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# The 'natural unintelligibility' of normative powers

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**ABSTRACT**

This paper offers an original argument for a Humean thesis about promising that generalises to the domain of normative powers. The Humean 'natural unintelligibility' thesis – prominently endorsed by Rawls, Hart, and Anscombe, and roundly rejected or forgotten by contemporary writers (conventionalists and non – conventionalists alike) – holds that a rational, suitably informed agent cannot so much as make a promise (much less a morally-binding promise) without exploiting conventional norms that confer promissory significance on act types (e.g., signing on the dotted line) that would not otherwise have such significance. The argument (like Hume's) is action-theoretic in character; its central premise is the Contribution Condition on acting with an aim: roughly, that doing X in order to (bring about) Y requires that the agent believe that their having X-ed on the occasion might come to fully or partly account for Y's coming to pass. The argument generalises to the broader domain of exercises of normative powers, i.e., to acts that modify normative properties by 'fiat' or 'stipulation'. This stipulative act has been characterised in three different ways, each of which is given due consideration. Finally, two different ways of accommodating the 'natural unintelligibility' thesis are considered, as is the thesis's normative significance.

Such is the breath of kings
-Shakespeare, Richard II

The will has here no object to which it could tend
-Hume, A Treatise of Human Nature, Bk 3 Pt 2 Sec 5, footnote 77

'Normative power' is a term of art in philosophy, one that singles out for unified treatment a certain way of effecting normative change. What exactly unifies the members of the class – acts constituting exercises of normative powers – remains a matter of debate,

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but characterisations commonly invoke the intention with which an act was performed, its communicative character, and its relation to a body of constitutive rules. If the term has taken root in philosophy, however, this is due not to any authoritative definition, but rather to the power of an arresting metaphor together with a set of paradigm examples that form a recognisable family. While there may be no member of the family whose membership is undisputed, examples of exercises of normative powers that are routinely invoked in the philosophical literature include promising, granting permission (e.g., to use or enter one's property or to handle one's body), gifting or exchanging property, issuing authoritative commands, waiving claims, and granting forgiveness. The metaphor (or picturesque description, as the case may be) is used to explain the manner in which such acts produce their characteristic normative effects: when somebody successfully exercises a normative power they change the normative properties of courses of conduct by 'fiat'; put differently, by exercising a normative power one may succeed in rendering some course of conduct permissible or obligatory by mere 'say-so,' 'stipulation,' or 'declaration', whether the declaratory or stipulative act is an outward expression or covert activity *in foro interno*.[1]

The term 'normative power' entered the contemporary philosophical discourse fifty years ago with Joseph Raz's pioneering effort to generalise from a much older jurisprudential concept (*legal power*) and it is one of this paper's central contentions that the ingenious effort was doomed from the start.[2] By generalising from his own novel account of legal powers (e.g., the power to execute a will or to enact a statute) Raz introduced into philosophy a notion of normative powers that was intended to have application beyond the domain of conventional (i.e., social, legal, and institutional) norms.[3] Armed with the more general concept, Raz contends that it is a live possibility, not ruled out by the notion of a normative power, that such power can be exercised without the exercise of legal, social (customary), or institutional power. For example, while it is, for Raz, a substantive question whether (and when) promises are morally binding, he does not think that classifying a promise as an exercise of a normative power casts any doubt on the notion that such acts can be performed in the absence of a conventional norm specifying the conditions for, and consequences of, making a promise. Indeed, Raz identifies promising with the act of 'communicating an intention

[1]Hobbes deployed the fiat metaphor in connection with promises: '[T]he *pacts* and *covenants*…resemble that *fiat*, or the *let us make man*, pronounced by God in the creation.' Thomas Hobbes, *Leviathan* (first published in 1651, Hackett 1994) 3–4 (italics in the original).

[2]Joseph Raz, 'Voluntary Obligations and Normative Powers II' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 59; Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999); Joseph Raz, 'Normative Powers', in Ulrike Heuer (ed), *The Roots of Normativity* (Oxford Univerity Press 2022).

[3]In introducing the category normative powers, Raz expressly aimed to rebut the claim 'that norms which are not practices cannot be affected by human acts in a way which allows one to regard these acts as the exercise of normative powers': see Raz, 'Voluntary Obligations and Normative Powers II' (n 2) 93; and Raz, *Practical Reason and Norms* (n 2) 53. 'Moral rules are perhaps the clearest example of rules which are not practices'. Raz's generalization proceeds as follows: while the notion of a *legal* power is defined in terms of the *motivating reasons* for which types of acts have been endowed with legal significance (see note 55 below) – and is therefore inapplicable to nonconventional norms that are not brought into existence in pursuit of any aim – the more general notion of a normative power is defined in terms of features of a *norm's explanation*. According to Raz, while a legal norm is explained by the aforementioned motivating reasons (that is, the law's intended design), nonconventional power-conferring norms are explained by the facts that 'justify' them. And just as a legal norm's power-conferring status is owing to features of the law's intended design, a nonconventional norm's power-conferring status is owing to corresponding features of the facts that justify them. Raz's account of the justifying features of power-conferring norms has evolved since his original 1972 paper, which appealed to the content-independent character of the justification of power-conferring norms. In subsequent work Raz modified his view, appealing to a different feature of their justification (see note 24).

to undertake, by that very communication, an obligation,' and expressly maintains that such acts can be performed in the absence of promising conventions: 'There are in our society, and in many others, various conventional ways of communicating such intentions. While conventional ways of promising make it easier to promise, they are not, however, a necessary condition of making promises'.[4] In what follows I argue against this claim – that is, the claim that we can perform the act that Raz identifies with the act of promising without exploiting conventional norms of promising – on grounds that extend to the broader class of normative powers. I do so by developing an action-theoretic argument, inspired by an argument of Hume's, for the conclusion that acts constituting exercises of normative powers are, in a certain sense, 'naturally something altogether unintelligible'.[5] While one may still mark a distinction between powers with respect to whether their exercise has the normative significance commonly attributed to them, this is a distinction internal to the class of conventional powers.

## 1. Conventionalism and natural intelligibility

We may take as our starting point Raz's observation that to qualify as an exercise of a normative power, an act's normative consequences must be produced 'normatively and not causally'.[6] If I persuade someone to make a binding commitment to a third party, then my impact on the promiser's ensuing obligation is (in Raz's terminology) merely causal, not normative. Others have screened off similar cases by appealing to the notion of 'explanatory directness': for an act to constitute an exercise of a normative power, the fact that an individual performed the act must not only belong to an explanation of its normative consequences; additionally, there must be 'no explanatory intermediaries between the' fact that the individual performed the act and the fact that the consequences obtained.[7] In the previous example, the fact that I persuaded someone to make a promise explains the ensuing obligation only indirectly: the fact that I persuaded the individual explains the fact that she made the promise, which in turn explains the obligation. We may note that for one fact to directly account for (i.e., directly explain) another, the former need not entail the latter, since the former may be an indispensable element of an explanation that includes other facts. In other words, in this particular way of speaking, one fact may *directly* account for another, even if it only *partly* accounts for it. We need not choose between these two ways of screening off the previous example, as it would attract little controversy to hold that S's Φ-ing qualifies as an exercise of a

[4]Joseph Raz, 'Promises in Morality and Law' (1982) 95 Harvard Law Review 916, 927; see also Joseph Raz, 'Promises and Obligations' in PMS Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A Hart* (Oxford University Press 1977). Raz's characterisation of promising has been widely influential in the literature on normative powers more broadly, and has been directly adopted by, e.g., David Enoch, 'Giving Practical Reasons' (2011) 11 The Philosopher's Imprint; David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012); David Enoch, 'Authority and Reason-Giving' (2014) 89 Philosophy and Phenomenological Research 296; Gregory Klass, 'Promise, Agreement, Contract' in Hanoch Dagan and Benjamin Zipursky (eds), *Forthcoming, Research Handbook on Private Law Theories* (Edward Elgar Publishing 2020); for illuminating synoptic discussions (with a focus on promising and consenting, respectively), see Ulrike Heuer, 'Promising Part 2' (2012) 7 Philosophy Compass 842; and Felix Koch, 'Consent as a Normative Power' in Peter Schaber and Andreas Müller (eds), *Routledge Handbook of the Ethics of Consent* (Routledge 2018).

[5]David Hume, *A Treatise of Human Nature* (first published 1739, Clarendon Press, Oxford 2007).

[6]Raz, 'Voluntary Obligations and Normative Powers II' (n 2) 94.

[7]Mark Greenberg, 'The Standard Picture and its Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press 2011) 45; cf. Ezequiel Monti, 'Against Triggering Accounts of Robust Reason-Giving' (2021) 178 Philosophical Studies 3731.

normative power only if it has a normative upshot that is *both* direct (i.e., unmediated) and noncausal. Accordingly, I shall begin by assuming that a particular act is an exercise of a normative power only if it is of a describable type Φ and the fact that the agent Φ-d belongs to a direct, noncausal explanation of a normative change.[8]

It is, however, equally uncontroversial that having direct, non-causal normative upshot is insufficient for an act to constitute an exercise of a normative power.[9] As H.A. Prichard observed in a related discussion, there are many ways of effecting normative change in such a manner (non-causally, and absent explanatory intermediaries) that are to be distinguished from exercises of normative power.[10] 'Instances would be (1) hurting the feelings of another, which we think renders us bound to assuage them so far as we can; (2) misleading another, which we think leads to the obligation to correct the misconception; and (3) becoming the father of a family, which we think gives rise to the obligation to feed and educate it'.[11] Accordingly, to make progress differentiating exercises of normative powers from other ways of modifying normative properties, we must consult the underlying fiat characterisation and consider what more is needed, when a normative change is (directly, non-causally) traceable to the fact that an agent performed an act of a describable type, to substantiate the claim that the agent brought about the normative change by fiat. To focus discussion, let us ask this question with reference to a specific type of normative change – namely, an agent's incurrence of an obligation – which may serve as stand-in for the broader class of normative changes: If the fact that S Φ'd belongs to a direct, non-causal explanation of the fact that S incurred obligation *O*, when can we properly conclude that S incurred *O* by fiat?

An agent's incurrence of an obligation is, of course, the characteristic normative effect associated with acts of promising, and given certain commonly held assumptions about promising – ones that I do not ultimately rely on – it is natural to reformulate the preceding question by asking which characterisation of the promissory act is consistent with the notion that promissory obligations are incurred by fiat.[12] One way of answering this question is to adopt what I shall call the *Conventionalist* theory of promising.[13] This theory consists of two parts. First, the conventionalist about promising provides an account of a particular class of social rules (i.e., social norms) – namely, social rules of promising. Such an account purports to specify the conditions in virtue of which a

[8]In due course I will relax the assumption that the description of the act in virtue of which it qualifies as an exercise of a normative power must be directly (normatively) significant (see note 43).

[9]Noncausal explanation has, of course, been much investigated in recent years, and Selim Berker (among others) has emphasized the prominent role of the grounding relation in normative explanation. See Selim Berker, 'The Unity of Grounding' (2018) 127 Mind 729 and on grounding more generally Fabrice Correia and Benjamin Schnieder (eds), *Metaphysical Grounding: Understanding the Structure of Reality* (Cambridge University Press 2012).

[10]HA Prichard, 'The Obligation to Keep a Promise' in Jim MacAdam (ed), *Moral Writings* (first published 1949, Clarendon Press, Oxford 2002). While Prichard's discussion is framed in terms of 'promising' rather than 'normative powers', he notes that the relevant features of promising (for the purposes of his discussion) are common to a broader class of acts, citing gifting and exchanging as other relevantly similar examples of operations on obligations.

[11]Of course, I make no claims about Prichard's examples, and the reader can substitute her own.

[12]Prichard sought such a characterisation of the promissory act and despaired that 'we get into difficulties … as soon as we try to state what [it is] which renders us bound' when we promise (id. 258). The source of Prichard's 'difficulties', which extend to all exercises of normative powers, is that we typically promise by 'making certain noises [or marks]' – that is, by performing actions of (at least some) describable types that are of no immediate normative significance (id., 264). Of course, this latter fact alone does not serve to differentiate exercises of normative powers from other normatively consequential acts. For example, one may cause great harm (and incur various secondary duties) by moving a finger ever so slightly.

[13]In note 65, I distinguish between stronger and weaker versions of conventionalism, and clarify that what is at issue in this paper is the weaker thesis ('count-as conventionalism').

social rule qualifies as a promissory norm. Second, a *promissory act* is characterized in terms of those social rules: on this view, to make a promise *just is* to perform an act that satisfies the conditions of a social rule of promising. Of course, for this reductive approach to succeed, the account of a social rule of promising cannot itself make reference to (or otherwise presuppose) the notion of a promise. Likewise, this two-part account needs to capture the sense in which a promise is a stipulative act (i.e., an act of fiat). At the beginning of the final section (§4) of this paper, I offer what I believe to be the first suitably general account of this category of social rules, and thus the first adequate account of the act of promising in terms of social rules. (While previous generations of conventionalists (e.g., Rawls;[14] Hart[15]) adopted the same two-step conventionalist approach, none of them either offered a general account of promissory rules or called attention to this lacuna.) Finally, it bears noting that this two-step Conventionalist approach can be replicated for any other act types (e.g., granting permission) that constitute exercises of normative powers. Indeed, the account offered in §4 expressly articulates what all power-conferring social rules have in common.

