

## PROMISES, EXPECTATIONS, AND RIGHTS

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### INTRODUCTION

Promises are unique and perplexing in that, by promising, we can voluntarily transform the moral status of an action. A promise can change an optional act into an obligatory one.<sup>1</sup> By promising, it seems that we can create moral rights and obligations “from nothing.” Specifically, we can create the promisee’s right to have the action performed and the promisor’s self-imposed obligation to perform the promised action.

Theorists have extensively discussed why we have a duty to keep our promises. Different answers have been provided, but two main approaches compete.<sup>2</sup> According to the first, which we can call the “institutional approach,” the individual act of promising belongs to the social institution or convention of promising, and we have a duty to keep our promises because we have a duty to comply with that social institution, which is in some way valuable for society. Not complying with the institution (by not keeping our promises) directly or indirectly undermines the practice.<sup>3</sup> The second approach, called the “expectational approach,” claims that the duty to keep our promises arises because when we promise something, we create an expectation in the promisee which we have the duty not to disappoint.<sup>4</sup>

The institutional approach has at least two major shortcomings. First, it cannot account for our strongly entrenched intuition that, when we fail to keep a promise, we are directly wronging the promisee. If I promise you that I will read your paper by next week, and I fail to do so, I am not doing wrong simply because I fail to comply with a social convention that bene-

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1. See CHARLES FRIED, *CONTRACT AS PROMISE* 8–9 (1981).

2. This is obviously just one of the possible ways to classify theories.

3. See DAVID HUME, *A TREATISE OF HUMAN NATURE* (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739–40); see also JOHN RAWLS, *A THEORY OF JUSTICE* 344–48 (1971).

4. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 302 (1990); see also T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 296 (1998).

fits everyone, or because I am free-riding on such a valuable social convention. I am doing wrong because of what I am doing *to you*.<sup>5</sup> Second, the wrongdoing of failing to keep a promise persists, at least theoretically, in contexts where the social convention of promise does not exist.<sup>6</sup> We can imagine at least two such contexts: first, a promise made in the state of nature or in a society where no institution of promise exists, and second, a promise made to a foreign person from a society that will not have any contact with ours in the future.<sup>7</sup> In both cases, the only conventions required to trigger the obligation to keep the promise are those needed to communicate and understand the concept of a promise. A shared and established practice of promising and promise-keeping between the promisor and the promisee is not necessary.<sup>8</sup>

In this paper, I will assume that the two mentioned objections suffice to reject the institutional approach, or at least to prove that it is seriously flawed. Accordingly, I will also assume that the promise-keeping obligation is a personal or “face-to-face” obligation and that it is independent of any social convention of promise-keeping.<sup>9</sup>

What we should first note about these assumptions is that the expectational approach is consistent with them. According to this approach, the promissory obligation arises from what the promisor does to the promisee and is independent of the existence of a social convention of promise-keeping. Thus, the expectational approach appears, at first sight, to be a good candidate to overcome our initial perplexity. However, I contend that the expectational approach is flawed because it cannot withstand the traditional objection that it is, in a crucial way, circular.

For this reason, an alternative is needed, and my central aim in this paper is to outline such an alternative view. The core of this alternative view is that promising and promise-keeping duties are conceptually linked to the rights of the promisor. Assuming those rights is necessary to explain why we can promise and thereby create new rights and duties. My approach will therefore be “rights-based.”

5. See SCANLON, *supra* note 4, at 316; THOMSON, *supra* note 4, at 302 (discussing how a party who relies on a promise acquires a personal claim against the promisor).

6. See SCANLON, *supra* note 4, at 297; THOMSON, *supra* note 4, at 303–04; J. Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 214–15 (P.M.S. Hacker & J. Raz eds., 1977).

7. THOMSON, *supra* note 4, at 303–04.

8. *Id.*

9. These assumptions are admittedly controversial, but my purpose in this paper is not to argue for them but to explore what follows from them.

In Part I, I describe the expectational approach in clear terms and explain why, in my view, the circularity objection is impossible to overcome within the framework of that theory. Then, in Part II, I develop the rights-based approach. In Part III, I aim to show that a rights-based approach can accommodate the concept of expectation. Finally, I consider some objections to the rights-based approach in Part IV.

### I. THE EXPECTATIONAL APPROACH ASSESSED

The expectational approach, which claims that the obligation to keep our promises arises because promising creates expectations that we ought not disappoint, deserves close analysis.<sup>10</sup> It seems clear that there are many ways of raising expectations in others other than promising,<sup>11</sup> and that there are some promises that do not raise any expectation, at least according to some definitions of “expectation.” To assess the expectational account, we first need to explain exactly what kind of “expectation” promises create and distinguish this particular kind from other ways of creating expectations.

First, we must define the concept of expectation. Suppose John does something that creates an expectation in Mary that he will do X. As a first approximation of the concept, we can say that Mary has an expectation that John will do X if, and only if, (i) Mary believes that John will (or very probably will) do X, and (ii) Mary is not indifferent toward John’s doing X.<sup>12</sup> Not being indifferent means that Mary has either a positive or a negative attitude toward John’s doing X (in other words, she desires that John either do X or does not do X).

Although this provides a general and, in my view, plausible definition of “expectation,” we need some further assumptions before we can focus on the particular concept of expectation used by expectational theorists. First, I will assume that the promisee’s attitude toward the promised act is always positive. If the obligation to keep our promises is to be founded on the obligation not to disappoint the promisee’s expectation, we obviously have to assume that such an expectation is a positive one. Raising a negative expectation might in some cases be a threat, but never a promise.<sup>13</sup> Second, I will assume that Mary is fully rational and, therefore, that her

10. In the following analysis I do not presume to be original. I merely aspire to spell out in clear terms the expectational account (especially Scanlon’s version). See SCANLON, *supra* note 4, at 296–315.

11. See THOMSON, *supra* note 4, at 94–95.

12. *Id.* at 297–98 (discussing “uptake” as a requirement of “word-giving”).

13. This is so even if we use the term “promise.” For example, if John tells Mary, “I promise I will kill you,” this is not a promise in the proper sense, or at least in the same sense as when John tells her, “I promise I will help you.”

expectations are always rational (she always has a reason to expect what she expects).<sup>14</sup> Note that Mary's belief that John will do X could be justified or unjustified. If her belief is justified, we can say that she has a reason to believe that John will do X. In such a case, she has a rational expectation. Summing up, we can say that, in the context of promises, Mary has the expectation that John will do X if and only if (i) Mary believes that John will do X; (ii) Mary has a positive attitude towards John's doing X; and (iii) Mary has a reason to believe that John will do X.

