

## 31

# NORMATIVE CONSENT AND AUTHORITY<sup>1</sup>

*David Estlund*

## 31.1 Introduction

Among our moral requirements, there might be requirements to consent to authority in certain cases. In those cases, what happens if we don't consent? Can we escape the authority in that way, by abusing our power to refuse consent? Why not say, instead, that, just as consent is sometimes null if it fails to meet certain standards, likewise, non-consent can be defective too and null as a result? The nullity of non-consent means, roughly, that the authority situation is as it would have been if the non-consent had not occurred—that is, just as if consent had occurred. The view that authority could be grounded in what would have been a requirement to consent could be formulated as a novel form of a hypothetical consent theory of authority, based on what I have called “normative consent”.<sup>2</sup> If this view can be sustained, authority can simply befall us, whether we have consented to it or not, though the conditions under which this occurs are a separate question. In this short piece, I do not attempt to explain or defend the normative consent approach in a general way. But after a brief sketch of the approach, I go more deeply than before into the questions I refer to as “bypass objections” (which are aimed at all hypothetical consent theories) and the question of what I shall call *quasi-voluntarism*. My main thesis is that, while normative consent theory, in certain versions, might indeed be quasi-voluntarist, even if it were not it would yet have moral force on other, utterly non-voluntarist grounds. A warning: in that part of the argument we will have occasion to distinguish voluntarism, quasi-voluntarism, proto-voluntarism, pseudo-voluntarism, and anti-voluntarism. I will explain each as it arises.

## 31.2 Overview of normative consent

First, an overview of the idea of normative consent as a basis of authority: by *authority* I will mean the moral power to require action (borrowing a phrase from Raz) by commanding (Raz 1986).<sup>3</sup> To say you have authority over me on certain matters is to say that on those matters if you tell me to do something, then I am, for that reason, required to do it. It would normally be limited in scope, and also defeasible. Still, we would need to explain how an agent can ever have such a power: the fact that they command something in the relevant domain is a moral reason to do it unless it is cancelled or outweighed. This, at any rate, is the sort of moral power that I try to account for in this chapter, and I will call it “authority”.

Normative consent theory rejects the actual-consent theory of authority, the view that there is no authority over a person without that person's consenting to be under that authority. Consent theory is not distinctive for holding that under the right conditions consent can establish authority. That is widely agreed. Consent theory is more controversial. Its distinctive claim is that without consent there is no authority. Consent theory, then, holds that,

without consent there is no authority (*the libertarian<sup>4</sup> clause*), but unless there are certain nullifying conditions (*the nullity proviso*) consent to authority establishes authority (*the authority clause*).

The controversial nub of consent theory, then, is the libertarian clause: if A does not consent to B's authority, then, for that reason, B has no authority over A. Roughly, *no authority without consent*. As Simmons has influentially argued, if consent theory is correct then hardly anyone is under political authority. It might yet be true, of course, letting those chips fall where they may. Normative consent theory argues, however, that it is not true, that an agent's consent is not a necessary condition of their being under authority. In that important respect it is not a version of consent theory, but a competitor.

The nullity proviso in consent theory says that consent does not establish authority unless it meets certain standards, with different consent theories specifying different standards. Sometimes it is suggested that under those nullifying conditions (such as duress or coercion) there is, really, no consent after all. Other times, it is said that there is consent but that it fails to have its characteristic moral power. Either way, I want only to point out that consent theory includes an account of when (putative) consent is null or nullified. When we say that a (putative) act of consent is null or nullified, we should not assume that the resulting condition is one of non-authority. All that follows is that there is no authority *owed to that (putative) consent*. To assume that this means there is no authority would be to go beyond nullity, and illegitimately to assume the libertarian clause: that without consent there is no authority. Even where consent fails, other circumstances might establish the authority relation that is in question. So long as consent theory is held in question, null consent does not entail non-authority. It only entails that there is no authority stemming from that consent.

There is an interesting *asymmetry* of a sort in consent theory. The authority clause (stating that consent can establish authority) is limited or qualified by the nullity proviso (stating that consent is sometimes null or nullified). But the libertarian clause (stating that without consent there is no authority) is not subject to any such qualifications. Non-consent establishes non-authority, no questions asked. We can put the asymmetry this way: consent only establishes authority if it meets certain standards, whereas non-consent establishes non-authority without the need to meet any standards at all. The asymmetry by itself proves nothing, but in principle the libertarian clause could be subject to nullifying conditions too. Why couldn't non-consent be disqualified, null, in some cases?

