The Unrecognized Dominance of Law in Morality: The Case of Promises

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THE UNRECOGNIZED DOMINANCE OF LAW IN MORALITY:
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Abstract
The commonplace view is that moral thinking has significantly influenced legal theory, but law has had very little theoretical effect on morality. In this article, I attempt to show this is not so. Taking the inverse course in tracing the interrelations between law and morality – investigating morality from the perspective of law rather than examining law from the perspective of morality – I show, through the case of promises, that legal theory has greatly affected dominant strands of moral thought. By bringing to the fore the robust legal elements that guide some of the prevailing moral theories, my aim is to offer a new diagnosis of their problems, showing that the legal mindset is what distorts their moral analysis.

I start by offering a list of law’s special underpinnings. Predicating law as a unique social phenomenon and, as such, as possessing certain features that distinguish it from other normative domains, this list, though not a definition of law as such, presents a sufficiently inclusive account of what it means for a normative theory to be legal or legal-oriented. This profile serves as a tool helping to discern, for the first time, the unrecognized influences of legal thinking on other normative domains, and to reveal whether, and to what extent, some normative accounts rest on and are affected by legal ideas, tools, terminology, and structure. Applying this model to the analysis of promises offered by such thinkers as Charles Fried, John Rawls, and T. M. Scanlon, I show how their legal mindset shapes their moral accounts of promises. My conclusions indicate that the unaccounted for influence of legal ideas on morality in general, and on the morality of promises in particular, leads to an unsatisfactory conception of both.

Introduction
In his piece on promises in morality and law, Joseph Raz notes that, until now, philosophical analysis has done more to elucidate important legal concepts and

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distinctions than the other way around, and that “philosophy has not yet found much inspiration in the law.”

What follows here is an attempt to illustrate that this is not so. Taking the inverse route to the one adopted by the standard method of legal philosophy—investigating morality from the perspective of law rather than examining law from the perspective of morality—I argue that law did have, and still has, a significant impact on dominant theories of modern moral philosophy. I further argue that this dominance, thus far unrecognized, has tacitly led prominent strands of moral philosophy to think about morality in legal terms, and that this significant though unaccounted for influence has led some of moral analysis astray.

My attempt here is to offer a new diagnosis of what is wrong with some of the most dominant modern moral theories. By bringing to the fore the robust legal elements that guide these strands of moral analysis, I show that it is the legal mind-set that distorts the moral analysis and concepts of these moral theories.

The impact that law has had on moral theory is most apparent in the writings of ethical contractualists, which are at the focus of my discussion below. By ethical contractualism I refer to the moral strands that think about morality as the right set of cooperative rules for the general regulation of behavior, with which we all have reason to agree. These moral schools, I argue, confuse between the moral and the legal projects, as they unduly think about “how should one live” by searching for a right set of regulative, coordinating rules. The result is that moral issues are dealt with within what is essentially a legal conceptual structure. Similarly, the social issues of the regulation of behavior and conflict resolution that law is designed to deal with become, unjustifiably, the aim of morality as well. In a like manner, the questions to be answered in morality and the analytical tools to answer them with are also imported from law. My claim, then, is that an entire normative system, with its special undertakings, values, reasoning, and terminology is, in effect, imposed on a distinctly normative domain without due reflection or sufficient reasons.

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2 Id.
Promises serve as an excellent example to demonstrate and critically evaluate the significant legal influences of law on morality, and especially on writers from the contractualist school described above. By investigating the way that ethical contractualists think about promises, I show that: (a) ethical contractualism is (inappropriately) laden with legal tenets, and (b) as a result of these legal influences, the view of promises in ethical contractualism is unconvincing.

Specifically, my discussion shows that many of the moral philosophers who analyze the duty to keep a promise do so within the (inadequate) contractual-legal context. By focusing on the bargain aspects of promises, by alluding to the Kantian-inspired principles of the “will binding itself,” or by thinking of promises as stemming from the more general principle of fairness, many writers ignore the relational aspects of promises, which I believe are at the core idea of promising. Placing promises in a contractual context is paradigmatically wrong, since the contractual-legal framework is not suited to deal with the complexity of real-life promises. Thinking that promises, like contracts, have the overarching aim of regulating commercial and social life through agreements allows for only a limited conception of promises and of their interpersonal role.

I start with a brief analysis of the central characteristics of law as a social phenomenon of distinct bearings and derive from it the legal “way of thinking,” that has influenced contractualism in ethics (Sec. 1). I then proceed to discuss promises by introducing a relational account of promises that draws mainly on Joseph Raz’s theory of promises, which I hold to be the best available account of promises (Sec. 2). This is followed by an examination of several legal-oriented accounts of promises, beginning with Charles Fried's view. Fried proposes that promises are the moral basis for contract law. I argue that Fried’s analysis is a law-centered moral analysis par excellence, and it is therefore a good example through which to demonstrate the

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5 See C. Fried, supra note 4.

I. The Distinctive Features of Law

My argument here presupposes that law is a unique social phenomenon and that, as such, it possesses certain features that distinguish it from other normative domains such as religion, social conventions, or, most significantly for my current purpose, morality. Thus, when I say that the orientation of contractualist morality is highly legal, my argument presumes that there is in fact something we can call “law,” and that this distinct type of normative field is in effect distinguishable from others.

What marks the legal normative field as a distinct domain, unlike others such as religion or morality? Much has been written in an attempt to understand what the law is and to characterize its nature, its social role, its terminology, reasoning, and structure. The significance of this topic and the breadth of issues it involves have generated a vast body of literature that approaches law from a variety of perspectives.7

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My purpose here is to try and recast some of the insights of this extensive literature into a workable model of law that would transcend the various disputes about law and, at the same time, offer a sufficiently inclusive account of law’s distinct underpinnings. At a second stage, this account of the features of law is meant to serve as a tool for diagnosing the unrecognized legal influences of legal thinking on other normative domains. What I offer here, then, is a list of four characteristics of law that will serve as a kind of a litmus test to examine whether, and to what extent, a normative account is grounded in, and influenced by, legal ideas. A normative theory that bears most of the characteristics of law will be considered “law-centered.” Note that normative theories could be regarded as law-centered even if they do not possess all the listed elements of ‘law.’ Likewise, a theory would not necessarily be considered law-centered even if a small number of its characteristics are, to a certain degree, in line with the characteristics of ‘law.’ This list of central features, however, does not purport to be a definition of ‘law,’ or an exhaustive list of the ingredients required by every legal system as such. Although my purpose in offering these central characteristics of law is to describe the broadest possible picture and capture as many manifestations and expressions as possible of law as a social phenomenon, some types of legal systems might not fit this description. Nonetheless, the list does offer a sufficiently inclusive model that tells us a great deal about what it means to think about different issues from a legal perspective.

(New Haven: Yale University Press: 1965); R. Dworkin, Law's Empire (Harvard University Press) 1986; J. Raz, The Authority of Law: Essays in Law and Morality (Oxford University Press, 1979); For the debate on formalism v. realism in law, see M. Horwitz, The Transformation of American Law, 1870-1960; M. White, Social Thought in America: The Revolt Against Formalism (Boston, Beacon Press, 1957); J. Frank, Law and the Modern Mind (1949) in Lloyd's Introduction to Jurisprudence, p. 679 (6th ed. By M.D.A. Freeman 1994); O. W. Holmes, “The Path of the Law” 10 Harvard Law Review 457 (1897); Karl Llewellyn, Some Realism about Realism: Responding to Dean Pound, 44 Harvard Law Rev. 1222 (1930-1931). For a critical theory of law on law’s social role and questions of dominance and hegemony in society via law, see: D. Kennedy, A Critique of Adjudication: Fin de siècle (Harvard University Press 1977); R. Unger, The Critical Legal Studies Movement (Harvard University Press, 1983); M. Kelman, A Guide to Critical Legal Studies (1987); R. West, Narrative, Authority and Law (1993); C. Mackinnon, Toward a Feminist Theory of the State (1989); see also D. Kayris (ed.), The Politics of Law: A Progressive Critique (2nd edn, 1998); for an economic analysis of law, see R.A. Posner, Economic Analysis of Law (5th ed., New York: Aspen), (2003); for a discussion on the normativity of law see S. Perry. My discussion here is not meant to take a stand on the different debates in legal philosophy. Rather, in an important sense, my discussion here precedes such questions. Thus, by arguing that law is a system of rules for the general regulation of behavior, I do not address the question of whether such rules are necessarily open-ended, or whether it is possible for legal rules to give us one right answer. Similarly, the question of whether these rules have to meet some “higher” standard to be considered law is secondary to my discussion. The discussion here is meant to present the elements of law in their most immediate sense, with the purpose of offering an inclusive model of law that will serve to assess other normative domains.
Following, then, is a list of four features typical of legal systems and of legal thinking, which I then apply to show how the contractualist accounts of promises offered by Fried, Rawls, and Scanlon can be described as “law-centered.” This analysis serves to demonstrate my wider claim that applying a law-centered structure to moral concepts yields an unsatisfactory and narrow analysis of these moral ideas.

