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LEGAL POWERS IN PRIVATE LAW

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ABSTRACT
This article explores the nature and role of legal powers in private law. I show how powers are special in that they allow agents to change their (and others') legal circumstances merely by communicating an intention to do so, without having also to change the nonnormative facts of the world. This feature of powers is, I argue, particularly salient in private law, with its correlative or bipolar normative structure; understanding powers and their role in private law thus requires careful attention to this correlativity. In the final section, I argue that the correct explanation of a variety of substantive problems in private law, many having to do with the role of a party's intention, turns on correctly understanding legal powers.

I. THE BASIC IDEA OF LEGAL POWER

Legal powers have been a topic of inquiry for a long time. Jeremy Bentham, John Salmond, Wesley Hohfeld, H.L.A. Hart, Joseph Raz, and many others discuss them. Since Hohfeld's work[1] especially, they are mentioned in hundreds of articles and books about the nature of legal relations and legal rights, about private law, and about many other legal problems. And yet their distinctive features are not as well appreciated as they ought to be in current legal scholarship, and in particular in contemporary private law theory. In what follows I want to bring out some of these distinctive features

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1. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

in order to highlight the quite special role that powers play in the law. My hope is that an appreciation of these distinctive features will bring us to a better understanding of some difficult and persistent legal questions. I concentrate on private law powers, and the questions that I suggest a better understanding of powers can help to answer are private law questions. This is for two reasons. First, because private law is the area I know best. And second, legal powers seem particular salient in private law because private law's recognition of power in the hands of private individuals seems central to its conception of such individuals as persons (or as, take your pick, sui juris, small-scale sovereigns, or self-originating sources of valid claims). I do not say very much at all about other sorts of legal powers, such as public law powers or international law powers, but nothing I say here is meant either to preclude or to endorse the application of my arguments beyond private law.[2]

To bring out what I argue are the most important features of legal powers, I employ and concentrate primarily on two powers: the power to acquire property and the power of consent (to some act that absent such consent would constitute a legal wrong). I choose these because in their centrality and importance they bring out the centrality and importance of legal powers more generally, and also because it is possible to discuss them without presuming any deep familiarity with private law on the part of the reader. But it is also important to remember that legal powers are pervasive throughout private law. The list of the powers that Hohfeld discusses in his article gives an idea of their diversity as well as their importance. He mentions, in addition to acquisition of unowned objects, abandonment of personal property, transfer/sale/disposition of property, revocation of gifts made *causa mortis*, the "right of re-entry," and offer and acceptance in contract.[3]

Now, the first thing to notice about powers, as this list exemplifies, is their second-order character: the exercise of a power operates on legal rights, duties, and so on (by changing them or creating them or ending them).[4] But perhaps the most crucial feature of legal powers lies in the way in which they change the legal situation. Changes in legal rights and duties can be brought about without the exercise of a legal power, but legal powers bring about such changes in a quite distinctive way. Contrast the following two cases. In one, I exercise a power to consent to your entry into my home when I invite you over for dinner. The exercise of this power changes what would be a trespass into a rightful visit. In the other, I convince my neighbor to invite you to dinner at her home (by regaling her with stories about your charm as a dinner guest, say). Her home is not my home, so I have no legal power to consent to your entry. I can bring about the change (from

2. Another thing I do not do is to attempt any kind of comprehensive review of earlier discussions of legal powers. I discuss the best-known views in notes 14 and 44 and accompanying text.

3. Hohfeld, *supra* note 1, at 45–54. I discuss some of these powers in Section IV *infra*.

4. *See* H.L.A. Hart, The Concept of Law (3d ed. 2012), at 81.

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trespassing to rightful entry) only in the nonlegal way (of convincing her to invite you).

As we will see below, explaining just what the difference is between these two cases is not a simple matter. But it is absolutely crucial to understanding legal powers and their role in private law. Private law gives us a sort of clue about what is happening in the way that it characterizes what is required to exercise some paradigmatic powers. To exercise the power to acquire property, for example, one "manifests an unequivocal intention of appropriating" the unowned thing.[5] Consent in private law must be established by "overt acts and manifestations [of] feelings."[6] To take another important example, entering into a contract requires "a manifestation of intention to act or refrain from acting in a specified way."[7] On its face, the law seems to be saying that powers are exercised through the manifestation or, as I put it, communication of an intention to change the legal situation in the relevant way.[8] Look again at the two cases. To change your legal situation with respect to my neighbor's home, I need to do something that causes her to license your entry. By contrast, I can change your trespass into a rightful entry merely by communicating the intention to do so, without any intermediate causal process needing to take place. I call the difference in the way that your legal situation changes in these two cases the *central distinction*. In Section II I expand on this at length and explore various ways we might understand the central distinction and the way that the exercise of a legal power brings about legal change.

Another feature of legal powers on which I concentrate is brought out by reflecting on the question of whose legal situation is changed by the exercise of a power. A power-holder's exercise of the power affects the legal situation not only herself but also of someone else (the holder of the correlative liability, in Hohfeldian parlance). By acquiring an unowned object, I not only gain rights in it but also impose duties on others not to interfere with what is now my property; by consenting to your entering my land, I lose the right that you not enter, and you gain a corresponding liberty to enter; and by forming a contract, we mutually modify our rights and duties as between one another. At least in private law, powers are shot through with the pervasively bipolar or bilateral or correlative normativity that on many accounts is characteristic of private law.[9] This fact, combined with the fact that exercises of legal powers bring about changes in the legal situation in

5. Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).
6. O'Brien v. Cunard S.S. Co. Ltd., 28 N.E. 266, 266 (Mass. 1891).
7. RESTATEMENT (SECOND) OF CONTRACTS §2.
8. Here I am assuming that in understanding legal powers, we should take account of the law's own internal understanding of them. For defense of this sort of methodology as applied to theorizing about private law more generally, *see* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).
9. For discussion of the idea of bipolar normativity, *see* WEINRIB, *supra* note 8; Michael Thompson, *What Is It to Wrong Someone? A Puzzle about Justice*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ (R. Jay Wallace, Samuel Scheffler & Michael Smith eds., 2004); STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT (2006).

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some distinctive noncausal way, has the implication, I suggest, that whatever it is that constitutes the exercise of a power must be something that is at the same time about both the power-holder and the liability-holder. That is, because A's exercise of legal power over B changes both A's and B's legal situation, the kind of fact that could constitute the exercise of that power must be a fact about both A and B. The law's notion of the communication of an intention to bring about the legal change is perfectly suited to play this role. As I show below in Section III, this notion makes the exercise of a legal power turn on a kind of a fact that is public as between power-holder and liability-holder.

