

## Normative Uncertainty, Normative Powers, and Limits on Freedom of Contract

Rebecca Stone<sup>1</sup>

September 20, 2020

Intuitively, we should not be able to benefit from injustice. Transactions, even those that are fully consensual on the part of all participants, shouldn't enable anyone to profit from injustice. But if this is so, many, perhaps most, of our voluntary transactions are suspect, given background distributive injustice. For the terms of those transactions will be affected by the distribution of resources—and therefore the justice or injustice of that distribution—in myriad ways. An unjustly poor person may be willing to pay much more to finance the purchase of necessities than she would be if she was less poor. An unjustly rich person will have many opportunities to enter into beneficial transactions with both rich and poor that he would lack if he had fewer resources, and will put his resources—including those resources to which he is entitled—to different uses than he would if he had less. Even transactions made by someone closer to the middle of the distribution who is not obviously unjustly rich or unjustly poor will be affected by injustice because the way in which wealth is distributed in society will affect the demand and supply for many goods and services, and so the terms by which they are traded, in complex and unpredictable ways.

Indeed, it seems likely that every single transaction will be affected, in at least a small way, by injustice in the distribution of resources once the degree of distributive injustice is significant, as it surely is in most contemporary societies. And if that is so, at least one party to every transaction is likely benefiting from injustice in at least a small way. In some cases, of course, the fact a person benefits from injustice does not seem troubling on its face, as when an unjustly poor person faces improved terms of trade for some product as a result of injustice. But even transactions of this kind might raise concerns. Suppose, for example, that the other party the transaction is even poorer. Are we still comfortable with the former benefiting from injustice?

---

<sup>1</sup> [Acknowledgments]

Pushing against these intuitions, however, are intuitions about the moral significance of consent and voluntary agreements. Consent, when it is freely given, and agreements when entered into voluntarily, seem to have a cleansing effect. If someone freely and with full information enters into an agreement in which he gets much less than another, why is it anyone's business to condemn the transaction or interfere with his choice? We are inclined to view such a transaction as valid absent negative effects on third parties, even if the transaction would have taken on a different form, or perhaps wouldn't have occurred at all, but for background injustice. Even transactions in which one person's poverty drives them to accept terms that would seem highly unfavorable to a rich person seem less troubling if we are confident that the poor person entered into the transaction freely and with open eyes. Respect for the choices of the participants, no matter the content of those choices, makes such transactions appear to be morally valid.

We confront a difficult set of questions once we set about trying to resolve these countervailing intuitions. Is a transaction truly voluntary in the right sense when one party was willing to assent to it only because of background injustice? Does an agreement between rich people that would have been unavailable to them under just conditions really have moral significance just in virtue of the fact they agreed to it? Does it matter whether the agreement has the effect of increasing or decreasing the overall justice of the distribution?

To answer these questions we need to understand why voluntary exercises of normative powers of consent and promising might have a cleansing effect on transactions that have been affected by background injustice. This, in turn, requires us to delve into the nature and purpose of normative powers and their relationship to questions of justice. Only then can we reach principled conclusions about the ways in which injustice may undermine the validity of their exercise.

Given that such questions put us squarely in the realm of non-ideal theory, it might seem that we should look for answers by searching for principles that respond directly to the conditions of our non-ideal world.<sup>2</sup> I'm going to adopt a different approach

---

<sup>2</sup> Perhaps, for example, we should ask the following question: "what principles about the validity of consent would be adopted in something like a Rawlsian original position in which people are choosing principles for a nonideal world." Alan Wertheimer, *Voluntary Consent: Why a Value-neutral Concept Won't Work*, 37 *J. Med. & Phil.* 226, 243 (2012).

that may seem incongruous at first. I start with a world even more ideal even than those typically assumed by those who take themselves to be doing ideal theory. Ideal theorists, following Rawls, typically take people more or less as they are, except that they assume full, or near full, compliance with the demands of morality or justice.<sup>3</sup> I go further than this by starting with a world of moral superbeings. These moral superbeings are, like the people that ideal theorists typically have in mind, perfectly motivated to comply with the demands of justice. In fact, they are perfectly motivated to comply with the demands of reason more generally. But, in addition, they know what reason demands of them, they know all the normatively relevant facts, and, while they cannot see into the future, they are able to imagine all the possibilities that might materialize and rationally assign credences to them.

I start with such a thought experiment for two reasons. First, although we will never be like these superbeings, there is an important sense in which they define the ideal towards which we are striving. There is a sense in which we ought to abide by the demands of reason and justice, even if we can't always tell what those demands are either because we don't know relevant facts, or we don't understand how we should rationally respond to those facts or what justice demands of us given those facts, and even though we are often tempted to do otherwise. We should govern ourselves as these superbeings would if we were able to do so.

Second, moral superbeings provide a helpful benchmark because, as I will soon argue, there wouldn't be a role for normative powers in the deliberations of these beings, at least if we assume that there is determinacy about the demands of reason and justice. If I'm right about this, then normative powers may be best understood as a response to a departure (or departures) from this ideal, in which case we should ask which departure(s) from this ideal they respond to. That is, we should ask what feature(s) of our actual world creates a role for normative powers in their practical deliberations. And so we should progressively relax the various assumptions that characterize our world of superbeings until we convince ourselves that they would need normative powers in their practical toolkits. This is the task that I undertake in this paper.

---

<sup>3</sup> Thus, in stating the limits of his "strict compliance" theory of justice Rawls says: "Everyone is presumed to act justly and to do his part in upholding just institutions." John Rawls, *Theory of Justice* 8 (1999).

My analysis also ends up yielding insights about how we should think about rights. In the world of moral superbeings, I argue, there won't be anything resembling the rights that we often take ourselves as having as a legal or moral matter—that is, rights that give their holders the authority to determine what happens within a certain sphere or with respect to a particular resource. Such rights—which I refer to as “de facto rights”—along with attendant normative powers emerge only once we move away from the superbeing ideal.

The main conclusion I draw from the thought experiment is that it is normative uncertainty about the demands of reason that explains the role that normative powers play in our practical deliberations. Superbeings don't face such uncertainty (except perhaps of the pure metaphysical kind), and so normative powers aren't a feature of their world (except as needed to resolve metaphysical uncertainty). But navigating the moral landscape for more limited beings is an extremely complicated task, especially when the starting point is one of injustice, and it is from this moral complexity that a need for normative powers emerges.

Tom Dougherty has argued that people can resolve moral uncertainty by making agreements with one another (explicitly or by implicitly endorsing a convention).<sup>4</sup> I go further than this by arguing that normative powers are constitutively devices for navigating normative uncertainty. Ruth Chang has argued that choice situations in which the reasons at stake are incommensurable are resolved through the exercise of normative powers, which she characterizes as acts of reflexive willing that a consideration be a reason that then creates a new will-based reason to act accordingly.<sup>5</sup> This understanding of normative powers coheres with mine when the normative uncertainty that defines a choice problem exhibits the specific kind of uncertainty that she has in mind—uncertainty arising from the fact that options can't be ranked on a cardinal scale.<sup>6</sup> But on my account, normative powers are devices for settling normative uncertainty that can arise from straightforward epistemic uncertainty about the balance of reasons and justice even when options are not incommensurable in this sense. My account is therefore

---

<sup>4</sup> Tom Dougherty, *Moral Indeterminacy, Normative Powers and Convention*, 29 *Ratio* 448 (2016).

<sup>5</sup> Ruth Chang, *Do We Have Normative Powers*, 94 *Aristotelian Society Supplementary* 275, 292 (2020).

<sup>6</sup> *Ibid.* 294.

compatible with, though it doesn't require, a conception of rational agency as entirely consisting of the ability to recognize and respond to reasons and considerations of justice—a conception she rejects.<sup>7</sup> The predicament of moral agents on my conception is centrally one of a struggle to navigate a very complex normative landscape and my conception suggests that the value of freedom in agents' practical lives may, to a large extent, be subordinated to considerations of reason and justice.

The resulting account suggests a way of resolving the clash of intuitions developed at the outset. Exercises of consent and promise are valid only if they constitute reasonable resolutions of the normative uncertainty that they purport to resolve. Thus, an agreement that is freely made against the background of distributive injustice may nonetheless be morally binding, but only if it constitutes a reasonable resolution of uncertainty about how the agents ought to respond, through their interactions with one another, to the background injustice.

