

CONTRACT

~ fair

circularity in reliance - p 804

Paradox Lost

F.H. Buckley*

NO.

The fundamental question of contract theory is why a promise gives rise to a legal obligation. Without promising, the scope of contract law shrinks to immediate transfers of property; and without a justification for promissory institutions, a considerable part of contract law is of dubious normative content. An analysis of some special feature of contract law, such as consideration requirements, could not aspire to great moral status if promissory institutions could be abolished without apparent loss.

- too quick

This Article defends a utilitarian theory of promising, under which legal and moral obligations to perform promises are justified by the felicitous consequences of a convention of promise keeping. Utilitarian theories, once accepted as providing the most plausible normative support for the economic analysis of law, fell into disfavor about ten years ago.¹ The rejection of utilitarianism now seems premature because many of the criticisms leveled at it do not withstand close scrutiny.² This Article does not seek to defend utilitarianism in general, however, but rather to demonstrate the inadequacy of rival, nonutilitarian theories. It does so through an analysis of contract theory, for if utilitarianism alone offers a persuasive account of so fundamental a legal institution as contract law, lawyers will find rival theories difficult to accept.

The first rival theory, identified most closely with John

* Associate Professor, Faculty of Law, McGill University. I am indebted for comments on earlier drafts of this Article to Richard Epstein, Serge Gaudet, Esther Goldberg, Mane Hajdin, David Stevens, and the participants at conferences at the University of Sherbrooke and George Mason School of Law. Special thanks also go to my research assistants, Jason Mogg and Kevin Woodall.

1. For a discussion of the movement away from utilitarianism, see R. POSNER, *THE ECONOMICS OF JUSTICE* 48-60 (1981), which is based on Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

2. The clearest rebuttal of the anti-utilitarian position is found in D. PARET, *REASONS AND PERSONS* 3-114 (1984). For a shorter statement of many of these arguments, see Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM; FOR AND AGAINST* 1 (J. Smart & B. Williams eds. 1973).

Rawls, is referred to as a low-fidelity theory because it does not invest promising with a moral status. Under this theory promissory obligations ultimately rest on morally compelling connecting factors between individuals and morally neutral institutions.³ The institution of promising is not ethically desirable in itself. Rather, the connecting factors alone have moral force.

Under high-fidelity explanations, in contrast, the duty to support promising arises as a consequence of the institution's desirability. Examples of high-fidelity theories include both utilitarianism and neoformalism,⁴ which is utilitarianism's second rival. Neoformalism defends promising on the basis of the moral value of a right to promise. As a high-fidelity explanation of promising, neoformalism seeks to provide a justification for the institution of promising and is not simply a theory that, on principles of rights, promises made in a promissory society are binding. Although neoformalists are rights theorists, not all rights theorists are neoformalists, for in promissory matters a rights theorist might subscribe to a low-fidelity theory.

Neoformalism today attempts to recapture private law institutions from a perspective of rights. Like the earlier formalists, neoformalists analyze legal institutions with little regard to their end-state consequences. Unlike their predecessors, however, the neoformalists' defense of contract law is more self-consciously philosophical, with principles of moral choice derived from deontological theories which exclude evidence of the remote consequences of acts. The neoformalists' readiness to bring forward the Kantian heavy artillery may be seen as a compliment to the strength of their adversaries, the nihilists and consequentialists, for whom no justification, or only one that looks to end states, is possible.

Neoformalist theories attempt both to explain and to justify legal rules and institutions by reference to the moral values they serve. The two endeavors are quite different, for the

3. See J. RAWLS, A THEORY OF JUSTICE 342-50 (1971).

4. Neoformalism is a term used in this Article. The leading example of the neoformalist analysis of contract law is C. FRIED, CONTRACT AS PROMISE (1981), which applies a general theory of promissory obligations to the broad contours of contract law. A chapter on lying in C. FRIED, RIGHT AND WRONG 54-78 (1978) provides an excellent analysis of misrepresentation from the perspective of a rights theory. In addition, the libertarian theory of contracts may be neoformalist in its insistence on the respect to be accorded a right to promise. See, e.g., Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291-300 (1986).

descriptive exercise of identifying the values courts find underlying contract law differs from the justification of the institution's ways to man. The descriptive project is a crucial part of any theory of contracts, for if the institution that is defended does not resemble the accepted regime of contract law, some otherwise valid contracts will not generate an obligation of performance. This would be a serious failure, for a normative theory would be unattractive if adherence to it came at the cost of jettisoning one class of binding agreements.⁵ However, the discovery of that value which underlies every valid contract does not of itself generate a moral theory of contracts. Unless it is assumed that the value is ethically desirable, its explanatory power is on the same moral plane as my decision to organize my library by author and not by subject matter. Thus, a justification of promising must be a normative theory which at the same time can account for the circumstances when promises are in fact binding.

While promissory theories would be unpersuasive if they claimed that valid promises did not oblige, they need not seek to explain every kind of bargaining activity. Promissory theorists are therefore free to focus on contract as promise.⁶ Even

5. See Barnett, *supra* note 4, at 270 (criteria for selecting a theory include whether it handles known problems as well as or better than its rivals).

6. As a matter of strategy, a combatant may pick the terrain, eschewing war on all fronts. In a defense of contract law, promissory theorists may legitimately narrow their focus to contract as promise, seeking to justify the legal enforcement of promises in the promisor's moral obligation to perform. This is not to say that all contracts reduce to forward-looking promises. Even non-promissory societies may know the bare gift or simultaneous exchange, by which property (shorn of any warranty rights) may be transferred in the immediate present. Contract law would then largely be limited to the conditions that determine the validity of consent, without any need for promises of future performance.

In the same way, an analysis of contract as promise does not deny the existence of nonpromissory, cooperative norms in many bargains, particularly those involving relational contracts. See, e.g., Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090-92 (1981). For a discussion of non-promissory norms in contract, see I. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) (contract as the relations among parties in the process of future change); Macneil, *Values in Contract: Internal and External*, 78 NW. U.L. REV. 340 (1983) [hereinafter Macneil, *Values in Contract*] (contract as the relations among people in the course of projecting exchanges into the future); Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) (relational norms aim at protection of relationship between parties). The promissory skeptic might then ask whether promises can be viewed in isolation from broader social conventions. But if admittedly not everything in contract is promise, so too not everything is background convention, social norm, firm, or relationship, with one kind of

when restricted to contract as promise, however, promissory obligations cannot be understood except by reference to a pre-existing convention or institution that permits obligations to be incurred in this way. Although the moral status of promissory obligations distinguishes promising from more trivial institutions, conceding a moral value to the imperative does not explain how an individual may have an obligation to perform a promise. If commands are issued by a convention, how do they command *me*? A justification of promissory institutions requires a principle of fidelity by which the convention's moral imperatives ought to be regarded as binding on a particular individual.

This Article argues that a principle of fidelity can be derived only by assuming the moral worth of the convention, but it does not seek to demonstrate that promissory institutions ought to exist.⁷ Instead, it assumes that promising is morally desirable and asks what conclusions follow therefrom.⁸ Part I examines promising as a convention, following the well-known discussion of conventional rules by John Searle and John

monism replacing another. The contract theorist may then select promising for analysis, and ask what values attach to it.

Macneil, from whose holistic perspective it is unrealistic to examine institutions in fractions, criticized C. FRIED, *CONTRACT AS PROMISE* (1981) for its focus on promising. See Macneil, *Values in Contract, supra*, at 409. If everything is connected in this way, however, the only kind of knowledge is of everything at all times and in every place, and the work of analysis, which considers discrete institutions and transactions, would be impossible.

Read uncritically, Macneil's studies might lead one to wonder how promising is possible at all. This kind of mistake, not accurately attributed to Macneil, seems a species of what Austin termed the *ivresse des grandes profondeurs*. See J. SEARLE, *SPEECH ACTS* 176 (1970) (discussing Austin's theory of speech acts).

7. Promising ends at the border of the doctrine of illegality. A further question therefore remains of where, on the continuum between individual liberty and paternalism, promises ought not to be performed. I offer no solution to that problem, nor do I purport to meet the arguments of extreme paternalists who, by expanding the realm of illegality, would ban promising altogether.

Lawyers have recently given much attention to paternalism. See, e.g., Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). For a useful introduction to recent philosophical studies of the subject, see *PATERNALISM* (R. Sartorius ed. 1983).

8. This device owes much to H.L.A. Hart (although its origin is Kantian). See Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955) (promissory institutions presuppose a range of unfettered action).

Rawls.⁹ Because promising is conventional, the obligation to perform a promise must rest on a principle of fidelity to promising by which the convention's rules bind individuals. Two kinds of duties of allegiance are distinguished. Under low-fidelity obligations, the principle of allegiance requires a morally compelling connecting factor between the individual and a convention. High-fidelity duties, on the other hand, base fidelity requirements on the duty to support just institutions, dispensing with special connecting factors.

Part II considers whether principles of low fidelity to promising may satisfactorily be generated through connecting factors. Various explanations of promissory institutions, based on different connecting factors, are examined from this perspective. Although voluntary consent by the promisor, acceptance of benefits, and promisee reliance might all be proffered as possible links between individuals and institutions, none of these provides an adequate account of promising. A successful defense of fidelity requirements must therefore assume the moral value of promissory institutions.

Part III examines what the values of the institution might be in high-fidelity theories. The first high-fidelity theory discussed is neoformalism, which prizes the institution for permitting individuals to exercise a right to promise. Like low-fidelity theories, neoformalism is unpersuasive. While promising might at first seem desirable from a libertarian perspective, the institution is neither a necessary nor a sufficient condition of a free society. As a consequence promissory institutions cannot be justified on abstract libertarian norms but must instead be defended for the special values of a regime of promising. Neoformalism, however, is unable to identify the ethically desirable attributes of promising and therefore must be rejected. Given

9. J. SEARLE, *supra* note 6, at 33-53. Rawls first set forth his analysis of conventional rules in Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), which argued that utilitarian theories of promising were more plausible on a conventional account of the institution. By contrast, this Article suggests that only utilitarianism offers a persuasive theory of promissory institutions. Rawls later abandoned his utilitarian explanation of promising in J. RAWLS, *A THEORY OF JUSTICE* 342-50 (1971).

Hume's category of "naturally unintelligible" rules would seem to have anticipated Searle's constitutive rules. D. HUME, *A TREATISE OF HUMAN NATURE*, bk. III, pt. II, § 5, at 516-25 (L. Selby-Bigge ed. 1967); see J. MACKIE, *HUME'S MORAL THEORY* 96-99 (1980). Kelsen suggested a similar distinction, noting that promissory obligations depend on a higher norm which permits the parties to create obligations by promising. Kelsen, *La théorie juridique de la convention*, 1940 ARCHIVES DE PHILOSOPHIE DU DROIT 33, 47.

the failure of neoformalism, contract theorists must choose between consequentialism, which accords a moral status to the consequences of adopting a promissory regime, and nihilism, which does not. This Article concludes that only utilitarianism provides a satisfactory defense of the institution of promising.

I. OBLIGATIONS OF FIDELITY

It sometimes helps to begin by asking what the questions are. Thus, it is a false start to ask why promises should be performed, for the proposition that promises are *prima facie* morally binding is analytic. As a matter of definition, then, a promise ought to be kept unless it is trumped by an overriding ethical concern, as under the doctrine of illegality in contract law. Instead of asking why promises should be performed, the primary question for promissory theory is why a convention that issues moral obligations is rightly regarded as binding upon an individual. Answering this question requires both an explanation of how promising is conventional and a general theory of fidelity to conventions.

A. PROMISING AS CONVENTION

The device of describing promising as a convention, even if widely accepted in analytic philosophy, no doubt remains counterintuitive. In fact, if convention is used to mean a societal institution that could easily be dismantled,¹⁰ promising is not conventional.¹¹ In another sense of the term, however, promising is conventional. Here a convention is a set of rules that creates the very possibility of the activity in question, and an institution is conventional if it cannot exist without these rules. Games provide the clearest examples of such rules: one can swing at a ball without making contact, but only in a game does this count as a strike. Without the rules of the game, the activity of striking out, hitting a home run, or stealing second would not be possible. For this reason, Searle described these rules as *constitutive rules* (C-rules).¹² To say that a rule is conventional, then, does not mean that it relates to a particular society, but rather that the rule cannot be imagined without the convention. Searle distinguished C-rules from *regulative rules* (R-rules), which prescribe activity without regard to the con-

10. See Midgley, *The Game Game*, 49 PHIL. 231, 252 (1974).

11. The frequent use by philosophers of game as a synonym of convention may bring this meaning to mind.

12. J. SEARLE, *supra* note 6, at 33-42.

ventions of a society.¹³ For example, normative R-rules indicate whether a particular activity is right or wrong but do not define the activity. The distinction between the two kinds of rules is not always sharp, and promissory C-rules may overlap with R-rules. Thus, physical duress may void a contract but might also be wrong even without the convention.

Like R-rules, C-rules also regulate (otherwise they would not be rules). In addition to prescribing conduct, however, C-rules create the very possibility of the activity.¹⁴ Moreover, C-rules may specify not only the consequences of breach but also what kind of conduct is within or without the convention. For example, promissory conventions may stipulate when an utterance successfully constitutes a promise and when it misfires and does not impose an obligation.

Those rules whose compliance require the use of a language constitute a special kind of C-rules, for language is itself a convention. For example, prohibitions of lying are C-rules because they depend on a language under which assertions are ordinarily taken as truthful.¹⁵ Without the convention, the act of asserting would not be possible. Similarly, promising requires a language (or some other convention) that specifies what counts as a promise.

