

**POLITICAL AUTHORITY AND THE TYRANNY OF
NON-CONSENT¹**

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Moral obligations can simply befall us. Sometimes we are morally required to help someone in need, or to tell the truth, or to undo some damage we have inadvertently caused, and we are required whether or not we consented to accept these requirements. But it is often held that certain obligations, to do as we are told, can never simply befall us. We are never under the authority of another person unless we have consented to be. This view adds that even if we have consented to authority, we are still not under authority unless the consent meets certain conditions of adequacy, such as being uncoerced, informed, etc. Sometimes consent is null.

Among our moral requirements, there might be moral requirements to consent to authority in certain cases. In those cases, what happens if we don't consent? Can we escape the authority in that way, by abusing our power to refuse consent? Why not say, instead, that just as consent is sometimes null if it fails to meet certain standards, likewise, non-consent can be defective too. I will concentrate on the case of wrongly withheld consent, and argue that in some cases this renders the non-consent null. The nullity of non-consent means that the authority situation is just as it would have been if the non-consent had not occurred—that is, just as if consent had occurred.

The result would be a novel form of a hypothetical consent theory of authority, based on what I will call “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 views do. My aim in this paper is to begin to explore the implications of the idea normative consent. I begin with actual consent theory, and criticize some arguments that have traditionally been offered in support of it. I then develop several points that appear to

support normative consent theory. Many questions remain, and I will note some of them in passing. Nevertheless, I hope to show that it is an approach with some promise.

I. The Libertarian Nub of Consent Theory

Consent is morally important in several contexts. I want to concentrate specifically on consent theories of authority. Much of what I say would have implications for other contexts of consent as well, but I will not be pursuing them. My interest is especially in the authority of political states, but I will not treat that case specially here. I will look at the general case of one person's authority over another, in the hope that a general theory of authority will eventually help us to understand the authority of states. I will also be leaving aside questions of law.

By *authority* I will mean the moral power to require action (borrowing a phrase from Raz)². To say you have authority over me on certain matters is to say that on those matters if you tell me to do something, then I am, for that reason, required to do it. This is only approximate, but it is enough for my purposes here. There are bound to be limits; no one thinks I could be required to do just whatever you say. But within those limits I can perhaps be required to do some things just because you said so.

I will not limit the discussion to the authority of political states, since my points apply more widely. I suspect that state authority ultimately requires special treatment in some respects, but what I say here is meant to apply to practical authority generally. Views of authority with which mine competes will sometimes only address state authority, and so the difference in generality needs to be kept in mind.

By a *consent theory* of authority I will mean basically (to be refined below) the view that there is no authority over a person without that person's consenting to be under that authority. On this view no one has the moral power to require action by me unless, first, I have consented to their having that moral power.

Consent theory is not distinctive for holding that under the right conditions consent can establish authority. That is very widely agreed. In any case, I will assume that it is true for my purposes in this inquiry. Consent theory, as I am understanding it, is more controversial. Its distinctive claim is that without consent there is no authority.

Consent theory, then, holds that,

without consent there is no authority (*the libertarian clause*), but unless there are certain nullifying conditions (*the nullity proviso*) consent to authority establishes authority (*the authority clause*).

The nub of consent theory, its controversial element, then, is the libertarian clause: if A does not consent to B's authority, then, for that reason, B has no authority over A. Roughly, *no authority without consent*.³

II. Supposed Grounds for Consent Theory

What is meant by the idea that people are born free, or are naturally free? This idea is central to modern moral and political thought. In what sense are we all naturally free? Children are normally treated as exceptions, since they are naturally under the authority of parents. Without delving into that question, I concentrate on adults only. One thing that is often meant is that it would be wrong of others to interfere with me in a certain wide range of activities. This kind of natural freedom won't concern me here, since it is not about authority as understood here.

Another thing that is often meant by natural freedom is that no person is born under the authority of anyone else. The authority of one person over another is, as I have said, simply the moral power to require action. So the thesis of natural freedom is the claim that no one is naturally subject to another's commands in this way. The claim is not that there are no authority relations at all, but only that none are owed to nature. This idea of authority relations being owed to nature is still vague, however. One thing this might mean is that no adult is under the authority of another except by voluntarily accepting their authority. If this is what is meant by natural freedom, then it just asserts that there is no authority without consent. This assertion is just the libertarian clause of consent theory, and so it is no argument against other alleged grounds for authority; it just asserts that they are false. The question I want to consider in this section is what reason there is to accept that there is no authority without consent. The appeal to mankind's natural freedom, in this sense, only begs the question.

