

Against Normative Consent

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Introduction

Consent to the state offers a clear basis for a duty to obey the law. It is difficult to deny that when informed and responsible people agree to the terms of an arrangement they are then bound to fulfill the requirements embodied in it. Yet, the chief problem recognized by the most widely cited consent theorists of the past and present¹ is how to understand citizens, most of whom have not given *express* consent to the state, as having consented at all. Despite its moral force, consent cannot serve as the basis of an adequate theory of political obligation if very few citizens have given their consent to the state.

There are two ways to solve this problem of limited application. Most traditional accounts weaken the conditions of consent (via “tacit” consent) to fit the behavior of the majority of citizens. Tacit consent takes our residence within state boundaries, failure to leave the territory, voting, surrender of judgment to political authority, choice of one of a plurality of mini-states, or other behaviors short of express consent to constitute our willing consent to political authority.² But these look either like descriptions of behavior that are radically insufficient for consent³ or like aspirations for future consent-based political arrangements that do not currently exist.⁴

Another way to solve the problem of limited application is to pair consent with a moral notion that already has widespread (or *general*) application. In the face of difficulties for traditional consent, a new and subtle concept has emerged. This is best described by David Estlund as “normative consent.”⁵ Normative consent combines natural duty—traditionally any universal and pre-institutional moral requirement—and consent in the idea that we can be *morally required* to consent to an arrangement. Although normative consent is new to the philosophical literature on political obligation, it appeals to common moral experiences that most of us can imagine. For instance, if someone in need of quick medical attention requires the use of my car, I may be required to consent to the use of it. The analogy to the state offers a promising basis for political obligation. Once we have a duty to consent to any arrangement, it is argued, we are bound to its terms even if we have not *in fact* consented to it. Normative consent remedies the problem of limited application that plagues traditional consent accounts by utilizing natural duty’s general application while retaining consent’s straightforward moral force over those to whom it applies. It is appealing for

these reasons and for the fact that it is easily utilized by those coming from both consent and natural duty perspectives. So, a new hope has arisen for consent theories of political obligation.

As with any fresh and inventive alternative to persistent theoretical problems, a number of critics of the view have arisen. The argument in which Estlund utilizes his notion of normative consent is simultaneously lauded (e.g., as “novel,” “ingenious,” “a tour de force,” and “highly original”) and criticized (e.g., as “lacking in justificatory power” and even “incoherent”).⁶ However, normative consent suffers from a deeper problem than has been hitherto presented. In the following, I argue that normative consent faces a dilemma. On one horn, if the content of the moral reason that grounds my duty to consent (e.g., I ought not to harm others) is identical to the terms to which I ought to consent (e.g., I ought to consent to an arrangement whereby I agree not to harm others), then the duty to consent is superfluous and there must already be a duty to do what would result from my consent.⁷ According to the other horn, if, as is true of typical cases of normative consent, the content of the moral reason for normative consent (e.g., I ought periodically to lend my neighbor yard tools) is not identical to the terms to which I consent (e.g., I consent to the arrangement whereby my neighbor is allowed use of my hedge trimmer at 10 am on Saturday), then there is always a choice in how I fulfill my duty of normative consent. The upshot of this dilemma in the case of political obligation is that either consent is superfluous and I already have a duty to obey the law (in which case it ought to be shown why I have such a duty), thus, rendering normative consent incapable of explaining the duty to obey authority, or the choice in fulfilling normative consent allows me to consent to arrangements that do not entail a duty to obey authority. The inevitable conclusion is that it is impossible for normative consent to serve as a moral basis or explanation for the duty to obey the law.

Our understanding of the failure of normative consent to serve as a moral basis or explanation for the duty to obey the law is instructive. In the final analysis, I point to a problem, which I will call the Content Problem for Political Obligation, that has undermined both natural duty and consent accounts of the duty to obey the law (though less so for consent accounts). Briefly, the problem is that certain purported moral bases for the duty to obey the law (e.g., consent, natural duty, normative consent), while possibly or actually capable of producing a duty with at least some specific content, are incapable of producing a duty whose content relevantly corresponds to (or “matches”) the directives of the relevant political entity. I claim that one reason many have found promise in the idea of normative consent as a basis for political obligation is that on its face it brings together certain strengths of natural duty and consent in order to escape problems each faces on its own. However, on a deeper analysis, the Content Problem poses difficulties that are no less damaging in normative consent than in either natural duty or consent by themselves, and in fact may be more damaging in normative consent than in traditional (express or tacit) consent accounts. There is no benefit in combining the strengths of different moral bases if we

aggregate their weaknesses as well. In the final section of this essay, I will explain both the reason normative consent seems at first glance to escape some traditional problems and explore the fundamental flaws that make it susceptible to the Content Problem.

