

# Terms of Agreement

*Kent Bach*

Can two promises add up to an agreement? Not according to Margaret Gilbert.<sup>1</sup> She has forcefully challenged the orthodox view that an agreement is an exchange of promises. It seems, however, that the exchanges of promises she considers are exchanges only in an attenuated sense of the word. There is a fuller sense, I suggest, in which exchanges of promises do comprise agreements. This is the sense in which a trade is an exchange. Just as a trade is an exchange of goods, so an agreement, at least in typical cases, is an exchange of promises.

To make her case, Gilbert takes up a series of progressively modified examples designed to illustrate what is essential to the obligations created by agreements. She focuses on two-person "agreements on acts," in which each party undertakes a "performance obligation." As illustrated by an example in which Mike and Jane agree that he is to walk Fido at three and she is to feed him at five, the two obligations are created simultaneously and are interdependent.<sup>2</sup> Gilbert argues that no sort of promise-exchange can yield the obligations of an agreement and yet satisfy the simultaneity and interdependence criteria. In some cases the obligations are not interdependent, because each would exist even if the other did not; in particular, default on one would not

1. In Margaret Gilbert, "Agreements, Coercion, and Obligation," *Ethics* 103 (1993): 679–706 (hereafter, ACO), and "Is an Agreement an Exchange of Promises?" *Journal of Philosophy* 90 (1993): 627–49 (hereafter, AEP). Her main line of argument appears in sec. 3, "Agreement and Obligation," of ACO, pp. 688–96. Support is provided in AEP, pp. 635–44, by way of a series of progressively modified sample promise-exchanges. Subsequent references to these articles are in parentheses in the text.

2. Gilbert has other examples, e.g., where the parties agree to meet at a certain place and time, which introduce an inessential feature into the discussion: each action is pointless unless the other is performed as well. A different but equally inessential feature is present if performance of one action is necessary for the performance of the other, e.g., where the agreement is for one to cook dinner and the other to wash the dishes. For simplicity our discussion will be limited to agreements like the one between Mike and Jane, where the aims of the two actions, and the actions themselves, are independent.

nullify the other. In certain other cases, where the promises are so framed as to create only conditional obligations, the result is too weak. In the extreme case (ACO, p. 690n.), the parties find themselves in a kind of Alphonse-and-Gaston situation in which the conditions for performance never get fulfilled ("After you," "No, after *you*," "No, after *you*," etc.).<sup>3</sup> Other things go wrong in other cases. So, Gilbert concludes, "no possible exchange of promises, . . . including exchanges involving conditional promises, can meet both criteria," of simultaneity and interdependence (ACO, p. 690). In her view the promise-exchange model fails because it does not capture the element of "joint decision" and "joint commitment" that characterizes agreements (ACO, pp. 691-96).

I do not contest Gilbert's analysis of her series of examples, but I do question her implicit assumption that an exchange of promises is a sequence of acts performed in response to one another, like an exchange of blows or of pleasantries. With just two parties, as in her examples, a promise-exchange is for her a sequence of two promises, one made in response to the other. Her contention is that no such sequence, whether the promises are unconditional, conditional, or mutually conditional, can add up to an agreement. But is such a sequence of promises really an exchange of promises?

Forget promises and agreements for the moment and compare gifts and property-exchanges. Consider simple transactions, like purchases or trades, made face-to-face and consummated on the spot.<sup>4</sup> I give you ten dollars for a compact disc. You give me a CD player for my camcorder. These are exchanges, not pairs of gifts. I don't really *give* you the ten dollars or the camcorder, and you don't really *give* me the CD or the CD player. Of course, these items change hands, and in that attenuated sense we "give" them to each other, but they are not gifts. Giving is unilateral. At Christmas we might, as we say, "exchange" gifts, but this is not a full-fledged exchange. If you give me a CD player and I give you a camcorder, my coming to own the CD player does not depend on your coming to own the camcorder, or vice versa. But in a genuine exchange, a reciprocal transfer of ownership, each party gains ownership only if and when the other does.