With this concept of expectation in mind, we can now distinguish two alternative ways to raise expectations: intentionally and unintentionally.<sup>15</sup> John raises Mary's expectation intentionally when he does something to lead Mary to expect that he will do X (direct intention), or when he does something for some other purpose, but knows that his doing so will raise Mary's expectation that he will do X (indirect intention). On the other hand, John raises Mary's expectation unintentionally when he is unaware that his doing a certain action raises Mary's expectation that he will do X.<sup>16</sup> I will focus on intentional expectation-creation, because it seems clear that, according to the expectational approach, no one can promise something without being aware that he is raising an expectation.<sup>17</sup> According to our previous analysis, this implies that John intentionally leads Mary to acquire the justified belief that he will do X.<sup>18</sup>

The analysis thus far is still insufficient to offer a complete expectational account of promising. John might intentionally raise Mary's justified belief that he will do X by leading her to believe that he is crazy and that he will do X out of an uncontrollable impulse. This is even compatible with John's being rational, since John might intentionally deceive Mary. We must therefore not only assume that John is rational (he acts for reasons), but also that he leads Mary to believe that he is rational. Assuming these two points, we can safely say that John's promising Mary that he will do X

14. Raising an irrational expectation would hardly be a case of promising. Suppose I promise to fly you to the moon and you form the irrational expectation that I will do so. Is this promise binding? It seems that promising such a kind of action is an attempt to deceive you.

15. See FRIED, *supra* note 1, at 10–11 (providing an example of raising expectations unintentionally); THOMSON, *supra* note 4, at 94–95 (distinguishing between raising expectations intentionally and unintentionally).

16. If (but only if) we assume that John had a duty not to raise Mary's expectation, we could say that he raises her expectation negligently.

17. See SCANLON, *supra* note 4, at 304 (stating as condition (1) of his "Principle F" (Principle of Fidelity) that "A voluntarily and intentionally leads B to expect that A will do X").

18. More controversial is whether promising is a case of raising an expectation with a direct intention or whether it may also be a case of raising an expectation with an indirect intention. The typical case seems to be one of direct intention. However, this point does not affect the argument of this paper.

implies that he intentionally leads Mary to acquire the justified belief that John will do X *for a reason*.<sup>19</sup>

It seems quite plausible to me to go a step further and claim that if John intentionally leads Mary to acquire the justified belief that he will do X for a certain reason, John must in some way make Mary aware of his intention to do X for such a reason. In other words, he must let her know of his intention to act for that reason.<sup>20</sup> That John communicates something to Mary means that he intentionally lets her know something. The communication may or may not be explicit. What is important is that part of what John communicates to Mary is the reason why he has the intention to do X.

We can distinguish two kinds of reasons why John may raise Mary's expectation that he will do X:

(a) Self-regarding reasons: John intentionally raises Mary's justified belief that he will do X by letting her know that he has the intention to do X for a self-regarding reason—that is, doing X helps to advance some of John's goals or interests. For example, John convincingly tells Mary that he will read her paper by the following week because (and, suppose, only because) doing so will be very helpful to John in improving his next lecture.

(b) Moral reasons: John intentionally raises Mary's justified belief that he will do X by letting her know that he has the intention to do X for a moral reason, meaning that doing X is necessary to fulfill one of John's moral duties.

It seems clear that, according to the expectational account, promises are instances of (b).<sup>21</sup> When John promises Mary that he will do X, he thereby intentionally raises her expectation that he will do X by letting her know of his intention to do X for a moral reason. But such moral reason is peculiar. To see why, compare these two examples:

(A) There is a general duty of reciprocity. John and Mary are faculty members, and Mary has read a paper that John wrote. John receives one of Mary's papers. Both John and Mary believe that there is a duty of reciprocity and they know that they both agree that such a duty exists. John tells Mary that he will read her paper out of reciprocity.

19. This assumption does not imply that he cannot make a false promise, that false promises are not promises, or that false promises do not generate obligations. The assumption is that John is not leading her to believe that he will do X irrationally, for no reason. In the case of a false promise (when John promises Mary he will do X knowing that he will not do X), John does not deceive Mary in this particular way.

20. See SCANLON, *supra* note 4, at 304 (especially conditions (3) through (5) of his Principle of Fidelity).

21. See *id.* at 306.

(B) There is no general duty of reciprocity. John and Mary are faculty members, and Mary has read a paper that John wrote. John receives one of Mary's papers. Both John and Mary believe that there is no duty of reciprocity and they know that they both agree that no such duty exists. John promises Mary that he will read her paper.

In (A), John's duty to read Mary's paper is independent of his raising her expectation that he will read her paper. When John tells Mary that he will read her paper, he merely informs her that he intends to read the paper because of some preexisting moral reason. We might ask whether John has an additional obligation to read the paper because he raised Mary's expectation. To that end, compare example (A) with (A'), in which John does not tell Mary of his intention, and therefore, no expectation arises. In (A'), John still has the duty to read Mary's paper out of reciprocity. Is his duty stronger in (A)? Probably, but it seems that such an increase arises only if it is true that Mary will suffer some kind of non-trivial loss or harm if John fails to read the paper (I will expand on this below). Imagine that John fails to read the paper and no harm arises from that failure; Mary's paper is published anyway. In my opinion, she cannot complain that he has disappointed her expectation. Mary might have a legitimate complaint against John because he disregarded the duty of reciprocity, but her expectation that he obey such a duty seems to add nothing (she cannot say, "You have failed to obey your duty of reciprocity. And not only that, you have also disappointed my expectation that you would obey that duty! That makes your failure even worse.").

Example (B), where John promises Mary that he will read her paper, is different in a crucial way. In this case, John also raises Mary's expectation that he will read the paper by intentionally telling her of his intention to read the paper for a moral reason. But, unlike example (A), John has no independent moral reason to read the paper (he is morally free not to read the paper). According to the expectational account, the moral reason to read the paper in example (B) arises from (and only from) John's raising Mary's expectation that he will read the paper and thereby assuming the duty not to disappoint that expectation.<sup>22</sup>

To sum up, the duty of promise-keeping is justified by the expectational theorist along the following lines: when John promises Mary that he will do X, he is morally required to do X because, by promising, John leads Mary to expect rationally that he will do X for a moral reason, R, according

22. *Id.*

to which John is morally required to do X because he should not frustrate Mary's rational expectation.