Sometimes consent theory is based less on natural freedom than on an appeal to a natural descriptive equality. Hume's version is typical:

When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties, till cultivated by education, we must necessarily allow, that nothing but their own consent could, at first, associate them together, and subject them to any authority.⁴

Descriptive equality really establishes very little about authority. At most, it would refute the claim that *owing to certain descriptive inequalities*, some naturally have authority over others. This leaves the field open to any basis for authority other than descriptive inequalities, and consent is only one possibility.

Consider the idea that the “default” condition is the absence of authority. This might only mean that there is no authority without consent, in which case, again, it begs the question. The idea that non-authority is the “default” might instead mean that there is no authority unless some positive moral case can be made for it. Absent moral considerations in either direction, a person is free from authority. Non-authority requires no reason, on this view, and is the default in precisely that sense. (Nothing is implied, by the way, about what kinds of reasons might establish authority, or how they might weigh up against conflicting reasons). So understood, the idea that non-authority is the default is no particular support for any claim of natural liberty in general, or for consent theory in particular. All it implies is that if people are under authority (possibly even “naturally” or apart from any consent) there is some moral basis for it.

Appeals to natural freedom, or to freedom from authority as a default, are no particular support for consent theory. I turn next to a point about consent theory that has a tendency to subvert it: the idea of nullity.

III. Nullity Goes Both Ways

The nullity proviso in consent theory says that consent does not establish authority when it fails to meet certain standards, with different consent theories specifying different standards. Sometimes it is suggested that under those nullifying conditions (such as duress or coercion) there is, really, no consent after all. Other times, it is said that it is consent but that it fails to have its characteristic moral power. For now, I want only to point out that consent theory includes an account of when (putative) consent is null or disqualified.

When we say that a (putative) act of consent is null or disqualified, we should not assume that the resulting condition is one of non-authority. All that follows is that there is no authority *owed to that (putative) consent*. To assume that this means there is no authority would be illegitimately to assume the libertarian clause: that without consent there is no authority. Even where consent fails, other circumstances might establish the authority relation that is in question. So long as consent theory is held in question, null consent does not entail non-authority. It only entails that there is no authority stemming from that consent.

There is an interesting *asymmetry* of a sort in consent theory. The authority clause (stating that consent can establish authority) is limited or qualified by the nullity proviso (stating that consent is sometimes null or disqualified). But the libertarian clause (stating that without consent there is no authority) is not subject to any such qualifications. Non-consent establishes non-authority, no questions asked.

We can put the asymmetry this way:

consent only establishes authority if it meets certain standards, whereas non-consent establishes non-authority without the need to meet any standards at all.

Many of the familiar qualifications are aimed at ensuring that an act of consent is not valid unless it genuinely expresses the agent's will. For example, consent might be rendered null if the agent is seriously mistaken in certain ways about the nature of what is being consented to. The details of this are difficult. It isn't clear that my consent to your borrowing my car is null if unbeknownst to me you will change the station playing on the radio. But if, unbeknownst to me, you don't have a driver's license, then arguably my consent is simply null. Qualifications on valid consent that preclude certain kinds of coercion and duress have a similar will-expressing function.

One possible version of consent theory, which I will call the *hardline consent theory*, holds that the only conditions that nullify consent are conditions that serve to promote the accurate expression of the agent's own will. We can contrast this with a more *moderate consent theory*, in which there are some nullifying conditions that have a basis other than accurately tracking the agent's will. Let's call them will-independent conditions on valid consent. The moderate version is perhaps the traditionally more important one, since most major consent theorists held that some rights were "inalienable." The sort of condition that I want to consider applying to non-consent, that the non-consent is (often) null if it is morally wrong, does not aim to promote the accurate expression of the agent's will. So, it would not count as a symmetrical consideration for a hardliner. The hardline view, though, has some morally dubious implications. It implies that a person could become a slave, under the complete authority of another person, by consenting to it, so long as this genuinely reflected their will. Many people will reject the hardline view for that kind of reason, and so they think that in some cases consent is null even if it genuinely reflects the will of the agent. They accept a moderate view, accepting what I will call *external normative nullifying conditions*, and not only the *will-tracking nullifying conditions* of the hardline view. The condition I propose, that non-consent is null if it is wrong, is not will-tracking and so cannot gain any support from the idea of symmetry, on a hardline view.

