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Consent as the Foundation of Political Authority—A Lockean Perspective*

Abstract:

The article focuses on the justification provided by classical contract theory for the right of states to enact laws and the corresponding obligation of political allegiance. At first the distinction between political authority and parental authority developed by John Locke in his seminal work “Two Treatises of Government” is explored. Thereafter it is discussed why the interests of individuals in the creation of a state fail to vindicate the exercise of governmental power. As regards David Hume’s influential objections to contract theory, it is argued that the consent criterion of political legitimacy withstands his criticism. Hume cannot establish that the core idea of Locke’s justificatory approach is wrong; he merely demonstrates that hardly any existing state meets the consent requirement. Finally the question is discussed which conditions a state must fulfil in order to be entitled to claim that its citizens tacitly approve of its authority.

Keywords: Authority, Consent, Contract Theory, David Hume, John Locke, Political Obligation.

1. Introduction

Hillel Steiner’s (1978) classical paper, that inspired the special topic of this journal, primarily focused on empirical questions about the emergence of social order. The article discussed two alternative models of explanation—the invisible hand process and the contractual agreement. According to the former approach, the creation of social institutions is not deliberately planned, it rather results unintentionally from the self-interested behavior of rational actors. The contractual model, by contrast, assumes that social institutions can only be established by a mutual consent of the individuals concerned. Steiner referred to the example of money to demonstrate that an invisible hand process fails to explain how social institutions come into existence. In his view, the individuals can only rely on each other’s acceptance of money in exchange for goods if there is a “visible” agreement on its continued use (Steiner 1978, 304-306).¹

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¹ For an opposing view see Nozick 1974, 18–22.

Closely related to this empirical controversy is, as Bernd Lahno (2013, 40) remarked in his introduction to this special topic, a “much more contested normative issue”. Given the existence of social institutions, the question arises for what reasons, if any, the individuals are morally obliged to comply with their rules. The two explanatory models sketched above seem to be naturally linked to different normative positions. According to the invisible hand approach, nobody has consciously agreed to the development of social institutions. It can, however, be shown that everybody benefits from the emergence and maintenance of certain institutions. A moral obligation to abide by the institutions’ rules may thus be based on the interests the individuals have in their creation and continued functioning. From a contractual perspective, this reasoning does not suffice to establish a normative relationship. Instead, a person’s factual acceptance of a social institution is needed to put him or her under a moral obligation to conform to its regulations.

In this paper I will primarily focus on the normative debate about the justification of institutional rights and duties. More precisely, I will deal with the rights of states to enact laws and corresponding moral obligations of obedience. To better understand the normative core of contract theory, it seems helpful to consult the classical work of John Locke. In *section 2* I will explore the distinction between political authority and parental authority which plays a central role for his justificatory approach. Thereafter, in *section 3*, I will discuss why the interests the individuals have in the existence of a state provide an insufficient foundation of political authority. Subsequently, in *section 4*, I will dwell on David Hume’s influential critique of contract theory and try to show that his objections fail to refute Locke’s approach. Finally, in *section 5*, I will comment on the practical relevance of the consent criterion of political legitimacy, followed by a brief summary of my argument in the *section 6*.

2. Locke’s Two Concepts of Authority

John Locke in the second part of his “Two Treatises of Government” (1980 II, § 4) sets out the requirements for the justification of political authority as follows: “To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.” Here Locke clearly places the burden of proof on those who consider the individuals subjugated to a sovereign’s commands. Perfect freedom is, in his view, the natural condition of man, while the exertion of political coercion needs to be warranted. Since all (mature) human beings are independent from the will of any other, they also live in a state

of equality. According to Locke, nobody is by virtue of divine ordinance, some higher faculties or any other reason, superior to his or her fellow humans.²

It may be worth emphasizing that moral norms are not absent from the state of perfect freedom. The individuals are bound by the law of nature and are, therefore, not permitted to perform whatever action they wish. According to Locke (1980 II, § 6), everyone has first and foremost the obligation to preserve himself and the rest of mankind. Unfortunately, Locke does not specify the implications of this—rather generally formulated—obligation in much detail. From the requirement to preserve God’s creation it clearly follows that nobody is allowed to commit suicide. Moreover, the individuals must not inflict serious harm on others, unless they act in self-defense or for the purpose of punishing violations of natural law. It is, however, controversial whether the obligation to preserve one’s fellow humans implies a positive duty to assist those in need (see Simmons 1992, 59–67). Although the natural state is not—as Locke puts it—a state of license, it does not contain a hierarchical relationship of command and obedience.