Estlund's Normative Consent

David Estlund begins with the widely held belief that under certain conditions consent can be nullified.⁸ I may give my consent under duress or without full knowledge of that to which I am consenting and in both cases my consent is nullified. But, wonders Estlund, why should we assume consent can be nullified but nonconsent cannot? He asserts that there are conditions where one's nonconsent can be nullified—namely, when one is morally required to consent (i.e., when there is *normative consent* involved).⁹

Estlund agrees with the libertarian view that no one is born under genuine authority, but only in the sense that freedom is the default position—that without moral reasons to prove otherwise, the assumption is that there is no authority over anyone.¹⁰ He disagrees with the libertarian that consent is the only way to come under authority. It is conceivable that one could be under authority by natural duty, for example. Under typical cases of the nullification of *consent*, the moral effects of some features of the consent situation render the consenter's moral position as if he *had not* consented at all. Estlund believes that we should talk about the nullification of *nonconsent* in a parallel way. The nullification of *nonconsent* is when the moral effect of some features of the nonconsenting situation render the nonconsenter's moral position as if he *had* consented.¹¹

The authority of the state is established in a way directly analogous to the authority of a jury trial system. The jury trial system has the authority to require punishment or exoneration, but this by itself does not capture the kind of authority that binds citizens to the state. Following Joseph Raz, "authority" for Estlund involves not just the right of the state to command and enforce, but the duty of citizens to obey. The jury trial system gets its authority because it is a morally preferable system that can only function with the consent of those under its judicial reach. According to Estlund, the jury system is the only system that will generate no disagreement from all "qualified" or "reasonable" points of view.¹² However, it can only work under the moral requirement that those within its reach do not carry out justice on their own (*antivigilante principle*). Thus, each must "accept" the judgments of the jury.

The analogy to political society is clear. Democracy has the same epistemic advantages of a jury trial system. The antivigilante principle entails the duty to obey the law because it is necessary that individuals not only be put under an adequate system of criminal justice, but also that they promise to obey that criminal justice system. The commitment (or consent) on the part of individuals to the justice system above and beyond mere deterrence by coercion is morally valuable. Estlund shows the value of such commitment by analogy to everyday

moral examples. According to these examples, the promise to do something (consent for Estlund) may be morally valuable beyond the habits, desires or moral duties that make it likely that you will do it anyway. A promise offers assurance to the rest of society that you will carry out your duty and puts moral weight on you to act in accordance with the judgments even when you could get away with disobedience. Thus, the promise to obey the law is morally valuable beyond the factors (fear? patriotism? gratitude?) that make it likely that you will in fact comply with it. Normative consent is an essential part of Estlund's argument in favor of democracy. It is because democratic political systems need consent beyond the likelihood that its citizens will in fact comply with its directives that there is a duty to consent to the state.

The Dilemma for Normative Consent

A number of critics have challenged Estlund on issues related to normative consent. Of these challenges, some of the most significant either push against the idea that *nonconsent* can be nullified similar to the way *consent* can be nullified or challenge the efficacy of normative consent in supporting political obligation as opposed to some other basis for it. Because Estlund responds to these criticisms, I will not address them or the responses to them.¹³ However, even if Estlund has a way out of the attacks so far leveled against normative consent, I argue that there is a much deeper problem. This problem emerges because normative consent faces a dilemma. Either it does not entail a duty to obey, or the duty to obey must be based on something other than normative consent.

It is odd to say that one's having a duty to consent results in one's being morally in the condition of having consented. What if people do not fulfill their duty to consent? Do they still have a duty to act exactly as they would have if they had consented? It is an open question what results from refusal to consent under normative consent situations. But if there is a resultant duty, why not say instead that from the very beginning nonconsenting people had a duty to act as they would if they were to consent (whether or not they actually do so)? After all, I must do all kinds of things that I would be required to do if I had consented to them. If I promised you I would not kill you for pleasure, then I would have a duty not to kill you for pleasure. However, I already have a duty to act as I would if I had consented not to kill you for pleasure because I have a very straightforward *natural duty* not to kill you for pleasure. So, it is silly to think that I have a duty to *consent* to such an arrangement.¹⁴ What is the point of requiring consent at all? The initial goal for normative consent theorists, then, is to think about what kinds of required consent situations might be different from this. When might we be required to consent in a way that does not seem morally superfluous as in the case above?

One essential feature of consent is that it changes the moral landscape around us. When we consent to an arrangement we take on duties and/or rights or we place on others duties and/or rights. If I consent to trade my goods for

your goods, I am taking on the duty not to prohibit your free action with respect to the goods that were mine just a moment before. You have a correlative right to free action regarding those goods. I also take on rights with respect to what was yours just a moment before and you have the duty not to interfere with my freedom. It may be that only one of us benefits from a consent situation, but there is often a correlation between rights and duties.¹⁵

Typically, we think of consent as a necessary condition for the moral landscape to be changed in the way that results from it. Thus, for a simple case of goods exchange, I cannot be considered to have a duty to refrain from using what was mine just a second ago unless I have done something to change the rights of ownership between the two of us. It is entirely up to me whether I engage in this kind of activity and so my (and your) willingness to exchange is the deciding factor in where our rights and duties fall. So, the idea of a *duty* to consent is certainly foreign to the typical case of consent. That does not mean it cannot exist, though.