Some resistance to this analysis may come from those who suspect that it represents a downgrading of promissory obligations. Conventional explanations are indeed objectionable if they mistake an R-rule for a C-rule, for such a mistake could

13. *Id.*

14. The distinction between the two kinds of rules may have little to do with their prevalence in various societies. For example, an R-rule may not be incorporated into the operating norms of every society. Even when an R-rule is not incorporated, however, it is still meaningful to speak of the rule being breached, with the failure of the society's norms to incorporate it going at best to an excuse for decidedly wrongful behavior. The excuse could even be rejected and the R-rule thought categorical, giving rise to an absolute prohibition at all times in every society. Similarly, a C-rule may be universal if all societies have adopted the convention. Unlike R-rules, however, a plea that the convention does not figure in one's society is not an excuse but rather a denial that the activity took place.

15. See C. FRIED, *RIGHT AND WRONG* 57 (1978) (every assertion intended to "be understood as an intended move within the assertion game"); Khatchadourian, *Institutions, Practices and Moral Rules*, 86 MIND 479, 482-84 (1977). A language without such a convention might be imagined, although only with some difficulty. *But see* Winch, *Nature and Convention*, 60 PROC. ARISTOTELIAN SOC'Y 231, 242 (1959-1960) ("[T]he notion of a society in which there is a language but in which truth-telling is not regarded as the norm is a self-contradictory one.").

change the nature of the prohibition. If the obligation is contingent upon a society's adoption of a particular convention, then the most heinous act could be rendered benign simply by swapping conventions. We would therefore insist that rules against murder, for example, do not rest on conventions about bodily integrity.

To say that promissory obligations are conventional, however, does not mean that they must be of a lower normative force. A convention's C-rules may endow its outputs with a moral status, and this in fact is how promising works. Promising *prima facie* provides a sufficient moral reason to perform. Asking why this is so, as Rawls noted, is like wondering why batters do not get four strikes.¹⁶ Thus, it is a manifest contradiction for a person to say, "I promise to do *X* but am under no obligation to do so." Such a person either is not promising, or does not understand what promising means. Promissory conventions are therefore to be distinguished from nonmoral games whose imperatives are of a "have-to" kind.¹⁷ (If you want to get on base, this is what you have to do.) Unlike the rules of baseball, which tell us only how to play the game, promissory obligations are both have-to and ought-to in nature. Nonperformance of a promise is not merely unconventional but also morally wrong.

B. RULES OF FIDELITY

The moral status of promissory obligations rests on a rule of fidelity to the convention. Unless it can be connected to people, contract law must be, as an institution without members, a matter of moral indifference. To make this more concrete, consider the parallel to political allegiance. Suppose that Norway may be characterized as a just society. From this, it does not follow that a Canadian has a duty of allegiance to Norway.¹⁸ Similarly, a society may have a convention that wearing a hat gives rise to a peculiar moral consequence. If, hatted, I visit the society, a resident might claim that the convention is invoked. But I may legitimately object that the convention does not bind foreigners. Everyone would agree that a principle of allegiance

16. Rawls, *supra* note 9, at 64.

17. For the distinction between have-to and ought-to rules, see Cameron, *Ought' and Institutional Obligation*, 46 PHIL. 309 (1971).

18. For this reason Simmons argues that "we need a principle of political obligation which binds the citizen to one particular state above all others." A.J. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 31-32 (1979) (emphasis in original).

is needed to bind the foreigner. If so, however, a principle of allegiance is also required to bind a resident of the society. (When does one stop being a foreigner?) In the same way, it is impossible for a promisor to derive a moral obligation to perform merely by doing that which constitutes promising according to the convention. Instead, one must ask what it is about a convention that makes it *my* convention to follow. If no principle of fidelity explains why the promisor is rightly regarded as bound by the convention, she is not obliged to perform.

Rules of fidelity differ from the convention's membership C-rules because no convention in itself requires allegiance without an outside principle of fidelity. In some cases a reference to membership C-rules may adequately explain why a rule should be followed. If the door to a private club bears the sign, "Members only," and I (as a nonmember) enter anyway, the doorkeeper has an easy answer if I ask, "Why can't I go in?" So too, the laws of Norway define citizenship in that country, and promissory C-rules tell us who is a promisor. This will not, however, generate a principle of fidelity if the C-rules (including membership rules) may be legitimately challenged. For example, one might claim that the club's membership policies wrongly exclude academic lawyers and assert a right to enter. In the same way, Canadians may resist the application of Norwegian laws whatever the citizenship laws of that country. These cases require a principle of fidelity separate from institutional membership rules.¹⁹

19. See Khatchadourian, *supra* note 15, at 486-96. Searle's derivation of an *ought* from an *is* seems vulnerable. In an abbreviated form, Searle's argument is that, from the statement, (1) "Jones uttered the words 'I hereby promise to pay you, Smith, five dollars,'" it follows as a tautology both that (2) Jones promised to pay Smith five dollars, and (3) Jones ought to pay Smith five dollars. See J. SEARLE, *supra* note 6, at 177. Hence an evaluative conclusion (3) is derived from a nonevaluative promise (1). See *id.* at 175-98. Searle emphasized that his thesis concerned the philosophy of language and not ethics, or "oughts" and not "moral oughts." *Id.* at 176-77. In either case, however, it must be assumed that Jones is bound by the convention for the derivation to work. While Searle appeared to think that such membership questions could be resolved solely through the C-rules, this will not suffice to generate fidelity rules. Even if a convention points to me, I can still ask, "And am I bound?" As Hare noted, what links me to a convention must be something outside the convention. Hare, *The Promising Game*, 18 REV. INT'L DE PHIL. 398, 408-12 (1964).

Hare's reference to a need for "subscribing members" to a convention will not, however, commend itself to one who rejects contractarian explanations of an obligation of allegiance. *Id.* at 411. For reasons discussed in Part II, Searle is correct in arguing that the act of promising need not amount to an affirmation of the value of the institution. See J. SEARLE, *supra* note 6, at 194-95; see

1. Hybrid Rules

Fidelity rules are a species of a more general kind of rule that regulates relationships between conventions and people. These are *hybrid rules* (H-rules), which are exclusionary when they prescribe who may not participate in a convention and inclusionary when they specify who must do so. H-rules are neither constitutive nor regulative but resemble both. They are regulative insofar as they do not create a convention and conventional insofar as they cannot be understood without one. These exclusionary and inclusionary rules are not R-rules because they cannot be understood by one not familiar with the convention (for example, no admittance to *what?*). But H-rules are not C-rules either, for a breach of the rule leaves the game intact (for example, girls playing minor league hockey). When played in violation of an exclusionary H-rule, a game is still a game. Nonobservance of an H-rule, therefore, is different from nonobservance of a C-rule. This may seem unduly dogmatic, because it is undoubtedly possible to play baseball without complying with all of its C-rules, for example, by ignoring the infield fly rule (or playing with designated hitters). The relevant question, however, is not "What is baseball?," but rather "What are its rules?" Some rules are H-rules *about* baseball rather than C-rules *of* baseball.²⁰

2. High and Low Fidelity

Fidelity duties vary in their content, and the requirements of an inclusionary H-rule may depend on the nature of the institution. It might involve a subscription for membership or financial support for well-organized institutions. Other institutions might demand adherence in less exacting ways, such as through requirements of noninterference.

In the case of promising, it is helpful to distinguish two different kinds of fidelity to an institution. Duties of high fidelity arise when the institution is so morally desirable that societies without the institution are less just. In such cases every individual, no matter how remote from the institution, owes it allegiance. If the institution already exists, it should be granted such support as it requires, and conscientious objection should be prohibited. If the institution does not exist, it should be fos-

also Zemach, *Ought, Is, and a Game Called "Promise,"* 21 PHIL. Q. 61 (1971) (discussing Searle's views on the act of promising).

20. I am indebted to Mane Hajdin for pointing out this distinction to me.

tered.²¹ A justification of a duty of high fidelity requires a universalizable defense of an institution so good that nonsupport is everywhere prohibited. Duties of high fidelity then arise naturally in that they are imposed with or without voluntary acceptance of the institution.²²

By contrast, the principle of low fidelity only binds individuals to an institution by virtue of the particular connecting factor between the two. One example of this is political allegiance to a particular state, in which duties of fidelity may depend on residence or citizenship. Without the requisite nexus, no duty to support the institution arises. If the connecting factor legitimately could be erased, conscientious objectors might then opt out of the institution. Although other variants exist, the leading low-fidelity theory of promising is that of Rawls.²³

What may serve as a connecting factor in a regime of low fidelity depends on the institution in question. In the case of promising, one frequently mentioned candidate is a voluntary act by the promisor from which attornment to the institution's jurisdiction may be implied. Because the act is consensual, the requirement is referred to as an obligation, the term duty being reserved for imperatives that arise without our consent.²⁴ Describing a low-fidelity inclusionary requirement as an obligation may, if one is not careful, lead to confusion, for promising, as a voluntary act, also generates obligations. It is therefore necessary to distinguish between the obligation of low fidelity and the promissory obligation created by the promise. The first kind of obligation might be thought to be owed to institutions and the second to people, if requirements to an institution made sense. It is, however, more accurate to think of fidelity obligations as different in kind from promissory obligations, being rather an element in the justification of institutional rules. Through fidelity requirements, a promisor is estopped from asserting an otherwise available defense to the imposition of a promissory obligation.

Whether a duty is one of high or low fidelity may depend

21. For example, Rawls's duty of justice, premised on a just society, requires that we both support and comply with just institutions which exist and apply to us and also further just arrangements not yet established, at least when this can be done at little individual cost. J. RAWLS, *supra* note 3, at 115, 334.

22. *See id.* at 115.

23. *See id.* at 115-16, 342-45 (discussing principle of fairness or fidelity to promising).

24. *Id.* at 114-15, 343-44.

on the normative value of the underlying institution. A duty of high fidelity might then arise from a more ethically desirable institution, with an ethically neutral one generating only an obligation of low fidelity. For example, if truth-telling conventions were so valuable as to support high-fidelity duties, the inclusionary rule that prohibits cheating at cards would likely be one of low fidelity. In other cases the distinction may turn on the scope of the institution itself. Thus, although allegiance to the just state of Norway is a low-fidelity duty based on a particular connecting factor (such as domicile), a Rawlsian duty to support just societies in the abstract may be one of high fidelity.²⁵

The justice of the institution is not wholly irrelevant to a low-fidelity theory, for at some point its actual injustice would break any bonds of allegiance. In addition, even just institutions may give rise to a principle of low and not high fidelity. Because political allegiance to the just state of Norway requires a connecting factor, the duty is one of low fidelity. Furthermore, the existence of the right kind of connecting factor is a necessary but not a sufficient reason for low-fidelity requirements. For example, one may be bound to two different institutions by separate connecting factors, and allegiance to both may not be feasible. In such cases the dispute may perhaps be resolved by reference to institutional values.²⁶ Thus, while institutional value implies a high-fidelity theory, low fidelity does not necessarily imply a morally neutral institution. Nevertheless, because the justice of the institution need not be of great concern under low-fidelity theories, such theories will be deemed to refer to morally neutral institutions.

Clearly, theories of high and low fidelity cannot explain every question of fidelity. For example, the distinction between the two kinds of duties may have little to do with the kind of support appropriate to a particular institution. If low-fidelity obligations have a lesser stature than high-fidelity duties, this is not because low-fidelity obligations are necessarily less onerous, but only because they depend on a special connecting factor. Low-fidelity obligations may vary in intensity, from require-

25. *Id.* at 115.

26. For example, suppose that as an academic lawyer I feel that I ought to support an association of law teachers from whose activities I derive benefits (the receipt of benefits constituting the connecting factor). If two such associations exist, I may decide that my obligation of allegiance is owed to the one that best accords with principles of justice, whether or not I derive more benefits from it.

ments of mere noninterference to duties such as enlisting in an army during wartime. In addition, when a right of conscientious objection is asserted, those realms of low fidelity, which rightfully forbid defection once the connecting factor has been established, resemble high-fidelity regimes. When the connecting factor is an indelible mark, individuals already bound to a low-fidelity duty differ little from their high-fidelity brethren.

Among defenses of promising, low-fidelity theories are today ascendant.²⁷ It was not always so. Earlier writers assumed that a justification of the institution of promising had to be based on an affirmation of the libertarian values or the goals of promissory regimes.²⁸ A preference for low-fidelity imperatives may then be rooted in a rejection of the values that seem implicit in ethical defenses of the institution. In addition, reasons of economy suggest that institutional values need not be considered if promising may be adequately explained from a low-fidelity perspective. Such theories would then rest not on the ethical value of institutions, but on the connecting factors which bind them to us.

II. LOW-FIDELITY REQUIREMENTS

Low-fidelity explanations of promising may be either promisor- or promisee-based, depending on the connecting factors that give rise to requirements of allegiance. Promisor-based theories focus on the voluntariness of the promisor's conduct in invoking a regime with its own ethical imperatives. An obligation of low fidelity to the institution of promising may thus arise either through consent to the imposition of an obligation or through voluntary acceptance of benefits from promis-

27. One example of this is Rawls's uncharacteristically fatalistic attitude toward institutions (other than the most general features of a just society): one takes them as one finds them. See J. RAWLS, *supra* note 3, at 348-49. Provided that they are not actually unjust, they may be accepted without the need to inquire whether any better institution exists. In addition, critics of promissory institutions are today more prominent than their defenders, whether they subscribe to low- or high-fidelity theories. For an overview of promissory nihilism, see C. FRIED, *supra* note 6, at 1-6.

