Note to Colloquium Participants

These two texts derive from the 2016 Frankfurt Lectures organized by the Formation of Normative Orders group at the Goethe University (which helps explain my focus on varieties of normative orders in lecture two). I am in the process of revising the texts; the notes are incomplete. I look forward to our discussion.

Private Law and Public Illusion

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Lecture One: Artificial Morality

1. Introduction

My lectures are about the morality and politics of contract and property law and their associated nonlegal normative orders. Contract and property are not the whole of private law, but they stand out for comprising the core of the law of the market. Property and contract are what private ordering is all about: private ownership and private exchange.

There are other areas of law that strongly affect the operation of markets: take for example tax law, bankruptcy, environmental law, the law of business associations, and securities regulation. Private ordering is “all about” private ownership and private exchange, but this broader legal environment determines the material implications of ownership and exchange. These other areas of law just mentioned, however, differ crucially from property and contract for being rather obviously instrumental through and through. They are grounded in the social benefits they bring, not pre-institutional duty and right. With the important exception of taxation, to which I will return in the next lecture, everyone agrees about that. By contrast
many people think that contract and property are grounded in a natural morality of promissory and proprietary rights and obligations. This moralization of the private law of the market is both a philosophical mistake and the source of a pervasive public illusion that distorts political discussion of social justice and institutional design.

I leave until the second lecture a full discussion of the costs and etiology of the public illusion. This first lecture is about the philosophical mistake.

2. Three Views about the Morality of Contract and Property

Over the past few hundred years, there have been three main philosophical positions on the moral status of the law of the market. First, there is what we now call libertarianism, the view that private law mirrors, or ought to mirror, a natural morality of property and of promissory exchange. Property law should mirror natural property rights, and contract law should enforce promissory obligations, thus protecting the rights of promisees. The libertarian view is that private ordering is morally mandatory because any other way of organizing the distribution of goods and services violates rights.¹

At the opposite extreme from libertarianism is the view that private law reflects or constitutes a false morality: moral ideas of property and promissory or contractual exchange are invented, and the point of the invention is to promote a partial social interest, the interests of those who do well through private ordering. An early statement of this view can be found in Rousseau’s *Discourse on the Origins of Inequality* of 1755.² Needless to say, the theme of norms tailor-made to serve the interests of a particular social class being presented as universal
truths—“usurpation converted into unalterable right,” as Rousseau put it—was much developed by Marx and others in the centuries to come. I will return briefly to the critique of ideology in the next lecture. Keeping things crude for now, we can say that the false morality view is that private law is simply a swindle of the worse off by the better off.

The third view I want to consider, and defend, agrees with the false morality view that there are no natural proprietary or promissory rights and obligations, that the morality of the market is, as Hume put it, artificial, but holds that a moral case for a practice of private ordering may nonetheless be made. The moral case for property and promise and contract turns on the morally significant social benefits that flow from social practices of private ownership and private exchange. We can call this the practice-based or instrumental view. Though Hume gave the definitive philosophical expression of this view in the Treatise, the idea that property is grounded in artificial social practice is commonplace throughout the history of Western philosophy. What was radical with Hume was to think about promise, and therefore also contract, in the same way. For Hume the entire foundational legal framework of market exchange is artificial.

Now from more recent history, my sense is that back in the nineteen seventies and eighties most English-speaking philosophers, at any rate, agreed with Hume. There were a few libertarians, of course, especially after Robert Nozick gave the view such an elegant presentation in Anarchy, State, and Utopia; just as some remained convinced that private ordering was destined for the dustbin of history. But for the most part arguments about
capitalism and its adjustments and alternatives were arguments about social effects—effects on aggregate wealth or welfare, autonomy, equality, social cohesion, and so on. For the most part, perhaps because of the enormous influence of Rawls—who was in this respect a thoroughgoing Humean—there was no sense in mainstream philosophical discussion that natural promissory and proprietary duties and rights served as constraints on institutional design.³

Since then, the Humean almost-consensus has broken down for the case of promise and contract. A great deal has been written about promise in the last decades, and almost none of it defends the previously orthodox practice-based view.⁴ With property, interestingly, the case is different. Though there has been in recent years something of a movement to restore a more fundamental status to property in legal theory, this work has generally stopped short of embracing full-fledged naturalism.⁵

As I have said, the importance of the issue is not just academic. Even when philosophers were converging on the position that the morality of the market was artificial, public discourse did not. In fact, the return to naturalism among theorists can in part be seen as an attempt to do justice to “ordinary attitudes” to property and contract. In my view, however, there is much that is wrong with those ordinary attitudes. But I’ll leave that aside until Lecture Two.

3. The Artificial Morality of Promise and Property

Let me start my discussion of the philosophical issue by laying out the practice-based view about property and promise in some detail, so that both its challenges to ordinary thinking and
the depth of its resources come into focus. I postpone defending the practice-based view against its rivals until we have a fuller sense of what it is. The account I will give is my own, not tied to Hume’s moral theory and taking a stand on several important issues that he either left open or differed with.

The basic idea is that some moral obligations or rights make sense all on their own, directly. The duties not to kill or hurt people without special justification, not to imprison them, and not to manipulate them; the duty to care for children, the virtue of benevolence, rights of freedom of movement and expression and conscience—all these duties, rights, and virtues derive their plausibility directly from some clear human interest; from something that, in a bedrock sense, we might believe just matters. This is the sense in which we can call them natural. Other ideas about moral rights and duties do not make sense in the same immediate way. For both property and promise, though there are clear human interests at stake, they do not directly give rise to duties, rights, or virtues; the explanation of promissory and proprietary morality must be mediated by appeal to the value of some social practice, to the morally important interests that the practice promotes.

It must be this way, because, as we will see, there is no plausible natural tie between people and things that could ground ownership rights, and there is no plausible natural story we could tell about how people manage to will obligations into existence when they make promises. If the retail level of the morality of property and promise—the relevant duties, rights, and virtues—is not natural, but also not false, then it must be artificial, a product of a valuable
social practice.

