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## Appropriate Normative Powers

Victor Tadros\*

A person has a normative power if she has the ability to alter rights and duties in the right way. I'm going to say that the right way is 'directly'. It is hard to characterise what 'direct' means here, and I will say more about that in a moment. But at least something like this is true: it is sufficient for a person to alter rights and duties directly that she intentionally and sincerely communicates to the appropriate people that she does so, and the exercise of her normative power is not made invalid by the circumstances in which the intention is communicated. The person with the power need not alter anything else that grounds rights or duties.

Thus, for example, if X has authority over Y with respect to *v*, X can give Y a duty to *v* simply by ordering Y to *v*, and it is sufficient for ordering Y to *v* that X communicates to Y the order to *v* sincerely, with the appropriate intentions and so on, and without any invalidating circumstances. If Y owes X a consent-sensitive duty not to *v*, X can release Y from her duty not to *v* simply by consenting to *v*, and it is sufficient for consent that X successfully communicates to Y that he consents, with the appropriate intentions and so on, and without any invalidating circumstances. And if *v*ing is something that X can validly promise Y to do, X can give herself a duty to *v* simply by promising Y that she will *v*, and it is sufficient for promising that X communicates to Y that she promises, with the appropriate intentions and so on, and without any invalidating circumstances.

The relevant invalidating circumstances have at least some similarity across normative powers. X does not successfully exercise the power if she is coerced, deceived, lacks capacity, and so on. There is some variation in the

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\* School of Law, University of Warwick. Email: [v.tadros@warwick.ac.uk](mailto:v.tadros@warwick.ac.uk). I'm grateful to Guy Longworth for excellent comments.

circumstances that invalidate normative powers. But that variation is not between kinds of normative power. Validity conditions depend on the stakes (perhaps amongst other things). For example, it takes a great deal of involuntary intoxication to invalidate my consent to your using my pen; much less to invalidate my consent to your destroying my car.

A general theory of normative powers aims to explain the full range of normative powers. Such a theory should explain why we have normative powers in particular, rather than just having things that are close to, but not identical to, normative powers. We might have the power to generate facts that then ground duties and permissions. For example, I might have the power to injure a person, and if I exercise that power, a doctor might then have a duty to cure the person. But I lack the normative power to give the doctor a duty to cure the person. Such a power is not a normative power – it is distinguished by the fact that the rights and duties created are not created directly. The tricky question is how to characterise the difference between altering another’s rights and duties directly and altering them indirectly.

Later, we will see that many of the functions that normative powers seem to serve do not rely on normative powers; it is sufficient that the person has the power to alter rights and duties indirectly. That insight helps us to understand and focus on the distinctive quality of normative powers.

For the most part, the literature on normative powers has focused on particular normative powers – there are distinct literatures on consent, authority, and promising, for example.<sup>1</sup> Sometimes, that literature aims to draw conclusions about one power by comparing it with others. There is no doubt a great deal to say about particular normative powers that does not generalise. But there are also some general issues that can guide us in our account of particular normative powers.

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<sup>1</sup> There are important exceptions, such as D Owens *Shaping the Normative Landscape* (Oxford: OUP, 2012).

My aim in this paper is somewhat preliminary: to explore what is distinctive about normative powers, and to show that tempting instrumental arguments fail to explain their distinctive features. I will also distinguish and briefly discuss kinds of argument that promise to explain the distinctive qualities of normative powers.

## I. General Questions

Let's begin with some clear pairs of cases where a person has the ability to alter rights and duties either directly or indirectly, where the first case in the pair involves the exercise of a normative power and the second does not. Amongst the range of normative powers, I'll pick consent, authority and promising. We'll see that there is a general contrast between the exercise of such powers, and indirect ways of altering rights and duties, that is similar across different normative powers. That gives us at least some reason to think that the problem of normative powers is, at least in some ways, general.

One set of contrasts between normative powers and indirect ways in which rights and duties arise concerns the contrast between the power to alter rights and duties directly and the power to alter facts whose value independently gives rise to the relevant rights and duties.

Consider:

*Bike*: X communicates to Y that Y is permitted to use X's bike.

*Bike II*: X leaves the gas on in the flat that he shares with Y. The only way for Y to get back to the flat quickly enough to prevent a fire is to use X's bike.

In both cases, X acts in a way that results in Y having a permission to use X's bike. And in both cases, X lacks a right that Y does not use X's bike. But X only exercises a normative power – the power of consent – in *Bike*, and not in *Bike II*.

*Key:* Y manages X's holiday home for her. X instructs Y to give the keys to Z, who wants to rent the property.

*Key II:* X has locked Z's child in her holiday home, and only Y now has the key. Z can prevent the child from becoming very distressed only if she is given the key.

In both cases, X has acted in a way that results in Y having a duty to give the key to Z. But X exercises a normative power – the power of authority – only in *Key* and not in *Key II*.

*Car:* X promises Y that Y will be able to use X's car on Tuesday.

*Car II:* X breaks Y's car, so Y will not be able to get to the hospital unless Y uses X's car.

X acts in a way that results in his having a duty to lend Y his car in both cases, but X exercises a normative power – the power of promising – only in *Car* and not *Car II*.

A related set of cases involves revealing information which is sufficient, independently, to give rise to the relevant (evidence-relative) duties. Consider:

*Bike III:* X tells Y that the gas has been left on in Y's flat. The only way for Y to get to the flat quickly enough to prevent a fire is to use X's bike.

X has 'given' Y the permission to use his bike. He has acted in a way that results in Y being evidence-relative permitted to use the bike that Y lacked prior to being given the relevant evidence by X. But X does not exercise a normative power. Similar examples can be found across normative powers.

