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PERSONAL SOVEREIGNTY AND NORMATIVE POWER SKEPTICISM

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Companion to: Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603 (2009).

Correspondence accounts of the relationship between contract and promise hold either that contract law is justified to the extent it enforces a corresponding moral responsibility for a promise or unjustified to the extent it undermines promissory morality by refusing to enforce a corresponding moral responsibility for a promise. In “The Correspondence of Contract and Promise,” I claim that contract scholars have mistakenly presumed that they can assess the correspondence between contract and promise without first providing a theory of self-imposed moral responsibility that explains and justifies the promise principle.¹ To illustrate the dependence of correspondence accounts of contract law on a theory of self-imposed moral responsibility, I demonstrate how a “personal sovereignty” account of individual autonomy—one of the most familiar and intuitive theories of self-imposed moral responsibility—explains how and why, contrary to existing correspondence theories, promissory responsibility corresponds to the objective theory of intent, the doctrines of consideration and promissory estoppel, and most remedial contract doctrines, including the bar against mandatory punitive damages, the foreseeability limitation on consequential damages, the mitigation doctrine, and expectation damages, the paradigm example of a contract doctrine alleged to conflict with promissory morality. I conclude that correspondence theorists can defend their critiques of contract law only by rejecting the personal sovereignty theory of self-imposed moral responsibility, defending an alternative theory, and explaining why any resulting

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1. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603 (2009).

divergence between contract law and its requirements is objectionable.

The personal sovereignty account of promising therefore plays a crucial role in my analysis of correspondence theories of contract. For purposes of that analysis, I described how personal sovereignty explains promissory obligation:

[P]ersonal sovereignty . . . recognizes the fundamental right of individuals not only to choose their system of ends but also to choose how to pursue those ends. Promising constitutes a particularly valuable means for pursuing ends. . . . [I]f morality itself can provide individuals a valuable means of pursuing their ends simply by recognizing the individual moral power to undertake self-imposed moral responsibilities, a moral theory committed to personal sovereignty as a fundamental moral value would have no grounds for refusing to recognize such a power. Personal sovereignty therefore counts the moral capacity to undertake self-imposed moral responsibilities as a basic individual liberty. By affirming the fundamental right of individuals to choose how to pursue their desired ends, personal sovereignty necessarily affirms the category of moral responsibility that obligation describes. The moral power to make—and thus the moral obligation to keep—a promise is therefore an axiom of personal sovereignty.²

According to this account of promising, individuals have the normative power to undertake self-imposed moral responsibilities (i.e., moral obligations) because such a power enhances personal sovereignty.³ A moral theory with a foundational commitment to personal sovereignty would therefore give moral effect to attempts to undertake such a responsibility. Although I find this an intuitive understanding of the logic of moral justification, some philosophers have doubted that morality can simply “give moral effect” to attempts to create moral responsibility. They argue that this view begs the fundamental question of whether individuals have the normative power to create moral responsibilities, as promises purport to do, by simply communicating an intention to undertake such responsibility. In Part I of this companion piece, I explain the skeptical argument that has been leveled against other theories of promissory obligation. In Part II, I argue that it has no force against the personal sovereignty account I offer.

2. Kraus, *supra* note 1, at 1609.

3. For the distinction between moral obligations and duties, see *id.* at 1614 (“Moral duties designate those responsibilities to which morality subjects individuals solely by virtue of their status as moral agents alone, while moral obligations designate those responsibilities to which morality subjects moral agents only if they have voluntarily chosen to undertake them. Unlike moral duties, moral obligations are self-imposed.”).

