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Colloquium in Legal, Political, and Social Philosophy

Speaker: **Liam Murphy, NYU**

Paper: **If You Do Have the Power to Promise, We'll Grant you All the Rest: Against (Natural) Normative Powers**

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If You Do Have the Power to Promise, We'll Grant you All the Rest:

Against (Natural) Normative Powers.[1]

Liam Murphy

I *Introduction*

Starting in the early modern period, the assumed bindingness of promises has played a foundational role in political theory. Grotius relied on the fiction of an implicit promise to animate conventional property norms and the civil law with binding force; Locke of course followed him in the latter. Promising operates in such accounts like Hans Kelsen's *Grundnorm*, transforming social facts into obligations. The obligation to keep promises itself was thought to require no justification—it was just part of the natural law. It was not until Hume argued that the bindingness of promises requires a conventionalist explanation—and so cannot play the obligation-generating role for other conventions that Grotius and others had given it—that anyone questioned the ability of people to take on obligations just by saying that this was what they were doing.

During much of the second half of the twentieth-century, we were mostly all Humeans on this point. The contemporary philosophical landscape, by contrast, is distinctly Grotian. The moral force of promises is commonly taken to be unproblematic, obvious. And even if not, whole theories of morality are developed out of the supposedly paradigm case of the reciprocal obligations and claims of promisor and promisee.[2] For Hume, by contrast, the moral significance

[1] "If you do know that here is one hand, we'll grant you all the rest," Wittgenstein, *On Certainty*, §1 (G.E.M. Anscombe and Denis Paul, trans.). Wittgenstein is responding to G. E. Moore, "Proof of an External World," *Proceedings of the British Academy* 25 (1939): 273-300.

[2] I have in mind in particular R. Jay Wallace, *The Moral Nexus* (Princeton University Press, 2019). Wallace writes that the solution to the "problem" of moral obligation "will begin by taking seriously some of the distinctive features

of promise was prima facie mysterious and could only be grounded in the social value of the conventional practice of promise-making—a moral tie between promisor and promisee plays no role.

I believe Hume was right about promise, and that his discovery was profoundly important for our understanding of morality, political morality, law, and social life generally. But I will not here discuss the merits of Hume's negative argument or his alternative positive account.[3] I will merely assume that he is right to demand that *some* justification of the idea that promises generate obligations and rights must be given. So I reject the position of W. D. Ross that is enough if it seems "self-evident that a promise, simply as such, is something that *prima facie* ought to be kept."[4] I will also not attempt to canvass all the important recent alternatives, conventionalist and not, to Hume's instrumentalist account.[5] I focus in this paper on just one alternative to the Humean position, an account that has become perhaps the prevalent view among contemporary philosophers. This is the view, first developed by Joseph Raz, that promises bind in virtue of being the exercise of a "normative power" possessed by the promisor.[6]

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that are at work in the case of promissory duty, and treating them as paradigmatic for the more generic phenomenon of moral obligation" (48).

[3] I defend the Humean position in Liam Murphy, "The Artificial Morality of Private Law," *University of Toronto Law Journal* 70 (2020): 453-488. For a different and philosophically much more ambitious defense, see Jed Lewinsohn, "The 'Natural Unintelligibility' of Normative Powers," *Jurisprudence* 15 (2024): 5-34.

[4] W. D. Ross, *The Right and the Good* (OUP, 1930), 40.

[5] The most important (other than the normative powers account) seem to me to be T. M. Scanlon, *What We Owe to Each Other* (Harvard UP, 1998), 295-327; David Owens, *Shaping the Normative Landscape* (OUP, 2012); and Seana Shiffrin, "Promising, Intimate Relationships, and Conventionalism, *The Philosophical Review* 117 (2008): 481-524. I discuss all three positions briefly in "Artificial Morality."

[6] The phrase "normative power" seems to have been unknown in philosophy or anywhere else before an exchange between Raz and Neil MacCormick at the Aristotelian Society in 1972: Neil MacCormick and Joseph Raz, "Voluntary Obligations and Normative Powers," *Proceedings of the Aristotelian Society, Supplementary Volume* 46 (1972): 59-102. The earliest result in a *Philosopher's Index* "anywhere" search for "normative power" is to Raz's contribution to that symposium. Especially over the past two decades, it has become ubiquitous in moral, political and legal

If we understand "normative power" in a loose and nontechnical sense, saying that promises bind because we have the normative power to bind ourselves doesn't on the face of it seem to be any less dogmatic or any more explanatory than saying that promises bind because the natural law (self-evidently) requires that we keep our promises. But the notion of a normative power is in fact a technical one, a generalization of the legal theorist's notion of a legal power. The generalization, and the application of the generalized notion to the moral domain, is due to Raz. Raz also offered an account of when and why it is warranted to believe that a natural (nonconventional) normative power exists. In this paper I will argue against both of these innovations.

In referring to "the moral domain" I mean what is sometimes called critical morality, or just morality unqualified—and not to conventional or positive morality, which is a set of nonlegal norms generally accepted as binding in some social context. The extension of the idea of a legal power to conventional morality, and in fact to any rule-governed practice or institution, such as an organized religion or a club, is unproblematic and does not start with Raz. Here is Hart invoking the idea of a power when discussing promises in *The Concept of Law*:

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theory. In addition to Raz's oeuvre, see, for example, Owens, *Shaping the Normative Landscape*, Gary Watson, "Promises, Reasons, and Normative Powers," in David Sobel and Steven Wall, eds., *Reasons for Action* (CUP, 2010), 155-178; Ruth Chang, "Do We Have Normative Powers?", *Proceedings of the Aristotelian Society, Supplementary Volume* 94 (2020): 275-300, and Victor Tadros, "Appropriate Normative Powers," *Proceedings of the Aristotelian Society, Supplementary Volume* 94 (2020): 301-326. A Google ngram for "normative power" shows a dramatic increase in occurrences of the phrase in the early 2000s, but there is interference here—around that time scholars of the European Union began to write about Europe's "normative power," as opposed to its military or economic power. See Ian Manners, "Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies* 40 (2002): 235–58. I borrow the idea of researching the history of occurrences of "normative power" from Hannah Ginsborg, "Normativity without Reasons: Lecture One, Conceptions of Normativity: a Historical and Critical Overview," New York Institute for Philosophy Lecture, May 3, 2024. Interestingly, Ginsborg's focus is the concept of normativity and Joseph Raz's writing and linguistic usage plays a central role in her account too.