One person might also give another evidence that a normative power has been exercised, and thus act in a way that gives rise to an evidence-relative right or duty, without exercising a normative power. For example, Z might give Y compelling evidence that X has consented to Y using X's bike. Z does not exercise a normative power, whether or not Z is being truthful. Again, this kind of case can be found across normative powers.

Finally, even where a person has a normative power, and successfully alters rights and duties that the power is concerned with, the normative power is exercised only if the alteration comes about in the right way. Consider:

*Causal Commander:* X commands Y to rescue a child in a lake when there is no child in the lake. His giving the command frightens a child, who then falls into the lake.

X's command gives rise to Y being required to do what X has commanded her to do. But he has not exercised a normative power. Again, it is easy enough to imagine similar cases across normative powers. For example,

*Causal Consent:* X threatens Y to consent to Z using Y's bike. Y consents, and his consenting causes a fire to start which Z can put out only by using the bike.

Assuming that coercion makes Y's consent invalid, Y doesn't exercise the normative power, even though by consenting Y made it true that Z is permitted to do what Y consented to.

When considering these cases, we are immediately struck by the similarity between the pairs of cases across different normative powers. At least initially, there seems something similar in the way in which these powers succeed or fail, both in cases where the underlying facts are either altered or not, and in epistemic cases.

Perhaps there are also differences between normative powers. For example, some claim that some normative powers require successful communication where others do not. For example, abandoning property can certainly be done without communicating with others. Some, though, think that promising and consent require successful communication.<sup>2</sup> Although I have my doubts about this particular contrast, even if it is right it only suggests that any general theory of normative powers must explain the commonalities that exist across normative powers. A good theory will offer a powerful account of the common features of normative powers whilst leaving room for differences between them.

## II. Pro Tanto Directed Duties and Normative Powers

Here is a further general set of ideas about normative powers. To understand them, first focus on the idea of power-sensitive rights and duties. These are rights and duties that are grounded on the exercise of a normative power. For example, a consent-sensitive duty is a duty that one person has not to perform a certain act where consent will ground her being released from that duty. An authority-sensitive duty is a duty that a person has to perform a certain act that is grounded in another person having commanded it. A promise-sensitive duty is a duty that a person has to perform a certain act that is grounded in her promising to do it. We have already seen that the relevant rights and duties need not exclusively be grounded in the exercise of normative powers – they

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<sup>2</sup> See, for example, T Dougherty ‘Yes Means Yes: Consent as Communication’ (2015) 43 *Philosophy and Public Affairs* 224; ‘On Wrongs and Crimes: Does Consent Require only an Attempt to Communicate?’ (2019) 12 *Criminal Law and Philosophy* 409; H Liberto ‘Promises and the Backward Reach of Uptake’ (2018) 55 *American Philosophical Quarterly* 15. For a response, see V Tadros ‘Responses to Wrongs and Crimes’ (2019) 13 *Criminal Law and Philosophy* 455.

can also arise indirectly. But, in many circumstances, the exercise of a normative power is required for the relevant right or duty to arise.

What kinds of duty are normative powers concerned with? First, they are normally directed – they are owed to particular others. Consent-sensitive duties are owed to the person with the power to consent. Promise-sensitive duties are normally owed by the person with the power to promise to the promisee. This is less obvious in the case of authority – it is not obvious that the duties that arise through political authority, for example, are owed to those with the authority. And there are clearer cases where the duty is not directed to the person exercising the power. Trustees, for example, have the normative power to determine rights and duties, but duties are not owed to the trustee, but to the beneficiary. In this case, the trustee exercises the power on behalf of the beneficiary.

Second, normative powers affect *pro tanto* rights and duties – rights and duties that may be permissibly overridden by other considerations. For example, if I promise you to loan you my car for you to go to a concert, but it turns out that I unexpectedly need it to take my sick child to hospital, I am not required to loan you the car. My *pro tanto* duty is overridden by the importance of a task that it conflicts with. This is not surprising, because whatever values underpin normative powers, they are not as important as many other things that can ground rights and duties, such as preventing imminent disaster.

Where normative powers involve releasing others from duties, they only release others from the duties that the normative power is concerned with. And that may make no difference to what the person is permitted to do overall, because other considerations ground the duty to do the same thing that the consentee consents to. Consider:

*Consent and Promise:* Harry, Wanda and Fred are housemates. Harry wants to use Fred's car. Wanda promises him that she won't use it, even if Harry allows her to. Harry says to Wanda and Fred that either of them are free to use the car.



Wanda does not wrong Fred if she uses the car. But it is nevertheless wrong for her to use it; doing so wrongs Harry. Thus, Fred's consent releases Wanda from her directed consent-sensitive duty, but not from all of her duties not to do the thing consented to. This can make a difference to what a person owes in the case of a breach of the duty. If Wanda uses the car, she owes an apology to Harry, but not to Fred.

Furthermore, there may be value in normative powers, even where this does not affect what the person is permitted to do overall. Harry may wish to make it true that Wanda does not owe it to him not to use the car, whilst recognising that he cannot release her from all of her duties not to use it.

Can the exercise of a normative power release a person from power-sensitive duty owed to a person, whilst a decisive duty to that very same person is still in place? I'm not sure. The possibility that we are considering is that I owe you two duties, with different sources, not to *v*. One of those duties is power-sensitive, and you exercise the power. Might I still be bound by the other duty, that is either not power-sensitive (or the power is not exercised)? If this is possible, by acting, the wrongdoer wrongs that person, but without violating the particular duty that she owes to that person.

Consider:

*Tattoo*: I consent to your using my tattoo pen to draw a horrific tattoo on me.