A straightforward implication of the Conventionalist approach is that it is impossible to promise without exploiting (triggering) a social rule governing promising. If one denies this impossibility claim (e.g., in the manner of Raz) then one must be relying on a different conception of the promissory act, one which is not construed in terms of social rules. Only three such characterisations of the promissory act have been seriously entertained that are consistent with the idea that promising is an exercise of a normative power.[16] If one has incurred obligation O in virtue of *willing O*, in virtue of *acting with the aim of (thereby) incurring O*, or in virtue of *communicating an intention to (thereby) incur O*, then one can properly be described as having incurred the obligation by fiat or stipulation. By contrast, if one incurs an obligation to perform X in virtue of either *acting with the aim of assuring someone that one will perform X*, or *inviting someone to rely on the fact that one will perform X*, then one does not exercise a normative power; with respect to the latter descriptions, unlike the former set, the obligation does not figure in the intentions, actual or communicated, invoked by the descriptions, and so whatever obligations directly result from their satisfaction cannot be said, in either a literal or extended sense, to have been produced *by* the agent's declaration (stipulation) that they are so obligated. Of course, an individual who wishes to incur an obligation, and believes that satisfying any of the latter descriptions would give rise to one, may proceed to do so with the aim of incurring an obligation; however, this is no less true of Prichard's 'becoming the father of a family.'

Having narrowed down the class of action descriptions available to the non-conventionalist, the question I wish to consider is whether any of the remaining candidates are *naturally intelligible*. As a first approximation, let us say that a candidate description of a duty-incurring act is naturally intelligible just in case rational and informed agents can satisfy it – that is, can perform an act of the describable type – without exploiting conventional duty-imposing norms that confer normative significance on act types (e.g.,

[14]John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3.
[15]HLA Hart, *The Concept of Law* (first published 1961, Oxford University Press 2012).
[16]I set aside compound descriptions built out of these three, since my argument generalises. For the same reason, I also set aside the variation on the 'communication' characterisation that substitutes 'belief' for 'intention'. And I note that some may prefer substituting 'expressing' for 'communicating.'

signing on the bottom line, or uttering a certain form of words) that would not otherwise have such significance. More exactly, a description of an agent's act (description D) that may figure in a direct, non-causal explanation of the agent's incurrence of obligation *O* is *naturally intelligible* just in case the agent's (S's) satisfaction of D is compatible with the satisfaction of all the following conditions:

(i) S and her audience mutually believe that S would incur obligation *O* by satisfying D in the circumstances;
(ii) S and her audience are – and are mutually known to be – rational and otherwise informed of all relevant facts (that is, they are fully informed, with the possible exception of the mutual belief that figures in (i), which we shall not prejudge as true or false);[17] and
(iii) S does not succeed in satisfying description D by exploiting either (a) conventional duty-imposing norms (e.g., social rules of promising) that confer normative significance on act types (other than description D) that would not otherwise have such significance, or (b) other moral principles that do not invoke description D (e.g., as one might if one harms another person in order to thereby incur an obligation to compensate).[18]

In the next section (§2) I will follow Hume in offering an action-theoretic argument in support of the conclusion that none of the characterisations left standing are naturally intelligible in this sense. Hume's position, despite prominent endorsements by Rawls, Hart, and Anscombe, has not so much fallen out of favor as out of sight.[19] Despite the pains taken by Hume, at the outset of his most important treatment of promising, to differentiate his claim 'that a promise would not be intelligible before human conventions had established it'– that is, that it would not be possible to make a promise in the absence of a promising convention – from his distinct claim 'that even if it were intelligible, it would not be attended with any moral obligation,' recent critics and defenders of Humean theories of promising have lost sight of the difference between these two claims; indeed, several have lost sight of the former ('natural unintelligibility') claim altogether.[20] Although the 'natural unintelligibility' argument that follows is original, it

[17]For those uneasy about the notion of a 'fully informed' agent, the condition can be recast so as to require that the agent's satisfaction of D does not depend on any particular false beliefs (again, with the possible exception of the belief that figures in (i)).

[18]With respect to iii (a), note that I make no assumptions about the 'genuine' normative significance of conventional norms. When they are not morally binding, then an informed agent would know this. As for iii (b), its motivation is articulated below (n 28).

[19]A central theme of Rawls' classic paper is that 'in the case of actions [such as promising] specified by [rule-governed] practices it is logically impossible to perform them outside the stage-setting provided by those practices, for unless there is the practice, and unless the requisite proprieties are fulfilled, whatever one does, whatever movements one makes, will fail to count as a form of action which the practice specifies', see Rawls (n 14) 25. Hart makes the same claim about promising at several points in *The Concept of Law*, see Hart (n 15) 43, 225, while Anscombe offered several original elaborations of Hume's natural unintelligibility argument in GEM Anscombe, 'On Promising and Its Justice, and Whether It Needs be Respected' (1969) 3 Crítica: Revista Hispanoamericana de Filosofía 61; and GEM Anscombe, 'Rules, Rights, and Promises' (1978) 3 Midwest Studies in Philosophy 318.

[20]Hume (n 5) 332. In their respective discussions of Humean theories of promising, Liam Murphy (a fellow traveler) and Seana Shiffrin (a critic) each mention only the second of Hume's two claims, which they (somewhat understandably) misattribute to Anscombe, see Seana Shiffrin, 'Promising, Intimate Relationships and Conventionalism' (2008) 117 Philosophical Review 481; and Liam Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' (2020) 70 University of Toronto Law Journal 453. In the article cited by Shiffrin and Murphy, Anscombe defends only the first of Hume's two claims, after carefully distinguishing between them, see Anscombe, 'Rules, Rights, and Promises' (n 20).

shares its key premise with one of the two arguments offered by Hume for the same conclusion (while sharing its spirit with the other).[21] After arguing for the 'natural unintelligibility' claim (in §2), and considering two objections (in §3), I conclude (in §4) by distinguishing two strategies for accommodating the 'natural unintelligibility' finding, and by considering the finding's normative significance.

In at least three respects, the argument that I shall offer is very strong, in ways that should be flagged at the start. First, the conclusion I reach is stronger than the relatively weak thesis that one can perform the act types at issue only if one believes (together with one's audience) that by doing so one would succeed in effecting normative change. By contrast, my argument demonstrates that the relevant action descriptions cannot be satisfied *even by believers* – that is, even by a population of individuals who believe that performing an act of the describable type would be normatively efficacious. Second, my argument establishes not only that the relevant descriptions cannot be satisfied without exploiting social rules; rather, my argument establishes the stronger claim that, barring moral overdetermination, the descriptions cannot be satisfied *period* – with or without the assistance of social rules. Given this feature of my argument, it is reasonable to wonder how it relates to debates about Conventionalism in particular. The answer is as follows. As we have seen, the Conventionalist defines exercises of normative power in terms of the triggering of particular kinds of social rules. Accordingly, if one holds that one can exercise a normative power (of type X) without exploiting a social rule (of type X), then one is driven to an alternative description of the stipulative act. However, the only viable alternatives are descriptions that cannot be satisfied by rational, suitably informed agents (with or without the assistance of social rules). Thus, the relevance of debates about conventionalism is that the non-conventionalist (unlike the Conventionalist) is forced to embrace an implausible characterisation of the stipulative act.[22] Third, the argument is strong in virtue of its implications for other philosophical debates.[23]

Before proceeding with the argument, I should further clarify its relation to promising, on the one hand, and to normative powers, on the other. Since my interest is in the class of normative changes made by fiat – rather than in promising, on the one hand, or any other conception of normative powers, on the other hand – I need not concern myself with the questions of whether promising is an exercise of a

Others take notice of Hume's 'natural unintelligibility' claim only to reject it out of hand without bothering to reflect on its basis. For example, despite extensive engagement with Hume's account of promising, Owens innocently asserts that 'there is nothing unintelligible about such a [communicative act] – each party possesses the conceptual materials necessary to both make it and comprehend it when made': Owens (n 4) 161.

[21] As noted, Hume distinguishes between the two claims at the outset of the promising chapter in the *Treatise*, see Hume (n 5) 332, where he goes on to offer two distinct arguments in support of the first claim (i.e., the 'natural unintelligibility' claim), one in the main text (assuming his own sentimentalist metaethics), the other in the adjoining footnote (assuming moral rationalism for the sake of argument). Hume's argument in the main text shares a central premise with my own (see *infra* n 33), while the spirit of his argument in the footnote is preserved by my argument (as indicated by my epigraph). My argument is also different from Anscombe's mesmerizing 'natural unintelligibility' arguments (which themselves stand in an uncertain relation to Hume's), though all the premises of my argument are endorsed by Anscombe in her earlier monograph *Intention* (see *infra* n 33).

[22] As I note below (n 58) Hume's second argument is strong in exactly the same sense as my own.

[23] Quite apart from the natural unintelligibility of normative powers, the argument rules out so-called second-order reasons (that is, reasons to act for certain reasons), including Raz's well-known category of exclusionary reasons. Similarly, the argument rules out the possibility of reflexive intentions (more specifically, reflexive intentions in action). I will leave it to the reader to draw out the former implication. The latter implication is briefly discussed below (n 41, 59).

normative power or whether there are other legitimate uses of the term 'normative power'.[24] I have maintained that talk of making a normative change by fiat can be unpacked in three different ways. As noted earlier, the three elaborations of the stipulative act, applied to the domain of duty incurrences, double as normative-power characterisations of the act of promising. These 'normative power' characterisations of the act of promising can be – and have been – replicated for each of the other (putative) members of the normative-power family by substituting the characteristic normative effect of each for the obligations associated with a promise: thus, one advancing normative power characterisations of the respective acts may say that in *consenting* one wills or intends (or communicates the intention) to thereby confer a permission, that in *transferring* property one wills or intends (or communicates the intention) to thereby give away one's right, and that in *commanding* or *ordering* one wills or intends (or communicates the intention) to thereby impose an obligation onto a subordinate. The argument I offer with respect to the normative power characterisation of promising straightforwardly generalises to each of these other characterisations of the other acts. Finally, I will restrict my arguments in the main text (§2) to what I shall call the Aim and Communication theories, relegating my treatment of the Will theory to a footnote.[25]

[24]Raz breaks the link between exercises of normative powers and the modification of normative properties by fiat by holding that 'a person's act is an exercise of a normative power if it brings about or prevents a normative change because it is, all things considered, desirable that that person should be able to bring the change about or prevent it by performing that act': see Raz, 'Normative Powers' (n 2) 163, a reformulation of Raz, *Practical Reason and Norms* (n 2) 98. As Raz frankly acknowledges, for all that we know, this definition applies to the act of procreation as much as to promissory acts, see Raz, 'Normative Powers' (n 2). But, if we know anything, it is that any obligation incurred by procreation is not produced by stipulation, irrespective of whether one procreates with the aim of incurring the responsibility. Conversely, if one follows Raz in identifying the act of promising with the communication of an intention to thereby incur an obligation, then one does not need to accept Raz's normative explanation of promissory obligations to conclude that any obligation immediately grounded in the fact that one has promised is the product of fiat or stipulation. Finally, while one can stipulate the meaning of a term like 'normative powers', it is not a matter of terminology whether one can perform the communicative act that Raz identifies with promising in the absence of social or conventional rules of promising.

[25]According to the Will Theory, one exercises a normative power by 'willing' a normative change in the way one is sometimes said, in philosophical texts, to will so-called basic actions such as the intentional (and unaided) raising of one's arm. In considering the Will Theory, it is worth remembering that, perhaps since Ryle, no proposition in the philosophy of action has commanded more assent than the one denying the existence of a private, mental action of willing (or trying) mediating between an intention, on the one hand, and a bodily movement, on the other, when somebody exercises the capacity to move their body at will. For illuminating discussion of Ryle's actual arguments, see John Hyman, *Action, Knowledge, and Will* (Oxford University Press 2015) 20–23. And while some philosophers, e.g., Brian O'Shaughnessy, *The Will: Volume 1, Dual Aspect Theory* (Cambridge University Press 1980), have identified the act of (successfully) willing the movement of one's body with the moving of one's body, no analogous position is available to the Will theorist about normative powers: for a single act of willing cannot at once be identical with and serve as explanatory ground of the incurrence of an obligation. Moreover, while it may be tempting to update Will theories (of normative powers) by substituting 'deciding' for 'willing', this temptation should be resisted. (In the context of duty-incurring acts, such an updated version of the Will theory would hold not that one incurs an obligation by deciding to incur it – after all, nobody thinks I would incur an obligation merely in virtue of deciding now to make a promise next week – but rather by deciding to incur it by this very decision. Such a view would have a number of untoward features, however, including incompatibility with the principle that a decision to Φ must be able to give rise to an intention to Φ.) Finally, one must take care not to conflate the phenomenon of inner speech (e.g., silently uttering the English sentence 'I forgive you Davida') with the putative act of 'willing' a normative change. For these reasons, I believe that contemporary theories of normative powers that are cast in terms of willing – see, e.g., Ruth Chang, 'Do We Have Normative Powers?' (2020) 94 Aristotelian Society Supplementary Volume at 275 – are most charitably re-characterised, *if possible*, in terms of intentions (aims).