> To promise is to say something which creates an obligation for the promisor: in order that words should have this kind of effect, rules must exist providing that if words are used by appropriate persons on appropriate occasions (i.e. by sane persons understanding their position and free from various sorts of pressure) those who use these words shall be bound to do the things designated by them. So, when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others: in lawyers' parlance we exercise 'a power' conferred by rules to do this.[7]

Hart offers these remarks about promising in order to motivate his preferred understanding of legislative power in terms of secondary legal rules. The rules are crucial. By writing that "rules must exist" and "we make use of specified procedures" Hart makes clear that he is thinking of the morality of promise in terms of an existing set of known and accepted rules—that is, he has in mind a conventionalist view of promising at least, if not of morality as a whole.[8] The rules of any normative practice can specify procedures that if followed will change the normative situation—in terms of the norms of the practice—of the person acting or someone else or both. What is so strikingly innovative about Raz's account is that he believes that moral normative powers can be identified without reference to existing accepted social rules or practices of any kind.

Despite this innovative extension of the technical idea of legal powers, it would be fair to characterize the core of Raz's account of moral powers as Grotian. Grotius writes:

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[7] *The Concept of Law* 2nd ed., (OUP, 1994), 43.

[8] For an excellent account of Hart's overall metaethical views, see Joseph Raz, "H.L.A. Hart (1907-1992)," *Utilitas* 5 (1993): 145-56.

> [I]t is part of the *ius naturae* that we keep our promises (for it was necessary that men should have some way of obliging themselves, and no other natural means can be conceived) . . ..[9]

Unlike Hume, who agrees that it is necessary that people should have some way of obliging themselves but holds that this is possible only once an artificial promissory convention is in place, Grotius appears to believe that the necessity of having a way of obliging ourselves is itself enough to establish that we have a way of obliging ourselves. Here, similarly, is Raz:

> [P]romises are binding because it is desirable to make it possible for people to bind themselves and give rights to others if they so wish.[10]

It is necessary or desirable for us to have the ability to bind ourselves, therefore we do.

I will argue that this form of argument assumes a legislative model of morality: the fact that a moral legislator would sensibly enact rules providing for the power to promise is enough to establish that we have that power. This model of hypothetical legislation has long been tempting for moral philosophers, but I believe that it must be rejected.[11] The legislative model of morality blinds us to the kinds of differences among moral considerations that Hume's insights brought to the surface: between the natural and the conventional, and between the

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[9] Hugo Grotius, *Prolegomena to the First Edition, The Rights of War and Peace,* edited by Richard Tuck (Indianapolis: Liberty Fund, [c. 1625] 2005), 1749.

[10] Joseph Raz, "Voluntary Obligations and Normative Powers II," *Proceedings of the Aristotelian Society, Supplementary Volumes* 46 (1972) [Raz, VONPII]: 101.

[11] Gisela Striker writes, in "Origins of the Concept of Natural Law," in *Essays on Hellenistic Epistemology and Ethics* (CUP, 1996), 209: "The term 'natural law' refers, it would seem, to the rules of morality conceived of as a kind of legal system, but one that has not been enacted by any human legislator." In Liam Murphy, "Nonlegislative Justification," in Jeff McMahan, Tim Campbell, James Goodrich, and Ketan Ramakrishnan, eds, *Principles and Persons: The Legacy of Derek Parfit* (OUP: 2021), 247-74, I criticize the legislative model as found in rule consequentialism and Scanlon's contractualism.

interpersonal and the systemic or impersonal. Blindness to these distinctions in turn misleads us about what is, and what is not, morally fundamental.

The case of promise is important not just because of the foundational role some philosophers give it in political and moral theory. It is also important because if we do have the moral power to promise, independently of any social practice, then we may naturally be thought to have all sorts of other moral powers as well—all the rest. Promises are not controversial, the thought goes; no one denies that we can bind ourselves by promising. So if we can ground the morality of promise in the idea of a desirable normative power, then it should be easy to justify other claims of moral powers without essential reference to social rules.

It might be wondered why I give promise pride of place in this way. Aren't there other equally familiar moral powers? Gary Watson writes:

> Since promissory powers are only some among many types of volitional power, it is very curious that promising has been the main target of skepticism. If promising involves magic, then moral (or normative) transubstantiation appears to be rampant."[12]

But the other normative powers Watson and others tend to mention—officers giving orders to soldiers, making gifts, accepting invitations[13]—are all easily, and most naturally, explained conventionally. This is not so easy in the case of promise as the conventionalist account cannot explain, and in fact must deny, the apparent directedness of promissory obligation—common sense would have it that promissory obligation is owed to the promisee, not to society at

[12] 160. Watson is referring to Hume's remark that promising, the willing of an obligation, may be compared to transubstantiation.
[13] See Watson, 160; Stephen Darwall, "Demystifying Promises," in Hanoch Sheinman, ed., *Promises and Agreements* (OUP 2011): 269.

large.[14] This tension explains much of the resistance to the Humean view and the persisting sense that an account of promise not grounded in the value of the social practice of promise must be available.

So on the one hand, it looks like if there is a natural moral power to promise, it will be the only clear case, since all the other familiar cases are easily explained by reference to social practices. I take this to be in itself a reason to be skeptical about the idea of a nonconventional normative power to promise. Surely, if such a thing is possible, there will be more than one. On the other hand, once convinced by the normative powers account of promise, one might start looking for other real but neglected powers. The best illustration of this is the case of authority—in the Razian sense of the power to give others moral obligations.[15] Many of us have found the idea of natural authority of parents over children absurd. Others have found it plausible. If the Razian picture is right, we can resolve the disagreement by asking whether such authority is all things considered desirable. Similarly, many of us are skeptical about the idea that legitimate governments have the power to give their subjects moral obligations. But if they have that power just in case it would be desirable that they do, then, since it is at least possible that that would be desirable (perhaps compliance with law would increase), then the idea gains some plausibility.[16] But this easy test for the existence of a normative power—its desirability—

[14] A soldier does not wrong an officer by disobeying an order. There is no analogous issue in the case of gifts. It is true that having once accepted an invitation, you would wrong the inviter if you failed to show without warning and good cause. But invitation acceptances are actually best understood as conditional promises: I promise to be there unless something significant happens in which case I will warn you as soon as I can.

[15] Raz himself emphasizes the importance of authority to his discussion of normative powers: VONPII, 95; Practical Reason and Norms (OUP, 1999), 101.

[16] See Stephen Perry, "Political Authority and Political Obligation" in Leslie Green & Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 2* (OUP 2013). A discussion of authority and normative powers I find wholly convincing is Andrei Marmor, "An Institutional Concept of Authority," *Philosophy & Public Affairs* 39 (2011): 238-261.

would not, I think, ever have been taken seriously were it not thought to be necessary to explain the central and foundational case of promise.

