# Agreements, Promises and Content

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## 1. Introduction

Most theories of agreements address two problems. First, they try to explain what is to agree and why agreements may be binding. They tackle this problem by focusing on promises: they assume that agreements are conditional promises, or exchanges of conditional promises, and they attempt to explain what is to agree and why agreements may be binding by explaining what is to promise and why promising may be binding.

Second, most accounts attempt to establish to what extent the content of an agreement is a function of the mental states of the parties. Three main views are held in this respect. It is maintained either that the content of an agreement is determined by taking into account all the mental states of the parties, such that only if the parties have the same relevant mental states an agreement has been reached (the subjective view), or by considering the mental states that were communicated by one party to the other regardless of whether the party had in effect the relevant states (the objective view), or by taking into account certain mental states as relevant, but not others (the mixed view).

In this paper I wish to challenge the assumption that agreements are conditional promises or exchanges of conditional promises, and to show that neither the subjective view, nor the objective view, nor the mixed view, are correct.

I begin by discussing the standard account of agreements, which I shall label 'the standard model'. It holds that agreements are conditional promises or exchanges of conditional promises. The standard model can be fleshed out in different ways, for there are many different accounts of promising available in the literature. I shall assess those which are representative of the main strands, favour one of them, and thus fill in the standard model in a particular way (section 2). I claim later that the standard model so understood should be dismissed because agreements cannot be understood in terms of promises. I propose a sketch of an alternative

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account, which I shall label 'the alternative model' (section 3). The alternative model has implications as to how the content of agreements is determined that show that neither the subjective view, or the objective view, or the mixed view is correct (section 4).

## 2. The standard model

There is a difference between entering into an agreement and agreeing with somebody about something (as when both you and I discover that we both like chocolate and hence agree that chocolate is delicious). We are concerned with the first sense only.

Consider two simple cases:

(1) Jerry: "I'll do A if you do B"; Mary: "Ok".

(2) Peter: "Why don't you do A and I'll do B?"; Mark: "Fine".

These agreements have several pre-theoretical features. Entering into an agreement is a way of undertaking an obligation by performing certain acts. Uttering "I agree" is one such act, but the expression is neither necessary (consider the examples) nor sufficient (consider "I agree with you that chocolate is delicious"). Normally, both parties undertake obligations (like in case 2), but not necessarily (like in case 1). The obligation is owed to the other party, and she is put in a special position: she has a right to demand conformity.

The standard model holds that simple agreements (like case 1) are conditional promises, and conceives of more complex agreements (like case 2) as an exchange of conditional promises.[1] The model is appealing because there is a strict correspondence between some of the pre-analytical features of agreements and those of conditional promises or exchanges of conditional promises. Conditional promises or exchanges of conditional promises involve at least two people. Promising is also a way of undertaking an obligation by performing certain acts. Uttering the words "I promise" is neither necessary (consider "I give you my word") nor sufficient (consider "I promise that it was not my fault"). The obligation is owed to the recipient, and she is put in a special position: she has a right to demand conformity.

The standard model has, nevertheless, to be brought into sharper focus. First, it has yet to clarify what promising is. For instance, it is

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[1] Among others, M Robins, *Promises, Intending and Moral Autonomy* (1984) 114; D Lewis, *Convention: A Philosophical Study* (1969) 34, 45, 84; J Raz 'On the Nature of Rights' (1984) 93 *Mind* 194; J Raz, *The Morality of Freedom* (1983) 173-175; A Baier, *Postures of the Mind* (1985) 199; P S Atiyah, *Promises, Morals and the Law* (1981) 204-5.

plausible to suppose that to promise is in part to communicate something to the other party. But we still need to know what is involved in this act of communication. Second, the standard model has to explain why promises may be binding. In other words, it has to explain why it is possible that, by communicating something to the other party in the appropriate way, agents can give rise to obligations.

I shall consider two main views that attempt to answer these questions. Each fleshes out the standard model in different ways.

## 2.1. The practice view

The practice view claims that to promise is to perform certain actions that, given a social practice of promising, count as a way of undertaking an obligation of the relevant kind. The practice consists in part of a set of rules that are, in Searle's terminology,[2] constitutive of what is to make a promise. These rules define which acts count as undertaking an obligation, just as the rules of soccer stipulate that performing certain acts counts as scoring a goal. When the practice is justified in the relevant way, performing the relevant acts in effect creates obligations of the kind considered. In other words, a promise is valid if the practice of promising is justified.

Rawls' views are the paradigmatic example of this position. He claims that the constitutive rules specify that, if one performs certain acts, one is to do something unless certain excusing conditions obtain. According to Rawls, for this practice to give rise to actual obligations two conditions must be met. First, the practice should satisfy his two principles of justice. Very roughly, the rules must be such that both the promisor and the promisee are free and equal at the time the promise is made. Second, the parties must have satisfied the principle of fairness, according to which one must do one's part in supporting a just practice of promising that generates benefits (such as enabling cooperation) that one has accepted.[3]

There are three main objections against this view. Firstly, we are familiar with a distinction between making a promise and a promise being binding or valid. Some promises are invalid. They are promises, but they do not give rise to an obligation. Consider, for instance, a promise to kill your annoying neighbour. Other times we think of valid promises, promises that in effect create obligations. The practice view does not do justice to this distinction. On the practice view, just as according to the constitutive rule of

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2 J Searle, *Speech Acts* (1969) 33-35.

3 J Rawls, *A Theory of Justice* (1971) 112, 344-8. For a more recent version of this conception, see Liam Murphy 'Promise and Practice" www.law.nyu.edu/clppt/program2002/readings/murphy/murphy-ch1-Promise0802.pdf.

soccer performing certain acts counts as scoring a goal, according to the constitutive rule of promising performing certain acts counts as undertaking an obligation. In other words, in this view the statement 'promising creates an obligation' is analytic.[4] But then it does not make sense to distinguish between a promise and a valid promise, just as it does not make sense to distinguish between a goal and a 'valid' goal. Notice that this renders dubious the idea of requiring that the practice meet extra conditions for promising to create a 'real' obligation.