28. "[D]ans sa mystique, l'autonomie de la volonté consacrerait la liberté, pour les parties, de contracter à leur guise, et sur tout ce qui les intéresse, puisque le Code civil les assimile au législateur." R. SAVATIER, *LA THÉORIE DES OBLIGATIONS* § 91, at 142 (1967) (emphasis in original); see also C. BEAUDANT, *LE DROIT INDIVIDUEL ET L'ÉTAT* 146 (2d ed. 1891); G. RIPERT, *LA RÉGLE MORALE DANS LES OBLIGATIONS CIVILES* § 22, at 38 (4th ed. 1949); Kelsen, *supra* note 9, at 48 ("on doit finalement constater que le principe politique de l'autonomie en matière de contrats repose sur une conception individualiste ou libérale de la vie").

ing. In promisee-based theories, on the other hand, the inclusionary duties rest on reliance by the promisee. In each case the question is why one should support an institution that has no moral significance in itself.

To be successful, a low-fidelity theory must show why allegiance is owed. This alone is not sufficient, however, for the institution that the theory describes also must resemble the accepted regime of promising. A connecting factor that cannot explain why some valid promises are binding cannot provide an adequate justification of promising. The theory, through its connecting factors, must then be able to account for both the H-rules of fidelity and the C-rules of promissory obligations.

Low-fidelity theories are generally unsatisfactory on both grounds. Neither consent nor benefits theories offer a compelling account of fidelity requirements, and only promisee reliance provides a plausible connecting factor between individuals and the institution. Even reliance theories, however, fail to describe promissory C-rules in an acceptable manner because they must gerrymander promises that are not relied on outside of the institution. None of these low-fidelity theories covers all of the contours of promising, for nothing is like promising save promising.

A. PROMISOR-BASED THEORIES: CONSENT

Two kinds of theories may base fidelity to promissory regimes on consensual values. An institution that permits an obligation to result from a consensual act may be thought just, insofar as freedom to choose through promising is considered morally desirable. This explanation, called a will theory because of its focus on voluntariness, endows the C-rules of promising with an ethical content. Because the will theory assumes the moral value of the institution, it must be a high-fidelity theory. As a consequence, will theories cannot be justified from a low-fidelity perspective.

A low-fidelity consent theory must then base a principle of allegiance on the promisor's consent to the imposition of the obligation. Consent theories are, however, subject to two fatal objections. First, it is not possible to demonstrate that promisors actually do consent in a meaningful way to the institution's C-rules. Moreover, even if they did, consent theories would be circular since they cannot explain how consent to promissory institutions could impart an obligation without a prior convention of promising.

1. Reality of the Consent

No promisor formally subscribes to the institution of promising, as a partner may to a firm, and so an act of tacit consent must suffice. The duty to support a promissory regime thus resembles the model of political allegiance provided by social contract theorists. The parallel between fidelity to promising and allegiance to a state is closest when the consent to both is thought to arise solely from residence in regimes in which promissory institutions may be found. Thus, John Locke believed that a foreign visitor to England tacitly consented to obey its laws merely by travelling through the country.²⁹

Although tacit, the consent must be real if it is to support a promise of allegiance. It is difficult, however, to see how such a theory can withstand David Hume's attack on contractarian explanations of allegiance. As Hume noted, the contractarian justification of political allegiance is quite implausible if the consent is implied from forms of participation over which the individual has little control.³⁰ Consent must presuppose rejectability. As for promissory allegiance, mere residence in a promising society is even less likely to provide evidence of tacit consent to the institution, it being harder still to leave promissory societies than political states.

On the other hand, a stronger case for promissory allegiance might be thought to arise if the requisite consent could be found in promising itself. Here the act of promising is seen as a voluntary adherence to an institution whose C-rules determine when obligations arise and are extinguished. By promising, the promisor assumes an obligation to the promisee; in promising, the promisor incurs an obligation of fidelity to the institution.³¹ So regarded, the obligation to support promising

29. Locke, *An Essay Concerning the True, Original Extent and End of Civil Government*, in SOCIAL CONTRACT 1, 70-71 (E. Barker ed. 1970).

30. Hume argued:

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.

Hume, *Of the Original Contract*, in SOCIAL CONTRACT 145, 156 (E. Barker ed. 1970). For other critiques of contractarian explanations of political allegiance, see J. RAWLS, *supra* note 3, at 336-37; Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79 (1981); Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791 (1984).

31. See Barnett, *supra* note 4, at 305 (under consent theory promisor's in-

regimes is positional, attaching to one who voluntarily occupies the position of promisor pursuant to a convention whose membership rules impose obligations to perform on those who take on that position. The principle of fidelity to promising is then similar to the obligation of an elected representative to perform the functions of a political office for which he has campaigned. In both cases voluntary behavior that fulfills the conditions for the application of C-rules explains why it is right that such rules are binding.

This amended contractarian theory of promising still leans heavily on tacit consent. While little sense can be made of consent to a promising regime unless a realistic possibility exists of rejecting promising, it is not easy to see how this might conscientiously be done. Could all promissory language systematically be pruned from one's vocabulary? Eliminating gerunds would likely be harder, while the subjunctive might perhaps be done away with a little more easily. Even that would not suffice for nonverbal conduct signifying consent. Thus, the possibility of opting out of promising entirely seems a little farfetched.³² Yet contractarian theories of promising must assume that it is possible because the consent to promising would otherwise be entirely fictitious.

If consent to promising is the moral glue that holds together all contracts, it is curious that there has been so little concern to obtain such consent. One might propose, in the in-

vocation of institution provides justification for legal enforcement of contracts). This would also appear to have been Searle's view of how one is bound to adhere to a promissory regime. See J. SEARLE, *supra* note 6, at 194-95 (promising invokes undertaking to use the word *promise* in accordance with its literal meaning). A contractarian explanation of allegiance would be plausible if, as Searle thought, a promisor must intend that his utterance will place him under an obligation. See *id.* at 60. If this were the case, a false promise by one who lacks the requisite state of mind might not be binding. The objective theory of contract, however, which dispenses with such spiritual acts, better accords with our understanding of what constitutes a promise. Under the objective theory, a court "exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken." *Laver v. Fielder*, 32 Beav. 1, 13, 55 Eng. Rep. 1, 5 (M.R. 1862); see J. AUSTIN, *HOW TO DO THINGS WITH WORDS* 10 (2d ed. 1975) ("Accuracy and morality alike are on the side of the plain saying that *our word is our bond.*") (emphasis in original).

32. See Hanfling, *Promises, Games and Institutions*, 75 PROC. ARISTOTELIAN SOC'Y 13, 22 (1974-1975) (nonrejectable institutions like promising must be distinguished from rejectable games). Principles of fidelity to the institution still stand in need of justification, however, because a nonconscientious rejection is always possible, with rebels opting out of performance if not out of promising.

terest of resolving moral ambiguities, promissory registration legislation under which only promises by current registrants are binding. The registration system would be expensive, but such prudential or utilitarian concerns would have little importance next to the higher moral purpose served by the scheme. The plan would be equitable, just, and entirely silly. That no sensible person would accept it may put the concern to find a consent to promising in its proper place. This in turn suggests not that such consent may be presumed, but rather that some other justification for promising must be sought.³³

One further attempt at a hypothetical consent must also be rejected. If real consent were possible and a meaningful possibility of rejecting the convention existed, contractarian theories would be unstable insofar as free riders might opt out for strategic reasons. This is to be deprecated if the convention is thought beneficial, and in a hypothetical agreement all members would then consent to the imposition of duties of allegiance. In this way lapsed contractarians may reduce consent to a subservient role. The state is not just because it is chosen; rather, it is chosen because it is just. But if it is assumed that the state is just, consent is superfluous and fidelity may instead be based on a duty to support just institutions. Actual consent is unnecessary if it suffices that one ought to consent. The result, expressly adopted by Rawls in the case of political allegiance, is a duty of high fidelity.³⁴ So too, it is difficult to see how a moral obligation to support a convention of promising can be derived from a hypothetical consent to a beneficial institution unless the benefits are endowed with a moral status.³⁵

2. Circularity

Even if a meaningful possibility of consent existed, a con-

33. Even if a consent to promising were somewhere to be found, this might not suffice to justify the institution. Such a consent would demonstrate a preference for promissory over nonpromissory regimes but nothing more than that. In particular it would not in any way show that the institution's C-rules are preferred to any other set of promissory rules that might be imagined and is not now available.

34. J. RAWLS, *supra* note 3, at 334-37.

35. This forms the basis of Dworkin's argument that hypothetical consent to wealth maximization norms is not equivalent to real consent. Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 574-79 (1980). In the same way, Gauthier's contractarian justification of dispositions of constrained maximization cannot be qualified as a theory of ethics unless the consequences of such dispositions are regarded as good. See D. GAUTHIER, *MORALS BY AGREEMENT* 167-70 (1986).

tractarian explanation of high fidelity to promising would still be objectionable as circular. The theory requires something like a promise to obey promises, and it founders in its inability to explain why the first promise is binding.³⁶ Suppose that two members of a nonpromising society, aware of this difficulty, seek to craft their own promises. So long as the society has some concept of moral duty, they might stipulate that a person who breaches a promise is to be considered as acting wrongly. They might then agree upon their own private contract regime, with C-rules as detailed as any of those found in a promising regime. In these circumstances Joseph Raz argues that they have consented to the rules of promising and that the promisor is required to perform.³⁷ But is she? Assume that the parties specify that a certain verbal formulary signifies that an obligation has been undertaken. This might be a statement such as "Let me be bound to perform." Even here, however, it is meaningful to ask whether the private convention morally binds its participants. Without a convention to uphold private conventions, they are not bound. But what is the prior convention, if not the institution of promising? The convention was constituted by its two participants through a promise to adhere to its norms. If that promise were not binding, the convention would not be, either. A promissory regime therefore cannot be crafted from a private convention.

If contractarian explanations of high-fidelity duties are necessarily circular, can a principle of consent sufficient to support an obligation of low fidelity be extracted from adherence to a convention of promising that already exists? It is unnecessary to wonder how the institution may arise if it is already present in society. Nevertheless, a justification of an institution

36. The circularity of contractarian explanations of how promising may arise was noted by Hume. See Hume, *supra* note 30, at 160-61. To avoid this difficulty, Locke, while seeking a connecting factor of consent to explain political allegiance, turned to natural law theories to justify allegiance to such institutions as promising and property. See P. RILEY, WILL AND POLITICAL LEGITIMACY 72-73 (1982); J. TULLY, A DISCOURSE ON PROPERTY 48-50 (1980). In the same way, Rawls's theory of justice cannot plausibly rest on a contractarian foundation. At times Rawls does speak of the deliberation in the original position in terms of a choice among alternatives. J. RAWLS, *supra* note 3, at 11-13, 41-42, 45. In the end, however, the procedure would seem not consensual but rational, with a single version of the theory deduced from abstract principles. See M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 132 (1982) (stating that "what begins as an ethic of choice and consent ends, however unwittingly, as an ethic of insight and self-understanding").

37. See Raz, *Promises and Obligations*, in LAW, MORALITY, AND SOCIETY, 210, 214-15 (P. Hacker & J. Raz eds. 1977).

that relies on a feature of the institution for support is still circular, unless that feature can be independently established as a criterion of value. Suppose that a promissory regime is not deemed just in itself, as low-fidelity theorists would have it. Why then does a promisor's consent to the institution represent a choice that her society must respect? The assumption must be that in choosing promising the promisor provides a justification for imposing a promissory regime. This assumption presupposes that the choice itself imports a binding commitment. Yet this is true only if one is bound to perform that which one has consented to do. This defense of contractarianism must then be circular and must reduce to a will theory which justifies contract law on the basis of the intrinsic value of the convention. Because it relies on the value of the convention, this explanation of promissory allegiance must rest on high-fidelity theories which dispense with connecting factors.

B. PROMISOR-BASED THEORIES: BENEFITS

1. Principle of Fairness

The second low-fidelity explanation of promising grounds a duty of allegiance on the promisor's receipt of a benefit. H.L.A. Hart regarded this social quasi contract as the only intelligible foundation of political obligation. "[W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions have a right to a similar submission from those who have benefited by their submission."³⁸ In these circumstances both groups are bound in a mutuality of restrictions, with the former accorded a moral right to support from the latter.

One difficulty with Hart's theory is that the obligation of fidelity arises whatever the moral quality of the institution or its benefits. A burglar may thus be subject to an obligation to a thieves' society that bribes police officers. To rescue his explanation of inclusionary rules from a duty to support immoral institutions, Hart relies on a category of morally unperformable obligations: although the obligation of fidelity arises, it may be one that ought not to be performed.³⁹ Similarly, promissory C-rules might provide that immoral promises

38. Hart, *supra* note 8, at 185. For a similar argument, see W. ROSS, THE RIGHT AND THE GOOD 27 (1930). Plato's *Crito* likely advanced the earliest such theory. See PLATO, *Crito*, in THE COLLECTED DIALOGUES OF PLATO 27, 37 (E. Hamilton & H. Cairns 2d ed. 1961).

39. Hart, *supra* note 8, at 185-86.

generate unperformable obligations.⁴⁰ Hart's benefits theory, however, does not describe how one ordinarily thinks of political allegiance. Even with a receipt of benefits, no obligation arises to support a wholly evil society. At some point, for example, a state may be so unjust that any obligation of fidelity is extinguished, with the only possible requirement being a duty of rebellion.⁴¹

Rawls's benefits theory, called the *principle of fairness*, provides a less counterintuitive explanation of duties of fidelity.⁴² Unlike Hart's theory, the principle of fairness presupposes that the institution satisfies Rawlsian principles of justice. But notwithstanding the requirement that the underlying institution be just, the principle of fairness is a low-fidelity theory of promise keeping. This is because ethically neutral institutions may satisfy the principle of justice, provided that basic liberties are not infringed and that any resulting changes in social and economic inequalities respect Rawls's difference principle.⁴³ The more trivial the institution, then, the more easily are principles of justice satisfied: how, after all, can tiddlywinks be troublesome under the difference principle? To say that promising is just is therefore not to say that it is necessarily morally preferable to regimes without promising, as in a high-fidelity theory of justice. In the same way, Rawls is careful to note that his theory of justice is compatible with both private and socialized property regimes.⁴⁴ Even if one could argue that promising served efficiency goals, this would not provide an ethical

40. That is to say, an obligation that ought not to be performed. That *ought* and *obligation* statements should be distinguished in this way may be seen in how we think about contradictory promises. If I promise Smith to do X and Jones to do *not-X*, the two obligations both stand. I do not, for example, absolve myself from one of the obligations through a cancelling out of the promises. On the other hand, I cannot say that I ought to perform both promises, if *ought* implies *can*. On *ought* and *obligation* statements, see G. WARNOCK, *THE OBJECT OF MORALITY* 94-96 (1971); Beran, *Ought, Obligation and Duty*, 50 AUSTRALASIAN J. PHIL. 207, 207-09 (1972); Brandt, *The Concepts of Obligations and Duty*, 73 MIND 374, 376-80 (1964).