II *Legal (and other Conventional) Powers*

We can start with legal powers, which are straightforward enough. On Hohfeld's account, a legal power is the power to change one's own or another's legal situation.[17] Any person with the capacity to contract has the power to make an offer, which brings into existence a power in the offeree. The offeree's power is to change their legal situation and that of the offeror by accepting the offer, thereby binding them both to a contract. In the 1972 article that started it all, Raz points out that we have to narrow down the notion of a legal power from Hohfeld's definition as a person can change their legal situation by assaulting someone, or moving house, but they have not exercised a legal power in so acting. To pick out legal powers accurately, we have to look to the reasons why the law recognizes the acts in question as having the normative effects they do. According to Raz, an act can be the exercise of a legal power only if

> one of the law's reasons for acknowledging that it effects a legal change is that it is of a type such that it is reasonable to expect that actions of that type will, if they are recognized to have certain legal consequences, standardly be performed only if the person concerned wants to secure these legal consequences.[18]

[17] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, edited by Walter Wheeler Cook (1919, New Haven: Yale University Press), 50-51. This volume reprints two articles both titled, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," originally published in the Yale Law Journal in 1913 and 1917.
[18] VONPII, 81.

This is a somewhat obscure formulation, but I take it that the point is that an act isn't the exercise of a legal power just because it brings about a legal change; in addition, the sole point of acts of that kind must, typically at least, be to bring about that kind of legal change.[19] The clearest cases would be legal formalities, such as signing a will. Legal powers exist because a legal rule or norm establishes them, in the usual case because lawmakers believed that it is good that they exist.[20] Of course lawmakers can be wrong. Legal powers exist because the law so provides, whether or not it is good that they do. People have the power to determine what happens to their property after they die because a statute governing succession gives it to them. It is just the same with other rule-governed social practices, such as the rules of institutions or conventional morality. The Dean has the power to suspend students for protesting in the library if the student conduct rules so provide. The fact that it would be better if a faculty committee had this power is immaterial.

III *Natural Normative Powers*

In *Practical Reason and Norms*, first published in 1978, the above quoted formulation relating to legal powers is repeated as being applicable to normative powers generally.[21] But another formulation, apparently understood to be equivalent, is also offered:

[19] For further discussion of this issue, see Tadros, 301-14.
[20] Raz denies that all legal powers are created by legal norms (VONPII, 82-5). But the examples he gives can be dealt with by invoking basic constitutional norms that are simply accepted in the legal community.
[21] Joseph Raz, *Practical Reason and Norms* (Princeton UP, 1990), 103.

> An act is the exercise of a power only if the reason for recognizing it as affecting norms and their application is that is desirable to enable people to affect norms and their application in such a way if they desire to do so for this purpose.[22]

Now this formulation, like the earlier more obscure one, provides a way to distinguish acts that are exercises of normative powers from other acts, such as moving house, that change a person's normative situation but are not exercises of powers. The ability to change the normative situation by acting in a certain way has to be itself desirable if acting that way is to count as the exercise of a normative power. So understood the formulation doesn't in itself establish that there are any natural normative powers, powers whose existence is not dependent on the existence of a social rule establishing that they exist. It just helps us isolate out those acts that change normative situations that truly are exercises of normative powers. But Raz is after bigger game.

In "Voluntary Obligations and Normative Powers II," he writes:

> To be an exercise of a normative power the act must be recognized as affecting a norm for reasons of a special sort. Whose reasons and what kind of reasons are these? In the case of powers to affect norms which are the practices of institutions or groups, the answer to the first question is simple enough: The reasons of the institution or the group for recognizing the normative effects of the act determine its character as a power-exercising act. When dealing with norms which are not practices the relevant reasons are those because of which the norm is binding, the reasons which justify the norm, because of which one should respect and follow the norm (94-95).

[22] Ibid., 102.

And in his late paper, "Normative Powers," published in 2023, after repeating a version of the definition of normative powers that turns on desirability quoted above, Raz comments:

> A prominent feature of the definition is that it identifies normative powers by the considerations that establish the justification for their existence (to be distinguished from the justification for their use), taking their justification to be sufficient for their existence.[23]

So with powers that are created by social rules the desirability test operates just to mark out, from among acts which change the normative situation of the actor and/or others, those that are the exercise of powers; that will be those acts which change normative situations because, in the view of the law-maker or relevant group, it is desirable that those acts bring about those normative changes. When it comes to powers that are not established by a social rule, by contrast, the fact that the power is (objectively) desirable is sufficient to show that it exists.

I venture to say that this is an extraordinary, and an entirely undefended, move in the argument. When we want to know what powers exist in some existing social practice we look both to the rules and (to make sure we aren't being over-inclusive) apply the desirability test. When there are no social rules to look to, however, an objective version of the desirability test itself is sufficient. All this by way of definition.

A possible explanation for Raz's willingness to move from the conventional to the moral without seeing the need for an entirely different kind of argument has to do with his general views on the continuity between moral and other kinds of normativity, especially the legal. There is a sense in which for legal powers to be fully valid, they must in any case be defensible

[23] Raz, "Normative Powers," in *The Roots of Normativity* (OUP, 2022), 163.

as moral powers. It was a central feature of Raz's philosophical outlook that there were not two kinds of obligation or right, the legal and the moral. Accordingly, fully justified legal obligations or rights will just be moral obligations or rights—or, better put, in both cases we will have, simply, obligations or rights.[24] I see no reason why he would have taken a different position on powers. An offeree will really have a (legal) power only if it is objectively desirable that they do—when it comes to full validity, full justification, that the law-makers thought it desirable would not be sufficient.

That's my speculation, at any rate, as to what explains the fact that Raz did not feel the need to so much as argue for his test for the existence of nonconventional normative powers. But I will not pursue this speculation further here. Instead, I want to investigate the plausibility of claiming that a natural normative power exists if it is desirable that it does.

IV *It Would be Good if it Were, Therefore it Is*

Donald Regan long ago charged Raz with accepting this form of argument: It would be a good thing if X, therefore X.[25] In his reply to Regan, Raz writes:

> Regan is surprised that anyone should find this a valid form of argument. Perhaps in the very general form it is not valid. But a suitably restricted form of it is a standard presumptive justification of normative conclusions on instrumental grounds. One may argue, for example: if such and such a duty exists (e.g., a duty to give to charity), then

[24] For further discussion of this aspect of Raz's philosophical outlook, see Liam Murphy, "Legal Rights," in *Palgrave Handbook on the Philosophy of Rights*, Margaret Gilbert Jeffrey Helmreich, and Gopal Sreenivasan, eds, forthcoming.

[25] Donald H. Regan, "Authority and Value: Reflections on Raz's Morality of Freedom," *Southern California Law Review* 62 (1989): 995-1096, 1036-7.