## I. Preliminaries

Normative powers like consent and promise give agents the ability intentionally to alter what they and others are morally permitted or required to do. The alterations of rights and duties that arise from their exercise are not mere consequences of actions agents take for other reasons. Rather, the very point of their exercise is to alter rights and duties.<sup>8</sup>

When X has the normative power of consent against Y with respect to action  $\phi$ , X can intentionally determine whether or not Y wrongs her by  $\phi$ -ing. Similarly, if X has the power of promise over an action  $\psi$  that she might take tomorrow, she can intentionally make it the case that she is duty-bound to Y to  $\psi$  tomorrow by exercising that power.<sup>9</sup> There may be other, related, normative powers, possibly reducible to consent and promise. Agreements, for example, seem to involve exchanges of promises, and/or sometimes exchanges of promises for exercises of consent, as when you promise to give

---

<sup>7</sup> Ibid. 297.

<sup>8</sup> See Joseph Raz, *Voluntary Obligations and Normative Powers II*, 46 *Proceedings of the Aristotelian Society* 79 (1972) (introducing the idea of promissory obligation as a normative power).

<sup>9</sup> Joseph Raz, 'Is there a Reason to Keep a Promise?' in *Philosophical Foundations of Contract Law* (Gregory Klass, George Letsas & Prince Sapra eds., 2014), pp. 58-77: 61 (offering a definition along these lines).

me a ride to the airport tomorrow if you let me use your bike to run an errand. I will work on the assumption that agreements are reducible to promises in this way, or at least that the way in which they generate commitment in the same way as promising, and that therefore we can take promises as standing for this larger set of phenomena.<sup>10</sup>

Rights, legal and moral, often have normative powers associated with them. Thus, a usual corollary of X having a right against Y doing  $\phi$ , is that she has the power to make it the case that Y does not wrong her by  $\phi$ -ing. Similarly, a usual corollary of X having the right to  $\psi$  or not tomorrow if she so chooses is that she has the power to promise Y that she will  $\psi$  tomorrow.

When the powers of consent and promising are associated with rights in this way, they seem to enhance the interests those rights serve, by giving right holders the authority to alter what they and others are permitted or required to do in the spheres of non-interference that are otherwise carved out by their rights. The value they thereby create is at least in part instrumental. The power of consent enables people to allow others into the domains their rights protects, enabling them to pool resources with others in the service of joint endeavors, while promises are mechanisms of commitment that facilitate social activity by giving promisees assurance that promisors will do as they promised.

But the value of these normative powers likely extends beyond this. It is plausible to think that many of our healthy relationships with others are constituted in part by promises and acts of consent. Certain forms of healthy physical intimacy seem to be valuable in part because and only insofar as they are consensual.<sup>11</sup> And promising may be constitutive of egalitarian modes of interacting with each other over time insofar as the assurance they provide helps to eliminate destructive power imbalances that can arise when persons must instead rely on the good will of others to successfully execute their projects.<sup>12</sup> In short, while rights give people domains in which they can do as they wish free from the interference of others, the normative powers that adjoin such rights expand

---

<sup>10</sup> See *ibid.* 58.

<sup>11</sup> See Seana Valentine Shiffrin, 'Promising, Intimate Relationships, and Conventionalism,' *Philosophical Review* 117 (2008): 481-524, p. 502.

<sup>12</sup> See *ibid.* 508. David Owens goes further than this, postulating that we have normative interests—interests in controlling what is permissible or require of others—over and above our non-normative interests in controlling the behavior and of and relating to others. David Owens, *Shaping the Normative Landscape Part II* (2012).

the power of right holders in valuable ways, by enabling them to autonomously enhance the discretion of others to enter their domains and limit the discretion that they would otherwise have in virtue of their rights.

But accounts of normative powers that make central their connections to the interests of the promisor and promisee in these ways don't have much to say—immediately at least—about the validity of their exercise under conditions of distributive injustice. This is not to say that they could not be further elaborated to draw out such implications. But they are fundamentally moral accounts that are detached from the larger political context and therefore devoid of immediate implications for the question posed at the outset of the paper.

Perhaps, then, we should try to understand normative powers in less interest-based terms. Suppose we regard rights as giving rise to constraints that establish domains of freedom that express the inviolability of the right-holder, entitling her to a form of respect by each person who interacts with her, even when a side effect of such respect may be that others rights are violated in exactly the same way.<sup>13</sup> Then, insofar as normative powers give the right-holder control over what counts as a violation of her rights and what others may demand of her, we might suppose that they help to instantiate this status by enhancing the role of her agency in the determination of the relevant constraints.

Such an account might appear to have more potential to directly answer the question posed at the outset, insofar as we could situate it in a larger theory about what rights we have. But the sketch just offered is pitched at a level too general to yield a determinate answer. More is needed to situate normative powers in a larger theory of political morality if we are to figure out how justice may constrain their existence and exercise. Thus, it may be fruitful to return to our world of moral superbeings and it is to this thought experiment that I now turn.

---

<sup>13</sup> F.M. Kamm, 'Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status,' *Philosophy & Public Affairs* 21: 354-389, pp. 385-386.

## II. Normative Powers in a World of Moral Superbeings?

Moral superbeings, recall, have perfect access to all the normatively relevant facts, know what reason demands of them, and are motivated to respond to those facts accordingly. For the moment I will also assume that the demands of reason and justice are determinate—that is, there is no metaphysical uncertainty about their content. Would exercises of normative powers such as promising and consent play a role in the practical deliberations of these beings? I don't think that they would.

### A. Consent

Consider consent first. Suppose that B is considering taking an action  $\phi$  that in our imperfect world would normally be thought permissible only if A consents to it—say, because it encroaches on A's person or property.<sup>14</sup> Because A is a superbeing, A will want B to  $\phi$  whenever the balance of reasons prescribes B's  $\phi$ -ing. B, as a superbeing, will know this, and will himself want to  $\phi$  when the balance of reasons prescribes his  $\phi$ -ing. Is there any reason to think that A's putative act of consent authorizing his  $\phi$ -ing or lack of it should have any practical significance for B?

I don't think that there is. Suppose, first of all, that agents face only impartial reasons for action. Then rationally A and B will give the same weight to the same set of considerations. This means that the reasons that motivate B will be identical to those that motivate A. Expressions of consent in such a world would therefore be normatively inert. A wouldn't consent to anything that went against the demands of reason or fail to consent to something that was consistent with them. Even if A were to fail to consent to something he rationally ought to, B shouldn't give that failure any weight in his own deliberations. Any such failure on A's part would be an error that A herself would recognize as such.

Now suppose that there are also partial reasons in the mix such that A rationally weighs some considerations differently from B. Then what is rationally required from

---

<sup>14</sup> Here, I implicitly assume for the sake of argument that there might be moral property rights—that is, rights over property that give rise to a directed obligation on the part of non-owners to respect the rights of the owner. But nothing turns on that assumption, because I ultimately conclude that there are no rights in the sense that we know them in the world of superbeings.



A's standpoint—the choices that are all-things-considered rational according to the balance of reasons that apply to A—may differ from what is rationally required from B's standpoint.<sup>15</sup> Suppose, for example, that B must decide whether to save A's child at the expense of several strangers or vice versa by throwing a flotation device either to A's child or to the group of strangers. Let's further suppose that reasons of partiality mean that from A's rational standpoint, B should save A's child at the expense of the strangers while from B's standpoint B should rationally save the others at the expense of A's child.

Rational conflicts of this kind complicate the moral landscape. But I don't think that they create a role for affirmative acts of consent. The considerations that shape A's rational standpoint will be relevant to B's decision in the manner prescribed by B's standpoint, but if B's standpoint ultimately prescribes something else, that is what B rationally ought to do, regardless of what A says about the matter. To give weight to A's affirmative act of consent or otherwise would (assuming it is rational from A's standpoint) simply push B towards acting in accordance with A's standpoint contrary to what reason requires of him.

It doesn't, however, follow that all things considered B should save the strangers at the expense of A's child. That only follows if B's standpoint governs B's choice. If A's standpoint governs B's choice, then B must throw the flotation device to A's child instead of saving the strangers. But if we conclude that A's standpoint governs, we haven't thereby created a role for consent. We have simply resolved the conflict between A's and B's standpoints in favor of A's standpoint. Once reasons of partiality are in the mix, such conflicts will arise creating a need for a mechanism to resolve them by allocating standpoints to choices or otherwise.