It seems clear that something has gone wrong here; this reasoning is considerably circular. Suppose, again, that John promises Mary that he will do X. The central question we are concerned with is why John is now morally required to do X—that is, why he ought to do X. For an expectational theorist, John ought to do X only if John raised a peculiar kind of expectation in Mary that he would do X. John raises this kind of expectation in Mary only if she has a rational belief that John will do X for a peculiar moral reason, R. Mary has a rational belief that John will do X for such peculiar moral reason, R, only if John has such moral reason, R, to do X. The central question is now, what moral reason can R be? Two possibilities are open. First, moral reason, R, may be internal to the act of promising. In this case, the circularity is patent: moral reason, R, would be that John, by his promising Mary that he will do X, is raising Mary's expectation. However, Mary's expectation would not exist until John made his promise, so at the time of promising, John would have no moral reason, R, to keep his promise. Given this situation, why would Mary form the requisite expectation? The second possibility is that moral reason, R, is external to the act of promising. In this case, the moral obligation to keep a promise depends upon moral reason, R. John must have an independent moral reason, R, to do X in order to raise Mary's expectation that he will do X. The problem here is that Mary's expectation is, at most, subsidiary to John's moral reason, R. Mary's reason to believe that John will do X is not founded on John's promise, but on John's independent moral reason to do X. This is the case of my previous example, where John is morally required to read Mary's paper out of reciprocity or out of a duty of benevolence. This kind of moral reason to read the paper may raise Mary's expectation that he will read the paper, but it differs from promising to read the paper.

There have been some attempts to solve the circularity problem, all of which try to find a moral reason, R, that combines two features. First, R must be independent of the moral reason to keep the promise (which is, according to the expectationalist, to avoid disappointing an expectation) in order to avoid the circularity problem. Second, R must nevertheless be connected with the promising act in such a way that the moral obligation can still be described as keeping a promise, rather than obeying some other kind of moral obligation.

I will now discuss two of these attempts. The first was proposed by Scanlon.<sup>23</sup> He claims that the moral reason that the promisor appeals to is the principle that forbids us to raise false expectations intentionally or negligently. This principle forbids John from raising Mary's expectation that he will read her paper if he does not really intend to read her paper. The complete explanation of John's duty to keep his promise to read Mary's paper would then be the following: John is morally required to read Mary's paper because, when John promises Mary that he will read her paper, he intentionally raises her expectation (or justified belief) by appealing to the principle (moral reason) that he is forbidden to raise her expectation that he will read the paper if he does not have the intention to do so.

The principle Scanlon appeals to is broader than the principle that forbids breaking promises. It claims, let us recall, that we should not intentionally (or negligently) raise an expectation that we will do X if we have no intention to do X. Such a principle (which, following Scanlon, I will call D) involves any kind of expectation-creation.<sup>24</sup> For example, according to D, John should not raise Mary's expectation that he will read her paper by telling her that it is in his best interest to read the paper if he does not have the real intention to read the paper. John would violate D even if he made no promise to Mary.

Scanlon's solution fails, in my view, for the following reason. Suppose John tells Mary that he will read the paper because (and only because) it is in his best interest. Her paper will, in fact, be extremely helpful for his next lecture, and he actually intends to read the paper. Therefore, he does not violate principle D. Afterwards, John's lecture is cancelled, and therefore, reading the paper is no longer to his benefit. We might ask if John is morally bound to read her paper. I think not, because he did not commit himself to reading the paper—that is, he did not promise to do so. John merely told Mary that he intended to read her paper for self-regarding reasons. He would only have the moral duty to read the paper if he had committed himself to reading the paper—that is, if he had promised. But if a promise is necessary to raise expectations, then we are facing the same circularity problem we previously observed. Thus, D alone does not raise the expectation in the required sense.<sup>25</sup>

23. *Id.* at 308–09.

24. *See id.* at 300.

25. *See* Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119, 131–36 (2003); Michael Pratt, *Scanlon on Promising*, 14 CAN. J. L. & JURISPRUDENCE 143, 151–53 (2001); Liam Murphy, *Promise and Practice* 18–22 (Oct. 17, 2002) (unpublished manuscript, on file with the Chicago-Kent Law Review), [http://www.law.nyu.edu/clppt/program2002/readings/murphy/Murphy\\_ch1\\_Promise0802.pdf](http://www.law.nyu.edu/clppt/program2002/readings/murphy/Murphy_ch1_Promise0802.pdf).



Kolodny and Wallace have put forward another possibility, which aims to combine the expectational and the institutional approaches. According to them, the moral reason why John has to keep his promise is institutional: he ought to comply with the social institution of promise because of its beneficial effects.<sup>26</sup> At the same time, this moral reason creates an expectation in Mary of the right kind. It is not merely that he lets her know that he has a firm intention to do X, nor that he has self-regarding reasons to do X, but that he lets her know that he has a moral reason to do X, and this, in turn, assures her that he will do X (at least *prima facie*) in the way promises assure.<sup>27</sup> Once John creates this kind of expectation, he has an additional reason to do X: to avoid disappointing Mary's expectation.

However, Kolodny and Wallace's theory has at least two problems. First, it makes the expectational account dependent upon the institutional one, and therefore, it inherits at least some of the weaknesses of the institutional account. For example, Kolodny and Wallace's theory cannot account for the moral binding force of promises in contexts where no entrenched practice of promising and keeping promises exists. Second, and more importantly, the proposed solution exploits an ambiguity in the concept of promise. The argument turns on the idea that, when John promises X, he raises the expectation that he will comply with the social practice of promising. The path of the argument is as follows. The social practice generates John's reason to do X. John's reason, in turn, generates Mary's reason to believe that he will do X. Mary's reason to believe this is tantamount to Mary's expectation that John will do X. Finally, Mary's expectation generates John's obligation to do X. The argument is attractive because John's reason is not fully independent of the act of promising (as in the case of non-moral reasons or independent moral reasons), but, at the same time, it is not the act of promising itself, understood as the act of raising an expectation (which would lead to circular reasoning). John's reason to do X is still his having promised, but in this context, "promising" is understood as making use of the social practice of promising.

Something is not quite right with this approach. Let us return once again to my example of the faculty members, John and Mary, and suppose, first, that reciprocity is John's moral reason, R, to read Mary's paper. We have seen that R may raise Mary's expectation that John will read her paper, but such an expectation is not enough to provide John with an additional moral reason to read Mary's paper. Only promising would provide

26. Kolodny & Wallace, *supra* note 25, at 151.

27. *Id.*

such a moral reason, but then we have the circularity problem. In Kolodny and Wallace's strategy, John's moral reason, R, to read Mary's paper is the act of promising itself, but in an institutional sense. This avoids circularity because such a moral reason is not founded upon John's having raised Mary's expectation. Yet it suffers, albeit in a more subtle way, from the same problem as before.

