Promise as an Arm’s Length Relation

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Do promises characteristically arise among intimates or among strangers? Philosophers have, increasingly, taken the former view, for example associating promises with trust, which is a cognate of intimacy, or even directly with intimacy itself. See Shiffrin (2008). Even pluralists about promising, who take the more modest view that promises figure in all manner of interpersonal relations, accept intimacy as one of promise’s natural habitats. See Scheinman (2004). I shall argue for the very different view that promises characteristically arise among strangers and, indeed, that the immanent structure of the promise relation is in itself distancing, which is to say opposed to intimacy. Although both intimacy and promising involve persons’ recognizing others as persons, the formal structures of the two types of recognition are very different. Indeed, the formal structure of promissory recognition is in an important way incompatible with the formal structure of recognition among intimates.\(^1\) Thus promissory recognition is thin, whereas the recognition involved in intimacy is thick: Whereas promissory recognition takes as its object the generic humanity of the promisee — her perspectival nature, or personality, simpliciter — the recognition involved in intimacy takes as its object the humanity of the promisee as it receives a particular, contingent expression in her distinctive person. Moreover, whereas promissory recognition is cabined by the \textit{ex ante} intentions of the promising parties, that is, their intentions when the promise is created, the recognition involved in intimacy must adjust to \textit{ex post} developments, which evolve in the shifting sands of the intimate relationship. Both these differences entail, I argue, that promises characteristically arise at arm’s length. One of the argument’s implications, which I take up briefly at its end, is that the legal practice contract – commonly
thought to fall somewhere between being a marginal and a degenerate case of promise – in fact represents promise’s highest and most complete expression.

I.

Promises create obligations. Thus it is one of the banalities of promising that a promisor may not break her promise simply because, as things have turned out, breaking it has become best overall. See e.g. Rawls (1955); Raz (1977). Moreover, promises confer the authority to demand performance of the promised acts specifically on promisees. See e.g. Raz (1997: 227-28); Darwall (2006: Chapter 8). Promises, one might say, shift the moral right to decide whether or not to do the acts that they name from promisors to promisees.

Promising therefore involves a form of recognition: to promise to someone is to respect her as a person – to acknowledge her moral personality – in a particular way. Certainly our ordinary practices of promising make clear that only persons can receive promises. We are inclined, when confronted with a promise to a creature other than a person, to attribute the promise to a category error: either to an excessively sentimental anthropomorphizing of the object, as when an owner promises a bone to her dog; or simply to madness. The mechanics of promising give this intuition a practical expression. Promises must be accepted before promissory obligation arises, and only persons possess the power of acceptance (indeed, this power is no less a mark of moral personality than the power to promise itself). Finally, the legal orders that have grown up around promise also follow this line. Contract law requires both offer and acceptance before a legal obligation arises, and only persons possess the capacity to accept.

This intuitive account of promissory recognition may, moreover, be made precise. When a person makes a promise, she forms intentions in favor of certain ends—the ends associated with the promised performance—that are also available to her promisee.
Moreover, the promisee, on whose acceptance the creation of the promissory obligation depends, is not merely drafted into the service of the promisor’s pursuit of these ends. Instead, she is engaged by the promise and takes up the promisor’s engagement by also forming intentions in favor of the ends associated with the promised performance—specifically, the intention to vindicate her promissory rights and correlative also not to act in ways that would undermine these rights. The ends of a promisor therefore coincide with those of her promisee, at least with respect to the promised performance. Moreover, the connection between the promisor’s and promisee’s ends is no mere coincidence, and the overlap in their ends is not just incidental. Instead, the promisor, through her promise, intends to entrench her pursuit of the ends announced by the promise and to refuse to defect from these ends unless the promisee releases her. She intends, in effect, to give the promisee authority over her ends—to pursue, within the sphere of the promise, only ends that the promisee also affirms. She intends, one might even say, to become obligated to the promisee to render the promised performance. And finally, insofar as the promisor honors the promise—insofar as she refuses to deviate from the promised performance without obtaining a release from the promisee—she carries out the intention not to defect and actually confers this authority over her ends to the promisee.

A promisor therefore intends, within the sphere of the promise, to defer to her promisee and indeed to subordinate her ends to her promisee’s will. And through this subordination—through placing her ends in his hands—the promisor comes to take the promisee’s ends as her own and, moreover, to treat him—his will—as an end. In this way, the promise underwrites a form of respectful recognition by the promisor of her promisee.

The promise, through the performance that it describes, specifies the precise intentions and ends that the promisor shares with her promisee and in this way fixes the terms
on which she engages him and treats him as an end in himself. A subsequent breach of the promise (when it is truly a breach\textsuperscript{9}) abandons these shared ends in favor of other ends that cannot be shared with the promisee, because they are inconsistent with the ends that the promisee has in fact adopted in conjunction with the promise. The promisor, through her promise, invites her promisee to fix his intentions in a particular way, and the promisee, by accepting, so fixes his intentions. A subsequent breach involves adopting intentions and pursuing ends that the promissory intentions foreclosed.

The breach therefore does more than merely return the promisor and promisee to the \textit{status quo ante}, in which they were strangers. Strangers do not share ends and do not treat each other as ends in themselves, but they may at any moment come to do so. The breach of the promise, however, presents an obstacle to such sharing between the promisor and promisee. The breach entails that, at least with respect to the promised performance, the two adopt \textit{inconsistent} ends. The breaching promisor does not just unmake but instead actively \textit{betrays} the recognition established by the promise; and she pursues ends, through her breach, that do not just depart from but instead \textit{contradict} her promisee’s ends. Her breach therefore forecloses possibilities for sharing ends that previously existed and imposes conflict in their place. Moreover, a breach has this consequence even (and in just the same way) in the case of pure promissory obligation – that is, in the cases of promises that have not produced any reliance or even expectations in their promisees.\textsuperscript{10} The breach expresses incompatible intentions, and hence produces estrangement, based exclusively on its involving a denial of the promisee’s authority, which is the opposite of recognition, and thus entirely apart from the promisee’s reliance or subjective expectations concerning the promisor’s conduct.
This remains so, moreover, even when the promisor made her promise honestly—actually intending to pursue the ends that her promise named and to defer to her promisee’s authority in respect of these ends. To be sure, the breach of an honest promise is unlike a lying promise in that the breaching promisor (unlike the lying promisor) does not manipulate her promisee—she does not treat him merely as a means. But this consideration does not exhaust the moral significance of the breach, because the failures of recognition are not exhausted by the disruption of the will that occurs when one person, employing force or fraud, treats another merely as a means. The parties to a broken promise, even one with an honest beginning, become more distant than strangers: the promisee has, though the promise, fixed his intentions in way that is incompatible with the promisor’s breach. And the breaching promisor therefore denies (at least in respect of the promise) the personality of the promisee, closing herself off to him, so that the parties to the promise become incapable of recognizing each other. The parties to a broken promise become actively estranged from each other. And this estrangement explains why not only making lying promises but also breaking honest promises is morally wrong.

One might summarize this by saying that promises render persons practically open to one another. Without promises, their wills would remain separated (just as their minds would remain separated without truth telling). Moreover, when promises are broken, persons’ wills become isolated (just as their minds become isolated when they lie, including even when the lie fails). But when a person makes and keeps promises, she may overcome her separation from her promisees, and respectfully recognize them, by submitting to their authority (within the scope of the promise) and taking their ends as her own. Promises, Seana Shiffrin recently observed, “involve[] the transfer of a party’s power to change one’s mind to another party, and so a consolidation of the power to determine what the two parties will do,” and in
this way “enable[] a fully first-personal perspective on joint activity” (2008: 516). As Hannah Arendt once said, promise-making and promise-keeping arise “directly out of the will to live together with others in the mode of acting and speaking . . .”(1958: 246).

II.

Promising is of course not the only way in which one person might directly recognize another – not the only way in which she may open herself up to his moral personality. One other familiar form of recognition is intimate love, at least where intimacy and love are understood not in terms of a drive, desire, or even benevolence but rather, as on the model recently articulated by David Velleman, in terms of the lover’s regard for her beloved’s humanity (1999). To love someone, on this model, is to perceive, clearly and vividly, his moral personality and to open oneself up to him in light of his personality. A lover develops what Velleman, borrowing from Kant, calls Achtung for her beloved – she both notices and values his moral personality. Perhaps the nearest English translation is to say that a lover appreciates her beloved for his humanity.

