3

CONSENT AS A NORMATIVE POWER

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3.1 Introduction
Acts of consent effect changes in the normative situations of both their authors and their addressees. For instance, an act of consent may bring about that a certain previously impermissible action or activity becomes permissible. Yet it can appear mysterious how consent accomplishes this, since it seems that the giving of consent need not change anything about the inherent desirability of the actions and activities whose normative status it nevertheless affects. This is perhaps especially salient if we conceive of consent as a communicative act, which need not be accompanied by any desire or intention that the consented-to action or activity take place. What could explain how acts that do not change the non-normative situation in any extensive way can have such far-reaching normative consequences?

The way in which consent seems to effect significant normative changes by comparatively minimal means has led many authors to compare consent to promising. A promise, too, can bring about far-reaching changes in both the promisor’s and the promisee’s normative situations through a simple declaration. Perhaps the same type of explanation is available for both kinds of phenomena. This article considers one such candidate explanation, which interprets promising and consenting, along with other kinds of normatively consequential communicative acts, as exercises of what is often called normative power. Normative power accounts have long been among the main contenders for explaining the normative effects of promising, but they have received somewhat less attention in the context of debates about consent.

Sections 3.2 and 3.3 of this chapter are devoted to explaining the concept of normative power, starting with the more specific case of legal power and then turning to generalizations and refinements of that concept aimed to make it applicable outside the legal sphere. Section 3.4 relies on this explanation to ask whether the ability to consent should be thought of as a normative power, and section 3.5 considers some further implications.

3.2 Normative powers: what they are
Normative power is a certain type of agential ability. As a first pass, it can be characterized as an agent’s ability to bring about normative changes in the world in a particular way. That agents are able to bring about normative changes in the world in some way or other, and to do so intentionally,
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is not a contentious claim: many things that we are able to do have normative consequences because they affect non-normative features of the world, and the normative situation partly depends on those non-normative features. But not all ways of changing the normative situation are exercises of normative power in the sense at issue here. The main burden of a more precise explanation of the concept of normative power thus lies in spelling out the qualifier “in a particular way”.

Some of the most familiar instances of normative power are found in the legal sphere. Since they are in the first instance abilities specifically to affect the legal situation (that is, the normative situation concerning legal norms), and since they are themselves created by the law, they are known as legal powers. Consider the authority to appoint someone to an office. This is an ability, conferred by law, to bring about a change in the appointee’s legal position, by investing her with certain legal rights and obligations (and perhaps also with other so-called Hohfeldian incidents, such as powers, liabilities, and immunities). The authority to appoint is thus a legal power. Similarly for many other legal acts: being able to perform them presupposes various legal powers. These include, for example, powers of legislation and adjudication, as well as the power to make a will or to enter into a contract.

The canonical early analyses of normative powers were analyses of legal powers. The concept of normative power was first generalized to non-legal contexts in writings by Joseph Raz (1972, 1975) and has since acquired wide currency (Wellman 1995, 1997; Watson 2009; Owens 2012; Westlund 2013). A paradigmatic instance of non-legal normative power is the power to promise. It seems that the ability to make promises is an ability to change one’s own and others’ (non-legal) normative situation in distinctive respects: the making of a promise places the promisor under an obligation to do as promised, and it also confers a claim right (to performance) and a power (of release) on the promisee. These normative effects seem to be brought about simply through an act of communication (perhaps coupled with acceptance), rather than by altering the properties of the promised act in more significant ways that might explain its becoming obligatory – for example, by making it the case that some harm would eventuate if the act were omitted.

Again, that people should be able to bring about changes regarding their own and others’ rights and obligations in some way or other is hardly remarkable. All that is needed to account for this broad ability is the observation that deontic facts about rights and obligations often depend on non-normative facts, and that agents can change those non-normative facts through their actions. For instance, there may be a general obligation to do something if one has intentionally invited others to rely on one’s doing it, and if they will as a result be worse off if one fails to do it than they would have been if one had not invited them so to rely. If there is any particular interest in the idea of normative power, it must be because the way in which the normative situation is changed through the exercise of such powers is more direct than in the case just given, and does not rest on comparable changes to the non-normative situation.