Secondly, suppose the previous objection is overcome. The practice view is committed to the idea that it is this practice, when certain additional conditions are met, that justifies the existence of actual obligations. Rawls' appeal to the value of fairness is a typical example of this strategy. The general idea is that one must do one's part in supporting a just practice of promising that generates benefits that one has accepted. But this seems problematic. Even if one has accepted the benefits that accrue from the practice, it seems one could legitimately break some promises. Breaking a trivial promise, for instance, cannot be plausibly conceived of as undermining the practice. The cooperative scheme might well survive without this promise being kept. Yet we do regard breaking this promise as wrong. Besides, we can conceive of agents who have not had the opportunity to enjoy the benefits of the practice (and hence have not accepted any benefit) and still acquire an obligation by promising. This view seems to have no resources to explain why this is so.

These obstacles are not perhaps decisive. More sophisticated arguments may be available. The third, conclusive objection against any version of the practice view is that one could plausible conceive of a person performing certain acts that, despite the absence of any practice of promising, would be recognisable as a (valid) promise. This objection claims, in other words, that these practices would not be necessary to understand what is to (validly) promise. This is what the second view of promising, which I shall label "the intention conception", claims.

## 2.2. The intention conception

This conception focuses on the idea of promising in isolation of the possible presence of a practice of promising. It focuses on an idealised context, where no practice of promising exists, so as to show that if an agent were in such a context he could in effect succeed, despite the absence of any practice of the relevant kind, in performing certain acts that we would regard as a (binding) promise. There is no denial that promising practices are important. But the intention conception claims that the obvious

4 Cf J Raz, 'Promises and Obligations' in P Michael, S Hacker and J Raz (eds), *Law, Morality and Society* (1977) 213.

importance of such practices can only be explained once the idea of promising itself has been explained.

The intention conception conceives of promising as communicating a particular kind of intention. And it also purports to give an explanation of why such communication may create an obligation. There are two main versions of this conception. I shall label them "the expectation account" and "the normative power account".

## 2.2.1. The expectation account

This account holds that she who promises communicates to the recipient an intention to perform an act being aware that she is creating an expectation that the act will be performed. There are several versions of this account, but I shall focus on Scanlon's version only, which is perhaps the most sophisticated along such lines.[5]

Scanlon claims that the reason why promises ought to be kept is, roughly, that they are a mechanism that enables people to give and receive assurance (which is a special way of creating expectations), and that being able to give and receive assurance is a valuable thing, for it gets matters settled. More precisely, he claims that the reason why promises ought to be kept is related to a principle that embodies this value, which he labels "the principle of fidelity" (principle F).

Principle F reads as follows: if (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents that A's not doing X); (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; (6) B knows that A has this knowledge and intent; then, in the absence of some special justification, A must do X unless B consents to X's not being done.[6]

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5 I shall focus on T Scanlon 'Promises and Practices' (1990) 19 *Philosophy and Public Affairs*; see also T Scanlon, *What We Owe to Each Other* (1998) chpt 7. Other versions include N MacCormick 'Voluntary Obligations and Normative Powers' (1972) *Supp 46 Proceedings of the Aristotelian Society* 59; R Brandt, *Theory of the Good and the Right* (1979) 286-305; P S Ardal 'And that's a Promise' (1968) 18 *Philosophical Quaterly* 225-237; J Narveson 'Promising, Expecting and Utility' (1971) 1 *Canadian Journal of Philosophy* 207-233. It will be clear, I hope, that the criticisms I put forward against Scanlon's variant of the expectation account apply to any version of it as broadly defined in the text.

6 Scanlon, above n 5, 206-208.

According to Scanlon, promising is only one special way in which one may provide this kind of valuable assurance. Its special character lies on the kind of reason that the promisee has for believing that the promisor will perform: when promising to do X, one provides the desired assurance only if one persuades the recipient of one's intention to do X, and one persuades the recipient of one's intention in a particular way, ie one indicates one's awareness of the fact that not fulfilling the promise 'would, under the circumstances, be morally wrong, ... disallowed by the kind of moral reasoning that lies behind principle F'.[7] So when I say "I promise", according to Scanlon, I do several things: a) I claim to have a certain intention to do X; b) I make this claim with the clear aim of getting you to believe that I have this intention, and in circumstances in which it is clear that if you do believe it then the truth of this belief will matter to you; c) I indicate to you that I believe and take seriously the fact that, once I have declared this intention under the circumstances, and have reason to believe that you are convinced by it, it would be wrong for me not to fulfil my intention.

The first difficulty of this account is, as Scanlon himself acknowledges, the worry of circularity. Promising creates an obligation only if it persuades the recipient of the speaker's intention to do A. But it can only do that if it gives the recipient reason to believe that the speaker has reason to do A. This reason is, on the analysis proposed, the speaker's awareness of the fact that it would be wrong to fail to follow through having promised. But it would be wrong only if promising created an obligation, and it creates an obligation only if it gives the recipient reason to believe that the speaker has reason to do A.[8]

Scanlon responds to this worry by claiming that the promisor persuades the recipient that she has the intention to do A because she indicates to the recipient that she thinks it would be morally wrong to attempt to persuade her that she has such an intention if she did not actually intend to do A. And that it would be morally wrong to do so because of another principle, distinct though related to principle F, namely the principle that forbids making a lying promise.[9]

Scanlon's response is ingenious but, I think, unconvincing. Scanlon himself admits, before addressing the objection of circularity, that the promisor persuades the promisee of her intention by indicating her awareness of the fact that *not fulfilling the promise* would be wrong, not by indicating her awareness of the fact that *claiming to have an intention of the appropriate kind if she did not have such an intention* would be wrong. The