(I) **Law is a device for regulating behavior**
The first distinctive feature states that law is primarily designed as a social device for the general *regulation of behavior* and the resolution of conflicts: the primary aim of law is to achieve social order and stability by making and imposing rules of conduct. Prima facie, however, this feature is not exclusive to law. Every normative system, by its very nature, regulates behavior. Why, then, is the regulation of behavior a distinctive characteristic of law? The difference between law and other normative realms is that law is intentionally contrived as a mechanism for social control and is avowedly designed to achieve certain social goals. Unlike morality or religion, for instance, which can be thought of as simply “out there,” law is a purposive enterprise. Its very significance stems from its nature as a deliberate human construction. Law is a set of rules, aimed at regulating behavior and resolving conflicts, exercised and backed by the organized public. Law is the intentional subjecting of human conduct to the governance of rules. Whereas morality or religion could be thought of as ‘ends in themselves,’ as it were, law is primarily an instrument, a regulative device.

An important consequence of this aim is that law aspires to *clarity, quantifiability, and precision of legal rules*, pointing to another important difference with morality or religion. Since the primary aim of law is to regulate behavior by way of subjecting human conduct to general rules, these rules ought to be defined with the greatest possible accuracy. Similarly, the fact that law is coercively enforced requires clear-cut rules. Ideally, then, legal rules and principles need to be fixed and determinate. In theory, law must be unambiguous even when reality is undefined, although some standards in the law obviously do allow some room for vagueness. Ideally, however, law aspires to be as unequivocal as possible: if law could anticipate

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8 This is an explicit demand of Fuller for what he terms “the inner morality of law,” but its logic is the leit-motif that runs throughout his account of what law should be like. See L. Fuller, *The Morality of Law*, (Yale University Press: 1965).
every possible scenario and could define in advance its do’s and don’ts, there would probably be no need for as many standards.\(^9\)

Law, then, deals with what it is best suited to deal with: the measurable and quantifiable elements of a much richer reality. It formalizes, categorizes and proceduralizes the complexity of life. In this sense, law is reminiscent of sports: not only must the rules of the game be clear, but points are granted and penalties imposed only for actions we can define. Take basketball, for example: a basket is worth two points whether the shooter earned them by performing a series of highly athletic moves or clumsily managed to put the ball in the basket. The rules of the game are plain: if the ball went into the ring, the shooter’s team earns points. Aesthetics is not measurable, and is therefore not reflected on the scoreboard. Although athletic ability and virtuosity are essential to the enjoyment of sports, they are much more difficult to quantify and the rules of the game do not count them in. Athletic performance will therefore earn the applause of the crowd, but not actual points.\(^10\) I show below that, when we think about morality in legal terms, the law’s search for precision and measurability tends to shift attention to elements that law is programmed to recognize. As a result, the focus of a legal-oriented morality also tends to shift to elements that can easily be determined and identified. In the case of promises, for instance, a legal-oriented analysis will lead us to focus on the elements of promising easier to determine and quantify, such as the compensation of loss (if a promise was broken and the promisee suffered loss). Other elements of promising involves that are looser or more vague, such as the communication of a promise as a symbol of being a good friend, will usually be considered secondary or will be left beyond the realm of ‘hard-core’ morality of promises.\(^11\) As in sports, where excellence, virtuosity, and elegance...
are essential to why people engage in sports in the first place (even if winning or losing is determined by a rigid set of rules), so in the good life, where what cannot be formulated in a set of rules is often what makes life worth living.

Whereas law aims to regulate and therefore typically requires clarity and measurability, morality is not necessarily concerned with these. Unlike law, moral principles can afford to be less precise, allowing for more ‘shadows’ and less black and white. Choosing to think of morality in legal terms, then, is in fact a choice to ignore an entire range of human possibilities.

(2) Law operates within an adversarial, polarized framework of human interaction

The second significant feature of law is its attempt to address what Schneewind calls the “Grotian problem”—the tension between the self-interested individual and the need to live in a society. Its starting point is the conception that free, rational, and equal persons will inevitably develop different conceptions of the good and pursue this good while making conflicting claims on scarce resources. Law is especially suited to work in these adversarial, polarized patterns of interpersonal interaction. Law postulates, and follows from, the Grotian presumption of conflict as the starting point of social life, and serves as a normative device to mitigate this most basic form of human interaction—a potential struggle of interests. Conflicting private interests are therefore the basic condition of legal relations. Derivatively, issues of personal autonomy and freedom, as well as the legitimacy of demands, are central to law: law places great importance on questions of personal freedom because it is required to justify its use of coercive power, which deprives individuals of certain aspects of their freedom.

While it may be clear that law is committed to thinking in these polarized patterns, the case for morality is very different. Moral thinking need not be confined to an adversarial world view. A non-legal moral account need not stem from a rivaling

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Feminist theory and communitarian philosophy have challenged in a related manner, albeit mainly in political philosophy, the “individualistic self” that stands at the heart of political liberal theory and Neo-Kantian morality. Arguing against the atomistic conception of persons as autonomous, rational choosers, interacting with similarly situated persons, feminist and communitarian theories exposed the inability of Western liberal thought to account for other types of relations or for situations of interdependence and connectedness. While not attacking contractualist ethical theory in particular or diagnosing the problems of Western liberal morality as stemming from a legal mind-set, the challenge
conception of persons and could instead be grounded in an other-oriented framework and built in terms of our ongoing relations with others.¹⁴

The same is true of the emphasis on personal autonomy and the centrality of the legitimacy of demands.¹⁵ Legal obligations, due to their being coerced and enforced by the organized public, are rightly defined by the space they allow for personal liberty.¹⁶ Morality, perhaps like religion in this sense, need not center on the legitimacy of its demands.¹⁷ Similarly, moral obligations are not necessarily constructed around the idea of personal liberty. Consider the moral requirements for being a good friend, a devoted parent, a responsible and trustworthy partner: none of them is primarily, and surely not necessarily, thought of in terms of the legitimacy of the demands it imposes.¹⁸

(3) Law operates within "triangular" relations of intermediated reciprocity:

¹⁴ Mcintire.
¹⁵ The question of the legitimacy of law and the relations between legitimacy and authority has, for centuries, been central to discussions of law. See Kant.
¹⁶ From a Kantian perspective, legal obligations even enhance personal freedom: the stability, certainty and security provided by a network of legal obligations (that all members of the community are obliged to comply with, as noted), may limit the range of permissible conduct in specific issues but, on the whole, allow members of the community to rely on a well-ordered social structure. By complying with their duties, all members of the community are more free than before. In the next section, I discuss a similar line of argument by Fried in regard to promises. See C. Fried, Contract as Promise, (Harvard University Press) 1981.
¹⁷ On whether over-demandingness in morality is indeed that or should be explained in terms of fairness, see L. Murphy, Moral Demands in Non-Ideal Theory (Oxford University Press, 2000); Bernard Williams argues that thinking about these concepts in terms of demands is counter-moral. See B. Williams, Ethics and the Limits of Philosophy (Cambridge MA: Harvard University Press, 1985);
term ‘reciprocity’ in a broader sense, to include the similar behavior of two or more people vis-à-vis a shared institution. Thus, intermediated reciprocity does not merely refer to the type of relations between two parties to a bargain struck for their mutual advantage, but to a situation wherein, for instance, two or more individuals pay the same percentage of their salary as income tax.

An aspect of these relations of intermediated reciprocity in this broader sense is the equal standing of all individuals in a legal community vis-à-vis communal institutions. This aspect is strongly connected to the idea of the ‘rule of law,’ which requires relations between members of the community vis-à-vis the law to be, as it were, symmetrical. This symmetrical reference is produced by the law: all are equal under the law. Instead of what we might call “horizontal symmetry,” typical of ordinary mutual relations of give-and-take, the law, (or, for that matter, the modern state or the social contract) constitute a kind of “vertical reciprocity,” which could be depicted as an isosceles triangle at whose apex is the law (state or contract), and at each of whose base-angles are the community’s individual members. The triangle’s isometric sides illustrate the equality between all members of the community, but also the intermediated nature of the relationships between them.

A juridical perspective views them, first and foremost, as subjects of the law. As such, their mutual relations are always indirect and always presuppose the presence of a “third party” – the law.

These triangular relations of intermediated reciprocity touch upon the very structure of law and play a significant role in its ability to be conceived of as legitimate. From a legal perspective, the strong sense is that social regulation is best attained by setting a network of legal duties, whose fulfillment by one individual depends on their reciprocal fulfillment by another. Such is the case, for example, with regard to the duty to vote or to pay taxes. The social relations that the law envisages between members of the legal community qua subjects of the law are therefore reciprocal by definition, in this “triangular” and intermediated sense.