Putting these two ideas together, the argument in Sections II and III is that A has legal power over B when A can change B's legal situation merely by communicating the intention to do so. Finally, in Section IV I turn to showing how this account, which is by and large motivated by quite general theoretical considerations about the sort of things that powers are and their role in our legal lives, provides concrete answers to legal questions about how to understand various private law powers. Many of these questions, as we will see below, center on the role of subjective psychological facts about the power-holder and the extent to which certain such facts are constitutive of the exercise of the power. For the kinds of reasons I briefly mention in the previous paragraph, I argue that these subjective psychological facts could not be constitutive of the exercise of the power, which is a juridical event.

II. THE CENTRAL DISTINCTION

Understanding legal powers requires us to understand the distinctive way in which powers allow us to bring about changes in our legal rights, duties, privileges, and so on (that is, in what I call our *legal situation*). Seeing how powers are distinctive in this respect is easiest by drawing the central distinction between the way in which we change our legal situation through the exercise of legal powers and the way in which we are able to change it otherwise. I draw this distinction in the previous section by contrasting two ways in which a legal change can be brought about. Before we examine it in detail, it is important to pause here to focus on just how important the distinction is.

One way to see this is by imagining what a legal system would look like without powers. I take it that in such a legal system we could still have rights and duties. But those rights would necessarily be quite limited. They would include only what Kant calls "innate right" as opposed to "acquired right": we would each have (only) the basic tort law right that others not interfere with our person and each owe the correlative duty to everyone else.[10] Without powers we would be unable to modify our legal situation

10. *See* Immanuel Kant, The Metaphysics of Morals (Mary Gregor trans., 1996), at 6:237–238, 245–246, 253.

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(or, what amounts to the same thing, the legal situations of others). We would be unable to acquire new rights through the acquisition of property or through others' promises to us, so there would be no law of property and no law of contract. And conversely, we would be unable to incur duties to others through consenting to acts that would otherwise infringe upon our rights or through agreeing to do things for them.[11] It is important to notice that in such a world, we would be able to act in ways that caused changes to our legal positions. But we would do so only either by changing the nonlegal facts of the world or by committing wrongs. By picking up an apple, I could impose upon you a duty not to interfere with it, but only because interfering with it would count as interfering with *me*, so the change in the legal situation would be merely the causal upshot of a change in the nonlegal world, the application of an unchanged norm to an empirically changed world. Powers seem to work differently. In exercising legal power, we change our legal situation just by doing so, that is, without needing to change any nonlegal features of the world.[12]

The central distinction is hard to pin down for a few reasons. For one thing, the law is rife with situations that can lead to a confusion about where it should be drawn. Contrast a case where A contracts with B to deliver some widgets with a case where A represents to B that A will deliver them and B relies on the representation. In either case, should A fail to deliver, he might be subject to liability and the amount of damages might even end up the same. But in the first case, A's liability arises from the exercise of a power (to contract), whereas in the second case it does not. Getting clear on the difference between these cases is hard without a clear understanding of powers. Moreover, some attempts to characterize legal powers are framed in a way that obscures this crucial distinction.

Take Hohfeld, for example. His view is that A has power over B when a change in B's legal situation results from a fact "under the volitional control" of A.[13] It looks on its surface as though A's liability in both of the above cases is grounded on facts under A's volitional control (his decision to enter the contract with B or his representations to B), and indeed the most natural reading of Hohfeld's language here seems to capture a much wider set of cases than we would normally want to capture with an account of legal power. To borrow an example from Raz, the decision to move house is under my volitional control in Hohfeld's sense, and when I do move house, my legal rights and duties change in various ways. But we do not want to say that by moving I exercise a legal power.[14] Why not? Beyond the

11. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481 (2008), at 500–502.

12. Taking up Owens's evocative phrase, we can say that legal powers allow us to shape our legal landscapes in a distinctive way: DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE (2013).

13. Hohfeld, *supra* note 1, at 50.

14. Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOL. 79 (1972), at 80. It is worth noting that Hohfeld's full account requires that power-holder's exercise of volitional control be "paramount" as compared to any other

case-based intuition, the explanation is that the changes in my legal rights and duties that result from my moving house are not brought about in the same distinctive way as changes are brought about when I exercise legal power. Roughly, it seems that nothing normative has changed but rather that the unchanged norms (or laws) apply to a world changed in some empirical way (I used to live here but now I live there).

In addition, we use the word "power" to describe both situations in which a legal power has been exercised and situations in which it has not. Recall the example I introduce in the first section. I have the legal power to change what would be a trespass into a rightful visit by inviting you to my home for dinner. But I might also be said to have power to bring about a parallel change insofar as I can convince my neighbor to invite you to her home. Of course, in the latter case, I do not have any *legal* power with respect to your being invited over. But we might nevertheless want to talk about both as cases in which I have power with respect to your invitation because in both it makes sense to say that you were invited over because I wanted you to be. Raz marks this contrast by differentiating legal power and what he calls "power as influence."[15] But even though in both cases we can say that you were invited over because I wanted you to be, an ambiguity in the word

person's. So Hohfeld does have the resources to say why I am not exercising legal power when I convince my neighbor to invite you into her house. (Although my volitional control may be at work in that case, her volitional control is paramount.) Still, the objection in the text seems decisive in showing how Hohfeld's account is overbroad, and the overbreadth tracks the central distinction in that Hohfeld's account captures cases in which the legal change is not brought about in the distinctive way that, as I am arguing, genuine exercises of legal power do. We might read Hohfeld differently by ascribing to him a quite specific understanding of "control," such that a fact is under my control only when I can determine whether or not it obtains without requiring any kind of empirical or causal process, or something along those lines. That would be a better account, as the discussion below makes clear. But Hohfeld does not offer any explanation of such a notion of control or, indeed, any reason to think that this is what he actually has in mind.