But on a moderate view, positive consent is nullified also by some conditions whose point is not the accurate tracking of the will. They might have various kinds of moral basis, and obviously there can be many different moderate views that accept different nullifying conditions. But then moderate views are vulnerable to the question why no nullifying conditions apply to non-consent. A condition such as the one I propose, in which non-consent is null if it is wrong, now has some standing on grounds of symmetry.

In principle, the libertarian clause could be subject to nullifying conditions too. The idea can seem foreign: what would it mean to say that

non-consent is null? Such a view would be one form of hypothetical consent theory. Since we are modeling the nullity of non-consent on the standard idea of the nullity of consent, we should note a few features of that more familiar idea. For one thing, to say that (putative) consent is, for some reason, null or disqualified, seems to be to say that the authority situation is as if the consent had not occurred. (As noted above, we are not assuming that this means there is no authority; that is a separate issue.) But now that we have noticed the possibility of *disqualified non-consent*, we see that it would be indeterminate to refer to “the authority condition that non-consent would have produced.” Qualified non-consent and disqualified non-consent would produce different moral conditions.

On the other hand, if we wish to model the nullity of non-consent on the nullity of consent, by referring to the authority condition that would have obtained without it, the idea must be that when *x* is disqualified, the authority condition is as if there had been *qualified non-x*. Otherwise, the “as if” construction would threaten to bounce back and forth infinitely. And this also seems to capture the normative position of consent theory: if consent is disqualified then the authority condition is as if there had been *qualified non-consent*.

So the nullity of non-consent would come to this: when non-consent is disqualified, the authority condition is as it would have been as if there had been *qualified consent*. That authority condition would have been, as even consent theorists agree, the establishment of authority. This would be a particular version of hypothetical consent theory: even in some cases where you have not consented you are under authority just as you would have been if you had consented (and not been disqualified).

IV. Example

The normative consent theory of authority relies to a great extent on the reasons that would make it wrong not to consent to authority. There need not be any great unity to these reasons across contexts and examples. Clearly, it would be helpful to have examples in which non-consent would be wrong, and in which this wrongness renders it null, cancels what would otherwise be the authority-blocking power of non-consent, with the result being authority.

Consider a flight attendant who, in an effort to help the injured after a crash, says to Joe, “You! I need you to do as I say!” Let’s not yet suppose this puts Joe under her authority. Even if it doesn’t, Joe would (I hope you agree) be morally wrong not to agree to do as she says (at least under a significant range of circumstances). Once that is granted, the question remains whether by refusing, wrongly, to agree to do as she says, Joe has escaped the duty to do as she says. Consent theory, with its libertarian

clause, draws the libertarian conclusion: Joe may have various obligations in such a terrible scenario, but the flight attendant's instructions have no authority over him.⁵ Why? Because, lucky for Joe, he is despicable. If you find consent theory's implication implausible here, as I do, then you think that Joe has not escaped the authority by refusing to consent. So he is under authority even without having consented. In this case, non-consent to authority is null. If this is granted, consent theory must be rejected. Normative consent theory doesn't jettison considerations of consent completely, and I will return to the comparison with direct theories—those resting authority on something other than actual or hypothetical consent.

It could yet be objected that Joe is not under any obligation to consent to the flight attendant's authority, but only to what we might call her leadership. He has a duty to follow her so long as she leads well under these urgent conditions, but authority is something more. The objector might say, and I am happy to agree, that there is no authority present if the commanded person may simply disobey if he thinks the commands are themselves at all defective. The objection continues, the flight attendant is well-positioned and knowledgeable to supply the most effective plan to aid the crash victims. But no one is obligated to accept her authority even in cases where she gets it wrong. So what they must agree to is not authority at all.

In reply, it is important to see that authority is rarely, if ever, absolute, if that means that some commander must be obeyed no matter how erroneous or immoral the commands. The mere presence of exceptions of that kind would not suffice to show that authority was not present at all. We should accept that authority is present to some extent so long as a duty to obey survives in some cases of erroneous or wrongful commands. Those cases of error put into relief the fact that the source of the subject's requirement is the command, not some other goal, requirement, or consideration. That is the characteristic of authority, the moral power to require action by commanding it.