Promising, in the institutional sense, is a social convention. If I break such a social convention by not keeping my promise, I am blameworthy, but it is important to focus on why this is so. Under the institutional approach, I am blameworthy because by breaking the promise, I frustrate a social convention that benefits everyone. Therefore, everyone is entitled to blame me, and everyone is entitled to hold me to my promise because I am harming everyone in society when I break my promise. Compare now the case of the institutional sense of promising (let us call it "institutional promising") with the case of reciprocity. As we have seen, if John has the moral duty to read Mary's paper out of (and only out of) reciprocity, and he breaks such a moral duty, Mary may complain about John's having failed to reciprocate. But Mary is not entitled to complain because John frustrated the expectations she had formed about his reading the paper. By the same token, if John makes an institutional promise that he will read Mary's paper and fails to do so, Mary would be entitled to complain about John's having breached his institutional duty—*the same complaint that every member of society would be entitled to make*. Mary is no more entitled to complain that John frustrated *her* personal expectations in this case than she is in the reciprocity case. In the reciprocity case, John might respond to Mary's complaint as follows: "Yes, I accept your complaint for my having failed to reciprocate, but I do not accept your complaint about my having disappointed your expectation. I did not promise you that I would read your paper. If you formed an expectation, that is your business." A similar answer would hold in the case of the institutional promise: "I accept your complaint about my having failed to keep my institutional promise (in fact, I would accept anyone's complaint), but I do not accept your complaint about my having disappointed your expectation. An institutional promise consists of committing ourselves to a social convention. If you formed an expectation that I would follow such a convention, that is your business."

I make an important qualification here. One could argue that I am wrong to say that the expectation raised by an independent moral principle (or even by a non-moral reason) does not create any additional moral duty. Perhaps John, in the reciprocity case, should read the paper not only to accomplish his moral duty to reciprocate, but also to avoid disappointing

Mary's expectation. Perhaps John, in the institutional promise case, should read the paper not only to accomplish his moral duty to enforce the social convention of promising, but also to avoid disappointing Mary's expectation. This is a controversial matter, as with other kinds of expectation-creation. At any rate, the most that one can argue, in my view, is that there is a duty to compensate when disappointing an expectation causes a loss or a harm. For Scanlon, however, the duty to keep promises goes beyond this duty to compensate and also exists in cases where breaking the promise produces no harm.<sup>28</sup>

My conclusion, after analyzing these two attempts to overcome the circularity problem, is that the problem has no solution within the framework of the expectational account. This is because the problem is general; any attempt to offer an independent reason to keep the promise will make the expectation superfluous and transform the promise-making into something else.

Abandoning the expectational account altogether is not without costs. Having assumed the two initial points, which lead to the rejection of the institutional account, the expectational account seems well-suited to explain how we can impose a duty on ourselves to do something in favor of some other person. The expectational account focuses on what the promising act produces in the promisee, which enables us to explain, among other things, why it is not possible for John to promise Mary that he will read her paper without letting her know that he is promising to do so. A plausible account of promising should therefore rescue this aspect of the expectational account. However, it must, at the same time, base the reason to keep promises on some element other than the expectations of the promisee.

## II. THE RIGHTS-BASED APPROACH: THE CORE IDEA

I will now present an alternative approach to promising. This approach aims to avoid the problems of the expectational approach (mainly the circularity problem), but at the same time it includes the two features of the expectational theory that represent an advance over the institutional approach. First, it explains why promise-breaking is a personal wrong done to the promisee, and second, it allows us to conceive the wrong of promise-breaking outside of social conventions.

28. See SCANLON, *supra* note 4, at 301–02. Another expectationalist, Neil MacCormick, has a different view. He claims that the duty to keep promises is based on the promisor inducing the promisee to rely upon his future performance. Neil MacCormick, *Voluntary Obligations and Normative Powers: Part I*, 46 ARISTOTELIAN SOC'Y, SUPP. VOL. 59, 64 (1972).

My account will be rights-based. Its core idea is that a plausible view of promises should appeal to and presuppose some view about individual rights.

In order to determine how rights enter the picture and what their role is, we must distinguish three different but interrelated questions:

- (1) What are we doing when we promise to do X?
- (2) Why does the act of promising to do X make doing X (*prima facie*) morally required?
- (3) Why do we have the power to make promises, thereby transforming a non-required act into a required one?

To clarify the meaning of these questions, it is useful to see how the institutional and the expectational approaches respond. The institutional approach would answer these questions as follows: (1) when we promise to do X, we are appealing to or making use of a social convention or institution; (2) we have the moral duty to keep our promise because complying with such an institution is socially beneficial (or, alternatively, because not doing so undermines a beneficial institution); and (3) we have the power to make promises because a society that confers that power is better off than one in which people do not have such a power.<sup>29</sup> The expectational approach would answer the same questions in the following way: (1) when we promise to do X, we essentially raise the promisee's expectation that we will do X; (2) we must keep our promise because we have the obligation not to disappoint the promisee's expectation; and (3) the answer to the third question is not clear, but, at least in Scanlon's version, it might be that we have the moral power to make promises to other people in order to satisfy those people's reasonable desire to be given assurance about what we intend to do.<sup>30</sup>

#### A. *Promising as Surrendering a Right*

I now turn to my first question from a rights-based point of view: what are we doing when we promise to do something?

My approach begins by developing some ideas that H. L. A. Hart suggests in his influential work, "Are There Any Natural Rights?"<sup>31</sup> In Hart's account of rights, having a right consists mainly of "having a moral justification for limiting the freedom of another person and for determining how

29. See RAWLS, *supra* note 3, at 346–47.

30. SCANLON, *supra* note 4, at 303.

31. H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77 (Jeremy Waldron ed., 1984).

he should act.”<sup>32</sup> His theory is a choice theory of rights because the right-bearer has control over the spectrum of choices available to those who bear the correlative duty.<sup>33</sup> According to this view of rights, John’s having a right to bodily integrity, for example, means that he is morally justified in limiting the liberty of others in their actions that affect John’s bodily integrity. John has normative control over those choices made by others that affect his bodily integrity.

Hart famously distinguishes between general and special rights.<sup>34</sup> Among special rights are those that arise from promises. Hart says in this respect:

To some philosophers the notion that moral phenomena—rights and duties or obligations—can be brought into existence by the voluntary action of individuals has appeared utterly mysterious; but this I think has been so because they have not clearly seen how special the moral notions of a right and an obligation are, nor how peculiarly they are connected with the distribution of freedom of choice.<sup>35</sup>

He does not add much more to this rather obscure remark. As a different kind of special right, Hart mentions those arising from transactions or acts of consent:

If I consent to your taking precautions for my health and happiness or authorize you to look after my interests, then you have a right which others have not, and I cannot complain of your interference if it is within the sphere of your authority. This is what is meant by a person surrendering his rights to another . . . .<sup>36</sup>

The important point of this example is that, under normal circumstances, if we have a right, we are able to surrender that right by an act of consent.<sup>37</sup>

Following these suggestions, we can make a first, and provisional, step toward a plausible answer to my first question. Suppose John has the right not to read the papers of faculty members. When John promises Mary that he will read her paper, what he is doing is surrendering his right *not* to read a colleague’s paper in Mary’s favor.<sup>38</sup>

This account seems attractive for the following reasons. First, it enables us to say that the promisor’s obligation does not arise “from nothing.”