This takes us back to the proviso introduced at the beginning of this section by the place-holder phrase “in a particular way”. Among philosophers who believe that the exercise of normative power is a distinctive phenomenon, we find a number of proposals about how to spell out this proviso. Among the most developed of these are ones by Joseph Raz, David Enoch, and David Owens. Raz (1972) suggests that a first step toward capturing the distinctiveness of normative power is to require that the normative effects brought about through exercises of normative power should be related to the acts constituting such exercises in a specific way: they must be the “results” of such acts rather than just “consequences” of them. If I do something that leads you to make a promise, I have in a certain sense brought it about that you are now obligated to do
as you promised. But your obligation is merely a consequence of my action. The very same action on my part could have failed to bring about the obligation, since it could have failed to bring about your promise. Not so with respect to the relation between your act of promising and your obligation: the obligation is related to the act of promising as a result, insofar as performing that very act could not have failed to bring the obligation into existence.  

While this requirement succeeds at distinguishing exercises of normative power from many other ways of influencing the normative situation, it does not by itself suffice to demarcate an intuitively plausible concept of normative power. If I intentionally wrong someone, I thereby incur new obligations toward that person: to apologize, compensate them, or make amends in some other way. In terms of the distinction just highlighted, those new obligations are “results” rather than merely “consequences” of my action. My action does not contingently cause their existence, but is part of some type of non-causal explanation of their existence. Nevertheless, we may not want to say that we have a normative power to create duties to apologize and to compensate. This suggests that further refinement is needed to arrive at a satisfactory characterization of normative power.

Raz proposes that a second necessary condition for an act’s counting as an exercise of normative power is that the explanation of why the act affects the normative situation in the relevant way must be of a special sort. As he suggests, “it is the nature of the reasons justifying the norm [e.g., the obligation created by a promise] which determines whether acts affecting its existence or application are power exercising acts” (1972: 95). Some obligations are justified or explained by reference to the desirable consequences of people’s discharging them, that is to say, the desirability of the actions required by them. In the terminology used by Raz, the justification of such obligations is “content-dependent”. Other obligations are justified instead by the fact that they “ought to be respected as created and regulated by human action”, which makes their justification “content-independent” (Raz 1972: 95; Raz 2009: 210–1). For example, if promises are exercises of normative power, then the obligation created by a promise does not rest on the independent desirability of the promised act. Promissory obligations are instead “justified by the justification of the general norm that promises (. . .) ought to be respected; they are not justified by giving reasons for the desirability of each obligatory act in its particular circumstances” (Raz 1972: 98). Unlike, say, an obligation to help someone in danger because one is the nearest person around – an obligation one may have intentionally taken on by placing oneself there – a promissory obligation not only happens to be created by human action but is binding precisely because it was so created, rather than being binding because of the consequences of discharging it.

More recent accounts of what normative power consists in are found in work by David Owens and by David Enoch, among others. Owens (2012: 4) writes that in exercising a normative power, “I change what someone is obliged to do by intentionally communicating the intention of hereby so doing”. He contrasts obligations resulting from exercises of normative power, in which “the speaker must present himself as intending (. . .) to change the normative situation by means of this very communication”, with “obligations [which] may be unintended side effects of what we do, and no part of our plan of action” (2012: 5). Thus, in contrast with Raz’s account, it is not part of Owens’ definition (though it is part of his fuller account, on which more below) that normative power be justified or explained in any particular way.