Evidently, Locke develops his thoughts on the natural freedom of man within the framework of a religious doctrine. Natural law is given by God to humankind whose (mature) members are able to discern its precepts by virtue of their reason. They are bound to comply with God’s commands because they are—as Locke (1980, II § 6) sees it—his workmanship and possession.³ Thus the question arises whether Locke’s theory is separable from its Christian origins and capable of providing a foundation for secular liberalism.⁴ In my view, in the first passages of the second treatise Locke formulates a basic intuition that is shared by all liberal thinkers. It is generally recognized that freedom is natural, in the sense that the exercise of political power over other individuals requires justification. To be sure, different strands of liberalism hold conflicting views on the criteria a legitimate authority has to meet, but they principally agree on the need to advance strong arguments for the submission of any individual to man-made rules. Hence, the commitment to the natural freedom and equality of all human beings provides us with a starting point for the following discussion which can be accepted without subscribing to religious tenets.

In Locke’s view, there is only one way how a legitimate political authority can be established: “Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of his Estate, and subjected to the Political Power of another, without his own *Consent*.” (Locke 1980, II § 95) In several passages of “The Two Treatises of Government” it is stressed that every member

² Later in this paragraph Locke (1980, II § 4) adds that all human beings should be equal, “unless the Lord and Master of them all, should by any manifest Declaration of his Will set one above another”. He gives, however, no examples of such a manifestation and explicitly denies that Adam was entitled to sovereignty by divine appointment (Locke 1980, I §§ 21–44).

³ In “An Essay Concerning Human Understanding” Locke (1975, 352) mentions—besides being God’s creature—two additional reasons why one should obey divine law. First, everybody stands to benefit from the goodness and wisdom of God’s directions and, second, God is capable of inflicting sanctions of “infinite weight and duration” in the case of infringement.

⁴ For a detailed discussion of the Christian foundations of Locke’s political theory see Waldron 2002.

of a political society has to give his consent individually.⁵ Nobody is entitled to bind any other by consenting on his or her behalf, unless the person concerned has agreed to delegate the decision. Moreover, a majority decision to found a political society has no normative relevance for dissenters who refuse to submit themselves to governmental authority. A majority vote can only be generally binding if every individual concerned has agreed in advance to the implementation of a majority procedure (Locke 1980, II § 96–99).

The individuals' consent can come up in two ways – it can be given either expressively or tacitly. Most clearly, a written or oral statement, such as a public oath, constitutes an express consent. An express consent is first and foremost given by the founders of a political society who jointly decide to leave the state of nature.⁶ In principle, members of subsequent generations or immigrants can also expressively agree to a government's authority. However, as Locke rightly observes, in practice they typically assent to the exertion of political power in rather indirect ways. According to Locke, the founding members of society unchangeably submit their estates to the government's jurisdiction. Even their descendants are not entitled to curtail the state's territory by withdrawing their inherited land from the political community (Locke 1980, II § 120). Moreover, in Locke's view an express consent, contrary to a tacitly given one, is irrevocable and renders it impossible for the individuals to dissolve their political bonds at any time later.⁷ It is, however, hard to see why the two types of consent distinguished by Locke must necessarily differ in content. Locke fails to advance a persuasive argument why the individuals cannot expressively consent to more conditional political obligations (Simmons 1993, 87–88).

A tacit consent to governmental powers, by contrast, is given without words or explicit signs of agreement. Rather, a person's factual acceptance of state authority has to be concluded from his or her observable behavior. According to Locke (1980, II § 119), "[...] every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it [...]" By the "possession of any part of the dominions" Locke clearly refers to property rights of land which is under a government's jurisdiction. Since the land once and for all belongs to a state's territory, a person who purchases or accepts the inheritance of an estate thereby demonstrates his or her submission to the government. Moreover, Locke (1980, II § 119) sees the "very being" of a person within a state's territory as sufficient evidence of his or her tacit consent. As long as persons are free to leave, remaining in a political society can, in Locke's view, be interpreted

⁵ For rich textual evidence see Simmons 1993, 206–207.