If conflicts are resolved by allocating standpoints to choices, we will end up with something that resembles a system of rights, though not a system of rights as we know them. For the resulting allocation is not (yet) an assignment of decision-making authority. It simply tells agents whose standpoint governs each of the choices that they must make.

---

<sup>15</sup> It might seem jarring to phrase this as a requirement rather than a permission. But my focus at this point is on what A has all-things-considered reason to do, and I'm assuming for the moment that the demands of reason are indeterminate. So there cannot be reasons that may or may not figure in A's deliberations for that would be to assume that there is indeterminacy about the demands of reason, which for the moment I've ruled out.

If, for example, A's standpoint governs what B or anyone else must do with the flotation device, we might say that A has the *right* to determine what happens to the flotation device. But A's right here is not a right to decide. The allocation of A's standpoint to the device entails only that B (and anyone else) is required to make the choice that is required by A's standpoint—by saving A's child with the flotation device. B would be required to do this even if A (irrationally) instructed B to do otherwise.

Thus, no role for consent emerges from the possibility of rational conflicts. If B found himself in control of the flotation device at the relevant moment, B would be required to make a decision in accordance with A's rational standpoint rather than his own. But it doesn't follow that A's act of consent or otherwise has moral significance beyond the dictates of A's standpoint. On the contrary, the allocation of A's standpoint to B's choice makes it rationally required for B to throw the flotation device to A's child, even if A (irrationally) told B to do otherwise. The rationality of the requirement to which B is subject in this case comes not from the underlying reasons that define B's standpoint, but rather from the requirements of right.

## B. Justice

The possibility of rational conflicts raises a distributive question: how should standpoints be allocated to choices? There will be better or worse ways of allocating standpoints to potential choices on at least two dimensions. First, there is a dimension of fairness. If we view persons as moral equals, rights should be allocated in a way that respects this moral equality. Second, the allocation should assign standpoints to choices in a way that makes sense given those standpoints—in a way that promotes persons' flourishing. It might be fair to give A's standpoint control over the voluntary movements of B's body if B's standpoint were given the same control over the voluntary movements of A's body. But, given the intimate relationship each has with her own body, it would usually make better sense from the perspective of human flourishing for each person's standpoint to control the voluntary movements of her own body rather than that of another (at least insofar as what she does with her body doesn't intrude on the person of another). I will refer to the set of considerations that determine how standpoints should be allocated to choices as considerations of justice.

Exactly what justice requires is obviously a complex question that cannot be answered here. What is important for my purposes is that the resulting allocation imposes practical constraints on agents' actions that are distinct from those arising from dictates of any given agent's standpoint.

### C. Promising

With this picture of rights in place, we can see why there won't be a role for promising in our world of superbeings either. Promises and agreements purport to alter persons' rights and duties. The recipient of a promise, the promisee, is entitled to demand that the promisor perform as promised, thus giving the promisee a right to the promisor's performance. For a promise to be effective it must be able to make it the case that the promisee has the right to a performance by the promisor that he didn't previously have a right to. In the terms of the framework developed so far, this means that the promise must have reallocated standpoints among possible choices: the promisee's standpoint governs the promisor's choice where previously the promisor's standpoint governed. But superbeings won't have any need for a device for reallocating standpoints to choices in this way, because justice, the demands of which are perfectly accessible to them given that they are superbeings, tells them whose standpoint should control each choice.

The conclusion that promises will be normatively inert in the world of superbeings may not be immediately obvious. Since superbeings can't predict the future, it might seem that they would need the power to make promises to one another in order to successfully execute joint projects that extend over time. But we are assuming that they can imagine all possible future contingencies and know what reason and justice demands of everyone in each. For justice has an intertemporal dimension, allocating standpoints to possible choices over time as well as across space in order to promote fairness and flourishing. But if the superbeings already know the just allocation of standpoints to choices over time, they have no reason to reconfigure it by making promises to one another.

Suppose that the allocation of standpoints to choices was unjust. Then the superbeings would want to reallocate standpoints in order to achieve optimality. But in the perfectly ideal world that we are imagining in which there is no normative uncertainty

there is no need for any such reallocation, because the superbeings will know and respect the allocation of standpoints to choices that realizes justice. Thus, they won't face the dilemma that promising would be needed to respond to in this world—the need to reallocate standpoints among choices.

Suppose, for example, that A and B and their children are going on a boat trip and that each will bring a life preserver with them in case of an emergency. Were an emergency to arise, reasons of partiality would mean that each would rationally prefer to save his own children. In recognition of this fact, A and B might enter into an agreement that in the event life preservers are needed, they will throw them in whatever way would maximize the number of children that will be saved thereby maximizing *ex ante* each child's chance of survival in the event of an emergency. But such an arrangement, it is plausible to suppose, is what justice *already* prescribes in which case any such agreement between A and B would be redundant.<sup>16</sup>

Of course, figuring out the just allocation of standpoints to choices is an immensely complex task that is fraught with uncertainty. It is this uncertainty, I will soon argue, that is the key to understanding promising in our world of much more limited beings. But in a world of superbeings, the dictates of justice are known to all. Thus, the system of rights achieves everything that promising might, and so our superbeings would have no need for promising.

---

<sup>16</sup> Thus, moral superbeings don't need promising to eliminate destructive power imbalances that can arise when one person relies on the good will of another to successfully execute their projects—a function that Seana Shiffrin takes as central to understanding promising. See Shiffrin, *Promising*, 508. Justice, not promising, takes care of such problems. Someone might object, though, that justice doesn't prescribe the arrangement on which the parties ultimately converge. I find this implausible. Resolving conflict of this kind seems to me to be exactly what justice is about. Moreover, here there is a resolution of the conflict that appears fair to all parties from the *ex ante* standpoint. But if you disagree and believe that justice doesn't yield a determinate answer, then there is metaphysical uncertainty about the content of justice and, as I explain soon, such uncertainty does create a role for normative powers.

### III. From Superbeings to Ordinary People

What happens as we start to relax the idealizing assumptions that underpinned the analysis in Part II? Let's start by relaxing the assumption that our beings know all the morally relevant facts. If they are otherwise fully rational and informed, I don't think that the possibility of such ignorance fundamentally alters the picture. This is because uncertainty about relevant facts is itself a kind of fact to which we can rationally respond, as when a doctor prescribes medicine to a sick patient based on her best guess about the cause of the patient's illness. Thus, we can simply redescribe the world in terms of more complicated facts that consist in part of the credences that are assigned to possible realizations of the uncertainty.

Factual uncertainty also raises normative questions about how agents should manage that uncertainty. But for the moment we can bracket such questions as we are assuming that there is no uncertainty or indeterminacy about how normative questions are to be resolved. For the moment, that is, we are assuming that agents know how they ought to respond to factual uncertainty.

What about situations in which one person has access to facts that the other does not, but that are relevant to the other's decision-making? I see no reason why the better informed agent wouldn't willingly share that information with the worse informed agent in situations where agents share the same standpoint.

Does this continue to hold when reasons of partiality require two persons to weigh considerations differently—when, that is, their rational standpoints conflict? If B is the better informed agent, could he fail to disclose to A information pertaining to A's child to ensure that A chooses an action that gives more weight to the interests of persons to whom B stands in special relationships than to A's child? I don't think that he could. If the system of rights assigns A's standpoint to the choice, then, all else equal, B should disclose information to A that would make A's choice more likely to conform to A's standpoint. Otherwise, B could use his informational advantage to achieve a reallocation of standpoints, which looks like a kind of injustice.

So far, I have been assuming that agents have the ability to accurately represent their own ignorance. What if agents are subject to information-processing biases? If they

know they are subject to such biases, they can rationally adjust their beliefs and behavior in response to the likelihood that their judgments are biased. But suppose they are not fully aware of their biases and so can't rationally respond to them. I don't think unconscious biases of this kind generate a need for normative powers. Our agents, we are still assuming, are fully committed to doing what morality requires of them, so such biases would not be the product of laziness or self-serving motivations. On the contrary, agents will take all available measures individually and collectively to minimize the impact of their biases. Their resulting beliefs about the world will imperfectly represent the world. But they will be as accurate as they could be given the constraints they operate under.

