Working Paper

Consent and Its Counterfeits

William A. Edmundson

In its critique and legitimation of state authority, the liberal tradition in political philosophy relies heavily on the idea of consent. But, at least in its justificatory role, consent has proven to have serious shortcomings. The history of efforts to correct those shortcomings is a story of the remaking of the concept itself. The question arises whether consent as justificatory tool in the service of political philosophy retains much of its original affinity to consent in its ordinary sense.

I. Obligation and Consent

Consent has some unique and enviable moral powers. The act of consenting, if performed properly, submits the consenter to moral and perhaps legal duties and liabilities she otherwise would not have. This power is especially significant in case the reasons that otherwise bear upon the consenter are not themselves sufficient to impose a duty to do or to suffer what has been consented to. If, for example, I consent to appear at the homeless shelter to help out on Saturday, I normally now have a ("perfect") duty to do so –even though it is the case that,

Electronic copy available at: http://ssrn.com/abstract=1222922

apart from the giving of consent, I would at most have good moral reason to help out on Saturday (say, to discharge an "imperfect" duty of beneficence).

Another aspect of consent's unique potency is the fact that it can create Hohfeldian liabilities to be placed under duties that are impossible to know or to predict at the time consent is given. If, for example, Betty asks Arnold to help her move to her new apartment on Saturday, and he agrees, Arnold is liable to be asked to perform an indefinite number of subtasks that may not specifiable in advance. But his liability goes further. Not only is he liable to be asked, the asking will impose upon him duties to perform those subtasks. Those duties can arise without any need for further, specific expressions of consent, and they are ones that Arnold would not have had, had he not earlier consented to help out.

Yet another aspect of consent is that, coordinate with the moral duties and liabilities that flow from it, there arise permissions enjoyed by certain others –the consentee and those suitably related to her– to sanction, however mildly, the consentor's failure to perform or to allow what has been consented to. Moreover, neither harm nor disappointment are necessary preconditions to the conveyance of this permission. If Arnold fails to show up come Saturday morning but, by happy coincidence, Arnold's nemesis Clarence appears, and does a better job than the two of them together might have done, and better than Arnold would have acting

Electronic copy available at: http://ssrn.com/abstract=1222922

alone, Betty nonetheless is morally permitted to remonstrate with Arnold —and this is a permission she would not have had had Arnold simply straightaway declined her request for help. We are not morally free to chide whomever we please for failing to discharge their imperfect duties when we think a suitable occasion has presented itself. Were it otherwise, the distinction between perfect and imperfect duty would be both imperceptible and pointless.

Consent and Political Obligation

Consider the situation of the citizen in a modern state. The citizen is expected to obey laws that do not necessarily track independent moral requirements. Some do, and some do not. Given the existence of a law purporting to regulate a certain area of conduct, there will normally[1] be a moral reason —if perhaps only a feeble or redundant one— to do as the law requires. But moral reasons are not ipso facto moral requirements, not necessarily even pro tanto moral requirements.[2] So, as a general matter, doing as the law requires needn't be congruent with what morality would require in the absence of positive law. Even if the bare existence of a law reliably furnished a moral *reason* to do as it requires (and this is controversial, even with the stipulation that the state issuing the law is legitimate and just or

[1] The "normally" represents, among other things, the supposition that the state that has issued the law in question is a just, or nearly-just state.

[2] Supererogatory acts, for example, are often ones that are not morally required even in the absence of strong countervailing reasons. But there is moral reason to perform them.

nearly so), and also a moral permission to do so, it would not in general be true that the citizen is morally *required* to do as the law requires. Of course, circumstances may be such that there are additional moral reasons to do as the law requires, and the balance of reasons may be such that the citizen is morally required to do as the law requires. Perhaps these circumstances satisfy the antecedent of some penultimate moral principle, or perhaps they are sufficient only particularlistically. But in either case, the basis of the moral requirement to do as the law says is not the mere *diktat* of the law, but some wider set of circumstances —a set whose contingency is such that it is not generally true that there is at least a pro tanto moral requirement to do as the law requires. This fact has been referred to as *the problem of political obligation*. It is a problem because it is inconsistent with the "folk" intuition that normally there is a duty to obey the law. It is a problem also because removing the supposed duty to obey the law reverberates through a web of connections between the concepts of legitimacy, authority, and justice. A familiar instance is the supposed logical correlativity between state legitimacy and a state's moral power to impose moral duties by legislation and adjudicative decree.

Consent has appeared to many, over many years, to offer the most attractive —maybe the only attractive— solution to the problem of political obligation. Despite the doctrinal diversity it contains, the tradition of Grotius,

Hobbes, Locke, Rousseau, and Kant is united by its thought that political bonds are not natural but, in some sense, artifices that emerge, consistently with the natural moral law, by the exercise of human powers of reasoning and will. The attractions and limitations of consent as the key to solving the problem of political obligation are evident through centuries of work in this tradition. Most philosophical anarchists, who deny that the conditions of political legitimacy are satisfied or practically satisfiable in modern circumstances, assume that properly given general consent is a "gold standard," a clear if merely hypothetical case in which a state would enjoy a moral power to impose moral duties which citizens would be duty-bound, morally, to obey, and thus in which a state would possess legitimate authority.