Does the flight attendant have authority, even though, of course, some errors would be too grave for a requirement of obedience to survive? Consider a modest error. Suppose that she were to order Joe to grab the bandages from the remnant of the overhead compartment. Joe correctly believes that it would be wiser to secure whatever fresh water can be found first. Does this exempt Joe from the duty to obey her command? On the contrary, unless the stakes were especially high, it would be wrong for Joe to decline to obey on that ground. The flight attendant may be making a mistake, but she is in charge. This is characteristic of authority, and different from merely following the leader when and only when she is leading correctly.

Certainly the flight attendant's having authority has something to do with her having the training and position to have some tendency to lead well

in these conditions. The question, though, is whether the duty to obey runs out whenever she errs. If, as I believe, it does not, authority is present. So, to sum up the point of the example: when she asks Joe to agree to do as she says, it is (new) authority, not merely leadership that Joe would be wrong not to agree to. The result is a duty to obey, which unlike a mere duty to follow, survives some of the commander's errors. Normative consent theory says that you are under authority even if you refuse to consent, because, owing to her knowledge and situation, you would be wrong to refuse to consent to her having the power to require actions of you even, sometimes, when she is in error. The duty to consent in this case concerns the potential authority's expertise and capacity to guide under urgent circumstances, but normative consent theory is open to other grounds, in other circumstances, for the duty to agree to authority.

V. Hypotheticals On All Sides

Hypothetical consent theory prompts some discomfort, stemming from its emphasis on fictional scenarios.⁶ I believe this discomfort is misplaced, since actual consent theory is no more or less committed to the suspect kind of use of fictional scenarios. The nullity clause in consent theory says that under certain disqualifying circumstances, even if consent occurred in actuality, the authority condition is *as if that consent had not occurred*. The moral situation is determined in part by a fictional condition, the condition of non-consent. This is quite parallel to hypothetical consent theory's use of fictions: under certain disqualifying conditions, even if non-consent occurred in actuality, the authority condition is *as if that non-consent had not occurred* (i.e., *as if consent had occurred*).

There is an obvious way that consent theory might resist the claim that it appeals to fictions or hypotheticals. It might claim that under disqualifying conditions, there is actually no consent at all. That—the actual state of affairs—is why the authority condition is as if there were no consent. We could argue about whether this is strained. Why, for example, should we say this about consent when we don't say it about promises? Suppose you promise to give me the hat you are wearing, but it is not your hat. The promise is invalid and null. But we would not say there was not actually any promise at all. So why should we say that invalid consent is not consent at all? This appeal to the way we talk is pretty inconclusive though. And there are cases that seem to press the other way.⁷ In any case, I hope to avoid relying on the argument from funny talk.

If we compare the two ways of formulating actual consent theory—the formulation that appeals to hypotheticals and the formulation that doesn't—we can see that hypothetical consent theory has two syntactically parallel formulations available to it as well.

Actual Consent Theory

A1: When consent is disqualified the authority condition is as if there had been no consent.

A2: When (putative) consent is disqualified, it is no consent at all, with the authority condition being one of non-consent.

Hypothetical Consent Theory

H1: When non-consent is disqualified the authority condition is as if there had been no non-consent (i.e., as if there had been consent).

H2: When (putative) non-consent is disqualified, it is no non-consent at all, with the authority condition being one of non-non-consent (i.e., consent).

I take this to show that there is no special difficulty for hypothetical consent theory that stems from its use of hypotheticals.

VI. The moral power to withhold consent

Appeals to hypothetical consent can seem to miss the point of consent. Often, it is a source of freedom and power to be able to refuse to consent to something, and thereby prohibit certain actions of others. This is a value that hypothetical consent theories might be charged with ignoring. Even in a case where it is wrong to refuse consent, it is often one's own choice to make, and the non-consent keeps its moral effect: that which is not consented to remains morally wrong even though the non-consent is also wrong. For an example (not involving authority), if someone asks for your consent to touch you, then even if under the circumstances you are required to consent, normally they are not permitted to touch you unless you actually do consent. How might you be required to consent? Surely, not all refusals of sex are morally permitted, even if they all are sufficient to forbid sex. Consider a committed sexual relationship, for example marriage. Normally, each partner will have a moral duty to be sexually available to the other to some degree. To simplify, suppose that this was simply promised in the agreement to marry. When sex is proposed, the partner can still prevent it from being permitted by refusing to consent. But if this refusal is too frequent or at the wrong times it might itself be wrong in light of the promise (an "imperfect duty" not to always say no). Still, it is each partner's moral power, a power that can be rightly or wrongly used, to permit or forbid sexual contact at will. We should have grave doubts, of course, about a view that said sexual contact is permitted so long as the partner was morally required to consent, whether or not he actually did. Hypothetical

consent is not enough. (We might express this by saying that normative consent is null in this context.)