The idea can seem foreign: what would it mean to say that *non-consent is null*? Recall that to say that putative consent to authority is, for some reason, null or nullified, seems to be to say that the authority situation is as if the consent had not occurred. Following that structure, the nullity of non-consent would come to this: when non-consent is nullified (if ever), the authority condition is as it would have been if the non-consent had not occurred—that is, as if there had been (non-null) consent.<sup>5</sup> That authority condition would then normally have been, as even consent theorists agree, the establishment of authority.

Supposed it is granted to me that if someone wrongfully refuses to consent to authority then the refusal is null, putting them under authority just as if they had exercised the power to

consent. What about cases where the authority has not even been proposed, and so there has been no refusal? Call that potential objection,

*the opportunity objection*: non-consent to authority is null only if there had been an opportunity to consent. Otherwise there is no wrongful refusal at all, and so no authority.

In reply, consider the case in which, while there was no opportunity, if there had been then refusal to consent would have been wrong. It is being granted to me that in that case the refusal would have been null. The agent lacks the power in such a case to block authority by refusing to consent to it. The opportunity objection must say, then, that even though the agent's decision whether to consent would make no difference with respect to the authority, her being bound depends on whether she is offered the chance to consent or refrain. But what moral basis would there be for thinking she escapes it if she is given no such chance? It is not as if offering her the chance to consent or not would give her a choice between being under the authority and being free of it. We are assuming that she would be under the authority whether she consented or not because non-consent would be null. The opportunity to consent or to refrain presents only a morally trivial choice: whether to consent without moral effect, or refrain without moral effect. There is no clear moral basis, then, for the opportunity objection.

It is notable that normative consent would be a particular version of hypothetical consent: even in some cases where you have not consented you are under authority just as you would have been *if you had established authority by consenting* (without its being nullified). Hypothetical consent theories are often criticized on several familiar grounds. One familiar objection claims that the appeal to the fact that one would have consented is superfluous and not at all explanatory, since the reasons that support that imaginary consent ground the authority all by themselves. This might be called the *direct authority objection*, though the issues it raises go beyond the question of authority and to hypothetical consent in other contexts, so I will discuss it under the name *bypass objection*. A second familiar objection is that hypothetical consent views seem to suggest (and sometimes assert) some connection to the agent's actual volition, where in fact there is none. We can speak of the alleged insinuation of a *quasi-voluntarism* that is supposed to be morally significant in a way akin to, but distinct from, actual voluntarism, i.e., consent. I will argue below that neither of these objections is compelling in the case of the normative consent approach to authority.

Before continuing, we should briefly acknowledge that, while the focus in this article is the explanation of authority, some of the issues we will see about hypothetical consent are, as in Thomson, not about authority but about the permission to interfere with or impose on someone in certain ways, such as subjecting them to a medical procedure, and so on. The points I make here apply equally well to both contexts, substituting (let's call it) authorized imposition, for authority. I will sometimes use the variable "A", which fits either nicely.

### 31.3 The bypass objection

Normative consent is meant to answer this question: What explains a command's authority?<sup>26</sup> In general, when we ask: "What explains x's being F?", it is not a good answer to provide just any set of features of x that entail that it is F. Someone's being a gold-medal gymnast might entail that she is strong, but it normally does not explain her being strong. Here is how some versions of the direct authority objection might seem to make this mistake. It might be pointed out that, whenever it would be reasonable or required to consent to authority, there would always be background facts, BF (moral or otherwise) that would entail (if not also explain) that

the consent was required,  $R$  (by reason or morality). For this point, let the arrow stand for entailment:  $(BF \rightarrow R)$ . Then, if consent's being required entails that the proposed authority is genuine authority,  $A$ , (as normative consent partly says)  $(R \rightarrow A)$ , then, by transitivity, the background facts entail that there is genuine authority  $(BF \rightarrow A)$ . Since the background facts make no mention of the requirement of consent at all, that requirement  $R$  plays no role, according to this objection, in explaining the presence of authority—the entailment can bypass it. The explanation, contrary to the core claim of normative consent theory, is wholly the background facts themselves—the ones that would incidentally make it required to consent to the authority. This objection makes the mistake of supposing that any entailing set is an explaining set, and therefore fails against normative consent.