Salmond's view is similar to Hohfeld's, but he claims that only acts done with the intention to bring about the legal change ("directed to that end") can constitute the exercise of a power. The problem with a view like this, as Raz saw, is that many acts could be done on a given occasion with the intention of bringing about a legal change, yet this does not seem to change them into the exercise of a power. (I cannot make my moving house the exercise of a power just by doing with the intention of bringing about the relevant legal changes.) *See* JOHN W. SALMOND, JURISPRUDENCE (4th ed. 1913), at 192–193; and *see* Raz, *supra* note 14, at 81, for the criticism. (I discuss Raz's own view in note 44, *infra*.) In addition to Hohfeld's and Salmond's basically common-law views, there is another set of views espoused by theorists from civilian jurisdictions, tracing back (at least) to Hans Kelsen, Alf Ross, and G.H. von Wright. These views tend to refer to legal power as "legal competence." Torben Spaak, a sophisticated contemporary proponent of such views, argues, similarly to Salmond, that a person has legal power when, if he or she performs "in the right way" some act that "depends for its legal effect on having been performed with an (actual or imputed) intent to bring about the relevant legal effect," the relevant legal effect is brought about. But in addition to its mysterious "right way" requirement, Spaak's characterization fails in that it does nothing to account for the central distinction. *See* Torben Spaak, *Explicating the Concept of Legal Competence*, *in* CONCEPTS IN LAW 67 (J.C. Hage & D. von der Pforden eds., 2007), at 78. For more on the civilian tradition *see* TORBEN SPAAK, THE CONCEPT OF LEGAL COMPETENCE (1994); LARS LINDAHL, POSITION AND CHANGE (1977).

15. JOSEPH RAZ, PRACTICAL REASON AND NORMS (2d ed. 1999), at 103.

"because" masks a very significant difference between the cases, a difference that has to do with the way that my action (or desire) could bring about or explain the legal change. In the case of power as influence—what I have over my neighbor—I cause the legal change to come about, but in the case of legal power, something different is going on. So the use of the English word "power" can sometimes lead to confusion about the central distinction.

Of course, the most important reason that the central distinction is so hard to pin down is that it is not at all clear how to characterize the nature of the explanatory relationship between the exercise of a legal power and the change in the legal situation it brings about. While H.L.A. Hart is most closely associated with legal powers for his discussion of power-conferring rules in *The Concept of Law*,[16] he discusses powers on their own terms in more detail in his consideration of Bentham's account. Bentham's own views are complex and problematic enough that it is not worth our while to discuss them here. But Hart crucially saw that Bentham's analysis suggested that the effects of the exercise of legal powers are "legal *normative* effects or consequences, not *natural* effects. The point is not that the use of such words *causes* later effects or events to be done or to happen."[17] Here Hart draws the central distinction by seeing that legal changes brought about through the exercise of legal powers are not brought about causally.

This is a promising idea. Recall once again our two cases of your being invited over for dinner, and start with the case of my neighbor's home. Assuming I do convince her invite you over, we can ask how it is that my action brings about or explains the relevant legal change. It looks as though what has happened is that in singing your praises as a potential dinner guest to my friend, I caused her to invite you. Here the causal relationship between my action and the invitation runs through the way my action has manipulated the nonlegal facts of the world (and in particular my friend's

16. HART, *supra* note 4, at 81. Hart's discussion of power-conferring rules in THE CONCEPT OF LAW is closely related to the ideas with which I begin this section. Hart's thought is, at least in part, that powers are constitutive of many common kinds of legal arrangements, and so a duty-based account of law will necessarily be inadequate.

17. H.L.A. Hart, BENTHAM ON LEGAL POWERS, 81 YALE L.J. 799 (1972), at 820 (emphasis in original). Hart goes on to draw a connections between this idea and J.L. Austin's theory of speech acts, as something like the central distinction applies in both cases. On Austin's view, speech acts have illocutionary effects, which are brought about noncausally, and perlocutionary effects, which are brought about causally. When I say "I promise I'll meet you for lunch," for example, the illocutionary effect of my utterance is that I am now obligated to meet you (which is not caused by my utterance), and the perlocutionary effect might be that you cancel your plan to see a movie tomorrow afternoon (which would be caused by it). There are disputes about how to draw the line between these two different aspects of my speech act. For more on the distinction, *see* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975), at 109–120 & *passim*; Jennifer Hornsby, *Illocution and Its Significance*, *in* FOUNDATIONS OF SPEECH ACT THEORY (Savas L. Tsohatzidis ed., 1994), at 187; Richard Moran, *Testimony, Illocution, and the Second-Person*, 87 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOL. 115 (2013). For more on the connection to speech-act theory, *see* notes 25, 29 & 56 infra. Another interesting early account, which crosses the line between legal powers and speech acts and applies in certain ways to both of them, is Reinach's theory of social acts. *See* Adolf Reinach, *The A Priori Foundations of Civil Law*, 3 ALETHEIA 1 (1983).

mental states). This relationship would be no different from the causal relationship between the invitation and any of the following: my friend's needing a fourth for her weekly bridge game, my friend's wanting your interior design advice, my friend's sister asking to be set up on a blind date with you. In all of these cases, an event takes place that causes my friend to decide to invite you over. These are all straightforward instances of everyday causation, in which some event's occurrence changes the circumstances of the world (and in particular some psychological facts) in a way that results in my friend's coming to a decision.

But in the case of my own home, things are rather different. Here the difference between the legal situation before my action (i.e., before the invitation) and after my action is not, at least not obviously, explained by reference to causation. My exercise of my own legal power to invite you over changes the legal situation—transforming what would be a trespass into a licensed entry—in a way that no other action could do.[18] By inviting you over, I have not caused it to be the case that you are now licensed to enter whereas before you were not. Rather, it seems that the exercise of my power explains the legal change in some other (again, noncausal) way.[19] Raz's well-known account tracks this same distinction. Raz says that legal powers bring about legal changes "normatively and not causally."[20] Again we see the idea that legal powers do not cause legal change but bring it about or explain it in some other way. It is not entirely clear what it means to say that

18. This formulation suggests that Aristotle's distinction between productive and constituent means might be another way to get at the difference. For discussion, *see* Christopher Essert, *How Law Matters in* WHY LAW MATTERS, 12 JERUSALEM REV. LEGAL STUD. 1 (2015).

19. Mark Greenberg endorses this way of thinking about the power to promise when he says that promises generate obligations noncausally; Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011), at 238–239. Interestingly, Greenberg is also among those who endorse a view of the nature of law that seems to deny that legal authority, or law as such, is to be understood in terms of normative power (or something in the neighborhood). This is because Greenberg's view, drastically simplified, holds that our legal obligations are the causal upshots of actions of legal institutions (or, more precisely, they are the moral obligations that we have in the world as that world has been causally affected by the actions of legal institutions). *See* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014). A view like this seems hard to square with the intuition, shared by many legal philosophers, that the legal authorities determine their subjects' legal obligations in the distinctive way associated with normative power. Ronald Dworkin and Scott Hershovitz also argue for views similar to Greenberg's. Dworkin's discussion of law in the final chapter of JUSTICE FOR HEDGEHOGS departs significantly from his earlier work and endorses a view on which law, as a branch of morality, is to be understood in terms of the moral effects of the actions of legal institutions. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011), at 408–409. For discussion, *see* Jeremy Waldron, *Jurisprudence for Hedgehogs* (NYU School of Law, Public Law Research Paper No. 13–45, 2013), http://ssrn.com/abstract_id=2290309 (accessed January 8, 2016); and Christopher Essert, *A Theory of Legal Obligation*, *in* THE LEGACY OF RONALD DWORKIN 245 (Stefan Sciaraffa & Wil Waluchow eds., 2016). Hershovitz argues that we should abandon the idea that law has "distinctively legal upshots": Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015).

