Private Law and Public Illusion

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Lecture Two: The Persistence of an Illusion

1. Varieties of Normative Order

The public illusion I am concerned with is the belief that the moral foundations of property and contract law are individual promissory and proprietary moral rights. Having argued that this belief is an illusion in my previous lecture, I turn now to its costs, and to offer hypotheses about why it persists. The structure of the problem requires that I start, appropriately enough, with some remarks about the formation of, or at any rate the relations among, normative orders. This is a complicated matter. In the first place, there are many different types of normative order, including those of law, morality, conventional morality, etiquette, religion, thieves’ honor, military codes, club rules, and so on. My lectures concern the first three of these—law, morality, and conventional morality.

But there is also another kind of normative order at the heart of my discussion, which we can call simply a social practice. A social practice is any rule-governed social activity, where the rules are generally complied with. To say that something is a social practice is to say nothing about the reasons why people comply. Possible motives include self-interest, a sense of moral requirement, and mere habit or a desire to conform.¹ I mention the category of social practices separately from the others in the list of normative orders I just gave, because it overlaps with some of them. Thus conventional morality, by which I mean the set of moral norms that are generally accepted in a society, will typically be realized in a social practice. And etiquette does
not exist at all except in the form of a social practice. As for law, there is disagreement: it could be nothing but a social practice, partly a social practice, or capable of realization in a social practice, depending on your views.

This disagreement about the connection between law and social practice reminds us that for law, as for many of the normative orders on my list, there is a philosophical question about what makes a normative order one of that type. This would seem to be a matter prior to any question of the relations among the types. And it is, but I’m going to leave aside the issues of what makes law law, morality morality, and so on, because discussion of the natures of the various normative orders would take us too far afield. I assume only that there are these distinct types of normative order and that, for example, the legal isn’t simply a subpart of the moral.²

Now different disciplines are traditionally interested in the relations between different pairs out of law, morality, and conventional morality. Within the field of law and society we have had a debate about something called the “mirror” thesis, the thesis that a society’s law typically mirrors its conventional moral norms.³ Philosophers, on the other hand, have traditionally been primarily interested in the relation between law and morality, where the word “morality,” used alone, means not conventional but critical morality, or the true or best justified moral view.

Two main kinds of question have been asked about the relation between law and morality. There is, first, another question about the nature of law. Related to the question of what makes a normative order one of law, there is the question of the grounds of law, of whether moral considerations play a role in determining law’s content. I’m not doing the nature
of law here, so I will simply assume that we all agree on how to find out the content of the law in force in any particular place.

My discussion does, however, concern the second kind of question philosophers have asked about the relation between law and morality. This is the question of what could morally justify the law as it is, to the extent that it can be justified, and of how it could be made morally better, if it can be. In other words, I am doing normative legal theory, interrogating the content of the legal normative order from the point of view of the moral.

Now to do normative theory of property and contract law we need to consider not just law and morality, but social practices too. That is not true for all areas of law. Some areas of law, such as for example some or all of the constitutional law of individual rights, simply pick up on what we hold to be independently cognizable moral rights. Here we might say that, if the law is good, it will simply reflect morality. We might hope that it will also reflect a conventional moral practice, for reasons of legitimacy and stability, but those are matters independent of getting the content of law right.

For other areas of law, there is nothing in the moral order for the law to reflect. No one thinks that the complex structure of bankruptcy law, for example, simply reflects natural moral requirements on citizens. Bankruptcy law requires moral justification, of course, but that takes the form of a complex weighing of considerations, where the particular rules may not at all reveal on their surface the moral reasoning that led to their enactment. So there is no natural moral order of bankruptcy. Neither, as I have argued, is there a natural moral order of property and promise. But there is an important difference between bankruptcy, on the one hand, and contract and property on the other. For there is not only no moral order of bankruptcy, there is
no conventional morality or any kind of nonlegal social practice of bankruptcy either.  
Bankruptcy is a legal order and only a legal order.

By contrast, there is a pretty well-worked out social practice of promise and property, supported both by self-interest and conventional morality, that has an important relationship with contract and property law. The relationship is a kind of mirroring, but it is not the mirroring of reflection—the kind of mirroring Stendhal had in mind when he said that a novel is a mirror carried along a road. Rather, in the context of contract and property, the legal normative orders and the social practices mirror each other the way identical twins do. We have two normative orders, one informal and the other legally enshrined and enforced, that have as their point the promoting of the same social values.