Why should wrongful non-consent be nullified when authority is proposed rather than sexual contact, as normative consent theory proposes? There is an important difference between the cases. It will be helpful to look at a few examples of various kinds. We have seen that wrongful non-consent to sex is not null. Here's another example in which wrongful non-consent is not null: in order to get to the movie theater you ask to borrow my car, for which I have no use at the moment. You have recently let me borrow your car several times. If I refuse to consent to your borrowing the car, this would be wrong, but it would still be morally effective: you may not borrow my car to go to a movie without my consent even if I'm wrongly withholding it.

Now consider some cases in which wrongful non-consent is null. Suppose we are roommates, and you never consent to my listening to the stereo. This is wrong of you, and, after a certain point, null. I should ask for your consent because, so long as you don't abuse your power, I may not have the stereo on without your consent. But you have an imperfect duty not always to say no. If you violate that duty, your non-consent is null. If I were proposing sex rather than music your non-consent would not be null, and so what makes it null is not simply the fact that it is wrong. It is the fact that it is wrong plus something about the kind of thing for which consent is being solicited.

I don't know what the criterion is for when wrongful non-consent is, or is not, null. In the sex and car cases if non-consent were null, this would permit another to interfere with my person or property. In the stereo case null non-consent does not have this effect. I doubt that this draws the line finally in the right place, though it might be a relevant distinction. But with this in mind it is notable that the nullity of non-consent to authority does not permit anyone to do anything. It does not even permit anyone to issue commands, since all it does is put someone under a duty to obey them if they are issued. Whether it is permissible to issue the commands is a separate question. Since null non-consent to authority only creates authority, and does not permit any actions, then *a fortiori* it does not permit interference in my person or property. This is as far as I am prepared to take the matter.

VII. The Opportunity Objection

It can only be wrong for a person to refrain from consenting if that person has had the opportunity to consent. Indeed, unless there is an opportunity, they have *not* refrained. It might seem as though this limits our conclusions a great deal: if, when offered the opportunity to consent to authority, a person wrongly refrains, then (in a certain class of cases) they

are under that authority just as if they had consented. But if there is no opportunity to consent, there is no wrongful refraining in the first place, and the point simply fails to apply. Call this the opportunity objection to normative consent theory.

It is certainly true that without the opportunity they haven't wrongly refrained. So their subjection to the putative authority could not rest on this (missing) act or decision. On the other hand, we are not taking for granted that a person only falls under authority owing to voluntary acts of his own. So, the fact that there is no responsibility-anchoring act of refraining in these cases (where there was no opportunity to consent) is not of any clear relevance to the question whether authority exists. The question is whether the presence of that element—that factual difference—makes any moral difference. Here are the two slightly different cases:

Case 1: Jodi is offered an opportunity to consent to some authority, in conditions where refraining would be wrong. And assume this is a case where wrongful refraining is null, leaving the authority situation just as if she had consented.

Case 2: Conditions are just as in Case 1 except that Jodi is not offered the opportunity to consent. Still, if Jodi had been offered the opportunity she would be bound whether or not she consented.

The opportunity objection must say that even though Jodi's decision whether to consent would make no moral difference with respect to the authority, her being bound depends on whether she is offered the chance to consent or refrain. What moral basis would there be for thinking she escapes it? It is not as if offering her the chance to consent or not would give her a choice between being under the authority and being free of it. We are assuming that she would be under the authority whether she consented or not. The opportunity to consent or to refrain presents only a morally trivial choice: whether to consent without moral effect, or refrain without moral effect. There is no clear moral basis, then, for the opportunity objection. In that case, an obligation can arise from the fact that it would be wrong to refuse to consent, whether or not the opportunity ever arose.

VIII. The Direct Authority Objection

I have said that normative consent theory, the view that results from saying that non-consent is sometimes null, is a version of hypothetical consent theory. Normative consent is present when it is the case that if you had been offered the chance to consent to authority you morally should have consented, and as a result the authority situation is as it would have been if you had. There must be some prior moral considerations, then, that

make consenting required. In a certain way, this means that normative consent is never the complete basis of an authority relation. So what is its significance?