> people will give to charity. Since it is good that people should give to charity it is right to conclude, other things being equal, that they owe such a duty.[26]

Raz's reply is puzzling for being on the face of it fallacious.[27] In the first place, the existence of a duty to give to charity will not in itself lead people to give to charity. People believing that they have such a duty may have such an effect, but it may do that whether or not there is such a duty. Suppose we add the premise that if there is a duty, people will in fact recognize and act on it. Then it will be good if there is such a duty, because it is good if people give to charity. But it is not "a standard presumptive justification of normative conclusions on instrumental grounds" to conclude from the fact that it would be good if there were a duty that there is a duty. Consequentialists argue that people should try to acquire various dispositions and internalize various "rules of thumb" because that will allow them more effectively to discharge their duty to promote the good. But the "rules of thumb" are not real duties, and the whole argument rests on the consequentialist premise that we have a duty maximally to promote the good, a premise that Raz does not accept, or at any rate rely on.

One way to make sense of Raz's remarks is to see them as invoking a rule-consequentialist outlook. Without endorsing rule-consequentialism, his point may be that it is a familiar enough idea that people's duties are those the general acceptance of which would do the most good. The point then would be that the general form of argument—it would be good, therefore it is—can't be ruled out across the board in moral theory without dooming what many have taken to be a plausible moral view.

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[26] Joseph Raz, "Facing Up: A Reply," *Southern California Law Review* 62 (1989): 1153-1236, 1197.
[27] Regan also makes many of the points that follow.

The problem is that rule-consequentialism is not a plausible moral view, precisely because it appeals to the good consequences of a counterfactual world of general compliance or acceptance of a set of rules.[28] Here we have the clearest example of legislative moral reasoning. The argument is that since it would be best if we all accepted or followed some set of rules S, S specifies our duties. But, in the first place, the fact that it would be best if we all accepted S doesn't mean that it will be for the best if I accept S. For it may be that no one else, or not enough others will follow S, and so my doing so will be pointless or counterproductive. More generally, thinking about what we morally ought to do by guessing at the consequences of general acceptance or compliance with various rules is to confuse moral theorizing with legislation. Actual legislators do need to consider the effects of general compliance with the proposed rules, because what they are discussing is what rules should be enforced. Moral theorists are not moral legislators. They are in no position to affect whether there will be compliance with the rules compliance with which would be optimal. And the relevance of the fact that it would be for the best if we all accepted S to the question of what each of us should do now remains mysterious. The case of rule-consequentialism provides no evidence of the possibility of a valid inference from *it would be good if it were* to *it is*.

V *Contractualism*

Normative powers such as the power to promise might seem to find rather easy justification in Scanlonian contractualism. Scanlon's formula that an act is wrong if it would be "disallowed by

[28] I draw here, and in my remarks about contractualism below, on the longer argument in Murphy, "Nonlegislative Justification."

any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement"[29] could be understood to extend to the case of normative powers: people have a power if they would have it in any system of rules for the general regulation of behavior which no one could reasonably reject.[30] This method of moral reasoning also seems to move from what is in a broad sense desirable—rules for the general regulation of behavior that no one could reasonably reject—to what is. Does Raz's form of argument get support from the example of contractualism?

No, because Scanlon's contractualism, insofar as it is meant to deliver principles for the general regulation of behavior, suffers from the same problem as rule-consequentialism. When we ask whether anyone might reasonably reject a principle for the general regulation of behavior, we have to take into account the hypothetical effects of general compliance. And that, once again, is to confound argument about what to do, morally speaking, with argument about what the (moral) law should be.

To illustrate: A straightforward contractualist defense of the moral power to promise could go like this. There are very significant benefits to everyone, including potential promisors, if we have the power to bind ourselves morally through promising. Assuming a certain level of moral conscientiousness, along with the operation of reputational incentives, the moral power to promise will make possible more mutually beneficial cooperation than would otherwise be the case. The exercise of the moral power to bind oneself makes it reasonable for others to increase their confidence in compliance, and therefore their willingness to cooperate in the first

[29] Scanlon, *What We Owe*, 153.
[30] See Watson, 163-5.

place. More cooperation benefits all of us. Lack of universal full moral conscientiousness, as well as the possibility of breach that does not cause reputational harm, would in turn make it unreasonable to reject legal enforcement of at least many promises by way of contract law.[31] Everyone has reason to welcome the promise principle and contract law, and a complaint by promisors who later change their minds that a cost is being imposed on them would not be reasonable, since they could have avoided that consequence by not promising in the first place.

There is no problem with the legal aspect of this argument. In general, contractualist lawmakers might assess proposed legislation by asking whether anyone affected could reasonably reject it. This is an apt question for them to ask, since the legislation will, if passed, be enforced. People in the relevant jurisdiction *will* be affected by it. But the moral argument is fatally flawed. The general benefits to everyone that *would* flow from the general acceptance of some principle for the general regulation of behavior are not, without further argument, at all relevant to the question of what it is morally right or wrong to do in our actual circumstances.

Now it is striking that Scanlon himself did not make this straightforward argument for the promise principle. His contractualist account of the promise principle does not appeal to the general society-wide good effects of there being a moral power to promise, but rather just to the interests of the two parties.[32] Consider first a simpler parties-only argument than the one Scanlon makes.[33] Take two people, Bert and Kurt. Perhaps they are Hume's neighboring farmers. If Bert is able to induce Kurt to rely on Bert's statement that he will help with Kurt's harvest

[31] For Scanlon's account of the justification of legal enforcement of contracts, see T.M. Scanlon, "Promises and Contracts," in Peter Benson, ed., *The Theory of Contract Law* (CUP, 2001), 86-117.
[32] See *What We Owe*, chap. 7
[33] See Wallace, *The Moral Nexus*, 181

tomorrow if Kurt helps with Bert's today, then it would seem to be unreasonable for either them to reject a principle that holds that it would be wrong of Bert to renege once Kurt has helped him with his harvest. Kurt clearly has an interest in his reliance not coming at a cost, and Bert can hardly reasonably complain that it is costly for him to perform as he said he would; he could easily have avoided the problem by not inducing Kurt's reliance in the first place. This seems like an appealing justification of a principle of responsibility for induced reliance. It is not, however, a defense of the promise principle, since promises bind independently of reliance.[34] It is also not an account of a normative power, since obligation flows—according to the reliance principle—in virtue of certain behavior by the two parties that has material consequences, not by one party exercising a power to change the normative situation.[35] Scanlon's own more complicated account, which aims to explain why promises bind even in the absence of reliance, is also not an account of a normative power, as it turns on the moral implications of successfully assuring someone that you will do something, rather than the exercise of a power to bind oneself.[36]

The question we reach is whether there might be a parties-only contractualist case for a *normative power* to promise? Take Burt and Kurt again. Suppose they make an agreement, on Sunday, that Kurt will help Bert on Monday and Bert will help Kurt on Tuesday. But later that same Sunday, Kurt learns that his nephew will after all be available to help him as usual on Tuesday, so Kurt won't need Bert's help. Kurt therefore tells Bert that he has changed his mind

[34] As Raz, VONPII, points out about MacCormick's reliance-based account of promise in VONPI. Reliance-based accounts are also offered by Judith Jarvis Thomson, *The Realm of Rights* (Harvard UP 1990), and Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2013).
[35] A point MacCormick makes about his own account, VONPI.
[36] For discussion of Scanlon's account, see Murphy, "Artificial Morality."

and the deal is off. Is a principle prohibiting reneging on the deal even before either side has performed reasonably rejectable? It would seem so, since Bert loses nothing and Kurt gains a day's labor. (We may assume that Bert had no opportunities to make other arrangements between the time of the deal and Kurt's change of mind.) Bert is no worse off on Sunday evening than he was that morning. Bert may of course be disappointed by the change of plan, but that is presumably a smaller burden than an unnecessary day's work helping him would be for Kurt.