When all agents are subject to the same unconscious biases, their beliefs will tend to converge. But if agents are subject to different biases, conflicts will emerge. These conflicts are epistemic in nature and therefore distinct from conflicts among agents' rational standpoints. They entail that agents will hold diverging views about what should be done from a given standpoint.

Agents will need a mechanism for resolving such epistemic conflicts—for assigning epistemic standpoints to choices. How standpoints get assigned will matter for fairness and flourishing, and so raises complex questions of justice. But we are still assuming that agents face no normative uncertainty. Thus, they will know the just allocation of epistemic standpoints and act accordingly. Conflicting epistemic standpoints don't create a need for normative powers.

Thus, far I have been assuming that persons can imagine all future possibilities. Does relaxing that assumption create a need for normative powers? I don't think it does. Agents' limited imaginations mean that the allocation of standpoints to choices will have to be elaborated over time as possibilities that they weren't able to contemplate earlier materialize. But being able to make promises wouldn't improve their predicament. Their predicament doesn't arise from their inability to commit themselves, but from their inability to imagine what the future might hold. A promise that is made in the face of such imaginative limitations is no better than an allocation of standpoints that is made in the face of such limitations. It simply doesn't solve a practical problem that a just system of rights—albeit one whose content is elaborated over time—cannot solve just as well.

Now let's relax the assumption that agents are perfectly motivated to comply with the demands of reason. Suppose that some simply don't feel the weight of some of the reasons that define their own rational standpoints. They know that those reasons apply, but they are completely unmotivated to act on them. This means that they will sometimes fail to do as their own standpoints require. This irrationality results in a kind of injustice given the framework developed so far, as it results in the failure of a standpoint to control choices that justice says it is supposed to control. And so justice may require that the rest of the community spend resources inducing the irrational to conform to the reasons that apply to them. The same will be true when some persons don't feel moved to conform to justice despite knowing what justice requires of them. Perhaps, for example, they are unwilling to conform to the dictates of another person's standpoint when justice assigns that standpoint to their choices. This even more clearly creates a problem of (non-ideal) justice that it will fall on the rest of the community to solve. In both scenarios, the community of conforming persons may have to spend time and resources preventing non-conformity, if, as seems plausible, justice requires that the burdens of non-compliance be distributed in a way that best furthers fairness and flourishing.<sup>17</sup> But it doesn't fundamentally alter the normative landscape in a way that creates the need for normative powers.

Persons might also be imperfectly motivated in a milder way by sometimes failing to conform to reasons or considerations of justice whose force that they recognize and ordinarily feel the force of. Imperfect motivations of this kind give imperfectly motivated agents reasons to create mechanisms of self-commitment that make it more likely that they will comply with the reasons and considerations of justice that apply to them. But again, I don't think the normative landscape is changed in a way that creates a role for normative powers.

But might not an agent who knows that she might be tempted to act contrary to what reason or justice demands of her find it useful to promise to act in a conforming way? Such a promise would be redundant, for reason and justice already require her to

---

<sup>17</sup> For discussion of these questions, see Jonathan Quong & Rebecca Stone, *Rules and Rights*, 1 *Oxford Studies in Political Philosophy* 222 (2015).

conform. But perhaps it could strengthen her resolve by adding a promissory duty to the mix?

I don't think that promising can do this. First, although we tend to think that the content of a promisor's duty is up to her (at least within certain bounds), it is much less clear that the strength of the reasons she has to keep her promise are within her control. It seems even less likely that someone can use promising to alter the relative strength of pre-existing reasons.<sup>18</sup>

Even if it is possible for an agent to change the relative strength of existing reasons in this way, the akratic agent who seeks to do this in the scenario we are imagining is engaged in a kind of charade. For her motivation for seeking to enhance the strength of certain reasons is to overcome her own tendency to neglect those reasons. But that means that her ultimate aim is to conform to the true balance of reasons. Thus, her act is premised on an understanding of the true balance of reasons, unaltered by the promise. Unless she can engage in some kind of self-deception about the point of her promise, she knows that the true balance of reasons cannot have been altered by it. It is the true balance of reasons to which she is seeking to conform.

Finally, even if a promise could commit an akratic agent do what reason already demands of her it is a blunt instrument for achieving this end, for a promise is characteristically made to someone else—the promisee—who has to accept (or at least not reject) it for the promise to come into existence at which point she acquires the power to release the promisor from the duty to perform. If promisor's aim is to simply act on the balance of pre-existing reasons, why would she want to give another person the power to release her from a commitment to so act—particularly, if that person, too, might be imperfectly motivated to do as reason demands?

Certainly, our akratic agent might find it helpful to deliberate in advance about what she will do and resolve to act in accordance with such an intention, particularly if the process of deliberating in the moment of choice makes her inclined to put too much

---

<sup>18</sup> See Raz, *Is there a Reason to Keep a Promise?* 64 (“If promises are ever binding that is because of the value of people having the power to determine (up to a point) the strength of the promised act relative to their other interests. But that does not mean that there is value in people being able to determine the strength of the reasons that promises generate, or the strength of any other reasons, relative to the strength of reasons that arise out of the interests of others.”).



weight on present temptations. But that simply means that she should form an intention about what she will do in advance of the moment of choice and resolve not to revisit that intention. Resolving to act in this way doesn't require the involvement of anyone else. It is what is involved in decision-making not promising. In particular, the agent isn't transferring her authority over her decision to another. And she is trying to conform to the true balance of reasons rather than alter what reason demands of her.

#### IV. Normative Uncertainty

Thus far we have been imagining that the reasons that define each agent's standpoint and the considerations of justice that determine how standpoints get allocated to choices generate determinate all-things-considered prescriptions about what agents should do. We have also been assuming that agents, as superbeings, know with certainty the content of those prescriptions. Superbeings, we also assumed, are motivated to conform to the demands of reason and justice, and so they will always act accordingly.

There is a sense in which this world may seem unpalatable, despite the superbeing status of its inhabitants. For freedom of choice has no significance in this world, and such freedom is a value that seems to have tremendous importance in our world.

But once we relax our assumption of normative certainty a way of understanding the significance of such freedom emerges. For agents cannot simply appeal to reasons and considerations of justice in order to navigate this normative uncertainty, because, by assumption, they don't yield certain or knowable prescriptions.

Normative uncertainty may have a metaphysical or epistemic sources. A practical problem is indeterminate in the metaphysical sense when there is no right answer, at least prior to an answer being selected by the appropriate person or via an appropriate decision procedure. A practical problem is epistemically uncertain when we don't know what reason or justice demands, even if there is a determinate answer. Metaphysical indeterminacy is thus something with which even superbeings will have to contend, though because they are all knowing, they won't have to reckon with epistemic uncertainty.

Metaphysical normative uncertainty greatly expands the potential normative significance of choice: chosen outcomes are the correct answers by virtue of having been chosen (by an appropriate procedure). For more limited beings such as ourselves, epistemic uncertainty expands it further. For agents faced with epistemic uncertainty have to make choices knowing they don't fully understand the normative picture, which means that their choices are not fully determined by the reasons and considerations of justice that govern them.

Epistemic normative uncertainty is pervasive for limited agents such as ourselves. What reason demands from any given agent's standpoint is often hard for the agent herself to figure out. It will typically be even harder for others to determine given their limited access to the reasons of partiality that inform another person's standpoint.

Figuring out the just allocation of standpoints is also a complex problem that confronts us with many difficult questions: Does justice require control over an equal amount of resources to be assigned to each standpoint? What about the possibility that persons' standpoints will converge or diverge in systematic ways, such that when A's standpoint governs, choices that also happen to accord with the standpoints of B and C but not that of D are rationally required? Is that a form of unfairness that the distribution should respond to? What allocation best promotes human interests? How should the allocation respond to conflicts between human flourishing and fairness? How should justice respond to uncertainty about what is required by the controlling agent's standpoint? None of these questions have easy answers. Thus, even if these questions have singular right answers, epistemically limited agents can't be certain what they are.

The predicament of epistemically limited agents is further complicated by interactions between metaphysical indeterminacy and epistemic uncertainty. Given that epistemically limited beings have limited ability to figure out what reason and justice entails, they likely also have limited ability to figure out at what point they run out. Thus, it may be epistemically uncertain how metaphysically indeterminate a normative problem is.