(4) Law is a network of relationships of exchange

19 “[T]he duty to vote is not absolute, but depends upon fulfillment of certain expectation concerning the actions of others.” L. Fuller, The Morality of Law, (Yale University Press: 1965), p. 20
The last characteristic of law that I consider here highlights law as a cooperative scheme for mutual advantage: every person agrees to pitch in on condition that others do the same. In this sense, legal demands are the constraints that rational self-interested persons would agree to as a minimum price for gaining the cooperation of other, similarly motivated persons. Consequently, the relationships between people *qua* legal agents are relationships of *parties to a cooperative scheme, participating for mutual advantage*. Indeed, in its most elementary sense, law is a rational system of costs and benefits, rewards and sanctions, in which everyone takes part. Both for individuals and for society in general, actions are price-tagged. Legal systems accordingly think of legal agents as primarily autonomous rational choosers who are likely to opt for bearing the costs the system imposes upon them in return for its benefits, the obvious ones being peace, the protection of private property, and social and political stability. Most of the benefits, however, depend upon others' cooperation, thus shaping the interaction between legal agents into relationships of collaboration and exchange.\(^{20}\)

This aspect of law—a community of rational choosers who all participate in a cooperative scheme for their mutual benefit—is strongly related to the principle of intermediated reciprocity discussed above, although the focus in each of these elements is slightly different. The element of “triangular reciprocity” focuses on the *structure* of legal relations by describing the intermediated character of the relationships generated by the presence of law as a constant third party, a common reference point for members of the legal community. Law, in a way, is the mutual source of symmetric rights and duties for members of the community. By contrast, the element of exchange focuses less on the structure of the relationships within a legal community and more on their *type*: legal agents are co-participants in a cooperative scheme for mutual advantage (as opposed to mere rivals on one hand or partners on the other). Both elements share the notion that the mutual fulfillment of legal obligations by individual members of the community is essential. As rational choosers making a rational account of costs and benefits and relying on the assurance that others will mutually comply with the demands of law, community members ensure a peaceful and stable social order for themselves. Within this rational analysis of costs v. benefits, however, individual members of the community relate to each other, first

and foremost, as the reciprocal exchangers of legal duties: “The ideal of law is realized at the same time as the ideal of the market. Both present man as the trader, as an autonomous agent setting his relations with his fellows.”

My claim in what follows is that the moral analysis of promises conducted by ethical contractualists is built along these legal tenets. To illustrate this, I will now present several contractualist accounts of promises. By contrasting the relational, non-legal, account of promises offered by Raz with the legal-contractualist accounts of promises by Fried, Rawls and Scanlon, I hope to show first that contractualist accounts are indeed legal. More generally, my intention is to point out that thinking about morality in legal terms does indeed change the way we think about morality and, in the case of promises, distorts one’s view to believe that the standard real-life promise is some kind of (pre) contract.

II. Relationships and Promissory Obligations

An analysis of promises conducted within a relational moral account views the heart of promising and the wrong of breaking a promise in the effect of promises on the relationship within which a promise was offered. A relational account of promises thus emphasizes a reference not only to the content of the promise (the ‘X’ in “I promise to do ‘X’”) but, more significantly, to its interpersonal context. As such, promises transcend the concrete substance of “the promised,” rising to an ethical sphere that both constitutes and reflects the character of the relationship. In this interpersonal context, the values of care, trust and responsibility take center stage.

In this account, a promise is more than just a tool to set up a scheme for the exchange of goods. Instead, it is fundamentally a symbolic communication between people that determines, and is influenced in turn, by the nature of the relationship. In this view, a promise is a form of obligation that a person undertakes voluntarily, one among a wide range of other such obligations we have toward other people. Promises thus play an important role in the forming and development of interpersonal

22 I use the term “voluntary” in a narrow sense: in order to make a valid promise, the promisor has to undertake the obligation out of her own free will, but she may be in a situation where promising is “the right thing to do” in the context of the relationship. Law-centered morality uses a wider sense for voluntariness. As I argue below, the focus of law-centered contractualists on a wider understanding of the voluntariness of the promisor is a legacy from the more general legal discussion of choice and accountability.
relations, and breaking promises could be a sign of “loosening or disintegration” of the relationship.23 The relationship, then, provides the code by which actions and omissions are interpreted, granting them normative weight and significance.24

In its ideal form, a promise is to be carried out through a specific performance. Anything else, even if amounting to full compensation of its monetary worth, falls short of the idea of promising. This is an integral part of what it means to promise, a matter worth stressing in light of other, contractual, accounts of promising (especially the efficient breach strands), which focus more heavily on the exchange element of promises. By breaking a promise, one does not only lead others to rely on one’s statement of intentions in a way that may cause them to suffer loss, but also frustrates their expectations and demonstrates and communicates one’s conception of the nature of the relationship. Indeed, according to the relational account of promises, failing to promise may be considered just as bad as breaking a promise.

Taken as such, the principle of fidelity to a promise recognizes the intrinsic value of promises to interpersonal relations. This value goes beyond the bargain aspects of the contractualist analysis and reflects a different, non-contractual, world view. In this non-legal outlook, the focal point of promises is the interpersonal relations within which the promise had emerged.

The implication is not that promises do not have a wider social role, but that the interpersonal relationships in which promises are made are socially recognizable and valued and the social patterns that these relationships occupy provide them with a normative framework. This account is very different from the regulative, social-planning perspective of law-centered contractualism. In a relational account, promises are not contracts.

Law-centered thinkers generally overlook the relational aspects of promises. Thinking about promises as the moral grounds of the legal contract, ethical contractualists analyze promises as a pre-contract and apply to them a contractual-legal structure. Conflating law and morality, they discuss promises in the context of the overarching aim of regulating social life through agreements. Promises, like contracts and law, are thought of as a mechanism for free and autonomous individuals to enter into cooperative schemes for mutual advantage, binding their own will on

23 See Raz, supra note, at p. 929.
24 J. Raz, supra note, at 929.
condition that others do the same. Derivatively, they see the significance of promises in their enablement of stable agreements. These thinkers, then, naturally view the paradigmatic promise as a bilateral, reciprocal promise between strangers who exchange goods or services, and the possible loss for the promisee in case a promise is broken as the primary interest requiring protection. Applying legal conceptions of responsibility and accountability to the moral notion of promises, these scholars are typically concerned with questions such as the voluntariness of the promisor, the boundary between explicit promises and an “implicit impression” the promisee may have received, and the proper compensation (reliance or expectations losses). In what follows, I demonstrate that thinking about promises and contracts in the same way misdirects the discourse on promises to issues that law is suited to deal with, and since matters of enforcement and remedies are central to law, the analysis of promises is led towards this aim. The result is that legal questions—enforcement, loss and compensation, and so forth, which I consider secondary to real-life promises—largely determine the basics. Such, for example, is the attempt to set a definitive line between promising and a mere statement of intentions. Only if one imagines the natural habitat of promises within the legal world does this distinction carry primary significance: the participants (the promisor, the promisee, and the court of law) need to know whether or not there was a clear promise, and consequently determine the reasonableness of reliance. A non-legal, relational account, while acknowledging that these issues matter, denies that they are central for an analysis of promises. In a relational account, the boundary between a “mere” statement of intentions and a full-scale promise may even be invisible, and hence much less significant. Indeed, the paradigm of real-life promises is that they are gratuitous, made not by strangers but by people in some kind of a relationship. They are not business-like, legal, reciprocal promises between mutually disinterested persons. In the relational model of promises, the statement “I will accompany you to the dentist.” or “I’ll try harder next time,” is deciphered by the codes and the nature of the relationship. When a friend does not show up to go to the dentist or fails to try harder the next time, the important question will not be whether

25 J. Raz, supra note 1 at 931.
26 It bears emphasis that a relational account acknowledges promises made in a commercial context. Like any other promise under the relational account of promises, these promises are to be analyzed, discussed, and interpreted in light of the context in which they were made – and in this case – the commercial context.
she was making a promise or merely stating her intentions, but whether this could mark the disintegration of the friendship.

(1) Fried on Promises
Fried’s account is an excellent example of a law-centered account of the morality of promises where the legal structure of the analysis ends up rendering it wide off the mark. My examination of Fried's view of promises will show that: (a) Fried’s entire analysis of promises is conducted along the legal characteristics I have discussed above; (b) as a result, Fried's conception of promises is unconvincing.

First, a few words on Fried's general conception of morality. According to Fried, morality is grounded in the conception that persons are free rational choosers, pursuing their own conception of the good. Our positive interaction with others is for mutual benefit: “others are part of the external world, and by denying ourselves access to their persons and powers, we drastically shrink the scope of our efficacy. So it was a crucial moral discovery that free men may yet freely serve each other's purposes.”

Our negative interaction with others is mutual restraint: “it is a first principle of liberal political morality that we be secure in what is ours—so that our person and property not be open to exploitation by others. […] morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours.”