⁶ Some passages (e.g. Locke 1980, II §75) suggest, however, that the founding members of a political society may have tacitly consented to be ruled by the head of the family.

⁷ Locke (1980, II § 121) writes: "[...] He, that has once, by actual Agreement, and any *express Declaration*, given his *Consent* to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature; unless by any Calamity, the Government, he was under, comes to be dissolved [...]"

as voluntary acceptance of its legislation. Quite obviously, Locke's argument relies on the availability of an exit option allowing the individuals to end their "enjoyment" of the government. Therefore, a tacit consent—unlike an expressive one—must be revocable, i.e. it must be possible to terminate one's political obligation by emigrating to another country. It is important to emphasize that both forms of consent are understood by Locke as factual agreement; in his view, demonstrating that an individual would have strong prudential reasons to sign a contract fails to ground any moral obligations.

In this respect Locke sharply distinguishes political authority from parental authority which may be exercised over children and immature adults, such as the mentally ill. With reference to the natural equality of man he states: "*Children*, I confess are not born in this full state of *Equality*, though they are born to it. Their parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after, but 'tis but a temporary one." (Locke 1980, II § 55) Since children are still incapable of making fully responsible decisions, their parents' authority cannot be derived from an act of consent. Instead it is precisely their lack of understanding what justifies the empowerment of a person who is willing and qualified to promote their best interests. The authority is placed on the parents because they typically have a natural inclination to promote their offspring's good (Locke 1980, II § 63). However, if, for instance, a father neglects his children and fails to adequately care for them, he forfeits any right to exert power over them.⁸ The authorized persons are best understood as trustees who care for the children's affairs until they have reached maturity. They are responsible for the children's bodily development, intellectual education, and protection of their material possessions (Locke 1980, II § 65). The parental authority is, as emphasized by Locke, limited in time and comes to an end as soon as a child has acquired a sufficient competency to guide itself.

Locke's argument is mainly directed against Robert Filmer's (1991) attempt to ground absolute monarchical power in parental authority. In Locke's view, the dominion of a father (or a mother) is not absolute but restricted with regard to its duration and the purpose of its exercise. Further, parental authority, even if it is correctly understood, cannot serve as a model for the justification of political authority.⁹ When children reach the age of discretion, they attain the natural state of equality to which they are born. From this point on the presumed higher faculty of other persons to discern and further their good can no longer provide a justification for exercising power over them. Any subjugation to the jurisdiction of someone else—i.e. any transition from the state of equality to a hierarchical relationship—requires the voluntary agreement of the person concerned. Locke

⁸ Locke (1980, II § 65) states: "[...] This power so little belongs to the Father by any peculiar right of Nature, but only as he is Guardian of his Children, that when he quits his Care of them, he loses his power over them, which goes along with their Nourishment and Education, to which it is inseparably annexed, and it belongs as much to the *Foster-Father* of an exposed Child, as to the Natural Father of another [...]."

⁹ In addition, Filmer's argument reveals a number of inconsistencies. For instance, if a father has absolute power over his son, it is hard to understand how this son can have full parental authority over his own children (Locke 1980, I § 68).

(1980, II § 116) famously remarks: “[. . .] Whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but *cannot* by any *Compact* whatsoever, bind *his Children* or Posterity. For this Son, when a Man, being altogether as free as the Father, any *act of the Father can no more give away the liberty of the Son*, than it can of any body else [. . .].”¹⁰

To be sure, Locke (1980, II § 124–126) gives weighty reasons for submitting oneself to the authority of a government whose competences are appropriately restricted.¹¹ In the state of nature there are no generally accepted interpretations of natural law and no judges who impartially decide on cases of dispute. Since humans tend to see their own affairs in a biased way and are often influenced by passions, such as desires for revenge, conflicts are likely to result in violence. These shortcomings can only be overcome by the creation of a political society safeguarding the effective and impartial protection of property rights. Moreover, in the state of nature the chances of enforcing one’s rights heavily depend on the factual balance of power. Therefore, it may prove impossible to punish offenders who possess superior strength, more potent weapons or powerful allies. However, in Locke’s view, for the justification of political authority it does not suffice to demonstrate that the individuals benefit from leaving the state of nature. “The only way whereby any one divests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community [. . .]. This any number of Men may do, because it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature.” (Locke 1980, II § 95, see also II § 15)