It isn't at all clear how epistemically limited beings should navigate this normative uncertainty. But it is clear that they cannot do by appeal to reason and justice alone, for the prescriptions of the latter may not yield determinate answers and even

when they do, agents can't be sure what they are. Thus, they need a set of tools distinct from the underlying reasons and considerations of justice that they are trying to conform to. Normative powers of consent and promising, I will now argue, are the tools they must use in order to do this.

## V. Normative Uncertainty and Consent

Let's simplify the problem of normative uncertainty for the moment by supposing that there is no uncertainty about rights—that is, about the allocation of standpoints to choices—only uncertainty about what reason demands from any given standpoint. Agents will have to make choices in the face of this uncertainty. How will they do so?

### A. Rights Again

Before we answer this question, we need to enrich our picture of rights. Rights, in the picture developed thus far, don't tell us who should resolve the uncertainty to decide what is to be done. They simply assign standpoints to choices thus telling us whose reasons govern each choice. In our world of superbeings, rights don't have to do more than this, because superbeings always choose as justice and reason dictate and there is no uncertainty about either. Thus, superbeings will always choose in accordance with the certain and determinate prescription of the applicable standpoint. But once we introduce normative uncertainty about the demands of reason, the choices of even well-intentioned agents won't always align with those demands, which makes the question who should determine how they are to choose a significant one. It is not sufficient to know whose standpoint governs a particular choice. We must also know who is authorized to resolve the uncertainty about that standpoint.

I will assume that authority is presumptively assigned to the agent whose standpoint governs the choice—that is, to the rightholder. This will usually make sense from an instrumental standpoint, because the rightholder is likely to have better access to the reasons that arise from her standpoint. But, more importantly, such an assignment has intrinsic value along at least two dimensions. First, it instantiates a conception of equal respect for persons. The principle of equal respect for persons, it is plausible to suppose,

entails that each of us should be allocated an equal amount of authority to resolve normative uncertainty. Second, the assignment to each of authority to resolve the uncertainty about her particular standpoint instantiates a conception of autonomy by giving each a form of authorship over her own life.

The intrinsic value of such an assignment is most obvious when it comes to metaphysical indeterminacy that arises from the partial, incommensurable reasons that seem to govern many significant aspects of our lives, such as who we should be intimate with and how, what career we should pursue, how many children we should have and so forth. The indeterminacy has to be resolved somehow. Assigning authority to do so to the person whose very standpoint is defined by those reasons is a way of respecting her agency.

For epistemically limited beings such as ourselves, such metaphysical indeterminacy will be mixed with and compounded by epistemic uncertainty about what reason determinately recommends. And when it comes to epistemic uncertainty, it is perhaps less clear that there is intrinsic value in having the rightholder resolve it, as opposed to it being resolved by someone with greater expertise about the relevant reasons. There is after all a fact of the matter and intrinsic value associated with getting the question what reason demands correct.

But metaphysical and epistemic will often be deeply entwined. Even when they are not and there is a determinate right answer that is in principle ascertainable, there is intrinsic value in the agent herself taking responsibility for resolving uncertainty about the reasons that apply to her in particular. Thus, it is plausible to think that there is intrinsic value to an assignment of authority to the rightholder, even if we could find someone who could more expertly resolve epistemic uncertainty about her standpoint.

## B. (Ideal) Consent

How then will an agent rationally navigate normative uncertainty about what reason demands from her standpoint? In the absence of normative uncertainty, rationality is simply a matter of doing as reason demands. But rationality in the presence of normative uncertainty cannot simply be a matter of acting on one's best assessment about

what reason demands. This is because agents face a second-order question how to formulate such an assessment in the first place.

If the uncertainty is of a purely metaphysical nature, such that reason really has nothing more to say, it looks like it will be rational for the agent to simply go with her gut in selecting among her options. At minimum, the expenditure of time and resources on the problem looks like it will be wasteful because reflection on the relevant reasons won't be productive.

By contrast, when the uncertainty has an epistemic component, deliberation may help the agent get closer to the truth. But given that deliberation is costly, it will be rational for the agent to eventually stop deliberating and choose in the light of her best assessment of the balance of reasons at that point.

Yet exactly when she should stop deliberating and act is itself a question fraught with normative uncertainty the optimal resolution of which depends in part on the underlying normative problem that, by assumption, she doesn't know how to solve. The solution is therefore necessarily going to involve satisficing rather than optimizing. It can't involve optimizing for she can't know the optimal stopping point without full understanding of the very problem she is trying to solve. That is, at some point, it is going to make sense—on grounds necessarily irreducible to the reasons she is attempting to balance—for her to stop and do her best given her deliberations thus far lest she be paralyzed by indecision. Once she does so—that is, once she makes a decision—it becomes rational for her to act on that decision. Her decision means that she has reason not to deliberate further.<sup>19</sup>

---

<sup>19</sup> Joseph Raz suggests that we should understand decisions as creating a reason that takes the place of and excludes the underlying first-order reasons on which it was based. Joseph Raz, *Practical Reason and Norms*, (Oxford: Oxford University Press, 1975) 65-71. While the suggestion I made in this paragraph is roughly in line with this suggestion of Raz's, I think it is misleading to think of a decision as itself a reason given that it necessarily involves considerations not reducible to the underlying reasons on which it is based. Thus, I think it is better to say that it is rational for the agent not to deliberate further about the matter, such that the conclusion of the deliberations to date should take the place of the reasons it has weighed, without adding that that conclusion itself has the status of a reason. David Owens rejects Raz's two-dimensional theory of obligation for similar reasons: "Obligations make sense of compliance but they do so by blocking deliberation about whether to comply, not by contributing to it. *Obligation is not a factor in deliberation.*" David Owens, *Shaping the Normative Landscape* (2012) 87. See also Michael E. Bratman, 'Reflection, Planning, and Temporally Extended Agency' in *Structures of Agency: Essays* (Oxford: Oxford University Press, 2007) 26 ("there is, normally, rational pressure not to reconsider and/or abandon a prior plan").

Thus, it seems that when there is normative uncertainty about what reason demands from a particular agent's standpoint that has a significant epistemic component, the agent must have the power of decision-making—the power to settle what it is that it is rational for her to do, even though she may be incorrect about the best course of action and it is possible that further deliberation could result in a superior choice.

How is this account of decision-making relevant to consent? Decision-making is a power to determine what oneself will do. In the framework developed so far, an agent needs the power of decision-making to resolve uncertainty about what she should herself do when making choices that are governed by her own standpoint. But recall that justice may assign one agent's standpoint to the choices of another. For example, if justice instantiates commonly held ideas about bodily integrity, then A's standpoint will govern whether B can touch A's body in a range of circumstances. This wouldn't, of course, mean that A can compel B to touch her. Indeed, it in most circumstances she probably cannot for the assignment of rights would likely assign B a similar degree of control over what happens to her body. But it would mean that A could make it the case that B should not intentionally touch A's body in a wide range of circumstances, thus constraining a range of choices B can make.

When there is normative uncertainty about what A's standpoint requires of B because A's standpoint is assigned to a choice B must make, A needs the power of consent to resolve that uncertainty, much as A needed the power of decision-making to resolves what A's standpoint required of A when making choices that are governed by A's own standpoint. Recall that in the world of superbeings I originally envisaged, A had no need for the power to consent, because everyone could see what the balance of reasons determinately prescribed from every person's standpoint. But powers of consent are needed once normative uncertainty enters the picture, because normative uncertainty means that there will be multiple ways that each agent might resolve the normative uncertainty about what reason demands of others from her standpoint. Just as the content of a decision is up for grabs prior to the agent making it, B cannot know whether A's standpoint allows him to touch her prior to A resolving normative uncertainty about her standpoint.

Thus, acts of consent, on this picture, resemble decisions in a crucial respect. Both resolve normative uncertainty about the dictates of an agent's standpoint. Decisions do so for choices made by the agent; acts of consent do so for choices made by others. Thus, an act of consent can be understood as a decision that bears on the permissibility of another's choices.

On this view of consent, exercises of the power don't actually alter the underlying reasons. The true dictates of B's standpoint are fixed by the truth about the content of that standpoint. But from A's (and B's) vantage points, there is uncertainty about what that truth is. When A resolves that uncertainty by exercising her power of consent, she may appear to alter the normative status of B's options. But while it appears at one level that she is making permissible an action that was previously impermissible, what she is actually doing is settling normative uncertainty about what B should do when making a choice that is governed by A's standpoint.