Bert may also point to the benefits of future cooperation between the two of them, which would be more likely if the promise principle were in force. But it is a contingent matter whether future cooperation with Bert is a benefit for Kurt. Perhaps his nephew is almost always available to help. If it be thought that still, neighbors might benefit from some kind of cooperation in the future we just need to vary the example to one where the parties know they will never see each other again. A defense of a normative power to promise in cases where the parties to each given promise are likely to have future cooperative opportunities is not a defense of the promise principle.

We see than that the simple contractualist case for the moral power to promise turns crucially on the systemic good effects of the power to promise being generally accepted as established by rules for the general regulation of behavior. Both the examples of contractualism and rule-consequentialism provide support for the form of argument "it is desirable that we have this power, therefore we have this power" only insofar as they involve legislative moral reasoning.

More generally, we can see that any argument for the desirability of the normative power to promise must appeal to the systemic good effects of acceptance of that power. If we just consider the two parties in the case where Kurt changes his mind on Sunday evening, there is just no sense in which it is desirable for them both that Kurt be bound even if he learns that he won't need Bert's help.

VI *Existing Practices*

It is notable that both rule consequentialism and contractualism are rarely used to defend dramatically revisionist conclusions. Both are almost always employed to provide a philosophical defense of widely shared moral views. It is because the widely accepted conventional rule that promises made should be kept has good consequences (isn't reasonably rejectable) that it is wrong to violate the rule. As we have seen, Raz explicitly does not tie the existence of all moral powers to the existence of normative practices generally complied with.[37] But a modification of his view along these lines may seem appealing in light of the argument so far. We could say that a conventional power exists if there is a conventional normative practice whose rules establish such a power, and that this conventional power is also a real normative (moral) power if it is desirable that it is. This is roughly the position of David Owens. Owens, however, does not believe that you can reason from it being good that we are morally bound (or empowered) to conclusions about what we ought (or have the power) to do. You can reason from it being good if we have an obligation to the fact that we have an obligation, but he offers an idiosyncratic "nonrationalist" account of obligation according to which having one does not

[37] And in VONPII he explicitly denies that promising requires a practice.

imply anything about what we ought or have reason to do.[38] Moral powers, as we are investigating them, do often change what people ought to do. And so Owens's account can be set aside.

We can all agree that the fact that an existing conventional normative practice is desirable (just, beneficial, not reasonably rejectable) shows that we have reason to welcome its existence, to support it rather than undermine it, and perhaps to call others to account for noncompliance with it. But it is equally evident, I take it, that that fact does not in itself convert the rules of the practice into moral rules.[39] Here the modified Razian argument just introduced offers another idea. In addition to the desirability of the practice itself, it may be desirable that the rules of the practice establish genuine moral duties, rights, and powers. And then the Razian move: If that *is* desirable, it will follow that the rules *do* establish genuine moral duties, rights, and powers. We here have the form of argument—it is desirable, therefore it is—operating on its own, unencumbered by the appeal to counterfactual levels of compliance that is the most glaring fault of legislative moral theory. The precise version of the argument is now: it would be good if something real—an existing social practice—had a certain kind of moral status, therefore it does. Is this an acceptable kind of argument?[40]

Why would it be better if the rules of the practice were moral rules? One option is instrumental: It would lead to higher levels of compliance with the rules. But this suggestion brings us right back to Raz's response to Regan. Perhaps people are more likely to believe a rule

[38] David Owens, *Shaping the Normative Landscape* and *Bound by Convention* (OUP 2022). For discussion see Liam Murphy, "What Binds: A Comment on David Owens's *Bound by Convention*," *Jurisprudence* forthcoming (2025).
[39] For further discussion, see Murphy "Legal Practices and the Responsibility of Individuals," ms.
[40] Daniele Bruno in "Value-Based Accounts of Normative Powers and the Wishful Thinking Objection," *Philosophical Studies* 179 (2022): 3211–3231, argues that it is. I comment on Bruno's argument in note x below.

is a moral rule if it is a moral rule, but they are not certain to, and they can also believe the rule is a moral rule though it is not one. The instrumental argument seems weak. Is there perhaps some reason to think that it is intrinsically desirable, valuable, that the rules have moral status?

VII *Kamm and Nagel on Inviolability*

In a discussion of the paradoxical nature of rights such as the right not to be killed—How can it be required to refrain from killing if that would prevent more killings?—Thomas Nagel adopts and develops a suggestion of Frances Kamm concerning the value of inviolability.[41] Inviolability, for Kamm, is the moral status of being the kind of creature that has rights, especially negative rights against attack and interference of various kinds; the upshot of this status is that it is wrong for others to violate our rights. Having this status has value even if respect for the right not to be killed makes it more likely that one will in fact be killed. Nagel goes on:

> The argument is that we would all be worse off if there were no rights—even if we suffered the transgressions which in that case would not count as violations of rights—ergo, there are rights.
>
> This is a curious type of argument, for it has the form that P is true because it would be better if it were true. That is not in general a cogent form of argument. One cannot use it to prove that there is an afterlife, for example. However, it may have a place in ethical theory, where its conclusion is not factual but moral. It may be suitable to argue that one morality is more likely to be true than another because the former makes for a better world than the latter—not instrumentally, but intrinsically.[42]

[41] Nagel, "Personal Rights and Public Space," *Philosophy & Public Affairs* 24 (1995): 83-107. See F.M. Kamm, *Morality, Mortality, Volume II: Rights, Duties, and Status* (OUP, 2001), especially Chapter 10, "Constraining Rights and the Value of Status."

[42] 92.

In emphasizing intrinsic rather than instrumental value Nagel seeks to distinguish what he is arguing from familiar instrumental defenses of legal and other conventional practices in which rights are recognized.

Nagel is here suggesting that there is a legitimate use of the argument from *it would be better* to *it is*. It is a better world for people if they have rights, because of the value of having the moral status of inviolability. "Kamm's approach enables us to understand rights as a kind of generally disseminated intrinsic good."[43] I am not myself convinced, however, that these reflections really are most illuminatingly understood as an inference from *it would be better* to *it is*. There is an intuition about the moral status of human beings at work here, an intuition that it is inconsistent with that status if human beings can be used in certain ways to promote other ends. It seems to me more plausible to claim that "the moral status of human beings is well captured by the idea of inviolability" than "it would be better for human beings if they had the moral status of inviolability, therefore they do."