We ordinarily close ourselves off from the vividness of other persons’ particular moral personalities – the immediacy of their constituting points of view that are just as rational, complete, distinctive, and free-standing (as Kant would say, “self-existent” (1964: 4:437)) as our own – even though we know in some vague and general sense that they are indeed persons. We must do so, because even if it is possible for us always to act in ways that are consistent with the equal moral status of other persons – that is, to treat them never merely as means and always also as ends in themselves – we cannot always act in full appreciation of the separate and distinctive humanity of every person whose status we respect. Always to
appreciate all other personalities in this way – not merely to acknowledge that they are personalities but to appreciate their perspectives in fully vivid detail – would literally overwhelm our own perspectival capacities. If we always took on the perspectives of all others with the same intensity and sensitivity that we devote to our own, we would no longer possess sufficient mental or intentional resources to live from our own perspectives. 17 This is why our efforts to ensure that we act only in ways that are consistent with the humanity of others, for example by testing the maxims of our actions against some principle of unanimous acceptance, inevitably abstract from the particularity of the perspectives of the persons whose acceptance they insist upon. (This is illustrated in Rawls’s veil of ignorance, although the illustration involves an analogic leap, as Rawls was not after principles to regulate individual conduct.) We must, as Velleman writes, engage in “self-protection” against other persons, “draw[ing] ourselves in and clos[ing] ourselves off from being affected by [them]” (1999: 360f). 18

But although we must close ourselves off from fully appreciating the personalities of many, and indeed most other persons, we need not (and indeed if we are to be healthy, cannot) close ourselves off from all others. And when we love another person, we depart from this ordinary practice of self-protection. “Love,” as Velleman says, “disarms our emotional defenses; it makes us vulnerable to the other” (360f). Many of our defenses against being overwhelmed by the perspectives of others are ways of not fully perceiving their perspectives (even as we act consistent with the fact of them) – they are cases of what Velleman has called “contrived blindness” (361). Love lifts this blindness, “with the result that we really look at [our beloved], perhaps for the first time, and respond emotionally in a way that’s indicative of having really seen him” (361). In particular, love makes a person sensitive and responsive to her beloved’s perspectival capacity; it involves a commitment to
taking on his point of view and making it as immediate for her as her own (at least, as immediate as her capacity for love allows).

Love is therefore, Velleman observes, “essentially an attitude toward the beloved himself” (354). Like promising, love is a form of respectful recognition of the moral personality of another, a vivid appreciation of the value inhering in the beloved. Moreover, love is literally a vulnerability to the personality of the beloved; it is an openness to sharing one’s perspective with the beloved. Indeed, where it is fully achieved, love produces a fusion of personalities, reflected in the various commonplace ways of speaking (familiar at least since Aristophanes’s speech in the Symposium) that suggest that the beloved completes the lover.

III.
Promisors and lovers therefore both recognize, and in some way open themselves up to, the moral personalities of their promisees and beloveds. This makes it natural to ask about the relationship between the forms of recognition involved in promise and in love. Answering this question will help, moreover, to determine whether promises characteristically arise among intimates or at arm’s length.

One line of argument proposes that the two forms of recognition are sympathetic to each other and indeed complementary. A recent proponent of this view is Seana Shiffrin, who claims that “the power to make binding promises . . . is an integral part of the ability to engage in special relationships in a morally good way, under conditions of equal respect” (2008: 485). (Shiffrin’s argument mentions “special relationships,” but both the examples of special relationships that she provides, which center on friendship and family, and the title under which the argument proceeds, “Promising, Intimate Relationships, and
Conventionalism,” make clear that what makes the relationships special is that they are *intimate.* Shiffrin argues that “being able to promise plays a role in forestalling some morally undesirable dynamics within special relationships and in reinforcing an important aspect of equality within them” (498). Shiffrin has in mind cases in which the parties to an intimate relationship are unequally situated with respect to an action that will importantly influence their lives and their relationship: perhaps, as in one of Shiffrin’s examples, two persons whose friendship substantially depends on living near each other contemplate moving together to a new city under conditions in which the move matters more to the happiness of one than the other; or perhaps, as in another example, a parent and child contemplate some activity (an outing or a treat) that matters intensely to the child but that the child cannot, because he is only a child, pursue without the parent’s cooperation (503-504, 509-510).

Shiffrin believes that the inequality in these and similar cases threatens to undermine the intimacy of the persons involved: the vulnerable party may come to feel powerless and frustrated. This may lead him self-protectively to suppress the desires that render him vulnerable; or, employing an opposite strategy, he may accept or even initiate exploitative side-arrangements designed to induce the powerful party to act in the ways he desires; or, he may threaten to impose new costs on the more powerful party if she fails to act as he desires; or, he may simply dwell on his disappointment, and broadcast it to the powerful party, in the hope that guilt or shame will lead her to act as he wishes (504ff). All of these responses, Shiffrin is surely correct to observe, distort the relationship. They render it “fraught,” as she says, and may even “sour” it, as the powerful party falls into carelessness or callousness and the vulnerable party falls into self-denial, exploitation, resentment, or even just pleading or
nagging (504). It seems that there is no way, given the inequality that Shiffrin imagines, for the two to retain their intimacy on egalitarian, respectful terms.

Things would be very different, Shiffrin thinks, if the parties could promise. In that case, the powerful person could promise the vulnerable person that she would do as he wished (in the relevant respect). In this way, says Shiffrin, “the power to promise provides an important way to manage vulnerability” that will otherwise skew the interactions even of well-disposed, mutually sympathetic persons in a manner that makes morally good, egalitarian intimacy impossible (509). A promise, in cases like those just imagined does not just increase the likelihood [that the powerful party will do what the vulnerable one wishes] but actively affirms [the vulnerable party’s] status as a free person, capable and worthy of exercising sound judgment about what is to be done. [The powerful party’s] relinquishment and transfer of that power to [the vulnerable party] works to neutralize aspects of the situations’ hazards and to restore an equal standing between [the parties] in this local domain (507f).

Overcoming these hazards, moreover, promotes intimacy, since it enables persons confronted with the hazards to navigate around the fact that they are not identically motivated and may not always share the same agenda. The ability to promise provides a crucial tool to permit mutual engagement among equals, who are nevertheless distinct and diverse, without either party feeling the pressure to homogenize (506f.).

Finally, this connection between promising and intimacy is, for Shiffrin, very close indeed. Although she sometimes writes as if promises are merely a tool (perhaps one among many) that may be deployed to produce or sustain intimacy – that they “facilitate healthy dynamics within relationships” (496) – Shiffrin in fact thinks that the relationship between promising and intimacy is much closer. Promise, for Shiffrin, is not just useful for intimacy; it is essential. Thus, she says that “[o]ur capacity to conduct our relationships in a morally decent way depends on our having the power to promise (as well as related, derivative powers of commitment)” (499). The closeness and necessity of this connection between promise and intimacy is driven home by the purpose to which Shiffrin directs this
observation. In the very next sentence, she writes: “Therefore, given our noncontingent capacity [for intimacy] and its dependence on the power to promise, we must have the power to promise” (499). Shiffrin is making a transcendental argument. She is proposing that one of the side-benefits of her account of promising is that it lays to rest a worry, originally raised by Hume (1978: 455, 524) and elaborated by David Owens (in his contribution to this volume (2010: ??)) that persons lack the normative power to create obligations in the way in which promising seems to involve, that is, directly by intending to do so. Shiffrin seeks to defeat this worry by drawing an inference back from observed intimacy to the conditions of its possibility, arguing that among these conditions is the power to promise. The connection between promising and intimacy therefore must be, for Shiffrin, itself “noncontingent.”

IV.

I believe that the true relationship between promise and love is very different. Although promising and love are both forms of recognition and respect, they are not nearly so sympathetic as Shiffrin’s view supposes but are rather, in important respects, opposed.