20. RAZ, PRACTICAL REASON, *supra* note 15, at 103; Raz, *Voluntary Obligations*, *supra* note 14, at 80. For clear discussion of Raz's view on this point *see* Michael G. Pratt, *Promises, Contracts, and Voluntary Obligations*, 26 LAW & PHIL. 531 (2007), at 540.

the exercise of a legal power brings about legal change normatively, but Raz further cashes the difference out by reference to the distinction between an act's results and its consequences, which he takes from Anthony Kenny. Here is what Kenny says:

> The result of an act is the end state of the change by which the act is defined. When the world changes in a certain way there may follow certain other changes . . . . In that case we may say that the second transformation is a consequence of the first and of the act which brought the first about. The relation between an act and its result is an intrinsic relation, and that between an act and its consequences is a causal relation.[21]

Raz says that when A exercises a legal power, the result of A's action is the legal change, but when A exercises power as influence, the legal change (if any) is just the consequence of it. Kenny's suggestion that the contrast is between a causal relation and an intrinsic relation brings out the thought that the form of explanation appropriate to our task seems to require something of a different sort of metaphysical relation from causation. We can say that a result happened because an act did, and we can also say that a consequence happened because an act did. But these are two different kinds of explanations.[22] The second "because" is the "because" of causation, but the first "because" is not. The act did not cause its result, on Kenny's understanding, because the result is in some sense a part of the act; it "defines," in a way, whether or not the act has occurred.

This suggests, as Hart saw, that what we need is a quite general idea of noncausal explanation. The recently philosophically popular notion of grounding seems to be onto the same idea.[23] Sometimes some Y facts are explained by some X facts in that the X facts cause the Y facts: the fact that the sun has risen explains why the temperature is going up. But sometimes explanation does not take this causal form. The fact that the page is red explains the fact that the page is colored but it does not seem to have caused it. Rather the page is colored in virtue of the fact that the page is red. The fact that I harmed you explains why my action was wrong but it did not cause it to be wrong. Instead the harmfulness of the action grounds its wrongfulness. The idea is that something similar is going on with the

21. Anthony Kenny, *Intention and Purpose in Law*, *in* ESSAYS IN LEGAL PHILOSOPHY 150 (R.S. Summers ed., 1968); cited in Raz, PRACTICAL REASON, *supra* note 15, at 103. Yet another closely related way to capture the contrast is by saying that the exercise of legal powers brings about legal change directly rather than derivatively. *See* Christopher Essert, *Legal Obligation and Reasons*, 19 LEGAL THEORY 63, 81 (2013).

22. Max Hocutt, *Aristotle's Four Becauses*, 49 PHILOSOPHY 385 (1970).

23. For discussion, *see* Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, *in* MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffman eds., 2010); Kit Fine, *Guide to Ground*, *in* METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY 37 (Fabrice Correia & Benjamin Schnieder eds., 2012); Jonathan Schaffer, *On What Grounds What*, *in* METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David Chalmers, David Manley & Ryan Wasserman eds., 2009); Paul Audi, *Grounding: Toward a Theory of the In-Virtue-Of Relation*, 109 J. PHIL. 685 (2012); Karen Bennet, *Construction Area (No Hard Hat Required)*, 154 PHIL. STUD. 79 (2011).

way in which the exercise of a legal power explains the occurrence of the relevant legal change: the fact that I invited you over explains the fact that you will not be trespassing when you enter, but it does not cause you not to be trespassing. In other words the exercise of the power grounds the legal change.

It seems plausible to suppose that at base all these different ways of cashing out the difference between legal power and power as influence are all grasping at the same idea. Whether we say that the exercise of a power brings about the legal change normatively, or that it grounds the legal change, or that it explains it noncausally, or that the legal change happens in virtue of the exercise of the power or depends on the exercise of the power, it seems we are aiming at the same basic idea. Although we lack a clear and unquestionably illuminating way to describe the phenomenon, we might nonetheless think we have a grip on the difference between how my invitation explains the fact that you are not now trespassing when you are at dinner at my home and how my description of your charms to my neighbor last week explains the fact that you were not last night trespassing when you were at dinner at my neighbor's home. The way in which the contrast is so illuminating suggests that this might be one of those situations that Aristotle reminded us of, in which "one contrary state is recognized from its contrary,"[24] so Hart's notion of noncausal explanation might be our best option. Assuming that it is, to grasp the central distinction, we need to understand this: while we can change our legal situations causally in any manner of ways, legal powers are distinctive in that they uniquely allow us to bring about legal change noncausally. We can turn now to looking at the implications of this thought within the correlative context of private law.

III. COMMUNICATION AND CORRELATIVITY

When I invite you over to dinner, I thereby exercise a power to change your legal situation so that you are no longer trespassing when you enter my home. According to what is shown so far, what is distinctive about this process is that the exercise of the power—the invitation—explains the legal change noncausally. Now I want to focus on something else. It not only changes your legal situation; it also changes mine. Having invited you over, I no longer have the right that you not be at my home (unless and until I revoke the invitation). There are complexities here, but at least this much is true: once I have exercised the power, it becomes the case that merely by standing in my dining room, you are not wronging me. So both of our legal situations are changed by my exercise of the power. This fact has significant implications for our understanding of powers in private law. It is plausible to suppose that if the change in the legal situations of both

24. Aristotle, Nicomachean Ethics, 5.1.1192a17.

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the power-holder and liability-holder is brought about by the exercise of a power noncausally, then only certain kinds of facts could explain that change. In particular, it seems as though the change must be explicable in virtue of some facts about both parties, because some fact entirely about one of them is a poor candidate to explain noncausally a change in the other's legal situation. Both the power-holder and liability-holder are star players in the drama that constitutes the exercise of the power. I argue below that this is why the law insists that the exercise of legal powers be brought about through an act of communication by the power-holder to the liability-holder of an intention to bring about the legal change. Thus the power must be exercised through an event in which they are both participants.