In Hume’s fable, the informal social practice comes first, supported in the beginning by reputational sanctions that appeal to self-interest. Moral motivations, based in recognition of the value of the practices, can kick in once the practice is up and running; eventually, conventional morality may come to treat the rules of the practices as moral norms. The legal order with its coercive force comes along when reputational sanctions and moral motivations prove inadequate to support the practice in larger and more complex societies. I don’t necessarily think the temporal element of Hume’s fable is correct, nor do I think he thought it was important. The social practice, the moral motivations, the formal legal sanctions—all these could emerge at the same time. Or rather, we might better say, all three might for all relevant purposes always have been there in human society. The important point is that the legal order just is the more formal enforcement of the nonlegal social practice.
Still, over time, as societies get more complex, details are added to the legal orders of property and contract that do not have any kind of presence in the nonlegal practices. Since there are effective methods for changing legal normative orders that do not exist for nonlegal social practices, divergence can occur. This can create a problem, and not just for reasons of stability or legitimacy. Divergence between the legal order and the non-legal social practice can have the effect that we do less well in achieving the goals that provide the point for having both of them in the first place. Which would mean that the law is less good, morally speaking: the success of the legal order from the moral point of view depends in part on how well it meshes with the nonlegal social practice.

This problem won’t arise if the divergence remains a case of the law just containing some greater detail than the informal practice. Or if, as is perhaps the case with property, the legal practice is so dominant that the nonlegal practice simply automatically changes as the law does. But if the law contains elements that conflict with a robust and stable nonlegal practice, there is the danger that they will work against each other, especially if the conflict is systemic and fundamental. For example, if contract law were changed so that the remedy for breach were reliance damages and promisors could discharge their duty to perform by giving a timely warning, it would become a very different practice from the social practice of making and keeping promissory agreements. Such a profound conflict would arguably undermine the ability of both law and the nonlegal practice to achieve the central aim that they have traditionally shared, which is to promote cooperative activity through the making and keeping of agreements. It is, I think, no surprise that throughout both the civil law and common law worlds, the legal remedy for breach is either a court order requiring performance, or
performance damages; this lines up perfectly with conventional ideas about promissory agreements.

We see then that differences in subject matter dramatically affect the way we should think about the relations between types of normative order. In the case of the constitutional law of individual rights, we could hope that the legal norms simply reflect valid moral norms. In the case of highly technical areas of law, such as bankruptcy, to take the other extreme, the legal norms are instruments in service of general social values and there are neither real nor conventional moral norms that they could mirror in any way. For contract and property, the legal norms cannot reflect natural moral rights and obligations, as there are none, but it is important that they align pretty closely with the norms of the social practices of contract and property.

2. Everyday Libertarianism

All right, with that structure in mind, let me turn to the costs and persistence of the illusion that contract and property law reflect or should reflect natural moral rights. We can start by enquiring a bit more into the content of the illusion.

It is clear from public political discourse that most people disagree with the conventionalist view about property and contract and promise. However, it is also plain that most people are not card-carrying libertarians. I submit, as a piece of sociological speculation, that most people are what Thomas Nagel and I have called “everyday libertarians.” The illusion that persists is the illusion of everyday libertarianism.
Let me explain what that means. The pure libertarian, as we know, holds that the law of contract and property ideally should reflect the proprietary and promissory rights that people naturally have. This has dramatic implications that most people do not accept. Most people do not, for example, believe that compulsory taxation of earnings is an infringement of property rights. But very many people nonetheless believe that their legal property is really, morally, theirs. Though true libertarianism is rare, a kind of everyday watered-down version of libertarianism is everywhere. Everyday libertarianism, though it shrinks from the radical implications of the pure view, nonetheless maintains the illusion of natural proprietary and promissory rights. This does great damage to our public discourse.

To fill this claim out, let me start with the damage done by the moralization of contract, which is perhaps less familiar than the case of property.

For a libertarian, promisees have a natural right to performance of the promise. And there are no limits to the agreements we can make. So long as there is no fraud or coercion, all promises create real rights. This is the sense in which we can be said to have a right to freedom of contract. Nozick accepts the implication that if I agree to be your slave, you acquire the right to enslave me; and others would wrong you if they interfered with your exercise of your rights as my master, and would be entirely justified in assisting you, as a vindication of your rights.

Now of course almost nobody really believes any of that. But people do believe in a vague right to freedom of contract, and they do believe that promisees really do have moral rights to performance.