On the practice-based view, the importance of the rules that apply to individuals—respect for private property, fidelity to promise—is explained by reference to the beneficial effects of the practice, the interests it serves. Those rules cannot be understood as reflecting corresponding real moral rights or duties people have, for none exist. Rather, it is that the effective operation of the practice as a whole does good, for society as a whole, and that’s the main reason why, generally speaking, the rules should be followed, since noncompliance with the rules will tend to undermine the practice.6

The first reason to comply with the rules of the practice, then, is that noncompliance may undermine a valuable practice, which would be bad. Of course, noncompliance will not always have a detrimental effect on the health of the practice as a whole. A theft or broken agreement may go undetected by any significant number of people and the practice will survive just fine. There is, however, also a different reason to comply, emphasized by Rawls in his discussion of promise in A Theory of Justice. Once the practice is up and running, and supposing it is just, we all may be assumed to benefit from it. In that case to engage in the practice but not comply with the rules would be unfair; it would be to free ride on the cooperation of others. This second moral reason for compliance might be thought to be always present.7 Whether that’s so is an issue I will return to in the next lecture.

Either way, we’ve arrived quickly at the most significant point: The two main moral reasons that people have to respect others’ property and keep promises are not reasons that run to particular owners and promisees; they are not reasons grounded in the rights or even
the interests of particular owners and promisees. The reasons—to sustain the valuable practice and not free-ride on it—run to society at large, to the benefits of the institutional system as a whole.

This feature of the instrumental view strikes many as deeply implausible: How can it be right that the moral significance of broken promises and violated property rights has nothing to do with the victims of these breaches? This is an important challenge. But we need to see that the practice-based story is actually not as simple as I have so far suggested, and is typically assumed.

For the practice-based view can recognize secondary reasons for compliance with the practice, reasons that do concern the interests of particular promisees and owners. Though the existence of the practices of respecting property and keeping promises cannot magically bring into existence individual proprietary and promissory rights and duties, it can engender in owners and promisees strong expectations, the disappointment of which there is reason to avoid, all else equal. The practices can also, through encouraging owners’ and promisees’ reliance, bring about new ways in which they can be materially harmed. So there can be individualized harms caused by breach of the rules and, depending on the circumstances and the relationships involved, there may be strong moral reason to avoid those harms. Typically, these kinds of harms will have greater moral salience the stronger the preexisting ties among the people in question. On the practice-based view, the mere fact that a total stranger will be disappointed if I do not do what she expected me to do (respect her property, keep my
promise), or even the fact that she will suffer some reliance loss if I do not do what she expected me to do, do not in themselves necessarily give me special reason to be concerned about that stranger’s interests over those of others. The primary relevance of these kinds of secondary harms is that if I already have reason to be concerned about someone’s welfare, then I should of course take into account these new ways in which I can affect it.9

These individualized harms are secondary in the sense that they are only possible against the backdrop of practices that are justified in some other way. For example, it would not be reasonable or even coherent for a promisee to develop strong expectations of performance just because performance was promised, unless the promisor has reasons to perform that are not grounded in the expectations of the promisee.10 Likewise, if you take from me something I own that I was relying on keeping, you may cause me investment losses. But I could not rationally have made investments in reliance on my continuing possession of the thing unless there were reasons for others to respect my ownership claim independent of my possible reliance on them doing that.

We see then that the practice-based view does recognize the possibility of special harms to the victims of theft and broken promises. However, in the first place, those harms are not necessarily present in every case. Owners and promisees may develop no expectations at all, let alone materially rely on compliance with the rules of the practice. Secondly, the moral importance of these harms will depend on preexisting reasons to be concerned about the victim’s interests. And third, the possibility of these harms depends upon the existence of the system-wide or collective reasons for people to follow the rules, which is that noncompliance
tends to undermine and free-rides on the practices.

So much for the reasons individuals have for complying with the rules of the practices.

But why have the practices in the first place?

It is sometimes assumed that the justification conventionalism can offer for having the practices must be reductive, one dimensional. But we must not confuse conventionalism with utilitarianism, let alone with the idea that economic efficiency is the only relevant value for institutional design. In the first place, instrumentalism about promise and property is obviously consistent with non-consequentialist accounts of other parts of morality. Not believing in proprietary or promissory rights does not mean you don’t believe in liberty rights, or rights to bodily integrity—rights not to be tortured, etc. Second, the range of values that the instrumental view might appeal to in justifying the practices is open-ended. As the case of Rawls makes clear, the good consequences of general conformity to conventional rules of property and promise are certainly not limited to promoting aggregate welfare. These practices, both informally and when shored up by the state in the form of property and contract law, can be part of an overall institutional structure that promotes economic and social justice. Moreover, and going beyond Rawls, the practices may promote values that are more specifically related to them—promise may promote people’s control over their lives, which may be an intrinsic good not reducible to other aspects of their welfare, and personal property may be necessary for the realization of my personality, for example.

So the values that the practices can achieve system-wide can be as lofty and as closely
tailored to the surface phenomena of ownership and promissory agreements as you like. I myself, despite a recent wave of attempts to identify very specific interests tightly linked to both promise and property, am inclined to the traditional view that the main value of these practices is that they make us better off and can form part of a just overall institutional scheme. But I am not in this lecture going to lay out a theory of the general social importance of the practices of property and promise. The comparison I am drawing is not between more or less reductive accounts of the values promoted by the practices of promise and property. It is between any such instrumental account and accounts that assert that there are proprietary and promissory rights and wrongs that make sense without reference to the social benefits of conventional social practices.

With this sketch of instrumentalism in hand, let me turn to expand on and defend the claim that motivates it: that the idea of natural moral promissory and proprietary rights makes no sense.