3. The Priority of Individual Freedom

As discussed in the last section, Locke advocates two concepts of authority for which he provides different justifications. A legitimate political authority requires the factual consent of each mature person over whom governmental power is exercised. For parental authority to be vindicated it has to be shown that it serves the best interests of the child or immature adult concerned. As outlined above, Locke holds that individuals may not be coerced into a political society if they reject membership, although they might have very strong reasons to leave the state of nature. For the assessment of Locke’s consent theory it is important to understand why dissenters must not be subjugated to a political authority which is to their benefit. Unfortunately, in the “Two Treatises of Government”

¹⁰ Locke (1980, II § 173) summarizes the difference between parental and political authority as follows: “*Nature gives* the first of these, *viz. Paternal Power to Parents* for the Benefit of their Children during their Minority, to supply their want of Ability, and understanding how to manage their Property. [. . .] *Voluntary Agreement gives* the second, *viz. Political Power to Governours* for the Benefit of their Subjects, to secure them in the Possession and Use of their Properties.”

¹¹ Contrary to Hobbes, Locke (1980, II § 93) holds that remaining in the state of nature is preferable to living under a government with unlimited powers.

and elsewhere Locke fails to explain his insistence on individual agreement in much detail. In the following I will examine two possible explanations for his denial of an interest-based justification of political authority.

The first interpretation is inspired by the great emphasis which Locke places on the normative importance of individual freedom. According to Locke, in the original state of perfect freedom the individuals' decisions and actions are only limited by the law of nature. Consequently, their freedom must entail the right to act against their interests, unless their very survival—and thus the maintenance of God's creation—is endangered. In a modern, secularized reading of Locke's political philosophy that rids oneself of theological tenets even self-preservation may no longer be obligatory. To be sure, one may take every effort to explain to others why a certain course of action would be in their interests. However, if one fails to persuade them, one may not exert coercion to ensure that they choose the most favorable option.

This freedom-based interpretation—although in line with the spirit of Locke's argument—faces two closely related problems. First, the assessment of a person's maturity crucially depends on the ability to understand his or her interests and to act accordingly. If an adult consistently exhibits the incapacity to take rational decisions, he or she has to be classified—in Locke's words—as “lunatic” or “idiot”. In this case the person's lacking faculty to guide him- or herself would not only justify but require the exertion of parental authority. Second, the decision whether to enter into a political society or to remain in the state of nature has an enormous impact on an individual's life. Thus a dissenter's refusal to sign the social contract is not an innocuous act of irrationality which plays only a marginal role for the overall assessment of his or her performance. Given the far-reaching consequences of this denial, one may regard the anarchist's decision as a serious indication of his or her immaturity.

However, even if one assumes that every rational person must share Locke's view on the advantages of creating a state—a point I will dwell on shortly – one need not accept this conclusion. It is a common phenomenon that people who are in general capable of taking responsible decisions fail to do so with regard to certain—sometimes central—aspects of their lives. Think, for instance, of the smoker who constantly ignores well-known health risks or the woman who always falls in love with the wrong type of man. In both cases the negative effects of the irrational choices are, as for the dissenter who deliberately remains in the state of nature, quite pervasive.¹² Nevertheless, if the overall picture of a person reveals the capacity to lead a self-directed life, any exertion of parental authority is commonly thought to be unjustified.