A very striking illustration of how deeply entrenched is the sense that promisees are morally entitled to performance can be found in discussions of so-called efficient breach of
contract in law and economics text books. Economic analysis of contract is the paradigm case of instrumental contract theory; you will certainly not find any talk of the moral rights of promisees in the contracts chapter of these text books. The entitlements of promisees are, nonetheless, unwittingly presupposed in the standard text-book analysis of the remedy for breach. Economic analysis tells us that the remedy should be that which will lead people to make choices that are economically efficient. That means that the remedy should be such as will induce a promisor to perform when that is efficient, but breach when that is efficient. By efficient is here meant a Pareto improvement, a decision that leaves at least one person better off and no one worse off. And so it is easy to see that performance damages, the rule that the breaching party must pay the other party the value of the performance that did not happen, is an efficient rule. For that rule will induce promisors to breach when and only when they can fully compensate the promisee for nonperformance and still be better off. That’s efficient because the promisee will be no worse off and the promisor will be better off.

What is remarkable about this analysis is that it assumes that the promisee is entitled to the value of the promised performance. If the promisee were not entitled to the promised performance, failure to perform or pay performance damages would not necessarily leave the promisee worse off. As we saw in the first lecture, the harm from nonperformance is in itself not a real harm at all. In treating it as a real harm, economic analysis here implicitly assumes that the promisee is entitled to the value of the performance. As good instrumentalists these analysts should do no such thing. They know that the issue before them is precisely whether the promisee should be legally entitled to the value of performance, and that the answer to this
depends upon whether that would be a good legal rule in view of the overall aims of the institution.

I tell this story because it shows that even economic analysts can’t loosen the grip of the idea that the legal rights of promisees under contract are not just features of an overall institutional structure that must be justified in virtue of its good social effects, but rather reflect some genuine moral entitlement.

Still, efficient breach is not a terribly important topic of discussion outside of the United States. The idea of freedom of contract, however, has broad political significance.

On the conventionalist view, there is no such right. Which contracts should be enforced is a question to be figured out when designing the rules of the practice. The practice is good and worth having to the extent that it does some good. There is no reason to think a priori that all agreements are equally worthy of enforcement. Of course, it is a sound rule of thumb, and perhaps the fundamental reason why private ordering is a good idea, that the people best able to figure out what is in their interests are the individuals who might be parties to agreements. But that rule of thumb is just that, and if there are good reasons for thinking that enforcing some categories of agreements does more harm than good, there is no reason based in contractual right for the state not to refuse to enforce them. Going so far as to ban agreements might have the effect of making certain conduct impossible in practice, which may infringe liberty rights. But even banning certain agreements does not infringe a right to freedom of contract, as there is no such thing.

That is not how most people think about it. Though perhaps no one believes in a right to sell yourself into slavery, the idea of a right to freedom of contract is alive and well. Think about
debates over sexual or reproductive services, or the sale of body parts. Most people do not think that whether certain kinds of agreements should be legally enforceable or unenforceable turns solely on the value of the results of enforcing versus not enforcing. The supposed right to freedom of contract, even if it is not absolute, is given weight in moral argument. There is a presumption in favor of enforceability that is grounded not just in the observation that things generally go better when people make up their own minds; instead, a decision not to enforce requires establishing that enforcement would involve very serious harm, serious enough to overcome the infringement of people’s right to freedom of contract.

For everyday libertarians, then, there is a special moral hurdle to be overcome if, for example, minimum wage laws are to be justified. At various points in U.S. history, the everyday sense that there is a right to freedom of contract has been very damaging to clear-headed discussion of the moral stakes of all kinds of regulation of the labor market. In a famous Supreme Court case from 1905, *Lochner v. New York*, a statute limiting the number of hours a day bakers could work was struck down for violating freedom of contract. The *Lochner* case has few defenders today—though it does have some.¹¹ In Europe too, some national constitutional courts, including that of Germany, have interpreted their constitutions to imply a right to freedom of contract. Of course, rights play a different role in German constitutional law than they do in the U.S. But aside from whether constitutional courts are striking down legislation on the grounds of infringement of a right to freedom of contract, the thought that there is such a right certainly distorts the deliberations of legislators and legal experts everywhere.

Let me now turn to property, where the political harm of everyday libertarianism is far greater. There are a number of areas where everyday libertarianism leads to misunderstanding,
including that of eminent domain, or takings, but where it really wreaks havoc is in discussions of tax policy. According to pure libertarianism, compulsory taxation is akin to theft. Again, apart from off-the-grid survivalists, this is not a common belief. But standard discussions of tax policy are in the grip of everyday libertarianism nonetheless, and it’s a disaster. Thomas Nagel and I wrote a book about this disaster over ten years ago. Amazingly, nothing has changed. Let me highlight just some key points.

In public finance textbooks—a much more significant presence in the public sphere than law and economics textbooks—we are told that taxation should be efficient and fair. Tax fairness is traditionally broken into two parts: the issues of vertical and horizontal equity. Vertical equity concerns the question of what fairness demands in the tax treatment of people with different levels of pretax income, horizontal equity what fairness demands in the treatment of people with the same levels of pretax income. Though the German Constitutional Court, and some other courts, have elevated these principles to constitutional status, neither of them makes any sense. I’ll illustrate with the case of vertical equity.