To be sure, achieving intimacy requires that the intimates make some sort of commitment to each other. Love – a vivid and particularized appreciation of the personality of the beloved – cannot actually happen at first sight, and achieving love takes not just time but effort and also devotion, which amounts to an inclination to overcome the self-protective instincts that get in the way of love and the inevitable misunderstandings that seem, at first, to validate such self-protection. This effortful pursuit of intimacy may, moreover, be conceived of on the model of a commitment to the beloved and the love relation. And this commitment may in certain instances, including perhaps in some of the instances that Shiffrin describes, involve promises that insulate the relationship from some of the self-protective tendencies
that threaten to undermine it. But the commitment need not involve promising nor any “derivative powers,” as Shiffrin supposes (499). It may involve no more than a simple intention – perhaps on the model of the intention in favor of mutual support that figures in Michael Bratman’s account of shared cooperative activity (1999: 103, 105) – to continue pursuing the intimate relation, and the appreciation that constitutes its intimacy, even in the face of unanticipated roadblocks. (The lover might intend to pick up the relationship, as it were, if it falters, including even if it falters because her beloved has dropped the ball.) Moreover, and more significantly, even if promising can serve as a useful instrument in establishing intimacy, it is in itself imimical to intimacy. Even if Shiffrin is right to suppose that promises may in certain special cases enable love by eliminating obstacles to intimacy associated with various forms of inequality, these cases do not establish the close conceptual relation between promise and intimacy that Shiffrin imagines. Rather the more powerful promisors in the examples are incapable of spontaneously responding to their promisees in the open and vulnerable way that love requires: they remain blind to their promisees and do not yet love. And while a promise may cabin the results of such blindness, and so may have the consequence of enabling persons eventually to love, the promise in itself is not a case of seeing the promisee in the way – 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.

To see why, begin by observing that the forms of recognition associated with promise and with love are phenomenologically very different.
Most obviously, love is rival in a way in which promise is not. To be sure, our capacity for promising is not infinite, so that promises can compete with one another. Certain promises, made to some persons, foreclose making other promises to other persons: for example, a person’s promise to devote her entire work energies to the success of one employer’s business renders a further promise to work for a second employer a fraud. Indeed, such competition among potential promising partners is among the core features of the markets in which contractual promises (which I shall in a moment hold up as the highest expression of promise quite generally) arise. But a person’s capacity to promise becomes exhausted only in certain substantive areas, that is, with respect to promises that have a certain subject matter. (In the example, this subject is the allocation of a person’s economic production.) The formal pattern of recognition associated with promising is nonrival, which is to say that when a promisor recognizes one person in the way of promising, this does not reduce her capacity for promissory recognition of others. (Thus, the promisor in the example remains free to make any number of promises to the second employer, including even a promise to work for him should her relationship with the first employer come undone.) Indeed, there are some promises that may be made literally to all of humanity, or at least to all persons who accept them. A simple and familiar example, also drawn from the field of economic activity, is the promise associated with a creative commons license for a text or image, under which a creator promises all persons that they may reproduce her work as long as they make certain similar promises with respect to any of their own work in which it figures.

Things are very different in the case of love – which does display rivalry directly among persons, and indeed does so in virtue of the formal structure of recognition that love involves. A person cannot love all others appreciatively, that is, in the manner that I have described.
Indeed, she cannot even be open to loving all others – our heart’s arithmetic, our capacities for appreciation and vulnerability, will not allow it. Accordingly, to love someone is (among other things) to foreclose loving others.

Even if love involves an appreciation of universal humanity as it is rendered particular in the personality of the beloved, this appreciation remains in important ways tied to the specific beloved. Certainly, one cannot distribute the appreciation of universal humanity outside of the love relation, as it were, so that to love one person is not to love humanity in all its expressions. Indeed, and quite to the contrary, to see universal humanity in the idiosyncrasies of one person is to become blinded to how the different idiosyncrasies of another person might reflect universal humanity in different, and perhaps even opposed, ways. As Velleman says, “we discriminate in love” because

the value we do manage to see in some fellow creatures arrests our emotional defenses to them, and our resulting vulnerability exhausts the attention that we might have devoted to finding and appreciating the value in others (372).

Accordingly,

we are constitutionally limited in the number of people we can love; and we may have to stop short of our constitutional limits in order to enjoy the loving relationships that make for a good life (372).22

Our capacity for new love is not, of course, eliminated by the love we already display, and we can always fall in love again. It is rather that we cannot, past a point, sustain the appreciation that is constitutive of love for more than a certain class of persons all at once; after a point, to fall into a new love is to fall out of an old one. This is so, moreover, simply in virtue of the formal structure of the appreciation that love involves, and is therefore not limited to the case of loves with a certain substantive content. (The special place that popular perceptions accord jealousy in the life of specifically sexual love is misleading in this connection, not least since jealousy is rivalry approached from the point of view of the
beloveds, whereas the structural limits on love that I have in mind apply from the point of view of the lover.) All love is rival. Promising, again, is not rival in this way.

This difference, which appears on the face of the immediate experience of promise and love, is moreover only the most obvious expression of a deep structural difference between the two relations. It is related to the deeper difference as phenotype to genotype.

Thus promissory recognition takes as its object the purely generic nature of the promisee – the promisee’s intentional capacity, his personality simpliciter. Promising is an example of the form of respect that Kant says arises when we “subordinate[] our will to a mere concept or idea,” so that a promisor’s respect for her promisee is “a response to something that [she] know[s] about him intellectually but with which [she has] no immediate acquaintance.” Velleman (371). Loving recognition, by contrast, takes as its object the beloved’s particular personality – the expression that universal humanity achieves in the distinctive traits that make the beloved not just a person, but the person who he is. The fact that love is rival while promise is not is merely an expression of this deeper difference between the two relations. We can promise many but love only a few because we can recognize generic will wherever it appears, but our perceptual capacities lack the bandwidth to recognize will’s particular expression in more than a few cases. Or, to change metaphors only very slightly, we lack the resolution to recognize personality in all but a few persons with the vividness that love requires. It is not that loving respect is a more intense or committed form of promissory respect. Rather, it is that loving recognition arises in a broader spectrum than promissory recognition: we promise in black and white, but we love in color.

(Velleman is therefore wrong to suggest that promise and love may be arrayed along a single dimension of increasing recognition – to regard “respect and love as the required minimum and optional maximum responses to one and the same value” (366). Certainly, a
promisor may be more faithful to her promisee than a lover is to her beloved: the promisor may be less easily tempted to defect than the lover, and in that sense the recognition in a promise may exceed that in a love. The difference between promise and love concerns the quality of the recognition that the two relations involve; promisors and lovers recognize in different ways. That the difference between promise and love is qualitative rather than quantitative is reflected also in the natural responses persons make to betrayals of the relations, which may, in appropriate circumstances, each be as serious or substantial as the other. Nevertheless, the two types of betrayal will always be qualitatively very different. A betrayed promise leaves the disappointed promisee upset and angry, but gives her no grounds for doubting whether the promise was real to begin with. The betrayal of a love is very different in this respect. It leaves the betrayed lover feeling as if she misunderstood the beloved who betrayed her in a way that calls the love itself into question – hence the commonplace sense, following the breakup of a romance, that the romance itself was an illusion and the commonplace utterance, “I guess I never really knew him.” These are natural and appropriate responses: the betrayed love was constituted by the betrayed lover’s vivid appreciation of her beloved’s person, and the betrayal shows that this appreciation was, literally, mistaken – that it misunderstood what was being appreciated.