Obviously, people possess the capacity for self-determination – depending on their different intellectual qualities and other factors—in various degrees. Ide-

¹² Of course, a decision can only be classified as irrational if it is inconsistent with the goals of the person concerned. For instance, somebody who attaches not much value to the preservation of his or her health may not violate any standard of rationality by refusing to quit smoking. Irrational decisions can be explained, among other factors, by an unwillingness to take note of relevant information or the force of adverse passions.

ally they could be organized on a scale beginning with the fully incompetent and ending with the perfectly self-governing person. The above given argument rests on a threshold concept of maturity the details of which are, admittedly, difficult to specify (Feinberg 1986, 28–31). Persons whose general capacity for taking rational decisions lies above the threshold should be ascribed the normative status of “perfect freedom”. Although occasionally or in certain contexts these persons act against their interests, they must not be subordinated to parental authority. Since they are, all things considered, autonomous agents, they qualify as holders of freedom rights who are entitled to take their own decisions. Treating them like a child or a mentally retarded person would be a humiliating experience which would negatively affect their well-being and undermine their self-respect.

The focus of the second interpretation is not on the individuals’ freedoms but on the certainty with which their interests can be established. The arguments for the creation of a state advanced by Locke in the *Second Treatise* are obviously based on a number of empirical assumptions. For instance, his account of the shortcomings of a stateless society presupposes a natural inclination of human beings to judge on their own affairs in an emotional and one-sided manner. As a consequence, in the absence of impartial judicial and executive institutions conflicts are likely to arise which may easily escalate into violence and bloodshed. On the other hand, in Locke’s opinion, state power can be effectively limited to the protection of the individuals’ life, bodily integrity and material property. Thus, by establishing a political society one runs no or only a small risk that the newly created centralized power might get out of control. Obviously, if one of these empirical hypotheses does not hold, leaving the state of nature is not in the individuals’ best interests.

Many people may find Locke’s account of basic human characteristics and the functioning of political institutions plausible. However, there inescapably remains a speculative element in his considerations; it seems impossible to prove the correctness of the aforementioned assumptions. Consequently, even fully rational persons may doubt that they would benefit from leaving the state of nature. Thus Locke’s argument for the founding of a political society is fraught by—what John Rawls (1993, 54–58) has called—the “burdens of judgment”. Since the relevant empirical theses and risk assessments are debatable, it cannot be irrefutably demonstrated that the dissenters misconceive their interests. There is a “rational disagreement” over the anarchist’s case which cannot be solved by an exchange of arguments.

Moreover, some people may espouse quite extraordinary values and attach little importance to the security of their lives and material possessions. Thus, even if the aforementioned empirical assumptions could be proven, leaving the state of nature would not necessarily serve everyone’s interests. On the here given (second) interpretation Locke makes a rather weak claim for the creation of a political society. He simply states his reasons for preferring state membership to a condition of perfect freedom while admitting that the dissenters’ doubts cannot be fully dispelled. Since the anarchists are justified in holding a

conflicting view, using political power to impose a government on them would be illegitimate.

4. Hume's Critique of Contract Theory

The discussions that preceded this journal's special topic centered very much on David Hume's moral and political philosophy. Most notably, Robert Sugden's (2009) assertion that one can consistently be a Humean and a contractarian prompted several critical responses.¹³ Moreover, from a historical perspective Hume has to be seen as the most influential opponent of Locke's justificatory approach. In his famous essay "Of the Original Contract" Hume (1993b) offered a sweeping critique of any attempt to ground political authority on the citizens' factual agreement. Some of his followers even believe that Hume's arguments "should have put an end to contractarian political thought" (Hardin 2007, 120). Hence, any defense of Locke's consent theory needs to respond to the objections raised by Hume and his followers.

In most of his work Hume, contrary to Locke, is primarily interested in providing an answer to two closely related empirical questions. He attempts to explain, first, for what reasons state institutions have evolved in almost all human societies, and, second, why individuals typically feel obliged to obey the law. Consent is mainly discussed by Hume not as a normative criterion for the justification of political authority but as a possible element of an explicatory theory. As to the first question, Hume regards the individuals' interests in security and economic prosperity as main driving forces for the development of state institutions. For very small tribal societies, whose members entertain close relationships and have few possessions, governments may initially be dispensable. However, as soon as external threats emerge an effective defense requires at least the temporary establishment of hierarchical structures.¹⁴ From this experience the individuals gain important insights into the advantages of establishing a common government. If societies grow larger and become more affluent, the trust relationships on which the social order relies inevitably begin to erode. Since the "monitoring of all by all" no longer works, state institutions are needed to enforce contracts and to protect individual belongings (Hardin 2007, 111).