What gets morality going, then, is the potential gain we may achieve by mutual exchange, or the risks of a potential clash between self-interested individuals. From this adversarial starting-point, it is only natural that morality, like law, is enlisted by Fried to regulate behavior and to provide the general framework within which individuals can pursue their own interests. This is a very legal way of thinking about morality: the social role of moral rules is to regulate behavior and resolve conflicts; the quintessential truth about relations between persons is that they are potential adversaries and, consequently, morality is a cooperative tool used for the mutual enhancement of self-interest: “not only that you respect me and mine but that you actively serve my purposes.”

27 Fried, supra note 5, at p. 8. Emphasis in the original.
28 Ibid., at p. 7. My emphasis.
29 Ibid., at p. 8.
Fried conducts his analysis of promises along the same principles and, as his discussion unfolds, we learn that all he has in his toolbox for this purpose are legal tools. From the outset, he clarifies in his *Contract as Promise* that “the promise principle … is the moral basis of contract law.” Promises and contracts thus share the same moral structure because, according to Fried, the core of the idea of promise, as of the idea of contract, is to enable people to further their autonomy by opening up new options created by the possibility of cooperation with others in mutually beneficial ways.

Fried’s account of the obligation to keep a promise is a two-staged argument. First, claims Fried, there is a convention of making and keeping promises. The existence of this practice, which provides a way for people to create expectations in others, is socially desirable because promises enhance our autonomy. Since autonomy is the core of Fried’s Kantian morality, its enhancement is valued. Others are obviously just as autonomous as we are, and their autonomy therefore deserves the same respect.

The second stage claims that, by virtue of the Kantian principle of trust and respect for others’ autonomy, invoking the promising-convention in order to make a promise and then breaking it is wrong: “An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance.”

According to Fried, then, promises are a useful tool in our mutual use of one another so as to further our autonomy and expand our future options: (recall that Fried says: “not only that you respect me and mine but that you actively serve my purposes.”). A promise, then, is a simultaneous exchange, in which the parties use one another for their own ends.

This approach, however, rests on an instrumental conception of others derived from Fried’s view that morality, like law, is a regulative system of cooperation for the

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31 Ibid., at p. 17.
32 Ibid., at p. 16. A relational account of promises rejects the argument that the wrong of breaking a promise stems from unfairly invoking a social convention. While Fried’s account of promises indeed makes use of this type of “social practice argument,” it is Rawls who offers the most robust social convention argument. I will therefore postpone the “social practice discussion” to the next section, where I discuss Rawls’ account of promises. With regard to Fried, I focus on the part of his account that relies on autonomy and trust and will argue that, grounded in a law-centered structure, Fried’s moral account of promises is both instrumental and wrong.
33 Ibid., at p. 8.
parties’ mutual advantage. Fried’s argument sets out from a Kantian conception of autonomy—people are ends in themselves—but involves an implicit shift, when he moves to the idea of expanding one’s autonomy. This is a shift away from the notion of valuing others as autonomous selves to one that regards them as co-contributors in a cooperative system for the mutual advantage of its participants (= expanding one’s autonomy). Conceiving others as tools to enhance our autonomy is predicated on an instrumental conception of others, which is not made less so by the fact that both parties mutually benefit from this bargain. 34 This is an objectifying account, whereby others are thought of as a device meant to enhance our own freedom.

My claim is that this instrumentalism comes from law. As I showed in Sec. 1 above, inherent in the idea of law is a basic conception of potentially conflicting human interests that are brought into convergence by relations of reciprocity, structured within a network of relations of exchange. Thinking about promises in the same way highlights the dominance of legal influence in Fried’s morality of promises.

A thought experiment might help to stress this point. It could be argued that, resting on the same moral underpinnings of Fried’s neo-Kantianism, promises are unilaterally created by the promisor, who binds his will into the future. Under this “Fried-like” extreme view, the duty to keep a promise follows solely from the promisor’s intentions, granting ultimate weight to the idea of maximal freedom that stems from self-imposed duties. In this self-centered non-relational view, a promise is formed between the promisor and herself unilaterally, before it is even communicated to the promisee. Such a view would obviously lack the regulative benefits that are a fundamental aspect of Fried’s promises, although this problem could be avoided by drawing a distinction between the forming of the moral obligation entailed by the promise, which is internal, and the social practice of communicating the promise to others, which is activated after the promise is already morally binding. Note that, for Fried, not much is lost in this most glorious manifestation of the “will binding itself.”

This approach is diametrically opposed to a relational account of ethics, which rejects the idea that promises are essentially pre-enforced contracts. A relational view

34 It could be argued that, even for Kant, thinking of others merely as means is objectionable but there is no problem, not even according to Kant, in treating others as a means so long as we also treat them as ends. It could thus be said that my argument merely shows that, for Fried, the practice of promising involves treating others instrumentally, but not only instrumentally. My reply to this is twofold. First, I believe we want more: the very concept of using others, even if not solely as means, is not enough. Second, Fried’s shift from a benign, even if self-based conception of autonomy, to an instrumental view of others, is a tacit and therefore unaccounted move.
of this type would reject Fried’s contractualism, arguing it cannot accommodate the moral significance of commitment to the idea that others matter intrinsically and not merely as co-participants in the same cooperative system, and that we share a responsibility for their well-being. Whereas Fried’s legal starting point leads him to tailor morality so as to protect individual autonomy from the risks of interaction, a relational account of morality enables us instead to focus on the reassuring value of relationships.

To sum up: according to a relational account of promises, the role that Fried assigns to both the promisor and the promisee does not properly reflect what promises are really about. As for the promisor, the concept of the will binding itself clearly reflects an instrumental conception of others, self-based, and obviously non-relational. But Fried’s account also misconceives the role of the promisee. Anchoring his account of promises in respect for the others’ autonomy, which is merely a symmetrical reflection of our own, Fried neglects—or is indeed unable to—account for the place of care or responsibility in our relationships with others. The value of autonomy, while undoubtedly significant, is surely not the only value that operates within an interpersonal moral relationship. Other weighty moral values, such as our responsibility for others and for their well-being as ends in themselves, are given no consideration or authority. Indeed, unlike the legal conception of morality that anchors our relations with others in our reasons to expand our freedom by keeping our word, a relational account rests our relations with others on our responsibility for others’ well-being. When promising, therefore, we do not engage only in mutually beneficial bargains. In fact, most promises are not even reciprocal and are often offered without the expectation of, or the desire for, reciprocity. Promises are not properly thought of as contracts. Rather, the most commonplace promises are gratuitous, offered within existing relationships. In a sense, Fried is right when he says that the moral grounds for keeping promises is the trust invoked by the promisee. But his ethical conception of trust is predicated on regulative interests for whose attainment trust is too powerful a tool.\[35\] Yet, according to a relational account of promises (and of morality in general), trust is not properly thought of as founded on the desirability of expanding our autonomy by binding our own will. Rather, trust

\[35\] Ibid., at p. 10.
rests on our regard for the well-being of others and on our care and responsibility for them.

Annette Baier’s general analysis of trust could be useful here. Applying Baier’s conception of trust to Fried’s account of promises demonstrates that Fried confuses trust with reliance. According to Baier, while trusting someone means depending on their care, reliance implies counting on someone’s actions, even if these actions are not necessarily directed at oneself. One, therefore, trusts a friend to look after one’s child or with one’s secrets, but relies on a security guard at the store to do her job. According to this account, even when we cease to trust someone we can still rely on them to act in a certain way, but trust and reliance are not similarly motivated nor are they made up of the same mental components. Trust, therefore “can be betrayed or at least let down, and not just [as reliance] disappointed.” This description pinpoints what is fundamentally wrong with thinking about morality in legal terms: in Fried’s law-centered world, where the range of interactions between persons shifts between contractual bargains and non-interference, where relationships are grounded in the regulative notion of “fair reciprocity,” there can only be reliance, properly understood. By contrast, a relational moral account of promises located within an ethics of interpersonal relationships and responsibility will naturally allow for deeper relations of trust.

(2) Rawls on Promises

According to Rawls, the principle of fidelity to a promise is a special case of the principle of fairness applied to the social practice of promising. According to the principle of fairness, a person is under an obligation to do his part “whenever he has voluntarily accepted the benefits of [the] scheme or has taken advantage of the opportunities it offers to advance his interests.” By promising, one knowingly invokes the social practice and accepts the benefits of a just agreement. These benefits

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36 A. Baier, “Trust and Antitrust,” in Moral Prejudices: Essays on Ethics (Harvard University Press, 1994), p. 94. Hannah Arendt’s view on promises, very much in this direction, is inspiring. Arendt draws a parallel between promising and forgiving as two redeeming actions between people. While forgiving is retroactive and serves to undo past wrongs, promising is forward looking, and is aimed to assure future trust. See H. Arendt, The Human Condition, (1958), 237.