## 2. The core argument

### 2.1. Aim theory

Restricted to the domain of duty-incurrences, the Aim Principle holds that, for all act types (X, Y) and persons (S, H), if S does X in order to thereby incur an obligation (owed to H) to perform act Y, then S is so obligated, provided that S's X-ing is not tainted by certain forms of force, fraud, or other defeating conditions.[26] The defeaters recognised by this (putative) moral principle are sensitive to its (putative) grounds. If one holds that the principle is morally valid insofar as, and because, it is valuable for people to have the ability to bind themselves to another when they wish to do so, then the defeating conditions ought to reflect the limits of this value. For example, if it is not valuable for people to have such an ability in circumstances where others exert undue influence on their choice, then the presence of such influence would serve as a defeater. Alternatively, if the principle is justified more directly, by appeal to the unmediated deontic significance of a voluntary decision to bind oneself, the conditions will reflect the limits of the voluntary. We need not delve further into the grounds of the theory, or the proper construal of the proviso, to show that its conditions are 'naturally unintelligible' in the sense described earlier. For we may simply stipulate that any provisos recognised by the best form of the theory have been satisfied.

The argument that follows appeals to a constraint that must be met for an agent to act in pursuit of an aim. (I shall assume, throughout this section, that all the agents under discussion are rational, which absolves us of the need to determine whether the constraint in question is a condition of agency or of rational agency.)[27] The constraint will be articulated in due course, but we may glimpse its operation by supposing, fancifully, that an individual (S) performs a certain arbitrary act – kicks a rock on the sidewalk, say – in order to thereby incur a certain obligation. If S kicks the rock for this reason, then surely S believes that she will or (at least) may come to incur the obligation by kicking the rock. If S had known that her kicking would have no bearing on her obligations, then she would have been unable to (rationally) kick the rock with this aim. But why does S believe that she will or may obligate herself by kicking the rock? Since our question is whether a rational and informed agent who believes in the validity of the Aim Principle can satisfy its conditions without triggering either a conventional promising rule or some independent moral principle, we may assume that there is no other normative basis, apart from the Aim Principle itself, that might serve to justify S's belief that she might bind herself by kicking the rock.[28] Accordingly, if S believes that she would incur an obligation by

[26]In the contemporary literature, the Aim Theory is sometimes adopted in the context of consent of Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165; although Alexander's formulation is slightly different, it should be charitably recast in terms of the Aim Principle). For uniformity's sake (and since the plausibility of the theory is not relevant to my purposes), I consider the version of the Aim Theory applied to the context of duty-incurring acts (rather than grants of permission). Finally, below (n 41) I will take note of an important ambiguity in the above formulation of the Aim Principle (pertaining to the construal of 'thereby').

[27]This assumption (reflected in the earlier definition of 'natural intelligibility') is innocent: for it is no significant weakening of the original claim (namely, that one cannot incur an obligation by fiat without exploiting conventional promissory norms) to acknowledge an exception for certain forms of irrationality.

[28]This assumption is also innocent (and is also reflected in the prior definition of 'natural intelligibility'), since it is no significant weakening of the claim that one cannot satisfy the Aim Principle absent conventional duty-imposing norms to draw an exception for such unusual cases where one's act triggers an independent moral principle (e.g., as when one inflicts harm with the aim of incurring compensatory duties).

kicking the rock, it is only because she believes that, in kicking the rock, she would trigger the Aim Principle, by acting in order to (thereby) bind herself.

But can belief in the Aim Principle be exploited in this manner? I will argue in this subsection that such 'bootstrapping' is not possible. Before getting to the argument, I will try to motivate its conclusion by considering a case quite removed from the field of normative powers. Consider someone who, out of devotion to God, adopts a lifestyle marked by severe self-discipline and abstention from worldly pleasures. Eventually, self-doubt intrudes, and the ascetic begins to be troubled by the possibility that she may be in error concerning what pleases God. Although she cannot rule out this possibility of error, she finds consolation, after much contemplation, in the judgment that even if she is wrong about what pleases God, the fact that she acts with the aim of pleasing God itself pleases God. The question arises whether this conclusion, that God is pleased by acts performed from the motive to please God, has practical significance beyond the comfort it provides. Once armed with this consoling belief, can the ascetic rationally proceed to perform otherwise trivial acts (e.g., squeezing a doorknob) with the aim of pleasing God? Surely, if the ascetic is in her right mind, she will not take her conclusion to license such acts, not even in her down time. The question is, why not? Once she has reached the conclusion about what pleases God, why can't she exploit it further to develop novel forms of Divine worship? The obstacle, I will argue, lies in general conditions of (rational) agency. For reasons that I shall proceed to spell out, it does not follow from the fact that an agent has both the ability to ϕ 'at will' (e.g., the ability to squeeze the doorknob at will) and the belief that any act performed with the aim of bringing about some desired outcome *O* will succeed (e.g., the belief that any act performed with the aim of pleasing God, pleases God) that the agent can ϕ with the aim of bringing about O. If this is all the agent has to go on, if she has no independent basis for believing that by ϕ-ing she will or may bring about O, then her belief in the efficacy of earnest attempts will be of as much practical use as a vehicle with a souped-up engine and gears that do not catch.[29]

We may proceed with the main line of argument (which is summarised, by way of reconstruction, at the end of this section). I have already indicated that there are certain constraints (rational or constitutive) on acting in pursuit of an aim. In particular, for an agent to (do) X in order to (bring about) Y, the agent must believe not only that Y might come to pass if she does X, but also that her X-ing *might contribute* to Y's coming to pass. Even if I would like it to rain tomorrow (and regardless of the forecast), I cannot raise my arm in order to make it rain tomorrow, given my belief that such movements

[29]The ascetic's consolation is loosely adapted from a prayer attributed to Thomas Merton. And while everyone would agree that a person of Merton's distinction would not be caught squeezing doorknobs (etc.), one might reply that the reason for this is due not to general conditions of rational agency but rather to the appreciation of 'local' considerations about what pleases God (viz., that such acts of 'bootstrapping' are exceptions to the general rule that God is pleased by acts performed in order to please God). While a conclusive rejection of this approach would require a deeper excursion into the philosophy of religion than I can here undertake, we may easily discern its limitations. If the ascetic were to exploit her conclusion to develop novel forms of worship, the sincerity of the ascetic's motives would not be in question – after all, why else would she be squeezing the doorknob? And since the conclusion the ascetic has reached in effect says that God is willing to overlook mistaken judgments concerning what pleases God, why would God carve out an exception for sincere (and harmless) bootstrapping? I return to this motivating example below (n 44), where I consider an alternative principle (governing rational agency) that might explain why such bootstrapping is not licensed by the ascetic's consoling conclusion.

have no impact on tomorrow's weather. This *Contribution Condition* is satisfied just in case an agent believes, at the time of action, that their X-ing here-and-now may (help) *bring it about*, or *make it the case*, that Y comes to pass. In other words, the condition is satisfied just in case, at the time of action, the agent believes that Y will or may come to pass (wholly or partly) due to the fact that they X'd on this occasion (that is, here and now).[30] All manners of contribution serve equally well as far as the Contribution Condition is concerned: for example, it is satisfied when an agent breaks eggs in order to bake a cake, raises an arm in order to signal that the enemy is approaching, helps Jones in order to help someone, or signs a document in order to incur a legal obligation, provided that the agent has the corresponding beliefs about the (possible) efficacy of her acts in realising her aims. Although these cases arguably involve different species of contribution (corresponding to different kinds of explanations, causal and non-causal), in each one the agent believes, at the time of action, that the fact that they X-ed on this occasion might come to fully or partly account for the fact that they Y-ed.[31]

Finally, with the help of a truism about agency, the Contribution Condition can be restated as follows: 'S did X in order to (bring about) Y' is true only if S believed, at the time of action, that it might (come to) be true that she (brought about) Y *by* doing X (or by doing X *inter alia*).[32] Thus, in the previous examples, if the Contribution Condition is satisfied, the agent believed that it might come to be true that she baked a cake by breaking eggs (*inter alia*),[33] signalled that the enemy is approaching by raising an arm, helped someone by helping Jones, or incurred a legal obligation by signing the document.[34]

The Contribution Condition is the first of four central planks in my argument for the 'natural unintelligibility' conclusion.[35] The second plank (a corollary of the Contribution Condition) concerns what I will call the *specification constraint*. A pair of action descriptions (more generally, a pair of active verb phrases) – for example, the pair consisting of 'wrote a letter' and 'wrote an angry letter', or of 'shut the door' and 'shut the door gently'

[30]Some readers will recognise that the constraint causes difficulties for Evidential Decision Theory (EDT).

[31]For a cutting-edge discussion of the various species of contribution, see Mikayla Kelley, 'How to Perform a Nonbasic Action?' forthcoming in *Nous*.

[32]The truism: if S did X in order to do Y, and succeeded in her aims, then S Y-ed by X-ing or by performing a series of acts that includes X-ing. One may wish to qualify this thesis in light of a purported distinction between 'mere preparation' and 'the act itself'. That is, one might wish to say that while I made the omelet by breaking eggs (inter alia), I did not make the omelet by walking to the kitchen (inter alia), even though I walked to the kitchen in order to make an omelet. We may ignore this complication, as all the cases of relevance to this paper fall on the 'act' side of any such divide.

[33]Hume employs the Contribution Condition in the first of his two arguments for the Natural Unintelligibility thesis: "tis certain we can[not] … *by* a single act of our will, that is, *by* a promise, render any action [obligatory] … It wou'd be absurd, *therefore*, to will any new obligation … nor is it possible, that men cou'd naturally fall into so gross an absurdity.' Hume (n 5) 332 (emphases added). According to Hume, if I will an obligation then what I'm doing is [performing an act of will in order to render an action obligatory], and this is absurd because it's obviously impossible to incur an obligation by a single act of will. (If one somehow resists this reconstruction, and denies that the Contribution Condition is strictly implied, one must at least concede that the argument can be generalized in that direction without loss of its essential logic). In *Intention*, Anscombe endorses the Contribution Condition ('a vague and general formula') and discusses it at some length: 'the [remote] state of affairs mentioned must be such that we can understand the agents thinking it will or may be brought about by the action about which he is being questioned': see GEM Anscombe, *Intention* (Harvard University Press 2000) 35; id. §22 more generally.

[34]I assume that, when an agent does Y by doing X, either their act of Y-ing is not identical to their act of X-ing, or, at the very least, the fact that they are doing Y is distinct from the fact they are doing X (because, say, the facts are about distinct properties of a single act). For helpful discussion, see Maria Alvarez and John Hyman, 'Agents and their Actions' (1998) 73 Philosophy 219, esp. section 4. In any case, *notwithstanding my occasional use of shorthand in this paper*, the Contribution Condition should be construed in terms of (beliefs about) facts about actions rather than (beliefs about) actions.

[35]I consider below (n 42) whether the Contribution Condition can be modified in ways that would undermine my argument.

– stand in what we may call a relation of *specification* when the pair satisfies three (individually necessary, jointly sufficient) conditions: First, satisfaction of one ('more specific') member of the pair logically or conceptually entails satisfaction of the other ('less specific'), *but not vice versa*. Second, if an agent has satisfied the more specific description at a given time and place, then it follows that they have also satisfied the less specific description at that same time and place. For example, if Plum killed Boddy with a dagger at time t, it follows that Plum killed Boddy at t. Third, satisfying the more specific description is not equivalent to satisfying the conjunction of the less specific description D and some other logically independent description or predicate D*. Thus, 'killed Boddy mercilessly and senselessly' is not a specification of 'killed Boddy mercilessly,' at least on the assumption that the former is equivalent to the conjunction of the latter and 'killed Boddy senselessly'.[36]

With the notion of a specification in hand, we may state the *specification constraint*: If one description is a specification of another, then an agent can neither perform an act of the less specific type in order to perform an act of the more specific type, nor perform an act of the more specific type *by* performing an act of the less specific type – assuming, of course, that a speaker who claims otherwise is not exploiting the fact that the agent has set out to satisfy either description on more than one occasion. When Professor Plum set out to kill Mr. Boddy with a dagger, and succeeded in this aim, it is not the case that Plum killed Boddy with a dagger *by* killing Boddy. Nor did Plum killed Boddy with a dagger by killing him *inter alia* (since it is not as if Plum killed Boddy with a dagger by killing him and *also* stabbing him). By the same token (and by implication), we also cannot say that Plum killed Boddy in order to kill Boddy with a dagger.