This account of consent can also generate an account of the validity conditions of consent. Because the underlying reasons remain in view on this conception of consent, a person cannot validly consent to something that is transparently against her interests—that is, something that is determinately proscribed by her standpoint. For instance, A could not validly consent to being gratuitously tortured by B. That will be determinately ruled out by A's standpoint. There are limits on what A may authorize B to do to her, on this account, because the power of consent is not a power to authorize the irrational, but to settle uncertainty about what reason requires.

### C. Consent under Non-Ideal Conditions

A natural objection to raise about this conception of consent is that it doesn't seem to capture the phenomenology of consent. When it is transparent to all that A's standpoint would allow B to interfere with her person (e.g. by performing a necessary surgery on her that it is manifestly in her interests to have), such that there is no normative uncertainty for A to settle through an act of consent, then, according to the settling conception, B can permissibly do so without seeking A's permission first.

I believe that this implication of the account is ultimately less counterintuitive than it first seems. First, it is unclear whether our intuition that A must consent to such

contact by B is driven the nature of consent itself or the usual circumstances in which such contact take place. For it will usually be the case that there is normative uncertainty about whether B should engage in such contact with A in situations like this. Thus, it will usually be the case, on the settling account, that A does need to consent for B to permissibly engage in such contact.

Second, it's going to be even rarer that the answer is transparent to B, even in situations where it is transparent to A. And if the answer isn't transparent to B, then B should ask A before touching her, otherwise he risks wronging A, even though, fortuitously for him in the case that we are imagining, he won't end up wronging A if he intimately touches her because touching her is, as it happens, consistent with A's standpoint.

Of course, in a scenario like this, when A tells B that he may touch her, A isn't, according to the settling conception, exercising the power of consent, because she isn't settling any normative uncertainty about the dictates of her standpoint. She is rather informing B of what her standpoint determinately prescribes. But should B go ahead without asking A, A would have a complaint against B—a complaint that B acted negligently or recklessly towards her, despite fortuitously not ending up infringing her rights.

On the flip side, suppose that A misinformed B about the dictates of her standpoint and B acted on that misinformation (without any grounds for thinking A had misinformed him), thus blamelessly acting contrary to A's controlling standpoint. In such a situation, we might be tempted to say that A had consented to B's touching. But A wouldn't have exercised valid consent on the settling conception through such a miscommunication because A would not have thereby resolved normative uncertainty about the dictates of her standpoint. She has instead miscommunicated what those dictates determinately are. Nonetheless, it seems plausible to say that A is the one that should be held responsible for B's infringement of A's right not B and thus to conclude that B hasn't wronged A.<sup>20</sup>

---

<sup>20</sup> Alternatively suppose that B knows that A's standpoint proscribes the touching. In that scenario, B plausibly does wrong A despite A's (invalid) "consent" to B's touching, consistent with the idea that "consent" doesn't do normative work when the dictates of the relevant standpoint are clear.



Finally, while the settling account provides us with a way of understanding what consent does at the fundamental level, it doesn't necessarily yield all-things-considered determinations of permissibility or impermissibility. We can, that is, subscribe to the settling account without thinking that B always acts permissibly by touching A in situations in which it transparently the case that A's standpoint authorizes such a touching. While the latter may well be true in an ideal world, where everyone is motivated to conform to the dictates of reason and justice, in a less than ideal world, the moral landscape necessarily becomes more complex. In particular, justice may require a different configuration of rights in non-ideal conditions in order to fairly allocate the burdens of non-compliance.

Suppose, for example, that sexual harassment is serious and widespread. Then justice may require that we lessen the extent to which individuals' standpoints control what may happen to their bodies. For instance, justice might require that B receive express authorization from A before B may have sex with A even in situations where the dictates of A's standpoint clearly favor her having sex with B. This will mean that A's standpoint alone would no longer control B's choice, or, more precisely, that A's standpoint would control B's choice only in circumstances where A also expressly authorized B's act. The result would be that no-one's standpoint controls whether B can touch A in the absence of an express authorization by A. B would be prohibited from so acting period. Such a reconfiguration of rights will limit A's ability to spontaneously have sex with B even when reason allows it. But if it is needed to protect others from unwanted sexual advances in the non-ideal conditions we are imagining, it may nonetheless be required by justice as a means of more equitably sharing the burdens of such non-compliance.

Such a reconfiguration of rights serves the larger community of people in the position of A. If B touches A where A's standpoint allows it, but she hasn't expressly communicated her approval, then the wrong B commits is not against A individually but against the community of similarly situated persons. Justice requires that rights be restricted in a prophylactic way in order to guarantee B doesn't touch A contrary to A's standpoint and to fairly protect other rightholders from the effects of non-compliance.

There is a large literature on the question whether consent requires communication or requires just some mental act or state of mind. It might seem that my conception puts me in the latter camp, because I identify consent with an act of settling normative uncertainty about choices of others that are controlled by the consenting agent's standpoint, which they agent can accomplish without communicating the settlement to those whose choices are governed by her standpoint.

But I don't think things are this simple. If B must make a choice among actions all of which might be inconsistent with A's standpoint prior to A's resolution of the normative uncertainty, without any way of knowing how A has settled it, I don't think it makes sense to say that he wrongs A if he acts contrary to A's standpoint. And if A actually lies to B about how she's settled the normative uncertainty, and B has no grounds for questioning the lie, it is very difficult to see how B wrongs A by acting in accordance with the lie, though he acts contrary to A's resolution of the uncertainty. Finally, the extent to which A's standpoint controls B's choices may, as we have seen, depend on the circumstances. If background conditions are sufficiently non-ideal such that allowing people to intimately touch one another without seeking the express authorization of the other first contributes to a culture that licenses a lot of sexual harassment, then standpoints should be reallocated among choices in a way that limits the extent to which one agent's act of settling uncertainty about her standpoint controls what another may permissibly do to her.

## VI. Normative Uncertainty and Promising

In the previous section, I argued that normative uncertainty about what reason requires from a given standpoint gives rise to a need for the powers of decision and consent. But I don't think we yet have a role for normative powers like promises and agreements that appear to reallocate decision-making authority. It is true that agents faced with uncertainty about the dictates of their standpoints will have to resolve it in a coordinated fashion in order to successfully engage in joint projects with others. But this seems to necessitate joint decision-making that settles in advance what each will do pursuant to a

joint plan, rather than the kind of transfer of rights from promisor to promisee that is entailed by promising.

Decisions, as we have seen, give agents *pro tanto* reasons not to reconsider them. Moreover, decisions that are made in conjunction with another—that is, joint decisions—have a stronger *pro tanto* force by virtue of the fact that they were made in conjunction with another. For the fact each has made the decision with another and the other has at least in that minimal sense relied on the former’s decision gives each additional moral reasons to stick with the plan alongside the basic individual injunction not to reconsider a decision once it has been made. Reasons arising from such reliance won’t guarantee that an agent’s standpoint will prescribe sticking to the plan, though they plausibly will ensure that he must at least take minimal steps to protect the other in the event that a departure is warranted. Moral reasons not to depart from the plan also become stronger as the other takes concrete steps in reliance on the joint plan. In short, a lot of moral glue should arise from joint decision-making in the face of normative uncertainty about the demands of reason from particular agents’ standpoints even if agents lack the power to make promises to one another. And this looks like it should be sufficient for well-motivated agents to coordinate with one another on joint projects.

#### A. (Ideal) Promising

But once we introduce normative uncertainty about justice into the picture, a clear role for normative powers that purport to transfer rights—promises, agreements, transfers of property etc.—arises (though, as we will soon see, exercises of such powers on the proposed conception don’t actually transfer anything of fundamental normative significance). This is because agents need to have the power to settle normative uncertainty about what rights people have—uncertainty, that is, about whose standpoint controls their choices—just as they need to have the power to settle normative uncertainty about the dictates of their particular standpoints. Promises, agreements, and the like, I suggest, are mechanisms for resolving this type of uncertainty.