37 J. Rawls, A Theory of Justice, supra note 6, at p. 344.

38 Ibid., at p. 342-343.
are, most notably, the possibility of setting up a small scale scheme of cooperation with others that will further one’s ends.\textsuperscript{39}

In order to make a binding promise according to Rawls, one has to be “in a rational frame of mind”;\textsuperscript{40} fully conscious; the promise must be spoken freely, voluntarily, without any form of coercion, and “in a situation where one has a reasonably fair bargaining position.”\textsuperscript{41} “In general, the circumstances giving rise to the promise … must be defined so as to preserve the equal liberty of the parties and to make the practice a rational means whereby men can enter into and stabilize cooperative schemes for mutual advantage.”\textsuperscript{42}

The whole of Rawls’ account, from the general moral grounds of the obligation to keep a promise and up to the conditions for making a promise binding, makes clear that his understanding of promises is highly legal and non-relational.

Let us first examine the moral structure within which Rawls’ promises operate. First and most clearly, is the fact that Rawls views promises as an instance of the general principle of fairness, his most basic moral principle. As such, promises are thought of within the broader framework of an agreement reached by mutually disinterested, free, and rational persons seeking to further their own interests. As in the case of Fried, the \textit{regulative} interest is clear, and so are the elements of \textit{cooperative relations of exchange} and \textit{triangular relations of intermediated reciprocity}: promises are a mechanism by which people set up small-scale cooperative systems in order to further their own ends. Individuals relate to one another through these cooperative schemes, viewing others as participants in cooperative mechanisms aimed to further each one’s personal ends. One joins in on condition that others do the same. The conception of others is therefore instrumental, since people are interested in each other only to the extent that they contribute to the system.

The second instance of Rawls’ legal mind-set is his analysis of the wrong involved in breaking a promise. Rawls explains the wrong of breaking a promise, defined as invoking a practice and then unfairly refraining from contributing one’s fair share to support the practice, in legal terms. As in the case of the general principle of fairness, the focal point of promise-making and promise-breaking is the idea that

\textsuperscript{39} Provided that this scheme, or institution, is just. See ibid., at p. 346-347.
\textsuperscript{40} Ibid., at p. 345.
\textsuperscript{41} Ibid., at p. 345.
\textsuperscript{42} Ibid., at p. 345.
promising is a cooperative scheme for mutual advantage. In legal systems, as shown in Sec. 1 above, individuals are willing to be bound by agreed-upon rules provided that others do the same. Full or close to full compliance is imperative for the system to work. The aim of the law is, in a deep sense, to keep the cooperative system working fairly by making sure every one pays his dues. According to Rawls, promises work in the same fashion. Explaining the wrong involved in breaking a promise in this way, then, stems from a strong legal conception of morality.

Notably, the concrete promisee is absent from Rawls' picture: breaking a promise wrongs society at large, so to speak, because the promise-breaker is a free-rider on a social practice.

The practice of promises is unquestionably a social fact and people appeal to it as a practical means to convey their intentions. The question touches on the role of this practice: does the social practice serve as grounds for the obligation to keep one’s promise, or does the existence of a social practice help to convey the message of promising while the obligation rests elsewhere? According to Rawls, the former holds: the obligation to keep a promise rests on the more general obligation of the fairness principle. The existence of a just social practice gives rise to the obligation to keep one’s promise. A non-legal, relational account of promises, on the other hand, would obviously deny this. Given that this account regards promising above all as a symbolic communication between persons that follows from their relationship while constituting and forming it at the same time, the obligation to keep a promise rests on the more general category of what we owe to each other. The existence of a practice of promising merely facilitates this communication. The appeal to a social practice in order to explain the wrong of breaking a promise is completely foreign to this conception.

The third instance of the law-centered character of Rawls' view of promises involves the conditions he enumerates for a promise to be binding. In his relatively short account of promises, Rawls chooses to focus only on a few conditions, all well-fitted to a legal discussion of promises and all resting on a legal conception of accountability and responsibility. Rawls discusses the voluntariness of the promise and the rationality of the promisor, stresses that the promise was not offered while sleeping or suffering from delusions, and that the promise was generally not coerced. These are all questions a legal system would be interested in regulating, mainly because of law's natural interest in enforcement and remedies, but also due to its

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commitment to the principle of personal freedom and the notion that people are responsible only for burdens undertaken voluntarily. None of these issues stands at the heart of a relational account of promises. Indeed, if one accepts that most real-life promises are non-reciprocal, offered within the context of existing relationships, and usually without any monetary value, the conditions that Rawls discusses seem less relevant. In this context, a much more significant issue would be the type of relationship, considered as the code by which actions and omissions are interpreted. Consider the following example. Suppose my best friend was offered her dream job on condition that she attends, at a certain time, one last and merely formal interview. Suppose she has two young children and no one to look after them while she is gone for the interview. Suppose she tells me this and I say nothing, though both of us are aware that I am free at the time of the interview, and that looking after them would not burden me in any special way. According to the relational account, not promising to be of help in this case is a wrong of the same kind as the wrong of breaking one’s promise: both communicate disinterest in the other’s needs. Within a relational account, the voluntariness of the promise bears a different, possibly narrower, meaning: in order to make a valid promise, the promisor has to undertake the obligation freely, but she may be in a situation where promising is morally required. Again, then, the legal mind-set for thinking about promises takes us further away from real-life promises and their role in our lives. Shifting our attention to what would be significant within a legal system, this analysis cannot offer a varied enough conceptual toolbox to really understand what promises are all about.  

3. Scanlon on Promises

Contractualist ethical theories agree that we can reach conclusions about the contents of morality by assessing the principles that people have reason to agree to. The

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43 It should be reiterated that thinking about promises in a context of relationships does not rule out the possibility of bilateral promises in a commercial context. These promises, like all others, will be considered within the framework of the circumstances that brought them about, that is, commercial relationships and their standards.

44 The question of whether the motivation to act morally is based on reasons or desires lies beyond the scope of this work. This phrasing of moral motivation in terms of reasons rather than desires reflects Scanlon’s current view in What We Owe to Each Other. In his Contractualism and Utilitarianism, Scanlon described the motivational basis of morality in terms of a desire to act in ways justifiable to others. See his discussion of the difference in What We Owe To Each Other, (Harvard University Press, 1998) especially pp. 6-8. See also T. M. Scanlon, “Contractualism and Utilitarianism” in Utilitarianism and Beyond (A. Sen and B. Williams, Eds. (Cambridge University Press: 1982), 103 -128, at p. 114. I refer to this issue below when I discuss Scanlon’s analysis of the importance we ascribe to others.
principles of morality are, according to this view, the object of general agreement. Scanlon’s version of contractualism offers a version of such an account. He claims that the contractualist structure is the best framework for explaining what he takes to be a basic concern—the value of justifying our behavior to others.

Scanlon believes that what distinguishes his account from other contractualist views, such as that of Rawls, is the motivational basis of the contracts. According to Scanlon, “the parties whose agreement is in question are assumed not merely to be seeking some kind of advantage but also to be moved by the aim of finding principles that others, similarly motivated, could not reasonably reject.”[^45] His account is therefore an attempt to work out this concern into a practical formula, which one is required to consult in order to decide whether it would be wrong to do X. This “formula of wrongness” is defined by Scanlon as follows:

> An act is 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.[^46]

I have addressed elsewhere the legal orientation of Scanlon’s contractualism according to this formula of wrongness, showing how the formula’s elements reflect the *legality* of Scanlon’s morality[^47]. My argument was that Scanlon’s formula of wrongness, just like his contractualist framework for morality in general, shifts his compelling idea of justifiability to others from the other-oriented motivation upon which it is thought to rest to a narrower, legal conception. This legal conception is only designed (and able) to find a set of regulative coordinative rules on which we can all agree, thereby showing that Scanlon thinks about morality through a prism appropriate for thinking about law. His account finds the procedure and content of morality in the wrong mechanism, rendering his theory inapt as a convincing account of what we owe to each other.

[^45]: Scanlon, *What We Owe to Each Other*, p. 5.
[^47]: Having the same motivations we have, that is, recognize the reasons we have to act morally. In the present context, what matters is that the principles of morality are believed to be the object of a general agreement.
In order for the idea of justifiability to others to work as a genuinely other-oriented moral motivation, it must stay clear of any structuring in terms of a cooperative scheme.

Any reference to a cooperative scheme in the context of justifiability would imply a transformation of this idea, turning it from a true interest to justify one’s actions to others into a conception that, in a deeper sense, relies on some form of mutual justifiability that protects and promotes the parties’ interests. In Scanlon’s case, it would imply an ability to reach agreement on principles for the general regulation of behavior. More specifically, my claim is that thinking about what we owe to each other in terms of an \textit{agreement} for the \textit{general regulation of behavior}, where the others’ inability to reasonably reject the agreement is the standard for \textit{licensing} the agent’s proposed course of action, burdens the justifiability aim with redundant elements. These elements introduce legal and contractual ideas that are unnecessary for the “pure” ideal of justifiability and narrow it to an instrumental conception of licensing.