41. See M. WALZER, *OBLIGATIONS—ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 3-23 (1970); Pitkin, *Obligations and Consent—II*, 60 AM. POL. SCI. REV. 39, 41-42 (1966).

42. J. RAWLS, *supra* note 3, at 342-50. Earlier versions of Rawls's theory, then called the *principle of fair play*, may be found in Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 180-84 (1958); Rawls, *The Justification of Civil Disobedience*, in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* 241 (H. Bedau ed. 1969); Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hook ed. 1964).

43. J. RAWLS, *supra* note 3, at 75-83.

44. *Id.* at 274.

defense of the institution, for Rawlsian principles of justice are always prior to those of efficiency.⁴⁵

Rawls does not specify the sort of benefits he has in mind, but clearly not every kind will suffice. They must not be too general, for if they had no reference to promising they could as easily support a principle of nonfidelity. Neither may they be too specific. In a bilateral contract, the benefit that comes first to mind is the promisee's reciprocal promise to perform or his immediate performance. Basing allegiance on such benefits, however, is more properly a reliance theory which justifies inclusionary H-rules on the basis of anticipated harm to promisees.⁴⁶ The benefits must then arise from promising itself. This, seemingly, is what Rawls has in mind, for the principle of fairness is stated as a rule of adherence to an institution and not merely an obligation to an individual promisee.

Thus, Rawls's argument is that an individual who has accepted benefits from an ethically neutral (although not unjust) institution is bound to support it. Benefits that derive from an institution that is ethically neutral share the institution's neutrality. If benefits were morally desirable in themselves, they would provide a sufficient reason to adhere to promising regimes. In that case the principle of fairness would simply rest on the natural duty to support a just regime of promising. Because the duty would be one of high fidelity, it would then be unnecessary to look for connecting factors. For this reason Rawls does not seek to base obligations of political allegiance on a receipt of benefits any more than on social contract theories. His natural duty of allegiance to just societies arises involuntarily, for the institution itself is deemed just.⁴⁷

Because the benefits of promising are ethically neutral, the principle of fairness cannot be defended for its effect on the production of public goods. A benefits theory does indeed promise greater stability for the institution than consent theories because beneficiaries are not permitted to free ride. If beneficiaries do not support an institution, their free riding may encourage other defections from it until it may at last disappear. When present participants in the institution are injured thereby, this may be objectionable under reliance theories of promising. Aside from this, however, the collapse of the institution is of no moral concern if it is ethically neutral.

45. *Id.* at 79-80.

46. See *infra* text accompanying notes 67-75.

47. J. RAWLS, *supra* note 3, at 335-36.

Free-rider arguments have force only if it is assumed, from a high-fidelity perspective, that promising should be preserved. The survival of promissory institutions is therefore no part of the purpose of the principle of fairness, nor is it justified if that is its result.

2. Promissory C-rules

If the receipt of benefits grounds the obligation, as Rawls argues, promises are not binding when no benefits have been received. As such, Rawls's explanation of promising is inconsistent with the institution's C-rules. So long as the theory is not tautological, it should be possible to posit persons who have not derived benefits from promising, such as recent arrivals from a nonpromissory regime. Even though they have received no benefits from promising, we would fault them if they promised and failed to perform. If they objected, we would simply tell them that their moral or cultural education was incomplete.

3. Valuation Problems

A further difficulty of benefits theories is their reliance on strong assumptions as to how the benefits may be identified. For example, from a high-fidelity perspective, the advantages of promising seem entirely obvious, for promising leads to a greater likelihood of reciprocal reliance by contractors. But these prospective gains will not suffice to ground the principle of fairness, under which the benefits must have been received in the past. The difficulty of identifying the benefit (not morally good in itself) that is received by living in a promising society is analogous to the problem that arises in restitution when unsolicited services are provided. While the donor of the services may have incurred a detriment, absent something that looks like solicitation or consent it is not clear that such services are of any value to the recipient. As a consequence officious gifts ordinarily do not ground restitutionary claims.⁴⁸

48. Because valuations of property and services are subjective, the risk is that the transformation will not be Pareto superior. The policy against recovery in restitution is therefore strongest when the donor of the benefit might easily have eliminated this risk by seeking instructions from the beneficiary. See, e.g., *J.L. Carpenter Co. v. Richardson*, 118 Conn. 322, 172 A. 226 (1934) (mechanic performed additional work on motor boat that owner had left simply for a tune-up). But recovery is more likely to be permitted when the valuation problems are of diminished importance. Thus, restitution is nearly always granted for a mistaken payment of money. See 3 G. PALMER, *THE LAW OF RESTITUTION* §§ 14.18-19 (1978).

How much harder it must be to derive a principle of fidelity to promising, whose benefits are so much less focused than goods or services in restitution. Did I receive a benefit from promissory institutions? Perhaps, instead of owing allegiance, I might simply repay it, if I only knew to whom.

Given such valuation problems, Robert Nozick argues that obligations of political allegiance may disappear altogether.⁴⁹ A similar difficulty besets benefits theories of promising. Suppose one argues that she derives no benefit from the institution. She may regard promising as less desirable than life in nonpromissory regimes. We cannot easily contradict her, so long as no moral value is ascribed to promising. This kind of objection could be handled without difficulty on a high-fidelity theory of promising under which a subjective estimate of value can be trumped by an objective measure of the benefit of an institution. But how could this be done on a low-fidelity theory? In political philosophy, as in law, valuation uncertainties may prevent the resolution of substantive issues.

4. Voluntary Acceptance

The objection based on valuation uncertainties may tell more against benefits theories of political than of promissory obligation. The benefits of promising, although not uncontested, at least seem less controversial than the benefits of actual governments. If promising offers prospective benefits, a present promisor might even be seen to have received benefits from past promisors through their performances, which renders her present promises more creditable.

Even if promisors are assumed to have derived a benefit from the institution, however, it is difficult to see how the mere receipt of benefits gives rise to duties of allegiance unless the benefits are voluntarily accepted. Without such acceptance a fidelity requirement may not be extracted merely by officiously providing a person with a benefit, even if its desirability is conceded. Consider, for example, the case of a community about to decide whether to take measures to reduce air pollution. Assume that the scheme's expected value exceeds its expected costs and that for each member of the community it represents a Pareto superior transformation. All recipients are asked to contribute to the expense. Despite one person's objection, the measure is carried out and air pollution is reduced without his

49. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 93-94 (1974).

support. The dissenter's failure to contribute to the scheme would justify his exclusion from its benefits. But if the benefits are nonexcludable (as is likely the case with air pollution measures), no inclusionary rule arises even if the scheme is deemed beneficial for each member of the society. In the same way, no obligation of support arises through the receipt of the nonexcludable benefits of Eastern Standard Time, the market for corporate control, and French literature. Without having voluntarily accepted benefits, one does not owe loyalty.⁵⁰ Rawls therefore excluded from the principle of fairness those nonrejectable benefits which come whether we will them or not.⁵¹ If these benefits, like clean air, cannot be rejected, it follows that they cannot feasibly be accepted by their recipients without express consent.

A further difficulty of benefits theories of promising then is that the benefits do not seem voluntarily accepted. Clearly the general benefits of living in a promissory society do not constitute an act of acceptance. At best the acceptance might be found in the act of promising itself, in the knowledge that promises are more likely to be relied on by virtue of performance by prior promisors. Such past performances are public goods, inasmuch as they facilitate future reliance by other promisees. If these benefits are accepted by promisors in their promises, this may be thought sufficient to support the principle of fairness. These benefits, however, are scarcely more

50. See A.J. SIMMONS, *supra* note 18, at 122 (Canadians do not owe allegiance to the United States simply because they, as well as Americans, derive benefits from law enforcement in the United States); see also Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616, 619 (1982) ("One cannot voluntarily accept a good one cannot voluntarily reject.").

It may be objected that such institutions seem less like active schemes of social cooperation than the town meeting on air pollution. If principles of fairness were restricted to community meetings or joint enterprises, however, they could scarcely explain the obligation to support a regime of promising. There is, moreover, no compelling reason why a benefits theory should be so limited, as long as some meaningful way exists of exhibiting an obligation of fidelity to the institution. See A.J. SIMMONS, *supra* note 18, at 104 (benefits theories extend to broad range of schemes, programs, enterprises, and institutions).

51. J. RAWLS, *supra* note 3, at 111-12. Greenawalt has argued that voluntary acceptance is not required if the recipient is delighted to receive a benefit, understands the cooperative scheme by which it is supplied, and thinks he or she received a fair share. See Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727, 757 (1984). But if the recipient's actual feelings are what matters, it is odd that fair-minded people should owe obligations when ingrates do not. If the recipient's actual feelings do not matter, Greenawalt's theory is no different than that of Simmons.

rejectable than the general material benefits available to those who live in a promising society.⁵²

Assuming, however, that it were possible to reject promising, finding a voluntary acceptance of benefits in the act of promising would greatly narrow the difference between benefits theories and contractarian explanations of promising.⁵³ The more that voluntariness is emphasized, the more closely the acceptance of benefits looks consensual. Consent theories, however, do not adequately explain promising.⁵⁴ Furthermore, to distinguish the principle of fairness from contractarian accounts of promising, it is necessary to posit a case in which benefits are voluntarily accepted but not consented to. John Simmons attempts to give an example of this in a community meeting to consider a clean water proposal.⁵⁵ One holdout announces that he wants nothing to do with the plan and votes against it. The proposal nonetheless carries at the meeting, and the community implements the plan. Unlike clean air, clean water need not be accepted because it is available only to those who take it from a particular well. This the holdout does, at night so no one will see him. It is presumed that the benefits of clean water cannot be excluded, in that the community cannot prevent him from drawing water from the well. Enough exists for everyone, and no one misses what he takes. He has not consented to the scheme, but Simmons concludes that an obligation of support arises from the acceptance of benefits.⁵⁶ Nozick's argument that a mere receipt of benefits without consent does not ground allegiance is thus alleged to be refuted.

Simmons's example is not well chosen, however, for the holdout's removal of the water when he said he would have nothing to do with the plan seems fraudulent. This example does not support a principle of fidelity, but only, if at all, a duty of nonfraudulent bargaining. In addition, even without the holdout's misrepresentation of his intentions, Simmons's example is flawed by its failure to distinguish between the allocational and distributional effects of free riding in the consumption of public goods.⁵⁷

52. See *supra* notes 29-33 and accompanying text.

53. See A.J. SIMMONS, *supra* note 18, at 124 (if principle of fairness binds only those who have undertaken to support institution, it collapses into theory of consent).

54. See *supra* notes 29-37 and accompanying text.

55. A.J. SIMMONS, *supra* note 18, at 126-27.

56. *Id.* at 127.

57. A similar difficulty arises in Klosko's argument for a principle of fair-

When an individual refuses to participate in collective action, two allocational consequences are possible. First, the probability increases that the scheme will not be undertaken by the remaining participants. Alternatively, if the scheme is implemented, there is a probability that it will not be on such a large scale as it would have been had the individual joined in.⁵⁸ This is undesirable if, on a high-fidelity perspective, the scheme is one that should be supported. These *ex ante* considerations, however, do not ground an obligation of fidelity if it is assumed that the plan is ethically neutral.

In addition, if allocational considerations could support fidelity requirements on the receipt of rejectable goods (like clean water), they would also do so when nonrejectable goods (like clean air) were received. Allocational issues must be determined at the time of the meeting to approve the plan, not at the later time when the holdout receives the benefits. If what is important is the provision of public goods, fidelity becomes important only at the meeting, when support is requested and when the plan will succeed or fail. Thus, no difference exists between the benefits of nonrejectable clean air and those of rejectable clean water. A defection at the meeting might be fatal to either plan if it encourages more attempts at free riding and the scheme eventually collapses. The defection might be principled, based on a preference for an alternate scheme of pollution control or perhaps for an entirely different cooperative scheme. But even in the hardest case, that of the defector angling for a free ride, rejectable benefits cannot be distinguished from nonrejectable ones. An obligation of fidelity must arise in both cases or in neither. If the obligation arises in both cases, with no need for rejectability, the class of institutions to which fidelity is owed would be impossibly broad. If neither

ness on the receipt of public goods that are "presumptively beneficial." Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241 (1987); Klosko, *The Principle of Fairness and Political Obligation*, 97 ETHICS 353 (1987) [hereinafter Klosko, *The Principle of Fairness*]. What Klosko means by presumptively beneficial goods are those needed to maintain a minimally acceptable life. In such cases "the indispensability of the goods overrides the outsider's usual right to choose if he wishes to cooperate." Klosko, *The Principle of Fairness, supra*, at 355. If these benefits are deemed morally good, the principle of fairness would collapse into a high-fidelity theory. See Simmons, *The Anarchist Position: A Reply to Klosko and Senor*, 16 PHIL. & PUB. AFF. 269, 272 (1987). If not, Klosko's argument is subject to the criticisms made in the following paragraphs.

