

SCANLON ON PROMISSORY OBLIGATION:
THE PROBLEM OF PROMISEES' RIGHTS*

When promises give rise to clear obligations, these can be accounted for on the basis of general moral principles.... —Thomas Scanlon¹

Promises, along with their close cousins, agreements, are a ubiquitous feature of human life, and not surprisingly.² Promises and agreements are powerful tools. One aspect of their power is this.

Failing special circumstances, at least, if you have promised to see me at five, and nothing more has transpired between us, I have a special standing in relation to your actions. Should you remark that you are thinking of not showing up at five, I have the standing to insist that you do. Should you fail to show up, I have the standing to rebuke you on that account. By virtue of your promise, your showing up at five becomes my *right*.³

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¹ *What We Owe to Each Other* (Cambridge: Harvard, 1998), p. 315; hereafter WW.

² For some reason the philosophical literature has focused on promises rather than agreements. This may be because it has long been thought—wrongly in my view—that agreements are constructed out of promises. On this see Margaret Gilbert, "Is an Agreement an Exchange of Promises?" this JOURNAL, xc, 12 (December 1993): 627–49, reprinted with some revisions in Gilbert, *Living Together: Rationality, Sociality, and Obligation* (Lanham, MD: Rowman and Littlefield, 1996), pp. 313–38. The precise nature of the relationship between promises and agreements is an interesting issue: my use of the phrase "close cousins" is not intended to beg any questions.

³ This last point, which I take to be intuitive, is common ground between theorists of otherwise different persuasions with respect to the nature of rights. See, for instance, H.L.A. Hart, "Are There Any Natural Rights?" *Philosophical Review*, LXIV, 2 (April 1955): 175–91; Joseph Raz, "On the Nature of Rights," *Mind*, xciii, 370 (April 1984): 194–214 (reprinted in Morton Winston, ed., *The Philosophy of Human Rights* (Belmont, CA: Wadsworth, 1989), pp. 44–60; page references here are to the original). Cf. Michael Robins, *Promising, Intending, and Moral Autonomy* (New York: Cambridge, 1984), p. 99. The qualification regarding special circumstances is intended to set aside, in particular, the cases of coerced promises or promises to perform immoral acts. I take it that these are best considered after one has an articulated understanding of less complicated cases. In what follows, the reader should assume that coerced promises or promises with immoral content are not at issue. I discuss coerced agreements in Gilbert, "Agreement, Coercion, and Obligation," *Ethics*, ciii, 4 (July 1993): 679–706, reprinted in *Living Together*, pp. 281–312.

As it happens, the philosophical literature has not focused on the way in which promising creates rights in promisees. Rather, the focus has been on how a promisor is obligated by a promise.⁴ There is, evidently, nothing wrong with asking how promises obligate as, indeed, they seem to do. If you have promised to see me at five, and nothing more has transpired between us, you are surely in some sense obligated to do so. Something along these lines has been seen, indeed, as a self-evident or a priori truth.

Thus H.A. Prichard:

Once call some act a promise, and all question whether there is an obligation to do it seems to have vanished.⁵

Intuitively, a promise obligates the promisor in a particularly direct way, and likewise directly gives rise to a right in the promisee. It is tempting to say that both the right and the obligation are part and parcel of promising.⁶

Since making a promise appears to involve little but the expression of the promisor's will, one might well think that promissory obligation is somehow directly willed into being. As David Hume observed, such an idea is "entirely conformable to our common way of thinking and expressing ourselves."⁷

How, then, do promises obligate? Thomas Scanlon's thoughtful treatment of this topic begins by discussing a popular type of account that he wishes to reject. Scanlon characterizes this type of account as a "two-stage" matter, the first stage being a "social practice" of promising (WW 295).

Here is a version of such a social practice account. First, there is a valuable social practice of promising. That is, there is a social norm or rule in a given society to the effect that one who does a certain thing under certain conditions (thereby "promising to do a certain thing") is to do something further (thereby "fulfilling the promise"). In addition, members of that society generally conform to this rule

⁴ As can be seen from the titles of many articles—see, for instance, "The Obligation to Keep a Promise" (H.A. Prichard, circa 1940) and "Promises and Obligations" (Raz, 1982).

⁵ "The Obligation to Keep a Promise," in Prichard, *Moral Obligation and Duty and Interest* (New York: Oxford, 1968), pp. 169–79, here p. 169.

⁶ If this is correct, it would seem that the special circumstances discussed in note 3 above either invalidate the promise—in other words, there is no promise in spite of appearances—or the promisor and promisee have the usual obligation and right, the special circumstances notwithstanding. I would argue for the latter alternative, but will not do so here—see Gilbert, "Agreements, Coercion, and Obligation," on the case of coercion.

⁷ *A Treatise of Human Nature* (New York: Oxford, 2000), 3.2.5.3.

and expect one another to do so, and the existence of the social practice as a whole promotes an important good. Second, in the circumstances comprising the first stage, it is morally wrong for members of the society in question to violate the relevant social norms.

Suppose that these two stages have been reached in my society. All else being equal, it will then follow that if I say "I promise to feed your cat tomorrow," it would be morally wrong for me not to feed your cat tomorrow.

Scanlon does not directly attack "social practice" accounts, but argues in favor of an account of a different sort.⁸ He proposes to argue that "the wrong of breaking a promise" is an instance of "a more general family of moral wrongs which are concerned...with what we owe to other people when we have led them to form expectations about our future conduct" (WW 296). He adds "Social practices of agreement-making, when they exist, may provide the means for creating such expectations..." but, he will argue, "these practices play no essential role in explaining why these actions are wrong" (WW 296).

I am inclined to agree with Scanlon that one should reject accounts of promissory obligation that appeal to social practices in the way described. One motive for developing such accounts has been the difficulty of understanding how—as our common way of thinking has it—the obligation of a promise can directly be *willed* into being. It is now standard to assume that another story about the genesis of promissory obligation must be found.⁹ A problem with any other story, however, is that it is likely to be found counterintuitive.¹⁰

Its counterintuitiveness is not the only problem with an approach that appeals to social practices. Another problem is that such ap-

⁸ Scanlon has developed this position in (at least) three places: "Promises and Practices," *Philosophy and Public Affairs*, XIX, 3 (Summer 1990): 199–226 (hereafter PP); "Promises and Contracts," in Peter Benson, ed., *The Theory of Contract Law* (New York: Cambridge, 2001), pp. 86–117 (hereafter PC), and chapter seven of *What We Owe to Each Other*. See also Scanlon's reply to John Deigh in Scanlon, "Reasons, Responsibility, and Reliance: Replies to Wallace, Dworkin, and Deigh," *Ethics*, CXII, 3 (April 2002): 507–28, pp. 522–28.

⁹ One contemporary philosopher who has argued against this assumption is Robins—see, for instance, "The Primacy of Promising," *Mind*, LXXXV, 339 (July 1976): 321–40.