Once we understand morality in terms of a reasonable agreement for regulation, it will naturally slide into a cooperative domain wherein everyone (reasonably) gives up something in return for what the system provides (first and foremost regulation, but also—from Scanlon’s perspective—knowing that you are licensed to do whatever it is that you do). This is quite different from simply justifying oneself to others. And if plain justifiability is what morality is about—why not do away with the contract? From this perspective, the contractualist framework is either redundant or limiting.

This legal mind-set characterizes Scanlon’s analysis of promises as well. As in the idea of justifiability to others, Scanlon’s analysis of promises may seem to raise fewer difficulties for a relational account of ethics in two key respects. First, Scanlon draws a clear distinction between promise and contract, arguing that although these are indeed two parallel ideas that respond to, and are consequently shaped by, the same underlying values, they nonetheless react to these ideals in different ways.\textsuperscript{48} As noted at the outset, conflating promise and contract is perhaps the most notable sign of

thinking about promises in legal terms. In this sense, Scanlon’s insistence on the
distinction between these two concepts is a necessary starting point for rejecting the
law-centered element of contractual cooperation-for-mutual-advantage, which most
law-centered thinkers wrongly ascribe to promises. The second advantage of
Scanlon’s account is his rejection of the explanation that the wrong in breaking a
promise depends on social practice. 49 From the perspective of the relational account,
this too is an advantage: ascribing the wrong of breaking a promise to a social
practice, that is, insisting that what is wrong with breaking promises is the abuse of a
fair or desirable social convention, is foreign to the view whereby promises are first
and foremost an interpersonal affair. Rejecting the social practice theory is a
necessary starting point for thinking about the wrong in breaking a promise as
stemming from our mistreatment of others.

Indeed, Scanlon’s analysis of promises seems consistent with the relational
account, especially in light of what he says about the proper context for thinking about
promises: “the wrong of breaking a promise and the wrong of making a lying promise
are instances of a more general family of moral wrongs, which are not concerned with
social practices, but rather with what we owe to other people when we have led them
to form expectations about our future conduct.” 50

Scanlon’s detailed account of promising, however, falls short of his statement of
intentions because his contractualist framework for morality, which he also uses to
discuss promises, rests on a law-centered analysis that precludes his pouring any
meaningful contents into what we owe to each other. 51 Despite the compelling
wording, Scanlon’s account of promises fails to transcend the standard, law-centered
analysis of promises. 52

I start by discussing Scanlon’s formulation of the more general category of
wrongs, such as a lying promise, which is predicated as the general framework for
discussing the moral principle of fidelity to a promise. My analysis of these “pre-
promise” wrongs reveals that Scanlon’s framework for thinking about morality in
general, and about promises in particular, fails to comply with the expectations raised

49 T.M. Scanlon, Promises and Contracts, supra note 48 at 86.
50 Ibid., at 87. See also T.M. Scanlon, What We Owe to Each Other, supra note 48 at 296.
51 The contractualist framework of morality is formulated in ibid. See especially Chapters Four
(“Wrongness and Reasons”) and Five (“The Structure of Contractualism”).
52 In this sense, the problem with Scanlon’s account of promises is an instance of the problem posed by
his moral account in general.
by his original declaration of objectives. Reflecting regulative interests and thinking about morality as cooperative-for-mutual-advantage, Scanlon’s law-centered moral theory cannot offer a persuasive relational account of promises. Following this discussion of the more general wrongs of which promises are an instance, I discuss Scanlon’s account of the value of assurance, which he places at the heart of the principle of fidelity to promises. I conclude my critique of Scanlon’s conception of promises with a discussion of his long and detailed account of what he calls the moral permissibility of legally enforcing the obligations arising from the class of wrongs at the start of his analysis.

3.1 The principles of wrongful manipulation and regard for expectations

Scanlon constructs his argument regarding the duty to keep a promise by introducing a general class of obligations, which rest on “one’s responsibility for harm that others suffer as a result of relying on expectations one has led them to form about one’s future conduct.” In this context, Scanlon discusses the duty not to unjustifiably manipulate others (which Scanlon formulates in terms of a principle M), the duty to take suitable measures not to lead others to form reasonable but false expectations about what one will do (principle D), and the obligation to take reasonable steps to prevent a person’s loss, suffered as a result of such expectations (principle L).

The first thing to notice about Scanlon’s discussion of these obligations is that it is conducted almost exclusively within a “bargain-oriented” framework, since his discussion in this section deals with reciprocal promises from which each party stands to benefit. Scanlon’s discussion of the principle that forbids wrongful manipulation, for instance, clearly adopts the classic contractual pattern of two parties forming a mutually beneficial bargain, and the potential losses for one party in case the other fails to deliver.

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53 T. M. Scanlon, Promises and Contracts, supra note 48, at 87.
54 Scanlon regards these obligations as similar in kind to the obligation to keep one’s promise, as they are “instances of a more general family of moral wrongs.” (See above, text accompanying fn. 50.) Dennis Patterson describes the entire spectrum as follows: intentionally leading others to falsely believe that one will act in a certain way (unjustly manipulating) or negligently so leading them (the principle of Due care), requires one to compensate for losses inflicted by this behavior (the principle of Loss prevention). In case that compensation will not do, however, specific performance is required (Fidelity to one’s promise). See also D. Patterson, “The Value of a Promise,” 11 Law and Philosophy (1992)385, at 390.
55 The first and paradigmatic example Scanlon discusses is that of two farmers with two adjacent pieces of land. One farmer is contemplating how to get his neighbor to help him build up the banks of the
Principle M states as follows:

In the absence of special justification, it is not permissible for one person, A, in order to get another person, B, to do some act X (which A wants B to do and which B is morally free to do but would otherwise not do) to lead B to expect that if he or she does X then A will do Y (which B wants but believes that A will otherwise not do) when in fact A has no intention of doing Y if B does X, and A can reasonably foresee that B will suffer significant loss if he or she does X and A does not reciprocate by doing Y.

This scheme is utterly contractual: A wants B to do X while B wants A to do Y; each of them thinks that in order to get the other to do X and Y respectively, they need to do Y and X. The problem is that A is lying about his intentions, and does not actually intend to do Y if and when B does X.

Note that principle M would clearly take the same form had Scanlon’s discussion been about (non-simultaneous) contractual obligations (when one party is lying), rather than about reciprocal promises (one of which is a lying promise).

Furthermore, according to principle M, it is not enough to manipulate someone into falsely believing that one will act in a certain way, and the principle also requires that the manipulator should “reasonably foresee that [the manipulated] will suffer significant loss if he or she does X and the [manipulator] does not reciprocate by doing Y.”

Scanlon’s focus on the element of loss is important here, because it implies that Scanlon’s perspective of “what matters” with respect to this general class of obligations correlates with the standard understanding of promises as tools to set up a scheme for the exchange of goods. This aspect is dominant with regard to all three principles—M, D and L (I discuss the principle of fidelity to a promise separately). Take principle D, for example, the central condition of which being that we owe due care if “there is reason to believe that [others] will suffer significant loss as a result of relying.” Scanlon stresses this aspect when stating that all three principles—M, D and L—are valid for the same reason: refusing to let people ignore losses caused by

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stream that runs through his plot in exchange for him helping his neighbor do the same. Another example discusses the reciprocal exchange of promises according to which one person would drive the other to work, in exchange for the other mowing the driver’s lawn. See Scanlon, Promises and Contracts, supra note 48 at p. 88.

Scanlon, ibid., at p. 89 (my emphasis).

Principle D states as follows: “One must exercise due care not to lead others to form reasonable but false expectations about what one will do when there is reason to believe that they would suffer significant loss as a result of relying on these expectations.” Ibid., at p. 31.
their (intentional or negligent) behavior is reasonable. Unless they result in loss, then, principles M, D and L do not apply. This is a classically legal element, since law protects against harms intentionally or negligently inflicted upon someone by imposing a duty to make good the losses one’s wrongs have caused. Focusing on the aspect of loss in his discussion of the family of obligations to which promise belongs brings us still closer to the standard law-centered framework of thinking about morality.

Careful analysis of Scanlon’s account of the class of obligations to which promises belong reveals that, contrary to the first impression, these obligations are considered in a typically legal context (especially principle M), and focus on some concrete form of loss rather than on the harm one causes other people by letting them down. The view of the relational account is completely different: the wrong lies in unjustifiably manipulating others or in failing to take measures to ensure that others are not hurt by reasonably but falsely relying on our statement of intentions as to what we are planning to do. This account thinks in terms of relationships, centers on the breach of their trust, on their disappointment, possibly their vulnerability. Thinking about a lying promise in terms of the deception involved in the formation of a bargain for mutual advantage and focusing on a tangible conception of loss, as Scanlon does, is thus yet another instance of the standard way of thinking about promises in contractual, legal terms.\(^{58}\)

A further problem in Scanlon’s analysis of this class of obligations concerns his application of his general ‘formula-of-wrongness’ to the principles providing the moral grounds of these obligations.\(^{59}\) Let us return to principle M.\(^{60}\) According to Scanlon, a principle suggesting it is permissible to falsely manipulate others into thinking one will act in a certain way would be reasonably rejected. His analysis works as follows: first, we must consider the interests of the group of potential victims

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\(^{58}\) Scanlon’s analysis of promises rather than of the “family” of obligations to which promises belong is different, especially in the sense that the principle of fidelity obtains even when there has been no act of reliance by the promisee. See ibid. As I will argue below, however, Scanlon’s analysis of the obligation to keep one’s promise is nonetheless legal in its orientation.