Now, no one has ever suggested that a trade is an exchange of gifts. No one supposes, just because we use the word "give" as we do,

3. It should not be thought that the issue here is distrust or unenforceability. Gilbert is not concerned with such questions as whether the other party is trustworthy or whether one can count on the other's trusting oneself. The question here concerns the contents of the relevant obligations, not whether the parties will fulfill them.

4. More complex cases, in which the transfers are to be made later, would involve agreements giving rise to performance obligations. Such cases would thus defeat the purpose of the parallel I wish to draw here between agreements and trades.

that a trade consists of a pair of gifts (mutually conditional gifts?) or, just because we describe what we do on certain holidays as "exchanging gifts," that symmetrical gift giving is an exchange in the (full) sense of making a trade. In short, no one would seriously ask, "Is a trade an exchange of gifts?" in the way Gilbert asks, "Is an agreement an exchange of promises?" Of course, she answers her question negatively, and asks it only because the orthodox view is intuitively plausible and widely held. Unfortunately, in focusing on the word "promise" she neglects the word "exchange," at least in its full sense. In any kind of exchange in that sense, the parties each do something *for* something. I pay you ten dollars *for* your CD; you sell me your CD *for* ten dollars. I exchange my camcorder *for* your CD player. An exchange is inherently reciprocal. Now, if in a trade the parties exchange goods, what do they exchange in an agreement? They would prefer to exchange future actions directly, but they can do only the next best thing, namely, exchange commitments to act.

It is ultimately a verbal question whether the ordinary notion of a promise does or does not preclude the possibility of reciprocal promises, as implicated in the promise-exchange model of agreements. There is no sense lapsing into a verbal dispute on this question, and Gilbert rightly insists that what is important is not what we call things but the range of possibilities we recognize. She is entitled to "construe the notion of an exchange of promises broadly" (AEP, p. 634), that is, in a weak sense of "exchange," but still she should consider promise-exchanges in the stronger sense of the word. In not doing so, she overlooks the possibility that what the promise-exchange model requires is not an extended notion of promising but a restricted notion of exchange, as in exchanges of property.

In order to appreciate the parallel between an exchange of property and an exchange of promises, we should recognize a distinction that may be obscured by the act-object ambiguity of the noun "promise," a kind of ambiguity shared by a great many nominalized verbs. It can mean either the act of promising (making a commitment) or what is promised (the content of the commitment). Acts of promising can be exchanged only in the attenuated sense of Gilbert's promise-exchanges, one in response to the other, but things promised, much like property, can be exchanged in the fuller sense. In an exchange of property each party acquires the right to a certain item belonging to the other, and in an exchange of promises each party acquires the right to the other's performance of a certain action.

There is a further parallel between (simple) trades and agreements. Ordinarily, they are not made in one stroke. Rather, somebody goes first, by making an offer (a counteroffer or series of them may follow). A trade or an agreement is consummated and takes effect when an offer is accepted. Now, what is an offer? In a trade the offer

is a conditional commitment to give up one thing for another, where the condition is the other's acceptance. Acceptance involves a reciprocal commitment. When the offer is accepted, ownership of the two items changes hands. In the case of an agreement on acts, an offer is not merely the suggestion for one party to do one thing and the other to do another. An offer is a conditional promise. Its condition is the other's acceptance of the offer. And the acceptance is the other's unconditional promise to do his part in the arrangement.

So Gilbert is perfectly correct to say that an agreement is a joint decision that yields a joint commitment. However, this does not show, or even suggest, that an offer and its acceptance are not promises in the ordinary sense.<sup>5</sup> Gilbert's dilemma for the promise-exchange model, that the result of a promise-exchange is either too strong, if the requisite promises are unconditional, or too weak, if they are conditional, does not take into account the nature of offers and acceptances. Both are promises. An offer is a conditional promise, but its acceptance by the other party turns the conditional obligation it creates into an unconditional one.<sup>6</sup> Acceptance removes the condition by satisfying it. On the "offer-acceptance" model, as we may call it, the combination of offer and acceptance creates the pair of reciprocal unconditional obligations that comprise an agreement. These are the promises (the things promised) which are exchanged in an agreement.