4. Against Natural Property Rights

Property is the easier case. In the history of Western philosophy, Locke is exceptional for defending the idea that there are pre-institutional private property rights, that there is full private ownership in the state of nature. Many philosophers have of course argued that there are moral grounds for a society to have a system of property, private or otherwise. And many have made use of some basic moral idea of ownership, or dominium—in holding, for example, that God gave the world to all persons to hold in common. But the sole explicitly developed
naturalistic account of private ownership is that by mixing what I naturally own—my person and therefore my labor—with external things, I come to own those things.\textsuperscript{14}

It’s a striking fact that Locke’s labor theory of property should be both so well-known and frequently appealed to, and also so well-known to be extremely implausible.\textsuperscript{15} Nozick, when embracing the theory, famously did not so much defend the significance of mixing one’s labor with external things as make fun of it.\textsuperscript{16} And if the theory is defended, as Locke himself partly did, by appeal to the labor theory of value, then that most plausibly leads to a theory of ownership quite unsuited to private ordering.\textsuperscript{17} Moreover, it is very plausible to attribute to Locke insidious motivations for the labor theory. Many have noted its suitability for justifying the colonization of the Americas—Locke evidently believing he could plausibly maintain that native Americans had not labored on their land.\textsuperscript{18} You can see why he didn’t go for first possession as his principle of acquisition. There’s even arguably a connection between Locke’s particular idea of self-ownership—which was historically innovative in holding that people own not just their labor, but their very person—with his defense of chattel slavery.\textsuperscript{19} Perhaps it is this unique historical-political connection of colonial expansion and Atlantic slavery, projects Locke was deeply involved in, that explains why his is the only clear and well-known example of a theory of natural ownership. Pretty much everyone else in the tradition of Western philosophy, from Aquinas to Grotius to Hume to Kant, emphasized the necessity of convention, whether that was understood to arise organically without promissory agreement, or through implicit or explicit contract, or required law.\textsuperscript{20}
The basic Humean point about property is that there is no natural tie between people and external things that provides a plausible moral justification even for the most basic incidents of ownership, such as exclusion and use.\textsuperscript{21} First possession, on its own, obviously cannot establish rights that can serve as constraints on the way property is organized in civil society.\textsuperscript{22} Locke’s labor theory is better for having substantive content, but its clear failure and the fact that it is the only such account leads many philosophers quickly to the Humean conclusion: There is no plausible naturalistic story that could explain the morality of property, so it must be artificial.

But more needs to be said to explain why conventionalism about property is now so much the standard view. If property were a single-generation, static affair, with no inter-vivos or inter-generational transfers, I would guess that more philosophers would be able to stomach naturalism about property. I myself find the idea of self-ownership one of the most benighted philosophical ideas in the history of the West,\textsuperscript{23} and see no independent plausibility to the idea that mixing your labor with something generates a right to exclude others and use the thing, but certainly there are those who have seen the appeal of these ideas. It is once we add in the entire history of property transfers that the idea of a fully natural account seems absurd to just about everyone.

Suppose that there is some theory explaining how people can acquire pre-institutional, moral, property rights in the state of nature. Current, legally protected holdings, anywhere in the world, cannot possibly reflect natural ownership rights as that theory explains them. Assuming that fraud and force entered into actual history pretty much as soon as acquisition
began, and assuming that whatever natural theory of rightful transfer one favors will not bless all of even the legal transfers that have happened through history, we will have no basis for assuming that existing legal property rights bear any useful relation to moral property rights. So what do we now own? The informational burden here is obviously laughably big. But beyond that, we need a lot more theory, which must, of course, be defended naturalistically, not instrumentally. Not only do we need a theory of transfer adequate to assess the legitimacy of all that has gone on since the first acquisitions; we need also a theory of rectification of enormous complexity. What do we say, for example, about a fortune acquired by an investor who made use of capital acquired in good faith at the end of a chain of fifty other good faith transfers all subsequent, however, to an ancient petty theft? The remarkable fact is that Lockean theory, which is the only naturalistic theory we have going, has precisely nothing to tell us about what people now own, morally speaking. This, I venture, is why even among contemporary theorists who are on a crusade to take property more seriously than has been typical in Anglo-Saxon legal theory, conventionalism remains the norm. Let me say a bit about this crusade.

One group of writers I have in mind, some of them gathered in the U.S. under the label of the “New Private Law,” stand in opposition to what they see as the skepticism and reductionism characteristic of the American legal realists and most economic analysts of law. Property, these theorists insist, is not just any bundle of rights arbitrarily gathered together under that label; there is a core to the concept of property and good reasons to hold onto it.
These theorists remain squarely within the instrumentalist camp, however, as they generally locate the point of the institution of property in facilitating the valuable use of things by people. Moreover, these theorists’ very interest in the concept of property could only be justified instrumentally. Conceptual questions are in themselves generally uninteresting, but if there are pragmatic benefits that flow from using only certain traditional and familiar ideas of what property is, then that provides a reason for the law to do just that.

Another important group of scholars engaged in taking property seriously are neo-Kantians. I want to mention just one recent paper, “Possession and Use,” by one of the most influential members of this group, Arthur Ripstein. In Ripstein’s view, property rights are extensions of or on a par with rights to bodily integrity. It’s all about authority. Just as you don’t get to say what happens to my body, you don’t get to say what happens to my things. Ownership is then very much a matter of rights, and these ownership rights are not justified by the good brought about by their protection, any more than my liberty rights are. So Ripstein is not an instrumentalist—he does not find the justification of the law of property in the overall social good it does. But neither does he offer a natural rights account of property, since, following Kant, he holds that it is up to positive law to determine what I own. This view puts pressure on the equivalence I have taken for granted between practice-based views and instrumentalism, since Ripstein’s view is practice-based but not instrumentalist. It does so at the expense of great mystery, however, since it is unclear why positive law should concern itself with property if it is neither enforcing pre-existing rights nor trying to do any good. In fact, this is such a strange view that it seems worth investigating its motivations, which I will do a little in
the next lecture. But the point to make now is that even Ripstein agrees that there are no preinstitutional, natural property rights that constrain the content of property law and government’s powers of distributing property.

So naturalism about property remains almost a crank view. Even philosophers who have embraced the label “libertarian” tend to offer instrumental arguments for the “right” to private property.\(^{32}\) We can almost consign naturalistic accounts of property rights to the dustbin of history.