The source of the specification constraint is the Contribution Condition. I have already observed both that the latter condition can be restated in terms of the 'by' relation and that one cannot truly say that Plum killed Boddy with a dagger *by* killing Boddy. When Plum killed Boddy with a dagger, the fact that he killed Boddy does not help bring it about, or make it the case, that he killed him with a dagger. This conclusion is supported not just by linguistic intuition (concerning the 'by' statements), but also by the most plausible characterisations of the explanatory notions that figure in the Contribution Condition. Since it is apparent that the fact that Plum killed Boddy with a dagger is not *fully* explained (i.e., accounted for) by the fact that he killed him, the only question to consider is whether the latter fact *partly* explains the former. In addressing this question, let us assume the following account of *partial explanation*:

[36]The first and third conditions together ensure that the (property corresponding to the) more specific description is 'subdeterminate under' (the property corresponding to) the less specific description, to adopt the more general terminology of Chisholm. (I will not pause to consider whether my second condition is redundant). As Chisholm puts it, 'eating lobster is a subdeterminate under eating,' where this means that while the property eating lobster 'falls under' the property eating – that is, while instantiating the former property entails that one instantiates the latter property, but not vice versa – the property eating 'is not one of two [independent] properties which are together equivalent to' eating lobster: see Roderick Chisholm, 'Adverbs and Subdeterminates' in Ernest Lepore and Brian P McLaughlin (eds), *Actions and Events: Perspectives on the Philosophy of Donald Davidson* (Oxford: Blackwell 1985) 326–28. Adapting Chisholm, two descriptions are logically independent of one another (in the relevant sense) just in case satisfaction of neither description entails, or is entailed by, satisfaction of the other description (or of any description logically or conceptually incompatible with the other description). *Id*., 325. The appeal to independence is intended to screen out 'contrived' equivalences, such as that obtaining between 'eating lobster' and the conjunction of 'eating' and 'eating lobster'. *Ibid*.

> *Partial Explanation*: Fact A *partly explains* (i.e., *accounts for*) Fact B just in case Fact A belongs non-redundantly to a set of facts that fully accounts for Fact B (whether directly or indirectly), where Fact A belongs non-redundantly to a set of facts (S) that fully accounts for B only if the set (S*) consisting of all members of S *with the exception of fact A* does not fully account for Fact B.[37]

A little reflection reveals that no set of facts that fully accounts for the fact that Plum killed Boddy with a dagger includes, as a non-redundant element, the fact that Plum killed Boddy. Any additional fact that might be added to the latter fact would either fail to complete the (causal or non-causal) account of the former fact or else would render the latter fact redundant. For example, due if nothing else to the possibility of multitasking, even the additional fact that Plum performed some act with a dagger at a given time and place (the very occasion that he killed Boddy, suppose) would not be sufficient to complete the account. Conversely, supplementing the account with the additional fact that Plum killed Boddy with his favourite weapon would render redundant the fact that Plum killed Boddy.

The third plank of my argument is a highly intuitive claim about explanatory relations. Suppose that one fact ('the Explainer') fully and directly accounts for another fact ('the Explained') and that the latter fact is not overdetermined. Given these assumptions, for any third fact F that is identical neither with the Explainer nor the Explained, F fully or partly accounts for the Explained if and only if F fully or partly accounts for the Explainer. For example, if the fact that S cooked something for breakfast is fully and directly accounted for by the fact that S cooked an omelet for breakfast, and if the former fact is not overdetermined, then the fact that S broke eggs (partly) accounts for the fact that S cooked something for breakfast only if it (partly) accounts for the fact that S cooked an omelet for breakfast. (The 'highly intuitive claim' is entailed by the above characterisation of partial explanation together with the following definition of 'overdetermination': a fact is *overdetermined* just in case it is fully and directly accounted for by (each of) more than one set of facts containing no redundant members).[38]

[37]Can this characterisation of 'partial explanation' be resisted? The only remotely plausible alternative of which I am aware involves holding, first, that the fact that Plum killed Boddy is a proper part of the fact that Plum killed Boddy with a knife, and second, that if one fact is a proper part of another, then the former partly explains the latter. However, this not only relies on the vexed idea that facts have proper parts (consider: is the fact that p a proper part of the fact that p or q?) but, worse still, on the rejection of the widely-held 'weak supplementation principle' (WSP), which 'states that whenever an object has a proper part, it has another part that does not overlap – that is mereologically disjoint – from the first. This is a straightforward statement of a basic decomposition intuition, the idea that when a proper part is 'removed' from a whole, there must be another 'supplementing' disjoint proper part': see AJ Cotnoir, 'Is Weak Supplementation Analytic?' in Massimiliano Carrara and Giorgio Lando (eds), *Synthese (Special Issue: Mereology & Identity)* (Springer 2018) 2. The rejection of WSP would be especially unfortunate in the context of the Contribution Condition, which is intended to capture the intuitive idea that an agent must believe that their action might go all or some of the way towards the realization of their goal. But where an agent knows that their having X-ed would (at most) go only some of the way, then surely they must believe that there might be something else (or some other things) that would, together with their having X-ed, complete the job.

[38]The 'highly intuitive' claim follows because if the Explained is not overdetermined (in the above sense) and the Third Fact is not identical with the Explainer, then the third fact does not directly explain the Explained. And if the Explainer is the sole set of facts that does directly explain the Explained, then any other fact, or set of facts, explains the Explained only if it (directly or indirectly) explains the Explainer. Erasmus Mayr has suggested that the 'highly intuitive claim' may stand in need of qualification. If the Explainer fully and directly accounts for the Explained, this explanatory relation will in turn be associated with a Grounding Fact – namely, the fact that the Explainer accounts for the Explained. And while the Grounding Fact is identical neither with the Explainer nor with the Explained, it nonetheless arguably belongs to the direct explanation of the Explained, even where the Explained is not overdetermined. However, even if we were to qualify the 'highly intuitive claim' to exclude such Grounding Facts from its scope of application – and it is doubtful

Let us now return to the Aim Principle and consider whether belief in that principle can enable one to perform an otherwise trivial act in order to thereby incur an obligation. Given the Contribution Condition, an agent (S) kicks the rock in order to (thereby) incur a certain obligation only if S believes that their having kicked the rock might come to belong to an explanation of their having (thereby) incurred the obligation. Having set aside all sources of obligation other than the Aim Principle, the fact that S kicked the rock accounts for the fact that S incurs the obligation only if the former fact accounts for the fact that S acted in order to thereby incur the obligation. After all, according to the Aim Theory, the fact that the agent incurred a promissory obligation is, absent defeaters, fully and directly accounted for by the fact that the agent performed some act or other in order to thereby incur that obligation.[39] Moreover, if S were to obligate herself by kicking the rock, the fact that she performed some act or other in order to thereby incur an obligation would, in turn, not be overdetermined, and would be fully and immediately accounted for by the fact that she kicked the rock in order to thereby incur the obligation. Putting two and two together, the fact that S kicked a rock accounts for the fact that she incurred an obligation only if it accounts for the fact that she kicked the rock in order to incur an obligation.

However, the description *kicked a rock in order to thereby incur obligation X* is a specification of *kicked a rock*![40] Accordingly, when one has kicked the rock in order to thereby incur an obligation, the fact that one has kicked it with that aim is not even partly accounted for by the fact that one has kicked it. One cannot (rationally) kick the rock in order to kick the rock in order to thereby incur an obligation. By the same token, if one kicked the rock in order to thereby bind oneself, one did not kick the rock with that aim *by* kicking the rock (not even in conjunction with other acts).[41]

that we must, given that the Explainer would no longer fully explain the Explained if it needs assistance from the Grounding Fact – the argument that follows would not be impaired, as there is no such Grounding Fact to which my opponent can appeal that would blunt the force of the argument.

[39]The above formulation assumes, controversially, that (non-conventional) moral principles do not, in general, figure among the explanatory grounds of their instances. Nothing turns on this simplifying assumption. If one rejects it, and thinks that the Aim Principle (if valid) figures in the full and direct explanation of the agent's incurrence of obligation O, then we can reach the same conclusion – namely, the fact that S kicked a rock accounts for the fact that she incurred an obligation only if it accounts for the fact that she kicked the rock in order to incur an obligation – simply by generalising the 'highly intuitive' claim to reflect the possibility that the 'Explainer' can consist in a set of facts (rather than an individual fact). And since the fact that the agent kicked the rock in order to thereby incur the obligation does not belong to the explanation of the Aim Principle, it explains the Explainer – that is, the set consisting in the Aim Principle and the fact that the agent performed some act or other in order to thereby incur that obligation – only if it explains the latter fact.

[40]The above claim constitutes the fourth and final plank of my argument. The claim is, of course, still controversial – indeed, Hume would not have accepted it – and should be rejected by one who both denies that 'B caused S to do X' is a specification of 'S did X' and holds that 'S did X in order to Y' is equivalent to 'S's intention to do Y caused S to do X'. Although this is not the place to adjudicate the dispute, it is worth flagging both that the causal analysis of 'S did X in order to Y' would (by all accounts) have to be supplemented by a condition requiring that the intention cause the action 'in the right way' and that (after decades of trying) the 'right way' has not, to my knowledge, been identified. Finally, it is worth relating my view to that offered by Anton Ford in a discussion to which I am indebted; see 'Action and Generality,' in Anton Ford, Jennifer Hornsby and Frederick Stoutland (eds), *Essays on Anscombe's Intention* (Harvard University Press 2011). While Ford defends the view that *intentionally X-ing* is a specification of *X-ing*, my specification claim concerns X-ing in order to Y.

[41]Since the 'thereby' of the Aim Principle can be interpreted in either of two ways, it should be noted that the above claim about specifications – namely, that kicked a rock in order to thereby incur obligation X is a specification of kicked a rock – holds under either interpretation. On the first ('non-reflexive') construal, the description 'kicked the rock in order to thereby incur obligation X' is equivalent to 'kicked the rock in order to incur obligation X by kicking the rock'; on the second ('reflexive') construal, it is equivalent to 'kicked the rock in order to incur obligation

Accordingly, the proponent of the Aim Principle cannot exploit their belief in that principle if they do not hold the (false) belief that the fact that they have performed an act of one describable type can fully or partly account for the fact that they have performed an act of a second type, where the second is a specification of the first. (In three lengthy footnotes, I consider the possibility that Contribution Condition is too strong,[42] revisit the

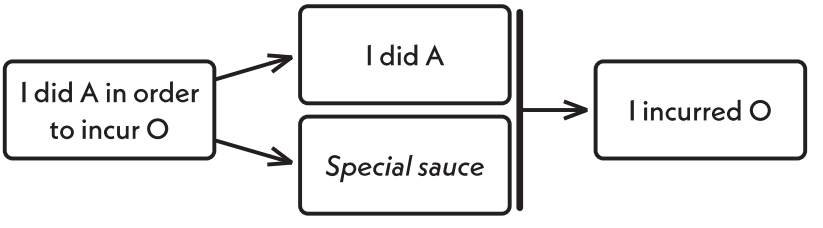
X by kicking the rock with this aim'. Under either interpretation, 'kicked the rock in order to thereby incur obligation X' is a specification of 'kicked the rock'. It bears noting that the reflexive construal faces further difficulties; after all, its condition is of the form 'S does X in order to Y by doing X with the intention to Z' and a rational agent can never satisfy sentences of that form without violating the Specification Constraint. (And if this rules out the possibility of a reflexive intention – as well as philosophical theories that rely on them – so much the better.) By contrast, the form 'S does X in order to Y by doing X' can be salvaged either by denying that 'doing Y by doing X' is a specification of 'doing X' or by equating it with 'S did X in order to (bring about) Y, and S believed at the time of action that their having done X on that occasion will or may be (partly) constitutive of their having (brought about) Y.' I will expand on this in a future paper.