Let us suppose that I have the power validly to consent to your using my tattoo pen, but not to draw a horrific tattoo on me; there are limits to what we can consent to, and let's say that the tattoo is so bad that I cannot consent to your giving it to me.

One way to analyse the case is that you do not wrong me by using my tattoo pen without consent, but you nevertheless wrong me by disfiguring me. Another is that because you will use the tattoo pen wrongly, my consent to

your using it in this way is invalid. I think that the former idea is right: it is hard to see why *Consent and Promise* and *Tattoo* should be treated differently, and it is clear that Harry has the power to consent to Wanda using his car, even though she will use it wrongly.

### III. Intending to Alter Rights and Duties

We have considered some basic cases which distinguish normative powers from non-normative powers to alter rights and duties. What is the mark of this distinction? One idea is that a person has the normative power to alter rights and duties if she has the power to do so intentionally. X intends Y to be permitted to use his bike in *Bike I* but not *Bike II*; X intends Y to be required to give Z the key in *Key* but not *Key II*; X intends to give himself a duty to lend Y his car in *Car* but not *Car II*.

An important feature of normative powers is that the person exercising them intends to alter rights and duties, at least in central cases. But is the successful execution of an intention to alter rights and duties necessary for the exercise of a normative power? And is it sufficient? I think that it is necessary but not sufficient, and seeing this helps us to understand the special way in which intentions are involved in normative powers.

Let us consider two kinds of case that put pressure on the idea that intentions are necessary for the exercise of normative powers. I discussed the first in previous work, in the context of an investigation of whether consent involves the exercise of a normative power:<sup>3</sup>

*Internalised Slave*: Terri consents to be Sandra's slave. Both Terri and Sandra wrongly believe that Terri is thus Sandra's slave: they wrongly think that the duty not to treat as a slave is consent-sensitive. Both thus believe that Sandra is permitted to do with Terri what she wishes,

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<sup>3</sup> See *Wrongs and Crimes* (Oxford: OUP, 2016) 211-2.

irrespective of consent. Terri and Sandra fall in love. Sandra needs a kidney transplant to save her life. Terri wishes Sandra to take her kidney – she says, truly, that she cannot bear to see Sandra die. As she loves Terri, Sandra takes Terri’s kidney only because Terri wills it.

This case might challenge the view that consent involves the exercise of a normative power, but also the view that a person who exercises a normative power necessarily intends to alter another’s rights or duties.

The challenges arise from the fact that Terri does not intend to alter Sandra’s duties with respect to the kidney, because she does not believe that Sandra has a duty not to take the kidney. Yet, it might seem, Terri consents to the taking of the kidney. Here is an argument that Terri has consented to Sandra taking the kidney:

- 1) Terri’s consent is needed for Sandra to be permitted to take the kidney;
- 2) Sandra is permitted to take the kidney because of Terri’s attitudes and actions with respect to taking the kidney, and nothing else that Terri does amounts to her consenting;
- 3) Therefore, Terri’s attitudes and actions amount to her consenting to Sandra taking the kidney.

Here is an extension of that argument to the view that normative powers do not involve intentions.

- 4) Consent is a normative power.
- 5) From 3) and 4), Terri has exercised a normative power.
- 6) Terri does not intend to alter Sandra’s rights and duties, as she does not believe that she is able to do so.
- 7) From 5) and 6), the exercise of normative powers need not involve an intention to alter rights and duties.

Overall, whilst this argument has some force, I think it should be resisted.

In *Wrongs and Crimes*, I argued against 1). Here's a clearer argument than I offered there. Normally, consent is required to permit a person taking another's kidney. But sometimes, something other than consent will do. Now suppose that consent is a normative power which requires the intention directly to alter another's rights and duties. As Terri does not recognise the duty that Sandra owes her not to take the kidney, Terri cannot consent. Often, when a person is unable to consent to something that is normally consent-sensitive, respect for the person requires us to make decisions on the basis of something else about the person, such as what she wants, wills or would consent to if she were able. Because Terri is unable to consent, given her beliefs, Sandra should decide what to do on the basis of what Terri wants, wills, or would consent to if she were able. And that is to take the kidney.

This argument also suggests that *Internalised Slave* is no challenge to the view that normative powers involve intentions to alter rights and duties. Terri does not intend to alter Sandra's duty not to take the kidney, as she does not believe that Sandra has any such duty. But then her willing Sandra to take the kidney does not involve the exercise of a normative power either. It is rather that Terri's willing Sandra to take the kidney directly grounds Sandra's permission to take the kidney.

In a second set of cases, people follow the conventions needed for the exercise of normative powers without having the relevant intentions. A standard example might be commercial contracts, where, it might be argued, following the conventions for the formation of such contracts is sufficient to make them binding, without the relevant intentions. This is necessary, it might be thought, to ensure that people can act in confidence that they are not wronging others.<sup>4</sup>

Consider:

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<sup>4</sup> See, especially, R Bollinger 'Moral Risk and Communicating Consent' (2019) 47 *Philosophy and Public Affairs* 179.

*Joke:* Xavier tells Yolanda that she is permitted to use his bike. But Xavier does not intend to release Yolanda from her duty not to use the bike. He is joking. She, though, has no reason to believe that he is joking, and so uses the bike.

Some might think that Xavier has consented to Yolanda using his bike, and that consent therefore does not require an intention to alter rights and duties.

It is certainly true that Xavier has altered Yolanda's duty not to use the bike, so that she has not wronged him by taking it. But this might be explained by something like rights-forfeiture rather than consent: by creating the impression that he consents, Xavier forfeits his right that Yolanda not use his bike. Rights forfeiture does not depend on the exercise of a normative powers. Similarly, those who sign commercial contracts without the relevant intentions forfeit their rights against the enforcement of these contracts without exercising normative powers.