Consent owes its appeal, as the key to solving the problem of political obligation, to its following features.

Relative uncontroversiality. Justifying any controverted and doubted thing A in terms of something else B is normally worth the effort only if B is less controversial and dubious than A.[3] Consent fills this bill; for it seems to be, as

[3] Of course it may be useful to frame an uncontroverted and undoubted thing –e.g., the duty not to torture babies for fun—in more controversial and dubious terms—e.g., a duty not to treat others as mere means—where doing so will systemize a range of things (some of them less uncontroverted and undoubted) by putting them all under a common principle.

John Simmons writes, "a clear ground of obligation."[4] The everyday experiences of asking and doing favors, coordinating plans, making and keeping promises, and forming and performing contracts make vivid to us what it is to submit ourselves to legitimate expectations —moral requirements— that we would otherwise be free of.

Content independence. A general duty to obey the law morally requires what any law in a relevant jurisdiction requires, whatever that may be. Such a general duty, to be morally acceptable, must be subject to moral constraints, but these constraints are not such that the general duty may require only what is independently morally required. What can give law this added moral power? Consent fills this bill; for acts of consent can render the consenter morally required to do what she is not independently morally required to do. Moreover, consent to abide by a decision-making procedure can bind the consenter to abide by the decisions that in regular fashion result —to abide by *all* of them, whatever their content (within certain perhaps quite wide limits). Having so consented, one surrenders one's right to "pick and choose"[5] which such decisions to abide by, based upon their merits.

---

[4] A. John Simmons. 2001. *Justification and Legitimacy: Essays on Rights and Obligations*. p. 11. Cambridge: Cambridge University Press.

[5] The expression is used in this context by John Finnis, among many others. See *Natural Law and Natural Rights*. p. 120. Oxford: Clarendon Press, 1984.

Explanatory sufficiency and unity. By pointing to consent, on whatever grounds, to various requirements, or to whatever might be stipulated as a requirement by certain modes of decision, one gives a good and normally sufficient reason to think that those requirements are at least pro tanto binding. No matter how various the possible grounds for so consenting, and no matter how far short of compelling those grounds might be, consent can stand as a simple and adequate justification for treating the consenter as subject to obligation. In the context of the problem of political obligation, consent holds out the attractive possibility that a single and sufficient answer exists.

Normative appeal. Political obligations can be onerous and demeaning. The less pusilanimous their acceptance can be made out to be, the better. Accepting political obligation out of fear of anarchy, or dire necessity, for merely strategic reasons —even as mandates of fairness— seems less inspiring than the idea that our political bonds are self-made and self-imposed, and are expressions of noble rather than servile traits of personality. To consent is to exercise a personal authority that ennobles even as it limits.

II. The Problem of Massive Nonconsent

Because consent has the attractive features just listed —relative uncontroversiality, content independence, explanatory simplicity and sufficiency, and normative

appeal– it has been the touchstone of modern attempts to justify the state. (Even Socrates, in the *Crito*, invokes consent as a reason why he must accept the unjust sentence given him by Athens.) As has been repeatedly noticed, however, in modern states consent of the required kind and scope has rarely, if ever, been given. Not expressly, anyway. The problem of political obligation, which may have seemed amenable to a consent solution, leads almost immediately to the problem of massive nonconsent. Although consent theories of political obligation have to answer other objections, the problem of massive nonconsent has perhaps seemed the most urgent.

What follows now is a quick survey of two important attempts to address the problem of massive nonconsent.

Tacit Consent: Locke One nearly automatic response to the problem of massive nonconsent is to relax the normal requirements for the giving of consent. One way of doing this is to dispense with the usual expectation that one's consent be given expressly. This move is more attractive than, instead, insisting that nearly everyone in a modern state has in fact given express consent. Standing during the playing of a national anthem, saluting the flag, and other patriotic rituals lack the specificity needed to support the claim that consent to the authority of law is, as a matter of fact, practically universal. Pledges of allegiance and loyalty oaths might have greater specificity but, on inspection, usually turn

out to lack the unambiguous language one would normally expect to find in the formulation of a binding agreement. Moreover, the state's claim to authority reaches persons regardless of whether or not they might have recited any particular formula of words.