32. *Id.* at 83.

33. *Id.*

34. *Id.* at 84–88.

35. *Id.* at 84.

36. *Id.* at 85.

37. *Id.* at 85. Inalienable rights are rather exceptional and require special justification.

38. The idea of promising as surrendering (or transferring) a right can be traced to THOMAS HOBBES, *LEVIATHAN* 92–94 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651). See also HILLEL STEINER, *AN ESSAY ON RIGHTS* 76–78 (1994).

It arises from a strongly normative background—namely, his previous right not to perform the promised action (or omission), and our general right to surrender our rights. Second, it explains why Mary can release John from reading the paper. Since John has renounced his right not to read the paper in Mary's favor, Mary has a right that John read her paper, and, because her right is not inalienable either, she can also surrender this right in John's favor. Considering promises as voluntary acts of surrendering a right in favor of another person would advance our understanding of promises because the ideas of having a right and of giving up a right are more intelligible and less perplexing than the idea of bringing into existence rights and duties by a voluntary act, *ex nihilo*.

As appealing as the idea of promising as “surrendering a right in favor of” is, we must analyze it more carefully. Rights can take several different forms and express different moral (or legal) relationships. The crucial distinction here is the Hohfeldian distinction between claim-right and liberty-right, and their correlatives, duty and no-right.<sup>39</sup> If promising to do X were the act of surrendering a claim-right not to do X, then the promisee would not acquire a claim-right, correlative to a promisor's duty to do X. The promisee would only acquire a liberty to force the promisor to do X, correlative to a promisor's lack of a claim-right preventing the promisee from forcing him to do X. In clearer terms, if we interpret John's promising Mary that he will do X as John's surrendering his claim-right not to do X, the outcome, after the promise, is the following: (i) Mary has a liberty to force John to do X; and (ii) John has a correlative no-right, which means that he does not have the claim-right to Mary's abstaining from forcing him to do X.<sup>40</sup>

But surely this is not what happens when John promises Mary that he will do X. When he does so, Mary acquires a claim-right to John's doing X, and John acquires a correlative duty to do X, or at least they acquire something similar to a claim-right and a correlative duty.

To obtain this, we should say that John surrenders his *liberty*-right not to do X. Since the opposite of a liberty-right is a duty, and the correlative of a duty is a claim-right, we can safely say that John has acquired a duty to do X and Mary has acquired a claim-right to John's doing X. The problem with this interpretation is that it does not seem to make much progress in

39. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, at 30, 32, 36 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, at 710 (1917). According to Hohfeld, X has a claim-right against B that B do X if and only if B is under the correlative duty to do X. On the other hand, A has a liberty-right to do X if his doing X is not prohibited.

40. Eric Mack, *Hart on Natural and Contractual Rights*, 29 PHIL. STUD. 283, 284 (1976).

elucidating the statement at issue—namely, that promising X is just bringing into existence the promisor's duty to do X and the promisee's right to X. Surrendering a liberty-right is tantamount to assuming a duty.

Nevertheless, it might still imply some progress. It is true that surrendering a liberty-right is equivalent to assuming a duty, in the sense that we always surrender a liberty-right when we assume a duty, and vice versa. However, this does not imply that surrendering a liberty-right and assuming a duty are the same thing. We normally accept that we can limit our rights and liberties. We may think that liberties, in particular, are things that we have and that we can renounce whenever we want. Therefore, if we consider that promising does not mean imposing a duty upon ourselves "from nothing," but instead means voluntarily surrendering one of our liberty-rights, this consideration might still illuminate our understanding of the act of promising. The core of such progress is the idea that we may surrender our rights in general, and our liberty-rights in particular. This idea is intuitively less controversial and perplexing than the idea of self-imposing a duty from nothing.

#### *B. The Duty to Keep Our Promises*

Once we have conceptualized the act of promising as an act of surrendering a liberty-right, we can turn to the second question, why do we have to keep our promises? The answer follows directly from the previous point. If it is true that we have liberty-rights and that promising consists of surrendering a liberty-right in someone's favor, then it must also be true that we have a duty to perform the promised act. As we have seen, surrendering a liberty-right is equivalent to assuming a duty and conferring a correlative claim-right. The crucial question remains: how is it that we have the power to surrender liberty-rights? This is my third question and I will discuss it below.

Still, it is worth stressing that this view of the promise-keeping duty explains some important points. First, it explains why we are wronging the promisee, and not society as a whole, when we fail to keep a promise. It is because we violate a right of the promisee when we fail to keep a promise. Second, this account explains our intuition that no social institution or convention of promise-keeping is necessary to ground the duty to keep our promises.

### C. *The Power to Make Promises*

The rights-based approach shifts the burden of the argument heavily onto the third question: why do we have the power to surrender our liberty-rights? The whole account would collapse if it could not justify such moral power. The suggestion I will defend is that having such power is necessary for the exercise of rights in the broad sense. Assuming that each individual has a set of rights (such as claim-rights and liberty-rights), and that such an allocation of rights entails the power to exercise those rights, then it would be self-defeating to negate or remove the liberty (or power) to give up at least an important number of liberty-rights. The following remarks should bolster this thesis.

Consider, first, the case of transferring property rights. As we have seen, when I surrender a liberty-right in someone's favor, I am, at the same time, imposing a duty on myself. This situation is not identical to, but has some important links with, the idea of transferring a property right. Imagine that John gives Mary a book as a present. When John does so, he also self-imposes certain duties which are correlative to the new property right held by Mary. Property rights are, as is widely accepted, a bundle of claim-rights and liberty-rights.<sup>41</sup> Though promises are not transfers of property rights, they share something important with such transfers. If Mary acquires a claim-right over the book, it is only because John has surrendered an important number of liberty-rights concerning the book, not because he has surrendered a claim-right over the book. For example, he has given up his liberty-right to read the book without Mary's permission. We do not see anything perplexing in a property right transfer. Therefore, we should not see anything perplexing in *one essential element* of such transfer, namely, the surrendering of a number of liberty-rights associated with such property right (like the liberty to read the book without permission).