This view can be reinforced by noticing that the rights and duties of the recipient are not altered if she knows that the person communicating lacks the relevant intentions. Neither conventional consent nor conventional promise are transformative where the recipient knows that the person with the normative power is just joking, even if this is not clear from what she says and does.<sup>5</sup> It thus seems that we can meet objections to the idea that an intention to alter another person's rights and duties is necessary for the exercise of a normative power.

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<sup>5</sup> Bollinger makes it a condition of conventional consent that the person to whom consent is given does not have reason to believe that the person communicating lacks the relevant intentions. But this just points to the significance of those intentions – the reason why evidence of a lack of an intention is decisive is that intentions are necessary for consent.

The larger problem is that the successful execution of an intention to alter rights and duties is insufficient for the exercise of a normative power, and that is because a person might exercise her intention by indirectly altering rights and duties. To see this, suppose that X intends to alter the right and duties in the *II* cases by altering the facts that ground the relevant duties. For example, X might want Y to be permitted to use his bike in *Bike II*, and so leaves the gas on, which will be sufficient for Y to be permitted; X might want Y to be required to give Z the key in *Key II* and so locks Z's child in the flat; X might want to be required to lend Y his car in *Car II*, and so breaks Y's car. In all of these cases, X intends to alter rights and duties but does not exercise normative powers.

One way to see this is that the facts that give rise to the relevant rights and duties, in the *II* cases, would be sufficient to ground those powers regardless of whether they arose due to X's intention to bring about those rights and duties. For example, even if X intended Y to be permitted to use his bike in *Bike II*, the gas being on would be sufficient to permit Y to use X's bike independently of that intention.

I don't intend this as an accurate test for the exercise of a normative power. There are funky cases where such a power is still not exercised, even though the person's intention would be necessary to ground the relevant right or duty. Consider:

*Specific Critic:* You are reluctant to criticize me, and I want to make it clear that you are permitted to do so to do so, so I make a racist remark to a colleague.

Suppose that you are permitted or required to criticize me not only for making the racist remark, but also for intentionally altering your normative situation. Then, my intention to alter your rights and duties is necessary for you to have the relevant rights and duties, but I still don't exercise a normative power. Still,

considering whether the intention is necessary for the right or duty to arise is a good ballpark test for whether a normative power has been exercised.

Perhaps it might be argued that normative powers exist where intentions regularly explain the rights and duties.<sup>6</sup> But, as I have argued elsewhere, even this is not enough.<sup>7</sup> Consider:

*Intended Rescue:* Karim intends that Layla has duties to rescue drowning children. A group of children is standing at the edge of a pond. Karim shouts 'rescue Alice'. His shouting this with the relevant intention makes Alice nervous and she falls into the pond and Layla rescues her. He then shouts 'rescue Bob' and this makes Bob nervous and he falls into the pond and Layla rescues him. And so on.

Layla regularly has the duty to rescue a child due to the execution of Karim's intention that she has this duty. But Karim's intention does not explain Layla's duty in the right way for him to be exercising a normative power. His intention gives rise to Layla's duty only by causing some independent ground of her duty, and not directly.

This is so even if Layla relies on Karim's intentions to decide what to do. Suppose, for example, that the only way in which she knows that children are drowning is by a machine which scrutinises Karim's intentions. That gives her decisive evidence that Karim has shouted, and that a child is in the pond. Karim still doesn't exercise a normative power. For the exercise of a normative power, the intentions of the person with the power must explain the rights and duties of others in the right way.

We can construct similar cases for other normative powers, and this helps to guide us to a general feature of these powers. Consider:

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<sup>6</sup> This seems to be the suggestion in D Enoch 'Authority and Reason-Giving' (2014) 89 *Philosophy and Phenomenological Research* 296.

<sup>7</sup> See *To Do, To Die, To Reason Why* (Oxford: OUP, forthcoming) ch.4.

*Intended Use:* Betty wants her daughter, Cara, to learn to drive, but she doesn't have a car. She wants Cara to be permitted to use the cars of the people down the street. So she regularly puts other kids in peril, where the only way that they can be rescued is for Cara to use her neighbours' cars.

Cara regularly has the permission to use her neighbours' cars because Betty intends her to be permitted to use them. But Cara's duty not to use these cars is not sensitive to Betty's consent, and Betty does not in fact consent to Cara's using them.

A similar result follows even where there are consent-sensitive duties. Suppose, for example, that each rescue can be performed only if Cara uses Betty's car. Betty could create the permission for Cara to use her car by consenting. But she does not do so in this case. Cara thus owes Betty a consent sensitive duty not to use her car; Betty intends that Cara does not have this duty; and she successfully executes that intention by making it true that Cara lacks this duty. Yet Betty does not consent.

Here is the lesson for a theory of normative powers. A good theory of normative powers explains why the intention directly to alter rights and duties can be successfully executed directly. In other words, it should explain the fact that the exercise of a normative power is a distinctive kind of intentional activity, where one directly alters the rights and duties of oneself and others. To do this, such a theory should explain the basic moral significance of the distinctive kind of execution of the intentions of the person with the normative power.

We have seen a wide range of cases where one person alters the rights and duties of another but does not do so through the exercise of a normative power. That is so even where one person intends to alter the rights and duties of another. In these cases, the successful execution of the relevant intention does not explain the alteration in the relevant rights and duties in the right way.