Tacit consent, normally, is given if one has either intentionally responded to a request or demand in a way that conventionally signifies consent, or if one intentionally fails to dispel a legitimate understanding that one's behavior manifests consent. The former kind supposes a more or less discrete occasion for expressing dissent to have arisen. But a request to consent to submission, wholesale, to the laws of a jurisdiction is rarely if ever made, and it is not easy to imagine any other type of circumstance in which silence would betoken consent. It is therefore the latter form of tacit consent that is of interest here. (The two forms are not starkly different, and it seems reasonable to think they lie at opposite ends of a continuum.) It was Locke's view that settled residence within the territory claimed by a state constitutes tacit consent to obey its laws.

The difficulties of tacit consent as a ground of political obligation are many and well-known. Tacit consent takes in more people than does the express variety; but it does so by drastically reducing the role the will plays, while at the same time it inflates the content of what is consented to beyond all normal boundaries. At least those who mouth a pledge or allegiance or loyalty oath

knowingly associate themselves with a verbal formula having easily ascertainable if vague content. In the case of tacit consent, by contrast, the content is specified independently, and at the sole discretion of the party (the state) to whom a duty of obedience would be owed. Moreover, the sole means purporting to allow a resident to escape consenting is emigration. It is not enough to expressly disavow consent, or expressly to reserve the right to conduct oneself in ways other than those exacted by law. One must pull up stakes and leave --however undesirable, costly, and troublesome that might be (futile, too, since nearly all Earth's easily habitable, non-aquatic surface is the claimed territory of at least one state or another).

Hypothetical Consent: Kant. It is tempting to diagnose the problem of massive nonconsent as a symptom of the underlying disease of ignorance, selfish bias, and sheer orneriness. The *justificans* of political authority might accordingly be adjusted to avoid the recalcitrant fact of massive nonconsent. What justifies political authority is not that it is or has been consented to, but that it would be consented to should certain facts obtain. The stipulation of those facts can vary, but the genus of justification is one that includes figures like Kant and Rawls. One of the typical stipulations is that the consenter be free of many of the cognitive and motivational limitations that most of us are confined by. Another is that the hypothetical choice situation be such as to allow a genuinely free,

uncoerced, choice among a wide range of options, including of course the option of anarchism.

Two different kinds of worry are raised by the move to hypothetical consent. The first is whether the account is compelling in its own terms. *Would* it be hopelessly irrational not to consent to state authority, in the choice situation? Within this worry are issues having to do with the proper specification of the hypothetical choice setting. The second kind of worry is that the kind of operation involved in this pattern of justification cannot amount to genuine *consent*. The idealizations used to overcome the problem of massive nonconsent have the effect of removing the individual will from the equation, along with all its quirks and weaknesses.

Lockean tacit consent and Kantian hypothetical consent share a common vulnerability to the charge that the operation they invoke under the name "consent" is not consent at all, but at best a distant cousin. And, just as one would expect, once the concept of consent is pressed into service to solve the problem of political obligation —despite the fact of massive nonconsent— the interesting properties that consent in the strict and proper sense possesses —relative uncontroversiality, content independence, explanatory simplicity and sufficiency, and normative appeal— all (with the exception of content independence) fall away.

It may be worse than that, on the score of relative uncontroversiality. The idea that, by merely remaining on the Earth where one was first put down on it, one consents to submit to an open-ended set of commands, seems more controversial than the pro tanto duty it is supposed to explain. Similarly, the notion that we may be deemed to have consented to whatever we would consent to, were we not as stupid and wicked as we in fact are, is probably more controversial than the pro tanto duty. Nonetheless, the original truism –that if one has indeed freely and wittingly given one's consent to follow the law's lead one has an at least pro tanto duty to do so– retains all of the properties of interest. The lesson here seems to be that we have to take consent where we find it and where persuasion can secure it, even though by so doing we have no answer to the problem of political obligation. One might even take a clue from Rawls's "Fact of Oppression"[6] –just as we cannot hope to secure uncoerced agreement to a single comprehensive ethical view, we ought not to hope that uncoerced, actual agreement can solve the problem of political obligation.

III. At Last, an Answer to the Problem of Massive Nonconsent?

Recently, David Estlund has suggested a different approach. A curious asymmetry is his inspiration. Express consent, wrongfully gotten, is typically

---

[6] John Rawls. 2001. *Justice as Fairness: A Restatement*. Erin Kelly, ed. p. 34. Cambridge, Mass.: Belknap Press.

null. The upshot in such cases is that, morally, things are as they would be had consent not been given at all. But likewise, consent may be wrongfully withheld. Why then is wrongly withheld consent not similarly null? That is, why isn't the upshot that, morally, things are as they would have been had consent been given and not wrongly withheld? Estlund quickly points out that there are cases in which wrongfully withheld consent is nonetheless properly taken as effective, and not null. Refusal to consent to sexual contact, for example, is effective even if wrongful (though it can be awkward to describe a case of wrongly withheld consent to sex). But the fact that symmetry does not generally hold doesn't establish that symmetry generally does *not* hold. Estlund doesn't claim that symmetry presumptively holds, or even that symmetry provides a strong reason to suspect that there are circumstances in which refusal to consent would be not only wrongful, but null. But if there are such circumstances, then the "circumstances of politics"[7] may be among them. If that is so, then the problem of political obligation may indeed turn out to have a consent-based solution, and to have it despite the fact of massive nonconsent.