¹⁰ This would hardly worry Hume, whose own account of promissory obligation in the *Treatise* appeals to a social practice along the lines indicated in the text. He famously argued that the idea of willing an obligation into being was unintelligible (3.2.5.3–7). His skepticism about the pretheoretical conception of promissory obligation has found favor among many Anglo-American philosophers. We should surely see it as both troubling, and challenging, however, if outside our studies, we understand the obligations of our promises to be willed into being.

proaches are not clearly free, in their initial assumptions, of something akin to a "prior promise."¹¹ One needs to ask in what the existence of a social rule in a society consists: Might some kind of social acceptance of the rule be necessary, and might that involve something akin to a promise or agreement? If the assumption of anything akin to a promise is avoided, it may be harder to make the moral argument. If it is not avoided, then, at the least, more will need to be said about the thing-akin-to-a-promise that is involved in social rules.¹²

It may be observed that, as sketched in the previous quotation, Scanlon's own account of promissory obligation itself has too many "stages" to accord with the intuition that promissory obligation is somehow directly willed into being. First, there is a certain set of circumstances, in part created by the promisor, that include, importantly, certain expectations of the promisee. Second, in the circumstances comprising the first stage, it is morally wrong for the promisor not to do what was promised.

Thus, though it does not invoke social practices, on Scanlon's account promissory obligations are not directly willed into being. This is one concern one might have with his account, as with any account sharing the feature noted.

I will focus here on a different concern: that Scanlon's account of promissory obligation does not explain the existence of promisees' rights. As I shall explain, if this is the case, his account of promissory obligation is inadequate.¹³

I. PROMISEES' RIGHTS: INTUITIVE POINTS

I.A. Hart on moral rights. In a classic article, "Are There Any Natural Rights?" H.L.A. Hart sets out an array of intuitive points on the nature of the rights of promisees. He refers to such rights as falling into a broad class of "moral rights." Precisely how he intended the qualifier "moral," need not detain us here. A central aspect of his intent is the differentiation of moral from *legal* rights. Certainly the rights of

¹¹ Cf. Prichard. The existence of this problem for a variety of theories of promissory obligation is a theme of Robins's "Primacy of Promising." For the relevance of the problem to Scanlon's theory, see the text, below.

¹² Observations in Hart, *The Concept of Law* (New York: Oxford, 1961), suggest that on a central everyday conception of a social rule something akin to a promise or agreement underlies social rules. I focus on these observations in developing a new account of social rules in chapter five of *Sociality and Responsibility: New Essays in Plural Subject Theory* (Lanham, MD: Rowman and Littlefield, 2000).

¹³ Is a promisee necessary for there to be a promise? For present purposes, I waive this question. Like Scanlon, I focus specifically on the case of a promise with a (single) promisee, that is, someone to whom the promise is made, someone who can say "You promised *me* that you would...."

promisees are not in and of themselves legal rights, though coupled with special circumstances, such as the intent to create legal relations, they may give rise to legal rights.

Hart lists the following features of moral rights in his sense: one *has* or *possesses* such a right, and corresponding to a right is another person's *obligation* to the right holder. This person *owes* the right holder what he (or she) has a right to: it is the right holder's *due*. If the obligated person fails to fulfill his obligation to the right holder he will have done *wrong* to the right holder. The right holder has a *claim* on the person who is obligated to him, and is *entitled* to have his right respected. He can *waive* the claim and *release* the person who is obligated to him from his obligation.

The emphasized terms—all emphasized in Hart's text—are central, closely related elements of what one might call the *language of rights*. Thus, Joe may *act wrongly* in relation to Jean. Or he may *do wrong to her*, *do her wrong*, or (even more briefly) *wrong* her. In the second set of cases, but not the first case, the words suggest that Joe has infringed a right of Jean's.

I.B. The "correlativity" of rights and (directed) obligations. The rights that Hart is talking about here are nonlegal analogues of what, in law, the eminent jurist Wesley Hohfeld called "claims." Hohfeld regarded claims as rights in the strict sense of the term.¹⁴ In discussing Hohfeld, and consonantly with Hart, I shall refer to them simply as "rights."

Hohfeld insisted that there was a *duty* corresponding to every right. This duty was a duty *towards* the right holder, the person with the duty being the person the right was *against*.

There are, then, three elements that figure in the specification of each right and of the corresponding duty (in Hohfeld's terminology) or (in Hart's terminology) obligation. In the case of the right, there is a right holder, something the right is a right to, and someone the right is a right against. In the case of the duty, there is a duty holder, the thing it is a duty to do, and the person towards whom it is directed.

Duties or obligations of the type in question will be referred to as *directed* duties or obligations.¹⁵ The duties or obligations corresponding to rights are, it may be said, intrinsically directed, as are rights themselves.

As is now common, I shall not here distinguish between duties and

¹⁴ "Some Fundamental Legal Conceptions," *Yale Law Journal*, xxiii (1913-14): 16-59, see especially pp. 30-32.

¹⁵ This follows the terminology of deontic logic. Other qualifiers used include "relational."

obligations.¹⁶ The directed nature of certain duties (or obligations) will be indicated by the prepositions "toward" or more briefly "to." A general term that would seem to serve as well as the unqualified "duty" or "obligation" is "requirement," which I shall use on occasion. The "correspondence" between rights and directed duties is extremely tight. You cannot have a right without a corresponding directed duty, and vice versa. They are, if you like, two sides of the same coin.¹⁷

I.C. Hart on special rights. In "Are There Any Natural Rights?" Hart distinguishes between *general* and *special* rights, the rights of promisees being "the most obvious cases" of the latter kind (*op. cit.*, p. 183). Special rights "arise out of special transactions between individuals or out of some special relationship in which they stand to each other" in such a way that "both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship" (*op. cit.*, p. 183). As to promising:

We voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties' freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act. The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation to the promisee to do what he has promised (*op. cit.*, pp. 183-84).

I.D. Hart on the character of directed obligations. The last sentence in the above quotation is of particular importance. As Hart sees it, being obligated towards another person is to be explicated in terms of that person's having a limited authority over one's will.

Hart sometimes writes of an obligation's being "owed" to the holder

¹⁶ Hart prefers to restrict the use of the term "obligation" for the directed duties that correspond to rights. He notes a broadening use of the term "obligation," however, such that "duty" and "obligation" are used interchangeably. See also Richard Brandt, "The Concepts of Obligation and Duty," *Mind*, LXXIII, 291 (July 1964): 374-95.

¹⁷ For emphasis of this point and discussion of its implications for moral theory see Hugh Upton, "Right-Based Morality and Hohfeld's Relations," *Journal of Ethics*, IV, 3 (January 2000): 237-56. Roman law expresses the sense of such a tight relation by using one and the same word (*Obligatio*) for the duty of one party and the corresponding right of the other party to a contract. There was no special word for a right against a determinate person or persons. See George Long, "Obligatio," in William Smith, *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875), pp. 817-21.

of the corresponding right.¹⁸ Presumably what is owed is an action rather than an obligation. Thus Hart also speaks of a right holder as the person "to whom performance is owed or due."¹⁹ He suggests, then, that an obligation of the type in question is a matter of the person with the obligation owing something to the right holder.

If I—somehow—owe you performance of a certain action, then there is a sense in which that action is already yours. In relation to that action, then, you are in a position to act towards me in a way appropriate to one who owns it.