The notion of vertical equity is based on the idea, pretty much a consensus across the political spectrum, that people with different levels of income should be taxed differently. The thought is that different people have different abilities to pay. The debate then becomes one of figuring out the right interpretation of ability to pay. Is the point that if you are richer a given euro is worth less to you, and so you can give more of them for the same real burden as someone who is poorer? If so, ability to pay demands that we equalize real burdens. An entirely different interpretation is that ability to pay demands that if you are richer, you can afford a
greater real sacrifice, though how much greater is, of course, not to be found by interrogating the idea of ability to pay.

It is easy to see that both the right and the left can frame their views on tax policy by appeal to the idea of ability to pay. That idea, however, is quite meaningless. The persistence of this way of thinking about tax policy is perhaps the gravest cost of everyday libertarianism.

The ideas of vertical equity and ability to pay assume that we should approach the issue of justice in taxation by asking how tax burdens should be distributed as against a pretax baseline. My pretax income, however, is what I get in a market economy that is structured by an entire set of legal and economic institutions of which property law and tax law are just parts. Without that set of institutions, which are funded by taxes, I would not enjoy the same pretax income. An obvious objection is therefore that using the baseline of pretax income is myopic—it looks only at the burdens of taxation, not at the benefits of what taxation buys. Why should we be concerned with a just distribution of the one, the burdens, in abstraction from the other, the benefits? Economists note that there is no difference between a tax cut and a transfer—a transfer being, for example, a pension check from the government. But once you start thinking about the benefits of government, you quickly move beyond transfer payments to the fundamental benefit of the very provision of a working market economy and a life free from violence, not to mention roads, schools, and all the rest of it; if we really do take the benefits of government into account it quickly becomes clear that no one actually suffers a net burden from government. The upshot of the banal fact that so long as our government is decent none of us is burdened by it is that there is no distinct question of justice in taxation but just the entirely general question of whether the state secures economic justice through the totality of
its economic institutions. That is, a just tax scheme is one that takes its place in an overall set of economic institutions that promote just social outcomes. Outcomes, not the distribution of sacrifice from a pretax baseline, is what matters.

When the focus is on outcomes we look at welfare, its distribution, equality of status or so-called relational equality, and so on. Tax rates are good or bad, just or unjust, insofar as they play their part in the overall set of institutions that determine just social and economic outcomes. From this perspective, pretax income is a mere accounting figure; there simply is no morally relevant question of the distribution of tax burdens as against the baseline of pretax income.

This objection to thinking of just taxation as a matter of the distribution of burdens measured against pretax income seems obvious. How could it be resisted? The most obvious way to resist is by claiming that the objection ignores a crucial fact: the fact that people have a property right to their pretax incomes.\(^{14}\) Leave aside the fact that there is no possible moral theory of property rights according to which I have a moral right to my current legal property. It just seems impossible for us to think of our earnings as a contribution to a common pot for the government to distribute in its wisdom. They belong to us. This is exactly Nozick’s objection to the very idea of distributive justice. And whether or not we agree with the implication that compulsory taxation is illegitimate, the spirit of Nozick’s objection to the idea of distributive justice rings true for many people. Nagel and I say that no one owns their pretax income, what they are entitled to is their post-tax income, and the question of the proper distribution of post-tax income is to be determined by our social aims. On that view, any objection to confiscatory marginal tax rates would have to turn on their systemic bad effects, which may be, say, a
providing a disincentive to work or save. It could be no part of the story that it is unfair to the rich to take so much of what is theirs, because their pretax income is not, in any morally relevant sense, theirs at all. And this strikes many people as incredible: there has to be a point, hasn’t there, where the government would simply be taking too much of what belongs to people?¹⁵

No. There are all sorts of good objections that could be made against very high rates of taxation. That this would take too much of what people own is not one of them. The harm done by everyday libertarianism in distorting public understanding of the morality of taxation could hardly be greater. Inequality of wealth and income has risen in recent decades to levels not seen since the Great Depression, and yet politicians for the most part remain terrified of an honest discussion of the primary means that could be efficiently used to do something about this: higher taxation of income and wealth, and its inheritance, at the high end of the income and wealth distribution.¹⁶

3. Ideology

All this explains why I say that the illusion that is everyday libertarianism does a lot of harm. It distorts our public discourse about fundamentally important issues of institutional design and social justice. It is an illusion, and it does harm. What then explains its persistence?