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7 Ibid 211.
8 Ibid 213.
9 Ibid 213.

two considerations on which persuasion is grounded are clearly different, and the second consideration would not provide assurance in the desired way. Promising would not be a way of providing assurance if the promisor persuaded the recipient by indicating to her that she (the promisor) has an intention to do something, for claiming to have an intention does not provide assurance. It does not get matters settled. Intentions are revocable. That is the case even if the promisor indicates her awareness of the fact that it would be wrong to declare her intention to do A if she did not have it. For that would only assure the promisee that the promisor has in effect a certain intention now, but not that she will follow through.[10] To provide the latter, relevant kind of assurance we need the kind of support given by the first consideration: the promisor needs to persuade the promisee that she believes that not fulfilling her intention would be morally wrong, that she thinks that she should comply with it even if she revokes it. If only the first kind of consideration would provide the desired assurance, and if it is admitted that breaking a promise would be morally wrong because of principle F, then we are back to the worry of circularity.

Secondly, Scanlon does not provide an adequate account of what promising is. As shown, he claims that when I say "I promise" I (a) claim to have a certain intention (b) in order to persuade you that I have this intention, such that it is clear to me that, if I persuade you, the truth of this belief will matter to you, and (c) I indicate to you that I believe that, once it is clear to me that you are persuaded, it would be wrong for me not to fulfil my intention. This suggests that he thinks these conditions are, at least, necessary for there to be a promise. But it seems clear that they are not necessary. For instance, the promisee might know that the promisor always fails to honour his promises, the promisor might know this, and still promise. Besides, one can promise to do A and know the recipient will not consider one's doing A as something desired or welcome, so long as it is not considered as unwelcome (claiming to have an intention to do something unwelcome to the recipient would be, we can assume, a case of threatening, not of promising). Consider an example by Raz: a son promises his father never to smoke despite his father's protestations that he sees nothing wrong in smoking; the son makes the promise in order to strengthen his resolve, and the father reluctantly accepts his son's undertaking as a favour to him.[11]

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10 See along similar lines M Pratt 'Scanlon on Promising' (2001) 14 *Canadian Journal of Law and Jurisprudence* 143; also L Murphy 'Promise, Practice Contract' at <http://www.law.upenn.edu/academics/institutes/ilp/200304papers/murphypaper.pdf>

11 Raz, above n 4, 214.

On the other hand, although Scanlon has not explicitly provided an account of the sufficient conditions for there to be a promise, we can attribute to him a specific view. He thinks that if conditions (a)-(c) above are met such that principle F applies, then one ought to fulfil one's intention. This suggests that conditions (a)-(c), in conjunction with some of or all the clauses of the antecedent of principle F, contain the sufficient conditions for there to be a promise. Yet this cannot be so. We regard promising as a way of voluntarily undertaking an obligation, and hence promising must consist of performing certain acts that are performed as a means of thereby acquiring an obligation. An individual whose conduct is captured by conditions (a)-(c) such that principle F applies does not communicate her intention as a way of thereby acquiring an obligation, and hence is not promising. It is true that Scanlon claims that the promisor indicates her awareness of the fact that not fulfiling the intention would be morally wrong. But this does not mean that she communicates her intention as a means of thereby acquiring an obligation. One might act being aware of the consequences of one's act without these acts being performed as a means of giving rise to these consequences.

Finally, if a promise might generate an obligation without the promisor actually having provided the desired assurance (and the examples mentioned above show that this is a possibility), then principle F cannot be the ground for holding that promises ought to be kept. Scanlon's argument is that those are "impure" cases of promising, and he claims that principle F needs to be supplemented if it were to deal with them.[12] But no supplementation seems possible. The principle cannot be supplemented by adding clauses to capture cases where assurance is not provided. To capture these cases the idea of assurance should be directly removed. But if the idea of assurance is removed from the clauses of the principle, then principle F would be unrecognizable.

In short, Scanlon's account seems not able to avoid the objection of circularity. Besides, there is no adequate construal of what promising is: his conditions seem neither necessary nor sufficient for there to be a promise. Finally, principle F cannot be the ground for holding that promises ought to be kept.

## 2.2.2. The normative power account of promising

The normative power account of promising has been developed by Raz. I think it is essentially correct, but it has to be expanded in some areas, and this expansion requires that some contentions by Raz have to be abandoned.

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12 Scanlon, above n 5, 216-217.

I shall proceed in the three stages. Firstly, I shall present an outline of his notion of normative powers. Given that Raz's construal of this notion is very complex, I shall content myself with focusing on it at an abstract level. Secondly, I shall present Raz's characterization of promises. This characterization is intended, I think, as a rough approximation. And as such it is basically correct. But it can be brought into sharper focus. The account of promises that emerges is, I think, essentially adequate. Nonetheless, it has to be expanded: it does not explain promising practices yet, and it seems subject to counterexamples. So, thirdly, I shall attempt to show that the model can be expanded so as to:

(a) explain promises practices (and here I put forward some contentions that Raz has not defended explicitly but jibe well, I think, with his general approach);

(b) deal with seeming counterexamples; it is here where some of Raz's contentions have, I believe, to be abandoned.

## 2.2.2.1. Normative powers

Let us consider the notion of a normative power in general first. Normative powers can be generally defined as the ability to bring about a particular type of normative change. It is an ability instantiated when, for instance, one makes vows, takes oaths, or consents (and, as we shall see, when one promises).

Normative powers should be distinguished from physical and mental abilities to bring about a state of affairs, and from the ability to influence other people's beliefs.[13] A normative change is the alteration of a normative situation, ie of the totality of reasons which apply to a particular person. Thus, a normative change may appear through the creation of new reasons for action (of whatever kind), the occurrence of facts which are not in themselves reasons for action but affect the weight or scope of the reasons that apply to a person, or the cancellation of such reasons.

