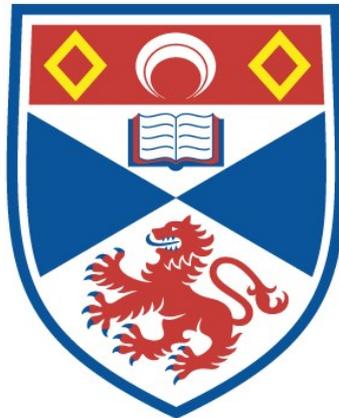


CONSENT, EPISTEMIC EQUITY AND A REVISED  
THEORY OF LEGITIMACY

Graham David MacDougall

A Thesis Submitted for the Degree of MPhil  
at the  
University of St Andrews



2021

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*Consent, Epistemic Equity and a Revised  
Theory of Legitimacy*

Graham David MacDougall



University of  
St Andrews

This thesis is submitted in partial fulfilment for the degree of Master of

Philosophy (MPhil)

at the University of St Andrews

June 2021

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# *Abstract*

In this thesis I argue, against prevailing wisdom in contemporary political philosophy, that consent is a sufficient ground of political legitimacy and I argue for a set of necessary conditions that must be satisfied in order for political consent to be valid. I call this a revised theory of consent. This theory focuses on what consenting *is*. It does so by arguing that what we call consent is a composite of three mental states. These are (i) recognition, (ii) trust and (iii) willingness and I argue that where (i)-(iii) are present we have consent. I then argue that this consent is *valid* when it is (a) suitably informed and (b) given freely. This applies in ordinary cases and in ‘high stakes’ cases.

I argue that prior versions of consent theory (what I call PCT's) have failed to demonstrate that consent is sufficient for legitimacy because they place an insurmountably high epistemic burden on consenters. I argue that subjects cannot consent in line with these theories because they cannot know enough about what their consent will authorise. I call this problem the *Epistemic Challenge* and I argue that in order to defeat it the authority must satisfy *The Principle of Epistemic Equity*. They do so through meeting the conditions of the revised theory of consent by satisfying certain epistemic and equitable conditions in order to enable subjects to give valid consent. Where these necessary conditions are met I argue that the consent given is sufficient for legitimacy.

In the final two chapters of this work I turn my attention to Joseph Raz’s ‘service conception’. I argue that Raz’s theory implicitly relies on consent — as I define it — and I show that were Raz to embrace the revised theory of consent then the argument of the service conception would be strengthened.

## *Acknowledgements*

There are many people to whom I owe a great deal of thanks, for all sorts of reasons — not least for their continued support and belief during the writing of this thesis. I could not have done it without them, and I would like to take a moment to acknowledge them here.

First and foremost I wish to thank Dr. Ben Sachs, my primary supervisor. Ben has helped me in more ways that I could have imagined when I began working on this thesis. I owe Ben an immense debt for his continued encouragement, optimism, his clear thinking and patience. Ben's kindness, wisdom and rigour have made all the difference during the process of thinking about and writing this thesis. Any shortcomings in this work are entirely my own. Ben, once again thank you for everything.

I would also like to thank Dr. Adam Etnison who came on board as my second supervisor at the beginning of this year and who gave invaluable advice when he did. Adam, thank you for convincing me to simplify — it made a world of difference.

Now, thanks go out to my friends. Especially to Ryan for being the best friend a person could hope for. We may not always agree on everything (or...anything?), but that never seems to hold us back. The fact that you chose to live in a barren wasteland 4'600+ miles away doesn't seem to hold us back much either. Long may it continue.

To my other friends as well, some near to home and others further afield who have also helped me along the way. My friends have engaged me in countless conversations which, to others, might have

seemed incredibly dull but which have been invaluable. Many of those conversations shaped my thinking and made writing this thesis possible. I appreciate it, you guys. You are the best.

Finally, my thanks are owed to my family, for everything. To Anne especially for continually supporting and encouraging me, for looking after me, for always believing in me and for convincing me to keep going during the good times and the difficult times. Once again, words cannot accurately convey the debt I owe you.

To the best wee man, my cat Perry, who slept on my desk and snuggled at my feet as I wrote various chapters and drafts of this work and who brings us so much happiness.

Lastly, and most importantly, to my wife Kim. We've been married for almost ten years and for six of them I've pursued an education in philosophy. Kim has never stopped cheering me on, believing in me and supporting me, emotionally, intellectually and otherwise. You made me laugh, even as you've suffered through the process of writing this thesis right beside me — and you helped me see I could do it, even if at times I got a bit bleak and fatalistic. Thank you, for everything and more. I love you.