Can we give an account of what the right way is? The question is hard to answer, and I don't have a complete answer. In cases like *Bike II* the explanation is that the facts that most immediately ground Y's right are the independent result of X having the relevant intentions. We might say that X's intentions cause, or give rise to, something else that then grounds Y's right. But we can see from *Specific Critic* that directly does not merely mean 'non-causal'. I can intentionally alter your rights and duties by acting in a way that grounds those rights and duties non-causally without exercising a normative power.

Here is a rough answer that is better. Rights and duties play a role in practical reasoning. X's duty not to *v* just is the appropriateness of X responding in a certain way to *v*ing in her practical reasoning. The response is to treat herself as unfree to *v*. A fuller account of duties involves characterizing the kind of unfreedom involved, but we can work with the rough idea that if a person is required to act in a certain way, there is a certain moral sense in which she is not free to act in that way. This is in contrast with the case where the person has a decisive non-moral reason not to *v*, where although she ought not to *v*, she is morally free to do so.

If this is an account of all things considered duties, how should we understand the kinds of *pro tanto* directed duties that normative powers are concerned with? Such a duty exists when the right set of facts about the relationship between the duty holder and the right holder exist. Facts about the right holder are the kind of facts that appropriately constrain the conduct of the duty holder.

Where a person has a normative power, the execution of the power itself generates the relationship between duty holder and right holder that make it appropriately constrains the conduct of the duty holder, subject to defeating considerations. The person with the power can thus make it appropriate for a person to be morally free, or not, to *v* simply by executing her power. Nothing more is needed to make the person free, or not.

Consider my power to consent to your using my pen. I can make it appropriate for you to take the attitude that you are morally free to use my pen

simply by doing whatever is sufficient for me to consent, subject to certain validity conditions being satisfied, and the absence of defeaters. And, in the introduction I suggested that successful communication that I consent is sufficient. By validly consenting, I generate a relationship between you and I that makes it appropriate for yourself to be free to use the pen, where otherwise you would not be, on condition that other extraneous facts do not restrict you from using it.

Or consider my power to give myself a duty to take you to the airport by promising to do so. I can make it appropriate for me to take the attitude that I am not morally free to refrain from taking you simply by doing whatever is needed for me to promise to do so, subject to certain validity conditions being satisfied, and the absence of defeaters. And successful communication that I promise is sufficient. By validly promising to take you to the airport, I generate a relationship between you and I that makes it appropriate for me not to be free to refrain from taking you to the airport, on condition that other extraneous facts do not make me free to refrain from doing so.

#### **IV. Simple Instrumental Accounts**

With this (admittedly underdeveloped) characterisation of normative powers in hand, how do we explain their existence? Certain kinds of instrumental account might seem satisfactory: those that explain the role of intentions in the exercise of normative powers. An instrumental account of a normative power is that the normative power exists in order to serve some goal that is independent of the rights and duties of others. An instrumental account might seem to give the appropriate role to intentions if the goal in question is best served by the person with the power being able to alter the rights and duties of others if and only if she executes the relevant intentions.

For example, here is a simple instrumental account of consent. With respect to some act, *v*, a person, *X*, has an especially powerful interest in others performing *v*ing only if *X* is in some state, such as her wanting the action to be

done, or valuing its being done. The interests of others in the performance of such actions are normally insufficient to justify acting in that way where the person is not in that state. And X herself is best able to establish whether she is in the relevant state, which is normally true in the case of wanting and valuing.

Here is an instrumental account of the significance of X's consent for Y's permission to perform the relevant act.

- 1) X has a powerful interest in Y not *v*ing unless she wants or values Y *v*ing.
- 2) Y almost certainly lacks sufficient evidence that X wants or values Y's *v*ing unless X communicates this to Y.
- 3) Therefore, it is wrong for Y to *v* unless X communicates her that X wants or values Y *v*ing.
- 4) A practice where Y is permitted to *v* only if X consents to Y *v*ing is the most effective practice of ensuring that Y *vs* only where X wants or values Y *v*ing.
- 5) Therefore, Y is permitted to *v* only if X consents.

This account might seem well placed to explain why we are owed consent-sensitive duties over things that we are intimately related to, such as bodily integrity, physical appearance, and sex. For example, a person has a very powerful interest in being tattooed only if she likes the tattoo; others have a much less powerful interest in tattooing the person; therefore, others owe that person a consent-sensitive duty not to tattoo her.

A good account of power-sensitive duties should certainly explain the scope of such duties in an appealing way, and a person's interests seem at least part of the story. Why does a person mainly have normative powers to determine how her own mind and body is treated by others, and not the minds and bodies of others? Surely in part because of the special interests that she has in what happens to her own body.

The difficulty, though, is to find an instrumental argument for direct rather than indirect ways of altering rights and duties. The argument above does this through 4): consent is necessary, because there is no adequate alternative mechanism to determine what people like. But 4) does not seem very plausible. Something like advice could do the job, where if the advice is sufficiently compelling, the person would be required to act on it. But advising is not a normative power.

And note that consent is required even once a person has been advised of the consenters' preferences. Suppose that X indicates to Y that X really wants a tattoo. That is insufficient to release Y of his duty not to give X the tattoo; X's consent is required. If, for whatever reason, X does not consent, Y is not permitted to give X the tattoo.

Similar things can be said about other normative powers. For example, where X knows better than Y what should be done, X can ground Y's duty by advising Y what should be done. But advice is insufficient for authority. So what explains X having authority over Y in particular, rather than X's power indirectly to alter Y's duties by giving Y advice?

A similar problem arises in the case of promising. Where X wants to give himself a duty that Y can rely on, X can simply indicate to Y what he will do in a way that induces reliance in a way that is sufficient to ground that duty.<sup>8</sup> Promising is not needed. Simple instrumental accounts of normative powers, then, fail to explain those powers.