The exercise of a normative power must bring about a particular type of normative change: it must at least create or cancel reasons of a particular kind, ie duties or obligations. Not every act of bringing about a normative change is the exercise of a normative power. For instance, injuring somebody intentionally brings in a normative change in that it generates a duty to compensate, but it does not consist of the exercise of a normative power. What explains the difference between the change of a normative situation where no normative power is exercised (as in this example) and the change effected by the exercise of a normative power (as when one consents to have an operation, or when one makes a vow of allegiance) is

13 Cf J Raz *Practical Reason and Norms* (1990) 98-106.

that not every act that effects a normative change is the exercise of a normative power. An act is the exercise of a normative power when, and only when, there are sufficient grounds to justify the agent's having this ability. These grounds point towards the existence of a value: the value of being able to shape, to a limited extent, our moral world.[14]

This presentation of the notion of normative powers is very general and abstract. But even if considered at this abstract level it brings in certain implications that, when focused on, are helpful to provide a more precise definition.

First, it is clear that a normative power consists of an ability that is exercised by performing certain acts. For instance, consenting to have an operation, or taking a vow of allegiance, involve performing certain acts. There is a parallel here with certain complex abilities. For instance, to exercise one's ability to write (where writing is loosely understood as the conveyance of some kind of information by drawing certain characters on a surface) one must at least draw some characters on a surface. The same happens with normative powers: to exercise a normative power the agent must perform certain acts.

Second, it is clear that the exercise of a normative power is the exercise of an ability that involves the performance of certain acts as a means of thereby bringing about the relevant normative change.[15] This is the idea that lurks behind the notion that exercises of normative powers are ways of voluntarily changing one's normative situation. For instance, when one consents to be operated, one performs certain acts as a means of thereby waiving one's right not to be physically interfered with. When one makes a vow of allegiance one performs certain acts as a means of thereby creating an obligation. Notice that many complex abilities involve something similar. For instance, one exercises one's ability of writing by performing certain acts (one draws certain characters on a surface) as a means of thereby conveying the relevant information.[16] This is the reason why an agent who is unconscious with a pencil in his hand and, by mere chance, draws certain intelligible characters is not a person who is exercising his ability of writing. Something similar happens with normative powers: to exercise a normative power the agent must perform the relevant acts as a means of thereby bringing about the relevant normative change.

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14 Cf ibid 102-103; also Raz, above n 4, 228; and J Raz 'Voluntary Obligations and Normative Powers' (1972) *Supp 46 Proceedings of the Aristotelian Society* 79.

15 And this presupposes that one believes that one can bring about the relevant normative change by performing the relevant acts.

16 Analogously, this presupposes that one believes that one can convey the relevant information by drawing certain characters.

The foregoing elements are not, nevertheless, the whole story. For instance, an agent might intentionally damage others (and hence perform certain acts) as a means of thereby acquiring a duty to compensate (say, because the situation is such that giving rise to this duty suits his interests). But intentionally damaging others is not the exercise of a normative power. Normative powers are special kinds of abilities. As Raz claims, for an act to qualify as the exercise of a normative power, there must be sufficient grounds for having this ability. In other words, the act must be the exercise of an ability the exercise of which is, in general, valuable (the general value at stake being that of being able to shape, to a limited extent, our moral world). So this third element is also implied in the notion. It is this element which rules out cases such as those of intentionally damaging others, for there is no value in having the ability to bring about duties by intentionally damaging others.

So the general construal of normative powers brings in three implications that, if put together, can lead us to a more precise definition:

An agent exercises a normative power if, and only if,

a) She performs certain acts as a means of thereby bringing about a normative change.

b) The agent can bring about the normative change because there is a value in her having the ability mentioned in (a).

## 2.2.2.2. Promising

Let us focus now on the particular case of promising. Promising, Raz claims, consists of communicating, in circumstances C, an intention to undertake by that very act of communication an obligation to perform an action and invest the addressee with a right to its performance (unless the addressee releases him from this requirement).[17]

This characterization is, I believe, intended as a first approximation only, and as such it is essentially correct. But it cannot work as a concrete characterization. It is clear that a promise might be rejected by the recipient right from the outset. He might oppose to the promisor's undertaking, and this prevents the promisor from acquiring any obligation. So we can propose a more concrete characterization of promising by incorporating this idea. Indeed, we can propose such a characterization highlighting the connection with the definition of normative powers suggested above:

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[17] Circumstances concern marginal conditions: the agent is not joking, or suffering from delusions, is not acting under duress, etc. See Raz, above n 4, 211; see also 'Promises in Morality and Law' (1982) 4 *Harvard Law Review* 927.

> An agent P (the promisor) promises an agent R (the recipient) to do A if, and only if, P communicates to R, in circumstances C, an intention to undertake an obligation to do A owed to R (thus creating a right to demand compliance) *conditional upon her acceptance or non-rejection* (and until R releases P)[18] *as a means of thereby obligating herself.*

Before proceeding notice two things. It is clear, I think, that an agent who performs the acts just mentioned is an agent who promises. Once we acknowledge this, and once we notice that the definition does not rely on the existence of a practice of promising (for one might perform the acts mentioned in the definition without any practice of this type existing) it becomes clear that the practice view of promising is incorrect. We can understand promising without relying on promising practices. Besides, this characterization captures the cases that the expectation account does not capture. One might promise to do A even if (one knows that) the recipient is not persuaded of one's intention to do A and hence no expectation has been created, and even if (one knows that) one's doing A is not something the recipient will consider desired or welcome (so long as it is not thought of as unwelcome).

Let us consider the idea of a valid promise now. We can say that a promise is valid if, and only if, (a) R accepts or does not reject P's undertaking, and (b) P can obligate herself because there is a value in her being able to create an obligation in the way described. That is, a promise is valid if, and only if, R accepts or does not reject P's undertaking, and P's undertaking is the exercise of a normative power. In other words, when, and only when, there are sufficient grounds to justify the agent's having this ability. Or to put it otherwise, when in effect there is a value in having it.