This conception of things may help to throw light on a variety of aspects of the situation of a promisee. For instance, suppose a promisor asks his (or her) promisee for release from the promise. The promisee is in a position to grant this request, and thus to release the promisor from his obligation. If the promisee owns the promised action, then he is in a position to give it away, should he so choose.²⁰ Again, the promisee is in a position to keep the promisor's obligation in force. If the promisee owns the promised action, then he is in a position to keep it if he so chooses.

Pertinent here, also, is a statement of Hart's about rights in general prior to his discussion of promises. He says, "there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate" (*op. cit.*, p. 178).

Contemplating the exercise of "force" in connection with everyday promises and agreements may seem to go too far. It is reasonable, however, to include under the rubric of force the kinds of thing noted at the outset of this essay: such things as informal rebukes and demands. Informal rebukes lie at the thin end of the wedge of force: nonetheless, they are a form of authoritative chastisement.²¹ Informal demands are a form of authoritative pressure to act in a certain way.

As applied to promises, one can take Hart's central point here to

¹⁸ See "Are There Any Natural Rights?" p. 179, note 7, also p. 181. Others sometimes write of "owing a duty."

¹⁹ See, for instance, Hart, "Are There Any Natural Rights?" p. 181.

²⁰ It may be that what the promisee has by way of ownership of the promised act is joint ownership with the promisor rather than sole personal ownership. He may then need the concurrence of the promisor in order to rescind the promise. Be that as it may, if the promisor has already sued the promisee for release, the latter is surely in a position "unilaterally" to release the promisor. I shall not go further here into the type of ownership that is in question.

²¹ In his classic work, *The Concept of Law*, Hart associates such rebukes with the punishments imposed through the formal processes of law as versions of one form of human activity—see p. 10 and elsewhere.

be about standing rather than justification. Whatever the merits of a forceful response in a given situation, if you fail to give me what I have a right to through your promise, I have the standing, as your promisee, to rebuke you on that account. Similarly, should you threaten to break your promise, I have the standing, as your promisee, to command or insist that you act as promised, and thus pressure you to perform.²²

Consider, now, a case of such insistence. Suppose that after lunch forgetful Fred casually remarks to his companion, Vera, "I'm off for a long hike!" and Vera authoritatively responds, "No, you're not!" explaining: "You promised me you'd help clean the house this afternoon!" If Fred's promise has brought it about that Vera in some sense owns his action of helping her clean the house, she would surely have the standing to insist that he does not withhold that action from her but rather performs it. She would also surely have the standing to rebuke Fred should he fail to give her what is hers.

In what follows I shall make the following assumptions about the directed obligations of promisors. In order to understand how a given promisor, *A*, comes to have an obligation *towards* his promisee, *B*, we need to understand how *B* comes to have a limited authority over *A*'s will, where this involves the promised action's being owed to *A*, its being already in a sense his. *B* will have the associated standing to effect the release of *A* from the promise if requested to do so or to hold him to it, and to command and rebuke *A* in the ways mentioned above. The same goes, of course, for our understanding of how *B* comes to have a right *against A* to performance of the promise. In what remains, I consider whether Scanlon's account of promissory obligation helps us to understand these things and hence, in effect, to understand the rights of promisees.

II. SCANLON ON PROMISSORY OBLIGATION

According to Scanlon, promissory obligations are a function of a moral principle that requires certain actions in specified circumstances. He labels this "Principle F" because he sees it as a principle of fidelity. He tells us that the conditions it specifies can be fulfilled in many ways other than by making a promise. "Promising is a special case, distinguished in part by the kind of reason that the promisee has for believing that the promisor will perform" (WW 306).

²² Compare the description Scanlon gives of (claim-) rights in general as rights to "command" particular things, where others have a correlative duty to "comply" in "Rights, Goals, and Fairness," in Stuart Hampshire, ed., *Public and Private Morality*, (New York: Cambridge, 1978), pp. 93-111.

It appears, then, that in Scanlon's scheme a given promisor's obligation to do what he promised will exist, if it does exist, by virtue of the application of Principle F, as will the obligations of all who fulfill the relevant conditions. I shall not, therefore, spend time here on what, according to Scanlon, differentiates making a promise from acting in one of the other ways that fall under Principle F.

Let us assume that a given promisor will have an obligation—indeed, a moral obligation—that derives from Scanlon's Principle F. It is not at all obvious that this obligation corresponds to a right of the promisee against the promisor to performance of the promise.

In order for it to do so, it will have to be not just an obligation, but an obligation towards the promisee, an obligation that is the other side of the coin from the promisee's right against the promisor to performance. An obligation that exists by virtue of the application of a moral principle requiring certain actions in specified circumstances, though indeed an obligation, is not, or not necessarily, a directed obligation.²⁵

One might sum up this line of thought by saying that there is an important challenge for any "moral principle" account of promissory obligation. Such accounts must show that what flows from the principle in question is not just an obligation, period, but a directed obligation.

At this point in the discussion someone may say "Whoa! What other kind of account can there be?" I believe that there is another kind of account, and a plausible one. In this article, however, I shall not go beyond the territory of moral principle accounts.

A variety of moral principle accounts is possible, and Scanlon's Principle F contains an interesting wrinkle such that it might be thought to be immune from criticism in terms of the rights of promisees. Scanlon may, indeed, have included this wrinkle in part so as to avoid criticism of this kind. There is some merit, therefore, in discussing the issue in relation to Scanlon's Principle F in particular.

I start with some observations on Scanlon's discussion preliminary to his presentation of his principle. In particular, I note some judgments on promises that help to motivate the principle.

II.A. Observations on promising. In the discussion preliminary to the introduction of Principle F, Scanlon introduces the "car and lawn" case:

²⁵ Concordant thoughts are found in Hart, "Natural Rights," pp. 180–81; also Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry*, iv (1970): 243–51, reprinted in Winston, ed., pp. 61–74, see p. 62.

Suppose, for example, that I promise to drive you to work if you will mow my lawn, and that you accept this arrangement. Then, a day or so later (but before the time has come for either of us to begin fulfilling the bargain) I think better of the deal and want to back out. On most people's understanding of promising, I am not free to do this. I am obligated to drive you to work unless you "release" me, even if I warn you before you have undertaken any action based on our arrangement. If I am going to break my promise then it is better to warn you than not to do so, but even if I do, this is a case of breaking a promise, not fulfilling one (WW 301, my emphasis; see also PP 205; PC 92).

Scanlon's emphasis here is on the fact that one cannot fulfill the obligation of a promise to do a certain thing by a timely warning to the promisee that one will not, after all, do that thing. He makes a similar point about compensation.

If one fails to fulfill a promise, one should compensate the promisee if one can, but the obligation one undertakes when one makes a promise is an obligation to do the thing promised, not simply to do it or to compensate the promisee accordingly (WW 301).

In other words, having failed to do what one promised to do, one cannot bring it about that one has, nonetheless, fulfilled the obligation incurred by one's promise by compensating the promisee.

The quoted passages differ in relation to Scanlon's positive characterization of the obligation of the promisor. In the first passage, one is said to be obligated to do the thing promised unless "released" by the promisor. In the second, one's obligation is said to be an obligation to do the thing promised, period.