This difference between the morphologies of promise and love may be explained, moreover, not just figuratively and generally, but in literal detail. Because the recognition in promise is purely generic, the substance of promissory obligation is not fixed by the promissory form. That is, promises may take on many substances, including contradictory ones, and they need not, in particular, be fair or morally wholesome in order to sustain promissory recognition. The substance that particular promises do take on is fixed not by the promissory form, nor even by the promissory form applied to the personalities involved.
in the particular promise in question, but by the contingent and indeed discretionary intentions of the parties at the point of making the promise, so that the only way to get a particular substance into promissory obligation is directly to choose it. Promises are therefore not just formally but in their substance *purely* the creatures of the intentions of the parties. They are complete *ex ante*, from the moment of their creation, and have no independent lives of their own.$^{25}$

Things are very different in love, where the substance of love relations is relatively more fixed by the loving form. Because the recognition involved in love is particular – because what is recognized is not the beloved’s purely generic perspectival capacity but rather that capacity as it receives distinctive expression in the person who he is – loving recognition does have a required substantive content. To be sure, love can have many, substantively various expressions – the polite and the unruly family may both be loving, and a person’s very different loves for her parents, her spouse, and her children may all and equally be true. But the varieties of love are more narrowly cabined than the varieties of promise, and love’s content is not contingent and discretionary in the way in which promise’s content is. Rather, the content of love is significantly constrained by the non-discretionary ways in which the particular personalities of the participants in the love relation give distinctive expression to universal humanity. True love must in some sense answer to the nature of the beloved, which is not up to the lover, and to the conditions of understanding and appreciating the beloved as the particular person who he is. (This is the philosophical analog to the advice text’s commonplace that a lover should not try to change her beloved. The point is not just that the effort will fail, although it might well, but that it is inimical to love.) The substance of the obligations of love is, moreover, therefore not fixed at the point of falling in love, or indeed at any point, but instead adapts to the exigencies of the love relation,
as the lovers themselves develop the ways in which generic personality is given distinctive expressions through their lives. (This is why we say that a marriage is for better or for worse.) Whereas persons’ generic personality (that is, the generic perspectival capacity that constitutes them as persons, and which all persons equally possess) is a fixed feature of their nature, persons’ particular personalities (the ways in which perspectival capacity is rendered distinctive in the persons who they are) are ever-changing, complex, and indeed unpredictable; they are too complex and unpredictable for one person fully to appreciate another all-at-once with the specificity that love requires. Love must thus be shifting and flexible – the vivid and particular appreciation of the beloved, by which love is constituted, requires an on-going openness to changes in the beloved and even to the possibility that details of the beloved’s peculiar manifestation of universal humanity come newly to the lover’s attention. Loving appreciation, being a species of awareness, responds to forces that stand apart from the intentions of the lover, and love therefore does not arise or persist at the discretion of the lovers. (Something like this can occur even at the outset of a love relation, as in the experience of falling in love without meaning to, or even against one’s will.) Love is never complete _ex ante_ but rather necessarily takes on a life of its own, growing and changing _ex post_. Persons lack the perceptual capacities to love in any fashion other than as they go along.

These features of the comparative anatomy of promise and love may be collected in the observation that promise establishes a much thinner relation than love.

Promisors engage their promisees’ pure personalities – that is, the generic perspectival capacities in virtue of which promisees are like all other persons. One person can appreciate another’s generic perspectival capacity simply by treating his freely formed intentions as authoritative. (Because only persons can freely intend – because a free will is constitutive of
personality – someone who gives over her freedom to another treats the other as possessing a personality that is in its perspectival capacity equivalent to her own.) Moreover, because persons have privileged epistemic access to their own intentions, one person may (at least in general) treat another as constituting an authoritative perspective simply by deferring to his expressed intentions. (Exceptions to the general rule – for example, cases in which a promisee suffers a temporary loss of her deliberative capacity or freedom, or simply misunderstands the nature of the promise she is owed – arise only at the margins of promise, and indeed often involve broader pathologies of rationality.) Accordingly, promissory appreciation may be rendered complete at the moment of promise, by shifting decisional authority over an action whose performance is antecedently discretionary in the promisor, to make the performance discretionary in the promisee. And that, of course, is precisely what promises actually do – it is just another way of characterizing the promisor’s core commitment to perform her promise (quite apart from her private judgment concerning whether or not performance is all-things-considered for the best) unless released by her promisee.

The love relation, by contrast, is thick. Love requires the lover to engage her beloved’s distinctive personality – that is, vividly to appreciate the peculiar way in which generic perspectival capacity receives expression in the particular person who he is. Appreciating another’s particular personality in the way that love requires involves a very different set of attitudes and intentions from those associated with promise. Most importantly, a person does not have nearly so privileged an access to the way in which his peculiar life renders generic moral personality particular as he does to his bare intentions. (Self-knowledge is famously as difficult as knowing another, and self-love raises the same problems of vivid appreciation as love of others.) And accordingly, loving appreciation does
not involve anything like the deference that promissory appreciation does. A lover must be enthralled by her beloved, of course, but she must also remain vigilant in fashioning and refining her own perspective on the love relation; she must pursue her appreciation of the working out of her beloved’s generic personality in the distinctive details of his life, from her own point of view. Thus it is not just possible but natural and proper (indeed, a commonplace of the romantic imagination) for a lover to know her beloved in some respects better than he knows himself. Loving appreciation is therefore ever-changing, and in particular changing according to the internal growth dynamics of the lover’s and not just the beloved’s personality.

To be sure, a lover must allow her beloved’s perspective on himself to figure prominently in her dealings with him. But it will figure not on the promissory model of deference – that is, to exclude her own perceptions of what respecting his humanity requires – but rather on the model of a fusion of perspectives or even of shared judgment – that is, to inform and instruct her appreciation, and indeed as one of the things about him that she appreciates. (Whereas a promisor need be no more than conscientious towards her promisee, a lover must be fascinated by her beloved. And whereas conscientiousness may be achieved impersonally, fascination occurs distinctively from one’s own point of view.) In this sense, and in contradistinction to promise, the demands of love are, quite literally, not up to the beloved to determine. Whereas promissory appreciation shifts authority, loving appreciation shares it.

V.

Promise and love are in all these respects clearly very different. But it remains to determine what to make of the differences between them – in particular, whether the forms of
recognition involved in promissory and intimate relations are complementary or in tension with each other. I believe that there exists a tension between promise and love. On the one hand, promissory obligations cannot be successfully created between persons who truly love each other, at least not within the scope of their love. On the other hand, insofar as lovers succeed at establishing promises between them, their promises crowd out their love.

To be sure, promise and love are not strictly incompatible. To begin with, lovers might employ promise to coordinate their activities in areas of their lives in which they lack the energy or inclination to achieve the vivid appreciation that characterizes the rest of their loving relations. Sometimes these will be trivial promises, adopted for cases in which the game isn’t worth love’s candle. Thus a wife may promise her husband that she will put gas in the car on the way home from work; or a father may promise a child that if she sleeps through the night, he will give her a treat for breakfast. In other cases, the promises are not trivial at all, but rather concern spheres of action and interest that the lovers self-consciously exclude, or carve out, from their intimate relations. A lover who has assumed a job that gives her authority over her beloved’s work conditions may promise him that she will recuse herself from any decisions concerning his professional life. Moreover, promises may even create space for intimacy to grow, by eliminating vulnerability and clearing away mistrust in the manner Shiffrin imagines, so that promise may be a path into love (although surely not the only path). But 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 structures – 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.
It is tempting to find the source of this tension in the fact that where a promisee loves his promisor, this will motivate him to release his beloved-promisor from any promises that she has made, just as soon as performance of the promises ceases to be best from the promisor’s point of view. At the very least, one might think, a promisee who stood on his promissory rights even in such a case would not love his promisor well, and that a loving promisee therefore has a reason not to accept the promise. But while this may indeed be so—although I do not wish here to argue the question either way—such considerations approach the relationship between promise and love literally from the wrong perspective. They suggest only that there is a difficulty in making a promise to a loving promisee— that the promisor’s promise is in tension with the promisee’s love. But observations along these lines, even if they are well taken, do not yet establish the claimed tension between promising and loving—they do not establish any tension between promissory and loving recognition in the same person, from the point of view of the lover/promisor. The question is not whether promising is consistent with being loved, but rather whether it is consistent with loving. Answering “no” requires showing that to promise one’s beloved is to take his pure, generic personality as determinative of one’s conduct and thus to foreclose appreciating his particular personality in that manner that love requires. In that case, a promisor would indeed treat her promisee in a fashion inconsistent with loving him.