To flesh out this idea, Estlund defines a concept he calls normative consent; in precise terms, something close to these:

---

[7] I mean the phrase to be "usefully vague" (as Jeremy Farris charitably puts it), although its prior deployment by Jeremy Waldron may be more precise. See Jeremy Waldron. 1999. *Law and Disagreement*. p. 102. Oxford: Oxford University Press.

> X gives *normative consent* to Y with respect to Z *iff* X's refusal of consent would be not only wrongful but null.

With this notion on board, the normative existence of legitimate political authority can be restated in something like these terms:

> Y has legitimate political authority over X *iff* X has given actual or normative consent to Y's having political authority over X.

The problem of political obligation can, in turn, be reframed:

> When we turn to normative consent we are not asking, at first, about a duty to obey, but a duty to consent to the new authority —a duty, not to obey, but a duty to promise to obey.[8]

Routing a solution through a duty to *promise* to obey opens up the possibility of garnering the advantages of the set of interesting features listed above: relative uncontroversiality, content independence, explanatory simplicity and sufficiency, and normative appeal. The problem of massive nonconsent is avoided by a shift of emphasis from what people frequently do to what they would do if they did as duty required. But the shift is not a bald petitio prinicipi, for the duty in question is not the *justificandum* –the duty to obey the law– but a distinct duty, a duty to promise or consent to obey. But because the duty in focus has reference to what

---

[8] David M. Estlund. 2008. *Democratic Authority: A Philosophical Framework*. p. 152. Princeton: Princeton University Press [hereinafter, "Estlund"].

authority requires or may require, it is not tied down to the requirements that circumstances justify apart from the existence of an authoritative command. Just as promising to do as Simon says may place me under a duty to do what I would otherwise have no duty to do, promising to obey the law places me under a duty to what I would otherwise have no duty to do. This kind of content-independence is easy to accept in cases of actual consent. Estlund's innovation is to attempt to derive that quality from the wrongness of nonconsent, not, directly, from consent itself. It is not a mere recycling of Kantian hypothetical consent, for its focus is not on what reason would require in idealized conditions, but rather on what morality requires in actual conditions.

But is some of the normative appeal of consent lost in the translation? Many will say that consent owes its normative appeal to an ideal of individual dignity and self-government. Estlund responds:

> The rhetoric of individual self-rule in the context of political authority places the bar higher than any theory can meet, and [my theory] proceeds without it. Legitimate and authoritative commands are plainly not compatible with individual self-rule….[9]

If individual self-rule is out the window, can consent be far behind? Estlund insists not:

[9] Estlund, p.110.

> [Here is] a novel form of hypothetical consent theory of authority, based on…*normative consent*. If this view can be sustained, authority can simply befall us, whether we have consented to it or not. Still, the normative consent approach does not separate authority from issues of consent completely, as some [natural duty?] views do.[10]

Working out this kind of theory involves several crucial but delicate operations. First, a general case must be made, one having this kind of structure:

1. Sometimes withholding consent is wrongful.
2. Sometimes wrongfully withheld consent is null.
3. Where wrongfully withheld consent is null, or would be null if consent were requested, the non-consentor is subject to the very same moral liabilities as a consentor [by definition of "null"].

The general case lays the groundwork for and makes plausible the following specific application to the problem of political obligation:

4. In the circumstances of politics, withholding consent to political authority is wrongful.
5. In the circumstances of politics, wrongful nonconsent is null.

---

[10] Estlund, p.116.

6. In the circumstances of politics, because wrongfully withheld consent is null, the non-consentor is subject to the very same moral liabilities as a consentor, viz. to a general, at least pro tanto duty to obey the law.
7. In the circumstances of politics, null nonconsent does not place non-consentors in a position in which their actual consent would have been disqualified, had it been given, due to disqualifying circumstances such as coercion, ignorance of material matters, etc.[11]

Estlund's discussion is largely addressed to the general case. A successful defense of the general case is of course essential if the advantage of relative uncontroversiality is to be claimed for a normative-consent account of political obligation. True, the case of political obligation might be uniquely one in which normative consent has application. If that were the claim, then any failures of the general case could be set aside as irrelevant, provided there were an explanation of why the case did not generalize. Because of the preeminent role of the general case in Estlund's discussion, it will be the focus of most of what follows here,

[11] At this stage, if not earlier, it must be shown or stipulated that the "circumstances of politics" are neither so inherently coercive nor so defective otherwise that actual consent would fail to have its usual normative effect.

with some incidental observations about the prospects for the applied case, should the general case succeed.