I take it that what is intuitively correct here is this. The content of the obligation of the promisor is, indeed, to do the thing promised, period. But that obligation stands as long as the promisee has not released the promisor from the promise. At this point, it seems reasonable to construe Scanlon's first positive characterization of the obligation of the promisor along these lines.²⁴

II.B. Principle F. Scanlon concludes that in order to explain the obligations arising from promises: "we need a principle stating a duty specifically to fulfill the expectations one has created under certain

²⁴ Scanlon's statement that (in effect) a promisor is obligated "unless released" by his promisee may be thought to imply that action on the part of the promisee alone suffices to get rid of the obligation, whereas, according my (deliberate) characterization in this paragraph, action on the part of the promisee is necessary but may not be sufficient. For some congenial remarks on the insufficiency of action on the part of the promisee alone, see William Vitek, *Promising* (Philadelphia: Temple, 1993), pp. 101-02.

conditions" (WW 302). The quoted words are somewhat ambiguous, but I take it that what Scanlon has in mind here is a principle stating a duty (or obligation) of the following form: if, under certain conditions, one has created expectations to the effect that one will do such-and-such, one must fulfill those expectations.

The principle Scanlon has in mind is understood to be a moral principle. When is a principle a *moral* one? The gist of Scanlon's own answer may be found in this statement of the core of his carefully argued and articulated form of "contractualist" moral theory: "an act is [morally] wrong if its performance under the circumstances would be disallowed by any set of *principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement*" (WW 153, my interpolation and emphasis).

I shall not attempt to discuss Scanlon's contractualism here. Nor shall I discuss his assumption that the moral principle that will explain promissory obligations has to do with *expectations* that have been induced in the promisee. Perhaps he does not so much assume this as infer it from the fact that he can, as he believes, explain promissory obligation in terms of such expectations.

After some further discussion Scanlon proposes "a principle of fidelity that requires performance" (WW 304), namely, Principle F:

If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A's not doing so); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X's not being done (WW 304).

At this point I am not going to question the truth of Principle F. Rather, I want to argue that, if it is accepted, it is not sufficient for an understanding of promisees' rights.

II.C. Scanlon's consent clause. Principle F is more nuanced than Scanlon's description of it as "a principle of fidelity that requires performance" suggests. It requires performance *unless the promisor consents to lack of performance*. I shall refer to the emphasized clause as the "consent clause."

How does the consent clause get into Principle F? In terms of the progress of Scanlon's discussion, it gets there as a reflection of the nature of the expectations that he takes to be at issue.

Prior to the presentation of Principle F, Scanlon writes that, in the car and lawn case, "the expectation you reasonably want to be able

to form is the expectation that I will drive you to work *unless you consent to my not doing so*" (WW 302). The expectation Scanlon then takes to be at issue when one promises is the expectation that the promisor will do a certain thing unless the promisee consents otherwise.

Principle F reflects this characterization of the expectation at issue. According to the principle, when this expectation is produced in the appropriate conditions, the promisor must do the thing in question unless the promisee consents otherwise. The promisor will in this way act precisely in accordance with the promisee's—internally conditional—expectation.²⁵

One suspects that Scanlon's consent clause—and, indeed, his characterization of the expectation in question—is also intended to reflect the fact that, as he wrote earlier of a particular promise, "I am obligated ...unless you 'release' me..." (WW 301). In other words, my "consenting" to your not doing the thing you led me to expect you to do, in the conditions specified by Principle F, is intended to be tantamount to my releasing you from your promise.

Scanlon puts the term "release" in quotation marks. I am not sure why, since the general idea of the promisee releasing the promisor from his promise is unexceptionable. I have just put the term "consenting" in quotation marks, though Scanlon does not do likewise. As I see it, the term "consent" may carry a load that is undesirable in this context. More specifically, it may seem to imply that I am in a position of authority in relation to you, something that would be true if you had, in effect, promised me something, or done something akin to that. This is presumably not something Scanlon either wants or needs to assume in the formulation of Principle F (where the term "consent" appears twice).

In what follows, therefore, I shall construe "consent" in such a way that my simply saying "I'm fine with your not doing it" or something to that effect is enough to count as my consenting to your not doing it. In other words, I can be in a position to consent—in this sense—to your not doing something even if I have no pre-existing authority over you with respect to your doing that thing.

III. WHY SCANLON'S PRINCIPLE F IS NOT SUFFICIENT FOR PROMISEES' RIGHTS

Let us suppose the conditions of the protasis of Principle F are fulfilled in relation to Anne (who is in *A*'s position) and Ben (who is in *B*'s

²⁵ On the intended internal/external distinction as applied to intentions, see section VI below.

position), and that "doing X" in this case is phoning Ben on Monday. Now suppose that Anne does not phone Ben on Monday, Ben did not consent to this, and there was no special justification for it. Does Ben have a special standing to rebuke her for not phoning him—a standing that is not generally held, or, at least, not held for the same reason? Again, were Anne to suggest to Ben, before Monday, that she did not plan to phone him, would he have a special standing to insist that she did—a standing that was not generally held, or, at least, not held for the same reason? If Ben had, in effect, a promisee's right to Anne's phoning him on Monday, then he would have both of these special standings.

For simplicity's sake, I shall focus on the question of a special standing to issue a rebuke. I shall consider four possible grounds that Ben might be thought to have for rebuking Anne. For each of these I shall argue either that it does not, after all, give him the standing to rebuke Anne, or that it does not give him a special standing to do so. These grounds are: (a) Anne's violation of a moral principle; (b) Principle F's consent clause; (c) Ben's "right to rely" on Anne's performance; (d) Ben's being the intended beneficiary of Principle F.

III.A. Anne's violation of a moral principle. On what grounds might Ben rebuke Anne for not phoning him on Monday? The ground that Scanlon's principle most clearly suggests is this: *Anne has violated a moral principle: she has not done that which, according to Principle F, she must do in the circumstances.* What she had to do was phone Ben on Monday, unless he consented to her not doing so.

For present purposes there is a problem with a ground of this nature. Either it is liable to give the standing to rebuke Anne to many other people, as well as to Ben, or it gives nobody that standing.

What I have in mind is this. There appear to be the following two options as to who has the standing to complain just because a moral principle is violated.

First, there may be a general "right to do wrong" such that *no one* has the standing to rebuke a person merely on the grounds that he or she has *violated a moral principle*.²⁶ In that case neither Ben nor anyone else—on those grounds alone—has the standing to rebuke Anne for violating Principle F. It obviously follows that Ben has no *special* standing to rebuke Anne on these grounds.

²⁶ Jeremy Waldron has argued in favor of a right to do wrong. See Waldron, "A Right to Do Wrong," *Ethics*, xcii, 1 (October 1981): 21–39; see also William Galston, "On An Alleged Right to Do Wrong: A Response to Waldron," *Ethics*, xciii, 2 (January 1983): 320–24. Waldron responds in "Galston on Rights," *Ethics*, xciii, 2 (January 1983): 325–27.

Second, there may be no general "right to do wrong" of the kind in question. In that case, it seems likely that *everyone* has the same standing to rebuke Anne merely on the grounds that she has violated a moral principle. Then, once again, Ben is in the same position as everyone else. He has no special standing in the matter.

Perhaps not absolutely everyone will have this equal standing in the second case. Perhaps some classes of people will be ruled out. It is implausible, however, to argue that *everyone but Ben* will be ruled out, if the basis for the rebuke that we are considering is simply the moral wrongness of what Anne has done.