Perhaps the clearest illustration of the tension between promise and love arises in the case in which the intimacy between promisor and promisee is total. Thus, a person cannot successfully make promises to herself. At least where a person knows and appreciates her own humanity, which his to say displays self-love, she will find it literally impossible to shift decisional authority away from her promisor-self to her promisee-self as promissory recognition requires. She will find it impossible because, being totally intimate with herself,
she will be unable to recognize herself as a generic personality, which is constituted by the
general capacity to form intentions entirely apart from the specific intentions that she forms.
A person’s promise to herself cannot shift decisional authority to another person in the
manner that promising requires – that is, to a person who is recognized generically for her
intentional capacity rather than particularly for the intentions that make her who she is. A
person simply cannot appreciate herself in this generic way – her self-love and the specific
appreciation that it involves obscures her generic personality from herself. To herself, she is
always and necessarily not just a person, but the person who she is. (The problem with
promising to oneself is thus not the familiar problem that there is no way for the promisee-
self to commit not to release the promisor-self from her obligations, but rather the novel
problem that the very idea of shifting decisional authority by deferring to one’s own purely
generic will is a nonsense because one confronts one’s own will in a necessarily particular
mode, so that one’s substantive intentions are front and center, and therefore that promissory
appreciation is impossible in the case of promises to oneself.) At the very least, a person can
achieve promissory recognition of herself only by distancing her promisee-self from the self
that she occupies as promisor, as happens, for example, in the cases in which promises to
“future selves” are understood in terms of an agent’s efforts to achieve temporal coordination
within her life on the model of interpersonal coordination among several agents at a single
point in time. A person’s promise to herself can therefore sustain promissory obligation only
in gaps that appear (perhaps, that she has herself opened up) in her self-love.

Promises made within ordinary intimate relations – relations between a lover and her
beloved – moreover, raise analogous difficulties. Indeed, the tension between promise and
love is quite general and may be read more or less directly off the earlier account of the
differences between loving and promissory recognition. That account, recall, emphasized
that whereas a promisor appreciates her promisee’s purely generic personality (the perspectival and intentional capacities that he possesses in common with all person), a lover appreciates her beloved’s distinctive personality (the peculiar way in which these capacities work themselves out in the person who he is). This entails, as I observed, that whereas promissory recognition, shifts decisional authority, is complete \textit{ex ante}, and remains purely formal (so that the substantive content of promissory obligation is entirely a creature of the discretionary intentions of the parties), loving recognition \textit{shares} decisional authority, must always be adjusted as the relationship develops \textit{ex post}, and includes \textit{substantive} requirements (so that the content of love is substantially fixed by the peculiar characters that make lovers the persons who they are).

These distinctions make plain that to love someone is to appreciate him in a manner that is incompatible with the manner of appreciation required in promising. Whereas a promisor abdicates responsibility for managing the subject-matter of her promise by shifting decisional authority in this area to her promisee, who is sovereign over his intentions to insist upon or release the promise, a lover must rather be prepared to follow her own perceptions of her beloved’s character where they lead, including even against his own perceptions (since his self-knowledge is not authoritative for her, although it may of course equally not ignore it). Whereas a promisor cabins her engagement with her promisee \textit{ex ante} by the terms of her promise – and indeed obligates herself to restrain the natural tendency to adjust her conduct towards him in light of reasons that arise out of subsequent developments – a lover must remain open to constant revisions as her love relation develops \textit{ex post}. And whereas a promisor may determine the shape of her promissory engagements by the free play of her will, a lover must accept that her engagement with her beloved must adjust itself to accommodate both their unchosen natures. It is not just that promise \textit{falls short} of love in
each of these respects – that promissory recognition does not involve the open-ended or vivid vulnerability to the particular humanity of the other that constitutes love – but rather that promising *forecloses* love, or at least *gets in love’s way*. A promissor engages her promissee’s generic personality, to be sure. But she also pursues, within the realm of the promise, and through the deference that the promise involves, a willful self-blinding to the particularity of her promisee; she abdicates the enterprise of knowing, really knowing, her promisee in the vivid detail that love would involve. Contrariwise, promissory obligation cannot get going within love’s scope, because a lover cannot, in light of her antecedent appreciation of her beloved, relinquish his fate to his choices in the manner that promissory appreciation requires. Just as when we confront ourselves, we necessarily confront our beloveds also in their particularity, as the persons who they are.

A familiar example – companionate marriage – illustrates the extreme difficulty of making promises within a love relation and that this difficulty increases as the relation becomes more expansively and completely loving. Certainly it is intuitively plain that if the reason why a wife remains faithful to her husband, or cares for him in a time of need, or performs any of the other myriad acts that a loving and intimate marriage involves is just that she recognizes that she is bound by her marriage vow, then her marriage is in serious trouble. Moreover, things would only get worse if she sought to give herself additional reasons to support her husband by making him further promises, say, a new promise to be faithful, made on the eve of a business trip. The general considerations adduced above explain why a marriage is in trouble in such a case. The husband wants his wife’s fidelity and support not because she has promised but because she loves him. That is, he does not want her to act because she has an impersonal regard for his generic will which leads her to recognize his authority over her as her promisee – it will, after all, be worse rather than better for the
marriage if she asks him to release her from her vows before betraying them. Rather, the husbands wants his wife to be faithful and supportive because she appreciates – vividly and specifically, which is to say, lovingly – his needs given the person who he is, and because she has opened herself up (by removing the self-protective blindness that shields her from the analogous particularity of others) to the claims associated with his needs. Insofar as the promise becomes the basis for her actions, the wife treats her husband as she would a stranger, and not as her beloved.

This account of marital obligation, moreover, receives support from the historical development of the marriage relation. Thus as companionate (that is, fully intimate and loving) marriage has emerged, over the last century or so, the marriage promise has receded from its once-central place in the institution and certainly no longer constitutes the marriage relation. In a fully companionate marriage, the marital promise, far from being the ground of the relation, is quite literally an afterthought – just the public record of a relation that has existed, privately, on other grounds. (The relation may even have long ceased to be purely private, as when the partners openly cohabited before marriage.) I suspect, finally, that the inadequacy of promise as a basis for marital intimacy has always been recognized in at least some way. Common law marriage, which required no vows, recognized that promise is not a necessary basis for the marital relation. And even the old marriage vows implicitly acknowledged that promise cannot be a sufficient basis. The terms of marriage, after all, were not variable at the discretion of the parties (so that the marriage relation, unlike the promise relation, was never purely a creature of the parties’ intentions), and the marriage vows self-consciously acknowledged that they could not fix, ex ante, the content of a marital commitment that must develop organically ex post according to particular requirements of the
organic growth of the distinctive personalities involved in the marriage, which is to say, for better or for worse.

VI.
The distinctions that I have been drawing between love and promise suggest where one might look to find the highest and most complete expression of promissory appreciation. In particular, they suggest that promise’s highest form will be achieved not in personal promises – which are embedded in intimate relations whose own immanent structure, I have argued, competes with promissory appreciation – but in promises among strangers, that is, among parties whose engagement arises entirely at arm’s length. Contract may be understood as the legal elaboration of arm’s length promising. I therefore conclude by identifying three respects in which contract represents an especially impressive case of promissory appreciation. This suggestion, of course, runs directly counter to the commoner view that contract is at best a marginal and at worst a degenerate case of promise.

Before turning to the respects in which contract establishes the highest form of promissory recognition, it is worth pausing briefly to observe that contractual promises do indeed establish the form of recognition associated with promises more generally. Even this may surprise some. The parties to contracts, after all, are unlike the parties involved in many personal promises in that they generally enter into their relations with purely self-interested motivations. Indeed, the parties to contracts generally face strategic circumstances in which these motives lead them to compete, as each tries to get the best deal that she can: buyers press for low prices, for example, and sellers for high ones. Moreover, the law permits the parties to contracts to carry these self-interested motivations with them into the interstices of their contractual relations. Thus contract partners are typically each unwilling, when the
other stumbles and places the success of the joint activity in jeopardy, to shoulder any uncompensated increases in their shares of the burden of the joint activity. This is especially true of discrete contracts, whose legal structure characteristically accepts such uncooperative participants. As a general matter, a material breach by one party to a contract (even if it is innocent\textsuperscript{33}) relieves the other of its obligation of return performance.\textsuperscript{34} Finally, the law never requires a disappointed promisee to catch a stumbling promisor and (shouldering the burden herself) ensure that the contemplated performance occurs.