The general case. The first step in the general case is to show that sometimes nonconsent is wrongful, or, more to the point, that nonconsent to (nonpolitical) authority is sometimes wrongful. Consider the following hypothetical situation:

> Flight Attendant
>
> After an airplane crash, a flight attendant X, to help the injured, says to passenger Y, "You! You need to do as I say!" Y refuses.[12] It is wrong for Y to refuse. Y's refusal is null: X has authority to put Y under a duty to φ by saying "Y, φ!" –precisely as X would had Y actually consented.

The term "authority" in this discussion is intended to mean that if X has authority over Y with respect to Z, then if, with respect to Z, X tells Y to φ then Y "for that reason [is] required to do it."[13] The question immediately arises whether this is an instance of authority rather than what could be called "leadership," where the term "leadership" means that if X is exercising leadership with respect to Z in

---

[12] Estlund also writes, "[Actual] Consent theory…draws the libertarian conclusion: Joe [Y] may have various obligations in such a terrible scenario, but the flight attendant's instructions have no authority over him. Why? Because, lucky for Joe, he is despicable." (Estlund, p. 124). Surely the example requires more description before Y could justly be despised. The reason an actual-consent theorist would give for denying that Y is under X's authority is that Y has refused consent.

[13] Estlund, p. 118.

circumstances C, then, if with respect to Z in C, X tells Y to φ, Y has a duty to φ if but only if φing is morally required of Y in circumstances C, given that X has told Y to φ.[14] As Estlund correctly notes, one difference between authority and leadership pertains to error-tolerance. Suppose that φing in circumstances C is not optimal but not catastrophic either. Mere leadership fails to impose a duty to φ, while authority does not. Back to the example:

> Consider a modest error[:] X says get bandages but Y knows it is more important to get water. Unless the stakes were especially high, it would be wrong for Y to decline to obey on that ground…[X] may be making a mistake, but she is in charge.[15]

What seems forced here is the insistence that morally required error-tolerance sufficiently indicates the presence of authority. It may well be that other features of the situation make it the case that Y's duty survives X's errors, yet still is merely a duty to "follow X's lead" rather than to obey X's authority. Moral requirements, whether to follow or to obey, are in the air (so to speak) only because the example has been described in a way suggesting that panic, chaos, and avoidable injury and death are in the offing unless there is a coordinated effort to respond to the emergency. How that coordination is achieved is

---

[14] Estlund expresses the contrast as one between a duty to obey and "a mere duty to follow" (Estlund, p. 125).

[15] Estlund, p. 125.

secondary. In particular, the error-tolerance that successful coordination morally requires can arise from facts falling short of those that could warrant saying that someone "is in charge."

To see that coordination and authority are but loosely connected, note that one's being in a unique position to coordinate doesn't mean one is ipso facto an authority.[16] Suppose the young George "Foghorn" Wilson (a child actor who had a booming bass voice) is on the scene, and due to surrounding smoke and noise, only he can coordinate an escape. Foghorn is in a unique position to coordinate, but not ipso facto an authority, nor in possession of authority. One ought morally to do what Foghorn says to do, but not because Foghorn says it. One ought to do as Foghorn says because a coordinated response is needed and only Foghorn can be heard. Authority is the moral power to place others under obligations by giving them directives. It is distinct from and more than the moral power to make things obligatory by creating or pointing out facts. Think of a drowning person Z who calls out "Get in and help me, Y!" thereby calling Y's attention to the fact that Z is in peril and Y can easily rescue him. This is not a case of authority at all, even

[16] A recent news item puts the point tersely, "A person who takes a leadership role in a disaster will invariably be followed." The item describes an incident in which a busboy saved hundreds from a fire, and another in which a bride took charge of evacuating her wedding reception. Outright panic is relatively rare: the more common, and often equally dangerous, reaction is "the 'gathering instinct'" and "'group think,'…[p]eople stick together, follow one another and are civilized and painfully slow during evacuations." Fortunately, "People also tend to stick to their roles. Passengers listen to flight attendants." See "Learning To Be Your Own Best Defense in a Disaster," Tara Parker-Pope, *New York Times* Aug. 5, 2008.

though Z may have intended, by calling to Y to bring Y under an obligation, and his directive succeeded in doing so.

Further descriptive detail is needed in another way. Suppose Y is morally required to comply (neutral term) small-error-tolerantly with X's directives. What has *consent* got to do with it? In an emergency, why isn't it enough error-tolerantly to do as one is ordered without *consenting* to do so? The example must, and easily can, be supplemented in a way that makes it plausible that an expression of consent would be morally required of Y, in addition to mere cooperativeness. Suppose that other passengers are likely to panic unless Y expressly consents to X's taking charge. Now it would be wrong of Y not to consent to X's authority, in addition to its being wrong of Y not to follow X's lead small-error-tolerantly. Nonetheless, suppose Y stubbornly consents *merely* to follow, small-error-*in*tolerantly; and that it is wrongful of Y not to provide the additional, needed assurance that Y will follow X's lead despite small errors -- others, let's suppose, are very likely to panic unless they have Y's assurance that Y will tolerate X's small errors of leadership. Y stubbornly withholds the additional assurance; and yet, contrary to all likelihood, there is not a general panic. What now is Y's moral situation vis á vis X and X's small errors?