According to Hume, consent only plays a role in the very early stages of state development. The members of a society which faces the threat of an external aggression may choose a military leader and submit to his commands. However, as

¹³ See, for instance, Anthony De Jasay's (2011) harsh denial of any compatibility of both positions.

¹⁴ Hume (2003, 384) remarks: "An *Indian* is but little tempted to dispossess another of his hut, or to steal his bow, as being already provided of the same advantages; and as to any superior fortune, which may attend one above another in hunting and fishing, 'tis only casual and temporary, and will have but small tendency to disturb society. And so far am I from thinking with some philosophers, that men are utterly incapable of society without government, that I assert the first rudiments of government to arise from quarrels, not of men of the same society, but among those of different societies."

state structures develop further the sovereigns are typically not selected by the people but determined according to some customary rule of succession. Moreover, many people become subject to a government as a result of wars and violent border changes. As Hume (1993b, 279) put it: “Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people.”

With regard to the second question, Hume asserts that neither governments nor citizens consider consent to be the foundation of political authority. Governments usually treat every citizen as a rebel who insists on his or her natural freedom and refuses to abide by the law. This holds even true for persons who could not have consented to their authority, such as young adults who were—according to Locke’s theory—previously incapable of making binding promises (Hume 2003, 390–391). The citizens, on the other hand, typically do not believe that they or their ancestors have agreed to the sovereign’s rule. They rather habitually acquiesce in his laws and tend to think that “they were born to such an obedience”. (Hume 2003, 390) The citizens’ allegiance to their governments is strongly supported by their interests in preserving the social order and their fear of chaos and insecurity.¹⁵

Hume’s observations have a direct bearing on the tacit consent argument advanced by Locke in his *Second Treatise of Government*. The observable behavior of a person can only count as an instance of a tacit consent if he or she is aware of its meaning. It is—in other words—impossible to unconsciously agree to a government’s authority or to any other matter. Hence, the mere presence on a state’s territory cannot plausibly be interpreted as a form of promise if the citizens do not understand it as such. Moreover, in order to give their consent to a government’s authority the citizens must have at least one feasible alternative. If they had no realistic choice but to remain in the state, it would be impermissible to take their very being on its territory as consent. Even if a state grants its citizens unrestricted freedom of movement, exerting this right may not be a viable option for many of them. As Hume (1993b, 287) remarks, for a person who is not familiar with foreign languages and habits leaving his or her country of origin may be prohibitively costly.

In my view, it is important to note that Hume’s arguments fail to refute ‘consent’ as a foundational criterion of political legitimacy. What they demonstrate is at best that Locke’s consent requirement is not, or only insufficiently, met by any existing government. In an instructive passage of his essay “Of the Original Contract” Hume (1993b, 280–281) states: “My intention here is not to exclude the consent of the people from being one just foundation of government. Where it has place, it is surely the best and most sacred of any. I only contend, that it

¹⁵ In “Of the Origin of Government” Hume (1993a, 30) states: “Habit soon consolidates what other principles of human nature had imperfectly founded; and men, once accustomed to obedience, never think of departing from that path, in which they and their ancestors have constantly trod, and to which they are confined by so many urgent and visible motives.”

has very seldom had place in any degree, and never almost in its full extent; and that, therefore, some other foundation of government must also be admitted.”¹⁶

Evidently, Locke intends to provide a more readily available justification for the exertion of political authority. His arguments aim at demonstrating the legitimacy of states which effectively secure the lives and material possessions of their citizens. Thus he would have regarded it a major shortcoming of his theoretical approach if it had failed to establish individual obligations even towards right-protecting governments. However, Locke’s probable disappointment over the practical achievements of his consent criterion does not invalidate the normative reasons motivating him to introduce this requirement. As outlined above, Locke considers the individuals initially to be in a state of perfect freedom and equality. It is exactly against this normative background that the hierarchical relationship between a government and its citizens needs to be justified. Moreover, Hume is certainly wrong to claim that in view of his critique “some other foundation of government must also be admitted”. Although it may appear desirable to resort to a less demanding criterion of legitimacy, one may be unable to support a weaker standard by adequate normative reasons.