Enoch (2014) offers an analysis of a phenomenon that he calls “robust reason-giving”, which he suggests is the kind of thing that possessing a normative power allows one to do. Robust reason-giving takes place when an agent A succeeds in realizing a set of intentions whose content is as follows: “(i) A intends to give B a reason to φ, and A communicates this intention to B; (ii) A intends B to recognize this intention; (iii) A intends B’s given reason to φ to depend in an
appropriate way on B’s recognition of A’s communicated intention to give B a reason to φ” (Enoch 2014: 7–8; cf. also Enoch 2011). In order for robust reason-giving to take place, these intentions must succeed and they must do so partly because of the existence of an independent “general” reason that B has – namely, a reason to φ if the intentions in (i) through (iii) are in place. For instance, A’s request that B should φ will succeed only if its addressee has a general reason to comply with A’s requests. To assert that such a general reason exists then seems equivalent to ascribing to A the normative power to make (successful) requests.

Owens’ and Enoch’s definitions are less committal than Raz’s concerning the justification (or the conditions of existence) of normative power. For that reason they fail to rule out as exercises of normative power certain cases that are plausibly excluded by Raz’s definition with its built-in reference to the value of such powers. Some person A may be able to change what some person B is obligated to do, simply by intentionally communicating the intention of hereby so doing, where the explanation of her ability to do so is that C has publicly threatened to kill D unless B complies with A’s communication. Should we say that A now has normative power? Are normative powers the kinds of things that can be created through coercive threats? Intuitively, the full explanation of B’s obligation in this type of case seems to be of the wrong kind for regarding that obligation as created through the exercise of a normative power, although on Owens’ account we might so regard it. A similar worry arises for Enoch’s characterization of robust reason-giving. It seems that some further constraint is needed on the type of “general reason” that must be in place in order for the realization of the intentions in (i)–(iii) to constitute a case of robust reason-giving. In a case like the one just described, where the “general reason” consists simply in some adverse consequences that would follow from B’s not φ-ing under conditions in which A’s non-normative intentions are realized, we would hesitate to classify the realization of A’s normative intentions – the normative change brought about by A’s communication – as resulting from the exercise of a distinctive kind of agential ability.

There would be little point in discussing these alternatives if they merely concerned the definition of a philosophical term of art. The interest in the concept of normative power, if any, is that its features help illuminate a certain shared structure of normative explanation underlying a number of familiar phenomena. Before I turn in section 3.4 to the question of whether the concept of normative power is useful for understanding the phenomenon of consent in particular, I will first briefly consider what could entitle us to believe that people do in fact possess normative powers, i.e., that the concept is sometimes instantiated.

### 3.3 Normative powers: what explains them

Legal powers are a special case of normative powers. What makes them specifically legal powers is not only that their normative consequences are specifically legal consequences, but also that their existence is explained by reference specifically to legal rules. By contrast, normative powers that are not legal powers have normative effects that are not legal effects, and their explanation – or a demonstration of their existence – will have to appeal to something other than legal rules. Take again the case of promising. When a person promises to φ, she thereby places herself under a (non-legal) obligation to φ. But what explains her ability to do so? What makes it the case that she has this power?

We have seen that the demarcation of a sufficiently distinctive concept of normative power already requires us to say something about what explains the possession of such powers. On Enoch’s account, there must be a “general reason” (and we might add: of a suitable kind) that is instantiated by the reason created through an instance of robust reason-giving. Depending on the case, this general reason will be a reason to do what one has promised, or to do as requested,
or to do as one was ordered. But Enoch does not offer any details as to what such a reason may consist in. More generally, we can say that, in order for someone to have a normative power, there has to be some true normative principle that assigns the relevant kind of normative role to power-exercising acts. But what explains the truth of such principles? The answers that have been offered to this question are broadly of two types, one appealing to the value of normative power and the other to its constitutive role in moral autonomy.

A first type of answer is elaborated by Raz and Owens. Raz (1977) supposes that what establishes the existence of some particular normative power is that it is valuable that people should possess that power. For instance, the existence of the power to place oneself under obligations through promising is established by pointing to the fact that the possession and exercise of that power allow people to establish and maintain valuable kinds of special relationships with others. The power to promise is explained by the fact that “it is desirable to make it possible for people to bind themselves and give rights to others if they so wish” (Raz 1972: 101). Similarly, Owens (2012) holds that a normative power exists only if it is non-instrumentally good for us that the existence (or absence) of certain obligations should depend on our exercising such a power. When this condition is met, we can be said to have a “normative interest” that is served by our possessing that power. On Owens’ view, the existence of such an interest is not sufficient to show that we do in fact have the requisite power. A further necessary (and jointly sufficient) condition is that there is an established social practice of recognizing the power in question (2012: 9–10).