Even so, there is certainly an important difference between transferring a property right and promising, understood as surrendering a liberty-right. The set of liberty-rights we surrender when we transfer a property right includes only actions, not omissions. Therefore, the duties we acquire when we transfer a piece of property are only negative duties, duties not to perform certain actions. For example, we acquire the duty not to read the book without permission. In the case of promising, we may promise to *do* something. In fact, this is often the case (although we may also promise not

41. See, e.g., THOMSON, *supra* note 4, at 56–58; A. M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107, 113 (A. G. Guest ed., 1961) (defining ownership as a combination of rights and limitations).



to do something). Therefore, the duty we endorse when promising is often a positive duty—the duty to perform an action, such as the duty to read Mary’s paper. However, this difference should not create any additional perplexity in the case of promising *vis-à-vis* the case of transferring property rights because it is clear that we have both positive and negative liberty-rights, and there is no reason to believe that we can surrender positive liberties but not negative ones. On the other hand, the case of promising not to do something (“I promise not to tell anybody about your embarrassing situation.”) is not taken to need less of an explanation than the case of promising to do something (“I promise to tell somebody who can help you with your situation.”).

My second remark refers not to transferring a property right but rather to exercising a property right. In the case of transferring a property right, we saw that transferring involves giving up a liberty-right or a set of liberty-rights. But this is also the case when we exercise a property right. Suppose Mary goes to John’s house and he invites her inside. This is a simple example of a type of case that, as we have seen, Hart distinguishes from promising: “consenting or authorizing another to interfere in matters which but for [the promisor’s] consent or authorization [the promisor] would be free to determine for himself.”<sup>42</sup> In my example, John is authorizing Mary to enter his house for a while. It is presupposed that John has a property right over his house. But this right typically includes a liberty-right to expel any person who has entered his house without his consent. When John gives Mary his consent, he is, among other things, surrendering his liberty-right to expel her from his house; he has the duty to let her stay in his house, at least for a while.

Both in this case and in the case of promising (as well as in the case of transferring a property right), we might ask why we have the power to limit our freedom in someone’s favor, why we have the (second order) liberty to limit our liberty-rights, why we have the liberty to impose duties upon ourselves. The answer should be the same, in my view: being able to limit our liberties is a necessary condition of exercising our rights, whatever they are. Suppose John has a property right in his house. Would it make sense to claim that John has such a right, but is not entitled to let Mary enter his house? Obviously not. Part of what it means that John has a right over his house is that he can do whatever he wants with his house, so long as he does not trespass on the rights of others. Now, would it make sense to say that he can let Mary enter his house, but he is not allowed to surrender his

42. Hart, *supra* note 31, at 85.

liberty to throw her out? He should then tell her something like, “Come in, but be aware that I am always morally free to kick you out. I am even morally free to prevent you from entering.” That would be absurd.<sup>43</sup>

It is important to stress that exercising a right is not the same as extracting a benefit from such an exercise. When I say that John’s exercise of his property right over the house must include his power to invite Mary in, thereby surrendering his liberty-right to throw Mary out of his house, I am not focusing on the benefit that such an invitation may produce for him. I am simply claiming that it would be silly to have property rights without being empowered to surrender some of the liberty-rights involved.<sup>44</sup>

Let us return to the case of promising, and to John’s promising Mary that he will read her paper. The rights-based account I have developed interprets such a promise as John’s surrendering his liberty-right not to read Mary’s paper. We may then ask how it is possible that John has the power to turn an action that he was morally allowed not to perform into one that he is morally required to perform. My answer is substantially the same as in the case of transferring and exercising property rights. John has a set of rights concerning his future time, and it is only with these rights in the background that it makes sense to say that John is required to read Mary’s paper.<sup>45</sup> John’s power to fully exercise his rights over his future time includes the power to surrender his liberty-right not to read the paper in Mary’s favor.

The set of John’s rights concerning his near future is complex. It conveys several claim-rights and liberty-rights about what he is entitled to do with his time, powers, body, property of external things, and so forth, in the near future, as well as about what other people are required to do or to avoid. The analogy of John’s property right over his house holds here. We have asked, how is it possible for John to exercise his right over a house without having the power to commit himself not to expel Mary? By the same token, we can ask here, how is it possible for John to exercise his

43. In our everyday language, there are many inaccuracies and ambiguities. That is why, in some contexts, John’s throwing Mary out after he had invited her to enter might seem merely a sign of rudeness, but not a violation of a right to stay held by Mary. Sometimes, phrases like “come in” are not promises or are implicitly more complex promises (such as, “I promise to let you stay in my house insofar as you do not dislike me”). In order to understand my point we should imagine a case where John really promises to let Mary stay during a time in his house. During such time, he has the duty to let her stay and she has the correlative right to stay.

44. In his seminal work on ownership, Honoré calls such a liberty-right the “right to manage.” Honoré, *supra* note 41, at 116–17.

45. It is controversial whether those rights should (or can) be spelled out as property rights. I am neutral on this point. I am equally neutral about the scope and nature of those rights. For a different view on this point, see Peter Vallentyne’s contribution to this Symposium, *Natural Rights and Two Conceptions of Promising*, 81 CHI.-KENT L. REV. 9, 13–14 (2006).

rights concerning his near future without having the power to commit himself to some actions, such as reading Mary's paper? Drawing on the analogy, we could say metaphorically that if John owns his life for the following weeks, then he must be entitled to "invite" Mary to "enter" his life during that time.

An extreme scenario can more clearly illustrate that the power to give up our liberty-rights is a necessary condition of exercising our rights. Imagine that only two individuals exist, A and B. A is the perfect master and B is the perfect slave in that A possesses the maximum of liberty, autonomy, and rights that we can imagine, and B possesses no liberty, autonomy, or rights at all. A has both the liberty-right to do every possible action (or omission) he wants to do and the claim-right to have done (by B) every possible action (or omission) he wants to be done. Correlatively, B only possesses no-rights and duties. Now imagine that, at some point, A promises B that he will not torture B anymore. According to my understanding of promises, he would be surrendering his liberty-right to torture B. B acquires his first claim-right—the claim-right not to be tortured by A. Imagine now that C and D are also master and slave, but C does not have the power to make a promise like A's. He may not surrender any of his liberties. Who enjoys greater real exercise of his own rights, A or C? It seems obvious to me that A enjoys more liberty than C. C is subject to an additional restriction—he is not morally allowed to do something A is allowed to do. Therefore, A is able to exercise his bundle of rights more perfectly than C.

Some authors, like Charles Fried, link the duty of promise-keeping to autonomy, mentioning two possible links.<sup>46</sup> First, by keeping promises I promote my autonomy because I thereby become able to pursue goals that I otherwise could not achieve. Second, by keeping promises I respect the autonomy of the promisee.<sup>47</sup> The first link is institutional in nature; keeping promises furthers my autonomy only if it is part of a social practice in which I can obtain something in exchange for keeping my promise. The second link does not explain why I should keep my promises: I would fail to respect the autonomy of the promisee by breaking a promise only if I had a duty to keep that promise in the first instance.