58. See Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL. J. ECON. & MGMT. SCI. 359, 359-60 (1974).

case generates fidelity requirements, then benefits theories must fail.

Arguments for fidelity requirements on distributional theories are equally troubling. If the holdout makes clear at the meeting that he will not contribute to the plan but will accept its benefits, the other participants will have been put on notice of his plans and will only proceed on that basis. If exclusion from benefits were feasible, the holdout's refusal to participate in the plan would certainly justify his exclusion from the benefits. If not feasible under present technology, the participants might invest in the production of new technology that would exclude the holdout. They might also seek to exclude him from the benefits of other public goods to which he cannot claim an entitlement. They cannot, however, claim that they are entitled to his support at the meeting.

Moreover, if distributional theories do not require the holdout to support the plan at the meeting, nothing much changes after the meeting when he takes water from the well. The participants will have already reacted to his defection, and the well will never run dry. This suggests that issues of distributional fairness, like those of allocational efficiency, should be determined at the time of the meeting. If they were not, the holdout would be wrong to take water from the well even if he has warned the participants of his plans and the supply of water is inexhaustible.

The principal reason why distributional arguments are unpersuasive, however, is that they suffer from an impoverished view of social relations. Public goods are too many and too varied to speak of fidelity requirements on their receipt. Like Blanche Dubois, we rely on the kindness of strangers, and in unforeseen ways assist others, as Frank Capra showed us in *It's a Wonderful Life*.⁵⁹ These benefits must not be trivialized; if they could be measured, they could well be as important as the benefits of promising. Beyond kindness is the spillover effect of ubiquitous public goods, like Richard Arneson's case of the well-dressed person who walks down the street, providing pleasure to those who see her.⁶⁰ Such benefits may be voluntarily accepted so long as the viewer permits his gaze to settle on the well-dressed person, but he could hardly be expected to choose

59. Liberty Films, Inc. 1946.

60. Arneson, *supra* note 50, at 621; see also Simmons, *Voluntarism and Political Associations*, 67 VA. L. REV. 19, 29 (1981) (receipt of spillover benefits does not ground fidelity requirements).

between looking away and owing an obligation. No one could seriously suggest that a Rawlsian meter is running.⁶¹

Benefits theories of fidelity to institutions are beset by other difficulties, notably because of their static character. Once benefits are received, one is bound forever and subsequent rejection of the institution is wrongful. Even the abandonment of promising by all other members of society would not loosen one's ties to the institution if the obligation is owed to past promisors.⁶² A dynamic account of how new institutions replace old ones would always begin with some first act of disloyalty, and each new institution, unless it arose out of thin air, would be founded on treachery. Even the features of an institution would remain immobile. Either institutions would never evolve or a theory based on loyalty would periodically require disloyalty. If applied consistently, the principle of fairness would inevitably offend under any regime of freedom of association that might reasonably be desired. For example, suppose that, of two similar institutions, one provides greater benefits. Surely recipients of benefits from the less desirable institution would not be barred from adopting the first. Although I derive benefits from the English language, I am free to enjoy them without moral scruples and may even without any sense of guilt abandon English for Norwegian the moment I find greater benefits in doing so. It is absurd to suggest that when taking benefits from such institutions, one should calculate nicely whether such benefits have in fact been supported (and, if so, to the requisite extent). One has the right to shop around, to be fickle. So long as two institutions are ethically indistinguishable, no obligation of fidelity to either arises through a receipt of benefits.

The receipt of benefits, therefore, does not suffice to ground a duty of fidelity to promising. This is not to say that every morally desirable enterprise should be supported without regard to the voluntary acceptance of benefits. The absence of a connecting factor may absolve one from obligations of alle-

61. This analysis does not mean to imply that public goods are never valuable. In fact, it is the low-fidelity theorist who refuses to ascribe moral worth to them. This Article suggests that public goods may be morally desirable, and if so they are best defended from a high-fidelity perspective. In such cases they should be supported by all, without regard to the degree to which past benefits were shared.

62. See R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 104 (1975) (criticizing fidelity requirements, based on past receipt of benefits even though others generally do not cooperate).

giance to just institutions. The lawyer who derives benefits from a local bar association may feel obligated to support it. She would owe no such obligation to an association of dentists even if both are desirable institutions. As promising illustrates, however, duties of fidelity do not always require a special connecting factor. As a consequence the receipt of benefits is neither a sufficient nor a necessary condition for an obligation of fidelity to promising.

5. Gratitude Theories

A final attempt at a benefits theory bases obligations of fidelity on gratitude for receipt of a benefit. It is, of course, difficult to speak of an obligation of gratitude, which in part is simply a feeling rather than an action. In some cases the debt of gratitude may even be requited with an expression of a feeling of gratitude. As Simmons notes, people have less control over their feelings than over their actions, so an obligation to feel grateful sounds odd.⁶³ Moreover, even when gratitude might lead one to some more positive action, it does not seem correct to label this an obligation. What distinguishes a gift, for which gratitude is appropriate, from mere self-seeking cooperative behavior is that a gift excludes obligations of reciprocity.⁶⁴

In addition, if gifts alone call for gratitude, the idea of gratitude is not easily extended to institutional benefits. What is needed are actual givers, quite apart from the institution itself: the gift without the giver is bare. Institutional benefits, however, are scarcely gifts. In the case of promising, the institutional benefits are derived from past performances by other promisors through which one's promise becomes more worthy of belief. But if past promisors are the donors, their self-interested performances generally are not gifts to anyone.⁶⁵ Without the instinct of charity, institutions such as promising are not suitable objects for gratitude.

Furthermore, a gratitude theory of fidelity to promising cannot succeed because gratitude is not an impersonal virtue, but is rooted in the relationships that it permits to flourish. It is part of a gift ceremony in which both donor and recipient

63. A.J. SIMMONS, *supra* note 18, at 166-67.

64. See Lyons, *The Odd Debt of Gratitude*, 29 *ANALYSIS* 92, 92 (1969); Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 953 (1973).

65. See A.J. SIMMONS, *supra* note 18, at 187-89 (criticizing gratitude accounts of political obligations); Berger, *Gratitude*, 85 *ETHICS* 298, 300 (1975) (no gratitude owed for contractual performance).

demonstrate their bonds to each other. For this reason a want of gratitude is most objectionable when the relationship is most prized, as with family ties. Similarly, the recipient who may rightly reject the relationship does not have to show gratitude for the gift.⁶⁶ What then is important is whether the relationship should be upheld. Thus, gratitude for the benefits of a promising regime is appropriate only if a case can be made for promising on other grounds, as when the institution is thought just in itself. Although this might justify duties of high fidelity, it does not support low-fidelity obligations.

C. PROMISEE-BASED THEORIES: RELIANCE

1. Duty of Respect

Reliance theories of promising are based on the foreseeable harm to promisees if promises are not kept. Because he trusted the promisor and acted upon the promise, the promisee is worse off on breach than he would have been had the promise never been made.⁶⁷ Under these circumstances the requirement of allegiance reduces to a duty to prevent harm from coming to those who rely on a person who breaches her promise.

Reliance theories are circular when applied in defense of high-fidelity duties. If the institution does not exist, it cannot be justified through promissory reliance, for promisees would not have relied in the same way on promises without the obligations generated by the institution.⁶⁸ Promisees would simply adjust their actions in accordance with their lessened expectation of performance and would have only themselves to blame for overreliance. Breach would not be an occasion for moral concern unless it were thought ethically desirable to resolve informational disparities concerning the likelihood of performance. This, however, would require endowing the institution of promising with moral status without regard to whether reliance

66. See L. HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 70-73 (1979) (gifts should be refused when acceptance would establish inappropriate relationship to giver).

67. "My statement is like a pit I have dug in the road, into which you fall." C. FRIED, *supra* note 6, at 10.

68. This circularity has been described as a "secret paradox of the common law," see P. ATIYAH, *PROMISES, MORALS, AND LAW* 38 (1981) (arguing that this secret paradox is largely historical), but this difficulty with reliance theories was well known to some of their earliest proponents. See, e.g., Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52, 59-60 (1936).

interests are affected.⁶⁹

Although reliance theories do not support high-fidelity duties, they do generate low-fidelity duties to support the institution. A convention requires a minimal respect, if not allegiance, so long as any harm may come to another through an assumption that one is acting according to it. When driving in a foreign country, for example, I should learn on which side of the road to drive, and not merely for my own sake. So too, a visitor to Canada from a nonpromissory society has a duty of fidelity to ensure that no one mistakenly believes she is promising. Thus, an inclusionary H-rule of *respect* arises, under which one is bound to take reasonable care to inform oneself of a society's conventions and to ensure that other members of society are not misled as to one's participation in them. This duty of respect can be distinguished from the more exacting requirements of allegiance. The duty is not imposed on everyone, but only on those in sufficient proximity to the society in which the convention is found to give rise to a risk of harm. The duty is therefore one of low fidelity.

In the case of promising, the duty of respect requires one to tread warily around the institution's borders, lest others come to harm. Breach of the duty may invoke a tortious regime of sanctions premised on promisee reliance. In other cases the sanctions may be found within promissory C-rules, and transgressors may become promisors.⁷⁰ If one were bound to take care to learn the convention, one would also know when it binds one. A duty to respect the institution by performing promises or abstaining from promising thus arises. Because opting out of promising in a promissory society is virtually impossible,⁷¹ the duty to perform or abstain generally collapses into a duty of performance.

69. An institution of quasi promising may survive despite a lack of moral sanctions. Promisors might have strong prudential reasons to perform, insofar as a reputation for trustworthiness raises the inference that cooperative behavior will be repeated in the future. MacCormick is undoubtedly correct in pointing out that, for this reason, a reliance theory of quasi promising need not presuppose a convention that promises are regarded as binding. MacCormick, *Voluntary Obligations and Normative Powers I*, 46 *ARISTOTELIAN SOC'Y* 59, 62-69 (Supp. 1972). But if promises do not create an obligation, a reliance theory cannot be advanced to explain why they ought to do so. In addition, as MacCormick notes, the likelihood of reliance is far greater given the existence of a convention of morally binding promises. *Id.* at 72.

70. The result is, of course, an objective theory of contracts, in which promissory obligations may attach to fraudulent or negligent promisors. See *supra* note 31.

71. See *supra* notes 29-33 and accompanying text.

This reliance-based explanation of low fidelity avoids the circle into which high-fidelity duties lead. The perform or abstain requirement assumes the existence both of the convention and of an obligation to prevent other parties from being harmed by relying on one's participation in it. Moreover, it is usually beside the point to argue that such promisee reliance as arises in a society is undesirable. Even if greater self-reliance by the promisee might be preferred, this ordinarily is irrelevant if his behavior was reasonable by his society's conventions. Under the duty of respect, one generally takes one's conventions as one finds them.⁷²

A promise thus may be extracted from patterns of reliant behavior. Suppose, for example, that a practice has developed whereby a friend drives me home from work each night. My friend has never formally undertaken to do so, but he and I both know that I have come to expect a ride and that by waiting for him I miss the last bus home. One day he leaves early without telling me. I might legitimately be upset by my friend's behavior and complain that he broke a tacit promise to give me a lift (or at least to warn me to find alternative transportation home). In contrast to this example, however, other examples of reliance clearly do not import an obligation. The burghers who set their watches by Immanuel Kant's walks relied on him but could not have been heard to complain if Kant had altered his habits. Reliance, therefore, may not be a sufficient condition for a promissory obligation.

It is necessary to find some way to distinguish these two kinds of reliance so that only the first gives rise to a promise. It might then be suggested that questions about fidelity should focus on the something else that differentiates the first example from the second.⁷³ But this mistakes a justification of an inclusionary H-rule with a description of the institution's C-rules. The difference between justified and unjustified reliance may simply be that, under promissory C-rules, one act counts as a promise while the other does not. An explanation of this difference may refer to the institutional values of promissory regimes, which prescribe its contours. Once a convention ex-

72. In an extreme case, the convention may be so unjust that opting out is permitted in spite of reliance. In other cases the more proper course is to warn those who might rely, rather than to instill self-reliance the hard way.

73. See, e.g., P. ATIYAH, *supra* note 68, at 64-68, 127-29 (extra element as compliance with socially accepted values).

ists, however, an inclusionary rule can be found in a duty of respect.

2. Promissory C-rules

Notwithstanding that reliance theories provide an explanation for requirements of low fidelity, these theories remain implausible insofar as they fail to offer a satisfactory account of the contours of promising. Duties of respect do not oblige without promisee reliance, and for this reason reliance theorists cannot explain why a promise remains binding even if the promisee has not relied in any way. To meet this objection, reliance theorists may prefer to focus on the vindication of the promisee's reasonable expectations. Here too, however, the theory remains unpersuasive. If it simply means that, on every promise, the promisee ought to have expected performance, the theory is tautological. If instead it limits promissory obligations to cases in which the promisee did expect performance, the theory does not offer an adequate account of promising. Reliance theorists like Patrick Atiyah must therefore gerrymander their C-rules, redrawing the boundaries of the convention so that promises do not take without reliance.⁷⁴ But this is plainly wrong. A promisor's obligation to perform is not excused, either in morals or in law, if the promisee did not believe her.⁷⁵ For this reason, reliance theories do not provide a satisfactory explanation of promising, as they can of quasi-promissory institutions like estoppel.

The unrelieved-on promise provides another insight into inclusionary H-rules. Without fidelity requirements a conscientious objector to promising might promise and fail to perform in an effort to destroy the institution. This would be wrong under an H-rule of respect, but respect requirements cannot explain why promises are binding even when there is no reliance. This portion of promissory C-rules then requires its own H-rule. Once again, unless the C-rule is linked to people, its obligations do not bind individuals.