I. THE SKEPTICAL ARGUMENT

Joseph Raz's account of promissory obligation holds that promises are morally binding because many intrinsically valuable special relationships are possible only if they are.⁴ Raz's view therefore holds that individuals have the normative power to promise because such a power would be valuable. The contemporary version of the skeptical argument rejects this argument. Thus, Michael Pratt argues:

That it is desirable to be able to bind oneself to another by means of communicating an intention to do so, provides no reason to suppose that it is possible to obligate oneself in that manner. The value of making binding promises does not, in other words, provide any reason for thinking that the rule that promises ought to be kept is valid.⁵

Pratt here echoes an objection that Don Regan years ago leveled against Raz's account of why consent is morally binding. Regan takes the claim that consent is morally binding to mean that consent provides an individual with a reason for action that weighs in the ultimate balance of his reasons for acting in accordance with his consent. Regan explains, however, that Raz's argument proceeds from the premise that "[i]t would be a good thing if consent were binding" to the conclusion that "[c]onsent is binding."⁶ But the argument form "It would be a good thing if X. Therefore, X" is a nonsequitur. Thus, Regan claims, the argument "It would be a good thing if promises were binding. Therefore they are," is invalid as well.⁷ Although Regan acknowledges that no one believes the general argument form is valid—no one believes that we can simply infer that X is true because it would be a good thing if X were true—he speculates that philosophers believe it is valid when

4. According to Raz, [A promise] creates a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having preemptory force. Hence, [promissory obligation] principles can only be justified if the creation of such special relationships between people is held to be valuable. . . . [Promissory obligation] principles [depend] on the intrinsic desirability of forms of life in which people create or acknowledge special bonds between them and certain other individuals.

Joseph Raz, Promises and Obligations, in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* 210, 227–28 (P.M.S. Hacker & J. Raz eds., 1977) [hereinafter Raz, Promises and Obligations].

5. Michael Pratt, Promises, Contracts and Voluntary Obligations, 26 *Law & Phil.* 531, 567 (2007). Similarly, Pratt writes that "[e]lsewhere Raz writes that 'promises are binding because it is desirable to make it possible for people to bind themselves and give rights to others if they so wish.' If by 'binding' Raz means 'morally binding' then, again, the objection is manifest: that it is desirable does not make it so." *Id.* at 567 n.84 (citation omitted) (quoting Joseph Raz, Voluntary Obligations and Normative Powers, 46 *Proc. of the Aristotelian Soc'y (Supplementary Volumes)* 79, 101 (1972)).

6. Donald H. Regan, Authority and Value: Reflections on Raz's *Morality of Freedom*, 62 *S. Cal. L. Rev.* 995, 1036–37 (1989).

7. *Id.* at 1037.

applied to morality:

The underlying idea would be that morality is not a set of facts about the universe, but rather a set of ideas and practices we invent. So, if we have a moral belief, and if it is a good thing that we have that moral belief, that is all the warrant one could possibly want for saying the moral belief is true.⁸

Regan rejects this view, roughly, because he believes that whether an action is morally right or wrong turns on moral facts independent of our beliefs about our moral responsibilities. For Regan, an action is morally right or wrong because of its consequences: “[P]eople ought to do acts which can be expected to have good consequences.”⁹ The moral assessment of actions, therefore, turns on whether they promote good or bad consequences.¹⁰ Thus, Regan concludes that promises are not morally binding—they do not provide the promisor with a reason for keeping the promise that always weighs in the balance of his reasons for action. Instead, their moral force depends entirely on the consequences of keeping them. That the promisor promised to do the act provides no independent reason for doing it. Regan concludes that whether it would be a good thing, from some point of view, that a promise created a moral obligation to perform the promised act has no bearing on whether it in fact does create a moral obligation.

David Owens traces this fundamental skepticism about the moral force of promising back to David Hume. Owens reconstructs Hume’s problem nicely:

What makes breach of promise a wronging is that someone has communicated the intention that it be a wronging Now something can be declared to be wrongful in this way whether or not it is harmful or constitutes unjust enrichment, or has any further feature in which human beings might sensibly take an interest. So such wrongfulness raises the problem of bare wronging: What sense is there in refraining from doing something simply because it has been declared to be wrongful? Conversely, how could bare wronging, wrongings which have no adverse effect on anything that matters to us come into being unless we do indeed have the power to create them by declaration?¹¹

8. *Id.* at 1037–38.

9. Donald H. Regan, *Reasons, Authority, and the Meaning of “Obey”*: Further Thoughts on Raz and Obedience to Law, 3 *Can. J.L. & Jurisprudence* 3, 27 (1990) [hereinafter Regan, *The Meaning of “Obey”*].