When we turn from property to contract, it is immediately clear that things are different. Conventionalism about promise is these days the minority view. Since I find the practice-based case equally strong in both cases, this will require some explanation.

5. Against Naturalism about Promises I: Harm to the promisee

The philosophical problem with a promise, according to Hume, is that it is the willing of an obligation. It isn’t the statement of an intention, or resolution, or desire. None of these give you an obligation to act as you say you will or want to.\(^{33}\) But then, how can an obligation simply be willed into existence? In believing that promises create obligations, we seem to be believing in magic.

Saying you have an obligation or intending to take one on doesn’t, in general, make it so. Why should it make it so in the particular case of an intention to take on an obligation to act in a certain way? Of course, there are things we can do—acts of will or voluntary choices—that
will make it the case that we have a duty to act in a certain way; deciding to have a child is an obvious example. The point is not that our obligations are not affected by our voluntary acts, but that we can’t will obligations into existence.

As I’ve said, until fairly recently, most English-language philosophers took Hume’s position to be obviously right. But there is a new naturalism about promise abroad. One line of response to Hume’s puzzle has been to deny his description of what is going on when we make promises. Promises are not binding because we have the magical ability to will obligations into existence, but because when we make promises there are morally significant effects on our promisees; it is these effects on those to whom promises are made that generate the obligation to perform. If one of these promisee-focused views is plausible, the Humean puzzle is simply not engaged. So we need to address these views first.

Now it is obvious that when a promise is made, a promisee may either develop expectations of performance, or rely in a material way on performance, or both. If I rely in a material way on your promise, your nonperformance will cause me actual harm, relative to a baseline where the promise was not made. Following Lon Fuller, we talk here of a “reliance interest.” If I have not relied, your nonperformance does not cost me anything relative to a baseline of no promise, other than perhaps dashed expectations or disappointment. But there is another kind of interest, which Fuller misleadingly called the “expectation interest.” A lost expectation interest is the loss you suffer relative to a baseline of performance as promised. Since you have that loss whether or not you expected performance at all, let alone suffered disappointment upon nonperformance, “expectation” is the wrong word—a better label is
“performance interest.” Note that unlike reliance losses and the hurt of disappointed expectations, losses in the domain of the performance interest are not real; they are not losses actually suffered because the promise was made and not kept. The loss from nonperformance is only a loss in the strongly normative sense that I didn’t get what I was entitled to.

In part because of this, some theorists, starting with Fuller, have argued that the reason why we should keep our promises is to prevent reliance losses by promisees. The general idea is this. We aren’t generally liable for losses other people suffer because they relied on what we said we would do. If some stranger overhears me say that I am going to do something – buy beers for everyone who comes to the pub that night, for example – I am not responsible for his reliance loss if I later change my mind. But what it is to make a promise, on this kind of view, is to go beyond mere awareness that someone may rely, and rather to ask for it, or invite it, or encourage it. If I invite or encourage your reliance, it can seem only fair that I do what I can to prevent reliance losses. And one way to do that, of course, is to keep my promise. The attraction of these views is that reliance losses are real. The problem with them, however, is simply that they do not capture the way promises work. Once a promise is made, the promisor is obliged to perform—barring excuses, release by the promisee, and so on. No one thinks that a promisor is excused just in case the promisee would suffer no reliance losses from nonperformance. Similarly, if reliance were what it was all about, a timely warning, before any reliance has occurred, would discharge the obligation. But you don’t get out of a promissory deal just because you gave an early enough warning to the other side. There may or may not be
a moral principle that if you encourage another’s reliance, you are responsible for their reliance losses.\(^{37}\) I have my doubts that there is, but either way, such a principle cannot explain the morality of promise.

A promisee-based account of natural promissory morality needs to establish responsibility of the promisor for the promisee’s performance interest, not her reliance interest. But this is going to be hard, since the performance interest, as we saw, is a normative interest, not a real material interest. It would be question-begging to explain the duty to keep promises by saying that promisees have an interest that promises be kept, since promisees only have that interest if promisors have that duty.

Scanlon appeals in this context to the “assurance” of the promisee. His thought is that if the promisor sets out to induce in the promisee a confident expectation of performance, it would be wrong to disappoint that expectation.\(^{38}\) An immediate concern here is that this account seems to make the moral importance of promises turn on how strongly the promisee expects performance. Just like the accounts that appeal to promisees’ material reliance, this doesn’t seem right; promises seem to bind independently of how strongly the promisee actually expects performance.\(^{39}\) A deeper issue, however, is this. Why should the fact that I have assured you that I will do something in itself make it the case that I should do it?\(^{40}\) What is your loss if I do not? As you expected performance, nonperformance may leave you with reliance losses, or losses of disappointment, but what if it does not? And even if it does, these costs bear no necessary relation to the value to you of actual performance, which is what you are entitled to.\(^{41}\) I conclude that promissory morality just isn’t about individual promisees’
material interests.

Scanlon notes that sometimes we don’t just want to avoid losses, we want things to happen. This is true. But we can want things to happen even though we are not assured that they will. One way it can become more likely that something will happen is that someone else acquires a moral reason to make it happen. To the extent that the strength of people’s moral motivations can be counted on, we all would benefit—for all the reasons why a social practice of making and keeping promises is valuable—if people could voluntarily acquire moral reasons to make something happen. But the fact that we would benefit if people could do this doesn’t mean that they can. My interest in not being harmed can and does generate a moral reason in you that you not harm me; but our joint interest in your having the ability voluntarily to acquire a moral reason to do something cannot give you that ability.

6. Against Naturalism about Promises II: A Normative Power?

Or can it? I turn now to a second line of response to Hume that has become the dominant philosophical position in recent years. We have the ability to bind ourselves by promises just because we have what is called the normative power to do that. And we have that normative power precisely because it is good that we do.