But although contracting parties are motivated by opposed interests and retain these interests even within the contract relation, they nevertheless pursue their interests, insofar as they pursue them through contract, in a way that involves recognizing each other's personalities as authoritative in just the manner that I have described. I have elsewhere elaborated in detail the precise pattern of recognition that contracts involve (Markovits 2004), and so I provide only a brief sketch here. To begin with, the intentions and actions of the parties to a contract are not just correlated but coordinated; they do not merely coincide but rather, to use Hume’s phrase, “have a reference to” each other (1978: 490). Moreover, the character of this reference may be spelled out quite precisely. Thus contracts are characteristically established by an exchange of promises, in which each party intends to join in the performance of the exchange; each party intends her participation in the performance to support the other’s; and, because even the simplest contract cannot be administered as pre-packaged coordination but instead requires constant adjustment in the face of unanticipated contingencies, the parties adjust their performance to be mutually responsive. Borrowing Michael Bratman’s formulation, to which this account of the morphology of contract obviously owes a substantial debt, one can say that contracts involve a pattern of intentions in the parties to them in which these intentions are self-consciously \textit{interlocking}: “each agent
must have intentions in favor of the efficacy of the intentions of the other. In this way, each agent must treat the relevant intentions of the other as end-providing for herself; for each intends that the relevant intentions of the other be successfully executed” (1999: 102). Finally, and crucially, contract adds to this interlocking pattern of intentions the additional feature that each party adopts an intention not to defect from the performance that the contract describes – not to abandon the promised performance unless released. In this way, the parties to contracts form intentions not just in favor of the activity that constitutes contractual performance but also in favor of each other.35 These are the promissory intentions not to defect – not to abandon the promised performance unless released. Rather than intending just that the intentions of her promisee succeed, a contractual promisor intends, in effect, to give her promisee authority – not just moral but also legal – to require her to promote the success of his intentions. She intends, within the sphere of the contract, to subordinate her will to her promisee’s, and she comes, in this way, to treat her promisee, and not just the joint activity of the contract, as an end in himself. And when she does so, she recognizes the personality of her contract partner, taking his intentions (within the sphere of the contract) as authoritative.

These observations establish that contract involves the characteristic form of recognition associated with promise in spite of the self-interested motives that contracting parties bring to their engagements. I am after a more striking claim, however, namely that self-interested contracting represents the highest form of promise – the form that most completely realizes the recognition in which the morality of promise is grounded. Indeed, I shall suggest that contract establishes the highest form of promise because of the arm’s length rather than intimate character of contractual promises – that is, because of the self-interestedness with which the parties approach their contracts. It is not that the moral light of promise, whose
natural precincts lie in intimate relationships, manages to illuminate even the dark and inhospitable domain of self-interested contracting. Rather, self-interested contracting most completely realizes the forms of recognition in which the morality of promise is grounded. It does so in three ways.

First, the self-interestedness of the parties to contract – their arm’s length interaction – makes it natural for each party to a contract to recognize the pure and free-standing personality of the other: the parties to contracts recognize one another exclusively in virtue of their wills, the fact that they each constitute an independent perspective and are capable of forming and acting on intentions. In this way, the self-interest that motivates parties to contracts prevents one party’s sympathetic concern for the other from interfering with the authority that her promissory engagements accord to his intentions.

As the earlier account of the tension between love and promise illustrated, paternalism – a practice in which a person imposes her own judgments on the person whom she paternalizes and which represents a direct affront to the forms of recognition and respect out of which the morality of promise arises – is natural in promises among intimates. As I have explained, promissory recognition in intimate relations is always compromised by the imperatives of intimacy – the promisor-lover’s sense that she knows her beloved-promisee potentially better than he knows himself and her commitment, as lover, to act on this knowledge even against the deference that she might owe, as promisor, even to his misguided or self-destructive intentions. By contrast, paternalism is quite alien to contract. Thus there is no analog, in the practice of personal promising, to the strikingly rigid rule of freedom of contract, which serves to protect persons’ capacities to enter into whatever contractual relations they wish, without regard to their wisdom or prudence. And within the contracts that persons have made, the law almost categorically rejects the practice, common in personal
promising, of insisting that promisors take responsibility for their promises’ impacts on promisees and subject their promises to regular reassessment, from their own points of view, concerning their attractiveness. The law effectively never imposes on the parties alterations of the terms of an agreement that one party has come to regret.

In both these ways, the law insistently supports the authority of contractual promisees to govern their contractual arrangements untrammeled by the interferences of meddling promisors. And by doing so, it accords promisees authority that is based simply on their possessing personality and is in particular not cabined by their promisors’ perceptions of their interests or indeed of any peculiar features of their personalities. Contract therefore insists that the arm’s length promises it recognizes display precisely the form of recognition that intimacy threatens.

Contract represents the highest and most complete form of promise in a second respect also, which is connected to the fact that contracts involve reciprocal promises. Anglo-American contract law achieves this result through the consideration doctrine, which requires that a legally valid contract include not only offer and acceptance but also a bargained-for exchange – that each party to a contract must make a promise to the other and, moreover, that each of these promises must (at least conventionally) have induced the other.37 This introduces an egalitarian element into contract, which is absent from promise simpliciter. The egalitarianism is not substantive, of course. Even as contract law insists on the fact of a bargain as a pre-requisite for legal enforcement, it expressly makes no effort to police the adequacy of the bargain.38 A contract might allocate all of the contractual surplus to one party or the other and still be supported by adequate consideration.39 But the formal equality of the contract relation survives such substantive inequality. The consideration doctrine requires each party to the contract to obligate itself to the other, so contracts necessarily involve
authority on both sides. Moreover, by requiring not just an exchange of promises but also an exchange in which each promise induced the other, the consideration doctrine selects for promises in which reciprocal authority is not just granted but also, because it was sought on each side, actually exercised.

Through this formal reciprocity requirement, contract secures a crucial condition of recognizing the personality of others that may be absent from one-sided promises. In particular, a person cannot engage others as persons by appreciating them in a manner that involves a retreat from her own humanity, a denial of her own personality. In order for recognition to be a good, it must be not just an appreciation of the personality of the other, but also an expression of the personality of the agent herself. This is immanent in the very idea of recognition – in the idea of seeing oneself in the other – an attitude that involves not just an appreciation for the other but an assertion of self for the other to reflect.

Formally one-sided promises, for this reason, fail to achieve the good of recognition. Indeed, they may affirmatively undermine recognition and therefore suppress the appreciation of humanity. This possibility arises in connection with promises whose text or subtext includes the thought that while the promisor might obligate herself to the promisee, she lacks the capacity to receive promises from him because she is incapable of the authority over him that receiving such promises would require. The promises involved in (a highly stylized version of) the Hobbesian social contract are perhaps like this – through them, the personalities of the subjects are subsumed in a sovereign (think of the image on the frontispiece of the first edition of *Leviathan*) whose absolute authority makes it impossible for him to make binding promises in return. Other illustrations perhaps include the promise of unconditional obedience made by the slave to his master in Hegel’s dialectic and the promise associated with a religious vow made to an omnipotent god. Promises such as these
involve not recognition (and its combination of appreciation for the personality of the other and assertion of the personality of the self) but rather self-denial – the promisor does not express her personality so much as retreat from or even repress it. (This is a practical analog of the suggestion, associated with Feuerbach, that the religious believer projects her capacities onto a god as a way of denying that she possesses them herself.41) And for this reason, such promises are detached from the human interest that underwrites promissory obligation (at least in its pure form), so that if they bind, they do not do so on the model of promise proper. By insisting, through the consideration doctrine, on promissory reciprocity and the formal equality of status that such reciprocity engenders, contract denies the law’s imprimatur to arrangements that constitute promises only in this degenerate sense.

The third and final respect in which contract represents the highest form of promise involves the fact that contract is a species of positive law. Insofar as the parties to promises (and especially to reciprocal promises) come to share ends and to recognize each other as authoritative with respect to the promised performance, their promise establishes a set of common reasons – a kind of public reason – between them. But for promises that have moral force only, this public reason remains, one might say, intangible or purely abstract. It has no independent constituency, no concrete expression in the world, but rather depends for its practical efficacy on the continued engagement of the parties and, critically, on their continued agreement concerning what conforming to the public reasons established by the promise requires. (The parties must agree not only that they are bound by the promises, but also what the promises bind them to.) The legal recognition associated with contract changes this, and gives the public reason associated with contractual promises a concrete, tangible existence. In particular, the law establishes an agent – the court – who reasons not from the point of view of the promisor or of the promisee, but rather from the point of view of the
contract, which it embodies, as it were.42 And the parties to contracts agree to give the court the authority not just to declare what their contractual obligations are but also to enforce them. In both these respects, contract perfects the recognition associated with promise: it protects the publicity of promissory recognition against the inevitable encroachment of the parties’ peculiar and contradictory views concerning what authority they have given each other; and it (relatedly) supports promissory recognition by creating third party enforcement, which proceeds from this public point of view. Contract law, one might say, does for private promises what the social contract – or constitutional law – does for public principles of justice.43 And in this sense also contract represents promise’s highest expression.
References


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* Professor of Law, Yale Law School. I would like to thank the participants in the Rice conference on the philosophy of promising, and in particular Hanoch Scheinman, who organized the gathering and edited this book, and without whose efforts the arguments here would have come out much worse.