The reason typical cases of consent are not based on any sort of duty is plain to see. Duty is a moral *requirement*, but typical consent must be *voluntary*, which means it involves some kind of choice. While we can imagine moral requirement and voluntary consent both giving reasons for the same action, typically those reasons are independent of each other. With normative consent, requirement and voluntary choice come together to provide the same reason. Notice, for example the difference between willing allowance of something and consent to it. I may have a duty to allow you to use something of mine. Perhaps you are starving and wish to eat some of my abundant food stores. It may be that, were I given the choice, I would not consent to your taking some of my food. However, you do take some of my food. I may be really angered by it, but knowing I have a duty to provide for the hungry, I do not inhibit you from taking it. Do I consent to your taking it in this situation? We can imagine consent occurring (e.g., I post a note giving you permission to take some of my food), but it does not seem to occur here.¹⁶

What kind of choice is involved in consent? It seems to me there are two kinds of moral choice in consent, only one of which is consistent with a duty to consent. Consent, remember, is a way of changing the moral landscape by imposing duties and granting rights. It seems to me that you can consent in situations where you have a choice in (a) accepting or rejecting a proposed arrangement that is set before you or (b) using your discretion to endorse a particular way of accomplishing a morally required goal. Imagine that a neighbor wants to use a lawn tool of mine. According to (a), I may have a choice about whether to enter into a single agreement with this neighbor in order for him or her to use a tool for some specified purpose, time, and so on. In that case, my duties are strictly dependent on my agreement to the arrangement or not. If I choose not to consent, then my rights and duties remain the same and my neighbor is left without the right to my tools. (a) is the straightforward kind of consent (express and tacit) that is used in traditional accounts of political obligation. As we have seen, though, this kind of

choice in consent cannot result in a duty to obey for most members of contemporary society. Because (a) involves choice in the very decision whether to consent or not, it is impossible to pair it with a *requirement* to consent.

It seems, then, that normative consent involves a choice in (b) using your discretion to endorse a particular way of accomplishing a morally required goal.¹⁷ Imagine, according to (b), that I have made a previous agreement with my neighbors to let each of them use one of my lawn tools once a month (and this is a reciprocal arrangement so that I have the same right with respect to their tools). I have taken a moral duty on myself to let my neighbors use my tools. It may be that according to the conditions of this agreement, no neighbor can make a demand of any other neighbor for the use of a *specific* tool. With respect to the neighbor seeking the use of my tools, then, I have a choice. I must consent to the use of one of my tools (imagine we agreed on a date and time for each use). In this example, there are two phases of consent. I first consented to the broad arrangement and then consented to the use of a tool of my choosing. In the first phase, my choice was, according to (a), in whether or not to agree to the arrangement. Here there was no requirement. I either choose to participate in a sharing scheme or not. In the second phase, my choice was, according to (b), in what kind of arrangement I choose to fulfill my obligations according to the original agreement. Thus, in the second phase I had a moral duty to consent (normative consent) to the use of one of my tools.

Notice, though, that if in the original agreement all the details of use (e.g., time, date, person, duration, etc.) were specified, no additional consent of mine would be necessary. I need not consent to your use of my tools after my previous consent specified the time, place, and all other conditions of its use. The implausibility of an additional requirement to consent is illustrated if you imagine the second case of consent occurring within minutes of the first. We have a neighborhood meeting where I agree to Judy's use of my hedge-trimmer for an hour immediately after the meeting is adjourned. Minutes later the meeting is adjourned. Does Judy have the right to my hedge-trimmer without my further consent? If not, then must I consent again to Judy's use of my tools once we reach my house? When we move back to the tool shed? When I place the tool before her? When exactly does consent sufficiently grant the right to my neighbor and impose the duty on me?

It seems clear that, whenever a second case of consent is required, there is a new choice situation to be resolved. The choice situation above arises only because the original agreement with my neighbors failed to specify exactly how the duty imposed on me must be fulfilled. Based on the typical case of consent we can formulate a principle for normative consent.

C1. Wherever there is normative consent (i.e., where one has a duty to consent), the content of the moral requirement from which it is derived cannot be identical to the content of the arrangement to which we must consent.

C1 is entailed by the nature of our two ways of consenting. The only way to be required to consent is according to (b), but (b) necessitates that there is some choice from various options. This means that the moral requirement by which we must choose according to (b) cannot have all the same content as the consenting arrangement of our choice. If the content of my moral requirement specified exactly when and how a specific person had the right to use one of my tools, then my consent to the use of that tool on the occasion of proper use is not necessary. According to this principle, it does not make any difference whether the moral requirement to consent is based on my previous consent (e.g., according to [a]) or some independent moral consideration (e.g., natural duty). In many cases of moral requirement, it seems possible for consent to be required in order to fulfill them.

On the model above, consent can be required on multiple levels, depending on the specification of duties imposed at each level. If I have a duty to give aid to others, then perhaps I can fulfill this duty by consenting to an arrangement whereby all participants in the arrangement give aid as a society of aid givers. The conditions of membership in this association of aid givers do not specify exactly how and when I fulfill my duty to give aid. Instead, I have options. I may choose to give money to an aid agency for members, I may aid a certain number of members per year, I may volunteer to work the dangerous jobs of the aid agency that is funded by fellow members, and so on. Each of these requires additional consent. I have no duty to do any of these things in particular, but I have a duty to choose and do one of them. Suppose I pick the third option—to work a job at the aid agency. Perhaps the aid agency does not specify what job I must work in order to fulfill this option. So now I must consent to a specific job in the agency. Once I have consented, I am required to act in accordance with all the stipulated duties of that job. Whatever the original agreement has not specified leaves open new areas of choice for me. Some of these choices may involve giving consent. In any case where every choice requires my consent, then I have a moral duty to consent but to just one among many things.