To begin in somewhat abstract terms, consider again the juridical event that comprises the exercise of power in a paradigmatic, unproblematic case. B wants to enter A's land; without A's permission, this would be a trespass, but A can exercise a power to consent to this entry. Suppose that A wants B to enter and wants to exercise her power. What must she do in order to do so? A's trying to exercise her power by simply intending that B not be trespassing is not enough. Nor would it be enough if B happened to guess what A was thinking and entered on that basis. In this simple case, it seems that the power has this feature: when A intends to consent and B recognizes that A intends to consent, A has consented. What brings the power-exercising event about is the recognition by B of A's intent to bring it about.[25] But just as this is not just a matter of A's intention, it is also not just a matter of B's knowledge: if A secretly intends to let B enter and tells this to C, and C tells it to B, A has not consented. And this suggests that the exercise of the power involves more than A's intention and B's knowledge of that intention. It involves rather a single event that makes reference to both of these: it requires B's coming to be able to know about A's intention through A's manifestation of that intention. It requires that A *communicate* her intention to B, where "communication . . . is a relation between people,"[26] so that the communicative act is public as between A and B. This communication, we might say, is something that A and B "do together."[27]

25. *Compare* JOHN SEARLE, SPEECH ACTS (1969), at 47:

> Human communication has some extraordinary properties, not shared by most other kinds of behavior. One of the most extraordinary is this: If I am trying to tell someone something, then (assuming certain conditions are satisfied) as soon as he recognizes that I am trying to tell him something and exactly what it is I am trying to tell him, I have succeeded in telling it to him. Furthermore, unless he recognizes that I am trying to tell him something and what I am trying to tell him, I do not fully succeed in telling it to him.

26. HORNSBY, *supra* note 17, at 194.
27. Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006), at 236 n.29.

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The power is exercised through a single juridical event that cannot be conceived of by reference to some facts about A alone, or some facts about B alone, or indeed some facts about A alone and some facts about B alone. Rather, the power is exercised through an event—A's communication of intention to B—that must be understood in terms of A and B and the relationship between them. Thus the exercise of power in this paradigmatic case invokes the correlatively structured normativity that is characteristic of private law. Just as a wrong in tort law is constituted by a single juridical event of which plaintiff's doing and defendant's suffering are two correlative aspects,[28] the exercise of a power is constituted by a single juridical event (communication) of which the power-holder's manifesting an intention and the liability-holder's recognition of the intention are two correlative aspects. In both cases, the relevant juridical event is one that situates the two parties equally as opposing poles of the correlatively structured juridical relationship and thus vindicates their equality as participants in the legal transaction.[29]

This basic notion of power as requiring communication is consistent with (and indeed an elaboration of) the law's own internal conception of what it is to exercise a power. To exercise the power of consent, a power-holder must communicate the intention to render nonwrongful conduct that would otherwise be a trespass or battery.[30] To exercise the powers of offer and acceptance, contracting parties must manifest the intentions to enter into the contract.[31] And to acquire property, one must communicate the intention to become its owner.

My intention to capture a fox running by in the woods is not enough to change the rights and duties of anyone else. I need actually to capture the fox to do that.[32] Carol Rose says that my act of capture can be seen as a form of communication (or "statement") of an intention to capture the fox and to change the legal position of myself and everyone else.[33] Rose takes the idea from Blackstone, who thought that a first possessor's "taking amounts to a declaration that he intends to appropriate the thing to his own use."[34] As Kant puts it, acquisition involves *"Giving a sign* (*declaratio*) of my possession of this object and of my act of choice to exclude everyone else from it."[35] And this is precisely how the power of acquisition is to be

28. Weinrib, *supra* note 8.

29. One might think something similar is true of the ways in which certain kinds of speech acts seem to presuppose a kind of reciprocity between speaker and hearer. For some discussion of this idea of reciprocity, *see* Hornsby, *supra* note 17; and for a very helpful linking of the reciprocity of some kinds of speech acts to the idea of correlative normativity, *see* Moran, *supra* note 17.

30. Liability-holders can "only be guided by overt acts and the manifestations of [the power-holder's] feelings," rather than the feelings themselves. *O'Brien*, *supra* note 6, at 266.

31. Restatement (Second) of Contracts §2.

32. *Pierson*, *supra* note 5.

33. Carol Rose, *Possession as the Origin of Property*, 52 Chi. L. Rev. 73 (1985), at 77.

34. 2 William Blackstone, Commentaries *9. *See also id.* at 258.

35. Kant, *supra* note 10, at 6:258.

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understood. My capture of the fox communicates the intention thereby to become its owner (the *animus possidendi*), and the communication brings about that legal change: I become its owner, and everyone else now owes me a correlative duty not to touch/take/damage the fox.

Rose's account of acquisition also helps us see that different communicative acts will be fitted to different powers. The thought that taking physical control amounts to the act that communicates an exercise of the power of acquisition seems odd for two reasons. First, why should acquisition be required to communicate? Here we can clear things up by supposing, contrary to fact, that different act of communication could suffice. Why can I not acquire a fox, that is, by pointing at it and saying "mine"? The answer has to do with the fact that power to acquire is an *in rem* power, such that when I exercise the power and acquire the fox, I impose a duty on everyone else not to interfere with it. Thus I need to communicate to everyone else. That is, it must be an act that communicates my intention, again in the sense of making it public and recognizable, to everyone,[36] or, as the court in *Pierson* says, it must be "unequivocal."

For *in personam* powers, A's communicative act must be understandable as one that is public as between A and B. For *in rem* powers, the requirement that A's act be public as between A and all other Bs just means it must be public. Once we see that, we see that the only way to communicate my intention to acquire the fox in a way that will be sufficiently public is actually to capture the fox.

Second, why think that acquisition is about communication and not just physical control? Here the decision in *Pierson* is helpful. The court tells us that "actual bodily seizure" is not in fact required, but that "encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible" is enough.[37] By catching a fox in a trap that I have set in the forest, though, I obviously do not have physical control of the fox vis-à-vis others (who could come and take the fox out of the trap when I am not there); rather what I have done is entirely normative, an act that, as the court says, "manifests an unequivocal intention of appropriating the animal."[38]

This last point brings us to the thought that different forms of acquisition require different forms of communication. We can interpret the law of first possession as telling us what acts are required to communicate the intention to acquire ownership in various kinds of unowned objects (noting

36. Shiffrin, *supra* note 11, at 520, glosses an example of Scanlon's to suggest how the communication needed to exercise of the power to promise does not need to take the form of language.

37. *Pierson*, *supra* note 5.