Under these (fanciful) circumstances, it seems that Y's duty to obey X's small-error-infected commands can reach no farther than those whose

nonobservance by Y would make likely a general panic or would otherwise be wrongful independently of the fact of X's having commanded. If Y can certainly get the water first without putting the rescue at risk, there is not even as much as a *reason* for Y not to do so. Thus, even though circumstances require Y to consent to comply error-tolerantly, it does not follow that Y has any reason to do anything at all "just because" X says so.

The "Direct Authority" Objection and the Special Case of the Political

These points are in line with what Estlund calls the "Direct Authority" Objection: "the duty to consent already depends on prior moral facts, which might as well be taken as the moral basis for the authority itself, as well as for the duty to consent."[17] Estlund confesses that "It is hard to know how to decide whether whenever normative consent grounds authority there would always already be authority on other grounds, too, even though normative consent does not depend on such existing authority." But he immediately adds: "Since it is not clear how this coincidence could be explained by the objector, I believe he bears *the burden of proof*."[18] If the inadequacy of this reply were not sufficiently plain, one ought to try reconciling it with Estlund's repeated insistence that authority requires a

[17] Estlund, p. 130. This line of objection is not new. It is voiced, e.g., by Judith Thomson in these words: "[W]hat does the moral work in appeals to a person's hypothetical consent to a thing…is not that the person would consent to it, but rather whatever it is that about the thing that makes it worthy of consent…." The Realm of Rights 360 (Cambridge, Mass.: Harvard University Press, 1990)

[18] Estlund, p. 130 (emphasis added).

special justification because it is an imposition upon liberty that goes beyond what moral requirements generally impose. (E.g., "The obligation to do as you're told by another person requires an extra justificatory element. Authority is a loss of freedom in a way that simple moral requirement is not."[19]). If there is a burden of proof to be borne, most of those who have taken up this subject have assigned it to the apologist for political obligation, rather than the skeptic. Should that assignment be reversed, the apologist's need to heave desperate grappling hooks in the direction of consent would seem to vanish, and with it the dilemma Estlund eloquently describes in these words:

> [One who buys] the direct authority objection is left with either philosophical anarchism or proposals that divorce authority completely from the one moral idea that has always been granted to have the potential to ground authority: consent.[20]

In the face of the "Direct Authority" objection, Estlund has shifted focus to the special case of political authority. In so doing, he (wisely) declines the occasion to establish crucial premiss #2 of the general case. He writes:

> I need to show that immoral non-consent is null. I don't expect to be establishing that as a premise and then moving on with the argument.

[19] See http://publicreason.net/2008/03/03/response-to-comments-on-chapter-7/ [hereinafter "Public Reason Discussion"]

[20] Public Reason Discussion.

> Rather, I introduce this possibility (novel, I think) and ask whether it leads to any utter implausibility (I haven't seen any argument that it does), and whether it would provide a new possible account of authority with some advantages. So, in a way, there's not much more to say here. It's the advantages that are really in dispute, as we'll see....[21]

Before looking at the advantages a normative-consent account might present in the special context of political authority, I want to suggest that the idea that in other contexts –the general case—wrongful nonconsent might sometimes be null is in fact implausible. Consider the case of a wealthy person, A, ambling past a destitute innocent, B, holding a $5 bill just taken in change. B sees and asks A for the $5 to buy desperately needed food. Assume that it is evident that this is indeed the purpose B will pursue, if the money is given; and assume further that the facts are such that A acts very wrongly in refusing to give B the $5. A refuses. If the circumstances are extremely dire B might be justified in forcibly taking the $5 bill from A. But, if wrongful nonconsent is possibly null, one would expect it to be at least prima facie justifiable for A to be regarded as having actually given B the $5.

In this hypothetical case, it matters quite a lot whether A is or isn't deemed to have given (or *consented* to give) B the $5. If B takes the $5 justified

[21] Public Reason Discussion.

only by the necessity of doing so, A will be entitled to the return of the sum should B's exigency pass; and A might also be morally permitted to resist B's effort to wrest it away. But if A is deemed to have given B the $5, A would have no right to resist, and no right to compensation. So, which is it? My hunch is that the moral situation that is the sequel of A's immoral refusal to give is not at all what one would expect if intuition were prepared to deem A to have given the money. In other words, none of the rights and remedies that flow from a gift are palpable here; rather, the only rights and remedies on either A's or B's part are those that flow from any other necessitous taking.