It might be thought that the former formulation is just dogmatic, whereas the second offers an argument. But the claim that it would be intrinsically better for us to be inviolable is hard, at least for me, to keep separate from a judgment about the moral status of human beings. Here are some passages from Kamm:[44]

> Suppose the correct constraint prohibits many types of killing even for very good causes. If we are inviolable in this way, we are more important creatures than more violable ones; this higher status is in itself a benefit *to us*.
>
> Individuals whose rights stand as a barrier to action are more potent individuals than they would be otherwise. There being rights and constraints with high thresholds is a

[43] 93.
[44] 272-273.

> mark that the person who has them is a stronger, more valuable type of thing, even if they prevent us from stopping more transgressions.

I find it hard, as I say, to think directly *just* about whether I would be a less *valuable* thing if I were not in Kamm's sense inviolable. On the one hand, if I am inviolable, there are things that can't be done to me to benefit others. That, according to Kamm, makes me important and "strong." But I might equally think that I am more important, for being more useful, if I can be used as a means to produce some good. Better to do some good than to stay uselessly inviolable in my moral stronghold.[45] Furthermore, if humans are inviolable there will be ways of saving me from harm that are ruled out because others are inviolable. That could also make me feel less valuable. It won't do to reply that, No, what's important is not that you are useful in that you can be used to benefit others, or that you are valuable in that even harming others is permissible to prevent harm to you, but rather that you cannot be used as a means even to promote very good causes, for that's what inviolability is. The judgment that inviolability is better for me than the status of being one "apt to be used to produce greater good and to be saved by any (less costly) means necessary" seems to me a judgment indistinguishable from the judgement that human beings have the former status rather than the latter.

Kamm also writes:

> Furthermore, the world is, in a sense, a better place for having more important creatures in it. Our having higher status is a benefit *to the world*.

This, however, seems to imply that it would be an even better world if all animals were inviolable. And better yet if trees were too. For that matter, why not cardboard boxes?[46] The

[45] I once heard Derek Parfit say something like, "I would much rather be killed as a means—at least then my death would do some good."
[46] I am grateful to Frances Kamm for discussion and the example of cardboard boxes.

thought must be that it is a better world if *humans*, having the properties that they do, are inviolable. But once again, this judgment of betterness is hard to distinguish from a judgment about the proper moral standing of creatures that have the properties that humans do.

So though the Kamm/Nagel argument is often mentioned as one plausible example of the form of argument we are discussing, that doesn't seem to me to be the best way to understand it. So much the better, it seems to me, for Kamm's grounding of rights in the status of inviolability.

Is it possibly in some intrinsic sense better for humans if the conventional power to promise is a real moral power? It is frequently remarked that the power to promise is essential to our autonomy. Presumably human autonomy is a very great value, even apart from any instrumental effects, just like inviolability. And for the power to promise to be a moral power, rather than just a useful conventional power, may seem to be desirable for enhancing autonomy as a moral status with intrinsic value. In this sense, then, it would be better for us if we have the moral, not just the conventional, power to promise.

As with the case of inviolability, I think that it is more plausible to understand these reflections as being about the moral status humans in fact have, as autonomous agents. If we are autonomous agents, and a moral power to promise is essential to autonomous agency, then we have the moral power to promise. The Razian desirability test plays no role in this argument.[47] If we go down this path, which powers we have will be those that are necessary for us to have the moral status that we have.

[47] In "Value-Based Accounts of Normative Powers and the Wishful Thinking Objection," Bruno notes that we can be wronged for violations of our autonomy without having our (nondeontic) interests set back. He concludes that (this aspect) of autonomy rights can only be explained by reference to the value to us of having such rights (as opposed

VIII *Interlude: Consent, Promise, and Autonomy*

Let us then leave aside for the moment the idea that people have the moral normative powers that is desirable that they have. A quite different idea is that people have the moral normative powers that it is necessary for them to have, given (what we all accept is) their moral status.[48] The most familiar suggestion here is the one already mentioned, that as autonomous agents we need not only rights, but also powers. As usually developed, this line of thought draws a strong analogy between promise and consent. So a further important feature of this line of thought is that it establishes not one but *two* moral powers. Not an enormous increase, but it is something, and there would be an explanation of why we have these two and just these two: they are both essential to our autonomy but (perhaps) no other power is. Here is a good formulation of the kind of view I have in mind, from Gary Watson:

> To (successfully) exercise promissory power is to authorize others to hold you to demands to which you would not otherwise be subject. This power presupposes a general freedom to affect by your consent what others may claim of you. This power of self-determination is crucial to how we understand our status as moral agents. To acknowledge this status is to recognize a moral title to limit the ways in which we may interfere with others' agency, a title to a sphere in which we each have a decisive say-so regarding how others are to treat us. That title is itself a normative power (or bundle of powers). We are under a moral requirement not to do certain things without others' authorization. That I can't limit your freedom in certain ways without your consent goes with the idea that I can, normally, limit your freedom with your consent. By consent, we expand or delimit our shared normative boundaries. Promising is just one of the ways we exercise our say-so. In other words, promissory power is inherent in the kind of moral standing that we have in mind when we speak of ourselves as autonomous beings, a standing to determine what others may permissibly do.[49]

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to the disvalue of their violation). Again, this seems an unnecessary way of making the point that the right to autonomy is not fully explained as a means to individual welfare.

[48] See Andrew Lichter, "Conventionalism and Contingency in Promissory Powers" *Philosophical Studies* 180 (2023): 1769-92, for related discussion of the idea that the practice of promise is "morally necessary."

[49] Watson, 165, footnotes omitted.

The moral power to promise, no less than the moral power to consent, is essential for autonomy. However Watson's own words show that we need not think of consent as a normative power at all.[50] It is part of a proper understanding of our rights. "We are under a moral requirement not to do certain things without others' authorization." That requirement correlates with various rights against interference without our consent. Autonomy rights against various kinds of interference just are rights to decide what happens to us in certain spheres. It is not that I have a right that you not touch me but also and in addition, since sometimes I want you to touch me, a desirable a power to make your touching me permissible after all. My right is a matter of being in control, morally speaking, of who touches my body. Autonomy without consent doesn't make sense.[51]

Autonomy without promise, however, does make sense. Consider Nietzsche's memorable discussion of the great achievement it was for humans to develop the ability to promise:

> In order to have that degree of control over the future, man must first have learnt to distinguish between what happens by accident and what by design, to think causally, to view the future as the present and anticipate it, to grasp with certainty what is end and what is means, in all, to be able to calculate, compute – and before he can do this, man himself will really have to become reliable, regular, necessary, even in his own self-image, so that he, as someone making a promise is, is answerable for his own future![52]

Being autonomous and being answerable for one's own future are two different things. It is clearly possible to imagine autonomous nonpromising creatures. They would be able to make free choices about what to do, both in the present and in the future, and they would be able to

[50] The following remarks draw on Murphy, "Artificial Morality."
[51] For a helpful discussion of some implications of viewing consent as a normative power, see Felix Koch, "Consent as a Normative Power," in *The Routledge Handbook of the Ethics of Consent*, Peter Schaber and Andreas Müller (Taylor &Francis, 2018), 59-76.
[52] *Genealogy, Second Essay,* Diethe translation.

consent to various otherwise impermissible kinds of interpersonal interactions; they would just be unable to impose moral constraints on their future selves.