As regards Hume’s theoretical approach, I find it difficult to see how it could provide a different foundation of political authority. Hume mainly expounds how citizens actually think about political allegiance and advances arguments why the creation of state institutions serves their best interests. On this basis he cannot adequately respond to an anarchist who does not share the common feeling of political allegiance. Demonstrating that someone has an interest is not tantamount to demonstrating that he or she has an obligation. An interest may give the actor a reason to incur an obligation, e.g. by entering into a contract, but the interest itself does not entail any obligation. Moreover, anarchists, of course, deny that they or anyone else stand to benefit from submitting to a coercive state power. Thus, once again the question arises of how to deal with substantial disagreements about the advantages or disadvantages of states as compared to stateless societies. In my view, Hume is not in a better position than Locke to prove that the anarchists’ concerns are unfounded. Given this conflict of opinion, referring to the individuals’ presumed interests can neither ground governmental authority nor a duty to obey.

5. The Practical Importance of Locke’s Consent Criterion

Hume’s objections to Locke’s justificatory approach suggest that the consent requirement of political authority is rarely met by any existing state. If at all, only

¹⁶ Of course, in other parts of his work Hume levels a more basic criticism against contract theories. As he sees it, political allegiance and promise-keeping are both conventions from whose effectiveness the individuals benefit. If one considers contracts to be the origin of political obligations, still one has to explain—in a non-circular manner—the binding force of promises. For an informative discussion see Chwaszcza 2013, 114–119.

a very restricted number of citizens incur political obligations by actually agreeing to a government.¹⁷ As I have argued above, this finding is not a sufficient reason to dismiss the consent criterion of political legitimacy. Hume's critique fails to demonstrate that Locke's normative standards are mistaken; it merely indicates that they are much more difficult to satisfy than Locke thought. Although at present the consent criterion is hardly met it is, as I will argue in this section, not without practical relevance. Every state is in principle capable of meeting the legitimacy conditions Locke sets out in his *Second Treatise of Government*. Hence, the consent criterion can inform our normative assessment of existing political societies and stimulate proposals for institutional reform.

Hume's quarrel with the interpretation of a person's unconscious behavior as tacit consent can easily be countered. The citizens can formally be asked whether or not they endorse of their membership with a political community with all the rights and duties this implies. Alternatively, a state may let its citizens know that their continued residence on the territory is understood as approval of its authority. As a consequence, nobody can claim to be unaware of the normative effects which his or her staying within a state's borders may have.

Hume's objection to the citizens' lack of feasible alternatives to remaining in the state is more difficult to meet. As regards the required range of options, it is crucially important that the individual freedoms, as specified by Locke, are not unduly restricted.¹⁸ Since all human beings possess full freedom of association and dissociation, any state should grant its citizens the widest possible set of exit rights. First, the individuals ought to enjoy the right of emigration, which enables them to leave the country and to join – if accepted – another political community. Moreover, they should be permitted to secede and to create an independent political community on the state's territory.¹⁹ Finally, the citizens must be able to return to the "state of nature", i.e. the established state must either accept a parallel anarchist society on its territory or designate a clearly defined area where the anarchists may try to realize their ideals (Beran 1987, 31–34). Obviously, the last mentioned exit rights raise a number of intricate questions which a complete account of the legitimacy requirements would need to address.²⁰

¹⁷ Arguably, civil servants who officially pledge loyalty to a government or immigrants who formally declare to abide by a country's law have consent-based political obligations.

¹⁸ In addition, it needs to be discussed whether, and possibly to what extent, the availability of an option depends on a person's material situation. As Hume suggests, a poor peasant may be unable to exert his right of emigration because he lacks the financial means to travel abroad (Simmons 1993, 233–248).

¹⁹ As explained in section two, Locke opposed a right to secede; for a critical discussion of his position on territorial rights see Steiner 1998, 66, and Dietrich 2011, 82–85.

²⁰ The right of secession, for instance, faces the problem that decisions on the political independence of subterritories are hardly ever taken unanimously. Thus the exertion of the right to dissociate by majority group A violates the right of minority group B to uphold membership in the established political association. This problem is discussed in some detail in Dietrich 2010, 238–242, followed by a proposal for an alternative justification of the right to secede which refers to widely accepted "democratic values".