38. *Id.*

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in particular that actual physical capture is not always required),[39] and something similar can be said about intellectual property.[40]

Then we can broaden the inquiry further, and questions will arise about just what acts constitute the communication that amounts to the exercise of any given power. The answer is that the law decides. That is, not every act that we might pretheoretically think of as communicating an intention will suffice to exercise the power; that was the lesson of the fact that just saying "mine" will not count as communication in first-possession cases. This is an important aspect of the role that communication plays in the account of powers. Moreover, the law decides what counts on a power-by-power basis. The point is made by Raz in pointing out that legal powers are often exercised by what Grotius called "certain mute signs,"[41] that is, "special ceremonial or formal acts as in making a deed or getting married," "weighing of metal on scales and its transfer from buyer to seller, or walking along the borders of the land bought": these acts are ceremonial and formal to ensure their suitability as distinctively public communicative acts.[42] Only legally recognized communicative acts will suffice to exercise a power. Although Raz's account of powers is not framed in terms of communication, his account does provide a helpful general guide to the way that the law indicates the nature of the acts that will count as communication in the requisite way:

> An action is the exercise of a legal power only if one of the law's reasons for acknowledging that it effects a legal change is that it is of a type such that it is reasonable to expect that actions of that type will, if they are recognized to have certain legal consequences, standardly be performed only if the person concerned wants to secure these legal consequences.[43]

In my terms, this passage tells us that people will not standardly catch foxes unless they want to acquire ownership in them, or sign deeds unless they want to transfer title in land, or say "I do" standing at the front of a wedding unless they want to get married, so the law picks out these acts as

39. Compare foxes; sperm whales (Swift v. Gifford, 23 F. Cas. 558 (D. Mass. 1872)); finback whales (Ghen v. Rich, 8 F. 159 (D. Mass. 1881)); unowned shipwrecks (*The Tubantia*, [1924] P. 78, [1924] All ER 615); and baseballs (Popov v. Hayashi, 2002 WL 31833731 (Cal. Sup. Ct., Dec. 18, 2002)). Rose discusses the point with respect to whales explicitly; Rose, *supra* note 33, at 83. Henry Smith's account in terms of custom suggests that the acts that constitute communication might be selected by reference to the special body of knowledge appropriate to a particular community. *See* Henry Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003), at 1117–1125.

40. Abraham Drassinower, *Capturing Ideas: Copyright and the Law of First Possession*, 54 CLEV. ST. L. REV. 191 (2006). The intellectual property case shows that communication of the relevant intention is a more abstract category that subsumes capture as a particular instance, because in respect of acquisition of unowned physical objects, the common law has determined that capture constitutes communication of the intention to appropriate, but in respect of intellectual property, other acts—in copyright, the act of original expression—constitute the requisite communication.

41. HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE (William Whewell trans., 1853), at 451.

42. Raz, *Voluntary Obligations*, *supra* note 14, at 81; RAZ, PRACTICAL REASON, *supra* note 15.

43. Raz, *Voluntary Obligations*, *supra* note 14, at 81.

the communication or sign or declaration of the intention to make those legal changes.[44] And this is important because the objectively reasonable nature of these acts as indicative of the presence of the relevant intention means that they are well placed to serve the role of making the exercise of the power public as between power-holder and liability-holder. That is, acts that reasonably would not be performed in the absence of the power-holder's intention to bring about the legal change are well suited to indicate publicly as between power-holder and liability-holder that the power is being exercised.

This last point helps emphasize, once more, that the act that counts as exercising the power must be an event that is public as between the parties. This is important because it helps us to see that the communication requirement is not simply about making the power-holder's intention known to the liability-holder. The requirement of publicity as between the parties manifests itself, typically, in a requirement not of knowledge but of knowability. A's power over B is not exercised when A intends to bring about the legal change and B comes to know about A's intention through some means other than A's communicative act.[45] So suppose that A intends to license B's entry onto A's property and tells this to C, who then tells B about it. A has not exercised any legal power, and B would still be trespassing were

44. Because Raz's discussion of legal power (and normative power more generally) will be familiar to readers, I should say something about it here. Raz's basic thought is that A has power over B when the law allows A to bring about legal change normatively rather than causally by performing an act that (per the passage quoted just above) is normally performed only by those who wish to bring about that legal change. *See* Raz, *Voluntary Obligations*, *supra* note 14; and RAZ, PRACTICAL REASON, *supra* note 15, at 98–104. While Raz's account is characteristically insightful, it seems incomplete, at least if we are focusing on the private law context, as I am here. The incompleteness stems from the account's focus on the position of the power-holder to the exclusion of the liability-holder. There are many varieties of actions that would fit Raz's definition but which could not constitute the kind of communication that is required by the correlativity of the legal change brought about by the exercise of a power. For instance, A would standardly not form an intention to bring about a legal change unless she wanted to do so, but as shown above, such a formation of an intention is not sufficiently communicative to constitute the exercise of a power in private law. (Incidentally, this shows why the account offered in Andrew Halpin, *The Concept of a Legal Power*, 19 OXFORD J. LEGAL STUD. 129 (1996) fails.) Raz, of course, could reply that his account is meant to be more general than mine—it seems that on Raz's account of normative power more generally, the formation of a decision counts as the exercise of a power ,since (as he claims) the formation of a decision creates an exclusionary reason because of the desirability of there being such a reason—and that any distinctive communicative or correlative elements of private law powers are to be explained separately. Perhaps that is right, and the communicative element of the account here could somehow be fitted into a Razian picture, but I leave that possibility to the side. I should note that at one point, Raz characterizes the power to promise in terms of communication of an intention to undertake an obligation; Joseph Raz, *Promises and Obligations*, *in* LAW MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 210 (P.M.S. Hacker & Joseph Raz eds. 1977), at 218. I take it that Raz thinks communication in the normal (noncorrelative) sense is relevant here simply because we promise, normally, through making utterances of one sort or another. The notion of communication I employ, of course, is quite a bit broader and (in addition to being correlatively structured) includes many things that Raz does not think of as communication.