This issue resembles a common objection to contractualist accounts of justice and morality, which says that the hypothetical agreement in an original position is never the real basis of morality or principles of justice, because the parties base their choice on prior reasons. Those reasons are the real basis of justice, or morality. Ronald Dworkin argued this way against Rawls's use of the original position, and many commentators have made similar arguments against Scanlon's contractualist account of moral obligation.⁸

One way to put the objection is this: if the contractors are addressing the very moral issue the theory is designed to address, then they and their choices are superfluous. As theorists we can address it ourselves and leave contractors out of it. It is helpful in avoiding this objection, then, to show that the contractors are not addressing the same issue that the theory is. Rawlsian contractors are addressing the matter of which proposal gives them the most primary goods, whereas the theory is addressing the question of what all parties in such a choice situation could agree to, since that is the theory's conception of justice. These are crucially different. The former task has no apparent moral significance by itself. The latter question, about what they could all agree to, sounds potentially morally significant. In Scanlon's case, each contractor is asking whether the proposal is acceptable in light of her own personal reasons (not pressed unreasonably), a question of limited moral importance. The theory, on the other hand, is asking whether the proposal is acceptable to all such contractors, since that is the theory's conception of what we owe to each other.⁹ It's true, in both cases, there are moral considerations that go into devising the choice situation. The Rawlsian veil of ignorance has a moral basis, as does Scanlon's stipulation that participants not press their own reasons without regard to the impact of the proposals on the personal reasons of others. But the charge of circularity or superfluity is deflected so long as these moral considerations are not among the very ones that the more complete story aims to account for. I believe both Rawls and Scanlon can show this.¹⁰

A similar answer is available to the charge that normative consent theory merely points to more fundamental consent-independent, or direct, bases of authority. Since I am not claiming that normative consent is the only basis of authority, I want to consider this objection in a particular form:

Direct authority objection: whenever it would be wrong to consent to authority in light of certain facts, those same facts already establish authority independently of anything about the duty to consent.

Part of the reply should be clear from what I have just said about the views of Rawls and Scanlon. Just because the hypothetical agent looks to certain

prior moral considerations does not show that those must already be the very moral facts—authority facts—the hypothetical scenario is designed to account for. So, just as Rawlsian contractors look to non-justice facts, and Scanlonian contractors look to non-rightness facts, normative consent theory's hypothetical consenters look to non-authority facts. The person who we imagine being offered the chance to consent does not address the question whether there is authority present, but a separate question: "Even if no authority were already present, would I be wrong to refuse to consent to the proposed new authority?" There will be various non-authority facts that will bear on the answer to this question.

An example might help: Suppose you think that there is no authority without consent. Still, suppose I ask you, a passenger in my car, if you will do as I ask (within reason) with respect to caring for the car. If you refuse to consent, the refusal is wrong, or so I hope you will agree. Stop the story before I try to claim that any authority enters. The important point is that you are faced with the issue about the permissibility of accepting new authority even if you believe that there is, at least so far, no authority already present to determine the matter. So the passenger's reasons are not, as the objection claims, the authority reasons themselves. It might be that it would be extremely rude to refuse, a rudeness that is bad enough to be morally wrong. Or there might be other considerations that require you to consent to my authority.

The direct authority objection claims that the consent-requiring facts are already authority-establishing facts. There would be no objection merely in pointing out that these facts guarantee that there is authority. My account accepts this, since the facts make consent morally required, which in turn grounds authority. The objection (if it is to be interesting) claims that the facts are already a sufficient *moral basis* for authority. Normative consent theory, which insists on the moral significance of the fact that consenting would be required, says that the facts are not a sufficient moral basis for the authority. They are a sufficient moral basis for the requirement to consent, and that is a sufficient moral basis for authority. But the sufficient moral basis relation is not transitive, or so normative consent theory claims.

This issue doesn't arise for Rawlsian or Scanlonian contractualisms. The reason is that on those views the hypothetical contractors do not act from moral requirements. They act from a morally reasonable prudence, with reasonableness imposed by the veil of ignorance in Rawls's case, but part of each individual's own motives in Scanlon's case. This makes it especially easy to see that their contractors are not addressing the theory's question, which is a moral or deontic question, not merely a question of a single agent's reasonable prudence. The deontic question is explicated in terms of facts about (to put it roughly) the overlap in a number of agents' reasonable prudence. Each agent's question is simply one of reasonable

prudence, not one about any such overlap. In normative consent theory, the hypothetical consenters do face a moral or deontic question: “am I required to consent?” This can seem to give fuel to the objection that they face the very deontic question the theory is addressing. Nevertheless, the objection fails. It is indeed a deontic question, but not the same deontic question. Whether consent to new authority is morally required is not the same question as whether it is present. Normative consent theory explicates the presence of authority in terms of the separate question of when a person would be required to consent to new authority if offered the chance.