Note also that we cannot *constrain* ourselves in the present by way of consent. Consent does not change our normative situation by creating ongoing nonrescindable obligations for us. This is a crucial difference from promise. Watson's formulation, "a general freedom to affect by your consent what others may claim of you" is misleading. When I consent to your entering my property I make it not wrong for you to come in, but I do not give you a claim right to be there, as I can always change my mind and tell you to leave. You have a liberty right to be there so long as I do not change my mind (and for a reasonable amount of time after I do) but no claim on me. I also cannot consent to your having authority over me. I can decide to do what you tell me to do, but I cannot, by consenting, make it the case that I am obliged to do that; if what I gave you was consent rather than promise I am always free to change my mind. Promise is fundamentally different in that, unlike consent, it creates obligations I am stuck with unless someone other than me (the promisee) changes their mind.

The ability to create obligations for myself plays a fundamentally different role in my life than consent and is not necessary for my status as an autonomous agent. Of course, if there were no practices of promise and, especially, contract, my range of options would be dramatically reduced. I would not only be worse off; on plausible understandings of autonomy, my autonomy would be reduced. But my autonomy is also reduced by having fewer resources

under my control. Not everything that enhances my autonomy is a condition of my having the very moral status of an autonomous agent.[53]

IX Promise v. Reliance: The Social v. the Interpersonal

The argument that promise and consent are best understood as normative powers that we must have if we are to be autonomous agents is unconvincing. There is no need to think of consent as a normative power and autonomy does not require the ability to be answerable for our futures. But my main interest is in Raz's more general argument that if it is desirable that a normative power exists, it does. I will conclude with some further reflections on this argument.

Raz's view is that we find normative powers when we can say that the reason why the act (that is the exercise of the power) changes the normative situation is that it is desirable that there be an act that enables us to change the normative situation in this way. Parenting a child changes one's normative situation, but not by way of exercising a power. Tadros helpfully classifies cases like having a child as those where the normative situation is altered indirectly, whereas the exercise of a normative power alters the normative situation directly.[54] New obligations arise when I have a child because the material facts that determine my normative situation have changed, not because I have done something aiming to change my own or someone else's normative situation.[55] But when I make a promise, on a normative powers

[53] Shiffrin argues in "Promising, Intimate Relationships," that the power to promise is necessary if intimate relations are to be possible. Though I am not convinced that close personal relations do require the power to promise (as opposed to concern for each other's interests, including reliance interests), this seems to me a more plausible claim than the more common idea that promise is necessary for autonomy.

[54] "Appropriate Normative Powers."

[55] The new obligations may be good things to have. Having responsibilities for other people can be intrinsically valuable. I might even count the acquisition of such obligations among my motivating reasons for having a child. But even if I do, that I had that motivating reason will not be the reason that I acquire the obligations.

account, that alone changes no material facts at all. If the promise is to be binding, it must be for other reasons.

It is helpful to compare, once again, the case of promise with that of reasonable reliance. In Neil MacCormick's example, Macdonald lowers a rope down the cliffside at the beach, making eye contact with Jones below who is about to be caught by the tide.[56] If Macdonald had not lowered the rope, inducing Jones to wait for it to reach him, Jones would probably have had time to sprint along the beach and reach a path up the cliffside. Lowering the rope changes Macdonald's normative situation, by changing morally relevant material facts. Having induced Jones's reliance, he would cause Jones very great harm if he changed his mind and dropped the rope before Jones climbed up it. MacCormick's example illustrates a plausible moral principle, a principle of responsibility for induced reliance. Scanlon formulates such a principle as follows:

> Principle L: If one has intentionally or negligently led someone to expect that one will follow a certain course of action x, and one has reason to believe that that person will suffer significant loss as a result of these expectations if one does not follow x, then one must take reasonable steps to prevent that loss.[57]

Those reasonable steps would include doing x, thus preventing reliance losses, but also compensating any reliance losses that flow if one does not. Principle L strikes me as too expansive: only reasonable reliance should generate responsibility, and negligence is too inclusive a standard; probably the inducement should be at least reckless to trigger

[56] "Voluntary Obligations and Normative Powers I," 67-68.
[57] *What We Owe to Each Other*, 300-301.

responsibility.[58] But the point here is just is that some such principle must be right, as MacCormick's excellent example shows.

When Macdonald induces Jones's reliance he changes the morally relevant material facts. In Tadros's terminology, he therefore changes his normative situation indirectly. If he had not started to lower the rope, Jones would have taken the chance to get to the path. MacCormick intriguingly suggests that we can think of the combination of inducing reliance and not following through as a case of causing harm.[59] If this is right the reliance principle is an application of a principle prohibiting intentional or reckless harming. Having induced the reliance, Macdonald must follow through lest his two acts together harm Jones. Duties not to harm people in various ways do not generate any sense of mystery because it is clear that something of moral significance is at stake in the interpersonal interaction. If A harms B, A sets back B's interests. A reliance principle is a plausible natural principle of interpersonal morality, requiring no reference to the desirability of it being a valid principle for us to see that it is one.

A promise, understood as a normative power, changes the normative situation directly because a promise binds in the absence of reliance or any other change in the material situation of the parties. Thus the logic of Raz's position: If promises bind independently of changes in the

[58] Imagine Bruce Springsteen answers a question from a passing stranger about his next planned tour and he replies, "Next January in Australia! We're going to play Bondi Beach!". This is immediately posted on social media. I do not think that Springsteen is responsible for the cost of thousands of nonrefundable and expensive airfares if he changes his mind a few days later. In part this is because tours do get cancelled and this one hadn't (we can suppose) even been formally announced and so the precise kind of reliance that happened was not reasonable. It is also because, while negligent, given what he knows about his fans, Springsteen's conduct fell very far short of intentionally or even recklessly inducing reliance, which seems to matter. In the terms of Scanlon's contractualism, I think that Springsteen could reasonably reject Principle L for imposing too burdensome a requirement of caution when discussing his plans.