The general value at stake is, as said, the value of being able to shape, to a limited extent, our moral world by creating special relationships. But what is the particular value involved in having the ability to promise? Raz suggests that the value is the general interest of both potential promisors and promisees to have a mechanism whereby, if they so wish, they can induce reliance in a special way.[19] The argument is, I believe, essentially correct. When one promises one indicates to the recipient one's awareness of the fact that one will acquire an obligation if she accepts. This enables one to give assurance on the performance of the act. As a result of that assurance, the recipient can rely upon the promise being delivered and hence form expectations about its occurrence. So promising does not create

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18 R's releasing of P, if it occurs, is itself the exercise of a normative power, namely the ability to dissolve the special bond that has been created.

19 This is, I think, the main thrust of the suggestion contained in Raz, above n 4; see also Raz, above n 1, 95-96.

an obligation because it provides assurance. It provides assurance because it creates an obligation. It is a device that enables people to do this. There is no denial that the power can be misused. For instance, it is possible for someone to promise to do A and then regret having promised. But since the power is exercised she becomes obligated. If that were not so the value of providing assurance could not be attained.

The normative-power account of promising is so far, I think, adequate. It contains a decisive objection against the practice view, and it characterizes promising in a way that overcomes the difficulties of the expectation account. But the picture is not yet complete. The model has still to explain promising practices, and it seems subject to counterexamples.

## 2.2.2.3. Promising practices and seeming counterexamples

Promising practices can be defined, I believe, as conventional norms. That is, as norms which exist and are regarded as valid insofar as they are generally practised, and according to which certain acts count as promising (when promising is understood in the idealised way proposed above, ie in the absence of such practices).

These practices are normally there to obtain certain goals for everyone's benefit. Thus, they may help to: (a) make the ability to bind ourselves easier and quicker to exercise by determining which acts counts as promising (eg by stipulating that uttering the expression "I promise" is a way of communicating the relevant intention); (b) make determinate certain normative implications that may be thought of as indeterminate or, at least, so debatable that it is better to have a fixed answer (eg there might be conventional practices as to what are the rights of third parties).[20]

This characterization of promising practices has not been explicitly defended by Raz but, I think, it jibes well with his general account of promising.[21]

Consider now seeming counterexamples, cases where an agent is regarded as having promised and yet the conditions mentioned in the definition above are not met. What we normally refer to as a lying promise is a case in point. A lying promise is a promise to do A, albeit an insincere one, ie the insincere promisor performs certain acts but not as a means of thereby obligating herself to do A. When rebuking the insincere promisor for not doing A, the recipient claims that she (the promisor) is under an

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20 Cf Lamond *Commitments and Practical Reason* (D Phil thesis in the Bodleian Law Library) 145-147.

21 It also jibes well with his general characterization of conventional rules. See Raz, above n 13, 81-82.

obligation because she promised, regardless of whether she (the promisor) performed the relevant acts as a means of thereby creating an obligating.

One way of dealing with this type of cases is to deny that they are cases of promising. This seems to be the route taken by Raz himself. He claims the insincere 'promisor' has not promised. The recipient would be in reality invoking a principle of estoppel according to which the putative promisor is prevented from denying that he has promised on the grounds that he has induced reliance.[22]

Such a view is, I think, unsatisfactory and has to be abandoned. It conflicts with the natural reaction of the promisee ('but you promised!'), and with the fact that we think of lying-promises as promises, albeit insincere ones. Besides, the recipient might demand compliance regardless of whether she relied on the insincere promisor. So she need not be invoking a principle of estoppel. Finally, similar cases abound, and explanations in terms of principles such as the principle of estoppel seem implausible.

Consider the case of James. Absent-minded as he is, he thinks that her five-year old niece's birthday is on the 19th when in effect it is on the 18th. He commits himself to take her to go to the zoo on her birthday and communicates this to his niece. When he takes notice of his confusion, he acknowledges that, despite his intention to bind himself to go with her on the 19th, he should go with her on the 18th. He claims that that is so because he promised. Yet James did not intend to bind himself to go on the 18th. No principle of estoppel, or other similar doctrine, seems applicable. James does not think that he is prevented from denying that he has promised to go on the 18th. He simply thinks that he has promised to go on the 18th. Perhaps it could be claimed that James has promised because there are practices of promising to the effect that certain acts count as promising regardless of whether the mental states are present. But, let us assume, this is not the case. Moreover, this is not what James thinks. James would claim that whether there are conventional practices or not is completely irrelevant.

The problem of cases where there is a promise despite the relevant mental states being absent appears because we have construed the notion of a promise by considering an idealised context. We have put aside the fact that promising normally takes place within the framework of on-going relationships (promising takes place among friends, colleagues, relatives, neighbours, and so on), which are partly constituted by certain values and norms, such that they shape and mould the ways in which one can promise, when promising is conceived in the idealised way.

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22 Raz, above n 17, 935.

James thinks that the relevant intentions are actually irrelevant because he conceives of his relationship with her niece as having certain features. The uncle-niece relationship is such, he thinks, that it requires that the uncle should attach special importance to the niece's birthdays, and that the uncle conduct himself in such a way that her niece learn that promises are not to be made without thinking carefully about what is being promised. The relationship as such, James believes, requires that his act counts as promising even if the stringent conditions, when promises are conceived in the idealised way in which we have been envisaging them so far, are not met. Moreover, he conceives of the relationship as requiring this regardless of promising practices, that is, even if there were no promising practices at all.

James may be wrong, but his position is perfectly intelligible. And this is so because, when promising takes place within the framework of different relationships that embody distinct values and which are partly constituted by norms, these relationships may mould the way in which one can promise: they may require that performing certain acts counts as promising, when promising is conceived of in the idealised way, regardless of whether all the ideal conditions for promising mentioned above are met.