## V. Second Order Instrumentalism

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<sup>8</sup> As T M Scanlon's account of promising (or perhaps I should say 'promising') in *What We Owe to Each Other* (Cambridge, Mass.: Harvard UP, 1998) ch.7 suggests, we can add further features to make something close to the practice of promising attractive in a similar way to actual promising without relying on normative powers.

One response to the argument just made is that normative powers might be more effective than alternative mechanisms in ensuring that people respond appropriately to the interests that are sufficient to ground rights and duties. Suppose, for example, that people tend to respect an important interest more effectively if the person has the power directly to alter her rights and duties than if she can only do so indirectly. People might be better disposed to respond to commands than advice, for example. Is that a good argument for her having such a normative power? I doubt it.

i) *Duties and Proxies*

First, focus on this more general question: suppose that some fact,  $f$ , is sufficiently important to ground a duty. However, a person,  $X$ , tends not to respond to  $f$  directly as well as she tends to respond to some proxy for that fact,  $p$ . Does  $X$  then have a duty to respond to  $p$ ? Here is an argument that she does:

- 1)  $X$  has a first order duty grounded in  $f$ .
- 2) Other things equal,  $X$  has a second order duty to ensure that she fulfils her first order duties.
- 3)  $X$  can best ensure that she fulfils her first order duty grounded in  $f$  by responding to  $p$ .
- 4) Therefore,  $X$  has a second order duty to respond to  $p$ .

Consider how this argument might apply to the case of consent to have a tattoo:

- 1)  $X$  has a first order duty grounded in  $Y$ 's interest in having a tattoo only if she wants to have it.
- 2) Other things equal,  $X$  has a second order duty to ensure that she fulfils her duty not to give  $Y$  a tattoo if  $Y$  does not want it.
- 3)  $X$  can best ensure that she fulfils her duty not to give  $Y$  a tattoo if  $Y$  does not want it by tattooing  $Y$  only if  $Y$  consents.

- 4) Therefore, X has a second order duty to give Y a tattoo only if Y consents.

This kind of argument might then support the existence of Y having the normative power to consent on the basis of the following premise:

*Instrument:* Y has the normative power with respect to X's duties with respect to *v* just in case her having this power will result in X better complying with his second order duty to ensure that he does his first order duty with respect to *v*.

This is a generalised variation on a well-known view about authority: Joseph Raz's well known service conception of authority.<sup>9</sup> It is generalised, in that it applies to all normative powers. And it is a variation in that Raz's view is concerned with compliance with reasons rather than with first order duties. This variation is an improvement in that respect, though, as it is a mystery, on Raz's own view, how a mere first order reason can be converted into a second order duty on a purely instrumental basis.<sup>10</sup>

The fact that this kind of argument can be mounted for consent as well as authority might give us some confidence in it, given my earlier suggestion that we have at least some reason to expect a general theory of normative powers. And we can easily imagine extending it to at least some further normative powers – for example, we might think that the duty to keep

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<sup>9</sup> See *The Morality of Freedom* (Oxford: OUP, 1986) Part I; 'The Problem of Authority: Revisiting the Service Conception' in *Between Authority and Interpretation* (Oxford: OUP, 2009).

<sup>10</sup> This is more fully spelled out in J Quong *Liberalism Without Perfection* (Oxford: OUP, 2011) ch.2. See, further, V Tadros *To Do, To Die, To Reason Why* (Oxford: OUP, forthcoming) ch.4.

promises is a duty to comply with the second order duty to ensure compliance with the first order duty not to disappoint legitimate expectations. And so on.

This kind of view can be improved by adding further constraints to the existence of normative powers. In the context of authority, for example, Raz adds a condition – that authority does not exist in cases where it is especially important that a person acts on her own judgement (what he calls the independence condition). And we could add further constraints of this kind.

Even with constraints added, though, I doubt that second order instrumentalism provides a good account of normative powers, or at least of core cases of such powers. To demonstrate this, it is worth considering two kinds of case. In the first kind, X is able to comply with his first order duties directly, without relying Y's decisions, but X is poorly disposed to do this. In the second kind, X is unable to do what he would otherwise be required to do, or to decide to do that, without Y's decision.

ii) *Abilities, Dispositions and Duties*

In the first kind of case, X can directly respond to the facts that ground his first order duties without relying on the proxy that Y creates. Y's reason to create the proxy, in that case, has nothing to do with X's abilities, but with X's disposition not to exercise those abilities in the right way. This might be true for a range of reasons. For example, X might have poor judgement, and so be disposed not to see the relevant facts as duty-conferring, or X might be poorly motivated to comply with his duties.

If X is more likely to respond to the proxy than directly to the facts that ground his first order duty, X may have a duty to respond to the proxy *rather than* failing to do what his first order duty requires of him. But this does not show that he is required to respond to the proxy *simpliciter*. And, it seems, he is not so required, because he could ignore the proxy and respond directly to the facts that ground his first order duty. The fact that he won't take this

alternative does not show that it is irrelevant to determining what he is required to do.

To see this, consider three things that X might do:

- a) Violate his first order duty
- b) Conform to his first order duty by responding to the facts that directly ground that duty.
- c) Conform to his first order duty by responding to the proxy.

To show that X has a duty to choose b), it must be shown that all other options are wrongful. But c) is not wrongful, and X has the option of picking c). The fact that he won't pick that option cannot make him required to pick b).