The rights-based account provides a more essential link between promise-keeping and autonomy. Assume that by autonomy we mean the complex bundle of rights (claim-rights, liberty-rights, powers, and immunities) that define the set of actions that an agent is morally allowed to per-

46. FRIED, *supra* note 1, at 8, 16.

47. *Id.*

form or abstain from performing, as well as the set of actions that other agents are morally allowed to perform or abstain from performing with regard to such agent. The power to surrender some of our liberty-rights is essential to meaningfully exercising our autonomy—that is, our rights, in the broad sense. Otherwise, we would be attached to our liberties. We would be their slaves.<sup>48</sup>

### III. THE RIGHTS-BASED APPROACH AND THE (MODEST) ROLE OF EXPECTATIONS

However plausible or helpful the idea of surrendering a liberty-right might be, it still does not provide a complete picture of the act of promising. There are at least three additional elements involved. First, when John promises Mary that he will read her paper, he renounces his liberty-right not to read her paper *in her favor*—that is, conferring upon her, and only her, a claim-right to John's reading the paper.<sup>49</sup> Second, he surrenders his liberty-right not to read her paper *in her ken*—that is, telling her of such a decision.<sup>50</sup> Third, Mary must voluntarily receive and accept the conferred claim-right to John's reading the paper.<sup>51</sup>

The element of acceptance is particularly relevant. The promisee's acceptance of the conferred right is similar to, but should not be confused with, the positive attitude implied in the concept of expectation, as we have

48. My main thesis is related to many deep issues about the power to negate one's own powers. There is, for example, the case of God's self-limiting to produce a being with true free will, or of a parliament passing laws or constitutions limiting the power of future parliaments. I would be ready to claim that God is more perfect if he has the power to produce free agents than otherwise. I owe this point to Allen Habib.

49. See THOMSON, *supra* note 4, at 302.

50. See FRIED, *supra* note 1, at 9–12 (discussing importance of communicating intent in promise-making).

51. THOMSON, *supra* note 4, at 297–98. These three elements are not conceptually linked to the concept of surrendering a liberty-right. We might imagine a situation where someone renounces a liberty-right "*urbi et orbi*," without anybody being present. It would be controversial whether such an act is meaningful. For example, does Robinson Crusoe have the power to surrender his liberty-right to do something—say, to touch some specific tree? Such a self-imposed duty could be conceived either as an oath or a self-promise. I will not discuss this issue, but let me just point out that, according to the rights-based account I have been developing, both interpretations are problematic. His self-imposition of the duty as an oath (as a duty "before nobody") does not make much sense because, when Robinson gives up his liberty-right to touch the tree, he must simultaneously confer upon someone the claim-right to his not touching the tree. But *ex hypothesi*, nobody is there except himself. If we conceptualize his self-imposition of the duty not to touch the tree as a self-promise, the problem is that the holder of the claim-right would be the same person (Robinson) as the bearer of the correlative duty. I will not discuss whether it is possible to be, at the same time, the bearer of a duty and of the correlative right. Even if oaths and/or self-promises were possible, they are not paradigmatic cases of promising. In social interaction, where our rights and duties are interdependent, the typical case of surrendering a right must include the identification of the person (or persons) that will be the beneficiary (or beneficiaries) of such an act, the communication of the act to the beneficiary, and the acceptance of the beneficiary.

defined it above—namely, the belief that the promised action will occur and the positive attitude toward such occurrence. The concept of acceptance implies some kind of positive attitude, but it does not imply a positive desire. It merely implies an act of consent. The difference can be illustrated with the example of a gift. Accepting a gift does not imply having a desire for it. It merely implies consenting to acquire the property right of the gift. It is arguable that such an act of consent conveys an attitude of “non-indifference.” If John promises to read Mary’s paper and she does not (even implicitly) manifest her conformity with his promise, we would be inclined to say that the act of promising has been unsuccessful, though sometimes an act of conformity need not be explicit, such as when the promised act is obviously beneficial to the promisee.

Taking into account the three mentioned elements, we can understand the act of promising as follows. When John promises Mary that he will read her paper, he is telling her something like, “I have the liberty-right not to read your paper (you do not have any claim-right to my reading your paper). I surrender that liberty in your favor. Therefore, if you accept, I will have, from the moment of your acceptance, the duty to read your paper, and you (and only you) are the depositary of the correlative claim-right.”<sup>52</sup> Mary’s awareness of, and conformity with, this communication is constitutive to her having the right.

This rights-based account may capture the appealing aspects of the expectational theory without inheriting its problems. An essential part of what we do when we promise something is raising a legitimate expectation. When John promises to read Mary’s paper, part of what he does is making Mary aware of her claim-right against him. He must create such awareness; otherwise, he is not promising, or at least he is not promising *her*. Once John has created Mary’s legitimate expectation, he is required not to disappoint her. But the reason why he should not disappoint her is not his having raised her expectation. Rather, it is his having surrendered his liberty-right not to read her paper.

Once the claim-right of the promisee is established through the promisor’s act of surrendering and the promisee’s act of acceptance, further rights and duties may arise. For example, the promisee may develop a legitimate expectation that the promisor will perform the promised act. We could then argue that if the promisor breaks the promise, and, as a conse-

52. This is consistent with Raz’s analysis, according to which, when John promises, he is not (only) communicating his intention to do X, but (also) communicating his intention to assume the obligation to do X. See Raz, *supra* note 6, at 218.

quence, the promisee is harmed, she would have additional grounds for complaint against the promisor.

#### IV. TWO OBJECTIONS

A plausible account of promising must accommodate some important features of our ordinary practice of promising. Otherwise, it would fail to obtain an appropriate reflective equilibrium between theory and common sense intuitions. There are at least two cases, which are common in our everyday moral practice of promising, but which seem to be difficult to explain for the rights-based view: the case of promising to perform an already morally required action, and the case of promising to perform a wrongful action.

In our everyday practice of promising, we often promise things we are already morally required to do for independent reasons. The debtor tells the creditor, "I know I failed to repay my debt, but I promise I will pay you tomorrow." The child tells her father, "I promise I will not fail to do my homework again." If these kinds of utterances are legitimate promises, they might represent a problem for the rights-based approach because the debtor who fails to repay has no liberty-right to keep the borrowed money, and the child has no liberty-right not to do her homework. And we cannot surrender something we do not have. Thus, pursuant to the rights view, it looks as though these kinds of promises would always be illegitimate, contrary to our common understanding.