[42]Jacob Rosen has suggested (noncommittally) a way of modifying the Contribution Condition that would undermine my argument. Instead of requiring, as a condition of doing X in order to (bring about) Y, that the agent believe that their having X-d will or may come to belong to the explanation of Y's coming to pass, the Modified Condition would require that the agent believe that their having X-d in order to (bring about) Y might come to belong to the explanation of Y's coming to pass. Although I cannot fully argue the point here, it is unlikely that the Modified Condition delivers plausible verdicts about cases. When I heaved a brick at my neighbor's window in order to break it, the fact that I broke the window is partly explained by the fact that I heaved a brick at it (from a certain distance, with a certain velocity, etc.), not by the fact that I did so in order to break it, see Stephen Yablo, 'Mental Causation' (1992) 101 The Philosophical Review 245. (Of course, the fact that I intended to break the window partly explains why I heaved a brick at it; however, the fact that I intended to break the window is not the same as the fact that I heaved the brick in order to break it). Felix Koch has observed that the counterexample can be accommodated by replacing the Modified Condition with a Disjunctive Condition consisting of the disjunction of the Modified Condition and the original Contribution Condition. Furthermore, he suggests that the Disjunctive Condition can be given a principled defense by appealing to the intuitive idea that the agent who performs X in order to (bring about) Y must believe that their performing X in the current circumstances may fully or partly account for Y. Insofar as the motive for which an agent acts belongs to the 'circumstances' of their action, the Disjunctive Condition can claim to capture the truth that lies in the vicinity of the Contribution Condition. My response to this formidable challenge has two parts: first, the aforementioned principled defense supports not the Disjunctive Condition but rather the following More General Condition: S does X in order to (bring about) Y only if S believes, at the time of action, that (their) Y(-ing) will or may come to pass either (partly) in virtue of their doing X on the occasion, or (partly) in virtue of their doing X' on the occasion, where X' is a specification of X that will be realized if S does X on the occasion. As far as I can see, there is no principled reason for proponents of the Disjunctive Condition to stop short of the More General Condition. Second, the More General Condition is false. Consider: Like Neo in the Matrix, when I am offered the choice between the red pill and the blue pill – knowing that the former would reveal a painful truth while the latter would leave in place a blissful illusion – I opt to swallow the red pill. In such a case, did I *swallow a pill of any color in order to learn the truth*? If the lefthand side of the italicized formula specifies a description under which the action is intentional, then clearly I have not, even though 'swallow a red pill' is a specification of 'swallow a pill of any color' that was realized on the occasion. To take another example, consider 'I swallowed a red or blue pill in order to learn the truth.' It sounds OK only if the context invites an extensional construal – e.g., years later, I cannot recall which pill was which, and mean only to say that the pill I swallowed was either red or blue, and that it was chosen in order to learn the truth. Likewise, if an utterance of 'I swallowed a colored pill in order to learn the truth' passes muster this is only because it is naturally interpreted as 'there is a pill of some color, such that I swallowed it in order to … ' In reply, Koch observes (correctly) that the More General Condition is (at most) only one necessary condition of acting with an aim, and proposes other conditions that might account for the absurdity of the utterances at issue. However, I do not think that the other conditions he mentions are fit for purpose in accounting for the absurdities. (In my example, I did *believe* that the red pill was colored; and although I did not *believe* that I was taking a pill of any color in order to learn the truth, this is only because such a belief is ruled out by my conditions.) Koch also suggests that pragmatic implicatures may be at work, but I do not think that the tests for implicatures are satisfied in these cases. (In this connection, it is also worth reiterating that the relatively unspecific 'there was a colored pill such that I took it in order to learn the truth' is not absurd at all). Finally, I note that while Koch refers to the More General Condition as 'maximally general,' there is in fact one condition that is more general still. The *Most* General Condition (as I will call it) weakens the More General Condition by replacing the requirement that the two act descriptions (X' and X) stand in the specification relation with the weaker requirement that they refer to the same act token. For example, when one succeeds in *making a bid* by *raising a paddle* at an auction house, both descriptions refer to the same act, and yet neither is a specification of the other. As before, I do not know how a proponent of the Disjunctive Condition could have principled grounds for resisting

assumption concerning direct explanation,[43] and reconsider the motivating example involving the ascetic.[44])

the Most General Condition. And yet the Most General Condition is surely false. Consider a person of means at an auction who decides that scratching a hard-to-reach back itch with their auction paddle is worth paying an exorbitant sum for an unremarkable painting. While they raised their paddle in order to scratch their back, surely they did not bid on the painting in order to scratch their back; after all, they did not bid for any reason at all – rather, their bidding was a side effect of their raising their paddle.

[43]As noted earlier, I have been assuming that the fact that the agent performed an act of the stipulative type figures in the direct explanation of the fact that the agent incurred the obligation. Let us relax the assumption and consider the following alternative explanatory structure:




Let 'did A' stand for 'kicked a pebble' and let 'special sauce' refer to the agent's intention-in-action – on this alternative proposal, what directly explains my incurrence of obligation O is the fact that I kicked the pebble together with the fact that I intended to be there-and-then incurring an obligation. If this structure is to constitute a genuine alternative that requires separate treatment, we must assume (what is by no means obvious) that the latter fact is distinct from the fact that I performed some act or other in order to thereby incur an obligation. Even granting this assumption, we may proceed to dismiss this alternative structure on two grounds: First, intuitively, the bare fact that I kicked the pebble is not of direct normative significance. At most, it is the vessel or vehicle for what really matters (that is, for the facts that are of direct normative significance) and therefore should not figure in the direct explanation of the normative change. Second, it is mysterious how a proponent of this alternative structure would go about explaining why the intention-in-action (the special sauce) is not sufficient to produce the normative change. For the fact that I kicked the pebble does not even ensure that the intention-in-action was successfully executed, as one may intend to kick a pebble with their left foot only to trip and (inadvertently, in the course of regaining their balance) kick it with their right. Thanks to Jacob Rosen for urging me to consider this alternative structure.

[44]Having presented the central argument, I would like to return to the earlier example involving the ascetic. Although I only claimed that my arguments would account for the relevant intuition (namely, that a rational ascetic could not perform an arbitrary action with the aim of pleasing God), it is tempting to make the stronger claim that the Contribution Condition is necessary to account for the intuition. However, in order to make this stronger claim we must rule out an alternative constraint on rational agency that would, if valid, also account for the same intuition. To explain the intuition one may appeal not to the Contribution Condition, but rather to the following principle ('Selection Condition'): For S to do X in order to (bring about) Y, S must believe that her intention to (bring about) Y will or may (come to) belong to an explanation of her doing X on the occasion. This principle accounts for the intuition *provided* that it is understood to incorporate a notion of 'explanation' that has the following implication: if an agent believes that *any* action performed with the intention to please God would achieve this aim, then the agent's intention to please God cannot explain why she did X in particular. While there are two interpretations of the Selection Condition that carry this implication, neither one is valid. On the stronger interpretation, for an agent's intention Y to explain why the agent did X, the intention must explain why the agent performed X as opposed to *each alternative* to X that was available to her. However, given that a rational agent can sometimes choose arbitrarily between several available alternatives (e.g., buying chocolates or flowers) that would equally realize a given goal (e.g., pleasing one's host), the strong interpretation of the Selection Condition can hardly be taken seriously. On the weaker interpretation, for an agent's intention Y to explain why the agent did X, that intention must explain why the agent did X as opposed to *at least one alternative* to X that was available to her. However, it is difficult to discern a compelling rationale for the weaker interpretation of the Selection Condition: if an agent can choose arbitrarily between several acts any one of which would equally realize her aim, then why can she not similarly choose arbitrarily when *any* of her available options would similarly realize her aim? Furthermore, this weakened Selection Condition, even if valid, would not explain the rational constraints on the ascetic's mode of worship if the principle that the ascetic accepts, concerning what would please God, carves out an exception for a certain class of acts (e.g., injurious or sacrilegious acts). For in that case, her aim to please God *could* explain why she squeezes the doorknob rather than perform an action belonging to the excepted class. And yet, for all that, her squeezing of the doorknob would be no less irrational. Accordingly, while I have no quarrel with the Selection Condition as such, none of the interpretations of the principle that would account for the irrationality of the ascetic's arbitrary act pass muster.

The foregoing argument may be summarised as follows:
Fact X: the fact that I incurred obligation *O*.
Fact 1: the fact that I performed some act or other in order to thereby incur obligation *O*.
Fact 2: the fact that I kicked rock R in order to thereby incur obligation *O*.
Fact 3: the fact that I kicked rock R

(1) For all act types *a* and obligations *O*, if, in the absence of defeaters, I perform *a* in order to thereby incur *O*, then I incur *O*. (Aim Principle, assumed)
(2) For all act types *a* and obligations *O*, I rationally *a* in order to thereby incur *O* only if I believe that I might come to incur *O* fully or partly on account of the fact that I performed *a*. ('Contribution Condition' applied)
(3) If I incur obligation *O* by triggering the Aim Principle, then Fact 1 fully and directly accounts for Fact X.
(4) If I kicked rock R in order to thereby incur obligation *O*, then Fact 2 fully and directly accounts for Fact 1.
(5) For all (distinct) Facts *A*, *B*, *C*, *D*, If Fact *B* fully and directly accounts for Fact *A*, Fact *C* fully and directly accounts for Fact *B*, and neither *A* nor *B* is overdetermined, then for any Fact *D*, *D* fully or partly accounts for *A* only if *D* fully or partly accounts for *C*. ('highly intuitive claim about explanatory relations')
(6) Each of facts X, 1, 2, and 3 is distinct from the others.
(7) Fact X obtains only if Fact 1 obtains (assumption that, in the circumstances, there is no other source of obligation *O* other than the Aim Principle)
(8) Fact 1 obtains only if Fact 2 obtains (assumption that I have done nothing else with the aim of thereby incurring obligation *O*)
(9) Therefore Fact 3 fully or partly accounts for Fact X only if Fact 3 fully or partly accounts for Fact 2.
(10) If I am rational and informed, then I believe premise 9.
(11) If I am rational and informed, then I understand the 'specification constraint' and therefore cannot believe that Fact 3 fully or partly accounts for Fact 2.
(12) Therefore, if I am rational and informed, then I cannot kick rock R in order to thereby incur obligation *O*.

### 2.2. Communication theory

Let us now turn to the characterisation of the stipulative act that figures in the Communication Theory. This theory, applied to the domain of duty-incurrences, holds that for all act types (X) and persons (S, H), if S communicates to H an intention to thereby incur an obligation, owing to H, to perform X, then S is so obligated to H, provided that S's communicative act is not tainted by the presence of force, fraud, or other defeating conditions.[45] (As with the Aim theory, we may stipulate that the provisos are satisfied in the cases we consider.) Although Raz and his followers do not tell us what such

[45]Raz defends this principle only insofar as the 'relationships [of obligation] between people' that the principle enables are 'held to be valuable': see Raz, 'Promises and Obligations' (n 4) 228. The reference to 'other defeating conditions' in my gloss should be interpreted by reference to this limit. As noted earlier (n 4), Raz's characterisation of the promissory act (incorporated in the Communication Principle) has been widely influential in the literature on normative powers generally.

communication consists in, the broadly Gricean framework on which they rely commits them to at least this much: For S to communicate a mental state M to H is, in part, for S to perform some act ϕ in order to get H to believe that she (S) has M (alternatively, in order to supply H with a reason to believe that she (S) has M), and for H to recognise that this is S's aim in ϕ-ing.[46] In the case of interest to us, mental state M is the intention to (thereby) incur a certain obligation. Thus, for Raz, the promisee figures in not just one of the promisor's aims but in two – what I shall call the communica*tive* aim, and the communica*ted* aim. Although, on broadly Gricean views, the communicative aim involves more than just an aim to give the addressee reason to believe that the speaker has mental state M, we may ignore the additional complexity, as the simpler (logically weaker) characterisation suffices. For if a speaker cannot possess even the weaker sort of communicative aim without exploiting a promising convention, then *a fortiori* they cannot possess the stronger variety. (On the stronger characterisation, one who communicates a mental state aims to give the hearer not just any reason to believe that the speaker has the communicated mental state, but a reason that is supplied by the communicative intention itself.) To simplify matters further we may weaken the Communication Principle in an additional respect: namely, by eliminating the 'uptake' condition that requires recognition of the speaker's communicative aim on the part of the hearer. If even the weaker principle, shorn of an uptake requirement, cannot be satisfied in the absence of a promising convention, then neither can the stronger principle that includes an uptake requirement.[47]

No additional premises are needed to extend the argument against the Aim Theory to the Communication Theory. We must not be misled by the possibility, afforded by any natural language, of stringing together terms such as 'I' 'hereby' and 'obligation' to form a meaningful sentence (e.g., 'I am hereby obligated to jump in the lake'). After all, few would maintain that a speaker can rationally act with the aim of inducing in her audience the belief that she (the speaker) has a certain mental state when it is mutually known (between speaker and audience) that the speaker does not have the state. For example, no convention of English can enable me to communicate the belief that I have the power to become invisible, at least not in contexts where my sanity is taken for granted. If I do whatever convention dictates for the making of such an assertion, an audience with whom it is mutually known that I lack this belief will understand me to be either

[46]Whether the Gricean should adopt the parenthetical alternative is discussed at length in Wayne A Davis, *Meaning, Expression, and Thought* (Cambridge University Press 2003). The Gricean framework is made explicit in Searle's well-known analysis of promising, which informed Raz's account, see John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969) 57–61. I do not myself rely on the Gricean framework. The leading competitor is a normative theory, according to which one communicates (in the relevant sense) in virtue of undertaking conversational commitments of various sorts. To reduce promising to communication in this latter sense would be to reduce one species of interpersonal commitment to another, and all the problems related to the identification of the normatively significant characterisation of the undertaking would recur with respect to the latter commitment.