This is only part of an adequate reply to the direct authority objection, of course. It might be a good reply to those who think normative consent depends on previously existing authority. I’ve tried to show how there could be authority resulting from normative consent even if there weren’t already authority on independent grounds. However, this might be granted by a proponent of the direct authority objection, who might wish to add that, nevertheless, there always is already authority on independent grounds, in addition to whatever ground for authority normative consent provides. I don’t want to argue that there is no other basis for authority than normative consent. At the very least, actual consent can be such a basis, and perhaps there are other bases. 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. Since it is not clear how this coincidence could be explained by the objector, I believe they bear the burden of proof.

IX. Normative Consent as Umbrella

Direct authority theories, of course, owe us some account of the direct basis of authority, and this has proven difficult.¹¹ In this section I want to propose a way of thinking about the relation between normative consent theory and several considerations that might seem to support authority directly.

I want to consider several competing approaches to authority that also do not rely on actual consent. My aim is to suggest that they might be conceived so as to be compatible with normative consent theory. What these approaches have identified, if this idea is right, is not any general moral basis of authority, but several contexts in which a person would, if asked, be morally required to consent to authority. The alternative approaches I will consider are, a.) urgent task theory, and b.) fair contribution theory. I briefly explain each one, and propose reconceiving each as falling under the umbrella of normative consent theory. Space only allows a sketch of how this might be done.

We can distinguish between relatively modest or ambitious uses of normative consent theory. The ambitious approach would be to hold that some authority is based on normative consent, and some based on actual consent, and that there is no authority that is not based on one or the other. The more modest claim would be similar, except that it would leave open whether there are some direct bases of authority. I do not choose between these here, but I do want to argue that some cases of supposed direct authority, derived from several different alleged direct grounds of authority, are better conceived as based on normative consent. Whether all alleged direct bases can be brought under the normative consent umbrella (when they are not simply mistaken) is a further question I must leave aside.

First, urgent task theory holds that some tasks are morally so important that there is a natural moral duty to obey the commands of a putative authority who is well-positioned to achieve the task if only people will obey. This is somewhat rough, and there are lots of possible variants, but it will serve the present purpose.¹²

One difficulty for such a view is in the idea of urgency. We can't get plausible results if we just let this stand for a measure of the great value of something being done. The reason is that some things that would be very great achievements nevertheless make no plausible moral claim on everyone who we might try to enlist by commanding them to help. For example, if my religion is the true religion, then it might be the case that a temple to my god would be of great objective value.¹³ That would not yet establish that you have any duty to obey my commands to help me build it. Other tasks, such as saving the person drowning at sea, do seem to have a claim on the assistance of whomever I enlist to help me save the person (assuming I am well-positioned to organize a rescue, I don't invidiously discriminate with my commands, etc.). The basis of authority, then, is evidently not simply the fact that the task is important. Normative consent theory proposes that in the case of some urgent tasks, but not others, those who are commanded would, if asked, be wrong not to consent to the commander's authority for these purposes. The wrongness of refusing consent, rather than urgency itself, would be the explanation for why some urgent tasks ground authority and others do not.

A second alternative approach to authority is often called the fair play argument, but might be better called the fair contribution argument. It says, roughly, that it is wrong to take advantage of the cooperation of others in an arrangement from which one benefits without contributing one's fair share. Nozick and others have presented examples that seem to meet this criterion but intuitively do not generate obligations, such as cases where the benefits are either unavoidable or at least not actively taken.¹⁴ Some writers have tried to limit the criterion to especially important benefits, but these adjustments face problems of their own.¹⁵

Consider fair contribution theory under the umbrella of normative consent theory. The question now would not just be whether one is

benefiting without contributing, nor would it necessarily focus on the importance or nature of the benefits. Rather, there could be a variety of reasons why it would be wrong not to consent to authority in certain contexts of fair cooperation. The importance of the benefits and costs might certainly be relevant. But there is no obvious warrant for inferring a duty to comply from facts about costs and benefits. Normative consent theory asks which cases of this kind are such that it would be wrong not to consent to authority if one's consent were solicited. The advantage of this step is that it is often easier to see that such a refusal to consent would be wrong, than it is to grant that, lacking consent, it would be wrong to disobey commands.