It was Joseph Raz who introduced the general idea of normative powers into moral theory, using the power to impose a promissory obligation on oneself as an illustration. A normative power is the power to change one’s own or others’ normative situation. Such
powers are commonplace in the legal context; the idea of legal powers being familiar since Hohfeld. We have the power to create legal rights in others and/or obligations for ourselves by executing a will, creating a trust, or entering into a legally binding contract. It is easy to know whether we have a legal normative power, and why we have it: the law will tell us. By contrast, it is not self-evident how natural moral normative powers could arise.

Raz has an argument, which I will turn to shortly. But a substantial number of philosophers, Stephen Darwall prominently among them, tell us, in effect, that no argument is necessary. Moral normative powers are ubiquitous, so it is out of place to worry about where they come from. In addition to the power to promise we have, for example, the powers to enter agreements, to accept invitations, to make gifts, to consent, and to give orders.

I am unmoved by this list. Some of these powers, such as entering agreements or accepting invitations, are promissory or at least so close that they do not provide clear independent examples. The power to make a gift is independent of promise, but this power emerges from the artificial morality of property. Similarly, the normative power to give orders is obviously dependent on actual institutional structures.

The only genuine candidate for a natural normative power other than promise is that of consent. It is clear enough that through consenting I get to change the normative situation, and clear enough that we don’t need to appeal to law or conventional social practice to make sense of this. So have we here found what it is clearly fair to ask for: at least one other example of a natural normative power?

It is obvious that we have an interest in being able to change our moral situation by way
of consenting to certain actions that others would otherwise not be able to perform without wronging us—if I could not consent to your putting a needle into my body (to draw blood), that would make my autonomy and my standing right not to be injured much less valuable. When I give my consent, I also change my obligations—I am now obliged, where before I wasn’t, not to punch you on the nose to stop you sticking a needle into my arm. It makes perfect sense for me to want all this.

So it is true that my right to autonomy and bodily integrity would be puzzling to me if I couldn’t by consenting give you leave to do various otherwise prohibited things when I want this, changing my own obligations in the process. It is true, furthermore, that no one would be able to convince me that this ability was an illusion; it just seems like moral bedrock, if anything is. So if this is a clear case of a natural normative power, why all the fuss about promise, which is just as familiar a part of ordinary moral life as consent is?

The answer is that consent is not an example of a normative power at all. What is fundamental to my autonomy rights is that I have control over who interacts with my body in certain ways. It isn’t accurate to think of the right as a prohibition on boundary crossing to which we add a desirable normative power of consent. The ability to consent is part and parcel of what it is to be free; I get to decide, within various limits, what happens to my body. And remember, I can always change my mind; I always remain in control.

Nothing similar can be said about the power to promise. Being able to commit myself into the future is dramatically different from being in charge, here and now, of what others can
do to my body (without wronging me). While I cannot make good sense of a right to autonomy and bodily integrity without the power of consent, I certainly can make sense of those rights without the power to promise. So the power to promise, unlike the ability to consent, is something added to my standing autonomy rights, and the question remains why we should think we have that power, especially since it would be the only natural normative power we have.

So we do need an argument. And so we turn to Raz. When we do, however, we see that in actually trying to justify the existence of moral normative powers, Raz is led back in the direction of conventionalism.

Raz’s account, in its most recent version,⁴⁸ is that we have a certain normative power just in case it is morally desirable that we do. In the case of the power to bind ourselves through promise, the power is justified or explained by the fact that it is morally desirable that promisors have that power. Note here the form of the argument: it would be good if it were so, therefore it is. I’ll get back to that.

For Raz it is the interests of the promisor that ground the normative power. His reflections on the benefits of being able promise are somewhat reminiscent of Nietzsche’s in the second essay of the Genealogy.⁴⁹ Raz notes that the ability to promise enhances our control over our lives. Having available the option whether or not to make commitments does this, for example, by expanding the options for collaboration. But, crucially, the extent to which it does this depends on the degree to which our promisees will in fact trust us to perform.⁵⁰ Earlier work by Raz had suggested that the value of the power to promise is that it is good to be able
to enter into the moral relationship of promisor and promisee, that this very tie of duty and right is inherently valuable. This seemed extremely implausible. What is intrinsically valuable about standing in the relation of obligor and obligee? But we now see that Raz’s view is that, depending on how much our promisees actually trust us, our ability to make promises enhances our control over our lives. It is easy to see value in that, even if Nietzsche exaggerated it.

What emerges from this quick summary suggests that for Raz the existence of the normative power, which turns on its value to the promisor, depends to a large extent on a social practice of acknowledging the existence of the power. It is only if our promisees actually expect us to perform that the power has any value. But then that suggests that a social practice of promising is required before the normative power to promise, and therefore the duty to keep promises, can arise.

The need for a social practice to trigger the existence of a normative power to promise is made explicit in David Owens’ important recent contributions to this topic. For Owens, the value in the power to promise lies in the interests of promisees rather than promisors. He holds that people have a moral interest, what he calls an “authority interest,” in being able to decide what others morally may do; this kind of authority is precisely what promises give promisees, since it is in their hands to excuse performance. I myself find quite unappealing this idea of an interest in it being up to me whether someone does right or does wrong. But leave that aside. Owens explains that I don’t actually have an interest in the mere fact of being able to determine whether you will act wrongly if you break your promise. What is valuable is social
recognition of that authority, in the form of performance, or of respect for or
acknowledgement of the fact that the promisee has a right to performance. Authority must
be a social reality; promises are only binding in a social context in which it is the actual practice
to recognize them as such.

But now if the value to the promisee of having the promissory right depends on the
extent to which her right will be socially acknowledged, then the appeal to normative powers
requires a social practice, just like the instrumental view. Since that’s so, explicitly for Owens as
it was implicitly for Raz, one might wonder why they bother with all this fancy talk of normative
powers. Why not just embrace the instrumental view, adding, perhaps, the value to promisors
of being able to promise that Raz discusses, and promisees’ authority interest, introduced by
Owens, to the list of values that the practice of promise promotes?