I turn next to related arguments that are focused on the question of what explains or grounds the authority. In particular, begin with the question of whether hypothetical consent is any part of the explanation, not whether it is the whole or fundamental explanation, postponing that issue for now. The main issue is familiar from discussions of the more general family of hypothetical consent views, of which normative consent is an instance. Judith Thomson puts a familiar charge against hypothetical consent theories this way: “[W]hat does the moral work in appeals to a person’s hypothetical consent to a thing. . . is not that the person would consent to it, but rather whatever it is about the thing that makes it worthy of consent by the person” (Thomson 1990: 360). She argues, then, that hypothetical consent itself is no ground at all. Crucially, I will not be arguing in this particular section that it is such a ground. The issue here is the narrower one of whether Thomson’s argument succeeds in showing that it is not.

There is an ambiguity in the passage from Thomson, and so I will consider the two possible interpretations in turn. Thomson refers to “whatever it is about the thing that makes it worthy of consent”. On one reading, the thing’s being worthy of consent is a crucial part of the explanation. What does the work is that the thing has certain features (perhaps features  $x$ ,  $y$ , and  $z$ ) that make it worthy of consent. If this is Thomson’s meaning, then there is no departure from hypothetical consent theory. Consent is mentioned in this explanation, and it is not actual consent but hypothetical warranted consent.

Another reading of “whatever it is about the thing that makes it worthy of consent” would avoid my first reply by leaving the worthiness of consent out of the explanation altogether. On this reading a clearer statement would say that what does the justificatory work is not the thing’s worthiness of consent, which it has in light of certain of its features, but the features themselves. Hypothetical consent and worthiness of consent both drop out completely.

Certainly, the requirement to consent must be grounded in other facts, facts that make it rational or required to consent. This, of course, is common ground. It leaves entirely open the question of whether Thomson is right that the background facts are “what does the work”. She evidently means that the requirement to consent does no work—no work in morally grounding or explaining the authority. Whether or not it is the only, or the most fundamental, ground (about which nothing is decided here), the question for now is whether it is a ground at all. But observing that the requirement to consent itself has a moral ground is no argument at all that it is not itself a moral ground of—at least part of the explanation of—authority or authorized imposition.

If there is authority or authorized imposition ( $A$ ) in virtue of consent’s being required ( $R$ ), and consent is required in virtue of the background facts ( $BF$ ), then we can conclude that there is authority partly in virtue of, or partly explained by, the background facts, and moreover they might seem to be more fundamental, a deeper explanation in some sense. For simplicity, I will not inquire into whether the relevant grounding or explanation relation is generally transitive, and I grant it for the sake of argument. This appeal to transitivity is no difficulty for the position

of the hypothetical consent theorist, of course, whose claim is simply granted *en route*. For example, I have claimed that there is authority in virtue of consent's being required, and this very claim of mine is the first premise of the objector's argument from transitivity:

- 1 A is (at least partly) in virtue of R
- 2 R is (at least partly) in virtue of BF
- 3 Therefore, by transitivity, A is (at least partly) in virtue of BF.

So there is no dispute about that according to this objection. And certainly I wouldn't deny that consent is required, when it is, in virtue of background facts. If it is asserted that, in a transitivity case, the background facts are the more fundamental explanation of the authority or authorized imposition, we would be granting the explanatory *relevance* of hypothetical consent and moving on to a new question. For what it is worth, the fundamentality claim is not, to my mind, at all obvious. But I will not take it up further here since it does not bear on this main question.

### 31.4 Voluntarism and quasi-voluntarism

Normative consent theory has voluntarist and non-voluntarist elements. It honors voluntary choices about what authority to subject yourself to, so long as they are not morally wrong. Within that constraint, you may accept or reject subjection to authority as you choose. In cases where you have not consented, and non-consent is permissible, the fact that you have not consented to the authority is enough to explain why you are not subject to it. In those contexts, where either consenting to authority or rejecting it is permissible, the theory is voluntaristic, congruent with actual-consent theories of political obligation. Call this the *truly voluntaristic component* of normative consent theory.

Even though normative consent, like any hypothetical consent view, is not a simply voluntaristic account of authority—one on which (as in consent theories) an agent falls under authority only voluntarily, by an exercise of her own will—normative consent might seem to retain some connection to the person's will. One might come to be under another's authority only as authorized in some way by the contents of their own will (even if not by an exercise of it—more below). This would be, as I will call it, a *quasi-voluntarist* constraint on authority. So far, though, while there is a truly voluntaristic element of the overall theory, the distinctive part—saying that you are obligated even when you do not consent so long as you would have been required to—is not yet shown to be voluntaristic at all. Now, of course, it is not supposed to be a voluntaristic theory, so the goal could at most be to explain why and how one's will must come into the account *in some way*, a weaker quasi-voluntarist condition.