This explains the case of an insincere promise. For when the recipient rebukes the insincere promisor for not doing A on the ground that she has promised to do A, regardless of whether she intended to obligate herself, the recipient is invoking a particular conception of promising. She is invoking the existence of either a conventional practice or of a special relationship according to which the promisor's acts count as promising, when promising is understood in the idealised way.

So the picture is now complete. Let us consider whether this account of promising, which helps to flesh out the standard model of agreements in a particular way, would provide a good explanation of agreements.

## 3. Assessing the standard model. Agreements reconsidered

Recall that, according to the standard model (now fleshed out in terms of the normative power account of promising defended above), an agreement is a conditional promise or an exchange of conditional promises. It seems that the standard model so fleshed out cannot provide a satisfactory account of agreements.

When an agent enters into an agreement, he makes an offer to the other party. And when he makes an offer he proposes to undertake an obligation and he reasonably thinks the offeree will consider this welcome. That agreeing involves making an offer is, I think, part and parcel of the

idea of agreeing. If that is so, when an agent enters into an agreement, she is not promising. For, as argued above, an agent might promise to do something and need not think of the undertaking as being welcome to the recipient.

This difficulty is not, however, decisive. An advocate of the standard model could claim that agreeing is in part to make a promise, though a particular kind of promise, namely a promise where the undertaking is thought of as welcome to the recipient. After all, many promises are of this sort. So let us focus on other difficulties of the standard model which, I think, are conclusive.

Firstly, consider how agreements end, ie how these normative arrangements cease to produce their normative consequences. One way in which agreements might end is by mutual rescission. Mutual rescission can be reconstructed as the shared normative power to cancel the agreement: a power that cannot be exercised unilaterally but need to be exercised by all the parties who have agreed such that, once exercised, both parties' obligations are put to an end simultaneously. The presence of this power is, I think, of the nature of agreements as well, to the point that it is natural to think that neither party, except in special circumstances (on which see below), can cancel the normative consequences of an agreement unilaterally.

For instance, consider case (1), where only Jerry acquires an obligation to do A after agreeing with Mary. Suppose the opportunity to do A has not arisen yet, and that only Mary does not longer wish the arrangement to stand. She cannot simply decide to cancel the arrangement. Jerry's reaction would be "you cannot simply opt out, for you have already accepted my offer". Mary needs Jerry's acquiescence. The standard model cannot capture this aspect of agreements. According to the standard model, Mary would in effect be able to cancel the normative consequences of the arrangement unilaterally if she wishes. After all, she is the recipient of the promise, and she can release the promisor at will.

Can an advocate of the standard model avoid the objection by claiming claim that, in cases like 1, agreeing consists of making a certain type of promise (one where the undertaking is believed to be welcome to the recipient) such that the recipient cannot release the promisor, and thus cannot cancel the arrangement unilaterally? The answer should be, I believe, clearly negative. Although some promises are such that the undertaking is believed to be welcome by the recipient, a 'promise' where the recipient cannot release the promisor if she wishes is not a promise. As we have seen, when making a promise, one of the parties has the power to cancel the normative arrangement unilaterally. This is part of the concept of promising. By contrast, when an agreement takes place, one of the parties

does not have that power (except on special circumstances, on which see below).

Secondly, recall case (2), where Peter and Mark both acquire obligations. Suppose that, once the agreement has been reached, Mark sees Peter taking an airplane, and that this means that there is no way that Peter can honour the agreement. To all purposes and intents Peter has already failed to fulfil his obligation. Let us suppose, in addition, that Peter has failed to fulfil his obligation unjustifiably. Finally, let us suppose that the opportunity for Mark to do his part has not arisen yet. In short, assume the scenario is this: Mark knows that Peter has unjustifiably failed to fulfil his obligation before he (Mark) had the opportunity to fulfil his. There is an important sense, I think, in which Mark's position has changed. Mark may not be seen as obligated as before. This is not because his obligation was conditional (for that is not the case), and not, let us assume, because the agreement has become pointless.

Margaret Gilbert has employed a similar scenario to object the standard model. In Gilbert's view, Peter's defection has nullified both his and Mark's obligation. The agreement has been "destroyed". Gilbert claims that, however one attempts to make the standard model more sophisticated, it will always be the case that, since each of the promises exchanged generates its own obligations, there is no way of showing that unilateral unjustified defection of one promise nullifies the agreement as a whole.[23]

The attack affects the standard model but, I think, is wrong in the diagnosis. The diagnosis is wrong because it is based on the incorrect assumption that unjustified defection "destroys" the agreement as a whole. If that were so, Mark would not be in a position to criticize Peter for defecting on the ground that he has violated the agreement. For if unilateral defection destroys the agreement, it would be senseless to invoke the agreement (which ex hypothesi does not exist any more) to criticize the defecting party. Moreover, pace Gilbert, it is important to notice that Mark himself is still obligated (although not as before). Unless the applicable reasons change, Peter can still criticize him if he (Mark) defects when the opportunity for doing the thing he is supposed to do arises, on the ground that he (Peter) failing to fulfil his obligation does not justify Mark's failing to fulfil his. The fact that Peter has defected is not a reason that overrides Mark's obligation, nor a reason that cancels such an obligation. This presupposes that the agreement still stands. Besides, Mark can well go on and do the thing he is supposed to do, while later demanding compensation from Peter (for he would have spent time, and perhaps other valuable resources, in doing what he is supposed to do). This also presupposes that the agreement still stands.

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[23] M Gilbert, *Living Together* (1996) 313-338.

(Some may be tempted to think that Peter, by failing to fulfil his obligation, has in some way, perhaps tacitly or implicitly, released Mark. This is not the case. As claimed, unless the applicable reasons change, Peter can still criticize Mark if he (Mark) defects, on the ground that he (Peter) failing to fulfil his obligation is not a reason for Mark to failing to fulfil his, nor a reason that cancels Mark's obligation. Peter would not be in such a position if, by failing to fulfil his obligation, he had in some way released Mark. Besides, Mark can well go on and do the thing he is supposed to do, and later demand compensation from Peter. Mark would not be in such a position if Peter, by failing to fulfil his obligation, had in some way released Mark from his obligation.)