In the United States, at least, part of the cause seems likely to be the work of professional ideologists. In this sense, the false morality view I mentioned in the first lecture is part of the truth.
As a preliminary matter, we should note that everyday libertarianism does count as a piece of ideology in the traditional sense. There is, first, just that fact that it presents as natural what is in fact artificial. Secondly, the belief that there are natural promissory and proprietary rights has the function of hindering market regulation that may benefit the worse off at the expense of those who are doing best. Everyday libertarianism supports laissez-faire and laissez-faire is, generally, good for the rich. In my view, this snippet of ideology-critique does not all by itself show that naturalism about property and promise is false. But the functional role of everyday libertarianism does, I think, add support to the moral philosophical arguments I have made in the previous lecture. It plays a role in the reflective process leading up to reflective equilibrium.

Be that as it may, we have a view that is false, that serves the interests of a sub-part of the population. We might expect this group to fund theorists who defend the false view. And that, at least in the United States, is very much what we see. I am not an expert on the rise over the past half century or so of conservative think tanks such as the Heritage Foundation and the Cato Institute. But it is easy to see that they are extremely well-funded and well-staffed with intelligent and well-trained people. I make no suggestion that any of the researchers at these think tanks write in bad faith. We need note only that there is a very large amount of private money available to support intellectuals who defend naturalism about contract and property. (Among other things, of course.)

It is hard to know how to assess the impact of these think tanks on public attitudes. We know that they are heavily involved in the legislative process in Washington, DC., and it seems implausible that they play no role in sustaining the illusion. But I am disinclined to think that the
role is terribly significant. For one thing, not every country is awash in conservative think tanks, but the illusion is alive and well throughout the industrial West, including in countries that regulate markets and adjust market outcomes much more than does the United States. More important, it seems to me that there are reasons both deeper and more innocent why it is hard to shake the illusion, reasons that have to do with the complexity of the relations among the multiple normative orders of property and contract and promise.

4. Morality and Conventional Morality
Let me first look just at morality and conventional morality, returning to law in a moment. The conventional morality of property and promise is deontological, a matter of fairly simple rules. We teach our children that they must not steal and that they should keep their promises, that stealing and breaking promises are wrong and that these wrong acts have victims, they wrong other people. We don’t tell them the whole truth. The whole truth is this: it is in general true that promises should be kept and ownership respected, because the social practices of making and keeping promises and respecting legal ownership are socially very beneficial and noncompliance with the rules of the practices may weaken and undermine them. Furthermore, it is unfair to choose to benefit from a practice and not be willing to shoulder your share of the necessary burden of sustaining it. Finally, sometimes the owner or promisee is someone with whom you have a special relationship, and if they will be disappointed, or suffer reliance losses, because of your theft or broken promise, that may be wrong because we have special reasons to be concerned with the interests of those with whom we have special relationships. All these
considerations give us reason to develop the disposition to respect property and keep promises.

Still, since this is after all the whole truth, it has to be admitted that sometimes it is not wrong at all to break a promise or take what belongs to others. For it is true that sometimes the owner or promisee has no reliance or expectations. And sometimes it is true that breach of promise or theft will not tend to undermine the valuable practices, and in fact will do no harm at all. It is even true that breaking a promise or taking people’s things isn’t necessarily a case of free-riding. Perhaps you have always rejected promises made to you, and you’ve only ever made this one promise yourself, the one whose moral force we are discussing. And perhaps you yourself have no property. In that case, it isn’t so clear that you have voluntarily accepted the benefits of the practices of property and promise. Secondly, as we already know, breach of promise and theft will not always harm the practice, and when it will not, it just isn’t true that keeping promises and respecting property is a burden necessary for the survival of the practice.

It is obvious why we don’t tell this whole story to our kids. But there are lots of areas of life that we simplify and gloss over when talking to our kids, that we expect them to be able to understand and accept fully when they are adults. The trouble with the instrumentalist moral theory of promise and property is not that it is too complicated for kids to understand, it is that it is so far out of line with the conventional morality of adults that many just find it impossible to believe. The conventional morality of property and promise is a matter of rules, over-rideable, of course, but rules laying out duties and rights nonetheless. The moral truth, however, is that the rules of the practices of promise and property are nothing more than that,
rules of artificial social practices, and their existence always leaves open the further question of whether, and if so when, we have genuine moral reason to follow them.