Suppose it is argued that facts about what a person would have willed under counterfactual conditions are facts *about* that person's will, even if they do not invoke actual exercises of the will. That is correct, but only because it takes very little for a fact to be "about" something. Here's a fact about my will: it is not my foot. Suppose the claim is stronger: normative consent is an indication of what is supported by my will. However, the skeptic might fairly ask, is it an indication of what is supported or favored by my appetite to note that I would have eaten a sandwich if I had chosen as morally required? In some cases the appetite might play some role in choosing from within the permissible set of choices. But normative consent is a case where accepting authority would not only have been among the permissible choices, but is the only permissible choice. It is no reflection of my appetite to say, in a case where eating a sandwich is the only permissible choice for anyone in that situation, that I would have eaten a sandwich

if I had done the required thing. That is much like the suggestion that normative consent invokes the subject's will. Arguably, they are both just about what is right, and are not pointing to the substance of what I will in any way.<sup>7</sup> A closer look at the variations available to hypothetical consent theory, however, suggests that normative consent's potential claim to quasi-voluntarism has not yet been refuted.

In a variety of contexts, it can seem to be morally significant what a certain agent who does not consent *would* consent to. Here is one familiar context:

*Coma:*



It is commonly believed that if a person is in a coma and cannot exercise consent to a certain risky or disfiguring medical procedure, it is morally important to do what she would have consented to if she had the chance.

Here is a very different context:

*Social Contract:*

Some philosophers over the centuries have argued that the burdens of state power or authority can be morally justified if, but only if, the people subject to it would have consented to it in specific circumstances.

These are very different uses of the general idea of hypothetical consent. But they have this in common: the idea of consent figures in the account, and it is not claimed to be actual consent.

Corresponding to our two examples—Coma and Social Contract—we can distinguish two uses of hypothetical consent: the former is person-specific and attitude-based. It tends to be about hypothetical consent by actual identifiable people, based on their actual attitudes. The latter kind of hypothetical consent is more familiar when the topic is a general philosophical question about duty or authority. It is typically standard-based, and person-generic (rather than attitude-based, or person-specific). That is, it tends (roughly speaking) to be about hypothetical people and what they would consent to, based on standards of morality or rationality.

*Attitude-Based Hypothetical Consent:*

Asks what a person would have consented to in certain real conditions if consulted, basing the answer on an inquiry into the individual's actual attitudes.

And,

*Standard-Based Hypothetical Consent:*

Asks what any person would have consented to if consulted, stipulating certain attitudes, and basing the answer on inquiry into the implications of a certain normative standard (such as rationality or morality).

The former person-specific, attitude-based version that is familiar in medical ethics contexts seems to me to have a strong claim to some moral significance stemming from a kind of quasi-voluntarism, while that is more doubtful in the standard-based, person-generic version, as I will explain. The quasi-voluntarism in the former case stems from its reliance on actual motives of the person in question, motives that are in a morally significant way (as I will call them) *protovolitional*: actual beliefs and desires whose relevance is that they are of the kind that are poised to figure in the person's practical deliberation about the kind of case in question—that is, about

whether or not to consent to some imposition. For example, suppose the imposition in question is a surgical procedure in which the patient's left-hand fingers will be removed, destroying his career as a saxophone player. His career could be saved, but only by allowing the spread of a disease that will make it impossible for him to sing. The relevant beliefs and desires are whichever ones are actually his, and poised to figure in his own deliberation, if only it could occur, about which procedure to choose. Their moral relevance is precisely their connection to the agent's will. On this view the question is not what is best for him, but what he has come sufficiently close to choosing. The attitudes that do the work are actual, not hypothetical, but their moral relevance is their relation to will or choice—and yet will or choice is not actual in this case. It is, then, hypothetical.

This idea of quasi-voluntarism by way of proto-volitional states is, so far, somewhat cryptic, and space prevents a fuller exploration. It will have to suffice to say only that, in the person-specific, attitude-based variety of hypothetical consent, quasi-voluntarism may have a footing. For easy reference below, call that hypothesis *proto-voluntarism*, a specific version of quasi-voluntarism. This will become important shortly. First, however, even if there is this proto-voluntarism in attitude-based and person-specific cases such as Coma, it is no case for quasi-voluntarism in the other, standard-based, person-generic version, as I will now argue.