Conversely, however, if the original agreement (or other pre-existing duties) specifies exactly what I must do, then consent thereafter is morally superfluous. I may still give it, but it is not a necessary condition of my being under the duty. If consent is not necessary, then it cannot be required. This is important for normative consent. Normative consent specifies a duty to consent, meaning consent must be the only way to fulfill a moral requirement. According to the discussion above, a duty to consent cannot be based on a duty that already corresponds exactly with what consent would require me to do. For any typical consent involves the freedom to choose in some way. Therefore, if normative consent requires me to consent to obey the government's laws (i.e., to consent to its authority), then it cannot be based on a natural duty to obey the government's laws (i.e., the fact that the government *already has* authority over me). Recall the example from the beginning of this section. If I am morally required to refrain from killing you, then I cannot be morally required to consent to refrain

from killing you. Such a requirement has to be based on something, but it cannot be based on the only duty that seems relevant to such consent—namely, the duty to refrain from killing you.

Now, we have a dilemma regarding political obligation. Either normative consent (the duty to consent) is based on a duty to obey the law (whose origin requires independent explanation), in which case consent is morally superfluous and cannot be required, *or* normative consent is based on a less specified duty, in which case there is sufficient choice so that obedience to the law is only one of many ways to fulfill the duty. The former horn of the dilemma is off the table for normative consent as a basis for the duty to obey and the latter fails to entail a duty to obey. Estlund simply cannot motivate normative consent. Though it serves as the connection between a mere duty to allow political bodies to command/enforce and the duty to obey the law, he cannot show that normative consent is plausible for political obligation. There are some responses available for Estlund, however, and so we must address them before we completely reject normative consent.

Objections and Estlund's Examples

If it seems at first unlikely that normative consent exists for political obligation, perhaps clear cases in other moral contexts will cause us to rethink our position. There are many examples to choose from in Estlund, but they can be criticized from three points of view. The “consent” in question for each example is just (a) a promise that does not function like actual consent; (b) consent that involves a clear choice in the fulfillment of a more general duty; or (c) consent that, while it looks like it grants a right to others, actually merely confirms a right on the basis of a pre-existing moral duty.

One example Estlund gives involves something like a promise to act according to what appears to me to be a pre-existing moral duty.¹⁸ It involves Joe, who has a duty to promise to obey a flight attendant during an emergency on a plane because if he does not the rescue of many may be hindered. But why is not there simply a pre-existing duty to obey the flight attendant that explains the duty to promise to obey instead of the other way around? In this case and others like it, whether there is a pre-existing duty to motivate the normative consent or not, the consent offers a promise to take some action. Notice, although that while some promises are like consent, others are not. One way to see the difference is that promises sometimes offer guarantees of what we are already required to do. In other words, they may do nothing more than strengthen the force of a pre-existing duty. For example, when someone doubts my intention to pay on a lost bet, my promise merely builds confidence that I intend to do so. It imposes no additional duty on me. I claim that “consent” in the present case does nothing more than this. Assuming Joe has a duty at all (otherwise he has no duty to consent among other things), the duty must be to act in ways that best resolve the emergency situation. If this is done through the authority of the flight

attendant, then Joe has a prior duty to obey her as an authority. The promise cannot possibly establish a duty to obey unless he already has it. This means normative consent does no explanatory work. If Joe's duty is merely to refrain from interfering with the flight attendant, then he need not promise anything to fulfill his duty, even if promising to obey is consistent with his noninterference.¹⁹

Another set of examples Estlund offers specifies cases where there is genuine consent involved, but it looks like the consent is given from a range of choices not specified from the original duty. These come in two forms. First, you may make a promise or have a duty that applies into the future for some duration of time. For instance, you may have a duty (from a previous promise or as a condition of marriage) to consent to sex when your partner initiates it. Second, you may have a duty to consent to the use of your property in reciprocation for your borrowing an item from someone else. If you have recently borrowed a roommate's car, for example, you ought to consent to his use of yours when he needs it (barring outweighing moral conditions).

The duty in the case of marriage is dubious. It is implausible that, without qualification, one must always consent to sex when his or her partner initiates it. As soon as we think there is some variation on when and where such initiation is morally appropriate, consent becomes necessary. But it is necessary not because one has a duty to consent every time, but because it is unclear what such a duty to be sexually available (if there is any such duty at all) specifies. Do you have a duty to consent to sex in an elevator? Probably not. It is doubtful that any "promise" or other duty could possibly specify all the conditions for the duty to have sex. Thus, consent constitutes the fulfillment of a more general duty to be "available" for sex, if there is such a duty at all.²⁰

If, as in the other case my roommate has lent me his car, I owe him a debt of gratitude. This may involve a range of choices for me, such as driving him myself or hiring a taxi for him. Do I have a duty to lend him my car? If I did, it would be very similar to the case of sex. Surely, I have no duty to lend him my car under all conditions. There must be some choice in the matter. It must be that I have a duty to lend him my car at some point according to my preferences (just as his loaning his car probably accorded with his preferences). Either my consent is the fulfillment of a more general duty or there is no duty at all. Thus, these types of cases cannot strengthen the intuition about normative consent to political authority either.

The final example we consider is one where you ought to let another person touch you, either from your previous promise or because it will do him a whole lot of good. The case of letting someone touch you because of a previous promise is less interesting. Your promise would either specify exactly when and how he can touch you, in which case you need not consent, or it would not, in which case your consent is adding additional requirements in terms of how, when, and under what conditions he can touch you. But what if you have a natural duty to allow someone to touch you?