It must be admitted that there is another route to agreement which does not fit the offer-acceptance model. Two people can enter into an agreement without either party having made an offer. Though not common, this can happen if a third party suggests a plan and engineers its joint acceptance: "I have an idea: you do A and you do B. OK? Shake hands." The two parties shake hands and the agreement is thereby effected. This case does fit Gilbert's conception of an agreement, since the two parties are not making promises in any straightforward sense and clearly are engaging in a joint action. The symmetry of the case prevents it from fitting the offer-acceptance model. How-

5. Indeed, in Gilbert's view unilateral promises involve joint commitment, in that the promisee "in some sense 'accepts' the promise" and "the promisor and the promisee become partners to a degree" (AEP, p. 648). For example, the promisee has no right to obstruct the fulfillment of the promise or to complain when it is fulfilled. So it is puzzling that she does not take into account the role of acceptance in the forging of an agreement.

6. More precisely, acceptance turns it into an obligation that is not conditional on acceptance. So although Gilbert describes the obligations created by an agreement as unconditional, in fact they can be conditional, but only in ways irrelevant to the present discussion. For example, two parties might agree that one is to bring an umbrella if it rains and the other is to bring sunblock if it shines, and each would be conditionally obligated accordingly. For simplicity's sake, where it is clear what is meant I will use the term "unconditional" as short for "not conditional on acceptance."

ever, this is an exceptional case and, even if it does show that not every agreement is an exchange of promises, it hardly shows that none is. The same symmetry is present in Gilbert's paradigm of an agreement, illustrated by Mike's and Jane's each intentionally expressing their "willingness jointly to accept that Mike is to walk Fido at three and Jane is to feed him at five" (ACO, p. 695). For Gilbert each party's willingness is a necessary condition on an agreement (a third condition is that this willingness be common knowledge), but she imposes no requirement on how, or on the order in which, each condition is to be met. Obviously, the symmetrical case does not fit the offer-acceptance model. But in the asymmetrical case, where an offer is made and accepted, the same conditions are met.

None of Gilbert's examples of promise-exchanges consists of an offer and an acceptance, but several come fairly close. Let us take up two of them and see why they do not fit the offer-acceptance model. In the first case, one promise is conditional and one is not:

Peter: "I promise to groom Tibbles, if you promise to walk Fido."

Rita: "I promise to walk Fido."

This does not yield an agreement, as Gilbert points out, because "the parties are in the situation they would have been in had they issued simple unconditional promises in the first place" (AEP, p. 642). One reason she says this is that "Peter incurs a promissory obligation at once." This is true, but it is consistent with the above exchange's being an agreement, inasmuch as Peter's obligation is merely conditional (until Rita removes its condition). The real problem here is that Rita's obligation is independent of Peter's. How, then, does the obligation created by acceptance of an offer differ from that? If Rita were to accept an offer by Peter, namely, for him to groom Tibbles and for her to walk Fido, then she would be obligated to walk Fido as part of a trade of commitments. Her obligation would not be independent.

Gilbert also considers the case of an exchange of unconditional promises in which there are two "special understandings." These are designed, respectively, to incorporate the simultaneity and the interdependence conditions: (a) the first promise is not to take effect until the second has been given, and (b) if (once both promises are in effect) one promise is broken, the other promise is nullified, and no further obligation arises out of it. Gilbert argues that not only does this understanding leave the interdependence criterion unmet but it "fails to respect the nature of promising," by "fail[ing] to respect the fact that, if you have made an unconditional promise that still stands, you are obligated by that promise irrespective of whatever other promises are kept or broken" (AEP, p. 644). In her view, the present proposal "is an attempt to capture a different notion that has certain things in

common with that of a promise-exchange.” In my view its defect is that it fails to capture what is essential to an exchange of promises. The special understandings attempt to build features of exchanges in general into the contents of the particular promises being exchanged. These are features common to exchanges of promises and of property. In both cases, at least ordinarily, the person making the offer proposes a plan involving both parties and commits himself to one part in that arrangement; the person accepting the offer commits himself to the other part in it.