[47]I note that while the first simplification eliminates the reflexive element of the communicat*ive* aim, it is nonetheless compatible with three reflexive (as well as one non-reflexive) interpretations of the 'thereby' occurring within the scope of the communicate*d* aim. According to the reflexive interpretations, the communicate*d* aim is an intention to incur obligation O by uttering U with either the communicat*ive* aim *(interpretation one),* the communicate*d* aim (*interpretation two*), or the communicative and communicated aim (*interpretation three*). According to the non-reflexive interpretation (*interpretation four*), the communicate*d* aim is simply an intention to incur obligation O by uttering U. (In his commentary, Koch questions my argument as applied to *interpretation one*, and I will have to take up this formidable challenge elsewhere. However, I note that, as a normative matter, *interpretation one* of the Communication Principle is unsatisfactory. For it implies that one cannot effectively promise unless one is known to have the correct normative theory of the source of promissory obligations.) Finally, I note also that the simplifications of the principle in the main text are not essential – that is, the argument offered against the simplified principle can be extended to the more complex (unsimplified) principle.

joking, speaking figuratively, making a philosophical point, or else failing to grasp the meaning of my words.

Accordingly, the question we must consider is whether an utterance can satisfy the conditions of the Communication Principle if the speaker does not exploit a conventional norm of promising that assigns promissory import to features of utterances that would otherwise lack this significance. A speaker's utterance satisfies the conditions of the Communication Principle only if the speaker believes that an addressee can impute to her (the speaker) the *communicated* aim (that is, the aim of thereby obligating herself). However, the latter aim can be imputed to the speaker only by one who can also impute to the speaker the *belief* that by uttering the sentence, she might thereby incur an obligation. Since we are ruling out reliance on irrationality, ignorance, or alternative sources of obligation, the speaker can have the latter belief only if she (also) believes that her utterance might satisfy the conditions of the Communication Principle, i.e., only if she believes that her utterance might be performed with the *communicative* aim. And yet, a rational and informed speaker would recognise that it is not possible for her to perform the utterance with this aim.

To see this, we need only run a variation of the argument marshalled against the Aim Theory. If the speaker's utterance of a sentence (sentence U) generates an obligation, this will be owing directly to the fact that she has performed an action with the communicative aim, a fact that will be in turn directly owing to her having uttered U with the communicative aim. Accordingly, the agent utters U in order to bind herself only if the agent believes that her having uttered U on the occasion might contribute to her having uttered U with the communicative aim. Yet *uttered U with the communicative aim* (that is, in order to get the speaker to believe she has the communicat*ed* aim) is no less a specification of *uttered U* than is *kicked the rock in order to thereby incur an obligation* a specification of *kicked the rock*! Since the speaker cannot utter U with the communicative aim by uttering U (not even *inter alia*), the speaker cannot trigger the principle in the absence of a promising convention.

I have argued in this section that certain conditions of certain putative nonconventional moral principles (i.e., the Aim and Communication principles) cannot be satisfied by rational, informed individuals without exploiting either a conventional norm or some independent moral principle. In closing, it is perhaps worth noting that the argument has equal force against anyone who claims that either the Aim or Communication principles (or both) are the only prevailing conventional rules of promising. For what the argument shows is that the ability to satisfy the conditions of either principle does not follow from even a commonly held belief that one would incur an obligation by satisfying the conditions. Accordingly, if conventional norms of promising enable rational agents to incur obligations by fiat, it is because they confer normative significance on features of acts (utterances) *other* than those features that figure in the conditions of either the Aim or Communication principle.[48]

[48]While such alternative features may be formalistic (e.g., involving signs or seals), they need not be, and may relate to the more fluid, pragmatic properties of an utterance (including presuppositions). For example, Raz contends, plausibly enough, that '[i]n our culture, communicating an intention to act in a certain way to a person who is known to be interested in the action is conventionally regarded as [a promise]': see Raz, 'Voluntary Obligations and Normative Powers II' (n 2) 100. Relatedly, while Anscombe remarked that 'it was absurd of Hume to write as if there had to be a special sign of promising,' the charge is misplaced: see Anscombe, 'Rules, Rights, and Promises' (n 19) 320, since Hume explicitly allows for the possibility of wholly tacit promises several chapters later in his discussion of allegiance.

## 3. Two objections (and replies)

*Objection #1 (from intent requirements in institutional norms):* The argument of the previous section seems to have counterintuitive implications. In particular, the argument threatens to rule out so-called 'intent requirements' that may figure in conventional power-conferring rules. For example, it is natural to think that legal power-conferring norms (roughly, laws designed to give subjects the means to produce certain legal effects when it is their wish to do so) that confer legal significance on the completion of certain formalities (e.g., the utterance of a certain form of words) can stipulate that the legal effects normally consequent to the completion of those formalities will not arise in the absence of an intention to thereby produce those legal effects. Any argument that entails that legal power-conferring rules containing such intent requirements cannot be triggered by rational agents aiming to produce the associated legal effects should give us pause, given the apparent prevalence of such rules in actual institutional life. And the argument of §2 plainly does entail this: after all, the rational and informed agent who jumps through the requisite hoops (i.e., completes the formalities) with the aim of producing the desired legal effects knows that, given the norm's intent requirement, their hoop-jumping would not succeed in producing these legal effects if not for their aim to produce them.

***Reply***: I dispute the premise that the familiar power-conferring norms of institutional life have intent requirements in the sense that would render them vulnerable to the argument of §2. While power-conferring legal rules frequently include conditions that are sometimes *referred to* as intent requirements, I am aware of no legal or institutional power-conferring rule that actually *requires*, as a necessary condition of exercising the power, that subjects satisfy the rule's other conditions with the aim of thereby modifying legal relations. My strategy will be to canvas four varieties of intent requirements that can figure in power-conferring rules that can be triggered by rational and informed agents seeking to trigger them. In this way, I will show that the implications of my argument are ones we can (and do) live with.

Let us begin by invoking the lawyer's distinction between so-called *subjective* intent and *objective* intent. In this specialised usage, a 'subjective' mental state (e.g., a belief or intention) refers to an *actual* mental state. In the context of power-conferring legal rules, I shall use the term 'subjective intent' narrowly to refer to the (actual) aim with which an agent fulfils the rule's other conditions (e.g., signing on the dotted line). The intent requirement that is plainly inconsistent with the argument of §2 is the one that requires, as a condition of exercising the power (i.e., of triggering the power-conferring rule), that the agent have the *subjective intent* to thereby trigger the rule, that is, to modify legal relations in the manner achieved by satisfaction of the rule's conditions. By contrast, 'objective intent' refers to apparent intent (also known as manifested intent) – that is, the subjective intent that a rational party would impute to the agent, whether correctly or incorrectly, on the basis of all and only the evidence available to somebody occupying the privileged position that I shall refer to as the position of the 'counterparty'. When the exercise of a power

('A tacit promise is, where the will is signify'd by other more diffuse signs than those of speech; but a will there must certainly be in the case, and that can never escape the person's notice, who exerted it, however silent or tacit'): see Hume (n 5) 351.

involves the modification of legal relations between the agent who exercises the power and some other party, it is often the position of the latter that is privileged by rules invoking objective intent; for example, when we speak of a promisor's objective intent, we are usually interested in the subjective intent that would be imputed to the promisor by a rational person who possesses all and only the (admissible) evidence available to the recipient of the promise (the promisee) at the time of the promise.

It is important to see that a power-conferring rule that insists on objective intent as a necessary condition of exercising the power – that is, that requires, as a condition of triggering the rule, that the agent fulfil the rule's other conditions with the *apparent* aim of thereby modifying legal relations in the manner facilitated by the rule – can be triggered without any violation of the constraints mentioned in the previous section. It is easy to miss this point: after all, given standard assumptions, objective intent is possible only if subjective intent is possible. That is, where it is not possible for an agent to actually have a certain aim, a suitably informed bystander could not have decisive reason to impute that aim to the agent. But this important truth in no way implies that a power-conferring rule that incorporates an objective-intent requirement is vulnerable to my argument. For, as I will now show, a rational and informed agent can not only trigger a rule containing an objective-intent requirement, but can do so with the (actual) aim of modifying legal relations in the manner facilitated by the rule. This is the case even though the same agent, suitably informed, would be unable to rationally trigger a variant of the same rule that construed the intent requirement subjectively.

The reason that rules with objective-intent conditions are not vulnerable to my argument is that 'S signed the document (in circumstances C) with objective intent' is *not* a specification of 'S signed the document', as I have defined the notion of specification. After all, [S signed the document (in circumstances C) with the objective intention to modify legal relations (in respect R)] can be broken down into [S signed the document in circumstances C] and [S's counterparty has sufficient reason to believe that if S signed the document in circumstances C, then S did so with the aim of modifying the legal relations (in respect R)]. And the latter fact, in turn, is not grounded in the fact that S signed the document in order to thereby modify the legal relations, but rather in such facts as that S had reason to want to modify the legal relations (in respect R); that in the counterparty's past experience, agents who have signed similar documents in similar circumstances did so with the aim of modifying legal relations, and so on. Accordingly, the Specification Constraint has no purchase here, and the Contribution Condition poses no obstacle for the exercise of a power conditioned by an objective-intent requirement. And given that a rational agent who wishes to exercise such a power would recognise that the Contribution Condition stands as no obstacle, there is nothing preventing her from signing the document with the actual (subjective) intention to thereby modifying legal relations. For while such an agent believes that her signing in the circumstances will or may come to belong to the account of how she succeeds in modifying the relations – as she must, on pain of violating the Contribution Condition – she also knows that her signing it *with that (subjective) aim* will not belong to an account of the same.

I have just argued that the Contribution Condition would not prevent the (rational) exercise of a power conditioned by an objective-intent requirement. I now add that nothing would change if the intent condition were expanded so as to require, in addition

to objective intent, certain *subjective* elements.[49] So long as those subjective elements do not include what I have dubbed subjective intent (that is, the actual intention to produce the effects associated with the power-conferring rule), the Contribution Condition need not stand in the way of exercising the power (i.e., triggering a power-conferring rule). For example, a rule might require not merely that the counterparty has strong reason to impute the relevant intention, but that the counterparty actually makes the imputation (i.e., forms the belief about the other's actual intention). Here, too, nothing in my argument entails that a rational agent cannot trigger such a rule, even though it requires the subjective attitude (the belief that we may designate as 'uptake') on the part of the counterparty.

Likewise, a power-conferring rule may stipulate that objective intent is sufficient for the exercise of the power, while also stipulating that in its absence (or in the absence of any requisite 'uptake' on the part of the counterparty) subjective intent shall also suffice, provided that there is a 'meeting of the minds' — that is, provided the counterparty, notwithstanding the absence of sufficient evidence, nonetheless imputes the correct (subjective) intention to the agent. To illustrate, we may first consider an example involving an ambiguous expression: in an offer letter to a prospective buyer, a seller of cotton proposes a sale of cotton imported on a ship named *Peerless* departing from Bombay, and there happen to be two different ships, freighted with cotton and bearing that name, departing from Bombay in different calendar months. In the absence of further evidence, it may not be possible for the buyer to rationally impute to the seller an intention to offer to sell the cotton aboard either one of the ships; still, if the seller intended to offer to sell the cotton aboard one of the ships, and the buyer happened to correctly identify the ship that the seller had in mind, then a legal rule may stipulate that a valid offer (i.e., conditional promise) has been made despite the absence of objective intent.[50] To take a second kind of example, suppose that the evidence concerning an agent's intent is positively misleading, and a counterparty has decisive reason to impute to an agent an intention that he lacks. In such a case, notwithstanding the evidence, the counterparty may correctly (if irrationally) identify the agent's intention. With respect to such cases, a rule may specify that there is a valid contract in light of the correspondence in the subjective attitudes of the parties (the subjective intent on the part of the agent and the subjective imputation of that intent on the part of the counterparty), and may do so without any concern that such a rule cannot be triggered by a rational, informed agent who seeks to trigger the rule. To be sure, when such a rule exists, the informed agent knows that in the event of misfire (of the kinds at play in the previous examples), her subjective intent will be enough to get the job done, provided that it is discerned by the counterparty (in some kind of lucky fluke). However, despite this knowledge, the rational agent who wishes to modify their legal relations in the manner facilitated by the power-conferring rule need not (and will not) intend to modify their relations via this backchannel; rather, such an agent sets out to modify the relations by satisfying the *objective*-intent condition (along with the rule's other

[49]In recent decades, several legal commentators have pushed back against the so-called 'objectivist' interpretation of contracts by emphasizing such 'subjective elements', see Melvin Eisenberg, 'The Responsive Model of Contract Law' (1984) 36 Stanford Law Review 1107.

[50]This reflects the position of the *Restatement (Second) of Contract* (1981), §20 (illustration 1). The example is adapted from the famous *Raffles v Wichelhaus* [1864].

conditions) and believes that she will not have recourse to the safety net provided by the subjective alternative. Thus, the Contribution Condition poses no problems for the deliberate triggering of a rule that incorporates such a hybrid condition.