Turning from the attitude-based variant, now consider two different standard-based hypothetical consent approaches to political authority. First,

*Hypothetical Rational Consent*

The hypothetical consenters are stipulated to have at least certain generic attitudes (especially ends or preferences), and then what they would consent to is derived from the normative standard of instrumental rationality, each maximizing her expected preference-satisfaction.

Call this the *rationality version* of standard-based hypothetical consent. It is one way of presenting Hobbes's social contract, for example. The next version, still standard-based, is a *morality version*:

*Hypothetical Moral Consent*

Hypothetical consenters are stipulated to have at least certain generic attitudes (especially ends or preferences). What they would consent to is derived not solely from instrumental rationality given their (stipulated) ends or preferences but also from the normative standard of morally permissible choice.

Rawls exemplifies this moral variant. As in the rationality version, the parties are assumed to effectively promote their own ends. But unlike certain other accounts such as that of Hobbes, their choices are rendered impartial, for moral reasons, by the imposition of the "veil of ignorance". Notably, this is formally equivalent to assuming that each chooses even without a veil, but with the moral virtue of impartiality.

Rawls explicitly suggests that such an account has (as I am calling it) a quasi-voluntarist element:

. . . a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.

(Rawls 1971: 13)



There is reason for skepticism about this quasi-voluntaristic interpretation—Rawls’s own interpretation—of the original position. It is commonly suggested that an actual person, say Joe, can be placed, in an act of imagination, in the original position in order to ascertain what he would have agreed to under those conditions, and so Joe’s own will plays a role. Now, *anyone* placed in those highly specific conditions would make the same choices, but that does not mean we do not learn something about Joe or his will. Joe’s will might have certain features that everyone’s has. If all have it then each has it. But this is not what Rawls does with the original position. If we want to say that Joe can be inserted into the original position we would have to admit in the next breath that he would be given a thorough make-over. His actual motivations are mostly ignored and replaced with the desire to maximize his bundle of stipulated “primary goods”. That is quite a structured aim, with very specific components, and some of them assign—by Rawls, not by actual Joe—certain weights relative to the others. It is a motive that is probably not found in any, much less all, actual individuals.

Indeed, in Rawls’s mature view, the primary goods are explicitly not meant to be attributed to people as things that everyone actually cares about (even if something closer to that is suggested in his earlier presentations). Rather, they are stipulated in an effort to devise a model of motivation in the original position, and a “political conception of the person”, that would be acceptable to all reasonable comprehensive views for purposes of identifying a serviceable public conception of justice, although the details of this complicated phrase do not matter here (Rawls 1993: 1178). Insofar as the motives are stipulated rather than found, the fact that the parties would make certain choices does not signify anything in the motives or wills of the real people they represent. To be clear: I believe that the argument’s purpose is to identify justice (or a viable public conception thereof), not to show that real people actually already will it, so this is not meant as an objection to the theory. The point here is only that Rawls is not persuasive that there is anything even quasi-voluntaristic about the argument from the original position.

If that moralized version of hypothetical consent lacks any connection to the will, shall we say the same about normative consent generally? There is a strong affinity between the Rawlsian moralized version of hypothetical consent, and normative consent theory, but there is this difference: normative consent theory can take either a person-specific or a person-generic form, while Rawlsian theory is solidly in the person-generic category. This might seem to position normative consent theory to have a better claim to quasi-voluntarism. Before considering that possibility, we can see that normative consent could take a person-specific form by noticing that whether a person would have been morally required to consent to some proposed authority could be held to depend partly on what else they happen to care about. Moral standards and one’s own motives could be held to interact in each specific individual’s case. In Rawlsian theory, by contrast, the motives of the hypothetical choosers are completely supplied by theoretical stipulation, and all parties have the same motives. For whatever reason, the standard uses of person-specific hypothetical consent (as in Coma) take the person’s attitudes as given and project them into a hypothetical choice without the imposition of any moral standard. Moralized uses of hypothetical consent such as that of Rawls and the veil of ignorance happen to hypothesize, rather than assert or ascertain, not only the choices but also the motives of the agents, thus forfeiting the claim to quasi-voluntarism. But there is also the possibility of a version of hypothetical consent in which moral standards partly drive the result (as in, “what choice, if any, would be morally required?”) and yet the actual motives of the person, rather than hypothesized or stipulated motives, bear on the answer (as in, “What would he have been morally required to do given his actual motives?”).