However, even if a state grants its citizens the full range of exit rights, it is still possible that some people are unable to satisfy their desires. Imagine, for instance, a person who yearns for the secession of some part of the country in order to realize his vision of a truly socialist society. Unfortunately, nobody else shares his aspiration and is willing to live in an economic order which bans or widely restricts the possession of private property. Most citizens are content with the existing political system and have no separatist ambitions—only a small group of territorially concentrated ecologists strives for the creation of a vegan republic. Now let's assume that the socialist prefers remaining in the state to (a) emigrating to some other country, (b) joining a newly established vegan republic, and (c) realizing some form of anarchism.

Since the socialist advocates a quite different societal idea, he clearly does not approve of the existing political order. Nevertheless, in my view, his decision to maintain membership in the state constitutes a tacit consent to its authority. Although the socialist is unable to accomplish his goal on his own, he may not coerce his fellow citizens to participate in his project. Consequently, he enjoys all options in the established state which are compatible with the freedom rights of others. The application of the consent criterion must be restricted to the set of morally acceptable alternatives. The fact that he would prefer the foundation of a socialist society if a sufficient number of others shared his vision can thus be ignored. If the socialist's observable behavior clearly indicates his preference for one of these options, it may be interpreted as a sign of tacit agreement. His dissatisfaction with the (normative) unavailability of an alternative does not invalidate this conclusion.

In sum, a state which provides its citizens with the full range of exit options and informs them adequately on the normative consequences of residing on its territory can legitimately claim political authority over any person who fails to make use of his or her rights. Correspondingly, any individual who remains in a state which grants the full range of exit options is under an obligation to comply with its laws.

6. Conclusion

In the preceding sections I have tried to elucidate what I think is the normative core of contract theory. Starting out from John Locke's distinction between political and parental authority, I have explored why an appeal to individual interests fails to justify the exertion of state power and corresponding duties of obedience. Furthermore, I have defended the consent requirement of political legitimacy against some standard objections initially raised by David Hume. I have asserted that Hume's critique is incapable of rebutting the core idea of Locke's justificatory approach. What it demonstrates is at best that all existing states fail to meet the consent criterion with regard to most of its citizens. Fi-

nally I have sketched out the most important conditions a state would have to satisfy in order to achieve full legitimacy.

In my view, the question whether a contractarian and a Humean position can be reconciled has to be answered in the negative. Any normative statement a Humean wishes to make on political authority or political allegiance must refer to the interests individuals have in the establishment and continued existence of state institutions. Interests fail, however, to provide a sufficient foundation for the justification of governmental rights and civil duties. Only an individual's factual consent to the authority of a state is capable of conferring legitimacy to the exertion of political power. It may be worth noting that theories which refer to a hypothetical consent do not meet the above explained requirement either. The idea of an imaginary contract may illustrate why it would—under certain circumstances—be in the individuals' best interests to leave the state of nature. However, a hypothetical agreement has, unlike a factual one, no binding force and cannot entail any moral obligations (Dietrich 2008, 62–65).

My defense of a Lockean approach of political authority has led me to a position John Simmons (2001, 102–121) has termed philosophical anarchism. Philosophical anarchists, contrary to political anarchists, do not regard the illegitimacy of a state as a conclusive reason for its abolition. They may, for instance, lack a positive vision of an anarchist society and consider the existence of a state to be the lesser of two evils. Philosophical anarchists merely assert that most individuals are not bound by—consent-based or otherwise founded—political obligations to abide by the law. The citizens may, however, have independent moral duties or prudential reasons to conform to a wide range of legal requirements. They are, for instance, under a moral duty to stay away from murder and theft and they typically have strong incentives to avoid state sanctions. The philosophical anarchism advocated here can be further characterized as a form of a posteriori anarchism. Contrary to a priori versions of anarchism, as for instance developed by Robert P. Wolff (1970, 3–20), states are not deemed necessarily illegitimate. As outlined in the last section, it is in principle possible to exert political authority in a way which satisfies the consent criterion.

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