A second type of answer to the question of what grounds or explains normative powers has been offered by Seana Shiffrin, and related proposals are found in Thomson (1992), Hurd (1996), and Chang (2013). In the context of a discussion of promising, Shiffrin (2008: 500–2) asks what could explain the “moral power” that underlies “the generation of morally significant relations merely through the expression of the will to do so”, and she argues that this power “flows (. . .) naturally from a plausible understanding of a meaningful right of autonomy”. We may be entitled to assume that Shiffrin believes that this “right of autonomy” is of value to us, but this further assumption is not invoked by her to explain why we have such moral powers. Rather, “[t]he idea that an agent can intentionally form an obligation through the exercise and expression of her will alone (and not by first transforming the state of affairs around her) comes part and parcel with any plausible conception of an autonomous agent” (Shiffrin 2008: 500). Insofar as we think of ourselves and others as autonomous agents, we are thereby committed to ascribing to them promissory powers (and that is to say, to believing the relevant normative principle).

A discussion by Gary Watson straddles the two types of answer just outlined. Watson agrees with Raz and Owens that the value of normative powers, and our corresponding interest in having them, plays a role in explaining them. Thus, promises bind partly because of the “value of being in a position to bind oneself by making assurances” (Watson 2009: 164). Yet, in Watson’s view, this is insufficient grounds for being entitled to believe that we have such powers. What needs to be added for a satisfactory explanation is that the relevant powers are “integral to our conception of our moral standing (. . .) as autonomous beings” in such a way that the normative principles that entail their existence pass a contractualist test, being principles that no one could reasonably reject (Watson 2009: 164–5). Considerations of value and considerations of moral autonomy are two necessary and jointly sufficient components of a justification of normative power.

3.4 Is consent a normative power?

A number of authors have taken the view that acts of consent are exercises of normative power. We can call this the normative power view of consent, or the normative power view for short.
Writers on consent who have endorsed this view either at length or in passing include Thomson (1992), Wellman (1995, 1997), Wertheimer (2000), Shiffrin (2008), Watson (2009), Owens (2012), Dempsey (2013), Enoch (2014), Dougherty (2015), and Manson (2016). Are they right in thinking that we exercise a normative power when we give our valid consent? And if they are, does this help us answer any of the questions surrounding consent, or contribute to settling any of the disputes over the nature and explanation of consent?

Before looking at some considerations in favor of the normative power view, consider first the question of whether the effects of consent are of the right sort for them to result from the exercise of normative power. It seems that they are. There is broad agreement among philosophers that at least core cases of valid consent have the effect of creating permissions. Consent makes otherwise (pro tanto) prohibited acts (pro tanto) permitted, removing the wrongfulness (in the relevant respect) of acts that would otherwise constitute wrongings (Thomson 1992: 348; Westen 2004; Shiffrin 2008: 501; Watson 2009: 160; Owens 2012; Dougherty 2015; Manson 2016; Schaber 2016). This may be because to consent is to waive a claim-right (Thomson 1992: 350; Wellman 1997: 21; Owens 2012; Schaber 2016), or because consent removes certain reasons against an action (Wellman 1995: 66), or because consent permits its recipient to exclude certain reasons from deliberation (Dempsey 2013).

