

Phil 290, March 15, 2011
Estlund, *Democratic Authority*, Ch. 7–8

From Consent Theory to Normative Consent:

Authority: power to make actions morally required because of a command.

Consent theory: 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*).

No persuasive argument for the libertarian clause. While consent may be one way to establish authority, there may also be others.

As the nullity proviso observes, consent can be nullified, say by coercion or duress.

Hardline consent theory: the only conditions that nullify consent are conditions that promote accurate expression of will.

- Questionable: Would imply (given the authority clause) that someone could put oneself into slavery, so long as that was an accurate expression of one's will.

Moderate consent theory: there are non will-tracking, external normative nullifying conditions.

Moderate consent theory is oddly asymmetrical. If these external conditions can nullify consent, they why can't they nullify non-consent (as the libertarian clause denies)? Consent theory holds that when consent is disqualified, the authority condition is as it would have been if there had been qualified non-consent. By symmetry, when non-consent is disqualified, then authority condition is as it would have been if there had been qualified consent.

An example of disqualified non-consent: Joe and the flight attendant. Joe ought to agree to do what she says. But he does not, because he is despicable. He has not escaped the duty to do as she says, even if what she later commands is mistaken.

This suggests that non-consent is disqualified if it would be *wrong to refuse* to consent.

What does the work in the Joe case?

1. Unfair to give bad people a loophole?
2. Hard to see what difference *actually* promising should make? But there are good explanations of this. Suppose that the reason to keep a promise is to preserve the assurance that one has given someone else, or not to exploit a valuable social practice. If we haven't *actually* promised, then we haven't created assurance that we might undermine by failing to perform, or taken advantage of a social practice that we might exploit by failing to perform.
3. How convincing is it that Joe is under her authority? Why not say that Joe has a duty to do as she says insofar as she makes good decisions, and when she doesn't make good decisions, he has no duty to do as she says?

Objections to Normative Consent:

Actual consent objection: Aren't there cases in which wrongful refusal to consent isn't nullified?

- Examples: invasions of one's person, uses of property.
- However, consent to the playing of music is different, although why is unclear.
- In any event, these aren't refusals to consent to your *obeying* other people, but refusals to consent to permitting them to *do* things to you. So there's at least that distinction.

Opportunity objection: What if people don't have the opportunity to consent? But why should having an opportunity to consent matter, when whether or not she consents makes no difference to her normative situation?

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." But the reasons that make it wrong to refuse consent might have nothing to do with authority, e.g., rudeness, a prior promise, etc.

What does this have to do with consent?

"Normative consent retains... *some* connection to the will.... there is...*some* moral independence of each person from the wills of others, having something to do with the fact that they, too, have a will that is just as morally important as anyone else's.... Our respect for the freedom of others finds a limit when their will is exercised immorally..."

But how is this really different from saying that one isn't under the authority of another except when there is good reason to be? Where does the will come in?

Conjecture: Direct accounts of authority are in fact various explanations of why it would be wrong to consent to authority.

- a. Urgent task theory: What counts as "urgent"? Maybe what it would be wrong to refuse to consent to authority to promote.
- b. Fair contribution theory:
 - i. Not clear that benefitting from a fair system is *sufficient* for obligations to contribute. No easy inference from importance of benefits and costs to an obligation. Perhaps wrongful refusal to consent gives us better guidance. "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 such commands."
 - ii. Not clear that benefitting from a fair system is *necessary* for obligations to contribute. Perhaps the contributions asked of one aren't quite fair. But it isn't obvious that this vitiates the obligation. Perhaps this is because it would have been wrong to refuse to consent.

Overview of conditions on legitimacy and authority

Conditions on legitimacy:

- A necessary condition for the permissibility of use of coercive force is that the (a?) justification of the use is acceptable to all qualified points of view.
- This implies that *actual* consent is not sufficient.

Conditions on authority:

- A sufficient condition (at least in certain contexts) for having an obligation to obey someone's commands, because they have commanded it, is that it would have been wrong of one to have refused to consent to such authority.
- This implies that actual consent (at least in those contexts) is not necessary.

There can be authority without legitimacy: "Authority, by which I mean the moral power to require action—can, in principle, be established even without a generally acceptable justification if normative consent...is present." Ambiguous: Without a generally acceptable justification of what?