III. HIGH-FIDELITY REQUIREMENTS

Given the failure of low-fidelity theories, the only plausible

74. See *id.* at 52-59; see also Mack, *Rights, Liberties, and Expectations: A Reply to Sterba and Markie*, 89 ETHICS 301, 303 (1979) (promises binding only with reliance by promisee).

75. See Markie, *Mack on Promises and Natural Rights*, 88 ETHICS 263, 264 (1978) (promises binding even without reliance).

justification for promissory institutions is a high-fidelity one in which the source of the allegiance requirement is found in natural duties to support just institutions. Although some just conventions do not command fidelity without a connecting factor, others may bind individuals even if nothing links them to the convention. This is because the institution itself may deserve support, either for the good that results from it on a consequentialist theory or for some intrinsic feature of the convention on a rights theory.

A. FORMS OF JUSTIFICATION

1. Argument from Inevitability

A justification for a high-fidelity obligation requires that an ethical case be made for the institution. At first glance it might be thought odd to search for a justification for a normative convention: how does one part of our moral language support another part? What might be behind this concern is that a moral justification for morality cannot be given. Prudential, non-moral reasons for moral rules are possible in terms of consequences not deemed good in themselves. But if morality is good for a particular reason, why is that reason good? On the other hand, if a justification of morality as a whole must be circular, a noncircular justification may be possible for certain features of a moral system, like promise keeping. A morally desirable institution could then be justified by its more fundamental good consequences. Must we suppose that in ethical spheres there is only the good (which cannot be justified) and that which is justified (which cannot be good)?

A more serious critique of promissory theory claims that the institution is so necessarily a part of our society that no justification is required. This objection from inevitability argues that nonpromissory societies cannot exist and concludes that promising must be accepted as a necessary social convention.⁷⁶ This argument does not generate an ethical defense of fidelity requirements, for that would amount to drawing an evaluative conclusion from a descriptive premise. It suggests, however, that inclusionary H-rules are not required when defection is impossible.

The challenge of such arguments, therefore, is to produce an intelligible account of a rebellion against promising. Admit-

76. See, e.g., Hanfling, *supra* note 32, at 26-27; Midgley, *supra* note 10, at 252; Pitkin, *supra* note 41, at 48.

tedly, refraining from promising in a promissory society would be extraordinarily difficult. Suppose, however, that defectors consider nonpromissory regimes to be in every way superior to promissory societies. Thinking that promising is evil, they might promise and systematically refuse to perform in an effort to hasten the convention's fall. This behavior would be wrongful if it could be established that they owed the institution allegiance. Whether the rejection of promising is wrongful or not, however, it remains intelligible. Nor could defectors be granted the right to opt out of the convention and yet be told that their promises ought to be performed. Every promissory ought thus requires a principle of fidelity for both rebels from and supporters of the institution. If the promisor is bound to perform, this must be by virtue of an inclusionary H-rule. Such a rule may arise because of the moral value of the institution even if the promisor thinks it unjust.

In addition, the argument that promising is a necessary convention is undercut by the fact that a society without promising does exist. Tonga is a Pacific monarchy that lies east of Fiji and south of Samoa. Several scholars have documented its customs, which are worthy of study even apart from the undoubted incentive to conduct a field trip there.⁷⁷ One of the more idiosyncratic customs in Tonga is the meaning of promises. Although several Tonganese words mean something like promising, none give rise to a moral obligation to perform.⁷⁸ Nevertheless, Tongan society places great importance on the maintenance of personal relationships and on reciprocal acts of assistance. A Tonganese promise is a recognition of solidarity, with the intention to assist in the future evidencing a

77. Tonga first came under European influence in the eighteenth century. Captain Cook visited it in 1773 and, with a Westerner's ignorance of native feeling, named it the Friendly Islands. He was apparently unaware that the Tongans were plotting to assassinate him and his crew and that they were saved only because of tribal disagreements as to whether this should be done by day or by night. S. LĀTŪKEFU, *CHURCH AND STATE IN TONGA* 12 (1974). He may also not have noticed the Tongan penchant for cannibalism and the strangling of widows. *Id.* See generally Korn & Korn, *Where People Don't Promise*, 93 *ETHICS* 445 (1983); K. Morton, *Kinship, Economics, and Exchange in a Tongan Village* (Sept. 1972) (Ph.D. dissertation, University of Oregon, available from University Microfilms International, Ann Arbor, Michigan).

78. Korn & Korn, *supra* note 77, at 446-47; see also H. MAINE, *ANCIENT LAW* 312 (15th ed. 1894) ("No trustworthy primitive record can be read without perceiving that the habit of mind which induces us to make good a promise is as yet imperfectly developed, and that acts of flagrant perfidy are often mentioned without blame and sometimes described with approbation.").

present desire to maintain a relationship.⁷⁹ But the future is uncertain, and if performance becomes difficult it may be omitted without moral sanction.⁸⁰ The greater probability of future breach in Tonga must then be balanced against the less easily quantifiable benefits of living in a society whose institutions suggest a heightened concern for present expressions of sympathy and concern. Compared to the advantages of promising, those advantages may not seem compelling, but at least a non-promissory society exists.

A second argument from inevitability is that an inquiry into the values of promissory regimes is unnecessary because of the institution's evident desirability. Under this theory non-promissory institutions are regarded as so repellent that everyone would reject them, with no need to explore the basis for doing so. For example, imagine a nonpromising society called the Kingdom of Natural Duty. Here promising is excluded not through some feature of the language, as in Tonga, but because of the breadth of preexisting natural duties. If contract is to be squeezed out in this way, putative promisors cannot be allowed any room to maneuver, with all their waking moments filled in the performance of some duty. In the land of Natural Duty, that which is not prohibited is made compulsory. Contract is eliminated because it is meaningless to say that one assumes an obligation to do that which one already has a duty to perform.

Promising regimes clearly are incompatible with realms of Natural Duty, for if all future actions are accounted for, nothing remains to promise. From this, Hart concludes that the existence of a promissory regime implies a range of personal liberty as to future action.⁸¹ Because he believes promising to be a universal practice, Hart describes the promisor's ability to arrange future affairs as a natural right.⁸²

Hart's argument is subject to the same weaknesses as other attempts to derive moral conclusions from empirical premises. In addition, were it (wrongly) taken as a defense of promising, it would be quite misleading. If promising implies liberty, it does not follow that liberty implies promising.⁸³ A rejection of

79. Korn & Korn, *supra* note 77, at 448-49.

80. *Id.* at 449.

81. See Hart, *supra* note 8, at 183-84.

82. See *id.* at 184 (promisor's ability to create future obligation follows from natural right of freedom).

83. One may even be troubled by the restrictions on choice that arise through the act of promising. See M. ROTHBARD, *THE ETHICS OF LIBERTY* 133-48 (1982) (because promises restrict liberty, no contract should be enforced ex-

the realm of Natural Duty need not lead to promising. One might also end up in Tonga. In both Tonga and the Kingdom of Natural Duty, the law of civil obligations is restricted essentially to tort. Despite this similarity, the two societies differ in the scope of their tortious regimes, with considerably fewer requirements in Tonga than in the land of Natural Duty. While in Tonga the scope of tort law can be more expansive than that found in promissory societies, it may also be less so. (The Gulag is after all a promissory society.) Nonpromissory regimes need not, therefore, place as many restrictions on human choice as do Western states, and promissory regimes cannot be justified as essential to liberty. Instead, a defense of promising requires a discriminating analysis of the institution's advantages.

2. Rights and Consequentialist Theories

High-fidelity explanations of natural duties of fidelity seek to justify promising from the perspective of either theories of rights or of consequences. Neoformalism, an example of a rights theory, values promising for the choices it facilitates, whatever the consequences. Consequentialist theories value promising for its consequences, taking into account how they are produced. With respect to promissory institutions, the most plausible version of consequentialism is utilitarianism.

Although neoformalism focuses on the choices involved in promising, such theories are devoid of content if they totally ignore consequences. Choosing in total ignorance of conse-

cept transfers of property); Macneil, *Values in Contract*, *supra* note 6, at 356-59 (enforcing promises that reduce future options is inconsistent with valuing free choice). The paradox of freedom that free choice in promising gives us the liberty to bind ourselves is the basis for the tension in the commercial exchanges of Venice and the matrimonial ones of Belmont, for, like Antonio's bond, Portia's promise was also a sale of her person. See W. SHAKESPEARE, *THE MERCHANT OF VENICE*, act III, sc. ii, 16-18 (W. Merchant ed. 1967); M. SHELL, *MONEY, LANGUAGE, AND THOUGHT* 81 (1982) ("The beautiful marriage bond is not far removed from the ugly bond that made it possible in the first place."). In the end the tensions remain, and for want of a resolution in tragedy we are given the palliative of comedy (mistaken identity of Portia-Balthasar).

These concerns dissipate when it is realized that promises are but one kind of bonding technique and that self-control theories provide numerous examples of unobjectionable methods by which an individual may restrict future choices. If promises are suspect for this reason, alarm clocks are dangerous as well. On self-control theories, see T. SCHELLING, *CHOICE AND CONSEQUENCE* 57-112 (1984) (describing theories of self-command and their relation to ethics and law); Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357, 361-73 (1985) (describing self-imposed rules designed to improve individual behavior).

quences would be like pushing a button without knowing where the current leads. Unlike the consequentialist, however, a neoformalist deliberately cuts off evidence of remote consequences when rights are concerned. Once the immediate consequences are known and the act can be identified, a choice that respects the rights of moral actors is preferred to one that produces a better end state but that violates those rights. The priority of rights over good end states is lexicographic in that no end state, however desirable, outweighs the observance of a right. Without the possibility of a trade-off between rights and consequences, evidence of probable end states is entirely irrelevant when a right is invoked.

Notions of the right and the good seem to color our ethical intuitions of many moral issues, and we may then be led to search for some overarching theory that unties these two strands of our moral ideas.⁸⁴ It may be suggested, for example, that rights may be relaxed in the face of monstrous consequences.⁸⁵ If so, this may be thought to involve something less than a total abandonment of rights theories, which might continue to serve for less dramatic moral questions. Alternatively, the consequentialist need not be indifferent to procedural rules with a rights component in selecting end states. In choosing a course of action, one also selects the path that leads there. If this involves abridging some right, the consequentialist must take that into consideration.⁸⁶ Moreover, the violation of a right should be weighed not merely from the perspective of the party directly injured, but more generally in terms of the precedent value of the breach. For example, a breach of promise may render the institution of promising more unstable for other parties in the future. In this way end states that would otherwise be desirable might be qualified as bad for their spillover effects.

These attempts at synthesis may seem to be headed in the right direction, being better able to accommodate ordinary feel-

84. For several suggestions as to how this might be accomplished, see R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 494-98 (1981). The same author's *Anarchy, State, and Utopia*, however, was nonconsequentialist in its approach to questions of political obligation. See R. NOZICK, *supra* note 49, at 26-53.

85. For example, this is suggested by Fried in his concept of catastrophic cases, those "extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply." C. FRIED, *supra* note 15, at 10.

86. "Mattering as a means is a way of mattering." D. PARFIT, *supra* note 2, at 46. A society whose citizens act rightly may also be taken as one of the ends posited as good by consequentialist theories. *Id.* at 48-49.

ings of justice than unreconstructed rights or consequentialist theories might. But what works in practice may not work in theory. The first suggestion—rights theories for ordinary cases, consequentialist for exceptions—simply raises the question of how the border between the two kinds of moral questions is established. If rights are like tunnels, so that only small cars pass through, the distinction between the two kinds of theories is moved back one step, where the height is established and where only one kind of theory is possible. As for the second suggestion, a consequentialist theory of rights must always refer to end-state consequences if rights are abridged, for information about the consequences of an ascription of rights cannot be shut out. Thus, every moral theory must be either a rights or consequentialist one insofar as it would exclude or admit evidence of remote consequences in moral decisions.

B. NEOFORMALIST THEORIES

The case for a natural duty of fidelity therefore must rest on either a rights or a consequentialist ethical theory. Neoformalist explanations of promising, based on concepts of rights, are considerably less persuasive than consequentialist theories for two reasons. Neoformalism cannot plausibly indicate when a regime of contracts ends, at the border of the doctrine of illegality. In addition, neoformalism cannot explain why promising, of all institutions, should be valued.

1. Limits of Contract

The first objection to neoformalism is that it fails to account for the circumstances when promises ought not to be performed, as under the doctrine of illegality. Of course, a rights theorist need not argue that every promise should be performed, in the way that Kant believed that lying was never justified.⁸⁷ When promises impose burdensome costs on third parties, for example, they might simply not count as promises, thus eliminating the apparent counterexample. But what of the promise that is unobjectionable when made and whose external costs become apparent only at the time of performance? From a neoformalist perspective, how can present promissory

87. See I. KANT, *On a Supposed Right to Tell Lies from Altruistic Motives*, in *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346, 347-48 (L. Beck trans. 1949). For a recent statement of Benjamin Constant's argument that lying to liars or murderers is justified, see C. FRIED, *supra* note 15, at 69-78.

rights be trumped by remote consequences? If the change of circumstances affected only the two parties, it might be argued that the problem could be resolved through a hypothetical consent to efficient breaches. Relating the changed circumstances to the original promise seems a little artificial, however, and in any event this move seems even more fictitious when third parties suffer the disastrous consequences. Performance of such promises may be forbidden by consequentialist theories, but from the perspective of rights, an implied consent to avoid unpleasant consequences does not seem possible without abandoning neoformalism. It is, however, easy to imagine examples in which this feature of rights theories is uncomfortably absolutist.