Here is an example: suppose Len asks Jen if she will agree to do as he asks tomorrow in cleaning the garage together. And suppose that Jen had previously said that she will accept such



a task on some Saturday soon, leaving the specific date to be determined by agreement. Depending on Jen's other motives, she may or may not be morally required to accept the task (and the ensuing authority) for tomorrow. If she has other significant plans, it might not be required, but if she does not, it might well be required. Jen's own aims play a determining role in whether she would be required. The truth of the normative consent claim that she is under Len's authority tomorrow because she would have been required to consent to his request depends partly on her actual motives.

In a person-specific version of normative consent, then, there does arguably remain a quasi-voluntarist element. I say "arguably" because the case for quasi-voluntarism here would be about the same as the case barely sketched above for the moral relevance of what I called proto-voluntarism in the case of person-specific (non-normative) hypothetical consent familiar in cases like Coma. There is no such case for quasi-voluntarism in Rawls's view, as we have seen, since his is person-generic, with no input from people's actual attitudes. This may or may not be an advantage for the person-specific version. I have not granted that a quasi-voluntarist element is necessary for authority. As I will argue in the next and final section, whether such an element is present or not, there is moral significance in both person-specific and person-generic versions stemming from the nullity of non-consent, which does not rely on any quasi-voluntarist claim.

### 31.5 The nullity of non-consent again

The argument above that there may indeed be a quasi-voluntarist element in person-specific versions of normative consent is undeveloped, but it is not needed to defend the moral significance of normative consent. To see why, for the purposes of this final section suppose it is mistaken. In that case, the interest of normative consent must lie in the moral significance of what I have called the nullity of non-consent. As I have so far argued, the prospects of that *nullity thesis*—that impermissible non-consent to authority would fail to block that authority (in at least some cases)—are not diminished by bypass arguments about hypothetical consent in general, because they fail, nor by the doubtful presence of even a quasi-voluntarist element in normative consent, since no such quasi-voluntarism is relied on by the nullity argument. I seek in this section to determine what conception of the nullity of wrongful non-consent would be required for normative consent theory.

First, though, the very idea of a requirement to consent may be unfamiliar. However, we can easily find cases that are, it seems to me, difficult to resist. Suppose your dog has settled in your neighbor's yard. To be cautious, you ask your neighbor if you may enter the yard, but your neighbor refuses. So far, the refusal might be permissible, based on reasonable considerations, such as if you were a dangerous criminal. But suppose the neighbor's aim is simply to frustrate you. The refusal of consent is morally wrong here (if this isn't obvious yet, suppose the dog will die without your immediate attention; people will die if you can't retrieve the dog, etc.) This example is not about authority (the moral power to require by commanding) for which consent is required, and so it does not matter for my purposes whether this particular wrongful non-consent nevertheless retains its force—morally prohibiting entry into the yard. Maybe; maybe not. The example is intended only to establish that consent can sometimes be morally required, and so non-consent can sometimes be morally wrong.

As we can glimpse in the example of the stranded dog owner, even when non-consent is morally wrong, it might yet retain its force. If no one is in danger, and the dog will soon relent, even wrongful refusal by the property owner might render your entering the yard morally impermissible. There are even clearer cases. In some sexual contexts it seems possible for

consent to be immorally withdrawn after it had previously been given, and withdrawn for bad reasons—such as the intention simply to anger or frustrate the partner, as with the property owner's motives in the dog example. It seems difficult to deny that so withdrawing consent (obviously not *all* withdrawing of consent) might be wrongful. But it is morally effective nevertheless: the partner is still thereby forbidden to proceed with sexual contact, even if this situation might be unjust under the circumstances. The sexual context is a valuable one to consider here, since it is especially clear in such an intimate setting that the non-consent is morally effective whether or not it is morally permissible. An obstacle in the way of accepting the nullity thesis, then—which says that wrongful non-consent to authority is sometimes wrong and null as a result—is the evident fact that wrongful non-consent is not null in all contexts.

A modest but helpful point, though, is this: it does not follow from the fact that wrongful non-consent is still morally effective in some non-authority contexts that it is also effective in authority contexts. It remains open whether there is some morally relevant difference between authority contexts and non-authority contexts of wrongful non-consent that might render it effective in some cases but ineffective in others. A natural suggestion for such a distinction would be that between, on one hand, *liability to imposition*: that is, another agent's being permitted to interfere with or impose upon you, and, on the other hand, *obligation to obey*: your being morally required to act in some way as ordered by another agent. Roughly, the hypothesis would be that agents have a less weighty interest in avoiding moral obligations than they have in avoiding the permissibility of their being interfered with or imposed upon.