Beyond permission-creating acts, it may be that some acts that give rise to obligations or liabilities for those who perform them – and perhaps also to claim rights, liberties, or powers – also qualify as acts of consent. Weale (1978: 68), Thomson (1992: 352), Raz (1986: 82), and Simmons (2010: 305) are among those who endorse some version of such a broader conception of consent. For instance, perhaps one can consent to being bound by the terms of a contract (thus incurring an obligation), or consent to deferring to another person’s decisions (thus conferring on them a normative power and incurring a corresponding liability), or consent to assuming a certain office (thus acquiring a range of corresponding rights and obligations). And by consenting to a duty-imposing act on the part of some other person one may not only be permitting that person to perform the act but first enabling her to do so, thus giving her a normative power. For example, by consenting to take B as her spouse, A does not simply make it permissible for the officiating party C to impose spousal duties on her by declaring A and B married, but rather she first confers on C the normative power to do so, and thereby incurs a corresponding liability. All these putative normative effects of consent seem to be of the right sort to make consent a candidate for a normative power. But is it one?

On the broader view of consent just outlined, some acts of consent – for instance, those in which one consents to being bound by the terms of an agreement – may simply be cases of promising. If promising, in turn, is an exercise of normative power, it follows that consent is at least sometimes an exercise of normative power. Yet for the general purpose of assessing the normative power view of consent, it may be useful to remain neutral, as between this broader conception of consent (which may best capture the extension of “consent” in everyday parlance) and the narrower, more regimented conception – shared by a number of philosophers – that limits consent to the creation of permissions.

A number of considerations speak in favor of the normative power view. One is that it allows a unified explanatory treatment of different normative phenomena that seem to play structurally similar roles in our practical lives and our practical reasoning. Like promising, the giving of consent is presented as an expression of the intention, sometimes successful, to bring about a relatively important normative change through the performance of an act that is itself relatively trivial. Both promising and consenting, and perhaps other types of acts as well, can plausibly be regarded as involving “the generation of morally significant relations merely through the expression of the will to do so” (Shiffrin 2008: 500). To say that they can be
plausibly so regarded is not to say that all agree in regarding them thus. Those who think of consent as a mental attitude may be especially reluctant to stress the analogy between consenting and promising, as will those who, like Scanlon (1998), aim to explain the normative effects of promising without recourse to the idea of normative power.

A second consideration in favor of a normative power view of consent is that it allows us to account for the unity of the phenomenon of consent itself. Suppose we were to think of consent not as an exercise of normative power, attended by the generic normative consequences of that exercise – say, permissibility – but instead as a class of acts that have broadly similar non-normative features and similar normative consequences, but whose normative consequences are explicable in light of general normative principles which themselves contain no reference to the value or autonomy-constituting role of a power of consent. The burden of any such approach would be to explain why the consent-constituting acts or attitudes should have the same kinds of normative implications across such a large variety of otherwise quite heterogeneous kinds of situations. Shouldn’t we expect the normative import of the relevant acts or attitudes to be highly variable depending on the specific circumstances, if that import is not one that they have simply qua exercises of consent?

Third, acts of consent can plausibly be thought to meet Raz’s two necessary and jointly sufficient conditions for counting as exercises of normative power. Regarding the first condition, it seems plausible – although, again, not trivial – that consent changes the normative situation not by causing some state of affairs that has the requisite normative import, but rather by normatively resulting in such a state of affairs, by grounding or partly constituting it. In giving our consent, we (and the recipients) are not simply hoping that we will succeed in contingently changing the non-normative facts in such a way as to make the consented-to act normatively innocuous. Rather, we give and receive consent in the belief that that is all it takes to ensure the intended normative effect.

Regarding Raz’s second condition, the content-independence of justification, the matter is less clear. Some accounts of consent, especially some of those that conceive of consent as a mental attitude, are most naturally interpreted as holding that the normative result of A’s consenting – say, that B is now permitted to φ – is explained by the difference consent makes to the value or desirability of B’s φ-ing. On such accounts, the normative difference made by consent is not content-independent, and thus consent would not be a normative power in the relatively specific sense discussed above. At the same time, many accounts of consent do explain its normative results in a way that meets the condition of content-independence. Consent renders actions permissible, on those accounts, independently of any difference it may make to the value of those actions. This is consistent with acknowledging that consent may make various sorts of difference to the desirability of actions. One of the attractions of the normative power view is that it allows us to clearly distinguish between these contingent normative effects of acts amounting to consent, on the one hand, and their content-independent normative results qua acts of consent, on the other.