Why does conventional morality treat the rules of the practices of promise and property as themselves moral norms, rather than as means to the achievement to some general good? I believe that one reason why we are all at some level reluctant to accept this instrumentalist account is just that life is simpler, easier, and—in a positive sense of the word—more humble if we simply treat the rules of the practices as moral rules. Living according to the whole truth about property and contract seems to be at best a big drag; at worst it puts us in the position of some kind of impartial social planner, to the apparent detriment of our own character and the decent treatment of those with whom we deal. It just seems that life would be so much better if the morality of promise and property were a matter of fairly simple rules.\(^\text{17}\)

Another, very different, reason why we might be happy to conclude that the rules of the practice are genuine moral rules is that, to the extent that we are motivated by our moral beliefs, this will be very good for the health of the practice and therefore the good of society.

As we saw in the previous lecture, there are philosophers, such as Rawls in “Two Concepts of Rules,” and contemporary theorists of normative powers, such as Owens and Raz, who turn this desire for the genuine bindingness of the rules of the practices into a philosophical claim: if the practice of following the rules is beneficial, then the rules really are morally binding, creating real duties and rights.\(^\text{18}\) As I explained, I don’t think that these attempts to turn a desire for genuine moral rules into an argument for them can succeed. But the motivation for making such arguments seems to me plain.
In addition to its unruliness, there is another feature of the fully instrumental view that may cause alarm. In Arthur Ripstein’s discussion of property that I mentioned in the previous lecture, he notes that if the point of legal property rights is to do some good, as the instrumental view has it, then the reasons I have for respecting those rights are at the same time reasons for trying to bring about the relevant kind of good directly. If property law is for the sake of making possible valuable use of things by people, then we should be as concerned about giving people things to use, or assisting them in making best use of things, and so on, as we are about protecting the possessions of those who already own things. This is true, and it reminds us that a deontological moral order of proprietary and promissory rights and duties is different from the fully instrumental view not just in what it requires, but in what it does not. A deontological morality of property has it that theft is wrong, and the reasoning leading to that conclusion gives us no reason to think ourselves responsible for conferring benefits on others. The instrumental view, by contrast, grounds property in the fact that the practice benefits people; and if we should respect the practice because it benefits people, it seems we should benefit people in other ways. Ripstein bases his concern about instrumentalism in its poor fit with positive law, which in most places and for the most part, lacks positive duties of assistance or beneficence. But it is quite easy to explain in instrumental terms why the law should be wary of extensive positive obligations, while protecting possession with negative duties. So one imagines that Ripstein is also troubled by the moral implication of the instrumental view. Which is, to put it bluntly, that if you believe in property and promise, you believe you have impartial duties to benefit others; such duties are potentially very demanding.
5. Law and Morality

Let me now add the legal normative order into our mix. Law, as I have said, enforces the social practices of promise and property. The way this works is somewhat clearer in the case of promise and contract law than it is for property, for two reasons. First, the content of the social practice of property is by now almost entirely taken over by property law, so it is hard to see daylight between the law and the nonlegal social practice; second, for the case of property we have not just civil but also criminal enforcement. I will return to these points, but let me start with the purer case of promise and contract.

Aside from contract law, the practice of making and keeping agreements is supported by reputational sanctions that appeal to self-interest, and motivations coming out of conventional morality. If I am thinking of entering into an agreement with a stranger, and evaluating the chances that she will perform, I may not put too much stock in her moral motivations. I may place greater stock in her self-interested concern with reputation. Hobbes and Hume were right that if we break our agreements, we may lose out on opportunities for beneficial cooperation in the future, and eventually may find ourselves unable to deal in our society at all. Self-interest goes a long way in supporting the beneficial practice.

But reputational sanctions grounded in self-interest will only be generally effective when noncompliance is detectable and knowable by all the people you are likely to interact with. In big societies, where this does not hold, the effectiveness of reputational sanctions will be limited to discrete industries, with repeat players.

Where effective reputational sanctions are not in place, people cannot reliably be expected to keep their side of agreements they enter into. Since we all know this, the result is
that we will be less likely to make agreements in the first place. The result is that less cooperative activity takes place than otherwise would, which is to everyone’s detriment. This is why we need law.

The point of contract law is not to remedy wrongs. It is to enforce agreements. And the reason to enforce agreements has little to do with the interests of the two parties. The point of contract law is to enforce agreements *generally*, so that everyone will have a reason to be confident in the performance of their potential contract partners, and therefore be willing to enter into agreements that they would not otherwise make. We need contract law to keep the practice of making and keeping agreements healthy.

What form will the legal normative order take? The law of contract must and does take the form of clear rules which line up with the rules of the social practice. If the legal rules line up with the rules of the social practice, reputational sanctions and conventional morality will point in the same direction as legal sanctions. As we have already seen, this alignment is important to the overall success of the enterprise. The rules have exceptions, but the list of exceptions is short—coercion, fraud, mistake. What we will not see is an exception for the case where no real harm or unfairness would be done through breach. For one thing, a rule that says do this unless it would be better to do something else is simply not amenable to judicial application. For another, the law will only give potential parties to a contract reason to be confident of performance if the legal duty to perform is simply a given, barring the recognized excuses.

