ABSTRACT. The question "What makes a promise binding?" has received much attention both from philosophers and lawyers. One argument is that promises are binding because the act of making a promise creates expectations in the promisee, which expectations it would be morally wrong to disappoint. Another argument is grounded in the effects engendered by the making of a promise, specifically actions taken in reliance upon the promise. These two positions, the so-called expectation and reliance theories, have traditionally been thought to be incommensurable. In a recent article, 'Promises and Practices', Thomas Scanlon advances a theory of promising developed out of both of these positions. This article argues that Scanlon's argument fails because it cannot avoid the incommensurability of the expectation and reliance principles.

INTRODUCTION

What do we owe to others when we make a promise? In the law, the answer to this question turns largely on one's theoretical commitments with respect to damages. Those who believe that the essence of contract lies in giving the promisee the value of what she expected at the time the promise was made see the non-breaching party entitled to an amount that will put her in the position she would have been in had the contract been performed.1 Those who believe the point of

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contract law to be compensation for losses incurred in reliance on representations in the form of a promise view promise-enforcement as secondary to compensation for reliance losses. From this perspective, the mistake of the expectation theorists is that by making the executory promise the paradigm of agreement, they have obscured the importance of other values in contract doctrine. These other values, principally reliance and restitution, require a different model of contract, one sensitive to what the legal realists referred to as the "real life" contexts of agreement making.

In a recent article discussing the moral basis of promising, Thomas Scanlon argues that reliance and expectation are two aspects of the same normative coin, one he labels "The value of assurance". While surely of interest to philosophers interested in the theory of promising, Scanlon's argument has wide implications for lawyers. If the central claims in Scanlon's argument can be sustained, then the long-standing debate between expectation and reliance-based accounts of the obligation to keep a promise can be ended.

Part I of this article surveys Scanlon's argument in favor of the value of assurance. In Part II, I argue that Scanlon's argument in favor of the single value of assurance fails because he equivocates on the meaning of "reliance". In Part III, I argue that the value of assurance cannot be one value but is at least two. The nerve of the argument is that expectation and reliance are incommensurable values which cannot be reconciled.

I. PROMISES AND PRACTICES

When a promise is broken, what is the nature of the wrong that is