So Gilbert's attack to the standard model is wrong in the diagnosis. It is based on the incorrect assumption that unjustified unilateral defection by one party 'destroys' the agreement as a whole. But the attack hits the mark because in effect Mark's position has changed, and the standard model cannot explain in what sense this is so.

Mark's position has changed, I believe, in this sense: he is still under an obligation, but he can cancel the arrangement in the face of unjustified defection if he wishes. In other words, he has an option. He can either exercise the power to nullify the whole arrangement, or not do this but rather go on and fulfil his obligation (thus creating a right to demand compensation). According to the standard model, since each promise generates its own obligations, there is no way of understanding why Mark would have that power. Unjustified breach of the promise by Peter to Mark does not give Mark the power to cancel the obligation he has created by promising to Peter. If Peter fails to fulfil his promise, there is no way of explaining why Mark would have the power to cancel his own obligation, the obligation he has created by promising something to Peter. When promising, only the recipient (Peter) can release the promisor.

Can an advocate of the standard model avoid the objection by claiming that, in cases like these, agreeing consists of an exchange of certain types of promises (promises where the undertakings are believed to be welcome to the recipients) such that one of the promising parties can release *herself* if the other party fails to fulfil her obligation? Again, the answer should be clearly negative. As we have seen, when making a promise, only the recipient has the power to cancel the normative arrangement unilaterally. The promisor has no such power. This is part of the concept of promising. So, although some promises are such that the undertaking is believed to be welcome by the recipient, an exchange of 'promises' where one of the parties can release herself if the other party fails to fulfil her obligation is not an exchange of promises.

The final flaw of the standard model is that it assumes that one party may acquire obligations only after communicating her intention to

undertake an obligation if the other accepts *on condition that the other does something*. That is why it conceives of agreeing as a *conditional* promise (or as an exchange of *conditional* promises). Yet it is clear that there are cases where parties agree by one of them simply communicating her intention to undertake an obligation in the relevant way if the other accepts, not by communicating her intention to undertake an obligation if she accepts *on condition that the other does something*.

Suppose Geoffrey and Steven have a common friend who needs to be informed of a piece of bad news. After debating, Geoffrey offers to convey the bad news (after all, somebody has to do it), and Steven accepts that Geoffrey will be the one to do so. It seems clear to me that they have agreed that Geoffrey will convey the bad news and that, in order to agree, Geoffrey has made an offer to convey the bad news that was accepted, but *not subject to the condition that Steven does some other thing*. In other words, there are cases of agreeing where this conditional aspect, an aspect that the standard model deems necessary, is completely absent.

An advocate of the standard model would perhaps deny that Geoffrey and Steven have reached an agreement. Geoffrey, the reply would go, has simply promised Steven to convey the bad news. But this is not the case. If that were the case, Steven would be in a position to cancel the arrangement unilaterally, ie to release Geoffrey from his obligation. For instance, he could release him and decide to convey the bad news himself. But he is not in such a position. Geoffrey could perfectly claim that Steven is not able, without his acquiescence, to opt out. Steven has no power to cancel the arrangement unilaterally.

The foregoing considerations show that the standard account of agreements is incorrect. Agreements cannot be construed as conditional promises or exchanges of conditional promises. They are normative arrangements much more complex than promises.

To propose an alternative account of agreements we should begin by focusing on the case of Geoffrey and Steven first, for it is the simplest case. If one focuses on idealised situations (ie regardless of agreeing practices and putting aside the fact that agreeing might take place within the framework of on-going relationships), one can say that two agents agree to do something, in the simplest case like this, when, and only when:

> (i) one of them communicates to the other her intention to undertake: (a) an obligation to perform an action where the relevant action is believed to be welcome by the recipient such that both parties will share the power to cancel the obligation; (b) subject to the condition that the other party accepts;

(ii) the agent performs the act mentioned in (i) as a means of thereby acquiring the obligation and giving rise to the shared power to cancel it;

(iii) and the recipient accepts.

In turn, an agreement is valid when, and only when, it is the exercise of a normative power. That is, if and only if there is a value in the agents' having the ability to create the special relationship just characterized. The general value at stake is the value of being able to shape, to a limited extent, our moral world. But the particular value at stake is similar to the value at stake in promising: having this ability is valuable because it enables individuals to provide and receive *mutual, reciprocal* assurance. For brevity, I shall say that, when conditions (i)-(ii) are met, an agent makes an offer.

We can now expand the model to cover more complex cases like (1), where one party acquires an obligation *on condition* that the other does something. Two parties agree, in this type of case, if and only if:

(i) one of them makes an offer to the other subject to the condition that the other party performs certain actions;

(ii) and the recipient accepts.

The qualification related to the power to cancel the obligations unilaterally in the face of unjustified defection should be taken as read. And the same considerations about the validity of the agreements apply.

Indeed, we can now expand the model even more to capture more complex cases like (2), where *both* parties acquire obligations *on condition* that the other does something. Two parties agree, in this type of case, if and only if:

(i) A makes an offer to do X subject to the condition that B makes an offer to do Y;

(ii) (ii) B makes an offer to do Y and accepts A's offer subject to the condition that A accepts hers;

(iii) (iii) A accepts B's offer.

These restrictions are necessary to account for the fact that, when two parties agree in this type of cases, the obligations are acquired simultaneously. The qualification related to the power to cancel the obligations unilaterally in the face of unjustified defection should also be taken as read. And the same considerations about the validity of the agreements apply.