The major weakness of any rights theory of ethics now becomes visible. It is not that rules are established in spite of their consequences, but that they are prescribed in ignorance of them. A disregard of known consequences might seem, at an intuitive level, a part of the price paid to protect rights. This kind of thinking may lead one, like Charles Fried, to propose a measure of consequentialism in extreme cases, in which the cost of respecting rights is too high.⁸⁸ Such suggestions, however, reveal a misunderstanding of the distinction between the two ethical theories. In excluding as irrelevant any evidence of remote results of an ascription of rights, neoformalism requires ethical decisions to be made at a time when extreme consequences cannot be distinguished from moderate ones. The theory of rights must be formed in the face of unknown consequences. From behind the veil of ignorance, the moral actor is permitted to anticipate the worst.

2. Fidelity to a Convention

The second objection to neoformalism is its failure to provide a justification of promising that takes account of its conventional nature. What must be shown is why this convention is desirable. Two such arguments must be considered. Promising may first be thought to provide greater freedom by expanding the domain of alternatives. On the other hand, adopting the institution might be seen to offer a more focused set of advantages under which the kind of alternatives available under the institution matter. Both of these explanations ultimately reduce to consequentialism.

88. See *supra* note 85.

At first glance it might seem easy enough to ground a neoformalist defense of promising in the greater range of action in promissory than in nonpromissory societies. There is one thing that can be done in promissory but not in nonpromissory societies, and that is to make a promise. The expansion of the domain of alternatives in this way offers more choices, with the case for promising resting on a simple affirmation of libertarian values.

This argument has a superficial appeal. While liberty may mean many different things, in part it does implicate the number of available alternatives.⁸⁹ With only one member in the class of alternatives, no real choice is possible. Suppose, for example, that one cannot leave his house because a large boulder blocks the only exit. Surely he need not know whether the rock was placed there by human hand or by nature before he can say whether his liberty has been restricted.⁹⁰ On the other hand, not every increase in the domain of alternatives results in an expansion of liberty. The mugging victim has alternatives (the highwayman's "your money or your life"), but neither is very pleasant. When the alternative is undesirable or not pre-

89. Thus, Locke believed that "the end of law is not to abolish or restrain, but to preserve and enlarge freedom." Locke, *supra* note 29, at 33. For discussions of the relation between liberty and the domain of alternatives, see Jones & Sugden, *Evaluating Choice*, 2 INT'L REV. L. & ECON. 47, 47-57 (1982); Beavis & Rowley, *Evaluating Choice: A Note*, 3 INT'L REV. L. & ECON. 79, 79-81 (1983); Jones & Sugden, *Evaluating Choice: A Reply*, 3 INT'L REV. L. & ECON. 85, 85-87 (1983).

90. From a utilitarian perspective, the distinction between negative freedom, by which only actual coercion restricts liberty, and positive freedom is suspect. Theories of positive and negative freedom are most closely associated with I. BERLIN, TWO CONCEPTS OF LIBERTY 7-19 (1958), although they may be traced back to Saint Augustine's distinction between the freedom to choose and the freedom to choose rightly. ST. AUGUSTINE, ENCHIRIDION § 30 (E. Evans trans. 1953) (Benedictine Folio ed. 1701). For arguments that the man confined to his house by the boulder is free, see F. HAYEK, THE CONSTITUTION OF LIBERTY 12-13 (1960) (distinguishing freedom of choice from range of physical possibilities); Miller, *Constraints on Freedom*, 94 ETHICS 66, 68-70 (1983) (distinguishing between freedom and ability to do an act).

In this Article positive freedom is identified with the size of the domain of alternatives and with the quality of the choices offered. See, e.g., Regan, *Paternalism, Freedom, Identity, and Commitment*, in PATERNALISM, *supra* note 7, at 113, 116-21 (discussing freedom-maximization principle). More frequently, however, positive freedom is taken to refer to the deliberative quality of the choice, see Sunstein, *supra* note 7, at 1132-38 (paternalistic regulation does not curtail but enhances liberty if process norms are served), or to self-realization norms, see C. TAYLOR, *What's Wrong with Negative Liberty*, in PHILOSOPHY AND THE HUMAN SCIENCES 211, 215-16 (1985) (directing action toward goal of self-realization does not curtail but enhances liberty).

ferred to existing alternatives, its effect on the realm of liberty is at best neutral. In addition, Nozick clearly is right in suggesting that two choices may both be described as free even if the relevant domains differ in size.⁹¹ Liberty is not measured simply by counting up alternatives with no consideration of the kinds of choices available.⁹²

The mere expansion of the domain of alternatives through the adoption of a convention of promising is then not enough to justify the institution from a libertarian perspective. It is true that, before the institution existed, one could not promise. And before Abner Doubleday, one could not play baseball. But surely no burst of liberty occurred when baseball was invented. A neoformalist justification of an institution therefore requires not only that new forms of activity be made possible when a convention is adopted by a society, but also that the convention increases liberty in a significant way.

In addition, a rights theorist cannot prefer promising to other conventions on the basis of its consequences. If, for example, promises are thought to generate more wealth than baseball, this merely provides a prudential reason for valuing the former institution more than the latter. From a rights perspective, the explanation of the importance of promising must focus on abstract rights and ignore end-state considerations. Imagine, therefore, that the consequences of adopting promissory institutions are not benign; instead, a realm of spontaneous disorder ensues. We must understand that, even here, the neoformalist's support for promising continues unabated, lest rights be thought parasitic upon ends.

Neoformalist theories therefore must explain, without reference to its consequences, why promising should be valued over other conventions. One response to this challenge might be to argue that a priority attaches to promissory institutions because they permit obligations to be incurred. There are, however, a variety of ways, not now available, in which obligations could arise. The easiest example of this is vows, conceived of as

91. See R. NOZICK, *supra* note 49, at 263-64.

92. It may be objected here that the weighing of two sets of alternatives is a hopeless task. In many cases this may be so, such that both states might be qualified as free. But in other circumstances it is not implausible to suggest that some alternatives may be thought trivial and others significant. In dwelling on the choices open to one chained to a column, Lord Byron did not persuade us that the Prisoner of Chillon was in any sense free. See Regan, *supra* note 90, at 119-20 (ranking of qualities of alternatives may be amenable to acceptable intuitive judgments).

promises to oneself, not to God. Although vows could easily give rise to moral or legal obligations,⁹³ given the right kind of institutions, they currently do not. Suppose, for example, that someone writes a note to herself in which she vows not to start smoking. In spite of the note, she smokes. She may be mildly reproved for this, but she will not be faulted more because she wrote the note. As a consequence promising cannot be prized as an obligation-creating institution without a further explanation of why that kind of obligation is valuable.

There is, moreover, a further reason why no unique advantage attaches to promising as an obligation-creating institution. This is because promises are *content independent*, conferring a moral quality to the object of the promise because of the promise and not because of the object itself.⁹⁴ The fact of promising, not the substance of the promise, creates the moral obligation. Promising is not justified by its obligations; rather, the obligations are justified by the promises behind them.

The neoformalist may also attempt to explain the particular advantages of promising by assimilating the institution to property law: the obligation is reified and made the subject of transfer to the promisee.⁹⁵ When I promise, I sell you the right to my performance. Nonpromissory regimes are then seen as ones in which such forms of property are inalienable, and the

93. On the Roman law of vows, see 12 G. BAUDRY-LACANTINERIE & L. BARDE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* § 28 at 36 n.3 (3d ed. 1906); see also R. WORMS, *DE LA VOLONTÉ UNILATÉRALE CONSIDÉRÉE COMME SOURCE D'OBLIGATIONS* 41-79 (1891) (discussing promises to a city and to a god). Vows as self-control tactics are discussed in T. SCHELLING, *supra* note 83, at 99-107.

94. H.L.A. Hart introduced the concept of "independence of content" in Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 102 (A. Melden ed. 1958); see also Raz, *Voluntary Obligations and Normative Powers* (pt. 2), 46 *ARISTOTELIAN SOC'Y* 79, 95-98 (Supp. 1972) (discussing arguments that justify norms).

95. The justification of legally binding promises on the analogy of property transfers is most clearly made by Grotius, who argued that the right to a property transfer or to performance of some action by the promisor may itself constitute property and that private ownership entails full rights of alienation. 2 H. GROTIUS, 2 *DE JURE BELLI ET PACIS* ch. XI, I, 3, at 33 (W. Whewell trans. 1853) (1625); 1 *id.* at ch. VI, I, 1, at 340; see also Benson, *The Executory Contract in Natural Law: A Theory of the Right in Contract* 26-32 (unpublished manuscript on file at Minnesota Law Review) (explaining Grotius's analogy equating a perfect promise with the transfer of property). I understand Kant to have adopted a similar explanation of promissory obligations. See I. KANT, *THE PHILOSOPHY OF LAW* 65, 104-05 (W. Hastie trans. 1887) (promises give one possession of will of another); see also Barnett, *supra* note 4, at 291-300 (contractual obligations arise from consent to transfer of alienable entitlements or rights).

justification of promising comes down to a rejection of paternalism, in the form of restrictions on alienation.

The analogy to property is not entirely unreasonable. Balance sheets would look quite different if promises were discounted from assets and liabilities. It remains unclear, however, why such assets must be alienable on a theory of rights. What is needed is a counterargument to the paternalist who would prevent the alienation of promissory obligations. If some restrictions on choice are to be permitted, the theory must distinguish proper from improper paternalism. Here, however, neoformalism seems bound to a treadmill, beyond a bare assertion that these kinds of assets ought to be alienable. Moreover, even the neoformalist libertarian who rejects any form of paternalism seems not to have a convincing argument for the superiority of promising to other institutions—baseball, for example.⁹⁶ The ability to imagine one institution as a property right more easily than another hardly moves the argument forward. For example, other rights (the right to associate with eight other people on a team) are better suited to baseball than promising. There are even property regimes, in which baseball teams are sold, better suited to baseball than promising. What is missing then is an explanation why *this* kind of property should be alienable.⁹⁷ And that question logically cannot be answered merely through an analogy to property.

The last attempt at a neoformalist justification of promising focuses upon the virtue of trust fostered by the institution. Fried has argued that a respect for informed human choice mandates upholding the institution of truth telling,⁹⁸ and in *Contract as Promise* he applies the same analysis to promising.⁹⁹ His defense of promising is, however, less plausible than

96. Some libertarians, like Murray Rothbard, would indeed prefer baseball, for legally binding promises are troubling under the paradox of freedom. *But see supra* note 83 (self-control tactics also permit individuals to fetter themselves, and these tactics cannot reasonably be thought objectionable).

97. This was the basis upon which Mill rejected the Kantian analysis of promising, under which the duty to perform rested on a perceived inability to make a universal law of promise breaking, because the institution then would not survive. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 18-19 (L. Beck trans. 1959). But all that this shows, as Mill noted, is that the consequences of the adoption of such a rule would be undesirable. *See* J.S. MILL, *Utilitarianism*, in 10 COLLECTED WORKS OF JOHN STUART MILL 203, 207 (J. Robson ed. 1969).

98. C. FRIED, *supra* note 15, at 63 ("The foundational values of freedom and rationality imply the foundational value of truth, for the rational man is the one who judges aright, that is, truly.").

99. C. FRIED, *supra* note 6, at 16-17.

his theory of truth telling, for it is harder to ascribe a foundational status to promissory trust. If moral choice must be informed to be meaningful, it is not clear why such knowledge must extend to future action by others. Are Tongans, lacking these foundations, unfree and irrational or less responsible in their moral choices? Surely notions of moral praise or blame are not inappropriate in nonpromissory societies.

The problem with the argument from trust is similar to that faced by neoformalists in their analogies to property regimes. It provides no explanation of why *this* kind of trust should be promoted, as opposed to the reliance that arises between teammates in baseball (Tinker to Evers to Chance). Doubtless, promissory trust produces more material wealth, but this kind of prudential reason counts as nothing in neoformalism, which must look to something intrinsic to promissory conventions as opposed to baseball conventions. What then is that essence of promising, shorn of its consequences, which leads one to prefer it to baseball? Trust arises through patterns of cooperative behavior, which in turn may be a by-product of almost any convention. How then is trust assayed, so that between conventions the quality (or quantity) of various kinds of trust can be compared? By dollars? To be sure, promissory trust is more important than baseball trust. But does this refer to anything more than the consequences of favoring one institution over another?

Furthermore, the adoption of promising in a nonpromissory regime might lead in part to unpleasant consequences. Might not some negative externalities arise with so fundamental an institution? The claim that Tongan society better promotes communitarian virtues should not be rejected out of hand. More trust may come only at a cost, as other features of society change in the new regime. In particular, if the abstract value of a regime of trust stems from the interpersonal relationships that it permits to flourish, it must be relevant to ask whether the adoption of promising might in some way weaken ties to one's fellowman.¹⁰⁰

100. There is another reason why a rights theory of the contours of contract law is unstable. As consequences become less remote, the parties might be expected through private contracting to alter the C-rules of the neoformalist regime if it departed from consequentialist norms. Indeed, the parties could not be prevented from doing so under any theory whose primary tenet is the value of human choice. Imagine, therefore, how rights theorists would select the kinds of conduct to be actionable for misrepresentation. For example, where on the continuum between fraud and nondisclosure is conduct

C. CONSEQUENTIALIST THEORIES OF PROMISING

1. Utilitarian Explanations

Consequentialist theories of promising must ground fidelity requirements on the superiority of promissory to nonpromissory societies. In examining end-state justifications of the institution, one manner of proceeding would be first to identify what counts as a good consequence and then to examine how it figures in a promissory regime. Although this might seem the most direct path, the circuitous route sometimes leads more quickly to one's goal. Thus, this Article questions the consequences of adopting the institution and assumes that they are morally desirable. There may be many other plausible concepts of the good, but I seek only those that might justify promising and contract law.