1. ...of why it is wrong for one to refuse consent to obey the authority? How would this block the authority of the experts? Can't it *in fact* be wrong for you to refuse consent to some expert, even though there isn't a generally acceptable justification?
2. ...of the use of coercive force by the authority over one?

Can there be legitimacy without authority? In principle, it looks like there might be a generally acceptable justification of X's use of coercive force (and even actual consent) without it being wrong to refuse to consent to obey X.

Summary: "As for the authority and legitimacy of political structures that meet the criteria of epistemic proceduralism, I argue that owing to normative consent they are authoritative, and also that they at least meet the general acceptability condition for legitimacy, whatever other conditions on legitimacy might be appropriate" (134).

The Argument for Democratic Authority:

Anarchic Prejuria: No institution of accusation, trial, and punishment.

Epistocratic Prejuria: Church fathers make the decisions.

Juristic Prejuria: A private group sets up a system where a randomly selected panel of citizens makes the decisions.

Is there an obligation to obey the decisions in Juristic Prejuria? Do those decisions have authority?

1. *Humanitarian duties:* to contribute to the solution of great humanitarian problems either by making a positive difference or at least by acting in such a way that if people generally acted in that way the problem would be significantly lessened or solved.
2. Juridical anarchy—the absence of a common system of judgment and punishment (which, in particular, prevents private punishment)—is a global humanitarian problem.
3. So we have a duty to do our fair share to solve it.
4. We do our fair share by contributing to the local, "districted solution" to the global problem. "Accepting the authority (within limits) of our local states is one way to do our part. States have not magically arranged borders along just the antecedently correct line, or any such thing. Their significance stems from their availability and effectiveness, such as it is" (149). (Question: But if we should just pitch in with the going concern, whatever it is, does that undermine the argument that we can refuse to go along with the sub-optimal Epistocracy when the superior Juristic isn't in place?) This aims to meet Simmons's particularity requirement.

How do we contribute to the system?

5. At least in part by *promising* to obey it. Note that if promising isn't a required contribution, then it isn't wrong to refuse to promise, and so there is no normative consent. But why is our promising *itself* important? Why is it necessary to fulfill the "general commitment task" of "getting people to have promised to obey an adequate system of criminal justice" (152)?
 - a. To make it more likely that people comply?
 - b. Because of some more intrinsic value to the promise?

Is it wrong to refuse to promise to obey Juristic?

6. There is no qualified objection that Juristic better serves substantive justice than Anarchic or random decision.
 - a. DE here seems to assume that, in addition to being a constraint on legitimacy, qualified acceptability is at least *some* constraint on authority. Perhaps: *one* factor that can affect the wrongness of one's giving or withholding consent to authority is whether or not one has a qualified objection to some premise in the argument that one ought to give that consent.
 - b. Do justifications of *humanitarian duties*, in general, need to satisfy a qualified acceptability requirement? (The remains of the building will collapse on the people still trapped inside if we take approach A rather than B. But someone might reasonably disagree with the claims of the so-called experts that this is so. Does it follow that there is no duty to take approach B rather than A?) If justifications of *humanitarian duties* need not satisfy a qualified acceptability requirement, then why do justifications of *duties to consent to authority to direct humanitarian duties*?
7. There is qualified objection that Epistocratic is better than...what exactly?
 - a. ...Juristic? "whether or not the epistocratic arrangement, in the hands of the church fathers, would do even better than the jury system, there is indeed qualified disagreement about that proposition... My argument here is the same as my general argument against invidious comparisons in political justification" (139).
 - b. ...Anarchic (or random decision)? "such consent would not be morally required of any citizen who (within a qualified point of view, not just any point of view) doubted that the church fathers would be substantively any more accurate than anarchy" (139, end of same para.).
 - i. EP > AN or RAND seems less controversial than EP > JUR
 - ii. EP > AN or RAND does not (obviously) involve invidious comparisons.
 - iii. Suppose that it *is* generally accepted that EP > AN or RAND, *not* that EP > JUR, and *not* that JUR > EP. Why should JUR prevail over EP? In the case of democracy, DE argued that universal suffrage had a kind of default status. Is that argument suppose to apply to JUR as well?
8. Therefore, it would be wrong to refuse to promise to obey Juristic.
9. So, we have given our "normative consent": we are obligated as though we had promised to obey Juristic. We are obligated to comply with its decisions even when the decisions do not actually help solve the problem or are otherwise incorrect.

The analogy to democracy? (Left as an exercise for the reader.)