It is an important question—both theoretically and practically—whether or not people generally have the standing to rebuke someone merely on the grounds that he has violated a moral principle.²⁷ There is no need to pursue that question here, however. For it seems to follow from the available positions that Ben has no *special* standing to rebuke Anne if we assume that his standing to rebuke her is grounded simply in the moral wrongness of what she has done, or, to put it differently, in her violation of a moral requirement.

This seems to be so however nuanced the requirement in question is. In particular, *the existence of Scanlon's consent clause appears to make no difference when matters are considered in this light*. That clause, embedded as it is within Principle F, only has the effect of qualifying what Anne must do, if she is to conform to the principle, or, in other words, if she is to act morally.

Does the consent clause really not give Ben a special standing to rebuke Anne? Perhaps its implications should be investigated more carefully.

III.B. Principle F's consent clause. Suppose Anne has failed to phone Ben on Monday, in the circumstances envisaged, and Ben later upbraids her for not calling him. Suppose, further, that it is common knowledge between Anne and Ben that each accepts Principle F, and each believes that no one has the standing to upbraid a person for simply contravening a moral requirement.²⁸ Anne asks Ben by what title he, in particular, sees fit to upbraid her in this case.

²⁷ I am myself inclined to the negative position. If one takes that position, and one believes, at the same time, that wrongdoers could do with rebukes from others, at times, one is likely to take a special interest in discovering how, in general, people gain the standing to rebuke one another that promises, among other things, seem to provide. This is a theme of Gilbert, "Shared Values, Social Unity, and Liberty" (manuscript).

²⁸ I use the phrase "common knowledge" in roughly the sense of David Lewis, *Convention: A Philosophical Study* (Cambridge: Harvard, 1969). For an elaboration of my own, see Gilbert, *On Social Facts* (Princeton: University Press, 1989).

Suppose Ben observes, with emphasis, "Well, it wasn't just anyone's consent that was at issue, it was *mine*. You were supposed to call me unless *I* consented to your not doing so, and I did not consent...." It seems that Anne can reasonably reply: "It is true that your consent was at issue in the way described. I don't see, however, how that gives you a special basis for upbraiding me for not calling you. Since you did not consent, I have, clearly, violated Principle F. In other words, what I did was morally wrong. We are agreed, however, that *that* does not give you the standing to upbraid me for what I did. I can't see how the fact that *your* consent was at issue does."

Anne might go on: "Consider the following case. Jane promises Diana that she will stay in the house with Timmy that night unless he consents to her not doing so. Later that night she leaves the house without Timmy's indicating that this is fine with him. She has broken her promise to Diana, and, intuitively speaking, Diana, the promisee, has a special standing to rebuke her for so doing. What about Timmy? Does he also have a special standing to rebuke Jane? I don't see that he does. Where would this standing to rebuke come from? Not, as far as my story goes, from her breaking a promise to him, or doing anything analogous. After the fact, he can certainly observe, as you, Ben, can observe: 'It was *my* consent that was at issue, and I did not consent....' But I do not see how that gives him a special standing to rebuke Jane, or to demand that she stay home when she prepares to go out."

Suppose Ben responds: "Consider this, then. Timmy had the power to bring it about that Jane lacked an obligation she otherwise had—the obligation to stay in the house with him on the night in question. All he had to do was consent to her not staying, and she would no longer have an obligation to stay. Similarly, by withholding his consent he was able to keep her obligation in force. In short, he had the power to release her from her obligation as a promisor—or hold her to it. Such power is a function of the authority that gives a promisee the standing to rebuke a promisor for failing to fulfill his promissory obligation. So Timmy has that standing—and so, by parity of reasoning, do I."

Anne could surely reply: "Jane's obligation through her promise is conditional. Timmy cannot release her from that conditional obligation, or hold her to it. Diana can. In other words, if Jane pleadingly asks Diana, 'Must I stay with Timmy unless he consents?' Diana's saying, 'No, you need not,' brings Jane's conditional obligation to an end. Timmy does not have the power to do that. Timmy's power is only the power to fulfill or fail to fulfill a condition of Jane's conditional

obligation. That he has this power does not imply he has the standing to rebuke Jane if she fails to fulfill her obligation."

III.C. *Ben's "right to rely" on performance.* Scanlon says that "the obligation to keep a promise is *owed to a specific individual*" (WW 316; emphasis mine). This may be thought to imply that the individual in question has a special right to performance of the promise, and, consequently a special standing to rebuke the promisor. Scanlon may or may not mean his reference to what is *owed* to imply this.²⁹ However, he does seem to allude to such a special right when he says the following:

When the conditions of Principle F are fulfilled, it would be wrong, in the absence of special justification, for the party in A's position not to perform. In addition, the party in B's position has a "right to rely" on this performance: that is to say, the second party has grounds for insisting that the first party fulfill the expectation he or she has created (WW 305).

I am not sure why Scanlon puts quotation marks round the phrase "right to rely." In any case, he evidently—by his use of the words "that is to say"—wants us to interpret this phrase in terms of grounds for insisting that the first party fulfill the expectation he or she has created. In other words, he interprets a "right to rely" on a performance as, in effect, a right to that performance itself.

There is another way of interpreting the phrase "right to rely," a way such that having a right to rely is not equivalent to having a right to the thing relied on, and does not, or at least not obviously, entail having such a right. According to this interpretation, "having a right to rely on a performance" means the same as "being epistemically justified in thinking that a performance will occur (and hence to act as if it will occur)."

I am not sure that fulfillment of the conditions of Principle F entails that—in the case of Anne and Ben—Ben *will* be epistemically justified in thinking that Anne will perform as expected unless he consents to her not so performing. For present purposes I shall assume that it does. While there is, in that case, no doubt that Ben has a right to rely on Anne's performance in the epistemic justification sense now in question, one must distinguish between this kind of right to rely and a right to rely that is equivalent to, or entails, a right to the performance itself, a right that gives one a ground for insisting on

²⁹ For some observations that suggest that he does not, see the discussion of Scanlon's use of "owing" in Frances Kamm, "Owing, Justifying, Rejecting," *Mind*, CXI, 442 (April 2002): 323–54, at pp. 333–36.

performance. I doubt that Scanlon was under any other impression, but it is worth pointing out the possibility of making an inadvertent slide from a claim that a right to rely in the first sense is present to a claim that a right to rely in the second sense is present.

Is it worth pursuing, in the present context, the idea that one might somehow argue from a right to rely in the epistemic justification sense to a right to rely in the right to performance sense? I think not, in part for this reason. In the present case, an observer of the situation may, presumably, have as good an epistemic justification as Ben for expecting Anne's performance. If an observer—Ben's trusty body-guard, for instance—can for that reason have a right to Anne's performance, this will not be an argument to the effect that Ben has a special right to Anne's performance, a right he holds by virtue of being the person to whom something analogous to a promise was made.

III.D. Ben as beneficiary of Principle F. Suppose Ben says: "I am—surely—the intended beneficiary of the duty specified in Principle F, as that principle applies to you and me. Hence I had a right against you to your fulfillment of this duty. This right gave me the standing to rebuke you for not fulfilling the duty, a standing that, in this situation, is special to me."