It is unclear what exactly is going on here. Most likely, he already has a right to touch you, but he does not know it. Your expressing a permission for him to do so would then just be a confirmation of a right that already exists. As a general rule, people are prohibited from touching others in various ways unless there are socially accepted norms for doing so. Given such norms, it may be extremely difficult for the other to know he has a right to touch you.²¹ So, perhaps all you are doing is showing the other that, unbeknownst to him, he has a right to touch you. In any case, I see no way of explaining this phenomenon except by either pointing to a pre-existing duty to allow him to touch you or by concluding that there is no real duty at all. This is the last type of example Estlund uses and the last hope for any analogy from moral experience to normative consent in political obligation.

In summary, none of the types of cases that seem to involve normative consent (or at least that Estlund uses to motivate his account) will support normative consent in the case of political obligation. There is another possible response to the arguments I have advanced so far that does not depend on the plausibility of apparent cases of normative consent. Estlund also claims that in normative consent he captures some connection to the will of the duty-holder. I have pointed to the strengths of normative consent in capturing what we want from both a voluntarist and nonvoluntarist source for the duty to obey the law. Natural duty, where it is present, makes a duty *general* in application. Conversely, consent offers a clear source for duty because it has direct connections to the will of the duty-holder. Estlund claims that normative consent retains this connection to the will of the duty-holder in the same way that Rawlsian or Kantian hypothetical consent is connected to the will of the duty-holder. A person need not have actually consented or even desired to consent in order to be bound. Instead, there must be a sense in which the agent would have or should have consented under certain conditions (e.g., as a rational, self-interested chooser behind a veil of ignorance).

Henry Richardson criticizes this methodology broadly in order to make a pointed claim against Estlund's view.²² According to him, there simply is no connection between hypothetical consent and the will of the duty-holder. While I am sympathetic to some of his concerns, the problem with such an approach is that it requires an attack on a vast literature defended by Rawlsians and Kantians alike. I have a much simpler response for Estlund.

Based on my objections above, we know that normative consent faces a dilemma. As Richardson's objection assumes that if there were a real connection to the will then there would be a duty to obey the law, we will focus on one horn of the dilemma—that in which there is a duty to obey the law. As I have argued, any moral duties that would explain the existence of normative consent in such a situation must also explain the duty to obey the law. Thus, even if one attempts to appeal to normative consent in these situations, it is really grounded in a straightforwardly nonvoluntaristic source—natural duty. Thus, despite Estlund's claims to the contrary, normative consent does not maintain any important

connection to the will of the duty-holder. Wherever the duty to obey exists (if it exists at all), normative consent will play no part in explaining the existence of that duty.

The Content Problem for Political Obligation

From the preceding discussion, we can say a few things about the nature of authority in relation to normative consent and political obligation more generally.²³ As Estlund says, normative consent involves two moral bases for political obligation—natural duty and consent (a quasivoluntaristic basis or having some connection to the will). There are many reasons why the strengths of each of these moral bases would be beneficial when united in a single moral basis. One thing I mentioned at the beginning of this essay is that normative consent remedies the problem of limited application that plagues traditional consent accounts by utilizing natural duty's general application. In other words, natural duty applies to many or all of those who are capable of having moral duties. This remedies the traditional problem of consent failing to capture many of those within political boundaries who have not given express consent to the state. Conversely, it is often easier to identify cases of obligation from consent than it is from natural duty. While natural duty theorists struggle to find a plausible natural duty that entails compliance with the state, if we can just retain some connection to the wills of individuals within political boundaries we might establish a clearer basis for political obligation. Consent also escapes what has been called the "Particularity Problem."²⁴ This problem stems from the fact that even if we have a natural duty to in some way advance political goals, the duty makes no reference to the political entity that claims authority over me. For example, if I ought to promote justice, then I ought to promote it in *some political organization or other*, but not necessarily in my own. Consent, however, occurs between specific parties. Thus, if I have made any binding agreement at all with a political party, it should be fairly clear to whom I have an obligation. So, the union of natural duty and consent in normative consent constitutes a promising solution to these problems.

However, when moral reasons are supposed to entail a particular duty (i.e., the duty to obey the law), even one obstacle to entailment is sufficient for failure. I will show that natural duty and consent, even when combined in normative consent, retain the weaknesses associated with what I will call the Content Problem for political obligation (even if it eliminates some of the other weaknesses we have discussed) that prevent them from producing the duty to obey the law on their own. Thus, normative consent does no better than either of these elements individually and, in one respect, does worse than consent.

The Content Problem is present in the literature on political obligation, but remains unnamed. The justificatory elements in any account of political obligation must accomplish a very specific and difficult task. The Content Problem, briefly, is that certain purported moral bases for the duty to obey the law (e.g.,

consent, natural duty, normative consent), while possibly or actually capable of producing a duty with at least some specific content, even content in some way related to a specific political entity, are incapable of producing a duty whose content relevantly corresponds to (or “matches”) the directives of the relevant political entity.²⁵ Because of this, we can see why the elements of normative consent—natural duty and consent—retain their central vices and explain the failure of normative consent to produce a duty to obey the law.

The Content Problem arises because political obligation is supposed to be in some sense content-independent (it is not based primarily on—even if it is occasionally affected/restricted by—moral principles that are independent of the judgment of an authority who specifies the content of the obligation).²⁶ The problem arises from failure to meet two minimal criteria for political obligation, described as follows.

Content Criteria for Political Obligation: as political obligation is in some form content-independent, the moral basis for the obligation must satisfy negative and positive criteria. It (a) *must not* specify the content of the obligation sufficiently to prescribe action without reference to the judgment of the authority, but (b) *must* specify the content of the obligation sufficiently to tie it to the *judgment* of the authority.