Now, Gilbert might object that the efficacy of an offer and its acceptance cannot be accounted for merely by appealing to the general nature of promises. That is true, for our explanation appeals also to general features of exchanges. She might complain that this is enough to show that the offer-acceptance model does not really account for the force of agreements, at least not insofar as it purports to be a special case of the promise-exchange model. Such a complaint would be consistent with Gilbert’s general strategy. Her strategy is to consider whether, in regard to any candidate promise-exchange, “if precisely these promises had (in effect) been exchanged, . . . the stated criteria [of an agreement would] have been met,” where it is stipulated that “each person makes a promise, and no more than a promise” (AEP, pp. 634–35). As Gilbert applies it, this procedure presupposes that the terms of a putative agreement are to be given entirely by the contents of the two promises that make it up. It is clear from the wording of her examples that Gilbert expects the terms of agreement to be fully expressed once the promises are spelled out in full. As a result, her procedure effectively requires the generic conditions on agreements to be incorporated into the terms of particular agreements. But such a requirement is surely too demanding.<sup>7</sup> If we adopted Gilbert’s procedure, then not only could we not explain the force of exchanges of promises as agreements but we could not even explain the force of simple promises.

To see why, suppose we demanded that the general conditions on promises be incorporated into the contents of each particular promise. Two such conditions are that a promise does not go into effect if the promisee rejects it and that the promisee has no right to place obstacles in the way of the promisor. Should we then suppose that an ordinary promise is conditional on its not being rejected and is qualified by a no-obstruction clause? It would be silly to suppose that an ordinary promise, when made fully explicit, takes the form: “On condition that

7. It would be almost like requiring that for an argument to be valid, i.e., for its conclusion to follow from its premises, it needs the further premise that its conclusion follows from its (other) premises. See L. Carroll, “What the Tortoise Said to Achilles,” *Mind* 4 (1895): 278–80.

you do not object, I promise to do A—unless you obstruct me.” That would make all promises multiply conditional. Just as it would be unreasonable to expect specific promises to encode the conditions on promises in general, so it is unreasonable to demand that fully explicit agreements specify the general conditions on agreements. Just as we cannot expect to account for the force of promises without invoking the general conditions on promises, so we cannot expect to account for the force of promise-exchanges without invoking general conditions on exchanges (as well as the conditions on promises). Yet this is what Gilbert does in regard to the two examples we just considered, which attempt to incorporate general conditions on agreements.

Thus it would be unreasonable to disallow invoking general conditions to explain how, on the offer-acceptance model, an exchange of promises could have the force of an agreement. It is no objection to that model that the wordings of the offer and its acceptance do not capture the general conditions on agreements. Those conditions are accounted for by the fact that the two promises are being exchanged. In the case of Mike and Jane, for example, the dialogue does not have to take anything like the following complex form:

Mike: “I offer to walk Fido at three, as part of a scheme in which I walk Fido at three and you feed him at five, provided that you accept my offer.”

Jane: “I accept your offer: I promise to feed Fido at five, as part of a scheme in which you walk Fido at three and I feed him at five.”

The following simple form is explicit enough:

Mike: “I offer to walk Fido at three in exchange for your feeding him at five.”

Jane: “I accept.”