If the only uncertainty about justice is of the metaphysical kind, then the role for promising and agreements when they are understood in this way will be a relatively minimal one. This is because justice will be indifferent among candidate distributions

that realize justice. All that justice will require is that agents coordinate on a device to select one of them. Once agents have successfully coordinated on a distribution the resulting agreement fixes what justice requires and will do so for all time. Thenceforth, agents won't have further need for particular agreements that reallocate rights away from the just distribution.<sup>21</sup>

When the normative uncertainty about justice is of an epistemic kind, however, there is a much more expansive role for promises and agreements to play in agents' lives when they are understood as devices for settling normative uncertainty about justice. This is because there are better and worse ways of resolving epistemic uncertainty, and agents may accordingly disagree about how the uncertainty should be resolved. Thus, any settlement of such uncertainty should be subject to revision by agents who reasonably believe that they can improve on the status quo.

Although the settling conception has parallels with rights-transfer accounts of promises and agreements, promises and agreements on the settlement conception don't actually transfer rights at the fundamental level. They are instead fresh attempts to specify, provisionally, what justice already demands. Valid promises and agreements do alter the contours of what I will call agents' *de facto rights*—the allocations of

---

<sup>21</sup> This may overstate things somewhat. Suppose the metaphysical uncertainty arises from incommensurable values. Suppose, for example, that there are multiple ways of trading-off fairness against flourishing that are perfectly compatible with justice, and the community implements one trade-off from the set of just possibilities. Then that might leave scope for sub-groups of agents to rearrange their own affairs in accordance with a different trade-off between the two values. But their ability to do so will depend on the compatibility of their choice with the justice of the larger scheme. The choices made by larger scheme will constrain what subgroups can do consistent with justice. And it is not clear what their motivation for doing so would be given the rights they have been given by the wider community already perfectly realize justice. Perhaps there is intrinsic value in particular groups living by the particular conception of justice that they have selected for themselves. But if that is so, it looks justice may actually requires delegation of the resolution of such normative uncertainty to particular subgroups. For, recall, that once we introduce normative uncertainty there are two allocative problems to contend with: the basic problem of allocating standpoints to choices, the solution to which is normatively uncertain; and the second-order problem of allocating authority to resolve that normative uncertainty among persons. I suggested that justice, presumptively at least, assigns authority to resolve uncertainty about an agent's standpoint to the agent herself. Justice may also require that authority to resolve normative uncertainty about some first-order problems of justice be allocated to particular subgroups. But once authority to resolve normative uncertainty about justice has been allocated as justice requires, it isn't clear why promises and agreements should play a continuing role in the lives of superbeings who face normative uncertainty only of the metaphysical kind. For once each group has resolved the questions of justice that have been allocated to it, there won't be any normative pressure for agents to reconfigure their rights through subsequent promises and agreement, because, so long as they choose an allocation from the just set, the allocation they will have chosen will be a just one.

standpoints and associated settling authority that agents have by virtue of prior valid attempts by the community (via law, previous agreements and so forth) to settle what rights people have. In this sense, they affect a kind of transfer. But the underlying moral rights that are given by the allocation of standpoints that is prescribed by justice remain unchanged.

Suppose that C makes a valid promise to D to  $\psi$ . This means that instead of C getting to choose whether or not she  $\psi$ s, D gets to make that choice by holding C to her promise or releasing her from it. On the settling conception, this is because there is normative uncertainty about whose standpoint should control C's choice whether or not to  $\psi$ , the de facto rights currently resolve that uncertainty in C's favor, and the promise settles the uncertainty in D's favor, thereby transferring the de facto right over C's choice to D. Thus, C's and D's underlying moral rights are not altered by promising. But their de facto rights are.

Promises and agreements are only valid on the settlement conception if they genuinely resolve normative uncertainty about justice as between the parties involved. It follows that one agent's authority over certain matters will not be alienable by agreement, if no reasonable theory of justice would give authority over those matters to anyone's standpoint other than that of the agent. Thus, an attempt to sell oneself into slavery would likely be invalid. More mundane promises might be too. For instance, promises to have sex with another may well be invalid under most circumstances. No reasonable theory of justice, it is plausible to suppose, would give D the authority to decide whether C will have sex with D except perhaps in very unusual circumstances. If this is the right picture, then while C could certainly consent to sex with D in the moment, she would usually retain the right to stop doing so even if she had attempted to promise D that she would have sex with him.

Recall that the settling conception answers the question whether consent requires communication by the person consenting somewhat equivocally. Although consent by A to an action by B requires A to settle uncertainty about the dictates of her standpoint insofar as it governs the choices of B, B must have some way of learning how the uncertainty was settled. And if it is A's fault that B is misinformed about A's settlement, then B might not wrong A when he acts contrary to the A's settlement. I also argued that

communication may be a prophylactic requirement of non-ideal justice in some circumstances, such that B would act impermissibly even if he acted in a way that was consistent with A's settlement, if A didn't expressly communicate her consent to B.

When it comes to promises and agreements, communication looks like it will be essential to the transfer of de facto rights even under perfectly just circumstances, because even in the case of a one-way promise, both parties are involved in the settlement of uncertainty about justice. Both parties must agree that the promisee's standpoint should govern the promisor's decision whether or not to perform instead of the promisor's. There is therefore some requirement of uptake on the part of the promisee, even if it might be made tacitly.<sup>22</sup>

The more interesting question is whether a subjective intent on each party's part is also required. What should happen in the event of a misunderstanding about what the parties have communicated? Here I'm tempted to take inspiration from the common law of contract and say that there is no valid agreement unless one party is responsible for the misunderstanding and the other is not, in which case we should resolve the misunderstanding against the former by holding both parties to the understanding of the latter.<sup>23</sup> But this isn't a strict entailment of the settlement account. The more important point is that we will need some rule that is external to the settlement account to resolve such misunderstandings.

## B. Promising and Background Injustice

At the end of section V, I considered how widespread non-compliance with rights in the form of widespread sexual harassment might change our practices of consent by making express authorization to sexual contact a necessary condition beyond the

---

<sup>22</sup> See Charles Fried, *Contract as Promise* (1981), 43 (arguing that we ought to recognize that there is "tacit acceptance" in situations "where the promise is clearly communicated and where it would be captious to doubt that the promisee is delighted by the promise"); David Owens, *A Simple Theory of Promising*, 115 *Philosophical Review* 72 (2006) ("In accepting a promise, you are acquiring the right to require the promisor to perform. Most often people will value the trust implied by such a gift, and because a promise is normally regarded as a benefit, the promisee's silence is usually taken as consent. But the promisee may not wish to accept this benefit and the debt of gratitude that implicitly accompanies it; the promisee may insist that the promisor remain free to change his or her mind so as to avoid being under an obligation to reciprocate at some future point. And should the promisee so insist, the promisee is invalid.").

<sup>23</sup> Cf. Restatement (Second) of Contracts § 21 (resolving misunderstandings against the party who knew or had reason to know of the other party's different meaning).

recipient's mental act of settling uncertainty about what her standpoint allows. In this section, I return to the question posed at the very outset of the paper and consider how distributive injustice in the distribution of de facto rights may affect the validity of exercises of normative powers.

Recall that on the settling conception, consent and promising are mechanisms for resolving normative uncertainty against a background of de facto rights that exist as a result of prior efforts by members of the community to settle normative uncertainty about justice. Those prior efforts establish the de facto rights. A valid act of consent settles normative uncertainty about what another may do insofar as the other's choice is, according to the de facto rights, governed by the consenting agent's standpoint. A valid promise transfers de facto rights by resolving remaining normative uncertainty about the rights of the promisor and promisee. It doesn't change the contours of agents' true rights (unless it is settling metaphysical uncertainty)—those are determined by justice. But because epistemic normative uncertainty about justice is pervasive there is a lot of scope for agents to validly alter their de facto rights despite the constancy of the (unknown) demands of justice.

If we understand normative powers in this way, then it can't be that any attempt to settle such uncertainty goes. Exercises of consent and promise are valid only if they do in fact resolve normative uncertainty. Some attempts at settling will be obviously erroneous, and as such will be normatively inert. For instance, promises to perform actions that are transparently not within the promisor's rights, cannot be valid. A promise to murder an innocent person, for instance, will almost certainly be invalid on the settling conception.

This immediately raises the question what happens when the de facto rights that the normative powers purport to alter represent, in whole or in part, invalid attempts to resolve the normative uncertainty about justice. Agent's de facto rights on the view I'm sketching likely always depart from their true moral rights given the pervasive normative uncertainty about justice. But when those de facto rights resolve the uncertainty in a reasonable way, the rights have a legitimacy (despite not realizing justice) that they lack when they don't, because, they constitute valid settlements of the uncertainty. A distribution of de facto rights lacks this legitimacy whenever it assigns standpoints and associated settling authority to choices in a way that is manifestly unjust.