Now, some kinds of interference and imposition are relatively minor, and normative consent does not need it to turn out that wrongful non-consent always effectively forbids them. By the same token some cases of obligatory acts of obedience are more momentous than others, and it would be open to a normative consent theory to hold that even wrongful non-consent effectively blocks some of them—i.e., it is not null—even if it is null in the case of others. Still, there is a challenge here. A normative consent theory of political authority would presumably hope to explain such obligations (under the right procedural and other conditions) as to obey tax laws that demand a significant fraction of one's income or expenditure. Wrongful non-consent to political authority, where that includes such significant obligations, would presumably be held to be null, while wrongful non-consent to being, say, kissed or touched, even gently, retains its force.

In addition, the point is not limited to cases involving the prospect of physical or intimate contact or interaction, since the obnoxious property-owner in the dog example can be successful in prohibiting entry to his property (at least when the dog is safe and will soon move, etc.). That example stands for a broader range of property cases, of course. The hypothesis of normative consent theory, then, would include that (at least in certain social and legal contexts) one's interest in not being liable to interference with (at least some kinds of) one's property is morally weightier than one's interest in being free from moral obligations to obey, such as those of significant taxation (though leaving aside any coercive enforcement—just the obligation). What is needed is a deeper explanation of this differential moral weight. There is some plausibility to there being a weightier interest in avoiding liability—the permissibility of being imposed upon—than in avoiding obligation—an unenforced moral requirement to obey. But so far the shape of that distinction and the case for it remains out of focus. There is a challenge here for normative consent theory to explain where such a line falls and why. In my view, no absurdity or inconsistency is thereby exposed in the normative consent approach, so this falls short of a problem inherent in the approach. It is an important unanswered question—one front (no doubt there are also others) on which more work would need to be done before normative consent theory should be accepted.

What is the point of putting either of such views (Rawls's, or normative consent theory) in terms of hypothetical voluntary agreements if (as we are supposing in this section for the sake of argument) there is no prospect of tying this to the contents of individuals' wills? If there is nothing even quasi-voluntaristic about the fact that the hypothetical parties would have made certain choices, or the fact that you would have consented to certain authority if you chose rightly morally speaking, then is there any other (extra-voluntaristic) moral significance in those facts? The hypothetical consent formulation can look like a trick, a charge we might call *pseudo-voluntarism*. If nothing about my actual will is being invoked, why speak about what I would have willed?

That general line of objection can take different forms. One form would focus on the nullity of non-consent, and contend that it is a distraction to formulate that point in terms of hypothetical consent. Rather than speak of what one *would have* consented to if they did not behave wrongly, why not let the nullity point rest on the claim that it would have been *wrong* not to consent? That point, however, would still not dispense with the reference to hypothetical consent, as we can see in two steps. First, the nullity of non-consent (which is being granted as the crux in this version of the complaint) essentially refers to consent—the consent that would have been required. Second, the consent referred to is not actual; it does not actually occur. The consent referred to is in a modal context, something like this (the details won't matter here): in all possible worlds that are relevantly similar to (or "near") the actual one, and in which Joe responds permissibly to the chance to consent, Joe consents. The consent upon which the nullity account turns, then, is hypothetical: necessarily, if, in the relevant possible conditions, Joe did as required, he would have consented.<sup>8</sup> Call this the *modal point*.

That point, it must be granted, does not really explain why there is any explanatory value in the nullity of non-consent in the first place. It might seem like saying the explanation for my baldness is that I was powerless to prevent it. There is, on that bizarre account, reference to my preventing it, in a modal context, along with the finding that all such worlds are too distant from the actual one in certain ways, and so on. Nevertheless, my baldness is *not* plausibly explained by my powerlessness to prevent it. Similarly, what does the fact of authority over me have to do with the fact that I was powerless to prevent it—the fact that my refusal would have been null? The answer, I believe, is that in many cases, and many we are familiar with, my non-consent *is* morally effective. So it is indeed explanatory to point out that this effectiveness lapses in the case where the non-consent is wrong. This would be roughly as if I were generally capable of preventing baldness in others, but alas not my own. It would plausibly be explanatory in that case to cite the fact that my powers of baldness-prevention lapse in my own case as partly explaining why I am bald. The nullity of non-consent when it is wrong has explanatory power precisely because non-consent is so often not null. Interestingly, in that indirect way, the account relies on the moral *effectiveness* of our powers of non-consent in many cases.