\(^{59}\) Recall that Scanlon defines his “formula of wrongness” as follows: “An act is 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.” See Scanlon, *What We Owe to Each Other*, supra note 48, at p. 153.

\(^{60}\) Scanlon takes his formula of wrongness to apply in the same way to each of these principles, including principle F (fidelity to one’s promise). My reason for discussing principle M here is that this is the first principle that Scanlon discusses in regard to promises, and his account of it is therefore the most elaborate.
of manipulation, who have strong reasons to want to direct their resources and efforts in accordance with their own free choice, and to object to having their plans thwarted by the manipulation of others simply because such manipulation may serve these others’ interests. Against this, we must consider the interests of the group of potential manipulators. For them, a principle allowing them to manipulate others may provide certain advantages.61 Scanlon argues that the reasons of members of the second group are not strong enough to enable them to reasonably reject the protection granted by principle M to members of the first group. The reason, according to Scanlon, is that “manipulation would undermine expectations about others’ behavior that it would be very difficult to avoid relying on,”62 while many non-manipulative ways are available for people to promote their interests.

This analysis by Scanlon reveals a number of interesting points. First, Scanlon’s rejection of the “social practice” account can now be reappraised. What we had (mistakenly) considered an appealing feature of Scanlon’s account of promises—his rejection of the “social practice” argument as moral grounds for the obligation to keep one’s promise—turns out to have been replaced by a parallel “social” account rather than by an interpersonal account. Applying his formula of wrongness to the class of obligations of not causing others loss by falsely leading them to rely on one’s statement of intentions, returns the underlying moral principles of the social practice accounts through the back door. Balancing the interests of large groups against each other, counting-in the costs and benefits of proposed principles for society at large, accepting certain principles for the general regulation of behavior and rejecting others, does not provide the conceptual scheme we were looking for when rejecting Rawls’ “social practice” analysis. Scanlon’s considerations are obviously the considerations of general social planning: the desirability of being able to rely on people’s statements of intentions (the interests of group A), or the range of options open to people to further their interests when manipulation is rejected (the interests of group B), are completely regulative. Scanlon’s detailed account makes no reference to specific others we lie to, manipulate, or break our promises to, or even to a general category of “relationships.”63 Rather, it is the same type of regulative interest that law-centered

61 See Scanlon, Promises and Contracts, supra note 48 at p. 89.
62 See ibid., at p. 89.
63 Raz, by contrast, states that promises are among our “obligations to others with which we are in long-lasting connections, that are at least in part of our own making... we mold each one of them
theorists consider the core of morality. The mechanism that Scanlon offers to think about the morality of right and wrong, then, essentially replaces one regulative mechanism (Rawls’ convention) with another (Scanlon’s “set of principles for the general regulation of behavior”). In the context of promises, however, as well as in the context of the entire class of obligations that Scanlon considers promises to be a part of—because they are so obviously rooted in the interpersonal realm of our lives—this legal perspective is particularly bothersome.

3.2. The principle of fidelity

The principle that serves as the basis of the obligation to keep one’s promise (principle F, the principle of fidelity) shares its legal genes with this family of wrongs, although somewhat differently. In assessing the wrong of breaking a promise, Scanlon argues that the principle of fidelity is designed to protect the value of assurance. Principle F is formulated as follows:

If (1) in the absence of objectionable constraint, and with adequate understanding (or the ability to acquire such understanding) of his or her situation, A 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.⁶⁴

For Scanlon, then, the value of assurance lies in the common interests of both promisees and promisors. Given the reasons of potential promisees for wanting to be assured that the promise will indeed be fulfilled, potential promisors have reason to be

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able to provide this assurance. Assurance may actually be thought of as a small scale bargain in itself, the goods exchanged being this “assurance”: the promisee wants to be assured that the promisor will do as he said he would; the promisor wants to be able to provide this assurance and acts in ways that generate this expectation in the promisee. The parties, therefore, exchange acknowledgments of each other’s interests—wanting and giving assurance.

In the terms of Scanlon’s general framework, principle F extends the protection that principles D and L provide. Principle L demands only that we take reasonable measures to prevent the loss caused to others by our statement of intentions, but cannot in itself guarantee actual fulfillment. Since it is important for promisees to receive and for promisors to be able to give this kind of assurance, we need a principle F that requires performance rather than compensation or warning. “From the point of view of both potential promisees and potential promisors,” says Scanlon, “it is reasonable to want that a principle of fidelity that requires performance rather than compensation, and that, once an expectation has been created, does not always recognize a warning that it will not be fulfilled as adequate protection against loss.”

This explanation apparently claims that, in the domain of principle F as well, what matters is the loss suffered by the promisee (see emphasis in the quote above). But Scanlon expressly states that obligations derived from promises are generally held to be binding even when the promisee does not suffer a loss as a result of reliance on the promise. These seem to be the situations for which we need principle F: even if one has not yet relied on the promise in the sense of acting on it, sometimes one has good reason to want for the things that were promised to happen.

This view supports the Razian account of promises: an integral part of what it means to promise is that the promise be carried through by way of a specific performance. Anything else, even if amounting to full compensation of its monetary worth, falls short of the idea of promising.

Now, it seems that there are two major lines of argument for arguing that a principle of fidelity to promises should require that a promise be binding even if the

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65 See ibid., at p. 95.
66 See ibid., at pp. 206-208.
67 See ibid., at p. 208 (my emphasis).
68 Pointing to an example of a drive to work in return for lawn mowing, Scanlon claims that, in the usual understanding of promises, the driver cannot simply call up the lawn mower to say he has changed his mind about the deal. See ibid., at p. 205.
69 See ibid., at p. 95.
promissee would not suffer any actual loss if the promise were broken. The first is the interpersonal argument stating that, by breaking a promise, one not only leads others to rely on one’s statement of intentions in a way that may cause the promissee to suffer loss, but also frustrates the expectations of the promissee who had considered the matter settled. Ignoring this latter injury demonstrates and communicates that the promisor does not care, a sign of the disintegration and loosening of the relationship according to Raz.\(^70\) In the example of the friend who promised to accompany me to the dentist, I want this, as Scanlon says, to “be the case.” Breaking her promise without good reason is wrong, even if I took no steps relying on it. It is wrong not only because it frustrates my expectations but also because it communicates that she may not care about my well-being as I was led to believe she does.

The second argument is the social-planning argument, stating that it is socially important for people to be able to rely on the fulfillment of a promise. From a general social perspective and in terms of the opportunities allowed by our social circumstances, it is not enough that, when A promises B to do \(X\), B can only be guaranteed that A will fulfill the promise or compensate him for his reliance losses. Promisees have a justifiable interest in receiving assurances that what they were promised (state of affairs \(X\)) will materialize: “People have good reason to want to be able to make agreements that they can rely on even when they have taken no action in reliance of these agreements.”\(^71\) This is the interest underlying contract law: people want to be guaranteed that the agreements they make will be carried out. Assurance, then, is a commodity sought by both promisees and promisors and, as such, it should be morally backed by principle F.\(^72\)

Notably, this is a regulative argument and not very different from Fried’s analysis of promises, since both Scanlon and Fried seem to consider the moral principle of keeping promises a desirable social tool to enhance one’s self-interests. Although Scanlon tries to formulate a moral principle that would make the obligation to keep a promise independent of social practice, he nonetheless appears to share regulative and coordinating interests with those who do.

\(^70\) This, of course, depends on the type of the relationship, and on the significance of the promise to the promissee.


\(^72\) As shown in the next subsection, Scanlon holds, and for the very same reasons, that a principle like principle F should also be legally enforceable.
Not only does Scanlon adopt the social planning argument, but he also rejects the interpersonal one. In his discussion of principle F, Scanlon rejects the claim that the notion of assurance rests on the description of the interpersonal injury discussed above. Our interests in accepting the principle of fidelity do not lie, according to Scanlon, in the promisee’s “sense of injury,” in a “degree of resentment,” or in an “impulse to assuage disappointment.” Rather, it is the ability to rely, indeed to be assured of the fulfillment of a promise in order to be able to make stable agreements. Awareness of the “seriousness of the situation,” then, of the moral obligation to avoid making promises and then breaking them does not stem from commitment to other people’s well-being but from the more general social interest in such reliance.