Matters are even worse for normative-consent theory when the case is cast not in terms of mere entitlement but of authority. Estlund describes such as case: suppose A owes B a big favor –A owes B "bigtime," for some favor B has done A. Suppose further that B asks A's help in moving to a new apartment on the coming Saturday morning. A has nothing planned that morning but, for no good reason, says No. A acts wrongly; it is easy to assume so, and let's assume it. Add that B tells A that B thinks A is acting very wrongly in refusing consent. As B parts with A, B says over B's shoulder, "I'll expect to see you at my place Saturday morning, ready to help." A says, "I might come and cheer you on, but don't even count on that." Saturday morning arrives. Had A agreed to help, he would be duty-bound to show up. Moreover, A would be subject to B's (narrowly

drawn) authority to direct A to perform any of a range of sub-tasks in furtherance of getting B moved.

A doesn't show. B begins the task without A's assistance. There is no doubt that B has a genuine grievance against A. But it would be crazy of B to react as though A had promised to help and *then* hadn't shown. Moreover, should A belatedly stroll by –but only to cheer B on—it would be silly of B to direct orders to A with any expectation that those precise subtasks were obligatory for A to perform. It would be silly of B to resent A for failing to *pick up the other end of the chiffarobe*, or to *pack up the cleaning supplies*, or to *take out the book boxes*, even if B (sardonically) were to order A to do precisely those things. The oddity of imagining that A is in effectively the same moral position vis-à-vis B's (small-a) authority as A would have been had A expressly consented highlights the implausibility of thinking there are *any* clear and undisputed cases of normative consent. The advantage of *relative uncontroversiality* is doubly absent from normative-consent theory; for its working, normative-consent fork possesses none of the uncontroversiality of its non-working, actual consent fork –and so any extra justificatory use to be made of the concept will tie the *justificandum* to an even more controversial *justificans*. After all, which is likelier to be more plausible to "the folk": that A has an obligation to pick up the other end of the chiffarobe when B says to, or that A as much as agreed to pick up the other end of

the chiffarobe when B says to? If (as I suspect), the former then, already at the general-case stage, normative consent lacks a virtue that is essential for a concept to be worth employing in any explanatory/justificatory enterprise: viz., being not more controversial than what it that it has to justify/explain.

It might seem open to Estlund to avoid the objection just raised by insisting that, although the obligations deriving from normative consent match those that would flow from actual consent, it does not follow that precisely the same reactive attitudes would be licensed. Normative consent, in other words, might impose the same duties without licensing the same reactive attitudes, in case the duties are breached. That would reconcile the silliness of B's resenting A for not picking up the other end of the chiffarobe with the notion that A, having normatively consented to B's authority, has a duty to pick up the other end of the chiffarobe when B says to.

But I suspect that driving a wedge between any duty and the reactive attitudes warranted by its breach is too costly a move. Suppose C had consented to help B, and is on the scene. B says to A and C, "You two, pick up the chiffarobe." Neither complies. Both breach a duty to pick up one end of the chiffarobe. But, while B is warranted resenting C's noncompliance, and in remonstrating with C, B is not similarly warranted in resenting A's noncompliance and remonstrating with A. So, C is justly liable to B's reactive

attitude and conduct for this breach, but A is not. Although the individuation of duties undoubtedly can be tricky, I find the idea that A and C are in precisely the same moral situation vis-à-vis the failure to pick up the chiffarobe peculiar in the extreme. But, if normative consent fails to put the two, A and C, in precisely the same moral situation vis-à-vis B's command, then A's normative consent appears to have been insufficient to have placed A *under the authority that C is under*. Therefore, there appears to be no plausible example of normative consent to authority, by anyone, to anyone, as to anything. The general case has no plausibility.

Avoiding the Cost Proviso. The list given above (in section I) of attractive features of consent does not include a certain one, having to do with cost, that Estlund repeatedly emphasizes[22]. The claimed (and, as I will argue, illusory) advantage is this:

> As has been known at least since Rousseau, the expected cost of accepting authority over you is moderated by the relatively small chance of having the greatest costs actually imposed on you…so the obligation to accept the authority, which derives from an obligation to share in providing an important good, is not likely to run up against the problem of excessive

[22] E.g., "The duty to obey…is…a duty to act as you would have been morally required to promise to act if you had been asked….The duty to aid someone because he is in need is more severely limited by the costs of providing aid than a duty to aid someone because you promised you would" (Estlund, pp. 154-55).

> cost….Some costs might be great enough to cancel the duty [to promise], but the relevant costs are not those of obedience but of accepting authority.[23]

The importance of this claim is that it serves to lower the threshold required to trigger authority, viz., the moral power to impose obligations by command, significantly below the threshold required to trigger a "direct" obligation to do those things that an authority commands. Estlund's thought is that normative consent can assist and supplement other theories of political obligation in a way that they need, and in a way that might unify the patchiness of the now-dominant hybrid theories of political obligation, which appeal to different principles to secure the comprehensive applicability that political obligation is supposed to have.[24] If this tactic were successful, then the loss of relative uncontroversiality in the general case could be compensated by added *explanatory sufficiency and unity* with regard to the special case of political obligation.