One further merit of the hypothetical consent formulation is this: it is a way of exposing the fact that the actual contents of people's wills do not have as much moral weight as some seem to think. They sometimes lack moral effect, namely, when they are morally bad. We might call this the *contrapositive point*:

Another way of saying that,

A) If you'd *behaved permissibly* you would have *consented*,

is,

B) If you would not have *consented*, then you would not have *behaved permissibly*.

There is some insight in placing the emphasis not on the hypothetical choosing, as in (A), but on the impermissibility if you hadn't, as in (B), but the point is still well made in terms of a hypothetical—a conditional statement (either of them, (A) or (B); they are logically equivalent). On this way of looking at it, far from being quasi-voluntarist, the point of the distinctive part of normative consent theory—the part that is not simply congruent with actual-consent theory and so “truly voluntarist” (see above)—is not only non-voluntarist, but, in one respect, *anti-voluntarist*, emphasizing the moral nullity of certain exercises of the will, namely non-consent when it is morally wrong. Of course, this depends on bracketing the prospects of proto-voluntarism, which might vindicate normative consent's quasi-voluntarism (for what it is worth) after all.

In the original presentation of the idea of normative consent it was presented as a virtue of membership in the hypothetical consent family that it thereby retains “*some* connection to the will” (Estlund 2008: 131). This may be correct, but things now appear to be slightly more complicated:

- There may indeed be a quasi-voluntarism in the person-specific version of normative consent and the relevance there of actual proto-volitional attitudes.
- Whether or not that is so, there is the connection to the will represented in the modal point—consent is essentially mentioned, and it is hypothetical, not actual.
- However, and it would be no deficiency, unless the proto-volitional approach is sound there is no appeal to any measure of voluntarism at all, no invocation of the actual will of the person in question (as we see in the contrapositive point).
- Moreover, the distinctive part of normative consent theory—the nullity of non-consent—is, so far as it goes, *anti-voluntarist*.
- Nevertheless, normative consent theory must be seen as a hypothetical consent theory, albeit of a novel kind.

### Notes

- 1 I received helpful comments on earlier versions of many of these ideas from participants in several settings: Workshop on “Authority” at UNC-Chapel Hill, January, 2011. Thanks especially to Paul Weithman, and to David Enoch for ensuing correspondence; Colloquium, “Political Obligation and Legitimacy of the State,” Royal Netherlands Academy of Arts and Sciences, Amsterdam, June 2011, with special thanks to Geoff Sayre-McCord; my graduate seminar at Brown University, spring 2016; Conference: “Beyond Contractarianism?” Inter University Centre, Dubrovnik, Croatia, June, 2016. Thanks especially to Nic Southwood for very helpful discussion there. Finally, thanks to Andreas Müller for comments on a penultimate draft.
- 2 In previous work I sketched this kind of view (Estlund 2005, 2008). I have also defended the view against several critics, but I will not rehearse those exchanges here (Estlund 2009, 2010, 2011).
- 3 This definition of authority is not committed to Raz's important view about when and why this moral power is present.
- 4 It is a presumption in favor of a kind of liberty, but no further association with the family of political views known as libertarian is intended. As will emerge, authority is a limitation of one's moral liberty, not otherwise an interference or imposition on one's person or will.
- 5 Daniel Koltonski helpfully shows that this must mean that the authority condition is as it would have been if there had been consent *in a counterfactual world in which, while everything else relevant is the same, authority depends on consent* (Koltonski 2013). He goes on to argue that no such world is possible if authority does not depend on consent in the actual world, since two worlds can't have different moral properties unless they have different non-moral properties. But, in reply, all that is required is that each such world be logically possible, as is surely the case. The moral truth will rule one of them out as morally possible (either authority depends on consent or it doesn't, given the same non-moral properties), but that is no difficulty. Rather, it is the substantive normative position itself.

- 6 For an overview and assessment of the literature on “grounding”, see Bliss & Trogdon (2016).
- 7 We observe, here, that the fact that one would have been morally required to consent does not count as any measure of voluntarism. This does not grant the Thomson charge that reference to hypothetical consent is inessential. It could yet be essential even if it does not count as any measure of voluntarism, an issue we come to below.
- 8 I believe this formulation avoids problems (related to the “conditional fallacy”) that might arise if we were to speak of morally perfect worlds, or worlds in which Joe is a morally perfect agent.

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