Consider consent. Suppose that the fact that Y doesn't want a tattoo is sufficient to ground a first order duty on X not to give Y the tattoo, but that if Y wants the tattoo, X lacks this duty. Y's consent, let us suppose, involves sincerely saying 'I give you permission to tattoo me'. Now suppose that Y's consent is just a proxy for what Y wants. If Y gives consent, X has sufficient reason to conclude that Y wants the tattoo; if Y refrains, X has sufficient reason to conclude that Y doesn't want the tattoo. Now suppose that X is bad at responding to what Y wants, but good at responding to Y's consent. Then X should respond to Y's lack of consent by refraining from giving Y the tattoo *rather than* giving Y the tattoo.

But that does not show that X is required to respond to Y's consent. X could do just as well by responding directly to the fact that Y either does or does not want the tattoo. Suppose that Y consents because she wants the tattoo. X is then permitted to give Y the tattoo. But X need not respond to the fact that Y consented. He could just as well respond directly to the fact that Y wants the tattoo. And suppose that Y does not consent because she does not want the tattoo. X is then required not to give Y the tattoo. But X could just respond to the fact that Y does not want the tattoo. Thus, Y's consent does not alter X's rights and duties. It makes no difference to what X is required to do, for we can



set out the complete set of rights and duties that X has simply with reference to what Y wants without mentioning the proxy. If X responds to Y's wants, he has no further work to do to determine what he is required to do.

A similar thing is true in the case of authority. Suppose that X has a first order duty to rescue a drowning child. Y commands X to rescue the child, and X is more strongly disposed to respond to Y's commands than to the value of the child's life. X has a duty to follow Y's commands *rather than* failing to rescue the child. But this does not show that X has a duty to follow Y's commands *simpliciter*. X could ignore those commands and just rescue the child because her life is important. Thus, X does not have a duty to follow Y's commands.<sup>11</sup>

### iii) *Creating New Opportunities*

Some might respond to this problem by noting that proxies might give rise to opportunities that the person would lack without those proxies. Normative powers, it might be argued, exist where their exercise creates these opportunities. For example, suppose that X is not ill disposed to respond to what Y wants; he is unable to do so. And suppose that the only way to make X able to respond to those wants is for Y to say things like: I permit you to *v*; or I don't permit you to *v*. That, it might be argued, blocks the argument in the previous subsection, because X's duties are genuinely altered by the exercise of normative powers; their exercise creates new opportunities, and that alters what X is required to do.

The problem with this response is that although the creation of new opportunities might genuinely give rise to new rights or duties, it does not do so in the right way for the exercise of a normative power. Rather, there is a mere triggering of a new right or duty. To see this, suppose that X is permitted to do what Y wants if X can, simply because Y wants it. Now consider:

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<sup>11</sup> For a more complete and developed argument of this kind about authority, see V Tadros *To Do, To Die, To Reason Why* ch.4.

*Tattoo Box:* Y wants a tattoo of a unicorn identical to the one on a picture in a sealed box, and if she cannot have that, she doesn't want a tattoo at all. X cannot give Y this tattoo without having the picture to copy. If Y says 'I permit you to tattoo me', the box will open, and then X will be able to give Y the tattoo.

By saying 'I permit you to tattoo me', Y makes it true that X is permitted to tattoo Y. Now suppose that the only ground of Y's normative power is the significance of Y getting what he wants. Although Y's communication results in X being permitted to tattoo Y, Y does not exercise a normative power. Rather, Y triggers an opportunity, which X is permitted to take simply for independent reasons – because Y wants to be tattooed. Thus, creating new opportunities to perform valuable actions does not explain normative powers.

## **VI. Appropriateness and Normative Powers**

In the remainder of the essay I sketch some responses to the failure of instrumental arguments for normative powers. One response is to reject the existence of true normative powers. Perhaps we don't really have any such powers in the truest sense. We only have abilities to trigger rights and duties indirectly by affecting independent grounds of duties and rights, or evidence about those grounds. We might even offer a debunking explanation for the appearance that we have normative powers. Perhaps our belief that we have these things makes us better able to serve the instrumental purposes of the kind outlined earlier. That may be right, and there is certainly something mysterious about normative powers, but our intuitions about them are quite robust. So I am reluctant to give up on them so quickly.

David Owens offers one possible explanation.<sup>12</sup> He claims that we have normative powers because we have distinctly normative interests. Normative interests are interests that are concerned with whether certain normative facts themselves obtain, or whether things that are closely related to certain normative facts themselves obtain. Owens own argument for such interests is mainly an argument from intuition. We know that we can directly alter the rights and duties of others through the exercise of normative powers; this fact can only be adequately explained by the existence of normative interests; therefore, we have normative interests.

We should distinguish two different ideas, each of which can be found in Owens' work. On one view, our basic normative interest is in ourselves or others having certain rights and duties. From that, we have a derivative interest in having normative powers, for by having them we can advance our more basic normative interests. I think that this is how Owens normally understands the idea of a normative interest. Such interests, if we have them, might explain normative powers in this way. If a person has an interest in herself or others having rights and duties as such, wouldn't it be better that the person can make it the case that she is able to make it true that she or others have rights or duties simply by some simple act of expression or communication, or even just some mental act?

A second view, and one that Owens' work also sometimes suggests, is that we have a basic interest in having normative powers themselves – powers directly to alter rights and duties - rather than interests in the rights and duties that these powers give rise to. We, or others, have rights and duties because the existence of these rights and duties makes normative powers possible, and we have a basic interest in those powers. Owens, for example, thinks that this helps to explain the rights and duties involved in friendship. We have an interest in being able to control our normative environment; we have that ability if we have the ability to form friendships, where friendships are partly constituted

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<sup>12</sup> *Shaping the Normative Landscape*.

by certain rights and duties; therefore the rights and duties involved in friendship are explained by our interest in having the ability to control our normative environment.