Anne might surely reply: "I will agree, for the sake of argument, that there is a sense in which you are the intended beneficiary of the duty specified in Principle F. I would still draw the line at saying you had a right against me to my fulfillment of the duty. To my mind, it is possible—without contradiction—to accept that I have acted contrary to a moral requirement that was in some sense intended to benefit you, while not accepting that you have a right against me to my acting in accordance with the requirement in question."

Ben appealed, in effect, to a *beneficiary theory* of rights. According to his version, the intended beneficiary of someone's moral duty is the holder of a right against that person to the fulfillment of the duty. Related theories of rights are quite popular, so it would be well to go into this matter further here.³⁰ In the next section, I briefly consider one such theory in relation to the question of a promisee's rights.

³⁰ Often "beneficiary theories" are contrasted with "choice theories" and both seen as theories of the function of rights. However, in some cases (see the text below) the notion of a beneficiary is used to explain what a right is, and how to determine whom a given right is a right against.

IV. BENEFICIARY THEORIES AND PROMISEES' RIGHTS

A distinguished exponent of a type of beneficiary view of rights is Joseph Raz.³¹ In a well-known discussion, Raz prefaces his account as follows:

...a philosophical definition of "a right" like those of many other terms, is not an explanation of the ordinary meaning of a term. It follows rather the usage of writers on law, politics, and morality, who typically use the term to refer to a sub-class of all the cases to which it can be applied with linguistic propriety (*op. cit.*, p. 194).

Raz may mean to suggest, plausibly, that terms can get used so widely in everyday discourse that philosophers and others should be comfortable developing partial accounts of their referents, accounts that pick out an important sub-class of everyday uses. And one can, of course, introduce any term or phrase, including "a right," in any technical sense one pleases. This is something that philosophers, among others, often do. If, however, one is specifically interested in the rights of promisees, one would presumably want to give an account that was consonant with an intuitive characterization such as that given by Hart.

Raz presents the following fairly complex definition:

"x has a right" if and only if x can have rights, and, other things being equal, an aspect of x's well being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (*op. cit.*, p. 195).

This may capture a prevailing use of the phrase "a right" among writers in the areas Raz specified, as he intended. It has certainly had some influence over the way in which rights are understood in moral theory.³² However, it is hard to see how it captures the nature of the rights of promisees.

A central thought about a promisee's right that seems to have no real place here is the thought that the person(s) who are under the duty referred to *owe* the action that fulfills it to the so-called right

³¹ See "On the Nature of Rights." I here include under the broad label "beneficiary theory" all those theories that make central to their account of rights the benefits, intended benefits, or interests of the putative right holder. Such theories may differ in important ways among themselves. Raz notes that his definition of a right "draws on several elements of analyses of rights which stem from Bentham's beneficiary theory" (p. 195, note 3). Among contemporary theorists, Raz cites Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), p. 100; D.N. MacCormick, "Rights in Legislation," in P.M.S. Hacker and Raz, eds., *Law, Morality, and Society* (New York: Oxford, 1977), pp. 189-209; and, especially, Keith Campbell, "The Concept of Rights" (D.Phil. thesis, Oxford University, Bodleian Library, 1979).

³² See, for instance, Richard Arneson, "Against Rights," *Philosophical Issues*, xi (2001): 172-201, see third paragraph.

holder. There seems to be a logical gap between its being the case that I have a (moral) duty whose ground is an aspect of the right holder's interest, and its being the case that I owe performance of that duty to the right holder. It seems that it would be perfectly intelligible for me to say: "Okay, this duty I have is grounded in an aspect of your interest...but I do not *owe* you its performance. It's just my duty, period."

If I were to allow that I owe you performance, then I would recognize that you have the standing to upbraid me for nonperformance, or to insist on performance. Before the fact you could pressure me, saying in effect: "Give me that! It's *mine!*"

It is true that a bystander could say, "Give her that! It's *hers!*" The case in which I command you to give me what is *mine* is special, however. The bystander's standing to command you to give it to me can be questioned. My standing surely cannot be questioned. In the bystander's case, the riposte "It's none of your business!" makes sense. In my case, it does not.

In a discussion of promises that follows his definition of "a right," Raz focuses briefly on the rights of promisees. He seeks an account of these according to which there is such a right corresponding to every promise. He therefore favors the view according to which, though anyone may lose interest in having a given promisor fulfill his promise, each person has a general interest that promises made to him shall be kept. This is the interest "to have voluntary special bonds with other people" (*op. cit.*, p. 203).

Of the promisee he says that "It is always up to him to waive his right under the promise and thus terminate the binding force of the promise" (*op. cit.*, p. 203), in other words, terminating the duty of the promisor. It seems that he might have suggested, though he does not, that the promisor's duty to perform is subject to a consent condition akin to Scanlon's.

There is nothing in Raz's discussion so far that seems to imply that a right is held *against a certain person* or that it corresponds to a *directed* duty. Nonetheless Raz says that "Rights are held against certain persons" (*op. cit.*, pp. 209–10). In his eyes, this seems to come down to the question of who can satisfy the interest that grounds the right. Thus, "since contractual rights are based on an interest in being able to create special relations, they give rise to rights against other parties to the agreement as they are the only ones who can satisfy that interest on that occasion" (*op. cit.*, p. 210).

If one wishes, one can stipulatively define "right *R* is held *against person P*" in some such way. Nonetheless, the points already made suggest that where rights are held against persons, in *this* sense, the

right holder does not necessarily have the special standing associated with the rights of promisees as ordinarily understood. I conclude that the idea of explicating rights of the latter kind in terms similar to those of Raz is problematic, and shall not pursue it further.

V. ADDITIONAL PRINCIPLES

Suppose it is accepted that Scanlon's Principle F does not in and of itself account for the rights of promisees. It may be suggested that Scanlon can plausibly account for these rights by introducing some kind of subsidiary principle, in addition to Principle F. I think this is doubtful, as I shall argue with respect to two rather different kinds of proposals that might be made in this regard.³⁵ I consider these proposals in relation to the example of Anne and Ben.

V.A. *A social rule in the context of Principle F.* The first kind of proposal invokes a social rule. A version of it might run roughly as follows. Assume that situations in which Principle F applies are common within a particular society, *S*. It is predictable that *S* will adopt a rule for behavior in such situations—call it *Rule R*—which has the following implication in the case of Anne and Ben: if Ben chooses to speak in a rebuking tone to Anne for not phoning him on Monday, she is not to object to his doing so on the grounds that he lacks the standing to rebuke her. In other words, she is to behave as if he has such standing. Indeed, she is to behave for all the world as if he has a right to her phoning him. The existence of Rule R in *S* would tend to promote the interests of those members of *S* who find themselves in Ben's position, interests that Principle F itself promotes. The ubiquity in human societies of Rule R would help to explain the intuitive judgment that promisees have the standing to rebuke promisors, and, indeed, the intuitive judgment that this standing derives from a right against the promisor, who owes the promised performance to the promisee.

To this proposal the following objection may be raised. Whether or not it is apt in some sense to explain them, the ubiquity of Rule R would not seem to *justify* the intuitive judgments in question. Rule R requires Anne to act *as if* Ben has a certain right. Intuitively, however, he actually has such a right. If what we are looking for, then, is an account of our intuitive judgments that provides a justification of them rather than a debunking explanation, this proposal must be rejected.