Fourth, like other putative normative powers, our ability to consent is one that we have reason to value. As Owens (2012) has argued, the ability to issue permissions, and to do so independently of whether we desire the performance of the act we thereby permit, is an integral component of many of our valuable relationships with intimates as well as with strangers. We thus have “permissive interests” (Owens 2012: 172–82; for similar considerations see also Raz 1986: 86–8). And Dougherty (2015: 244) has highlighted the ways in which consent enables intimacy and the shared use of property and facilitates interaction. It is also plausible, as Shiffrin (2008) and Ripstein (2009) do among others, to regard the ability to consent as a central aspect of our self-conception as autonomous agents, whether or not we believe this
kind of autonomy to be valuable. Thus, if the possession of normative powers can be established in one of the ways discussed earlier, the normative power view of consent would allow us to explain why we are able to bring about the normative effects we do in giving our consent.

While consent thus seems in many respects to fit into the mold of a normative power, some may also see reasons to be wary of the normative power view. I will mention two main concerns here.

The first concern, already broached above, is that the normative power view of consent is unlikely to be neutral vis-à-vis one of the most contested questions regarding the nature of consent – namely whether the normative effects of consent-giving result (at least partly) from the performance of some communicative or expressive act, or rather from the presence of a suitable mental state or attitude. The normative power view naturally aligns with a performative or communicative conception of consent. On the accounts of normative power canvassed in section 3.3 above, exercises of normative power consist in intentional acts and, what is more, in acts that communicate the intention to affect the normative situation in the relevant way. To view consent as a normative power is therefore to emphasize the agential aspect of consent, the fact that it is an ability that persons exercise when they intend to bring about certain normative results. But the mental attitude that does all the normative work according to attitudinal theories of consent need not be, and perhaps is not most naturally, thought of as an intentional act, or as resulting from an intentional act. It may be that one could develop an attitudinal conception of consent that embraces the model of normative power, on the basis of a suitably adapted conception either of the relevant mental attitude or of the valuable ability in question. But on the face of it, the attitudinal theory and the normative power view do not seem to be well matched. Whatever reasons there are for accepting some form of an attitudinal theory are thus likely to be at the same time reasons against the normative power view. Of course, the reverse holds as well.

A second concern rests on the observation that consent may be given through actions undertaken for reasons that are quite independent of its normative effects. For example, it may be that we consent to being subject to the rules of a public transportation system simply by entering a subway station in the knowledge that those rules apply to all those who enter (cf. Raz 1986: 83–4). But is it true that entering a subway station is an exercise of normative power? That seems doubtful. Whatever the explanation of the fact that entering a subway station has this normative result, it does not seem to rest on the desirability of persons being able to bring about this normative result in this fashion. More plausibly, the explanation is content-dependent: it turns on the fact that conformity with those rules on the part of those located in the station is on the whole desirable. This species of consent thus does not conform to the characteristic pattern of explanation by which we demarcated exercises of normative power. If consent encompasses cases like the one just described, the normative power view seems inadequate as a general characterization of consent.

If one or both of these concerns turned out to be well placed, this would not entail that the normative power view of consent is on the whole misguided. Rather it would restrict the scope of that view. It is hardly far-fetched to think that the term “consent”, as used in our complex and heterogeneous moral and legal practices, denotes more than just one single normative phenomenon, and that it may require disambiguation in contexts where we are looking for a detailed account. There may be a number of different ways in which we can change our normative situation, all bearing some resemblance to each other but subject to different kinds of explanation. The normative power view may help us isolate one of those ways even if it does not explain all of them.
3.5 Further questions

Accepting a normative power view of consent, or of one species of consent, leaves us with a number of further questions.