1 Even those who acknowledge that the norms of intimate relationships may compete with promissory norms (see, for example, Kimel (2007)) have not proposed, much less elaborated, a general conflict between the essential natures of promissory and intimate relations. Certainly they have not found this conflict in the distinction between two incompatible forms of recognition.

2 Insofar as organizations (for example, corporations) can make and accept promises, then this is because they are endowed by law with artificial personality.

3 The connection between moral personality and promissory capacity has a long history in philosophy and indeed in law.
In philosophy, it is rendered most vivid in Nietzsche’s remarks that “To breed an animal that is permitted to promise — isn’t this precisely the paradoxical task nature has set for itself with regard to man? isn’t this the real problem of man?” and that a person who possesses promissory capacity holds “his kick in readiness for the frail dogs who promise although they are not permitted to do so.” (1998: Second Essay, Section 2)

The connection between legal personality and promise was for a long time expressed in legal rules that deprived human beings whose personality the law did not recognize – slaves and women – of contractual capacity. Even today, the law acknowledges this connection when it denies certain classes of human beings contractual capacity. See Restatement (Second) of Contracts §§ 12-16. Notice, moreover, that human beings, for example minor children, may lack contractual capacity but nevertheless sue and be sued in tort, so that having contractual capacity indicates a higher legal status than merely enjoying the right not to be harmed. (Keeton: § 134; Farnsworth: § 4.4).

4 See Restatement (Second) of Contracts §22 (1981).

5 The brief discussion that follows borrows heavily from my earlier effort to elaborate the patterns of recognition that promises involve in Markovits 2004).

6 If there were no acceptance requirement, so that a promisor could draft her promisee into the service of her ends, then promising would not necessarily involve respect or recognition, but could be a form of manipulation. This point has been noted by Charles Fried. (1981: 41).

7 The last two ways of characterizing promissory intentions, which build the idea of obligation (or its cognates) into these intentions, raise the specter that the theory is circular – that the account of recognition out of which the theory derives its defense of promissory obligation builds the very obligation that it is meant to generate into the promissory intentions from which it begins. This is a false worry, however, because the account of recognition can be fully elaborated without any reference specifically to obligation, using simply a promisor’s intentions not to defect from her promise unless released by her promisee. Once recognition has been explained in this way, using the language of obligation going forward becomes a harmless concession to expository ease.

8. It is worth pointing out, in light of the complication mentioned in the previous footnote, that this account of the promissory relation does not depend upon characterizing the promisor’s intentions in terms of obligation or any of its cognates. All the elements of the promissory relation appear even if promising is characterized simply in terms of a promisor’s intentions not to defect from the promised performance unless she is released from the promise.

9. That is, when the circumstances do not excuse the promisor from performance under either the express or implied terms of the promise.
The account of promising developed here therefore addresses what David Owens, in his contribution to this collection, calls the problem of the “bare wrong.” I have addressed this problem (in the version articulated by Hume) in greater detail elsewhere (2004: 1442-46).

11. This claim must be approached cautiously, because the distinction between making a lying promise and breaking an honest promise cannot be drawn formally. A promise that was honestly made may become a lying promise when a promisor develops a secret intent to breach that she does not disclose in order that the promise might continue to encourage her promisee to complete his own agreed-upon performance. (An installment buyer, for example, might form an intention not to pay for goods that she had intended to pay for when she bought them but keep this intention secret from her sellers in order that they deliver the goods.) A once-honest promisor who forms such a secret intention to deceive her promisee becomes a lying promisor, and uses him merely as a means, just as surely as a promisor who lies from the start.

12. Here it is instructive to notice the difference between the moral character of non-performance that constitutes a breach of promise, on the one hand, and non-performance connected to a promisee’s waiver of her promissory rights on the other. In this alternative case—in which the promisee releases the promisor from any duties that arose under the promise—the relation that was invited by the promise is not so much betrayed as abandoned, and the status quo ante in which the promisor and promisee were strangers is simply restored.

13. Promising, by uniting the wills of the parties in pursuit of shared ends, may even be said to serve as a private analog to the public practice of law-making—as a private act of collective self-governance. The analysis that I am conducting of the respectful private community of promising may be said, therefore, to parallel the republican analysis of the respectful community of citizenship.

14 Velleman is concerned not just to characterize the peculiar form of appreciation that he has in mind but also to argue that it better captures what we commonly call love than more familiar conceptions, which, as Velleman says, “tend to conceive of [love] as having an aim, in the manner of a Freudian drive” (351f). Velleman attributes this view of love to a host of philosophers, including Rawls and Nozick (352).

I set aside the question whether Velleman is right about what we commonly call love. It is enough, for present purposes, that Velleman has identified and characterized a form of recognition that accompanies a certain form of intimacy that we can recognize from our own experience, regardless of whether or not this is distinctive to love in the ordinary sense of the word. Indeed, nothing in my argument would change if it turned out—as may be the case—that certain forms of hatred, or at least resentment, involve the same formal structure of appreciation as love (although with an opposite affect) and therefore also constitute a style of intimacy. If I succeed in arguing that promise is incompatible with love, it will likely not seem a challenging extension to argue that it is incompatible with hatred, also.

15 Velleman also cites to this language, which he uses to emphasize that even though the lover acts for the sake of his beloved, he does not act in pursuit of effectuating any aim (1999: 356f). Thus Velleman observes that “[s]elf-existent ends [such as a person’s humanity] are the objects of motivating attitudes that regard and
value them as they already are,” whereas “other ends are the objects of attitudes that value them as possibilities to be brought about” (357f). Thus, “the fact that a person is a self-existent end just consists in the fact that he is . . . a proper object for reverence, an attitude that stands back in appreciation of the rational creature he is, without inclining toward any particular results to be produced.” My purpose in turning to the self-existence of moral personality is related to this thought but importantly different. I emphasize that the features of persons that make them proper objects for reverence also make it essential to close oneself off from most persons, most of the time.

16 This account of the equal moral status of persons obviously has its roots in Kant’s injunction: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end” (1964: 429). This command identifies what O’Neill has called “two separate aspects to treating others as persons.” (1989: 13) First, a person should never treat others merely as means to his own ends; and, second, he should always treat others also as ends in themselves. The first principle, which insists that other persons are never simply available to an agent for her own use, is important to be sure, but not in the present context, which instead focuses on the second (separate) idea that persons must always treat others as ends in themselves. This has sometimes been thought to announce merely that each person should “enhance [other persons’] prospects for the successful exercise of their agency,” including “by directly assisting [them] in their pursuit of [their] ends.” (Guyer 2000: 148). But this way of speaking does not quite capture Kant’s idea, which is that in order to treat others as ends in themselves it is not enough to act just in support of their ends, assessed from one’s own point of view. Rather, one must support the ends of others for the sake of their personalities, which requires deferring to their judgments and intentions concerning these ends. The forms of recognition involved in promising establish precisely this deference.

17 Keats proposed that poets characteristically do open themselves up to others generally in this way, displaying what he called “negative capability,” with the result that they lose any distinct personalities of their own. As he wrote, “[i]t is a wretched thing to confess; but it is a very fact that not one word that I ever utter can be taken for granted as an opinion growing out of my identical nature – how can it be when I have no nature?” (1970: 158). I have elsewhere elaborated on a sense in which adversary lawyers, who must open themselves up to their clients’ perspectives, face a similar threat to their own personalities. (Markovits, 2008).

18 Velleman writes specifically of emotional self-protection. But the scope of the self-protection is much broader than the association with feelings or sentiments suggests. I suspect that Velleman would not disagree with this, and that he intends emotional to convey a broader idea than the word’s standard usage.

19 This fusion can (and probably should) leave each personality room for independent expression. That lovers are united through their love does not mean that they retain no life outside their love.