While the best known variant of consequentialism is utilitarianism, a consequentialist position is not necessarily utilitarian. For example, a complete contingent theory might rank all possible end states without inquiring as to their place in the felicific calculus. Alternatively, other goods, such as end states characterized by particular virtues, may be the desiderata. A consequentialist thus may prefer a choice leading to an end state that leaves its members with less average or total utility than is available through another choice.¹⁰¹

Apart from spillover effects, the direct product of promising is the disclosure of information concerning the promisor's likelihood of performance. The assumption of a moral obligation, like that of a legal obligation when civil remedies for breach are attached, may assist in resolving the informational disparity between promisor and promisee as to performance.¹⁰² Higher quality promises may be made when the consequences of breach are more painful to the promisor. In this way a promisee who is not satisfied by the promisor's statement of intention may ask, "But do you *promise?*," thereby raising the stakes on breach. Promising operates, both on moral and legal levels, as a bonding technique. Without it, substitutes for prom-

wrongful? Suppose that the choice of fraud standards is to be made at a time before the consequences are known, but that the parties are subsequently told the economic consequences of their decision. Must any attempt on their part to reallocate disclosure duties now be resisted?

101. See D. PARFIT, *supra* note 2, at 26-27 (pluralist consequentialism appeals to several different concepts of what constitutes a good outcome).

102. For a discussion of this signalling explanation of guarantees as a response to informational asymmetries, see Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 499 (1970).

ising may arise, such as third-party guarantees and performance bonds.¹⁰³ Stable firms may also make more creditable promisors if they have acquired a reputation for performance.¹⁰⁴ But these devices will not wholly take the place of promising in promissory regimes.

The advantage to promisees of information concerning the possibility of performance is that it permits greater reliance (or trust). The promisor will respond to the possibility of sanctions for breach by decreasing both the number of promises made and their breadth, revealing regret contingencies through the conditions attached to the bargain.¹⁰⁵ A better quality of promise results, and promisees may more safely arrange their affairs in the expectation of performance, facilitating future planning. If promissory regimes are defended, it therefore must be for such beneficial reliance. The possibility of beneficial reliance is not, however, a connecting factor of the type that would support a low-fidelity theory. The inclusionary duty arises from the general benefit that accrues to society from the capacity to rely on promises, not from actual reliance by a particular promisee. In this way the duty presupposes the moral value of the institution.

But why stop there? Beneficial reliance itself seems at best an instrumental good, desirable only insofar as it promotes some higher good. Apart from a belief that welfare gains will result, it is not easy to see what it is about promising that might attract. Why would we promote reliance if we thought, in a

103. The use of performance bonds as a substitute for the enforcement of promises is proposed in M. ROTHBARD, *supra* note 83, at 133-40 (discussing libertarian theories under which courts should recognize property transfers but not enforce promises through damages remedies). Such bonds implicate a hostage strategy in resolving informational asymmetries between promisor and promisee. See Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 12-18 (1985) (discussing varieties of hostage techniques).

104. See Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 618-25 (1981). An investment in reputation is warranted only when (1) promisor and promisee are repeat players or information about the former's cooperative strategy will be conveyed to other parties with whom she will bargain in the future, and (2) all such bargains are characterized by a temptation to defect (such as arises in prisoners' dilemma games). A cooperative strategy in a prior game may then communicate that defection strategies are unlikely to be adopted in future games. See Scott, *Conflict and Cooperation in Long Term Contracts*, 75 CALIF. L. REV. (1987).

105. For a discussion of considerations in devising efficient sanctions for breach, see Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1274-86 (1980) (optimal damages rule will seek to maximize beneficial reliance while minimizing detrimental or mistaken reliance).

particular instance, that it would lead to a net loss of utility? A defense of promissory institutions therefore appears to rest on utilitarian foundations.

Under such a theory, it is not necessary to deny that negative externalities arise, but only to assume that they are exceeded by the benefits of promising. A utilitarian defense of promising does not require that communitarian virtue in Tonga be denied. In fact, a better strategy for the utilitarian might be to insist on such values, for they must on his estimate be exceeded by the values of promissory societies. The greater its costs, the greater its virtues.

Utilitarian theories also offer a creditable explanation of fidelity to a just institution. Even if promising is desirable, this does not suffice to bind one to the institution unless one's defection would weaken it. If an ethical case could be made for an institution, an individual ought then to support it when fidelity to it makes a difference. Moreover, the appropriate question here is not whether a single breach matters, but whether a rule absolving promisors from performing (or a disposition not to perform) threatens the institution. For example, promissory skeptics sometimes argue that "desert island promises" do not bind promisors.¹⁰⁶ These are promises made to a dying person at a time when no one else is around to hear them or to know if they are performed. Yet even here a rule that these promises are not binding would lead to fewer such promises being believed in the future. This is because a moral theory that accords a right of defection in particular circumstances affects the behavior of parties who later find themselves in that situation. On a utilitarian theory, desert island promises continue to have a moral force, provided that a rule of enforceability in these circumstances is itself justified on utilitarian grounds.

2. Nihilist Objections to Utilitarian Theories

With the failure of low-fidelity theories and of neoformalism, only consequentialist explanations of promising offer a plausible alternative to promissory nihilism. In particular, utilitarian theories provide the strongest defense of promising. In what remains, this Article considers three objections to the utilitarian analysis of promising. The most serious objections reduce to nihilism, against which no defense is offered save to recognize it as such.

106. Arguments for and against the binding quality of desert island promises are discussed in P. ATIYAH, *supra* note 68, at 59-63.

The first objection is that high-fidelity duties require too much of an individual. Utilitarian theories of promising prohibit not merely free riding but also conscientious objection. If the institution deserves support without a connecting factor, then even a principled attempt to secede from promissory societies is wrongful. But is this too hard? Must an individual be prevented from severing links with existing societies and institutions so as to work out private utopian dreams?¹⁰⁷ Could Roman tax collectors legitimately have been sent out to Saint Paul of Egypt, among his society of lions?

The context of questions of political allegiance may be too rich to permit their easy resolution through the single touchstone of a duty to support just institutions. Much may depend on the kind of individual and his reasons for seceding, as well as the nature of the institution and the kind of fidelity it requires. It is also difficult to imagine how a theory of political allegiance could mandate fidelity without some kind of connecting factor such as residence in a territory. If the nexus could be erased legitimately, a right of conscientious objection in political regimes must be conceded. In contrast to political allegiance, however, duties of fidelity that do not depend on a connecting factor may more easily be imagined for promissory institutions. One reason for this is that promising's demands on an individual seem less intrusive than the demands of a modern state. In addition, we are likely to have less concern for the scruples of an anarchist or visionary in matters of promissory rather than political allegiance. This may be due to nothing more than a stronger intuition that the institution of promising is morally desirable.

The second objection to utilitarianism assumes that promissory institutions can be justified only through the independent desirability of the bargained-for result. This objection asserts that, so long as any value is thought more desirable than the bargained-for result, it is fair game to substitute a duty aimed at fostering the higher value for the promissory obligation. This might be termed the fallacy of content dependency, although it is really a species of promissory nihilism.¹⁰⁸ It takes

107. See R. NOZICK, *supra* note 49, at 309-12 (rejecting idea of one best society for all individuals).

108. A prominent example of this kind of nihilism is found in P. ATIYAH, *supra* note 68, at 193-94, which suggests that promises are admissions of pre-existing or noncontractual obligations. "[T]he modern social group has much more difficulty in recognizing the right of individuals to create obligations in circumstances where the group itself does not recognize the existence of obli-

doctrines of illegality as the norm, not the limiting case, with the content of every promise held to be of no moral worth except insofar as it accords with public goals such as distributive justice. Utilitarianism may seem particularly susceptible to the objection from content dependency. With its instinct that moral issues may require trade-offs, utilitarianism may appear to lack the barriers to paternalism of libertarian rights theories under which public purposes might never trump private rights.

The problem with content dependency, however, is that it misconceives the nature of the institution of promising. Promissory institutions and norms of distributive justice are not mutually exclusive, but if both are supported, the social planner must be denied the right to substitute his goals for those of the promisor and promisee. This is because promises are necessarily content independent.¹⁰⁹ Thus, any perspective which asserts that some justification beyond the fact of promising is required for enforceability denies that a moral case can be made for promising. From a utilitarian perspective, then, it is the institution and not the individual promise that is content dependent. Although the institution must be one that promises greater utility than would obtain in a nonpromissory regime, the institution so approved is one of private obligations whose content is left to individual choice.¹¹⁰

The third objection to utilitarianism focuses on the procedural rules of promising. Not all promises are binding, but only those that satisfy a threshold level of procedural fairness. If procedural norms are not respected, the moral imperative does not arise. A further kind of promissory nihilism then suggests that theories based on the moral value of promissory institutions are rendered doubtful by the difficulty in providing a principled distinction between procedural fairness and unfairness. If no such distinction is possible, the contractual output may always be of dubious ethical value, and some other societal goal, such as distributive justice, could be substituted.¹¹¹ Again,

gations." *Id.* at 194. This explanation of promising is criticized in Cartwright, *An Evidentiary Theory of Promises*, 93 MIND 230 (1984).

109. See *supra* text accompanying note 94.

110. "La morale nous commande de ne pas traiter le contrat comme un fait social dont le juge a le droit de tirer telle ou telle conséquence . . ." G. RIPERT, *supra* note 28, § 22, at 39.

111. What lies at the heart of this objection may be a confusion between two quite separate questions: ought the contract be performed? and can a fairer set of terms be imagined? These are separate questions, however, and an affirmative answer can be given to both. In other words even if a neutral arbitrator might have crafted slightly different terms, the contract may still be

this attack seems most directed at utilitarian accounts of promising, for the conclusion that greater utility is derived from promising rests on pragmatic assumptions of individual rationality. The utilitarian, although perhaps not the rights theorist, might excuse performance if in one readily identifiable kind of promise the promisor systematically ended up worse off as a result of judgment biases.

If this objection were taken at face value, it would be destructive of any contractual values. If contracts entered into with a gun at one's head cannot be distinguished from those in which the parties have the slightest disparity in wealth, the enforcement of contracts is never justified. Promising is fraud. This kind of paradox mongering therefore must be rejected, not only under utilitarian, but also under any ethical theory of promising.¹¹²

There are two further reasons why such arguments cannot plausibly support promissory nihilism. First, save in theories that impeach all moral choice, cases involving the impairment of individual judgment form the exception and not the rule, and such exceptions are readily distinguishable. Although categories of rationality and irrationality shade together, the distinction between the two may be understood even if rigid borders cannot be laid out. Prophylactic arguments for total nonenforceability are therefore unconvincing. Second, even if subject to judgment biases, systems of individual choice still lead to greater utility than realms of Natural Duty. Some recent defenses of paternalism assume that restrictions on choice are justified on utilitarian grounds.¹¹³ But on such theories, the case for interfering with individual preferences is not made merely by demonstrating individual judgment errors. Instead, the real issue is who, as between the individual and the paternalist, has better information about the individual. Normally,

considered enforceable in its unamended state so long as promissory institutions are on balance beneficial and the cost of correction is excessive. It is then unnecessary, to meet this objection, to deny that questions of fairness are meaningful if the procedural requirements of a binding contract are satisfied.

112. See G. RIPERT, *supra* note 28, § 22, at 38-40. Attacks that question the ability of promisors to make *any* rational choices must also be rejected. The claim that individuals act against self-interest through irrationality (for example, intransitive preferences) may be restricted in scope to certain kinds of bargaining contexts in which a degree of paternalism may seem warranted. If so, a range of unimpeded promising is still preserved. But if it is suggested that irrationality invades *all* of our choices, such arguments are destructive of any ethical theory founded on individual responsibility, in addition to promising.

113. See, e.g., Sunstein, *supra* note 7, at 1140-41.

this must be the individual, for the paternalist's opinion about how to maximize an individual's utility is parasitic upon the individual's preferences. The paternalist is permitted to second-guess individual choice in the restricted sphere in which this is done, not because the result better accords with the paternalist's preferences, but because the individual's utility is maximized thereby. The paternalist's authority stems from a knowledge of individual preferences, and this is derivative of observed human choice. So, far from extinguishing individual choice, this kind of paternalism must be founded on it.¹¹⁴

CONCLUSION

Among ethical issues promissory theory is of cardinal importance to lawyers, for the moral value of virtually all of contract law rests on it. The most plausible theory of promising is consequentialist, basing a duty to support the institution on the desirable results of its adoption. Although promising's consequences are several, utility appears the ultimate good. Other consequences, such as promisee reliance, appear instrumental only. Thus, the institution rests most easily on utilitarian theories.

Two other explanations of promising must be rejected. The first of these, described as neoformalism, bases promissory institutions on an abstract right to promise. A justification of promising that ascribes value to the institution without knowledge of its consequences is unconvincing. Neoformalism is flawed in assuming that promising may be preferred to competing conventions by virtue of its prudential and economic consequences without endowing these consequences with a moral status.

That leaves low-fidelity theories, which would find a justification for promise keeping in morally binding connecting factors between individuals and a convention. On these theories, a duty of performance would be imposed upon promisors because of their consent to the institution, their receipt of benefits from

114. The tension between legal rules and private orderings is also visible in canons of interpretation. Goetz and Scott have noted that rules of interpretation constrain private choice first by offering parties a restricted list of implied terms and then by erecting interpretive barriers should they wish to contract around them. See Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 288-91 (1985). But rules of interpretation are also informed as to their content by private bargains, with an evolutionary process by which standard terms develop and achieve legal recognition. See *id.*

it, or reliance by promisees on the promise. None of these theories provides an adequate explanation of allegiance to promissory institutions. As a result only utilitarianism offers a creditable alternative to promissory nihilism.

In rejecting consequentialism rights theorists may adopt either low-fidelity requirements or neoformalism. In neither case have they yet provided a persuasive justification of legally and morally binding promissory obligations. This Article has shown why they cannot do so.