One who accepts this aim may counter that the existence of a rule

³⁵ In informal discussion of an earlier version of this paper, the first was suggested by Arneson, the second by David Brink (La Jolla, November 2002).

in one's society to the effect that in certain circumstances one is to be treated as if one has a certain right is a sufficient basis for allowing that, in that society, one actually has that right. Or a rule understood in somewhat different terms may be invoked: if, in a given society, it is allowed that a promisee is to *count as* having a right to performance against the promisor, then, in that society, the promisee has such a right.³⁴

There is a familiar problem common to both of these responses: they are not clearly free of the assumption of a "prior promise." What, after all, does the existence of a social rule in a given society amount to? According to at least some accounts, something akin to a prior promise or agreement is among the existence conditions of a social rule.³⁵ Thus these responses are open to the objection that they are attempting to explain a puzzling feature of promising by reference to something with that very feature. Suppose we set this problem aside, and allow, at the same time, that the existence of an appropriate social rule would actually give Ben a right against Anne. This still leaves the proposal at issue with serious problems. In particular, it detaches promisees' rights from promises, and from promissory obligation, in an unintuitive way.

Intuitively, a promisee's rights are part and parcel of promises. They are on a par, in this way, with a promisor's obligations. According to this proposal, however, a promisor's obligation may exist when a promisee's right does not: that right depends on the existence in the promisee's society of an appropriate rule. To say this is to say something in the spirit of Scanlon's doubts about practice theories of promissory obligation: promises and the like appear to obligate independently of any background social practices, rules, or understandings as to what counts as what. In the same way, they give promisees rights.

Relatedly, from an intuitive point of view, a promisee's right is the obverse of a promisor's obligation (and vice versa), a promisor's obligation being, by its nature, a *directed* obligation. The proposal at hand, meanwhile, starts with a nondirected obligation—that which is a result of Principle F—and puts it together with a social rule that is supposed independently to generate a right. Clearly this right is not simply the obverse of the obligation in question.

The proposal under consideration, then, has several problems. These are the problem of whether and how a social rule could give

³⁴ The formula "X counts as Y" plays a large role in the account of social institutions in John R. Searle, *The Construction of Social Reality* (NY: Free Press, 1995). See also Searle, *Speech Acts: An Essay in the Philosophy of Language* (New York: Cambridge, 1969).

³⁵ See Gilbert, *Sociality and Responsibility*, chapter 5.

a promisee a genuine right, the prior promise problem, and the structural problem. Even if the first two problems are set aside, the relationship between an obligation derived from Principle F and a right supposedly the product of a social rule is not structurally the same as the intuitive relationship between a promisee's right and a promisor's obligation.

V.B. Subsidiary moral principles. Rather than appealing to a contingent social practice, can Scanlon plausibly appeal to a subsidiary moral principle? A beneficiary theorist of rights may point out, as did the proponent of the previous proposal, that it is in the interests of someone in Ben's position to be able with impunity to act as if he had a right to Anne's performance. Might one not argue, indeed, that Ben's interest in being able so to act is sufficient to ground a moral duty in Anne, and that Anne has, therefore, a moral duty to allow him so to act?

What exactly is Anne's duty according to this argument? It seems to be a duty to allow Ben to act as if he had a right to her performance. Does this mean that Ben does in fact have a right to her performance? That is at best not clear.

Perhaps someone will say that if certain others morally ought to act as if I have a given right against them, then, whatever else is true, I have a *moral right* against them with the same content. Perhaps it will be said that that is *what it is* to have a moral right—or one type of moral right—against certain others.

Suppose that for the sake of argument one accepts these points. One must then observe that a moral right of the kind in question is, intuitively, of a different type to the rights of promisees. Promisees' rights are not, at base, only rights-people-morally-ought-to-act-as-if-the-promisee-had. They are—in addition—rights the promisee has. The same can be said of similar understandings of what a moral right is. It can be said, for instance, of the understanding that to have a moral right against someone is for it to be the case one morally ought to have a right against him. A promisee's right is a right the promisee has.

Another problem with this proposal has to do with the relationship between a promisee's right and a promisor's obligation. Once again, we have a proposal that starts with a nondirected obligation—unlike a promisor's obligation—and adds to the mix a type of right of the promisee—a right-people-morally-ought-to-act-as-if-the-promisee-had. Though it may not be correct to say that the right of the promisee is in this case only contingently present when the obligation of the promisor is, it is not simply the obverse of the promisor's obligation. It is something additional. For the promisor's obligation derives from Principle F, whereas the promisee's right relates to a different, here

unnamed, principle, concerning an interest of Ben's that—according to the principle—morally ought to be protected.

VI. PRINCIPLE F AS THE SOURCE OF A SECONDARY OBLIGATION
PRESUPPOSING PROMISEES' RIGHTS

There could be more than one obligation, and perhaps more than one *type* of obligation, associated with promises. I take it that, first, there is a (primary) obligation that is part and parcel of promising, a directed obligation correlated with a right of the promisee against the promisor. Then there could be one or more other obligations, always or perhaps only sometimes present when promising occurs. These (secondary) obligations would perhaps reflect the existence of the obligations that are part and parcel of promising. The secondary obligations would not necessarily be directed obligations with correlative rights.

The gist of my argument so far has been that Scanlon's Principle F is not the source of the primary obligation, given the directed nature of that obligation or, in other words, its correspondence to a right in the promisee. Principle F could, however, be the source of a secondary, nondirected obligation that obtains in some or all cases of promising.

There is, indeed, reason to think that Principle F is least debatable, as a moral principle, if one of its assumptions is the making of what is, in effect, a promise, complete with the primary directed obligation of the promisor. This may be argued roughly as follows.

Scanlon's statement of the principle starts with the assumption that a person *A* voluntarily and intentionally leads another person *B* to expect that *A* will do *X* (unless *B* consents to *A*'s not doing so). But there are many ways in which *A* might lead *B* to believe this. Thus *A* might express an appropriate personal intention. But *A*'s personal intention is surely *A*'s to change as *A* wishes. If all that *A* has done in bringing about the truth of the assumption is express a personal intention, then it is not at all clear that there will be any moral onus upon *A* to the effect that *A* must do *X* unless *B* consents to *A*'s not doing so.

Scanlon's second assumption is that *B* wants to be "assured" that *A* will do *X* (unless *B* consents to *A*'s not doing so), and his third is that *A* acts with the aim of providing this assurance, and has good reason to believe that this has been done. Now it may be that a simple expression of personal intention is not enough to *assure* anyone of one's future actions, because one may always choose to change one's mind. In that case, it seems that *A* must have done more than express such an intention.

In Scanlon's discussion, he at one point refers to a "settled intention," but it is not clear on the face of it what a "settled" intention is, other than a genuine one. However genuine my intention, I am surely at liberty to change my mind when I wish to, if my intention is the only relevant constraining factor. So the expression of a genuine intention is unlikely to be enough to assure someone that I will indeed do the thing intended. Rather, I will do it unless I change my mind.³⁶

What is the appropriate intention here? Presumably it will incorporate a consent clause. Might the inclusion of this clause make a difference, constraining *A* from changing course?