Contract law, with its clear rules, will end up enforcing some agreements even though, from the point of view of the instrumentalist moral truth, performance was not morally
required. Effective enforcement of the rules of the practice may well produce a worse outcome than we’d see in an ideal world where everyone acts perfectly according to the instrumentalist view. But we can forget about impossible worlds. What matters is that full or almost full compliance with the clear rules of contract and the social practice of promise is much better than the collapse of these practices.

So we see that the law of contract inevitably has a deontological structure, where there are clear rights and duties, clear violators and clear victims. But the justification for this deontological structure is not that there are individual moral rights and duties that should be enforced. Even if judges should perhaps read the rules straight and apply them formalistically, legal theorists trying to find the point and rationale of contract law should not take the content of the rules at face value. The surface of the doctrine has it that promisees have contractual rights, which correlate with duties on the part of promisors. This deontological structure of the legal doctrine naturally suggests that it is aiming to reflect real natural rights and obligations that people have. But on the correct moral evaluation of contract law, all those legal rights and obligations have no independent intelligibility. They do not reflect moral rights. They are features of a complex system of overlapping normative orders that together must be justified instrumentally and holistically.

That’s the way it is, I believe, but it’s a hard thing to keep in your head as you go about your daily life. It is my hypothesis that the main reason why so many of us are everyday libertarians is that when you live in a society whose day to day life is so thoroughly shaped by the institutions of contract and property law, it is very difficult not to believe that there are real rights and duties underlying the legal rules. The structure of contract law is that promisees do
acquire a *legal right* to performance. And it is very hard not to think of ourselves as really having such a right; it is hard not to think that the legal right reflects a genuine moral right. Living with contract law, and its clearly articulated set of rights and obligations for promisees and promisors, we instinctively think that what the law is doing is reflecting, enforcing genuine individual rights and duties. In this way, private law, through no fault of its own, leads us astray.

The effect is only greater for property law which also has an inevitably deontological structure. For the legal rights that are mine according to the private law of property are protected not only by civil remedies but also by the criminal law. Theft, destruction of property, and even sometimes trespass, are crimes. It is hard to live with the thought that the criminal law concerning property is just a means to achieving some overall social good, not a protection of the moral rights of owners.

So my thought is this. There is in the case of property and contract and promise a structural misalignment between the moral normative orders on the one hand, and the social practices, the conventional moral orders, and the legal orders, on the other hand. This misalignment is to be expected, since the unruly messy truth about when people have reason to keep their promises and respect property is not easily enforced through a system of sanctions. The only way to support the artificial social practices of promise and property is by enforcing their rules in all but a small clearly-marked range of exceptional cases.

Living under the inevitably deontological legal regimes of contract and property, which match the social practices and conventional morality, leads us unreflectively to embrace ideas of moral rights of contract and property. We later disastrously appeal to such ideas in political
argument, as providing constraints on institutional design, including the design of contract and property law.

The disaster of everyday libertarianism is, I believe, due in large part to the law. It may be wondered whether that belief is plausible. After all, all of law is deontological, a matter of rules, duties, and rights, but we do not in all cases see legal rights and duties as reflecting underlying moral rights and duties. Take a highly technical area of law, such as an emissions trading scheme; the law establishing that scheme has a deontological structure, but nobody thinks it simply reflects natural moral right. Or take some obviously mala prohibita crime, such as a parking violation. Everybody understands that what is going on is that much social good comes from the enforcement of a set of clear rules and that it would be nonsense to think that those rules simply reflect moral duties that exist outside the institutional context.

I think that the answer to this objection lies in the fact that the legal practices of property and contract exist hand in hand with well-established social practices and conventional moralities of property and promise, whereas there is no social practice, let alone a conventional moral order, of trading permits or parking rules. With the social practices of promise and property in place, and the profound relevance of them to daily life from childhood onwards, there is something there that the legal normative order can mirror. This is not a case where all there is is the legal order. There is more. But we go wrong in thinking that the law is mirroring a real moral order of rights and duties, rather than a social practice with an instrumental point.