One set of questions concerns the implications of this view for on-going debates about the nature of consent: how it is instantiated, what kinds of acts can be consented to, under what conditions consent is valid or effective, and what it could mean to speak of hypothetical, presumed, tacit, and implied consent. The goal of this article has been to sketch the normative power view in general outline rather than to apply it to these substantive issues. We can suspect that the normative power view will be neutral with regard to some of those questions, and that it will favor or exclude certain answers with respect to others. One example of the second sort has been the issue of the “ontology of consent” addressed in the previous section. But, concerning a number of other issues, the details of a normative power account of consent will simply be answerable to the results of substantive normative reflection about consent. Normative powers have boundaries and possession conditions, which we discover either by thinking about the value of these powers or by thinking about their specific role in our self-conception as autonomous agents.¹³

This, then, is a second set of questions arising with respect to a normative powers account, concerning not its conceptual implications but rather its normative implications and the constraints imposed on it by first-order normative judgments. In this respect, the normative power view supplies a framework for thinking about the role that consent plays in our lives, by thinking about what could justify taking the normative situation to be sensitive to specific kinds of communication in systematic ways. This inquiry points in two interrelated directions. On the one side, we want to find out which values or self-conceptions are served by the power to consent. On the other side, we want to know what exactly the power to consent is a power to do, who has it, and to what constraints its exercise is subject. These two lines of inquiry are interrelated, and no strict priority can be assigned to either. The value of the normative power to consent has to guide our reflection about the content of this power, and vice versa.

In carrying out these more detailed investigations, it may prove useful to relate the power of consent back to the Hohfeldian context of legal incidents. Doing so alerts us to the fact that the question of whether we have the power to bring about a certain result – say, to create a permission – is distinct from the question of whether we are at liberty to use or refrain from using that power, or whether we are under an obligation to use or refrain from using it in certain ways. Thinking about consent in the context of the Hohfeldian framework also reminds us that powers are correlated with liabilities. To the extent that we and others have the power to make otherwise impermissible acts permissible, all of us are also under corresponding liabilities to have some of our obligations taken away or annulled at the say-so of others. These liabilities may be of interest in their own right, most saliently when it comes to explaining the existence of the correlative normative power. In thinking about the value of the power to consent, we should consider the possibility that it consists not just in its benefit to the power-holder but also in the way it serves the interests of those who are under corresponding liabilities.¹⁴ In these ways, there is reason to think that the normative power view can be fruitful for understanding what our ability to consent amounts to and what its grounds are.¹⁵

Notes

¹ The most influential discussion is by Hohfeld (1913), and a detailed earlier account is found in Bentham (1970). For a summary of the latter, see Hart (1972). Other accounts of legal power (sometimes also referred to as “legal competence”) are found in twentieth-century legal theorists such as Salmond.
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The term “normative power” already occurs in Von Wright (1963), where it seems to denote a similar phenomenon. But one cannot be quite sure, as the presentation is overly abstract and contains no reference to the earlier treatments by authors such as Hohfeld and Kelsen. Arguably, the concept of normative power was also developed, contemporaneously with Hohfeld’s influential work, in Reinach (1922).

To be sure, promises often generate reliance, and the violation of the corresponding expectations may be a harm that could explain the obligation to perform. But this does not seem to be a necessary aspect of all promises. A more sophisticated attempt to explain the bindingness of promises by recourse to the value of assurance can be found in Scanlon (1998: 295–327). For an overview of the difficulties encountered by this approach, see Heuer (2012) and Pratt (2013), and for a “hybrid” account that combines elements of Scanlon’s proposal with elements of an explanation in terms of normative power, see Kolodny & Wallace (2003). For criticisms of the normative power approach to explaining promissory obligation, see Pratt (2007).

There are others. For instance, MacCormick (2008: 97) holds that “acts of exercising [normative] power are acts which necessarily and intrinsically invoke the [power-conferring] rule in some way”. And Wellman (1997: 93), who uses the terminology of “ethical power” or “moral power”, holds that such a power consists in “the ethical ability to perform some act that has specific ethical consequences and that is normally performed in order to bring about some such consequences”.