The reason, I believe, is that these normative powers accounts aim to vindicate the idea
that promisors have genuine moral duties correlating with genuine moral rights on the part of
promisees. Both Owens and, as I read him, Raz, hold the following: if there is a practice in which
people are treated as having a normative power to promise and that practice is valuable, then
the normative power really exists, which is to say that if you promise you have a duty to
perform and the promisee has a right to performance. Since these rights and duties are
practice-dependent we do not here have an account of natural promissory rights. But we do
have an account of real promissory rights and duties, an account of how breach of promise
wrongs promisees even where there is no reliance or disappointed expectations.

To my mind this position is effectively the same as that of Rawls in “Two Concepts of
Rules.” In that paper Rawls argued that the morality of promise requires a valuable, just practice. But once we have such a practice, its rules are fully binding automatically, without any need to think about whether noncompliance would be unfair, or harm the practice. From within the practice we do not think about the instrumental reasons to have it, or the reasons for participants to comply; we just know that the rules are binding, and that any breach will wrong promisees.

The normative power account, understood along these lines, may seem to have a clear advantage over the instrumentalist view, which cannot see any wrong to the promisee in cases where there is no expectation or reliance. The trouble, however, is that the genuine duty-right pair the normative power account offers us was pulled out of a hat.

Recall that Raz holds that we have a normative power if it is valuable that we do. Suppose it would be better, because the interests of promisors and promisees would de facto be better served, if there were genuine rights and duties in the story. Does that mean that there are genuine rights and duties? It would be good if it were, so it is, is clearly not generally a good form of argument, and I can’t see that it is in this specific context either. The fact that general compliance with a certain rule-structured social practice produces value does in not in itself establish the deontological force of the rules.

We reach here a very interesting and important wider topic. I will touch on it again in the next lecture, but there is no need to explore it further now. For Owens is explicit, and Raz suggests, that the morality of promise is dependent on the existence of a conventional practice.
This means that the rights of promisees are entirely dependent on the content of actual practices, and there is no such thing as a preconventional natural promissory right. The normative powers account is not, once it is actually argued for, an account of natural normative powers at all. That’s enough for me for present purposes.

A different and original way of arguing for the existence of the normative power to promise, which nonetheless has affinities with Raz’s approach, has recently been made by Seana Shiffrin. Shiffrin replies to doubts about the moral power to promise by arguing that the existence of this power must be assumed if we are to make sense of aspects of our lives of unquestioned moral value. Intimate relationships that display equality of concern and respect are of unquestioned value, and the ability to promise plays a necessary role in such relationships. The value of promising lies in its constitutive contribution to something else we all agree has value. So the argument is not quite that we have some power just because it is good if we do. Rather, it is a transcendental argument: It is obvious that such valuable relationships are possible, therefore we must have the power to promise. This also casts the analogy with consent in a different light. Shiffrin’s argument is not that we have a whole lot of normative powers, among them that of consent, so why not promise too? Neither is it that promising, just like consent, is part of our autonomy rights from the start. Rather, just as we cannot make sense of autonomy without the ability to consent, we cannot make sense of morally valuable intimate relationships without the ability to make promises. Both abilities must be presupposed if we are to make sense of other uncontroversial aspects of our moral lives. I find the argument ingenious and compelling in its form, but unconvincing in its content.
Shiffrin holds that intimate relationships on grounds of equal respect are not possible without the ability to promise because “promises provide a unique and indispensable tool to manage and assuage vulnerabilities.” My reaction is that while promises are such a tool, they do not seem to be unique or indispensable. The ability voluntarily to take on moral obligations to do something certainly can have value within close relationships. Promises are sometimes made to intimates (though among adults usually when things have gone off the rails a bit). To the extent that the parties are morally motivated and known by each other to be so, promises can have the effect of promoting trust and assurance, as well as making it more likely that certain things will happen. This may certainly help assuage vulnerabilities. But the ability to make promises is not the only way to bring about trust, reliability, and assurance, or make it more likely that something will happen; mutual knowledge of mutual love and special concern may do away with the need for the tool of promising altogether. For promising to be essential, it would have to be the case that vulnerabilities can only be assuaged by the ability of the parties voluntarily to take on moral obligations to each other; that without the ability to add to existing moral reasons to act as we know those we love want us to act, truly intimate relations on equal terms would be impossible. Perhaps it is idiosyncratic of me to think that a relationship that depends on promising is less valuable than one in which equality and the absence of vulnerability is achieved naturally via mutual special concern. Be that as it may, it seems to me clear that the ability voluntarily to ramp up the moral reasons to act in ways that we know those we are close to want us to act is not essential to a decent intimate relationship.
7. Promise and Property

My conclusion is that both promissory and proprietary morality are essentially matters of the collective good, not individual pre-political right. And the root reason for this is the one that Hume gave: the bindingness of promises, no more than ownership rights, simply does not make immediate, natural sense. That my uttering the words, “I hereby take on an obligation” has the effect that I have taken on an obligation, is on the face of it absurd; Hume was right to compare it to transubstantiation.\(^{60}\) It is easily as absurd as the idea that by mixing my labor with a piece of land, I acquire the moral right to exclude all others. Promissory and proprietary rights and duties are not plausibly regarded as natural moral primitives. Though there are certainly natural and morally significant interests that the practices of promise and property serve, those interests cannot directly generate rights and duties. Compare what does make sense naturally: that I have the right to decide whether you touch my body; that I have the duty to care for my dependent children; that I have to duty to turn over a drunk man lying face down in a puddle; that I should not abuse your agency by manipulating you with lies or otherwise. Hume’s contrast between the natural and the artificial seems to me plain, as does the fact that promise lies on the artificial side. What explains the fact that most philosophers disagree with me about promise, even as they agree about property?