10. For example, Regan suggests “[t]hat an act is one of relieving suffering is an *intrinsic* reason for doing the act—the relief of suffering matters in itself.” *Id.* at 26. Regan does allow that promising might provide an evidentiary, and therefore defeasible, reason for performing the promised act if it could be shown that promise-keeping is on average conducive to promoting good consequences. But on this view, promises are only *prima facie* binding. They do not bind when the promisor reasonably believes that performance does not promote good consequences. In such instances, rather than providing a reason for action that is outweighed by other reasons, the promise provides no reason for action at all.

11. David Owens, *The Problem with Promising* 7 (Feb. 12, 2009) (unpublished

As Owens explains, the puzzlement underlying this question stems from the assumption that it “makes sense to do something because you are obliged to do it only if the discharge of this obligation would serve some interest, where the interest in question can be specified without using the notion of an obligation.”¹² Most promise theorists presume that this interest must be a human interest, something which it makes sense to want or value.¹³ So the problem is to explain why keeping a promise serves some sensible interest or value that human beings have. But unless the relevant interest or value is necessarily promoted by keeping a promise, or necessarily undermined by breaking a promise, any account of promising that traces its moral force to its effects on a distinct interest or value will render promissory obligation contingent, dependent entirely on whether keeping a promise in any given instance promotes that interest or value. So conceived, it seems impossible to provide an account of promising that vindicates the common belief that promises create moral obligations irrespective of the consequences of breach—that promises always provide promisors with a reason to perform the promised act, even if those reasons might sometimes be outweighed by other competing reasons. In short, the skeptical argument originating with Hume and reformulated by Regan and Pratt claims that promising could create a genuinely deontic obligation only if promise-breaking necessarily undermines some independent human interest or value.¹⁴

II. A DEONTIC REPLY

In this Part, I explain how the personal sovereignty account of promising I offer provides a deontic foundation for promissory obligation that does not depend on the effects of promise-keeping or promise-breaking. In so doing, I explain why I reject the implicit premise that underwrites Humean skepticism.

The personal sovereignty account of promising has much in common with the account of promising Raz defends. According to Raz:

[T]o acknowledge the validity of voluntary obligations . . . is to accept a rather unfashionable view of practical reason. It is a view according to which what a man ought to do depends not only on the ways things happen to turn out in the world

working paper, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=1342060>.

12. *Id.* at 3.

13. *Id.*

14. I use the term “deontic” here to describe any moral theory that does not reduce an action’s moral rightness or wrongness entirely to its consequences. See e.g., Larry Alexander & Michael Moore, Deontological Ethics, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2007), at <http://plato.stanford.edu/entries/ethics-deontological/> (on file with the *Columbia Law Review*) (“[D]eontological theories are best understood in contrast to consequentialist ones. . . . [D]eontologists of all stripes hold that some choices cannot be justified by their effects—that no matter how morally good their consequences, some choices are morally forbidden. . . . For deontologists, what makes a choice right is its conformity with a moral norm.”).

What one ought to do depends in part on oneself . . . [in part] because the agent has the power intentionally to shape the form of his moral world, to obligate himself to follow certain goals, or to create bonds and alliances with certain people and not others. It seems to me that many have become so preoccupied with the way considerations of human welfare affect what one ought to do that they become blind to the existence of this other dimension to our practical life.¹⁵

I share Raz's conviction that promising is a crucial moral device for pursuing one's projects and creating special relationships. This much, which few would doubt, is enough to explain why individuals would care about having the power to undertake self-imposed obligations. But Raz also argues that promises create moral obligations only "if the creation of . . . special relationships between people is held to be valuable."¹⁶ As we've seen, for Raz, the justification of promissory obligation depends on "the intrinsic desirability of forms of life in which people create or acknowledge special bonds between them and certain other individuals."¹⁷ Thus,

The right to promise is based on the promisor's interest to be able to forge special bonds with other people. . . . Those who assign sufficient importance to the interest people have in being able to impose on themselves obligations to other people as a means of creating special bonds with other people believe in a right to promise. . . . [P]eople's interest in being able to bind themselves is the basis of a power to promise which they possess and of an obligation to keep promises they make.¹⁸