[59] "Voluntary Obligations and Normative Powers I," 69.

material interests of the parties, that must be because the ability to bind ourselves is just good in itself.[60]

As we have seen, the only route to the conclusion that it is good in itself if people have the power to promise is to consider the good effects of a general practice of making and keeping promises. In the absence of an existing general practice of this kind, this requires engaging in legislative moral reasoning. We do have such a practice. But, as I have argued, we cannot infer from the fact that it would be good if the norms of the existing practice were moral norms that they are moral norms.

A puzzle about my position could be raised at this point.[61] I have said that some reliance principle must be correct. In thinking about reliance we appeal to our understanding of the distinctive interests of human beings, and our responsibilities with respect to those interests, to reach conclusions about our rights and duties.[62] Jones has a clear interest in Macdonald not dropping the lowered rope. He would also have an interest in Macdonald lowering a rope in a different case where there is no path to run to. Jones's interest in having a rope to climb is the same in both cases, but in the original case Macdonald dropping the rope would, given that he induced Jones to rely on the rope rather than run, be more a case of doing harm than allowing it; this, we think, makes a difference to his responsibilities with respect to Jones's interest in there being a rope. This is how ordinary deontological thought goes: we consider people's

[60] David Owens holds that promises bind in virtue of a nonmaterial, "deontic" interest—what he calls an "authority interest." See *Shaping the Normative Landscape*. I don't believe that I, at any rate, have such an interest. The discussion in this section is closely related to Owens's discussion of "bare wrongs" in *Shaping the Normative Landscape*.

[61] I am grateful to Crescente Molina for pressing the point. It is related to the concerns raised in Bruno.

[62] As a general methodology in moral theory I find plausible a nonlegislative version of Scanlon's contractualism. I apply this method to the case of reliance in Murphy, "Nonlegislative Justification, 261."

interests and weigh them, taking into account various distinctions that seem relevant. The objection now is: What is so different about the case of promises? We have allowed for the sake of argument that it is in everyone's interests if the widely accepted promise principle is a moral principle. What is blocking the inference in this case from various facts about human interests to conclusions about what is morally the case?

The difference is that the argument for the normative power runs via the premise that it would be better (in a morally relevant sense) if something were morally the case, whereas the argument for the reliance principle does not. In the reliance case, we reason from the fact that Jones has a weighty interest that Macdonald is in a particular way causally responsible for to the moral conclusion that Jones has a right and Macdonald has a correlative obligation. Depending on Macdonald's conscientiousness, it may be better for Jones that Macdonald has that obligation. But even if so, that fact plays no role in the argument; the conclusion that Macdonald has that obligation has already been reached. In the argument for a normative power to promise, the fact that we all would be better off if there were a moral power to promise is the entire case. To say that rights or obligations are grounded, in a certain way, in interests, is very different from saying that we have an interest in having a right or obligation. The argument that it would be good if it were, therefore it is, receives no support from the familiar role interests play in ordinary deontological argument.

There is a connection, I believe, between the two objections I have been pressing, the objection to legislative moral reasoning and the objection to the argument that something is morally the case just because it would be good if it were: It is my conjecture that in any case in which we are tempted by the thought that a normative power exists because that is desirable,

the desirability in question will be evident only when we consider the interests of society or humanity as a whole, not just the particular parties involved. This is the case for promise, as I have argued. It is obviously the case for political authority. It is also clearly the case if we can imagine a nonconventionalist account of gift-giving, giving orders, and accepting invitations. Perhaps it might be thought that there is a natural moral power of parental authority because it is desirable for the parties directly involved in its exercise, independently of any social consequences. It might be argued that it would be better if parents had authority over their children because it would be better for the children. I cannot point to a logical flaw with this thought, it just strikes me as extremely implausible. From the children's point of view, it is better if parents have liberty rights to constrain and coerce them in certain ways and make decisions on their behalf. That they can be given obligations doesn't seem to do them any additional good. If by contrast it is argued that it is better for the parents if they can give their children obligations, that seems better understood as a view (plausible or not) about the proper status of parents, rather than that it is desirable that they have authority.

I cannot establish that any plausible claim of the desirability of the existence of a natural normative power will look to systemic consequences. It's just that the cases I can think of do. Normative powers find their place precisely in the space of artificial morality, the space where we have to look to "whole plan or scheme,"[63] rather than particular interactions, to see what is going on, morally speaking. If this conjecture is right, the desirability test for natural normative powers just is legislative moral reasoning. Which is not surprising, since it emerges from Raz's discussion of legal powers.

[63] Hume, *Treatise* 3.2.2.22

The difference between promise and reliance is that promise, as Hume correctly saw, is a distinctively social or collective phenomenon. Macdonald's obligation to Jones, however, is fully accounted for just by considering their interaction: the obligation would exist even if they were the last people alive. One important explanation of the resistance to conventionalist accounts of promise is the fact that in most cases where the promise principle is engaged, so too is the reliance principle. Promises typically are intentional efforts to induce reliance and reliance on them is typically reasonable.[64]

The fact that the reliance principle makes perfect sense as a reflection of the moral significance of a particular interpersonal encounter, whereas the promise principle requires thinking about society as a whole, makes it impossible to think that contract law, which enforces agreements rather than compensates for reliance losses, is about the moral significance of particular interpersonal encounters. This led several distinguished contract scholars in the last century to advocate that contract law really should be about compensation for reasonable reliance.[65] Their mistake was to assume that private law is always about the moral significance of interpersonal encounters.

As I have noted it is frequently objected to conventionalist accounts of promise that they cannot explain the directedness of the obligation—the obligation is to the promisee and breach wrongs them, not society at large. Macdonald's obligation to Jones is clearly directed. And legal duties in contract law are directed: performance is owed to the promisee and breach is a legal

[64] Dworkin plausibly remarks that even creating a risk of reasonable reliance can be wrongful, as in a case where I decide not to perform a promise though I cannot or do not warn you but as it turns out no reliance harm was done. *Hedgehogs*, 306.

[65] L. L. Fuller and William R. Perdue Jr., "The Reliance Interest in Contract Damages: 1," *The Yale Law Journal* 46 (1936): 52-96; Grant Gilmore, *The Death of Contract* (Ohio University Press, 1974); P. S. Atiyah, *Promises, Morals, and the Law* (OUP, 1981).

wrong to the promisee. In the nonlegal conventional practice of promise the same can be said. But conventional wrongs, legal or otherwise, are not automatically moral wrongs. In thinking that promissory moral obligation is directed we have been misled by the fact that reliance is typically present when promises are made and also by the internal normative structure of well-justified legal practices. To repeat, the fact that it is good if people follow the rules of a certain practice does not mean that those are moral rules.

All this does, however, leave us with a pressing question: Just how should we understand the ethical responsibility of individuals with respect to justified social practices? That is a topic for another essay.[66]

[66] See Murphy, "Legal Practice and the Responsibility of Individuals."