The Content Problem arises because nonvoluntaristic bases tend to fail to meet criterion (a) and voluntaristic bases tend to fail to meet criterion (b). Given the foregoing discussion, it is now instructive to see how the Content Problem relates to normative consent and reveals insights about political obligation generally.

Natural duty tends to fail to meet criterion (a) because, where it is sufficient to specify a duty, those actions that would fulfill the duty are usually unrelated to any individual’s or group’s *commands*. For example, for the most part, if you have a duty to achieve or support a certain goal (e.g., establishing security), even if that duty is directed toward a specific political entity (i.e., even if our account escapes the Particularity Problem), it is often very difficult to establish any connection to the *will* of the governing body in relation to the goal. Often the mere existence of the governing body or the establishment of a condition (e.g., of security) is enough to discharge the duty. Thus, the Content Problem for natural duty usually comes in the form of a failure to establish any *authority* in the form of a duty to obey the contingent commands of a particular governing body. The problem for natural duty remains even when combined with consent, as in normative consent.²⁷

According to the argument of this essay, normative consent faces a dilemma in its attempt to form the basis of a duty to obey the law. The first horn of this dilemma is that normative consent (the duty to consent) might be based on a (natural) duty to obey the law (whose origin requires independent explanation). This makes consent morally superfluous and it cannot be required (as in normative consent). So how does this relate to the Content Problem? I have claimed

that, according to the first horn of my dilemma, normative consent suffers from the Content Problem in the same way as any existing natural duty account. Natural duty accounts base more particularized duties on the necessity of actions' contributions to the fulfillment of more general moral goals (more basic moral duties). What I have shown is that *even if* natural duty were to succeed in producing a duty that prescribes action that exactly accords with the law, it must do so while failing to satisfy (a). In other words, if natural duty is to be a successful basis for the duty to obey the law, it must be a duty to obey the law as such, not a duty to act according to laws that happen to match our pre-existing natural duty. As is well known, if laws have moral authority, many of them could have been specified differently from the way they are in fact articulated by lawmakers without effectively changing the nature of their authority. This is because the authority of the law is supposed to be directly related to the authority of the lawmaker. Any natural duty account of political obligation is unsuccessful if it entails that, whenever the "authority" accidentally produces a law prescribing action that is not already morally required by natural duty (even if the prescriptions to act are not *contrary* to duty), then we would have no duty to follow it. This is because in that case it is not really the *judgment of the authority* that matters; it is just our pre-existing moral duty.²⁸ Insofar as normative consent retains elements of natural duty, it suffers from the Content Problem.

In contrast, consent by itself suffers from the Content Problem in a different way. I have mentioned a couple of times now a problem for consent in the lack of *application* to very many subjects of a purported political authority, as most do not in fact consent to it.²⁹ The Content Problem is slightly different from this. The Content Problem for consent highlights the failure of consent to create *uniform* obligations across a general population, *even if all or most within the population have consented*. The problem, in brief, is that even for the group of people who have consented to some sort of agreement relating to the state, be it a small or large group, the agreements persons make may differ in their contents. Because consent situations almost always admit of some choice in the content of the resulting obligation, it is difficult to show that consent can serve as a genuine source of political obligation that is tied to the judgment of a political authority. Perhaps some consent to *obey* the authority, while others consent only to *support it financially*.

This problem is exacerbated by the union of natural duty and consent in normative consent. For example, one can imagine with express or tacit consent to the state that the only offer being made is an all or nothing agreement to obey the state. Against my claims that consent may result in obligations with different contents, this view claims that there is only one offer on the table (i.e., full obedience in exchange for certain goods) and so the content of political obligations from consent *is* uniform for all who consent. Thus, one might claim that the real issue is just in whether or not people have consented to the state, because once people have consented, the consent is uniform for all according to the only offer anyone receives from the state. What I have mentioned above, though, is that

for situations where one is *required* to consent, either there is choice about the content of the agreement to which one must consent, or there is no requirement to consent at all. Thus, this objection is not available to normative consent, even if it is available to more traditional consent accounts.

From the preceding argument, we can see again how the Content Problem affects the consent part of normative consent. The second horn of the dilemma for normative consent is that it might be based on a less specified duty, in which case there is sufficient choice in fulfilling it and obedience to the law is only one among many options.³⁰ In other words, I must consent, but the content of those actions to which I may consent are to some degree at my discretion. What this means is that the content of any general obligation from normative consent is completely undetermined just as (or even more than) it would be in any account of express or tacit consent because the content will vary according to the choices of each individual. Before we even get to the point of asking what it means when people fail to fulfill normative consent—whether their nonconsent is *nullified* or whether other moral considerations give us reason to act as if they had consented—we are faced with the reality that their requirement to consent involves consent to any of a range of possibilities. Not only does this severely complicate the question of what we can do when someone fails to consent, it prohibits us from saying that normative consent entails a duty with any specific content. Thus, when normative consent is based on a less specified duty, it fails to meet criterion (b) of a successful account of political obligation because it cannot specify the content of the obligation sufficiently to tie it to the judgment of a specific authority. Indeed, it fails to specify the content of the obligation at all.