I think the reason lies with the far greater complexity of proprietary rights relative to promissory rights. As we saw, the fact of transfers over the millennia makes it quite impossible for any naturalistic theory of property rights to tell us who owns what now. For the case of
promise, by contrast, we generally are concerned with a moral relationship that does not last
over generations, where change of parties through assignment is exceptional, and that has just
one core incident: that promisees have a right to performance. As will be elaborated in the next
lecture, we all tend to incline towards naturalistic views about both promise and property. But
while philosophical reflection makes plain that naturalistic theory cannot tell us who owns
what, there is no difficulty saying who has what promissory rights. This makes it possible to
hold out hope for some naturalistic account of promise. We feel that there must be some way
to vindicate the intuitive thought that the primary thing to say about breach of promise is that
it wrongs promisees. But discussions of promise should learn from the case of property. After
all, it is also intuitive that the primary thing to say about theft is that it wrongs the owner. And
we know that can’t be so.\footnote{This view is often referred to as neo-Lockean, but it is debatable whether John Locke actually held it, so I won’t use that label. See Jeremy Waldron, “Locke, Tully, and the Regulation of Property,” \textit{Political Studies} 32 (1984): 98-106; \textit{The Right to Private Property} (Oxford: Clarendon Press, 1990), 282–83, and \textit{God, Locke, and Equality: Christian Foundations in Locke’s Political Thought} (Cambridge: Cambridge University Press, 2002), 177–78. See also A. John Simmons, \textit{The Lockean Theory of Rights} (Princeton: Princeton University Press, 1992), 43, note 73. Simmons remarks that “libertarians are moved, I’m afraid, more by their search for philosophical forbears of suitable respectability than by close attention to Locke’s texts.” Simmons, 60-61.}

I conclude that both promise and property are artificial, morally speaking, and so that
the law of the market, contracts and property, does not have individual right at its foundation.
Hume was right, the whole thing is artificial. Belief in moral promissory and propriety rights is a
harmful illusion. In my next lecture I will discuss the harm it does, and investigate why it is so
hard to shake off.
“Such was, or must have been, the origin of Society and of Laws, which gave the weak new fetters and the rich new forces, irreversibly destroyed natural freedom, forever fixed the Law of property and inequality, transformed a skillful usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjugated the whole of Mankind to labor, servitude and misery.” Jean Jacques Rousseau, “Discourse on the Origin and Foundations of Inequality Among Mankind,” The Discourses and Other Early Political Writings, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 173.

3 Note that Rawls himself proposed evaluating institutions such as property and contract solely on the basis of social justice as identified by his two principles, which do not obviously have room for values distinctively associated with private ordering. For discussion, see Samuel Scheffler, “Distributive Justice, The Basic Structure, and the Place of Private Law,” Oxford Journal of Legal Studies 35 (2015): 213–235. This limitation of Rawls’s theory, if that’s what it is, need not, of course, be shared by all instrumentalist views, no more than need Hume’s exclusive focus on the values of individual self-interest and social utility—about which more below.

4 In 1984, Michael H. Robins wrote of the “near universal deprecation, inspired by Hume, of the idea that real, binding obligations can somehow be ‘willed’ into existence, as one can will into existence the movement of one’s arm.” What is now near universal is the deprecation of the Humean deprecation. Michael H. Robins, Promising, Intending, and Moral Autonomy (Cambridge: Cambridge University Press, 1984). 1.

5 I have in mind both neo-Kantians, especially Arthur Ripstein in Force and Freedom: Kant’s Legal and Political Philosophy (Cambridge: Harvard University Press, 2009), and “new essentialists” (a term coined by Katrina Wyman in “The New Essentialism in Property,” unpublished ms.) inspired by the work of the economically inclined scholars Thomas Merrill and Henry Smith.

6 Both David Hume, A Treatise of Human Nature, ed. P. H. Nidditch (Oxford: Oxford University Press, 1978), III.2, in his discussion of the artificial virtues, and John Rawls, “Two Concepts of Rules,” The Philosophical Review 64, no.1 (1955): 3, appear to believe that once the desirability of the practice is established, the bindingness of the rules within the practice is assured. But this does not follow, as we will see below.

7 For criticism of the “voluntariness” part of the argument, see Robins, Promising, Intending and Moral Autonomy, 127-32. I make a different criticism in the next lecture.


9 For the view that what I do or say may generate responsibility for reliance and expectation harms of people for whom I otherwise have no responsibility, see T. M. Scanlon, What We Owe to Each Other (Cambridge, Mass.: Harvard University Press, 1998), ch. 7.


12 Note on competing interpretations of Hegel’s remarks about property and freedom, and Kant’s unconvincing claim that private property is necessary for the realization of equal liberty.

13 Such as the ideal of respectful community between moral agents, as argued by Markovits with regards to promise and contract, see “Contract and Collaboration,” Yale Law Journal 113 (2004): 1417-1518; or the idea that promises serve our authority interests (our interests in controlling what others are obliged to do), see David Owens, Shaping the Normative Landscape (Oxford: Oxford University Press, 2012); or the idea that private property is grounded in an idea of self-authorship and is an empowering device crucial for personal autonomy and relational equality, see Hanoch Dagan and Avihay Dorfman, “The Human Right to Private Property,” Social Science Research Network (2015), available at http://papers.ssrn.com/abstract=2624428.

14 Note on Hegel’s discussion of possession in s. 50 of The Philosophy of Right.
For critical discussion, see Waldron, The Right to Private Property, 171-77, 184-207.

For instance, Nozick asks: “What are the boundaries of what labor is mixed with? If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot?... if I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” More deeply, Nozick asks: “Why does mixing one’s labor with something make one the owner of it? Perhaps because one owns one’s labor, and so one comes to own a previously unowned thing that becomes permeated with what one owns... But why isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t?” Robert Nozick, Anarchy, State, and Utopia (New York: Blackwell, 1974), 174–75.

Note on (Cohen’s interpretation of) Marx’s theory of exploitation.

See, e.g., Waldron, God, Locke, and Equality, 164-70; Barbara Arneil, John Locke and America (Oxford: Oxford University Press, 1996).


With, again, the possible exception of Hegel, as discussed in note x.


The idea, Kantian and perhaps Hegelian, that only first possession can establish initial acquisition because once something is justly possessed, no one else can justly possess it shows only that if mere possession is going to ground rights, it had better be first possession (and not, say, second).

Note on Harris on self-ownership.