Let us label the foregoing model 'the alternative model'. The alternative model seems to provide a good explanation of agreements in the

idealised context. It can also explain practices of agreeing: practices of agreeing are conventional norms to the effect that certain acts count as agreeing, when agreeing is conceived of in the idealised way we have considered. The model can also explain agreements that take place within the framework of special relationships. When agreeing takes place within the framework of different relationships which are partly constituted by norms, they mould the way in which one can agree: they may require that performing certain acts counts as agreeing, when agreeing is conceived of in the idealised way.

So the picture is now complete. It has several implications as to how the content of promises and agreeing is determined. Let us consider how most accounts deal with this problem first.

## 4. The content of agreements

According to the subjective view, for there to be an agreement to do A, the intentions of the parties must coincide.[24] The difficulties of this view seem obvious. Consider cases where one party makes an ambiguous offer. The agent intended to bind himself to do A, but becomes aware that the recipient will reasonably think that he intended to bind himself to do B because the context clearly supports that view. So he acknowledges that he agreed to do B, despite not having the intention to obligate himself to do B. The same applies to many other cases, like blunders, mistakes as to the identity of the other party, errors about the nature of the thing proposed, and so on. These are cases of agreements and, contrary to the subjective view, the intentions do not coincide.

According to the objective view, whether one has agreed to do something depends on whether the parties have performed some actions that count as agreeing as defined by the conventional practice of agreeing, regardless of whether the intentional states are present.[25] This view is, I think, clearly wrong. As noticed, there might be agreements without conventional practices of agreeing. Most importantly, conventional practices may require some intentions to be present.

According to the mixed view, some mental states are relevant while others are not. Endicott's argument is a good example of this approach. He claims that whether the parties have entered into an agreement to do X is

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24 Cf G Treitel, *The Law of Contract* (1995) 1; P S Atiyah, *An Introduction to the Law of Contract* (1995) 82 and P S Atuyah, *The Rise and Fall of Freedom of Contract* (1979) 407-8, 731-3, 744-7.

25 D Goddard 'The Myth of Subjectivity' (1987) 7 *Legal Studies* 263; B Langille and A Ripstein 'Strictly Speaking – It Went Without Saying' (1997) 2 *Legal Theory* 63.

determined by the meaning of the conduct by which the parties agreed as interpreted by a reasonable person. The only 'subjective' aspect of agreement is that the parties must do intentionally what counts as entering into an agreement to do X. For instance, in Endicott's view, if A reasonably thinks that she is signing an autograph (not a form of contract), then she has not agreed to anything, even if B, a reasonable person, would interpret her conduct otherwise (eg because C arranged things so that everything looked to B as if A was signing a contract).[26]

This view is also subject to counterexamples. In some cases the 'subjective' aspect that it requires may not be met and yet an agreement has been reached. For instance, there could be (justified) conventions that, while providing a remedy against C for misleading A, stipulate that A has acquired an obligation by merely signing a form of contract, even if A reasonably thinks that she is signing an autograph, in order to enable third parties like B to perform transactions rapidly and without bothering about A's mental states. In other cases no 'objective' aspect is required. For instance, Peter acts in a way that leads his intimate friend, John, to think that he has agreed to do A, an action that both of them consider relatively unimportant. John thinks this because that is what a reasonable person would make of Peter's conduct. John begins to act accordingly and, when Peter notices this, he promptly claims that he had no intention to bind himself. So John apologizes and claims "I'm sorry, I thought you agreed to do A, but obviously I was wrong". It seems clear that Peter has not agreed to anything, so the objective aspect that the view considers indispensable is absent.

One could attempt to provide more sophisticated arguments in favour of each of these views, but the result will always be, I think, unsatisfactory. It is clear that sometimes we adopt the 'objective' view, sometimes the subjective view, and sometimes the mixed view.

The reason is that agreements normally take place within the framework of on-going relationships or conventional practices that are thought to promote certain values. These relationships and conventional practices may require that certain acts count as agreeing (when this notion is construed in isolation of these relationships and conventional practices). They may demand that the subjective view be adopted. That is the case of the friends, where agreeing requires the presence of all the relevant mental states because the relationship as such requires that one takes into special consideration what a friend intends. They may require that the objective view be adopted, as in the case of the contract signed by mistake, such that one has agreed regardless of whether all the mental states are present. In

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26 Timothy Endicott, 'Objectivity, Subjectivity and Incomplete Agreements' in J Horder (ed) *Oxford Essays in Jurisprudence* (2000) 152, 157, 162, 163.

other cases, the mixed view is appropriate. That would be the case if James, who is confused about dates, had offered her niece to go to the zoo on her birthday and she had accepted.

Perhaps the best way of establishing when one has (validly) promised or agreed to do X when the activity of promising or agreeing takes place within the framework of special relationships or promising or agreeing practices, is in these terms: one has (validly) promised or agreed to do X, in the kind of situations envisaged, when, and only when, a reasonable person -a person that (correctly) assumes that the relationships are valuable and masters the (justified) conventional practices - would conclude that one has promised or agreed to do X. A 'reasonable person' is only a theoretical construct, a model that represents a particular mode of reasoning.

This explains all cases, and shows that neither the objective view, or the subjective view, or the mixed view is correct.

## 5. Conclusion

Much can be learnt of agreements by considering the standard model according to which to agree is to make a certain kind of promise. In particular, when the standard model is fleshed out in terms of the idea of normative powers, the puzzle of why in our conception of promising performing certain acts is a device by which one can voluntarily acquire obligations is solved. But it should be recognized that agreements are not exchanges of promises but (conditional) offers or exchanges of (conditional) offers accepted by the offeree(s) whereby the parties share the normative power to cancel this particular kind of normative arrangement.

A particular strategy to understand voluntary undertakings, according to which one should begin by considering idealised cases and then put them in context (ie as appearing within the framework of special relationships or conventional practices), shows that neither of the usual views as to how the content of agreements is determined (the objective view, the subjective view, or the mixed view) is successful.