It should be clear now that the fusion of natural duty and consent, rather than providing a way to overcome the obstacles imposed on each, suffers doubly in their combination. In any serious case of a requirement to consent, it appears to involve a range of choice in the same way that or even more than typical consent involves a range of choice. Estlund's attempt to temper that choice with the universal requirements of natural duty runs straight into the Content Problem on the other side. Thus, the irresolvable tension in normative consent is that either the content of our obligations is not sufficiently tied to a political entity because we have too much choice or because the content is already specified by considerations completely independent of such an entity. Normative consent is doomed to failure.

Conclusion

Normative consent to political authority is not an adequate basis for the duty to obey the law. If simple consent (express or tacit) will not be capable of generating a widespread duty to obey, then the argument in this essay should give substantial reason to believe that any account that uses consent to establish a duty to obey the law is bound to fail. The only way to get consent to cover all

members of society is to make it forced. However, morally forced consent is impossible for the duty to obey. Either normative consent will require consent among a range of possibilities only one of which is consent to obey the law, or normative consent will be based on a prior duty to obey the law, in which case consent is morally superfluous and cannot be required to establish a duty to obey (even if it is required for some other reason). Consent remains one of the clearest examples of a basis of political authority, but it applies to very few people.

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Notes

¹For example, Locke (2010), Nozick (1974), Otsuka (2003).

²Socrates famously declared his duty to Athens because of his continued residence despite his opportunities to leave (Plato 1981). Since then, Locke (2010) famously offered a similar account of tacit consent and many more have offered creative amendments to the idea. For example, Plamenatz (1968), Murphy (1999), Otsuka (2003), Steinberger (2004), and Gilbert (1993).

³Criticism goes at least as far back as Hume's argument against Locke, where he claims that such conditions for consent would render a man's refusal to jump off a boat to his likely death as consent to the captain who kidnapped him and dragged him aboard while he slept. See Hume (1994).

⁴Beran (1987), Murphy (1999), and Otsuka (2003) imagine conditions where consent would be the basis of political obligation, though Beran's account requires *express* consent.

⁵Estlund (2008).

⁶See Edmundson (2011), Sreenivasan (2009), and Koltonski (2013)

⁷My argument for this represents a stronger form of what Estlund (2008) has called the Direct Authority Objection.

⁸At least, it is either nullified or was never really effectively given.

⁹The idea that one ought to consent to an arrangement is not entirely new in the literature on political obligation. Mark Murphy suggests something like this and claims it would be a necessary step for the success of accounts like that found in Jeremy Waldron's "Special Ties and Natural Duties" (1993). Were it within the scope of this essay I would also argue that, from the consent side, Michael Otsuka needs something like normative consent to get his account off the ground. His tacit consent is the result of two principles working in tandem—the Kantian duty to offer a guarantee of security to those in close proximity and a reconceived "enough and as good" proviso from Locke. The reconceived proviso includes the provision of land ownership for those who come of age in a society. Tacit consent requires one to choose either life in proximity to others *along with* the moral duty to obey the state or life away from others under no such authority. Yet, this is not a direct result of the requirements of each principle by itself. According to one principle, everyone must be provided with the opportunity to own land whose location is initially unspecified. By itself, this principle puts no limitation on where one can own land. Conversely, Otsuka's treatment of the Kantian duty is as if we can fulfill it only by consenting to an authority. But why should we think such consent actually occurs just because we choose to own land in close proximity to others? We are first entitled to land ownership, which may include land in close proximity to others. Consequently, if we own land in close proximity to others, then we *ought to consent* to a political authority to offer guarantees of security to our neighbors. Fulfilling the Kantian duty need have nothing to do with my initial right to own land.

- ¹⁰This is contrary to other possible interpretations that suggest either that there is no authority without consent or that descriptive inequality is the only basis of authority.
- ¹¹One might doubt that nonconsent can be nullified based on the fact that the nullification of some acts are possible only because they nullify *moral acts*. Nonconsent, though, is no moral act, as it is usually seen as the position one is in before acting at all. One can see the difficulty in talking about one's "situation" or "circumstance" of nonconsent. The circumstance of consent is usually relatively specific, but the circumstance of nonconsent seems to be the circumstance of failing to act. Perhaps one ought to act, but why is one's failure to do so seen as something that can be nullified? In any case, normative consent is still a clear idea without its claims to the nullity of nonconsent.
- ¹²Although he does not accept a Rawlsian model of political justice, Estlund is clearly influenced by Rawlsian overlapping consensus from reasonable points of view.
- ¹³The first criticism I have in mind is captured by Koltonski (2013) and Sreenivasan (2009). Gopal Sreenivasan's criticism has significant relevance to the idea of the "nullity of nonconsent," but I discuss his criticism below in relation to the Direct Authority Objection. Daniel Koltonski objects to Estlund's treatment of consent and nonconsent as symmetrical in the possibility of their nullification. He claims that consent is predicated on the existence of a prior moral state of affairs that would be changed if consent takes place. Typical cases of nonconsent, however, involve the persistence of the prior moral state of affairs. Thus, there is good reason for asymmetry. While I think these are serious charges, I wonder how central the concept of the nullity of nonconsent is to the overall argument regarding normative consent. It may be that when we have a duty to consent, we can be treated as if we had consented, not because our nonconsent is nullified, but for some other reason. In any case, due to the scope of the present topic, I will not consider the objection further.
- The remaining problem for Estlund is captured in what has been called the Direct Authority Objection. The central idea is that for any case of normative consent there is an explanation of authority by some more direct means, such as natural duty. Sreenivasan, for example, claims that normative consent is "otiose," because the nullity of nonconsent is in no privileged justificatory/explanatory position with respect to the conclusions that we can be under authority even if we have not consented to it. Similarly, William Edmundson (2011) writes about the Direct Authority Objection that "the objector's point is that normative consent does no normative or explanatory work." What is puzzling about Estlund's treatment of the Direct Authority Objection (along with the arguments of Edmundson and Sreenivasan) is that he fails to consider a much stronger version of the objection—one that would do much more damage to his theory. Estlund (2011) responds to those who believe that there *may* be a natural duty (or other moral) source to explain every instance of duty supposedly based on normative consent. In contrast, one horn of my dilemma above reveals that there *must* be a natural duty (or other moral) source to explain every instance of duty based on normative consent.
- ¹⁴One might doubt that it is at all possible to change the moral landscape by consenting to action/omission in accordance with a pre-existing duty to the very same action/omission. However, I call it "silly" (and later "superfluous") because I hold that consenting to do what you are already required to do may give you additional moral reasons to do it. Thus, I claim it is possible. It might seem odd, but I can imagine that some reason for required action may become irrelevant before one accomplishes the action. Consent would then remain as an additional reason for required action. You may deny all this without affecting the argument I defend in this article.
- ¹⁵Much of what I say will have implications for many situations of consent, but it is beyond the scope of this article to address these implications.
- ¹⁶For a more general and deeper discussion of these issues, see Murphy (1999) on agent-dependent and agent-independent moral requirements. His discussion, although broader in scope, fails to explore the conditions under which one might be required to consent. He merely argues that there exist some conditions where a more general agent-independent moral requirement (what I have considered a natural duty) might require one to consent.