45. A can bring about a change in what B knows only causally, but a successful act of communication explains the knowability of its contents noncausally.

she to enter A's land. The law is consistent with this. In general B has no defense to a trespass action brought by A if B gets putative permission to enter A's property from someone other than A.[46] To the same effect is the phenomenon of so-called "ghost surgery," where A consents to her doctor, B, performing a surgery which is then performed by C after B purports to license B to perform it. Here A has a claim in battery against C even though C performed exactly the surgery that A wanted done, and no harm resulted.[47]

This is a crucial point. It helps us to see that the requirement of A's intention and the requirement of B's knowability are not two distinct requirements joined for external purposes but rather that one and the same juridical event must constitute both the manifestation of A's intention and the recognition (or availability for recognition) by B in order for that event to constitute the exercise of a power. When A intends to bring about a change in B's legal position and B recognizes (or is able to recognize) this, neither the intention nor the recognition counts independently of the other. The intention is significant only because of the recognition that is correlative to it, and vice versa. These two elements in the exercise of the power are two sides of one single juridical event.[48]

The idea that legal powers are exercised through communication indicates why it is a mistake to think, as some recently argue that we should, that the relationship of ownership is best understood in terms of a power that owners have over others "to change (in some nontrivial measure) the rights and duties that nonowners have toward the owner with respect to an object."[49] While of course ownership involves powers (in particular the power to consent[50] and the power to transfer), it is simply wrong to think

46. Athwal v. Pania Estates Ltd. (1981), 11 C.E.L.R. 17 (B.C. S.C.) (Can.).

47. Vitale v. Henchey, 24 S.W.3d 651, 659 (Ky. 2000); Tom v. Lennox Hill Hospital, 627 N.Y.S.2d. 874 (N.Y. Sup. Ct. 1995).

48. This is a version of the Weinribian thought about tort law. It is beyond my scope to argue this point here, but, especially given Weinrib's embrace of the idea of *personality* ("the capacity for purposiveness") as "mutually entailed" by correlativity, it is plausible to suppose that the power-liability relationship is just as important for understanding the kind of correlative normativity that Weinrib claims is embodied by private law. Indeed, Weinrib sees acquisition and transfer as "the exercise . . . of purposiveness," thus endorsing a view on which personality and correlativity require the possibility of legal powers (understood as I am claiming they should be); *see* Ernest J. Weinrib, Corrective Justice (2012), at 11, 23. We might go even further and suggest that normative powers are fundamental to our conception of ourselves not just as purposive agents (who might have rights) but as what we might call *normative agents* (a phrase I take from Jane Heal, *Illocution, Recognition, and Cooperation*, 87 Aristotelian Soc'y Supplementary Vol. 137 (2013), at 145), able to make normative change in just the way that powers allow.

49. Avihay Dorfman, *Private Ownership*, 16 Legal Theory 1 (2010). To the same general effect, *see* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 53 U. Toronto L.J. 275 (2008), at 290.

50. Consent can be exercised implicitly and without the owner's actual subjective intention. *See* Walter v. Dexter (1874), 34 U.C.Q.B. 426; R. v. Can. Pac. Ry., [1931] A.C. 414 (P.C.) (Can); Restatement (Second) of Torts §§167, 892(2). This applies to chattels as well as real property; Driscoll v. Colletti, [1926] 2 D.L.R. 428 (Ont. C.A.) (Can.); Restatement (Second) of Torts §§252, 892(2). For more on this point, *see infra*, notes 60–61 and accompanying text.

that the primary legal relation between owners and others is a power. The basic juridical feature of ownership is that owners have a right that others not enter their property.[51] As this is a private law right, the right includes in the normal case the power to waive or consent to acts that absent consent would constitute infringements. But it is crucial to see that the right is paramount here. One way to see this is by noting that nonowners have a duty not to enter others' land, and not merely a liability (which would be what they had were ownership to consist in a power).[52] When I enter your land absent permission, it is a trespass even if you have never communicated that to me, and indeed, even if you or I or both of us do not know who the true owner of the land is.[53] That is, no exercise of a power is required to make me a trespasser on your land. Quite the contrary; the exercise of a power is required to make me *not* a trespasser on your land.

The correct understanding of the role of communication in an account of ownership thus helps to bring out the core features of legal powers. Since the exercise of a power brings about a legal change in the situation of the power-holder and liability-holder noncausally, it must be accomplished by an act that does not depend on either of them taken singly but rather is about both of them, an act that is public as between them. The law's conception of powers as accomplished through communication serves this role. In the next section I turn briefly to some discussion of the communication requirement and its relation to some questions about the role of the subjective intentions of the power-holder in the exercise of a power.

IV. POWERS (AND INTENTION) IN PRIVATE LAW

In the previous two sections, I highlight what I take to be the central salient features of legal power in private law. First is the central distinction, the idea that legal powers allow us to change our legal situations noncausally. It is the exercise of legal powers in this distinctive way that allows us to acquire property, to enter into contracts, to consent to acts that would otherwise wrong us, and to perform and participate in many other legal activities

51. This is simplified in that it refers only to land. For more general ideas, *see* Christopher Essert, *Property in Licenses and the Law of Things*, 59 MCGILL L.J. 559 (2014).

52. The alternative position cannot be saved by claiming that nonowners merely have a duty not to make *unauthorized* entry onto the land of others; *see* Avihay Dorfman, *The Society of Property*, 62 U. TORONTO L.J. 563 (2012), at 574; and *see* Civic Western Corp. v. Zila Industries Inc., 66 Cal. App. 3d 1, 16 (1977). This is because either "unauthorized" means "unwanted," in which case the account fails by grounding B's liability for entry entirely on a fact about A's subjective psychology, or else it means "without authorization having been communicated," which is to say it means that the power has not been exercised. In more recent co-authored work, Dorfman defends his view on this point at greater length, marshaling "conceptual, normative, and doctrinal claims" for his view. But his conceptual argument fails to take on the crucial point above. Given that, the normative and doctrinal arguments are (basically) irrelevant. *See* Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, 65 U. TORONTO L.J. 48 (2015), at 64, 73–74.

53. Teis et al. v. Corp. of Town of Ancaster (1997), 35 O.R. (3d) 216 (C.A.) (Can.). *See also* Burns Philp Food Inc. v. Cavalea Cont'l Freight Inc., 135 F.3d 526 (7th Cir. 1998).

that are at least partially constituted by legal powers so understood. I also highlight the fact that because of the correlative normativity of private law, legal powers so understood must, at least in private law, be exercised through an act of communication of the intention to bring about the relevant legal change, because only communication can provide a way for the change to be brought about noncausally for both the power-holder and liability-holder. In this section I want to show how understanding legal powers in terms of communication of an intention to bring about a legal change helps to clarify a set of persistent questions about various parts of private law.

The set of questions I have in mind largely revolves around whether a party's subjective intention—her actual mental state—matters in determining some legal question about powers in private law, such as whether A and B have formed a contract, whether A has consented to B's entry on A's land, whether A has given her property to B, and so on. The suggestion will be that a proper understanding of powers, consistent with the considerations discussed above, gives us a theoretical reason (as opposed to case-by-case intuitions) to think that most of the time the exercise of a legal power does not depend on the subjective intentions of the power-holder.[54] As I argue above, the communicative act that is constitutive of the exercise of a power is a correlative event, one that takes place at the same time for both A and B such that they are both equal participants in the legal change. Once we see this, we see that it is highly implausible to think that facts about one of A or B's subjective mental states can play a role, as these are facts that are entirely about the person whose mental states they are.