For the now familiar idea that a naturalistic theory needs these three elements, see Nozick, Anarchy, State, and Utopia, 150-153.

Nozick acknowledges the difficulty in Nozick, Anarchy, State, and Utopia, 173. Note on critique by Barbara Fried.

The historical Locke, sympathetically interpreted, understood this, because he held that once government was up and running the laws defined what people owned. (Though perhaps that’s not so sympathetic an interpretation, since it suggests that he needed the account of property in the state of nature only for the sake of his defense of colonial acquisition and slavery.) Robert Nozick also understood it full well: in his view, historical principles of entitlement to holdings have been violated so grossly and for so long that we have no hope now of rectifying the breaches. So in the end, the entire theory is admitted by Nozick to be useless as a moral guide to what the content of actual property law, now, should be. Nozick, Anarchy, State, and Utopia, 231.

For a very sensible approach to the “bundle of sticks” idea of property, one that makes more recent anxiety about it seem unwarranted, see Waldron, *The Right to Private Property*, ch. 2. For the recent anxiety, see . . . cites to Penner, *Smith, Merrill*.


Scanlon’s “Principle I” is precisely that sort of principle. Scanlon, *What We Owe to Each Other*, 300-301.

Scanlon, 302-309.

Scanlon, in his discussion of “the profligate pal,” accepts that a promise is not binding if there is no expectation of performance. Scanlon, 312-314.

Scanlon explains this via his contractualist method; I believe that the points I am now about to make apply to that form of the argument as well. Scanlon, 306-309.

This brings out again that expectation damages, in contract law, are badly named. They should be called “performance damages” since what they give the promisee is not what will make up for lost expectations he really had, either in the sense of compensating for the hurt of disappointment or even in the sense of giving him what he actually thought he would actually get.

Scanlon, *What We Owe to Each Other*, 303.


Agreements are just exchanges of conditional promises, and accepting an invitation is a conditional promise to attend unless something significant comes up in which case a warning will be given. Agreements are exchanges of conditional promises because, for example, if you announce you will not perform any part of your side of the deal, that will amount to the failure of an implicit condition of my promise to perform my part. This is just common sense, though it was not worked out in explicit terms for the common law until the Eighteenth century by Lord Mansfield in *Kingston v. Preston* 2 Doug. 689 (1773). The same doctrine is found in the French Civil Code, Article 1184. Margaret Gilbert’s argument that agreements are not promise pairs, in “Three Dogmas about Promising,” *Promises and Agreements*, ed. Hanoch Sheinman (Oxford: Oxford University Press, 2011), 96-98, and Darwall’s similar discussion in Darwall, “Demystifying Promises,” p. 153, neglect implicit conditions.
33

See Darwall, “Demystifying Promises”; Seana Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” *Philosophical Review* 117 (2008): 481-524; Watson, “Promises, Reasons, and Normative Powers.” Owens presents a long discussion of consent in *Shaping the Normative Landscape*. He would agree with my discussion that follows in the text but in his terms I am discussing morally significant choice, not true consent. True consent, for Owens, is a “normative power” that allows individuals to abolish, by declaration, the wrongful character of bare (non-harmful) wrongings. So, for Owens, true consent is another normative power, one grounded in our “permissive interest” in being able to transform bare wrongings into permissible actions. Owens’ resort to the example of rape that does no physical or psychological harm for a case of a bare wrongdoing that can be made right by (true) consent persuades me rather that consent in his sense is an illusion.

Raz, “Is There a Reason to Keep a Promise?”

“Dieser Freigewordne, der wirklich versprechen darf, dieser Herr des freien Willens, dieser Souverain – wie sollte er es nicht wissen, welche Überlegenheit er damit vor Allem voraus hat, was nicht versprechen und für sich selbst gut sagen darf, wie viel Vertrauen, wie viel Furcht, wie viel Ehrfurcht er erwacht – er verdient alles Dreies – und wie ihm, mit dieser Herrschaft über sich, auch die Herrschaft über die Umstände, über die Natur und alle willenskürzeren und unzuverlässigeren Creaturen nothwendig in die Hand gegeben ist?”. Friedrich Nietzsche, *Jenseits von Gut und Böse. Zur Genealogie der Moral*, eds. Giorgio Colli and Mazzino Montinari (Munich: Deutscher Taschenbuch Verlag, 2002), II.2. (“This man who is now free, who actually has the prerogative to promise, this master of the free will, this sovereign – how could he remain ignorant of his superiority over everybody who does not have the prerogative to promise or answer to himself, how much trust, fear and respect he arouses – he ‘merits’ all three – and how could he, with his self-mastery, not realise that he has necessarily been given mastery over circumstances, over nature and over all creatures with a less enduring and reliable will?”). Friedrich Nietzsche, *‘On the Genealogy of Morality’ and Other Writings*, eds. Keith Ansell-Pearson and Carol Diethe (Cambridge: Cambridge University Press, 2006), 37.

By contrast it does not depend on our actually keeping our promises.

This seemed to be Raz’s earlier view, but perhaps that was a misreading. In that earlier account, the relationship of promisor and promisee is one characterized by a particular kind of bond, “binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having peremptory force.” Our belief that promises create obligations will be justified “if the creation of such special relationships between people is held to be valuable.” Raz, “Promises and Obligations,” 227-8.

Raz also notes that the value of promises for promisees is that it gives them normative assurance, and this kind of assurance presumably also has greater value when the likelihood of performance is greater.

In earlier work, Raz wrote that one “could promise even in societies - if such ever existed - that do not recognize the practice of promising.” Joseph Raz, “Promises in Morality and Law,” *Harvard Law Review* 95 (4) (1982): n. 21. Perhaps this leaves open whether one can make a binding promise in such a society.

Owens, *Shaping the Normative Landscape*.

Owens, pp. 150 ff.


And see my work in progress, “The Model of (Moral) Rules.”

Shiffrin, “Promising, Intimate Relationships, and Conventionalism.”

Shiffrin, 508.


I am here influenced by discussion with Jed Lewinsohn.