I conclude my review of Scanlon’s adoption of social planning argument over the interpersonal one with his discussion on refraining from promising. As part of the general considerations for accepting principle F, Scanlon suggests that, in order to avoid the possible burdens of accepting principle F, potential promisors could refrain from promising altogether, thus protecting themselves from its possible burdens. This claim sums up the difference between Scanlon’s law-centered account of promises and a theory that regards promises as a special case of interpersonal relations. Scanlon’s suggestion that people refrain from promising in order to secure themselves from future burdens is only possible if promises are viewed as a tool to enhance self-interests. If no benefit accrues to one’s interests in making the promise, if promising is a matter of the chances of benefit versus the risks of costs, it does make sense in some cases to refrain from promising in the first place. Note that Scanlon’s recommendation is not meant to prevent hurt to others but to avoid future costs to oneself. A relational account rejects this. A relational account does not view promises as a tool to enhance one’s interests by a mutual exchange of goods, so that promising is not a future burden but a key aspect of interpersonal relationships. In this view, our moral obligations are not thought of as a necessary burden but, understood in a wider context, as rather desirable. In a relational account, as noted, promising is sometimes “the right thing to do,” and not promising could sometimes be a wrong similar to breaking a promise (recall the example about the friend’s dream job).

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73 Scanlon, Promises and Practices, supra note 48, at p. 95. These values are taken from Fuller and Perdue’s discussion of expectation interests that need to be protected in case a promise or a contract are broken. See L. L. Fuller and W. R. Purdue in “The Reliance Interest in Contract Damages” 46 Yale Law J. (1936) 52.
3.3 The moral permissibility of legally enforcing promises and contracts

The last section of Scanlon’s *Promises and Contracts* deals with the moral permissibility of legally enforcing promises and contracts. Scanlon investigates “the moral permissibility of legal enforcement” of both contract and promise, and essentially applying the ordinary legal considerations that a legal system might take into account before enacting laws: ‘Is it right for the state to have this kind of law?’ ‘Should the state enforce this type of behavior?’ Further considerations of efficiency and so forth usually do or should follow the basic question—should principle X become a binding law?

According to Scanlon’s wrongness formula, the question of whether the state is morally permitted to enforce *contracts* depends on whether anyone could reasonably reject a principle that licenses the state to do so. To examine this, Scanlon’s first step is to consider whether it might be possible to reasonably reject a principle EL (standing for the enforceability of principle L—loss prevention). The considerations that Scanlon takes into account for and against having a principle EL (the legal principle) are almost the same as those he considers for principle L (the moral principle). These include, on the one hand, our need to rely on the representations of others about what they are going to do, and our desire to avoid potentially significant losses should these representations prove false, and, on the other, the costs of compensating potential promisors. The only difference between the moral principle L (taking proper steps to prevent others from suffering significant losses as a result of relying on one’s statement of intentions) is the error costs of the judicial system, and a threat of enforcement that may “change the numbers” in favor of performance. Now, if Scanlon can use the same mechanism to examine the validity of both legal and moral principles, and if considerations of the same type are taken into account in both cases, then his understanding of morality is in fact indistinguishable from his understanding of law. If the structure for thinking about law and morality is the same (the wrongness formula of the contractualist framework) and if both disciplines raise the same issues (the interests of competing social groups “for the general regulation of

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74 As I show below, Scanlon’s analysis of principle F and the subsequent principle EF share the same structure. See Scanlon, *Promises and Contracts*, supra note 48, esp. pp. 105-111.
behavior”), then morality and law are significantly interchangeable. The general idea for both morality and law, according to Scanlon, is that a certain principle obtains if the contracting parties have a good reason to pay the costs of its availability. The benefits and costs of every one of these principles are calculated in the same way for morality and for law, counterposing the interests of the groups that will benefit from the principle (legal or moral) with the interests of those who will benefit from rejecting it. Throughout this section, Scanlon discusses promises and contracts interchangeably, without considering (except for the costs of the errors of the judicial system) any immanent differences between morality and law. This natural fit of Scanlon’s wrongness formula to legal matters—both in terms of the formula’s structure, which required no adjustment to apply it to law, and in terms of Scanlon’s readily application of it—are the result of Scanlon’s legal perspective on morality to begin with. Since morality, like law, is for Scanlon a set of agreed upon rules for the general regulation of behavior, the formula of wrongness can do the job for both domains.

Scanlon’s discussion of whether the law should enforce contracts (principle EF) makes this even clearer. First, Scanlon thinks about principle F (fidelity to one’s promise) and about a legal principle that allows its enforcement (principle EF) as he thinks of principles L and EL noted above. He expressly states that “as in the case of L and EL, an argument for a principle authorizing the enforcement of expectation damages may be constructed by both tracking and relying on the argument for F.”

Again, the structure and considerations for having a principle of fidelity to one’s promises are the same as those for enforcing them by law. One difference that Scanlon does consider, however, is that our moral motivation to keep our promises “often fails to move people to keep promises.” This is a reason, he says, for both promisees and promisors wanting to have legally binding contracts.

The statement that the enforcement of promises is desirable because it builds up motivation to keep promises can only be understood if promises are thought of as “un-enforced contracts.” By contrast, according to a Razian account, even if people are not always sufficiently motivated to keep their promises, enforcement will not do the trick: since promising is thought of in the wider context of relationships,

75 See ibid., at pp.107-108 (my emphasis). Note that principle EF discusses the enforceability and remedies for breach of contract.
enforcement could not generate the suitable motivation to keep one’s promises. For a relational view, the difference between promises and contracts does not lie only in the latter’s enforceability. Their difference is deeper, and touches upon their distinct structure, conditions, and motivational make-up. For Scanlon, law and morality serve the same general purpose in this context: allowing people to form reliable contracts. The only difference is that the law is a more powerful tool to achieve this.

In this wider context, Scanlon’s idea of “justifiability to others” appears to reflect a true desire to achieve fair and reliable cooperation with others. It does not, however, advocate an interpersonal, deeper conception of responsibility towards others. This difference represents a profound disagreement about the moral aspects of what is important and valuable in interpersonal relationships.

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**Conclusion**

My main argument was that contractualists think about ethics in legal terms, and that this is conceptually mistaken and also leads to an unattractive moral theory. Adopting a legal paradigm for morality, as noted, imposes restraints on contractualist ethics and renders it a mediating, underdemanding, and negative moral theory. I also showed that, even contractualist theories of the kind that Scanlon develops, which find the motivational source of morality in interpersonal and other-oriented ideas, are still limited because of the law-centered contractual setting within which they locate morality. Thinking of morality as an object of (reasonable) agreement for the general regulation of behavior expresses commitment to many underlying ideas that, as I argued, undermine the very option of contractualism as genuinely other-oriented.

My aim in this paper was to demonstrate that applying the law-centered contractualist model of morality to promises enables only a limited conception of promises and their interpersonal role. Contrary to experience and moral intuition, this approach focuses only on the marginal, exceptional type of promises, mistakenly viewing reciprocal, bargain-context promises as the standard kind.

Employing an alternative conceptual scheme to think about promises—as well as to think about ethics more generally—will yield a more complex and attractive conception of both promises and ethics, which is also more attuned to our moral institutions and real-life relationships.
In a wider context, my deepest disagreement with ethical contractualism turns on the question of what comes first: does the moral law precede our commitments to others or vice-versa, does recognizing our relationship with others lead us to recognize moral demands? For contractualism, which thinks of morality as the object of an agreement from which moral imperatives are drawn, the contract is the *grundnorm* of moral relations. This brings in its train values of cooperation and participation in a mutual scheme, so that moral demands, in a primary sense, are both reciprocal and the product of one’s free and rational consent, even if very broadly understood. What we owe to each other is thus, in a very deep sense, conditional. And I believe this is a very wrong way to think about morality.

Instead, I hold that morality constructs our interpersonal relations with others. It properly deals with everything we owe to each other that is directly derived from our humanity. In this sense, morality starts from recognizing the responsibilities we have for others and thus responds and constructs our pre-existing commitments to each other, rather than deduce moral demands from an antecedent moral law.

In his *Nine Talmudic Readings*, Lévinas discusses the giving of the Torah and pays special attention to the “shocking logic” of its acceptance by the Jewish people, who said “we will do and we will hear.” Accepting first the burdens of the ten commandments and only then knowing them, says Lévinas, is an example of a spontaneous, almost naïve, incurrence of responsibility. Yet, thinking about morality should be close to that. Our moral responsibilities are assumed spontaneously. They are not dependent on any antecedent agreement and, in this sense, are more about partnership than participation. In this significant regard, recognizing the other is at the same time recognizing our responsibilities for others. Its inability to accommodate this immediate manner of incurring moral responsibility renders ethical contractualism both limited and limiting and, for this reason if not for any other, contractualist ethics is deemed to be less than enough.

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