Finally, a power-conferring rule may invoke, in lieu of objective intent, some other species of 'objective meaning'. For example, given the distinction between what a speaker *means* (i.e., intends) and what the speaker *says*, an objectivist may be faced with a choice between privileging either the latter notion (what was said) or an objectified version of the former notion. To illustrate, suppose a purveyor of barnyard animals makes you an offer 'to sell "Maisie" for 100 dollars'. As it happens, Maisie is the name of the seller's horse, and you know (on the basis of ample compelling evidence) that the seller committed a slip of the tongue and actually intended to offer up Daisie the cow. Here, while the seller's objective (and subjective) intent was to offer up Daisie the cow, a rule that privileges 'what is said' over 'what is meant' would hold that the seller offered up Maisie the horse. Whatever its merits, such a rule could similarly be exercised by a rational agent consistent with the argument of §2.[51]

As I have said, while I am aware of legal power-conferring rules that have conditions resembling each of the above, I am aware of no such rule that *insists on* subjective intent as a condition of exercising the conferred power.[52] Of course, this is not to say that intent requirements in power-conferring rules have never been *understood* by theorists or others as requiring subjective intent, nor is it to deny that such understandings have sometimes had an impact on the development of the law.[53] Lastly, I note in closing

[51]In the Anglophone contract literature, committed 'objectivists' often fail to properly distinguish between an objective approach that privileges 'objective intent' and one that privileges a notion of objective meaning equivalent to 'what was said'. This is likely owing to the traditional 'plain meaning rule,' which excludes extrinsic evidence of the parties' intentions when there is a sufficiently clear integrated document embodying the agreement; given such a rule, there is usually little practical difference between the two approaches. While lip service has sometimes been paid to the latter of the two approaches – for example, Holmes famously wrote that 'no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that … the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties' having meant the same thing but on their having said the same thing': see OW Holmes Jr., 'The Path of the Law' (1897) 10 Harvard Law Review 457 – the objective intent approach remains the dominant one among objectivists. Indeed, Holmes elsewhere formulates his view in terms of objective intent, see, e.g., OW Holmes Jr., 'Agency II' (1891) 5 Harvard Law Review 1. For helpful discussion see: William F Young, 'Equivocation in the Making of Agreements' (1964) 64 Columbia Law Review 619; George Palmer, 'The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second' (1966) 65 Michigan Law Review 33; Eisenberg (n 49) 1107; and Timothy Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence*: Fourth Series (Oxford University Press 2000). (While Endicott maintains that a certain subjective intention is required of an offeror – namely, 'the intention to act in a way that, understood in the context, counts as agreeing' – Endicott does not equate this required intention with the intention (aim) to incur an obligation. Ibid 162).

[52]Even intent conditions in the rules governing the execution of wills (where the interest in fulfilling the actual wishes of the deceased is presumably quite strong) are construed objectively. As a leading casebook puts it, 'the plain meaning of the words of a will cannot be disturbed by evidence that the testator intended another meaning.' A corollary to this rule is that courts ordinarily will not correct 'mistakes' in wills even whether there is extrinsic evidence showing that the testator intended something other than what the words of the will instrument convey. Of course this leaves open the question of what counts as 'plain meaning,' but the basic idea seems to be that courts are looking for objective indicia of the testator's intent, so much so that these indicia, where clear, control the disposition of the estate even when there is strong evidence that the indicia do not reflect what was actually going on in the testator's mind, see Jesse Dukeminier and Robert H Sitkoff, *Wills, Trusts, and Estates* (Aspen Publishers 2013). It bears noting that an intent condition that singles out the intent imputable to the testator on the basis of evidence available to the executor during probate, say, would be equally objective as one that privileges the evidence available (to the witnesses, say) when the will is executed.

[53]With respect to the former proposition (that we must distinguish between rhetoric and reality), I do not deny that Savigny – to take a prominent example – attributed to the Roman Law a subjective-intent requirement with respect to informal contracts, but I merely question the correctness of the attribution (by all accounts influenced by

that I need not insist that it is impossible for a law to clarify that its intent condition is subjective rather than objective. For I see no reason to resist the conclusion that a legal norm that succeeded in clarifying this would indeed require the irrational, perhaps the impossible, as a condition of effecting normative change.[54]

***Objection #2 (from ordinary language)*:** Are there not perfectly intelligible utterances that violate the specification constraint? Suppose that a baseball player has good reason (e.g., the prospect of winning a certain prize) to throw a baseball 100 miles per hour, and

his Kantianism), see MD Howe, *Justice Oliver Wendell Holmes: The Proving Years* (Harvard University Press 1963) 232, 233. Similarly, it is worth noting that the widely held view that French contract law is a modern-day subjectivist outlier has been refuted in the scholarly literature, see Wayne Barnes, 'The French Subjective Theory of Contract: Separating Rhetoric from Reality' (2008) 83 Tulane Law Review 359. More generally, we may note that judicial techniques such as conclusive presumptions can serve to conceal the objective character of a rule. As Williston observed, '[d]oubtless the law is generally expressed in terms of subjective assent, rather than of objection expressions, the latter being said to be merely 'evidence' of the former, as for example in the so-called parol evidence rule; but when it is established that this is no rule of evidence the whole subjective theory falls to the ground. Under the guise of conclusive presumptions of mental assent from external acts, the law has been so built up that it can now be expressed accurately only by saying that the elements requisite for the formation of a contract are exclusively external' (Williston 1920, §1536). With respect to the second proposition (that such false understandings may have an effect on legal doctrine), it is likely that, at various points in its development, the law's treatment of topics such as the revocability of offers has been influenced by lofty subjectivist rhetoric about the meeting of minds. But such influence does not entail that the intent conditions were in fact ever construed by the law subjectively. Additionally, it is perhaps worth mentioning that avowedly objectivist understandings of intent conditions in power-conferring rules date back much further than Holmes. Talmudic law, for example, offers an avowedly objectivist understanding of the law governing interpersonal agreements, reflected in its application of the dictum 'devarim she-balev einan devarim' ('undisclosed intentions are not words') (Babylonian Talmud, Tractate Kiddushin 49b). Finally, it is worth noting an important contrast in the treatment given by Holmes (far and away the most influential objectivist in modern legal thought) to subjectivist approaches pertaining to criminal law and tort law, on the one hand, and contract law, on the other. Although he championed objectivist approaches in all three areas, with respect to the first two areas, where the rules under consideration are not power-conferring, Holmes maintained that the law itself evolved from embodying a thoroughly subjectivist approach (interested in the actual mental states of the offender) to a largely objectivist one. By contrast, in his treatment of the law of contract (where the intent requirements at issue *do* figure in power-conferring rules) there is no indication that, in his view, the law ever embodied a subjectivist approach, see OW Holmes Jr., *The Common Law* (Little, Brown & Co. 1881); and Howe (n 53) ch 9.

[54]Armed with the distinction between subjective and objective intent, one might object that I have previously mischaracterized the Aim and Communication principles: properly construed, the intention condition (of either principle) should be construed objectively and not subjectively. Now, even if I were to concede the point and weaken my conclusion accordingly (by restricting it to putative non-conventional power-conferring norms with subjective intent conditions), the weakened conclusion would still be worth drawing, given the prevalence of subjective interpretations of the relevant domain of nonconventional morality (not to mention the independent significance of the constraints on agency that figure in my argument). However, I do not believe that the point should be conceded. I shall set aside the delicate question of whether an agent, in the absence of conventional norms, could perform an observable act that would give another person sufficient reason to impute to him the relevant intention. I also defer (until the next section) consideration of the extensional difficulties that beset even the objective versions of the Aim and Communication principles. Instead, I simply observe that the rationales that have been put forward for the objective construal of intent requirements in power-conferring norms are distinctly institutional in character and have no ready application to a non-conventional domain that neither presupposes a centralized enforcement mechanism nor assumes that agents lack intrinsic motivation to comply with the principles of true morality. Consider again a norm that confers a power on an agent to incur an obligation; let us suppose that such a promissory norm (as I will now call it for the sake of simplicity) has an objective intent condition that includes what I have called an uptake requirement on the part of the promisee. According to this norm, a promissory obligation is not extinguished even if the promisee learns, sometime after hearing the promissory utterance but before relying on it, that his prior imputation of subjective intent to the promisor was mistaken. Most of the justifications that have been given for such a rule are premised on the putative facts that, first, a speaker's claim that they lacked the subjective intent to incur an obligation that they appeared to possess 'would be hard [or merely costly] for the addressee to refute [in an enforcement proceeding], since it would relate to the addressor's own state of mind'; second, that it may be onerous for the addressee who does rely on misleading appearances prior to learning the truth to prove such reliance in court, see Eisenberg (n 49) 1119. Given these facts, the subjective requirement would undermine the policy of 'security of transactions' and would thereby dampen the wheels of commerce to the detriment of society at large. *Ibid*. For individuals would be less likely to rely on promissory undertakings (or would take more time before doing so, in order to more thoroughly collect evidence concerning the subjective attitudes of the addressor) if they thought that enforcing the promise would require rebutting the above claim or proving reliance. Again, considerations such as these are of doubtful relevance for a non-institutional morality.

sets out to do so. Can we not say that such a player 'threw the baseball in order to throw the baseball 100 miles per hour'? Yet 'threw the baseball 100 mph' is a specification of 'threw the baseball.'

***Reply***: I do not deny the possibility of 'getting a (true) message across' by uttering such sentences. However, it is a banality that we can often get true messages across by uttering false sentences. To take another example related to this paper, if a philosopher is charged with having an ulterior motive for 'doing philosophy,' she may deny the charge by declaring 'Not true; I do philosophy in order to do philosophy (that's why)'. The fact that the speaker is able to get the message across in this way (that is, the message that she is engaging in the activity of philosophy for its own sake and without ulterior motive) gives us no reason to deny that the sentence, construed literally, is false, as it invokes the form of instrumentality where no instrument is required. Additionally, it bears noting that, apart from sentences that approach the idiomatic (as the preceding example perhaps does), we do not actually tend to speak in this way – indeed, I cannot resist inviting the reader to consult their preferred search engine in an effort to find (as I could not) a single (non-idiomatic) instance of a violation of the specification constraint.

Along the same lines, I also concede that where action A' is a specification of action A, and A' fully accounts for O (and O is not overdetermined), it may sometimes be natural to assert 'I did A in order to get O.' (For example, in the earlier baseball example, it is perhaps natural to say that the player threw the baseball in order to win the prize.) However, when such assertions are natural, 'I did A in order to get O' must be understood to mean (to be an ellipsis for) either 'I did A' in order to get O' or 'There is some specification of A – call it $S_a$ – such that I did $S_a$ in order to get O.'

## 4. Accommodating natural unintelligibility

I conclude by considering two different strategies for accommodating the natural unintelligibility finding of Section 2, and by demonstrating the finding's significance. However, it might help to first say a bit more about how I understand the notion of a *social rule (norm) of promising*. Taking the notion of a social rule (alternatively, social norm) for granted, I propose the following account consisting of four conditions. (Since none of the conditions invokes the notion of a promise, the account will facilitate an account of the notion of *promising* in terms of the triggering of social rules of promising.)

(1) *Power-conferring*: social rules of promising are *power-conferring*. To say that a conventional norm is power-conferring is to say that its conditions are designed, in part, to screen for the presence of an intention to modify normative properties in the manner specified by the norm. More exactly, conventional norm N is power-conferring just in case, and because, norm N (i) conditions a normative change on an agent's course-of-conduct C (in circumstances D), and (ii) is adopted or designed with (the partial) aim or goal of making it the case that agents subject to N will perform C (in circumstances D) only if they (the norm subjects) have the aim or goal of making the normative change specified by N.[55] Given such a design, it

[55]The above formulation tweaks Raz's account of legal powers and extends it to the conventional domain. ('Let us agree, then, that an act is the exercise of a legal power only if it is recognized in law as effecting a legal change and if it is so

would usually come as no surprise (and constitute no accident) if most or all of those who satisfy the norm's conditions (i.e., perform C in circumstances D) do so with the aim of triggering the norm. However, it does not follow that a conventional power-conferring norm *cannot* be triggered in the absence of such an aim. So long as the norm does not contain a condition requiring that the agent who performs C has the (objective or subjective) intent to generate the duty, one may trigger the norm by performing C in a manifestly accidental manner, or by C-ing deliberately but without awareness of the normative consequences; alternatively, an agent who is fully aware of the normative consequences of performing C may do so *in spite of* those consequences and not because of them – as when a person of means decides that scratching a back itch with their auction paddle is worth paying an exorbitant sum for an unremarkable painting.[56]

(2) *Duty-incurring:* unlike norms that (e.g.,) confer a power to issue binding commands on others, the obligation that figures in a promissory norm is incurred by the very agent who exercises the power, i.e., by the very agent who performs C (in circumstances D).