Mike does not have to *say* that his offer is conditional on acceptance. That is in the nature of an offer. Nor does Jane have to *say* that her acceptance constitutes a promise, much less make explicit that it is being given in exchange for Mike’s promise. That is in the nature of an acceptance. It is no objection to the offer-acceptance model that the two promises do not incorporate, either singly or jointly, the general features of exchanges.

The offer-acceptance model differs substantively from the generic promise-exchange model with which Gilbert operates. In particular, it casts the simultaneity and the interdependence criteria in a different light. First, on the offer-acceptance model the obligations created by the two promises that ordinarily make up an agreement are not really created simultaneously. The offer creates an obligation before its acceptance creates one. To this extent the offer-acceptance model violates the letter of Gilbert’s simultaneity criterion. However, it does

fulfill the spirit of that criterion, for the condition on the first obligation, the obligation created by the offer, is removed when the offer is accepted, and that occurs precisely when the accepting party's obligation is created.

Second, what is the status of interdependence on the offer-acceptance model? Can that model explain how default on the part of either party nullifies the other's obligation to do his part? Here is one suggestion. On the offer-acceptance model, what is agreed upon is a pair of actions. The agreement is not for each to do one thing iff the other party does his part, for then it would be fulfilled even if neither party did anything. Rather, since what is agreed upon is a pair of actions, one for each to perform, each party has an unconditional obligation to do his part. Then if one party defaults, the other cannot do his part in that pair. He can perform the same action he would have performed but he cannot perform it as a member of the pair.<sup>8</sup> It was his obligation to perform the action not unilaterally but as a member of the pair, and this is precluded by the other's default. On this suggestion, then, the interdependence condition is met by virtue of how the two actions are described under the agreement. Each party is obligated to perform an action as a member of the pair.

This suggested explanation of interdependence is rather superficial. It fails to exploit the central feature of the offer-acceptance model. On that model the obligations undertaken by the two parties are interdependent because they are exchanged. They are exchanged one for the other, as in an exchange of property. In a trade, each party does not gain ownership until the other does; the trade cannot be rescinded unilaterally. Similarly, the unconditional obligations under an agreement arise together, upon acceptance, and neither party can unilaterally rescind an agreement (to break an agreement is not to annul it). On the offer-acceptance model, then, the obligations created by an agreement are interdependent. This interdependence consists not in their being mutually conditional but in their being reciprocal, and it is explained by the fact that the two obligations are exchanged.

Now Gilbert contends that "the obligatoriness of agreements can be understood without reference to social practices" (ACO, p. 695 n.). Even if this is true, as in her example of Mike's and Jane's each intentionally expressing "willingness jointly to accept that Mike is to walk Fido at three and Jane is to feed him at five" (ACO, p. 695), it does not undermine the offer-exchange model. For even if no background of social practices is necessary for the possibility of agreements, it can

8. This is true only if the action is not part of a joint action, like lifting a heavy trunk, and only if its performance is not dependent on the performance of the other action. These special cases were excluded from discussion in n. 2.



still be true that the agreements of everyday life are effected with such a background already in place. In particular, they rely on the practices of promising and exchanging—the practice of making an exchange normally involves an offer and its acceptance, and in an agreement the offer and its acceptance are both promises. It must be conceded, then, that the offer-exchange model does not explain how “the obligatoriness of agreements can be understood without reference to social practices,” if that is taken to entail that being an exchange of promises is not essential to the notion of an agreement. However, the offer-exchange model is not intended to show that agreements are necessarily exchanges of promises but merely that they can be and to suggest that they commonly are.

An exchange of promises, like an exchange of property, is an exchange in a fuller sense than is, for example, an exchange of pleasures. In appealing to this fuller notion of exchange, I have not tried to give an account of the practices of exchanging and of promising. Given the background of these practices, I have argued that Gilbert’s dilemma for the promise-exchange model of agreements relies on an attenuated notion of exchange, not the fuller notion exemplified in trades. Promises of the right sorts, an offer and its acceptance, can and do create the obligations essential to an agreement. They are interdependent because they are exchanged.