- ¹⁷Indeed, this is consistent with Estlund's claims that the jury trial system and democratic government achieve morally important goals that support the requirement to consent to them.
- ¹⁸Indeed, Estlund views consent generally as something like a promise.
- ¹⁹The other cases Estlund uses do not help. In the second case, a friend plans to make a special Sunday dinner and wants you to promise to come despite the fact that you usually do so anyway. Third, parents give their daughter a school loan and wish for her to promise to pay it back. Finally, doctors take a version of the Hippocratic oath at the beginning of their careers as doctors. The Sunday dinner example is puzzling. It appears quite obvious to me, at least, that your friend's desire to have you for dinner on Sunday imposes no obligation at all to consent to it. The other two cases are no more effective even if they do involve a duty. The daughter has a duty to pay back her school loan. Her promise neither bestows additional rights on her parents nor imposes additional duties on her. Her parents have a right to repayment regardless. She has a duty to repay regardless. Likewise, doctors have prior duties to help the sick in various ways. Taking an oath neither imposes duties on them nor grants rights to potential patients. None of these cases involve a duty to promise what we do not already have a duty to do. Thus, consent cannot be required and these cannot be the kinds of cases that strengthen our intuitions about normative consent to political authority.
- ²⁰To refer back to another example, you have a duty to consent to your roommate's playing of his music on occasion through the course of your residence together. It is difficult to imagine there is a duty on any particular occasion to consent to your playing music. I may have a duty to consent on some occasion or other, but not on this particular occasion. So, what if I have used up all my chances of nonconsent? It is the last day before we move out and you still have not gotten permission to play your music. Well, it is still easy to see the disanalogy to the case of political obligation. Normative consent involves consent to the authority of another over me at all times. There is no choice to begin with for me in fulfilling my duty. The example just given involves consent on particular occasions over a period of time. Thus, there is no assumption that one act of consent covers them all. However, the duty to obey the law would be a single act of consent that establishes my duty for the rest of my life (so long as certain conditions hold). I cannot appeal to my having used up all my chances of nonconsent. I also am not expected to consent in every obedience situation.
- ²¹Or does he? It is difficult to imagine that someone's touching you is so morally valuable that you have a duty to allow it. Perhaps it is like a case where someone is starving and you have a duty to give him food. But if he is close enough to starving in that case, then he has a right to your food and he can know it pretty straightforwardly. You may object to his taking it, but he may have had a right to it in the first place.
- ²²Richardson (2011).
- ²³Here, I follow what I consider the "traditional" model of "political obligation." While there are many duties and correlative rights associated with political obligation, one essential duty is the duty to obey the law with the correlative right in the state to its subjects' obedience.
- ²⁴See Simmons (1979).
- ²⁵This problem is present in various places in the critical literature on political obligation, but is never given substantial treatment on its own. See, for example, Simmons in Wellman and Simmons (2005).
- ²⁶My definition of content-independence is not significantly different from many other definitions. Any disagreement on this can be remedied by adapting the definition of content independence. My definition is fairly weak and will accommodate most others.
- ²⁷See Simmons in Wellman and Simmons (2005).
- ²⁸This fact is quite well known about content-independence and natural duty. However, to my knowledge, no one has thus far articulated it in terms of the *content* of our obligations and I claim that we have significantly underestimated the import of difficulties with the content of political obligation.

- ²⁹This is most often referred to as a question of whether the political obligation is sufficiently *general*.
- ³⁰Again, see Simmons in Wellman and Simmons (2005). Depending on the basis of the duty, we may be able to fulfill it by contributing financially, contributing our time, or simply allowing the state to function without interfering. If one doubts that there are real options beyond obedience, then there must be a reason why obedience is what we must give to the state. And as soon as we attempt to find a reason, we are back on the other horn of the dilemma. Normative consent becomes superfluous.

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