(3) *Individually-tailored*: Unlike the obligations typically incurred when one (e.g.,) voluntarily assumes an office with a fixed ('off-the-rack') schedule of associated responsibilities, the *content* of the obligation that one incurs by triggering a promissory rule cannot be inferred merely from the fact that one has triggered such a rule; rather, the content is sensitive to features of the particular acts that trigger the rule (e.g., by uttering 'I promise to *jump in the lake*,' I may incur an obligation to jump in the lake). Significantly, this sense in which the content of the promisor's obligation is 'up to them' is consistent with the idea that promises can be in another sense unchosen: a given promisor (e.g., a consumer buying on credit) might have no control over the terms of the promise that they need to make if they are to acquire significant goods.

(4) *Address*: To qualify as a social rule of *promising*, satisfying the rule's conditions (i.e., performing C in circumstances D) entails that one has in some sense addressed the party to whom the obligation is owed.

recognized because, among other things, it is an action of a type which it is reasonable to expect to be performed for the most part only when the person concerned wants to bring about the legal change'): see Raz, 'Voluntary Obligations and Normative Powers II' (n 2) 82, 83. Although I find Raz's account of legal powers attractive, I am not wedded to it. In particular, a case can be made that the class of (conventional) power-conferring rules should be defined with reference to whether their conditions in fact reliably screen for intent (to a reasonable degree), rather than with whether they are designed to screen for intent. Given the availability of this alternative, I do not ultimately rely on the assumption (reflected in the main text) that all conventional norms have intended designs (i.e., that they are brought into existence for reasons).

[56] I digress to note a significant upshot of this account of normative powers. As a general matter, just like a duress (or knowledge) condition, an intent condition in a rule – power-conferring or otherwise – is outside the scope of an agent's choice: that is, an agent never faces the bare choice (i.e., one where everything else is held fixed) of whether to fulfil the norm's other conditions with or without an intent to incur an obligation, see TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press 2008) 60. Again, this species of deliberative insignificance of intent requirements is common to power-conferring rules and non-power conferring rules alike. For example, if a criminal statute provides that one is criminally liable for a certain act only if one performs the act intentionally, the provision carries no deliberative significance for an agent who is considering whether to perform that act, see GEM Anscombe, 'Two Kinds of Error in Action' (1963) 60 Journal of Philosophy 398, 399. However, given the above definition of normative powers, an intent condition of a power-conferring rule is deliberatively insignificant in a second respect. Assuming that conventional 'power-conferring rules' are designed to be, in Hart's (avowedly oversimplified) formulation, 'recipes for creating duties,' an intent condition is trivially satisfied by whomever turns to the rule with the aim that the power-conferring rule is (by definition) designed to serve, see Hart (n 15) 33. (In formulating this last point, I set aside the issues concerning subjective intent considered in the previous section.).

The natural unintelligibility finding admits of both anticonventionalist and conventionalist accommodation strategies.[57] Beginning with the former, one may hold that even if conventional norms are needed to (rationally) satisfy the conditions of the Aim or Communication Principle, it is one or the other of the latter principles that explains why (and when) one incurs an obligation when one triggers a conventional power-conferring norm. In other words, conventional power-conferring norms are (essential) ladders or *steppingstones* that enable individuals to satisfy the conditions of the nonconventional Aim or Communication Principle; triggering a social promissory norm, for example, gives rise to a (moral) promissory obligation when, and because, in triggering the social rule one has also satisfied the conditions of the Aim or Communication principles. Furthermore, proponents of this view may identify the fact that one has promised with the fact that one has communicated an intention to thereby incur an obligation (or, less plausibly, with the fact that one has acted in order to thereby incur an obligation), rather than with the fact that one has satisfied the conditions of a social or institutional promissory norm.

The most troubling feature of the *steppingstone strategy* is its implication that, apart from cases of overdetermination, a rational agent can incur a promissory obligation only if she is ignorant of the obligation's true grounds. After all, if one believes that invoking the conventional forms will give rise to a moral obligation only because one will thereby satisfy the conditions of the Aim or Communication Principle, then one is in the same position (as far as the argument of §2 goes) as the individual who, without the guidance of a practice, performs an arbitrary act (e.g., kicks a rock) to trigger the Aim Principle. Where there is not an alternative source of obligation, an informed rational agent would not be able to trigger the Aim (or Communication) Principle, and hence would not be able to avail herself of the *steppingstone* strategy.[58]

This is not the only difficulty for the strategy, however. More prosaically, it is doubtful that the Aim or Communication principles provide sufficient conditions for moral obligation (or for promising). It should not require much coaxing to come to see that satisfying the conditions of the Aim Principle is sufficient neither for promising nor for obligation.[59] Consider a conditional duty-imposing social rule that does *not* confer a power – e.g., Prichard's rule that if one 'hurts the feelings of another', then one is 'bound to assuage them so far as [one] can'. Such a norm is not designed to screen for

[57]The terminology will be defined below.

[58]I note that Hume's position on this point was similar. Hume argued, first, that anyone who holds that the act of promising is possible in the absence of a promising convention must identify that act with a certain 'act of the mind' (namely, the willing of an obligation); second, that due to principles governing agency this act cannot be performed either in the absence *or the presence* of a promising convention. That Hume held that the act cannot be performed even against the backdrop of a promising convention not only follows from his two arguments for the 'natural unintelligibility' thesis but is an implication that he appears to embrace. For example, it is notable that the second clause of the following sentence (unlike the first clause) is not modified by the term 'naturally': 'A promise, therefore, is naturally something altogether unintelligible, nor is there any act of the mind belonging to it': see Hume (n 5) 332. Similarly, when he maintains that nobody will be able to show that there is a 'peculiar act of the mind annext to promises,' he does not restrict his claim to promises that are made in the state of nature, see Hume (n 5) 333.

[59]Two points of clarification: First, the argument below can be easily modified to reach other variants of the Aim Principle (dealing with other sorts of normative change). Second, I assume here, and for the remainder of this section, the nonreflexive interpretation of the Aim Principle (see n 41). *This assumption is warranted, as it is not possible to incur an obligation by satisfying the condition of the reflexive version of the principle while remaining ignorant of the source of one's obligation.*

an intent to incur an obligation, and we may suppose that nobody who accepts the rule thinks that having an aim to incur such an obligation is a necessary condition of incurring it. Nevertheless, for one reason or another, one may decide to satisfy the conditions of such a rule (hurt someone's feelings) in order to incur the obligation. In such a case, nobody would say that such a person has made a promise or exercised a normative power, and if one succeeds in incurring an obligation in this way, this would be owing entirely to one's having satisfied the conditions of the rule one intended to trigger, and not to the fact that one triggered the Aim Principle by acting with the relevant aim.[60] This is so even though there is, in general, no bar to the incurrence of a redundant promissory obligation, i.e., a promissory obligation to perform an act that one is independently obligated to perform. Furthermore, if, despite one's best efforts, one does not succeed in triggering the duty-imposing rule, then one ordinarily remains unbound, even if one has satisfied the conditions of the Aim Principle.[61]

Likewise, we can throw doubt on the claim that the conditions of the Communication Principle are sufficient, either for promising or for moral obligation.[62] As before, consider a social norm that is not power conferring, but that ascribes a duty to whoever satisfies certain conditions (e.g., anybody who spills wine on another is bound to pay for their dry cleaning). It is possible that one may intentionally satisfy the conditions of such a norm not only with the aim of incurring such an obligation to some person, but also with the aim of rendering it overt to that person that this is one's aim. Such an individual neither promises nor incurs a promissory obligation, despite having communicated in the same sense that Herod communicated to Salome that John the Baptist was dead by presenting her the saint's severed head on a silver platter. (In Grice's analysis, 'Herod intended to make Salome believe that St. John the Baptist was dead and no doubt also intended Salome to recognise that he intended her to believe that St John the Baptist was dead'.)[63] To be sure, Grice laboured to distinguish such communicative intentions from another kind more central to his interests – he was primarily interested not in 'showings' but in 'tellings,' where the speaker's intentions were not simply made manifest but were intended to play a central role in the inferences that the hearer was intended to draw – and a proponent of the steppingstone view might appeal to this distinction to restrict the sense of 'communication' that figures in the Communication Principle, thereby deflecting such counterexamples. However, it is highly doubtful that the differences between the two kinds of communicative intentions have the sort of moral significance that they would need to possess to vindicate such a restriction. As long as

[60]The point that such a case does not involve the exercise of a normative power is often made in the normative power literature, e.g., Raz, 'Voluntary Obligations and Normative Powers II' (n 2) 81; and Victor Tadros, 'Appropriate Normative Powers' (2020) 94 Aristotelian Society Supplementary Volume 301.

[61]To be sure, it is possible that a failed attempt to humiliate or harm someone may generate secondary duties, but even here the ground of the secondary duties is the attempt to harm or humiliate, not the attempt to incur an obligation. Additionally, I note that the argument in the paragraph is not diminished if the Aim Principle is revised to require apparent (i.e., objective) intent rather than actual (i.e., subjective) intent. And the same is true of the argument against the Communication Principle in the next paragraph.

[62]I digress to observe that communication (in the broadly Gricean sense) is not, in general, necessary for the exercise of conventional powers. Consider someone who deliberately exercises a power to vote on some important matter by following some mechanical procedure (e.g., pushing a button in a private booth). While such a voter intends to cast a vote, they often have no reason to care whether this intention is recognised by anyone – for example, it may be no part of the vote-counting procedure to determine the intentions of a voter – and hence will not aim (or appear to aim) to achieve such recognition.

[63]Paul Grice, *Studies in the Ways of Words* (Harvard University Press 1989) 218.

one is *openly* aiming not only to incur an obligation (by performing some act), but also to make such an intention manifest to the person to whom the obligation is owed, why should the inferential route by which the latter is expected to reason their way to the various conclusions (about the communicator's beliefs, intentions, and obligations) be thought to carry such normative significance?[64]

Given the weaknesses of the steppingstone strategy, the natural unintelligibility finding better supports a *conventionalist* theory, according to which the making of a promise *just is* the triggering of a social or institutional rule of promising.[65] Of course, a proponent of such a theory is left with the independent question of whether (and under what conditions) such rules are morally binding. Since this question constitutes another topic, I shall not attempt to answer it here. I will instead close by making explicit one important normative consequence of the 'natural unintelligibility' finding, one that is independent of the choice of accommodationist strategies considered in this section (*steppingstone* or *conventionalist*). If certain moral rights or obligations presuppose or depend on the ability to exercise normative powers, and if (as I've argued) the latter ability depends on conventional power-conferring norms, then the existence of the moral rights or obligations depends on the existence of the conventional norms. Setting promising to one side, we may briefly illustrate the point with reference to the example of private property. It is natural to think that property rights would not be morally binding if the owner could not exercise certain powers with respect to those rights – if not the power to transfer ownership to another, then at least the power to permit non-owners to interact with the property in ways that would otherwise be wrongful. If the owner had no ability to grant such permission at will, then the obligations corresponding to her right, binding on all non-owners, would not be waivable by the owner.[66] If property rights in realty were to assume this form, they would in effect impose a sentence of solitary confinement on owners, at least where all or most land is privately held. (If such property rights were morally binding, dinner 'guests' and hired labourers would act no less wrongly than the rankest trespasser.) On the assumption that such 'rights' would *not* be morally binding, the natural unintelligibility thesis entails that no one can have morally binding property rights in the absence of a social or institutional property practice that confers on them the relevant powers. While the question of which normative domains depend on powers is a substantive one, and lies

[64]To be clear, my point is that it is ad hoc to restrict the Communication Principle to 'tellings' rather than 'showings' as those notions are understood by broadly Gricean accounts (where the distinction is drawn at the level of communicative intentions). For incisive critical discussion of this aspect of the Gricean program, see Richard Moran, *The Exchange of Words: Speech, Testimony, and Intersubjectivity* (Oxford University Press 2018) ch 6.

[65]For present purposes, we may define conventionalism about promising as the view that identifies promising with the triggering of a social rule of promising (a species of social rule that we were able to characterize without appealing to a prior notion of promising). According to a weak version of Conventionalism ('Count-as Conventionalism'), while the prevailing social rules of promising determine whether a given utterance qualifies as a promise to perform some course of conduct, once it is determined that such a promise was made, nonconventional morality takes over from there to determine the (genuine) normative upshot of the promise. By contrast, a stronger version of conventionalism ('Thoroughgoing Conventionalism') holds that the normative upshot of one's promise to Φ is (subject to moral constraints) also determined by the conventional rule that one has triggered – for example, the particularities of the rule's provisions related to outsourcing, delegation, defeasing conditions, etc. may be binding in morality (subject to moral constraints). I defend the stronger version elsewhere, see Jed Lewinsohn, 'By Convention Alone: Assignable Rights, Dischargeable Debts, and the Distinctiveness of the Commercial Sphere' (2023) 133 Ethics 231.

[66]As my aim here is schematic, I set aside the possibility (worthy of investigation) that such notions as the owner's acquiescence can be appealed to in lieu of their grant of permission.

beyond the scope of this paper, if there are any such domains, then the natural unintelligibility conclusion is of considerable normative (and not just theoretical) significance.

## Disclosure statement

No potential conflict of interest was reported by the author(s).