Consider the honest effort of a putative authority to distribute benefits and burdens fairly in order to accomplish a task that requires widespread contribution and has morally important effects. For example, consider a state collecting taxes in order to provide for national defense. Suppose, though, that the state is fallible, and does not always distribute burdens quite fairly. The obligation to contribute *fairly*, then, would not generate a duty to comply. If offered the chance to consent to being under this state's authority, however, the fallibility of the commands might not be an adequate reason for declining. The commander's aiming at fairness, and maybe some reasonable tendency to approximate fairness, has something to do with the moral story here, but it is not simply a duty to do one's fair share. It is the requirement to consent to this fallible person's authority so long as there is a proper and competent effort at fairness (or something along these lines). Since refusing to consent would be wrong, you cannot escape the authority by pointing out that you would not have consented to it. The result is a duty to comply with the commands even when they are mistaken. I have not tried to specify which precise features of the case have ensured that it would be wrong not to consent to the authority. Still, this is enough to suggest that fair contribution theory might best explain authority when it is understood as falling under the larger umbrella of normative consent theory.

This at least suggests that the difficulties faced by direct theories cannot be assumed to infect the normative consent umbrella in the same way. The moral considerations for or against a duty to consent will often be different enough from the moral considerations for or against a duty to obey in the absence of any normative or actual consent. This point needs more elaboration, but space requires that I leave the matter here.

Notes

1. I am grateful to audiences at the Mershon Center at Ohio State, the Legal Theory Workshop at University of Toronto, Jules Coleman's seminar at Yale

Law School, and the Political Philosophy Workshop at Brown. Thanks to my colleague, Nomy Arpaly, for numerous constructive discussions of this material, and to John Simmons and Kit Wellman for helpful comments on a late draft.

2. I take this formulation from Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, Chapter 2. This definition of authority is not committed to Raz's important view about when and why this moral power is present.
3. John Simmons comes pretty close to what I call consent theory, with the following qualification. He argues only that there is no (state) authority without consent *unless*, as, for example, Kantian views of authority claim, accepting authority is necessary to discharge some moral duty or obligation. If, as I think, there can be a duty to accept authority as such, he has allowed that there might be authority without consent. But he doubts that there is ever such a duty. See part IV of his essay, "Justification and Legitimacy," in the volume of his papers, *Justification and Legitimacy*, Cambridge University Press, 2001.
4. *Of the Original Contract*, 1748, any edition, paragraph 4.
5. That is, unless Joe has already consented by getting on the plane. I assume that he has not, since you can't consent without realizing it.
6. Ronald Dworkin presses worries of this kind, for example, in "The Original Position," in Norman Daniels, ed., *Reading Rawls*, Stanford University Press 1989.
7. For example, we often say there was no contract when it was not a binding contract.
8. Cite Dworkin, *op. cit.* See Michael Ridge "Debate: Saving Scanlon: Contractualism and Agent-Relativity," (*Journal of Political Philosophy*, vol. 9, no. 4, 2001, pp. 472–481), for references to these criticisms of Scanlon, and a powerful reply on Scanlon's behalf, to which I am indebted here.
9. I'm indebted to Ridge, *op. cit.*, for this point.
10. I say more about this point in connection with Scanlon's view in "The Democracy/Contractualism Analogy," *Philosophy and Public Affairs* vol. 31, no. 4, 2003, pp. 387–412.
11. For the leading criticisms of such attempts in the context of state authority see John Simmons, *Moral Principles and Political Obligation*, Princeton University Press, 1979.
12. With all their differences, Kant, I. (*Metaphysics of Morals*, in H. P. Reiss, ed. *Kant's Political Writings*. Cambridge: Cambridge University Press 1979), Anscombe, E. (1978). "On the Source of the Authority of the State," 20 *Ratio* 17, 1978, and Kit Wellman, "Liberalism, Political Legitimacy, and Samaritanism," *Philosophy & Public Affairs* 25: 211–37, 1996, all arguably provide examples of this general approach.
13. This is Scanlon's example, for slightly different purposes, in "Preference and Urgency," *The Journal of Philosophy*, vol. 72, 1975, pp. 655–669.
14. Robert Nozick, *Anarchy, State and Utopia*, Basic Books, 1974, pp. 90–96.
15. For example, see George Klosko, *The Principle of Fairness and Political Obligation*, Rowman & Littlefield Publishers, 1992.