Consider the statement "I intend to do *X* (unless you consent to my not doing so)." The stated condition, your consenting to my not doing so, may in principle be construed as internal or external to the intention. What I have in mind is this: when it is construed as internal, the quoted sentence comes out as equivalent to "I intend this: to do *X* (unless you consent to my not doing so)." When construed as external, it comes out as "Unless you consent to my not doing *X*, my intention is to do *X*."

As to the first construal, there seems no bar from the consent clause to my changing my mind, and canceling or otherwise amending my intention. To cite two possibilities, the intention that results from my change of mind might be the intention not to do *X* whether or not you consent to my not doing so, or to do *X* whatever you say.

As to the second construal, it seems to imply that I have an intention to do *X* that will persist unless you consent to my not doing *X*. It is not clear, however, how a personal intention can become subject to another person's consent. Is my claim that my intention will persist absent your consent an empirical one? Then how can I be sure it is true? Is it or does it presuppose an undertaking of some kind? If so, then it seems that there is, in effect, a promise in the background, a promise complete with a directed obligation of the promisor and its correlative right in the promisee.

In short, it is not easy to see how the assumptions with which

³⁶ A similar drift, not directed at Scanlon in particular, is to be found in various writings—see, for instance, Prichard, "The Obligation to Keep a Promise"; Robins, "The Primacy of Promising"; and, in relation to Scanlon, Michael Pratt, "Scanlon on Promising," *Canadian Journal of Law and Jurisprudence*, xiv, 1 (January 2001): 143–54, of which I learned after formulating similar points (Gilbert, "Moral Obligation and Agreement" (manuscript), presented at the University of Connecticut/Storrs, spring semester 2001). A focus of previous writing of mine has been the unilateral rescindability of personal intentions and other sources of personal commitments. See, for instance, my 1997 essay, "What Is It For *Us* to Intend?" reprinted in Gilbert, *Sociality and Responsibility*, pp. 14–36.

Scanlon introduces Principle F lead to a *nondirected* obligation of the person in *A*'s position unless they implicitly include what is, in effect, a promise of *A*'s to do *X*, complete with the directed obligation of the promisor. If we assume—contrary to Scanlon's drift—that this is so, then Principle F may hold. I shall not attempt to decide if it does here. If it holds when and only when these amplified conditions are met, then it will indeed describe an obligation that promisors often, if not always, have. It will not, however, describe the primary, directed obligation of a promisor.

VII. SUMMARY, CONCLUSIONS, PROSPECT

Scanlon's account of promissory obligation is one of a certain general type, a type that appeals to a moral principle applied in a noninstitutional context. It is intended to apply on the basis of facts about personal intentions, expressions of such intentions, expectations, and preferences. I have briefly argued, concordantly with other authors, that in order to be valid such a principle needs a different basis. It may well need a promise or something like it as part of the basis on which it will apply. Be that as it may, my central argument in this essay has been that Scanlon's principle is not equipped, in and of itself, to account for promisees' rights and the correlative directed obligations of promisors. My argument strongly suggests, if it does not show, that no account of this type will adequately account for the nature of a promisee's rights as these are intuitively understood.

If so, and if one agrees with Scanlon that social practice accounts are implausible, one might wonder: How are a promisees' rights possible? And if it is hard to see how rights of this nature are possible, their actuality may be doubted. One might then be tempted to stick with a noninstitutional, moral principle account of promissory obligation such as Scanlon's. And one may give up the search for a source of a promisees' rights.

I think this would be a mistake, since I believe that it is possible to give an account of promisees' rights that is neither a practice account nor a noninstitutional, moral principle account. I shall not describe nor discuss the account I have in mind here.³⁷ I shall, however, make some points relevant to it.

³⁷ I have sketched such an account in various publications. These focus on agreements rather than promises, but suggest an interpretation of promises as well. See, for instance, my articles, "Is an Agreement an Exchange of Promises?" "Agreements, Coercion," and "Obligation and Joint Commitment," *Utilitas*, xi, 2 (January 1999): 143–63, reprinted in Gilbert, *Sociality and Responsibility*, pp. 50–70. I return to it in my book, *Rights Reconsidered* (to be published by Oxford University Press). Robins, in *Promising, Intending, and Moral Autonomy*, emphasizes the need to account for a promisee's rights (at pp. 99–102) and pays careful attention to that need in developing a proposal as to the nature of promising (see pp. 102–03). My own proposal has some affinities

On the topic of promissory obligation, people may seesaw between noninstitutional moral principle views and practice views that, also, appeal to a moral principle because they take seriously Hume's worry that there is no sense in the idea of willing an obligation into being. Now this may seem to be absolutely clear if we are thinking of an obligation, duty, or requirement that derives from a moral principle, a principle, roughly, of the type that Scanlon's contractualism attempts to characterize. Call such obligations, and these alone, *moral* obligations. One may think, plausibly: How could anyone will a moral obligation into being, just like that, just because they wanted to? A moral obligation simply is *not* that kind of thing. One has or does not have such an obligation, in the circumstances. Given such-and-such circumstances, the obligation is or is not there. In a given context one may be able to create the relevant circumstances by an exercise of will, but that is not willing the *obligation*.

Supposing this is right, it need not end discussion of the possibility that the directed obligations of promisors are directly willed into existence. For it could be that the obligations associated with promises, while being genuine and indeed paradigmatic obligations, are not moral obligations (nor legal obligations either).

Though one might be unclear as to how this could be, it can surely not be thought unintelligible. That there are nonmoral, nonlegal obligations and rights would only be unintelligible if by "moral" one meant "other than legal." Then the categories of "moral" and "legal" would be exhaustive, by definition. But a moral obligation is not being conceived of here in such a residual fashion, but rather in terms of an intuitive idea of the moral realm. Perhaps a sense of the problematic nature of moral principle views, along with practice views, will allow those otherwise skeptical of a *via media* to view such a possibility more favorably.

Evidently, the discussion here is relevant to more than the rights of promisees and the correlative obligations of promisors. It bears on the general question of the nature and source of rights in the sense of Hohfeldian claims or rights "in the strict sense of the term." When their directionality is construed as in this article, such rights—for short, *rights*, period—are clearly valuable possessions. If I have a right against you, I have the standing to put pressure upon you to do certain things. I have a certain, if limited, authority over your will. How, then, do people come by such rights?

with that of Robins—for whom the notion of *commitment* is key. There are important differences too, in particular, my invocation of a commitment that is *joint* in the sense I articulate.

Insofar as legal rights are *stipulated* rights, they raise immediate questions about the authority of law itself. The same goes for any other stipulated rights, including the rights, if any, that are created by nonlegal rules. Setting such rights aside, many moral philosophers have been inclined to suppose that some rights—which they would refer to as *moral* rights—are constructed out of purely moral materials such as moral requirements. These philosophers do not think of moral rights as rights that ought to be, or some such thing. They think of them as real, existing rights constructed out of purely moral materials. The discussion in this article suggests that there are no moral rights in this sense.³⁸

If that is right, it leaves us with the question: Where do nonlegal, nonstipulated rights come from? One source of such rights is, evidently, the source of promisees' rights. Clearly, it would be good to know what that is.

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³⁸ I explore this issue further in *Rights Reconsidered*.