But now if that’s so, if the social practices, conventional morality, and the legal orders have the same content, why am I placing so much emphasis on the role of the law? Why not
point to the reasons why these three normative orders take the form they do, and the fact that we are misled by that form, and leave it at that? The answer has two parts. First, the deontological structure of the legal regimes of contract and property is so much more clear, precise, and well-articulated than anything we could find in the associated informal normative orders. It’s the legal practice of contract, with its richer content and more clearly deontological structure of rights, duties, and duties of repair, that’s doing most of the work of everyday libertarianism. We don’t talk about freedom of promise or agreement, but about freedom of contract. In the case of property, the influence is even stronger. Ideas about the rights and wrongs of ownership pretty much just track the legal rules; it’s the law that gives us the clear structure of proprietary rights and obligations. There are some few cases where we may fall back on nonlegal moral intuitions—such as when thinking about eminent domain, or property in body parts. But those are exceptional cases, of little relevance to the morality of the market. We could say that it is when they take the form of legal normative orders that the social practices of promise and property get most clearly articulated as fully-worked out deontological normative codes.

The second part of the answer turns on the fact that law is typically, even if not in its nature, backed up by an institutional apparatus of adjudication and sanctions. The expressive effect of this is to suggest that what is legally required is truly serious. I have already mentioned the importance of criminal sanctions in the case of property. For many of us, to say something is a crime is to say that it is more than just wrong. But even for civil sanctions, grave judicial process is in the foreground and coercion is in the near background; both of these make us pay attention. Where the rules are both present in our everyday moral lives and get backed up with
solemn adjudication and coercion it is hard to resist the thought that those rules track right and
wrong.

And so I conclude that the illusion that there are natural moral proprietary and
promissory rights is to a large extent an effect of living in a social world so thoroughly shaped
by the law of property and contract and the nonlegal social practices that these bodies of law
mirror and enforce. The belief in natural moral proprietary and promissory rights is not only
false, but also incoherent, since very few of us would be prepared to embrace the full
implications of there being such rights. But false and incoherent views can still do great
damage, as we have seen. If we see through the illusion, if we fully understand the fact that
there are no real moral promissory or proprietary rights, we can start thinking with clear heads
about the morally best design of the totality of institutions, legal and otherwise, that structure
markets and determine their effects on human welfare, human autonomy, social justice, and all
the rest of the values that we collectively should care about.

2 As Ronald Dworkin held at the end of his life but not during what we might call his classical period. See Ronald
3 For criticism, see Brian Tamanaha, A General Jurisprudence of Law and Society (Oxford: Oxford University Press,
2001), chap. 5.
4 Or if there is, it is very rudimentary. My thoughts about bankruptcy law in connection with contract theory are
stimulated entirely by the work of, and conversations with, Jed Lewinsohn.
7 On the broader issue of the divergence between contract and promise, see Seana Shiffrin’s celebrated article,
the case against any nonperformance (or performance damages) remedy in Liam Murphy, “The Practice of Promise
and Contract,” in Philosophical Foundations of Contract Law, ed. Gregory Klass, Prince Saprai, and George Letsas
(Oxford University Press, 2015), 151–70.
8 The term is coined in Liam Murphy and Thomas Nagel, The Myth of Ownership (New York: Oxford University


The remainder of this section follows Murphy and Nagel, *The Myth of Ownership*.

Another influence would be the thought that market outcomes reflect moral desert, and therefore ground an entitlement. This argument, however, requires extremely controversial commitments: That desert has a role at all in distributive justice and that departures from laissez-faire outcomes are prima facie bad. It also suffers from a fatal flaw. In actual societies, actual outcomes are not laissez-faire outcomes. Commitment to this way of thinking about tax justice therefore requires commitment to reform of economic institutions in the direction of laissez-faire. Also, we don’t actually have here a justification for the pre-tax income baseline. Rather, this line of thought points us to a baseline of taxing so as to produce as closely as possible an outcome where people end up with what they deserve. I think the thought that I own my pretax income is by far the more significant influence.

For a while the German Constitutional Court thought so, holding that it would be a violation of rights to tax at an average rate of more than 50%. BVerfGE 93:138.


I pursue these themes further in “The Model of (Moral) Rules.”

As Rawls put it, to ask about what good my compliance with the rules would do is to misunderstand what a practice is. John Rawls, “Two Concepts of Rules,” *The Philosophical Review* 64, no.1 (1955): 26. That may be, but I could still ask why the fact that general compliance with the practice would be good means that I should blindly follow the rules regardless of whether it will do any good. The reply “that’s what it is to act within the context of a practice” won’t move me, since I can always ask why I should do that, why I should accept this practice and its rules so unconditionally. Similarly, after a long discussion, Raz in effect notes that if we wonder why we should keep our promises, we have failed to understand what a normative power is. Joseph Raz, “Is There a Reason to Keep a Promise?,” *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Letsas, and Prince Saprai (Oxford: Oxford University Press, 2015), 76. Again, that may be, but still the question remains why the fact that it would be good if I had a normative power means that I have a normative power, given that this implies real rights and obligations.