So the basic thought is that to exercise a power, a power-holder must communicate the intention to bring about the relevant legal change. It is generally uncontroversial at law that there is no requirement that the power-holder have an intention to act consistently with the change in question: I can contract without ever intending to perform the contract.[55] But what is a matter of controversy—or at least unclarity—is whether the power-holder must intend to bring about the change or merely communicate the intention.[56] For example, the orthodox view says that the common law of contract allows that one can contract unintentionally if one communicates or manifests the intention to contract.[57] But there are dissenters, and in civilian jurisdictions, subjective intention is required.[58] Contract formation

54. To similar effect, *see* Tom Dougherty, *Yes Means Yes: Consent as Communication*, 43 PHIL. & PUB. AFF. 224 (2015).

55. Scanlon argues for a different view about promising; T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998). But for convincing criticism, *see* Shiffrin, *supra* note 11; and OWENS, *supra* note 12, at 190.

56. One last point on speech-act theory: some version of this type of question is present there, too, in the dispute about whether a speaker or a listener or both get to determine whether or not some particular illocutionary act has happened. Compare Moran, *supra* note 17; and Heal, *supra* note 48.

57. RESTATEMENT (SECOND) OF CONTRACTS §2.

58. For a defense of the view that subjective intention is required, *see, e.g.*, Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 101 (2007); for spirited defense of the

is a difficult and deep problem, but on the understanding of powers that I offer here, the orthodox view must be correct: the formation of the contract affects both parties and so must be constituted entirely by facts that are public as between them and not by facts that are entirely about one of them (such as their internal psychological states).[59] As shown above, at private law, subjective intention is not required to exercise the power of consent; by communicating an intention to render some touching (or some entry onto land) nonwrongful, I have exercised my power to do so even if I did not actually want to do so.[60] The reason for this is that the relevant legal change—the rendering nonwrongful of some act that otherwise would infringe upon a right of mine—affects not just me but also (say) you, and so it must be explained by some fact that is not merely about me (or merely about you) but about both of us, and the communication of my intention is just such a fact.[61]

There are many powers involved in the law of property. I discuss the power of acquisition and the power to consent to entries that would otherwise be trespasses in the previous section. Another central power in the law of property is the power to transfer.[62] Generally, it takes two to transfer. Transfers of property can be accomplished through contract (as per above), as well as through testamentary dispositions, where it is clear that the subjective intentions of the testator do not matter if they conflict with what was communicated.[63] Transfers can also be accomplished through gift. In England, no subjective intention is required to exercise the power of gift,

orthodox view, *see* Peter Benson, *The Idea of Consideration*, 61 U. TORONTO L.J. 241 (2011). For general theoretical discussion of the question the context of legal powers, *see* Pratt, *supra* note 20; and Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1728 (2008).

59. There is a parallel view about the morality of promising, with some arguing that subjective intention matters—*see* Scott Hershovitz, What Must One Intend to Promise? (unpublished manuscript); Kimberly Kessler Ferzan, The Bluff: The Power of Insincere Actions (unpublished manuscript)—and others arguing for a nonlegal analogue of the orthodox view of contracts; *see* OWENS, *supra* note 12; and Shiffrin, *supra* note 11, at 490 n.19.

60. *O'Brien*, *supra* note 6; RESTATEMENT (SECOND) TORTS §892. For consent in the property context, *see supra* notes 49–53 and accompanying text.

61. Again, there is controversy outside private law. Criminal law, in at least some jurisdictions, makes subjective intention relevant; *see* R. v. Ewanchuk, [1999] 1 S.C.R. 330, 348 (Can.). And in morality, we can make a case that someone who insincerely communicates consent to sex (i.e., someone who says "yes" but thinks "no") has not actually consented; *see* Ferzan, *supra* note 59. On the other hand, it might be that the same sort of considerations about correlativity require a communicative account of consent in morality, too; *see* Dougherty, *supra* note 54.

62. Transfer of property often comes up in the context of what RAZ, PRACTICAL REASON, *supra* note 15, at 103, calls "regulative powers," which means powers to "change the application of norms." James Penner motivates his theory of property in part on the basis of a worry about the way this sort of change affects the duties of others (or does not); *see* JAMES PENNER, THE IDEA OF PROPERTY IN LAW (1997), at 75. Penner argues based on this that property cannot be understood in terms of duties owed to owners. But Penner's theory fails because we can just understand the duty as owned to the (office of the) owner of the property, and then understand the effect of the exercise of the (regulative) power of transfer to be the changing of the identity of the officeholder. *See* Christopher Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418 (2013).

63. Perrin v. Morgan, [1943] A.C. 399, 406.

but in Canada and the United States it seems things are different.[64] Another power that seems to require subjective intention is the power to abandon property.[65] If subjective intention is required in these cases, it is easy to see why: it is merely an evidentiary requirement, as the acts that constitute communication of the relevant intention (respectively, handing the object over, leaving the object behind) allow too easily for ambiguity, so a subjective intention requirement might be added in order to attempt to resolve such ambiguity. However, these minor exceptional cases aside, the law of property is consistent with the account of powers I defend here.

When attempting to understand the role of subjective intentions in various private law powers, we ought to look first and foremost to the fact that these are powers. And powers play a special role in private law. As I endeavor to demonstrate here, powers have two central features that make them important and distinctive. They allow us to change our legal situations noncausally, and so vastly expand our control over our rights and duties and thus over our legal relations with one another. And this noncausal mechanism means that, in private law's correlative context, they are exercised through acts of communication of the intention to bring about the relevant change, as in the law of consent's insistence on manifest consent or the law of acquisition's requirement that a first possessor unequivocally manifest an intention to possess. These considerations apply across private law powers. They help us to resolve disputes about particular powers by appeal to high-level theoretical concerns about the nature of private legal personhood. But they also help us to see just what sort of thing private law is and what sort of beings persons are, for the purposes of private law. As such, attention to legal powers in private law can be nothing but rewarding.

64. Day v. Harris and others, [2013] EWCA (Civ) 191, paras. 67–72. Restatement (Third) Property: Wills and Other Donative Transfers §6.1(a); Hardy v. Atkinson (1908), 9 W.L.R. 564 (Man. C.A.) (Can.); Schilling v. Waller, 243 Md. 271, 277 (1966).

65. Wood v. Etiwanda Water Co., 147 Cal. 228, 234 (1905). *See also* Simpson v. Gowers (1981), 32 O.R. (2d) 385 (Sup. Ct.) (Can.).