The intuition upon which this tactic relies is specious. Consider this case. John, who is a strong swimmer, tells Jane he is going swimming. He will need a rescue if he gets into trouble, but Jane could manage it. Jane has no duty to rescue

---

[23] Estlund, p. 155.

[24] "My view is similar to [Christopher] Wellman's [hybrid theory joining principles of samaritanism and of fairness]…but…the individual's duty is not…analogous to a duty to aid [with its cost and efficacy provisos]…There is a hypothetical duty to accept the authority; this fact yields the authority of law, and then the duty to comply is simply based on the authority of law [regardless of cost and efficacy]…" Estlund, p. 154-55.

John at great cost. John would rather Jane promise to rescue him; and if Jane does promise, the costs she would be duty-bound to incur if a rescue became necessary would, arguably, be greater. Jane is not asked and does not promise; but, let's stipulate, the expected cost of promising is moderated by the relatively small chance of having great costs imposed. Rescue is an important good, the expected cost of promising is small, and so Jane has a duty to promise to rescue John, if asked to promise. Jane thus has a duty to come to John's rescue even at great cost, because she would have been morally required to promise to rescue John had she been asked.

Those who believe that there is a duty to provide an easy rescue –but only an easy rescue—in circumstances like those just described are, I suspect, unlikely to register the predicted intuition. Of course, one might grant that the "easy" cost proviso survives in this type of case, but deny that the circumstances of politics are relevantly analogous. Such a denial would, however, again threaten to put the special case ahead of the general, and the special case would then forfeit the advantage of being able to draw upon the attractiveness of the general case. Another tack might be to affiliate the defense of political obligation with an across-the-board assault upon the cost proviso.[25] But joining in a sweeping assault upon the cost proviso would be costly in itself. The kind of attack Kagan

[25] Shelly Kagan attacks the root idea of a cost proviso in *The Limits of Morality*. Oxford: Clarendon Press, 1989.

makes is essentially an act-consequentialist one; and reconciling authority of any kind with an act-consequentialist approach taken at any level of theorizing, will be a hard row to hoe.

Another difficulty this tactic encounters has to do with the cost of bearing moral bonds. Suppose the relevant costs were, as Estlund insists, not those of obeying but of consenting to obey. Consenting to obey costs nothing, for it imposes no cost but the negligible one of being morally bound –only the performance of one's duty can be costly, not the mere having of it. What Estlund ignores here is that to be subject to a moral requirement is to be morally liable to sanctions of some sort, from some quarter, should one fail to do as required. This moral vulnerability is costly whether or not those sanctions are visited upon the duty bearer. True, Estlund has carefully distinguished between authority (the moral power to impose duties by mere command) and legitimacy (the moral permission to enforce duties that authority has imposed); and he has carefully limited his claims and argument to the authority issue, as though the legitimacy issue were fully detachable. Detachable they maybe, conceptually; but to exploit their detachability in this fashion will seem to many to drain the resulting account of much of its significance. Moreover, the account will nonetheless have to make peace with those who will insist that to be subordinated to a moral duty is no light thing at all.

IV. Conclusion

Authority is not easy to justify. Its (legitimate) exercise, by way of directive or command, characteristically attaches a moral reason to an action that the action would not otherwise have. But how can saying so create a moral reason where none would otherwise exist? As remarkable as such a feat might seem, looked at a certain way, it is familiar and even commonplace in the realm of promising and consenting. By, for example, promising to water my neighbor's aspidistra, I bring into being a reason –a moral reason—that might otherwise be absent. Appealing to consent to justify authority seems to be a natural, and the only possible, move to make; and philosophers from Socrates to Grotius to Locke to, most recently, David Estlund have tried to harness the moral power of consent to justify authority. But the attempts have all failed.

An inductive inference that all further attempts will fail seems amply warranted. By consenting, the will extends moral reason where it would not otherwise reach. (Where reason reaches on its own, consent is unneeded, except perhaps to make the consenter answerable in a special way to the consentee). But the will is fickle. Even where reason demands that it assent, it might, or might not. To deem the will to have assented whenever it rationally, or morally, ought is to cast it aside as dispensable. If authority must face the tribunal of reason without the aid of consent's unique moral power, it dissolves.

Is liberal political philosophy a failure? One might as well say that calculus is a failure because it rests on division by zero. Liberalism is a failure only insofar as it embraces the faulty notion that political theory can be liberal all the way down –making the individual's will not only a value to be protected and promoted, but the very foundation of legitimate political authority.

For help received, I thank David Estlund, Malcolm Smith, Jeremy Farris, Jason Craig, Kimberley Brownlee, participants in my Spring 2008 seminar on Democratic Authority, and participants in the blog Public Reason's online reading-group on David Estlund's book.