The first thing to say is that, in some cases, we do not find these kinds of promises intuitively legitimate. For example, we would not find it a normal use of promising if someone tells us, "I promise I will not kill you." Therefore, a plausible account of promising should not imply that we always can legitimately promise that which is already required. Rather, the account must be able to accommodate different situations, some in which we can make these kinds of promises and some in which we cannot.

Let me now explain how the rights-based account accomplishes this task. Returning to our example, suppose first that John is required to read Mary's paper out of reciprocity. Mary has often read John's papers, but John has never read one of Mary's. In this situation, would John be allowed to promise that he will read one of her papers? According to the rights-based view, he would not, because we cannot surrender a liberty-right we do not have, and John is not free not to read Mary's paper. I think this is a plausible conclusion. Suppose that John tells Mary, "I know I should read your paper. You have read my papers so many times. I promise this time I will read your paper." In these kinds of cases, I suspect that we recognize

John's statement as something like acknowledging the existence of the duty and declaring the intention to respect such a duty. We do not, upon reflection, interpret his "promise" as a real promise. If Mary understood his promise literally, she would be entitled to answer, "Your promise is superfluous; just do your duty."

However, John could promise *someone else* that he would read Mary's paper. Suppose that John promises one of Mary's friends, Dora, that he will read Mary's paper. John is free not to read Mary's paper with respect to Dora, since she does not have the claim-right to John's reading Mary's paper.

Now suppose instead that John promises Dora that he will not kill Mary. Does this promise make sense, or is it morally outrageous? In my opinion, it depends; it depends upon whether we believe that we all have a claim-right to John's not killing Mary or whether we believe that the only holder of such a right is Mary. Suppose that we endorse this latter view. In such a case, John could promise Dora that he will not kill Mary because Dora would not possess a preexisting claim-right to John's not killing Mary. The difference from the reciprocity case is only a matter of nuance in this case. Reciprocity duties are rather weak and duties not to kill are rather strong. Therefore, if John breaks his promise to Dora by not reading Mary's paper, breaking the promise is an important part of what he is doing wrong. Instead, if John breaks his promise to Dora by killing Mary, his breaking the promise is rather insignificant when compared to the underlying act. Even so, the rights-based account can distinguish two relevant and morally different cases: whereas John's promising Mary that he will not kill her is simply not promising anything, John's promising Dora that he will not kill Mary might be trivial or indecent, but it is not meaningless.<sup>53</sup>

The second difficult case is promising to do something that is wrong or objectionable for independent reasons. Common sense allows for some such promises and confers on them at least some binding force.<sup>54</sup> Yet this might be considered a problem for the rights-based account because if the promised action is wrong, the promisor has no liberty-right to perform the act and thus cannot surrender his liberty-right not to perform it.

53. Note that both the institutional and the expectational approaches have problems with these cases. Both theories should hold that John has an additional moral reason not to kill Mary when he promises that he will not kill her. By keeping such a promise, he is both reinforcing the social institution of promise-keeping and fulfilling Mary's expectation.

54. The possibility of promising to perform wrong actions and of the manipulation of morality that such a possibility opens was carefully explored in Holly M. Smith, *A Paradox of Promising*, 106 PHIL. REV. 153 (1997). See objections to her proposal in Earl Conee, *The Moral Value in Promises*, 109 PHIL. REV. 411 (2000). I do not have a solution to this problem. I think all theories are equally vulnerable to it.

As in the case of promising the obligatory, common sense allows for *some* but not for all of this kind of promise. Suppose John promises Jane, Mary's worst enemy among the faculty, that he will not help Mary by reading her paper. However, John is morally required to read Mary's paper out of reciprocity (Mary has read many of John's papers before, etc.). Is John's promise to Jane binding? To some extent, yes. He is not free not to read Mary's paper; he has the duty to read it. But, as we have seen, reciprocity duties are centered on the person to whom we owe reciprocity. John's duty correlates with Mary's right, not with Jane's. (Moreover, even if it had correlated with Jane's right, she would be entitled to renounce such a right). The upshot of John promising Jane not to help Mary is that John has two incompatible duties (and Mary and Jane have two incompatible rights). This might be awkward, and there might be some strategy to overcoming the incompatibility, but the picture is at least faithful to the actual practice of promising. We are often confronted with situations in which we say things like, "I know I should not go to that academic meeting, which is academically so poor that I would be wasting the university's resources. But, on the other hand, I promised the organizer that I would go."

What happens in the case in which John promises Jane to kill Mary? This is a different case, and the rights-based approach can account for this difference. Mary's right not to be murdered is not only against John, but also against Jane. Therefore, Jane has the duty to release (or not to accept) John's promise. The act of promising does not trigger the promisor's duty to keep the promise in this case.<sup>55</sup>

#### CONCLUSION

Promising is a complex phenomenon, and we will likely not find an account that is capable of explaining all of its multiple aspects. However, I conclude by stressing some of the advantages of a rights-based account of promising. Understanding promising as giving up a liberty-right allows us to avoid the uncomfortable idea that we can create duties and rights from nothing, through an act of language. We must have rights of some sort in order to be able to promise. With this explanation, we can also understand the personal character of the promise-keeping obligation. When we surrender a liberty-right in someone's favor, we transform a preexisting norma-

55. Again, the alternative theories face difficulties with these kinds of cases. Promising to perform a wrong action always gives the promisor a moral reason to perform such an action. If John breaks his promise to kill Mary, he is both undermining the social practice of promise-keeping and disappointing Jane's expectation.



tive relation into a new one.<sup>56</sup> Such a relation is a personal, face-to-face relation. Therefore, the wrongness of breaking promises is also a personal wrong.

One further advantage of the rights-based approach is that it allows us to concede a modest, but necessary, role to the promisee's expectation, understood as a legitimate expectation. Finally, and perhaps more provisionally, the rights-based account can resolve some difficult cases that show the complexity of promising: promising the already required and promising the wrong.

56. It is worth noting that the dependence of promises on rights shifts the question about the conventional or non-conventional nature of promises to the conventional or non-conventional nature of rights. The Humean conventionalist might object to my view that if we are conventionalist with regard to rights (as Hume is), we should be conventionalist regarding promising. *See* Hume, *supra* note 3, at 318–20 (describing concepts of justice as products of social convention). Therefore, endorsing my rights-based view would not skirt the consideration of promising as a social artifact. I think this is wrong. My contention has been that, whatever rights we enjoy, and whatever be the nature of those rights, it is necessary for its meaningful exercise to be able to have the moral power to surrender at least some of those rights. This is so, I insist, whatever the theory is about the nature of rights that we are inclined to endorse. To this extent, the justification of our power to make promises is independent of the conventional or non-conventional nature of rights.