The personal sovereignty account, however, does not ground the normative power to make, and the moral obligation to keep, a promise on its causal effects, including their role in facilitating the pursuit of projects and forming special relationships. Instead, it derives the normative power to make, and the moral obligation to keep, a promise from the foundational normative premise that individuals are morally entitled to decide how to live their lives as they see fit, consistent with a like liberty for others. The personal sovereignty account understands Raz's conclusion that "the agent has the power intentionally to shape the form of his moral world"¹⁹ to follow not from the valuable activities and relationships it makes possible but from the same prior normative commitment to a conception of the individual as sovereign over all matters exclusively affecting his own life. Just as individuals have the sole

15. Raz, Promises and Obligations, *supra* note 4, at 228.

16. *Id.*

17. *Id.*

18. Joseph Raz, *The Morality of Freedom* 173–74 (1986) [hereinafter Raz, *Morality of Freedom*]. Similarly, Raz argues:

[T]he power to promise and the right to promise are distinct notions. But both stem from a common core, i.e. the interest of persons to be able to forge normative bonds with others. That is why they coexist, and one has the power to promise if and only if one has the right to do so.

Id. at 174.

19. Raz, Promises and Obligations, *supra* note 4, at 228.

right to decide whether they will eat meat, devote themselves to a meditative practice, or become a lawyer, so they can decide for themselves whether to undertake a moral responsibility they are otherwise free to avoid.

If morality is committed to the value of personal sovereignty, then it affords individuals the maximum morally permissible control over “the shape of their moral world.” To be sure, a moral theory that recognizes the fundamental value of personal sovereignty cannot delegate individuals’ control over the moral *duties* to which they are subject because these are grounded in the principle of equal respect for the personal sovereignty of all individuals. To enhance one individual’s personal sovereignty by allowing him to avoid moral responsibility to others necessarily and simultaneously diminishes respect for the personal sovereignty of the other individuals to whom that individual would no longer be morally responsible. Moral duties therefore define, rather than fall within, the realm over which individuals are personally sovereign. In contrast, by recognizing the power of individuals to undertake moral *obligations*, morality enhances everyone’s control over their lives—their power to “shape the form of their moral world”—without diminishing the personal sovereignty of others.

Thus, although this account of personal sovereignty does not rest on its role in enabling individuals to realize valuable relationships or to pursue their valuable projects, it is nonetheless animated by the same ideas that inform the conception of autonomy that Raz embraces:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.²⁰

If morality imposes duties and recognizes rights that it derives from the values it takes to be fundamental, and personal sovereignty is among the fundamental values morality affirms, then morality must recognize the duties and rights derived from personal sovereignty. The ability to undertake self-imposed moral obligations enhances personal sovereignty by affording individuals more control over the norms that apply to them. A moral theory therefore cannot consistently affirm the fundamental value of personal sovereignty and yet deny the power and obligation of promising.

The personal sovereignty account of promissory responsibility, however, appears to commit precisely the fallacy that Hume, Regan, and Pratt have identified. Having the normative power to create self-imposed obligations by promising may well enhance personal sovereignty. Yet the skeptical view denies that this constitutes an argument to demonstrate that such a power exists. As Regan puts the point, from the fact that it

20. Raz, *Morality of Freedom*, *supra* note 18, at 369.

would be desirable if something were true, it certainly does not follow as a general matter that it is true. Why should this be otherwise when it comes to moral truth? Perhaps personal sovereignty does not include the power to undertake self-imposed moral obligations because self-imposed moral obligations simply do not exist. One can no more demonstrate the existence of the normative power of promising by observing that this power would enhance personal sovereignty than one could demonstrate the existence of a million dollars in my bank account by observing that this money would enhance my financial sovereignty. What is needed is an argument explaining how promissory obligation is possible, not an argument demonstrating why it would be a good thing if it were.