20 Bratman in fact speaks of a “commitment” to mutual support (103). Note that the “commitment” Bratman identifies is a practical commitment to the joint activity; it is not to the other participants in the activity.
We may see this by noting the difference between his response and the response of the true lover, who acts towards her beloved in ways that are incomprehensible save by reference to her love. She exposes herself to the personality of her beloved and spontaneously adjusts to what she sees in ways that cannot be rendered comprehensible save through love’s lens – through the thought that she acts, as it were, in the grip of his charisma. This is what we mean when, confronted with a lover’s inexplicable sacrifices in the face of, to us, an unappealing beloved – “I don’t know what she sees in him.”

Some remarks by Velleman suggest that he would embrace still narrower limits on our capacity for love, under which the range of others that a person can appreciatively love is limited not just by her loves but also by her prior nature. Id. Although I do not argue the point here, I am inclined to think that universal humanity shines more vividly through individual idiosyncrasy than this restriction allows, and that persons are, commensurately, open to finding love even in unexpected places. Love’s power over us is just an expression of the powerful claims that the personalities of others make on our attention. No lesser power than love itself, it seems to me, can obscure these claims.

As Velleman observes, this feature of love is connected to the fact that falling in love involves overcoming our emotional defenses. As Velleman says, “[t]he manifest person is the one against whom we have emotional defenses, and he must disarm them, if he can, with his manifest qualities. Grasping someone’s personhood intellectually may be enough to make us respect him, but unless we actually see a person in the human being confronting us we won’t be moved to love; and we can see the person only by seeing him in or through his empirical persona” (371).

I set aside the question whether the content of a promise may be so profoundly immoral – so disrespectful of humanity – that it is incompatible with the formal structure of promissory recognition. Promises in which one party sells herself into slavery may have this character, as may promises in which two persons agree to wrong a third (although this is a harder case, because the disrespect is directed outside the promise-relation, and I do not want to deny that there might, as it were, be honor among thieves).

All that is needed for the argument in the text is that promises may depart from morally ideal terms and still remain perfectly good promises (which establish promissory recognition and promissory obligation just as surely as their more ideal counterparts). The terms of valid contracts, for example, are not limited by any notion of a “just price.”

Promises may, to be sure, be modified, including over the course of their performance. But these modifications themselves have a promissory form, which is to say that their substance is also fixed by the intentions of the parties, ex ante, which now refers to the moment of their creation.

Such cases pose the question whether the vivid appreciation that love requires can endure the lover’s commitment to avoiding matters that will inevitably impact her beloved’s distinctive personality even in the areas of his life that her love affirmatively engages. It seems likely, in the example, that the beloved’s workplace triumphs and frustrations will receive expression in his personal life, and it will be difficult for his
lover to appreciate this expression if she maintains her self-imposed exile concerning its causes. But this difficulty is not my main target, since the tension between love and promise that it takes up turns on the substance of particular promises and loves rather than, as in the argument that I am pursuing, on the incompatibility between the form of loving and promissory recognition.

Shiffrin recognizes the feature of promising that accounts for this tension. As she says, promises make persons “able to commit to a course of action, without valuing it as the promisee does” (2008: 496). To the contrary, a promisor must, for purposes of her performance, remain agnostic about the nature or importance of the promisee’s valuing the performance, leaving that entirely for the promisee. She may not, in other words, indulge in the modes of appreciation that constitute love.

It will be worse for the marriage because, by asking him to release her, she is not just betraying her own love (since she could not make the request if she possessed a lover’s vivid appreciation for its effects) but also attempting to exploit his love for her.

This thought bears a rough resemblance to Bernard Williams’s well-known observation that a man who, facing a choice between rescuing a stranger and his wife, chooses his wife on the grounds that she is his wife and it is impartially permissible for him to prefer his wife has had, from her perspective, one thought too many. (1981: 18) In each case, the beloved wants the grounds of her lover’s conduct to lie in her particularity and its effect on him, and not in the generic personality that she shares with all other persons, and that affects him as anyone’s personality might

This distinction may make a practical difference to how the wife acts. Consider, for example, a case in which the wife can honor her marital obligations of support only by abandoning the more pressing needs of others. She might be a surgeon, for example, who can meet her husband’s reasonable needs for emotional support only by abandoning an operation to a less experienced and less skilled colleague. If the basis of her husband’s claim over her sounds in promise, then his releasing her from her promise in this case dispositively settles the question what she ought to do, namely perform the surgery. But if her duty of support sounds in her love, then her husband’s protestations that she should take care of her patient do not release her from her duty of support, since her loving knowledge of him and his needs may exceed his self-knowledge and so endure even in the face of his efforts at self-abnegation. The second model, I believe, much more nearly accords with the lived experience of marriage than the first.

Shiffrin at one point cites Kant’s argument for the necessity of marriage as an example of the way in which promise might support intimacy in the face of inequality. (2008: 508). But this example depends on a model of marriage – one that makes heavy weather of gender differences concerning the attractions and burdens of sexual relations – that is very different from the companionate, truly loving account discussed in the main text. As Shiffrin herself acknowledges, Kant may have “unduly pessimistic about the necessity for legal relations” to resolve gender differences regarding sex. (2008: 508)
Notwithstanding the increased prominence of ante-nuptial agreements, they still are not. Although ante-nuptial agreements do allow the parties to a marriage to customize the outcomes that will follow the dissolution of their marriage relations, these agreements do not render the terms of the marriage itself discretionary, or make the marriage purely a product of the parties’ intentions. Ante-nuptial agreements and their analogs do not so much constitute the marriage relation as fix its outer limits (by specifying what each party will receive on exiting the marriage). Ante-nuptial agreements carve a more individualistic space out of the intimacy of the marriage, on the model that I developed earlier. Thus, even as ante-nuptial agreements (and indeed agreements more generally between parties to an intimate relationship) are enforceable, agreements to establish an intimate relationship generally are not recognized by contract law. (Williston 2008: vol. 7 § 16:23).

33. Contractual liability, after all, is strict liability.

34. See, e.g., Restatement (Second) of Contracts § 237 (1981).

35 This distinguishes contract from joint intention simpliciter, at least on Bratman’s model. There, the entire interlocking intentional structure depends wholly on each participant’s individual interest in the activity. Even though the participants in joint intention intend to adjust to each others’ intentions, each participant’s adjustments answer exclusively to her own engagement with the activity. The participants do not intend to subordinate themselves to each others’ wills. And joint intentional and even shared cooperative activity therefore do not involve recognition in the sense that I have described. It should therefore come as no surprise that when Bratman turns to applying his model of joint intention to promising, he finds the foundations of promissory obligation in the morality of harm. (1999: 130-141).

36 The law does of course include doctrines that review, and sometimes even override, contracting parties’ apparent intentions. Many of these rules – for example, rules concerning duress, fraud, misrepresentation, and even unconsonancibility (especially insofar as unconsonancibility is understood, as it increasingly is, to require procedural defects in contract formation) – are designed to ensure that contracting parties’ intentions are free rather than the product of manipulation. Others – for example rules concerning illegality – are designed to prevent persons from using contract as a tool for harming others in ways that the law deems impermissible. Neither set of rules seeks to over-ride a party’s intentions in the service of the parties’ own interests, and so neither is paternalistic. Indeed, insofar as contract law does embrace paternalism, for example in the rule that contracts for the provision of personal services will not be specifically enforced, it does so in the service not of promoting contracting parties’ interests but rather of safe-guarding their freedom over time. Even here, therefore, contract law supports the patterns of respectful recognition that I am describing.

37 See Restatement (Second) of Contracts §71 (1981).

38 See Restatement (Second) of Contracts §71 cmt. [c] (1981).

39 The prototypical such case involves contracts of sale in perfectly competitive markets, in which the equilibrium price is competed down until all of the surplus goes to the buyers.
This feature of recognition is rendered vivid in Kant’s Formula of Humanity, for example, which takes a broad view of the injunction always to treat humanity as an end in itself. This requirement applies, as Kant takes pains to point out, to every expression of humanity, “whether in your own person or in the person of any other.” (Kant 1964: 429, italics added).

Perhaps this is why, as Jeremy Kessler has pointed out to me, many religions understand such vows on the model not of promise but of love.

Shiffrin is right that promise involves “a consolidation of the power to determine what the two parties will do” and therefore “enables a fully first-personal perspective on joint activity” (516). But whereas in promise this perspective exists at the pleasure of the parties, as merely a creature of their intentions, in contract it exists even apart from them.

Cf. Waldron 1996.