In previous work, I also offered an argument for the second view in the context of consent. The power to consent, I suggested, gives us the ability to shape our relations with others by altering what they are permitted to do. This is most obvious in the case of monogamous sexual relations – by only consenting to sex with one’s partner, one distinguishes one’s partner from others in one’s sexual life, and that is a meaningful way of forming a relationship with him or her. Note that it is insufficient for monogamous relationships to exist, or to have the value that they have, that people in fact have exclusive rights to have sex with each other. They depend on the fact that sexual partners exclusively *grant* each other the permission to have sex with each other by exercising a power that they could exercise in other ways. Thus, the value of monogamous relationships depends on the power to consent, or not, and not merely on the rights and duties that consent, or its lack, gives rise to.

Whilst I still think that these ideas help to show that normative powers can be valuable in themselves, and not merely because of our interest in normative outcomes, I doubt that they are the whole story, or even the most important story, in explaining normative powers. One reason for doubt is that it is hard to extend the ideas in the previous paragraph to all normative powers. They are most naturally employed with respect to the normative powers that govern our ability to develop our interpersonal relations with others. But normative powers have a role in a wide range of contexts. It is harder to see how, for example, authority or abandonment could be justified in anything like this way, and it is hard to see how central instances of consent and promising that are not about interpersonal relations are explained in this way – commercial contracts, for example, or the role of consent in medicine.

More importantly, our interest in forming relationships by altering rights and duties does not seem to be sufficiently fundamental and important

to explain why normative powers, including the power to consent, have the importance they have in ordinary moral life. Can we really fully or adequately explain why it is wrong to have sex with someone without their consent, where no other interest is set back, by pointing to a person's interests in determining which relationships to form with others by consenting? That seems doubtful.

A third view is that normative powers are just morally basic. We just have the power to alter rights and duties, on this view, and no further grounding explanation can be offered. But even if such powers are basic, to meet debunking arguments we should be able to explicate what those powers involve in a way that is sufficiently compelling to explain their significance in moral life.

Here is an attempt to do this. Not all norms are justified by, or grounded in, interests. Some exist because the conduct that the norm prohibits or requires, or the attitudes that would cause a person to act in the relevant way, are justified simply because they are an appropriate response to something of value, and not because of any interest of any sentient creature. Normative powers might be explained by the appropriate reaction that others have to our decisions. On this view, appropriateness directly explains normative powers without appealing to interests that people have.<sup>13</sup>

Here are some examples of norms that are not grounded in interests. Many will find at least some of these examples compelling instances of the existence of norms that are not grounded in interests, even if they need careful elaboration. I might owe it to you to give you a proper burial after you are dead. But you don't have an interest in a proper burial. It might be wrong to walk over someone's grave, but that need not set back any interest that anyone has. It might be appropriate to feel guilty at having beaten my dog, but not because

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<sup>13</sup> Owens also gives a role to appropriateness: a person's interests in certain things being appropriate explain why they are appropriate. See *Shaping the Normative Landscape* 8. This appeal to interests plays no part in the view I go on to describe.

anyone has an interest in my feeling guilty. It might be wrong to destroy a beautiful landscape, simply because restricting one's conduct is an appropriate response to its beauty, but a landscape does not have interests, and if no one will appreciate it, no one else has an interest in its persisting.

At least some normative powers seem best explained by appropriateness too. This seems true of consent, for example. Consider the fact that doctors are required to get consent of their patients before operating on them or giving them medicine. This practice is warranted even where it conflicts with the interests of the patient. It might seem that this practice can be justified wholly on interest-based grounds – for example that patients have special insight into what is best for them, or that it is especially bad for a person to be operated on against her will. But, as we have seen, these explanations are not extensionally adequate.

An alternative explanation is that it is appropriate that patients are in control of the rights and duties of doctors. Consider how it is appropriate to respond to the fact that patients are embodied autonomous agents, whose value is not only realised through ensuring that their welfare is advanced, but in the shaping of their lives through the decisions they make. It is appropriate for doctors to govern their practical reasoning by responding to the decisions of patients.

Some might respond that it is the patient's interest in living an autonomous life that makes consent important. But I doubt that this is right. A patient is in control even where her decisions set back her interest in living an autonomous life overall. For example, a patient might refuse treatment that will, overall, enhance her autonomy, and thus her interest in living an autonomous life is set back by her refusal. But her refusal is still decisive. Her decision is to be respected rather than promoted. And that is just to say that the appropriate response for the doctor to make to the patient's decision is to acknowledge a constraint on his conduct.

Similar arguments can be offered for other normative powers. Consider political authority. Instrumentalist conceptions of authority such as those we

considered earlier struggle to explain normative powers in particular. A better view is that an appropriate response to the decisions of a political community, where it is properly constituted, is to restrict one's scope for autonomous practical reasoning. In doing so, we respect the significance of collective decision-making as such. This is not because our interests as autonomous agents are advanced in this way – these decisions are significant where they are appropriately made even where they are suboptimal, and where more value can be advanced by ignoring them.<sup>14</sup>

### **Conclusion**

I have mainly made progress in clarifying the right questions to ask about normative powers by identifying the features that they have. I have also argued that some tempting arguments for such powers fail, because they fail to explain those features. I have only sketched an account of normative powers that might explain the particular features that they have. Much more would need to be done to make this account convincing. But there is at least some promise in the idea that normative powers are basic – that we have them simply because it is appropriate that we, and others, respond to our decisions in practical reasoning by drawing conclusions about what we are free to do.

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<sup>14</sup> There are significant content-based limits to this idea. For discussion, see V Tadros *To Do, To Die, To Reason Why* ch.3.