This terminology, and the conceptual distinction, is adopted by Raz from Kenny (1975). Raz’s own gloss on this distinction is that the exercise of a normative power affects the normative situation “normatively and not causally” (1972: 94). As a number of writers have remarked, the distinction here is reminiscent of the distinction between the illocutionary and the perlocutionary effects of speech acts (cf. Weale 1978). Readers are invited to consider the import of this parallel, and whether the result of the exercise of a normative power may simply be identical with the illocutionary effect of the speech act whereby that power is exercised.

Essert (2015) makes the plausible suggestion that the “results in” relation invoked here is a type of grounding relation.

The term was originally introduced by Hart (1958) as part of an explanation of the concept of obligation. According to him, a reason for action is “content-independent” when it “[functions] as a reason independently of the nature or character of the actions to be done” (Hart 1982: 254). On the challenges of explaining what content-independence amounts to, see Markwick (2000) and Sciaraffa (2009).

To say that the obligation does not derive from the consequences of the act of discharging it is not to say that the obligation is independent of the act’s value. On one reading, the condition of content-independence does not require dispensing with the idea that reasons for action derive from the value or desirability of the relevant actions, and some recent accounts of normative power that resemble Raz’s in other respects do not embrace this implication. For instance, Edmundson (2010: 184), while retaining the terminology of content-independence, takes exercises of “moral power” to “impart” to another action a value that it would not otherwise have, and which might easily have been imparted to an action of a wholly unrelated kind”. Cf. also Wellman (1995, 1997).

Explanations along broadly Razian lines are also found, for instance, in Estlund (2009) and Edmundson (2010). Another account is offered by Chang (2013), who adopts the term in the context of an avowedly meta-normative explanatory project. Her explanandum is the normative significance of personal commitments, rather than the nature of interpersonal transactions such as promises, orders, requests, or communications of consent.

As stated, the conditions are meant to capture only the specific cases of requests and authoritative directives. If the account is to be made to work as an account of promissory reasons, which after all are created by an agent for herself, the first, fourth, and sixth occurrences of “B” in the schema will have to be replaced by “A”. Adapting Enoch’s account to explain the phenomenon of consent would require yet more far-reaching modifications.

Not only may consent, understood as the exercise of a normative power, have consequences — as opposed to direct normative results — that make the consented-to action less undesirable, it may also give rise to reasons against an action, or remove reasons in favor of it. Think, for instance, of a case where A accepts B’s bet that A will not ϕ without C’s consent. A then has a (financial) reason to ϕ that is removed when C consents to A’s ϕ-ing. The fact that an action has been consented to may also give rise to reasons against that action: for example, if performing the action under those circumstances would contribute to fostering a manipulative habit in the consenting party.
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12 For defenses of the latter view, see Alexander (1996), Hurd (1996), and Westen (2004). For a recent critical discussion, see Healey (2015).

13 Thus, to say that their justification is content-independent does not entail that it is entirely content-insensitive. This point is emphasized by Raz (2009) and Watson (2009), among others.

14 Here we should be careful not to say that the existence of the liability explains the existence of the power, since both consist in one and the same normative state of affairs. The relation between Hohfeldian legal correlatives is not a relation of grounding or explanation but one of identity. But this does not bar us from thinking independently about the respective value of two legal correlatives.

15 For valuable comments on an earlier draft of this chapter, I am grateful to Jan Gertken, Andreas Müller, and Daniel Viehoff.

References

Consent as a normative power


Further reading

An influential exposition of the concept of normative power is provided in Raz (1975), and a useful recent discussion of the concept of legal powers is found in Essert (2015). For an exemplary attempt to account for the normative effects of one type of putatively power-exercising act – promising – in a way that does not rely on the concept of normative power, see Scanlon (1998). Heuer (2012) offers a critical survey of the debate over the normative power approach to explaining promissory obligation, which is suggestive of corresponding options regarding the explanation of consent-based permission. Some recent substantive accounts of consent as a normative power are found in Dempsey (2013), Dougherty (2015), and Owens (2012: 164–86).

Related topics

Ch.5 Consent and wronging a person
Ch.11 Moral obligations and consent