How then does the injustice of the de facto distribution of rights threaten the validity of attempts to exercise normative powers? There are broadly two ways it can do so. First, it may do so directly by giving de facto rights to agents that they transparently lack as a matter of justice, thus, plausibly rendering invalid exercises of consent and promise that are premised on such authority. Thus, the unjustly rich person who purports to consent to the use of his fancy yacht that he has de facto rights to control (in the form of legal property rights) plausibly doesn't thereby validly exercise a normative power. It is too obvious that he lacks the right to the yacht in the first place. (This is not to say there might not be reasons of an instrumental nature for the community to enforce such property rights, but these reasons would not be grounded in the owner's rights.) Similarly, two unjustly rich people forming an agreement about how to best use resources that are de facto theirs plausibly don't thereby create a morally binding agreement about what is to be done with those resources, because it is transparently unjust to give them the right to control those resources in the first place.

Second, such background injustice may have indirect effects on attempts to exercise normative powers by altering the nature of the agreements that people enter into, even if those people are not unjustly rich. In Hillel Steiner's terms, such agreements are exploitative because at least one party ends up with less than he would have received had the agreement been entered into under just conditions.<sup>24</sup> On the view of normative powers developed here, such agreements are morally valid if the terms don't reasonably appear to have been affected by background injustice. This means that parties to the transaction who look like they may be set to benefit from background injustice should take steps to make sure they aren't setting terms in a way that is in any way taking advantage of injustice. To take a relatively simple example, suppose that there is a natural disaster and that persons who can help are duty-bound to help those in need, but too few people are helping. Then agreements to provide necessities might be morally invalid if those providing them charged exorbitant prices because of the failure of society to come to

---

<sup>24</sup> For the latest statement of his theory, see Hillel Steiner, *Exploitation Takes Time*, in *Economic Theory and Economic Thought: Essays for Ian Steedman*, ed. J. Vint., S.S. Metcalfe, H.D. Kurz, N. Salvadori and P. Samuelson (London: Routledge, 2009).



their aid, even if those providing those necessities had already discharged their own duties to aid the victims of the disaster.

### C. Relationship to Other Accounts of Promising

While most people believe that promises ought to be kept and that genuine consent can make otherwise wrongful acts permissible, the idea that people can will obligations in and out of existence by uttering words like “I promise” and “I consent” makes normative powers *prima facie* puzzling. As a general matter, we can’t will moral obligations in and out of existence. Morality, as we usually understand it, is something that constrains us, not something we alter at will.

The puzzle has led many to understand normative powers as the product of valuable social conventions that serve the general good. Our reasons to keep our promises don’t flow from the fabric of moral reality, but rather arise from rules we have developed to manage our cooperative endeavors. Thus, according to Rawls, we should keep our promises because by breaking them we undermine a useful social practice and free-ride on the efforts of others who sustain it by keeping their promises.<sup>25</sup> The problem with such accounts, though, is that they don’t vindicate the intuition that it is the promisee in particular who is wronged by a promisor’s breach of her promise. Instead the wrong is a generalized wrong committed against the community at large.<sup>26</sup>

Once we understand normative powers as constitutively tools for settling normative uncertainty, we can dissolve the puzzle in a different way. On the settling conception, exercises of normative powers don’t create new reasons or duties from whole cloth. Rather, they operate on pre-existing, albeit normatively uncertain, reasons and rights. Indeed, they are only valid if they constitute reasonable resolutions of applicable normative indeterminacy. And so the conditions of their validity are always tethered to those underlying reasons and considerations of justice. Because the underlying

---

<sup>25</sup> John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, revised edition, 1999), 304. See also David Hume, *A Treatise of Human Nature* (Cambridge: Hackett Publishing Company, 2006), Bk. II, Pt. II, § VIII [3] (the duties of both justice and promise “have the same source both of their *first invention* and *moral obligation*. They are contriv’d to remedy like inconveniences, and acquire their moral sanction in the same manner, from their remedying those inconveniences.”).

<sup>26</sup> For a more thorough exposition of this kind of criticism of conventionalist accounts, see Stephen Darwall, ‘Demystifying Promises,’ in *Promises and Agreements: Philosophical Essays* (Hanoch Scheinman ed., 2011), 257–264.

considerations of justice establish individual rights that promises and agreements are directed towards, the framework can make sense of the sense in which a promisor wrongs a promisee when she breaches their agreement. When she breaches their agreement, she infringes the promisee's de facto right to her performance, which if the agreement was valid, is part of what the agents have determined justice between them requires. Given epistemic uncertainty about justice, their agreement may not in fact describe what justice between them requires, but insofar as it represents a reasonable attempt to do so, there is a sense in which the promisor wrongs the promisee when she breaks the promise.

There are important affinities between the settling conception and views that regard promises as transferring rights and acts of consent as modifying the boundaries of rights by creating permissions.<sup>27</sup> On my account, this is roughly how normative powers operate when we focus on de facto rights. But de facto rights are not genuine moral rights on the settling conception. They have an inherently provisional quality—representing simply the latest attempts by the community to settle normative uncertainty about justice. Exercises of normative powers that are made against this background have a similar provisional quality, and they don't alter the underlying reasons and considerations of justice that they purport to settle.

## VII. Disagreement versus Indeterminacy

A central contention of the paper is that normative powers settle normative uncertainty, including uncertainty that is epistemic in origin. Indeed, I've argued that metaphysical uncertainty only gives rise to a limited role for powers of consent and promising.

Someone might object that epistemic uncertainty doesn't generate indeterminacy, because there are better and worse ways to resolve such uncertainty. True, people will often disagree about how the uncertainty should be resolved. But that doesn't entail that all candidate solutions are on a par, equally available to be selected among through the exercise of normative powers as I am proposing. Suppose someone else knows better

---

<sup>27</sup> A prominent example of such an account is set out in Shiffrin, 'Promising, Intimate Relationships, and Conventionalism.'

how to resolve the uncertainty than the consenting agent or the parties to the agreement. Why should the inferior resolution proposed by the latter take precedence over the former, just in virtue of meeting a threshold of plausibility?

I think the answer lies in the absence of a shared framework for resolving normative uncertainty. The absence of such a shared framework makes normative uncertainty different from mundane uncertainty about non-normative facts. In the absence of a shared framework, there is more at stake normatively speaking than the likelihood of being correct. Maximizing the chance of right answers, even assuming for the sake of argument we know for sure how to do this (which seems doubtful when normative problems are epistemically uncertain), will lead to allocations of decision-making authority that don't give expression to principles of equal respect for persons and autonomy that prescribe distributing authority equally and in a way that maximizes each person's control over decisions that are most relevant to them.

More generally, in the absence of a shared normative framework, a certain humility is warranted when faced with those with whom we disagree. The fact that others disagree with us properly ought to give us pause about our own resolutions of the uncertainty—that is, we should be alert to the possibility that our own preferred solution is underdetermined by reason.

Indeed, even when the normative problem is purely prudential and private, and so unlikely to one about others will form strong views, it seems plausible to be cautious about the solution that one ends up adopting. Living one's own life well is an immensely complex problem. And so, I think, it is appropriate to regard our own particular decisions as always open to challenge by different versions of ourselves. So long as the appropriate attitude towards the complex problems we face in our practical lives is one of equivocation, we will need mechanisms of settling the resulting uncertainty in order to productively interact with others.

## VIII. Conclusion

I have developed an account of the normative powers of consent and promise according to which they are constitutively responses to normative uncertainty. Acts of consent

resolve uncertainty about what reason demands from the consenting agent's standpoint. Acts of promising and agreement make resolve uncertainty about what justice demands—about who has authority to decide a particular question. Exercises of such powers are therefore valid only if they constitute reasonable resolutions of the relevant normative uncertainty. When there is normative uncertainty about what justice requires, for example, a promise is only valid if it represents a normatively plausible resolution of such uncertainty. Thus, a transparently exploitative contract would be invalid despite having been freely entered into, but a contract in which a poorer party is dealt with on generous terms by a richer party may well not be, even if the poor party would never have entered into such a deal under just conditions.