The skeptical argument proceeds, however, on the basis of a crucial suppressed premise that Owens has identified: “[T]he problem of bare wrongdoing arises only if we impose some substantive constraints on what kinds of consideration can make sense of an action.”²¹ Thus, many philosophers believe that an adequate account of promissory obligation must provide an account that explains the moral force of a promise in terms of more basic, normatively primitive, values and interests, such as fairness, reciprocity, well-being, harm, and the like. Hume accounts for promissory obligation by explaining its role in providing valuable social coordination. Regan would be satisfied by an account of promissory obligation that demonstrated why making and keeping promises reduced human suffering.²² Pratt accounts for promissory obligation by explaining its role in providing valuable assurance.²³ And even Raz ultimately traces the normative power of promising to its role in facilitating valuable relationships. In this sense, all of these philosophers are deeply consequentialist about the normative force of promissory morality.

The personal sovereignty account, however, explains promissory morality not on the consequentialist ground that it *promotes* some other moral value, but on the purely deontic ground that it *derives* from a fundamental moral value.²⁴ In Regan’s terms, it claims that personal

21. Owens, *supra* note 11, at 7.

22. “That an act is one of relieving suffering is an *intrinsic* reason for doing the act—the relief of suffering matters in itself. That is what we believe about the relief of suffering . . .” Regan, *The Meaning of “Obey,”* *supra* note 9, at 26 (internal quotation marks omitted). However, Regan in fact offers no such account and believes promises do not generate genuine moral obligations.

23. See Michael Pratt, *Promises and Perlocutions*, in Scanlon and Contractualism 93 (Matt Matravers ed., 2003).

24. Although the personal sovereignty account of promissory morality is distinct from Kant’s, both derive promissory morality from a conception of autonomy. Kant argues that “freedom would be depriving itself of the use of its choice” were it not possible to acquire rights over “external objects of [one’s] choice.” See Immanuel Kant, *The Metaphysics of Morals* 68–69 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). According to Kant, “another’s choice” is included in the category of “external objects of choice” and called “contract right”. *Id.* at 90–91. Kant does not appear to claim that autonomy specially requires the freedom to *bind oneself* according to one’s will. Instead, his claim is

sovereignty, understood as entailing the power to undertake self-imposed moral responsibility, is a fundamental moral value which no more stands in need of justification than does the claim that reducing human suffering is morally good. Does it explain, as Hume requires, how a promise provides the promisor with a reason for action by explaining how keeping the promise serves some human interest, without using the notion of obligation? Here I am once again inclined to follow Raz's lead:

[T]o the extent that promises are a source of voluntary obligations they are made by the exercise of normative powers. The obligatoriness of many promises can no doubt be explained on other grounds which do not depend on the fact that promises yield voluntary obligations. But such explanations, correct and useful as they are, miss the essential point in the common conception of promises.²⁵

Furthermore,

Because all types of voluntary obligations are characterized by being mandatory norms with content-independent justification, they are justified by the justification of the general norm that promises . . . ought to be respected; they are not justified by giving reasons for the desirability of each obligatory act in its particular circumstances.²⁶

Personal sovereignty itself provides, in Raz's terms, "the justification of the general norms that promises ought to be respected." The fundamental moral value of according individuals the maximum permissible control over the moral norms that govern their lives explains why individuals have the power to make promises and promises provide reasons for action. According to the personal sovereignty account, promisors should keep their promises not because of the consequences of performing or failing to perform the promised act or following or breaking a general norm of promising, but because morality treats personal sovereignty as a fundamental value that requires promises to be kept. Simply put, promisors have reason to keep their promises because morality requires that promises be kept.

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that it requires the freedom to *receive* commitments from others, and thus to have rights over their choices, analogous to our rights over external goods (i.e., property rights), whose possibility is similarly essential to full autonomy. Thus, Kant argues that we deprive the will of its full scope if we confine it to "internal" objects of choice (i.e., our own actions), excluding external objects of choice (such as other things and other people). Hence, for Kant, full freedom requires the possibility of property and contracts.

25. Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 *Proc. of the Aristotelian Soc'y (Supplementary Volumes)* 79, 98 (1972).

26. *Id.*