This work is dedicated to my grandparents, Thomas and Rae MacDougall who from the beginning made everything I've ever done in my life possible and who I miss every day.

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## *Introduction*

It is fair to say that this essay treats of a familiar subject. It is an essay about political authority and, more specifically, political legitimacy. These are subjects that are as old as political philosophy itself. I have chosen to write on this subject because, in my view, although much has been written about it, no theory has been put forward which settles questions on the nature of legitimacy or the conditions required for its presence. Philosophers have not reached anything like a consensus on the issue of legitimate political authority. We disagree about what legitimacy is, if legitimacy is actually achievable and, if it is achievable, how it can be achieved. These uncertainties makes the subject of legitimacy deserving of further treatment. Of course the reader could be excused for questioning whether legitimacy is a subject that still merits discussion since it has received such extensive treatment. This essay operates under the assumption that it is.

A lot turns on legitimacy. If it is right that authorities should rule then it is right that political subjects — ordinary people — should take an interest in *why* authorities possess an alleged *entitlement* to rule. Put another way, people should be interested in knowing that they are being ruled by the right people, the correct bodies and proper institutions. In light of the raising of such questions political subjects should be entitled to ask questions of authorities. Specifically subjects should consider the following: (i) the reasons why they ought to comply, (ii) if they *should* comply at all with the demands authorities make and, (iii) is the individual, body or institution making the demand or setting the limitation doing so *validly*? In other words: are they legitimate? Interest in this third question has been my primary motivation in writing this essay.

This essay serves as an attempt to solve some of the central problems that questions about political authority continue to throw up. The solution that I will propose to those problems is familiar: that the consent of the governed is sufficient for political legitimacy. I readily admit that

consent theories are not necessarily new. However, the version of consent theory that I argue for in this essay is superior to its predecessors. My argument can be thought of as an upgrade, and not necessarily as a brand new theory. Instead I will introduce a revised theory of consent, a theory that is capable of demonstrating one way through which political authority can be correctly legitimated; a theory of consent, in other words, which does not suffer from the all-too-familiar-by-now shortcomings that prior versions of consent theory have long failed to overcome.

There is a fatal flaw at the core of consent theory in general, namely the problem of understanding, or being *informed*. Where consent is informed we can say that it is *valid* — that is, that the consent generates certain obligations. If, as consent theorists have long argued, consent is sufficient for legitimacy then we are left wondering: to what extent does the requirement that consent be informed feature in these theories. In other words, under what conditions can subjects be said to be in an epistemic position to consent? I argue that prior versions of consent theory have failed to demonstrate that consent is sufficient for legitimacy because they have failed to consider the epistemic conditions for consent. For that reason prior versions of consent theory have failed to overcome a major objection that I call the *Epistemic Challenge*. The Epistemic Challenge is the centrepiece of my argument against prior consent theories (hereafter PCT's.) The Epistemic Challenge is, I think, a silver bullet against which PCT's cannot stand. The Epistemic Challenge claims that the major failing of consent theories generally is that they place an unreasonably high epistemic burden on the individual. It claims that it is inconceivable that people can consent when they do not — and cannot — know what their consent will enable or authorise. By misplacing that epistemic burden PCT's fail to make legitimacy by consent possible. In this way PCT's have failed to address a simple fact: that in order to give suitably informed consent subjects must be in possession of certain facts that, often, they do not possess. In order to enable their subjects to validly consent authorities must accept: (1) that the burden falls on them to facilitate overcoming

the Epistemic Challenge. Doing so strengthens an authorities ability to claim that they deserve their subjects consent, because they enable the consent of their subjects to be suitably informed, and (2) they must ensure that their subjects can give their consent freely. Where (1) and (2) are satisfied we can call consent valid. In this thesis I therefore argue for a revised theory of consent that involves three steps. The three-step process involves:

- (i) introducing a theory of what consent is;
  - (ii) proposing a set of conditions which ensures that consent is suitably informed;
- and,
- (iii) showing under what conditions consent can be given freely.

This revised conceptualisation of consent has wider application. In the first instance it acts as a revised model of general consent. Condition (i) describes what consent is while conditions (ii) and (iii) combine and demonstrate where consent is valid in ordinary cases. However, more importantly in political contexts a focus on developing conditions (ii) and (iii) can demonstrate how a political authority comes to meet the conditions for validity. Condition (ii) of this model establishes where consenting to an authority is epistemically appropriate and condition (iii) establishes where consent can be given freely. For the most part I focus on condition (ii).<sup>1</sup>

In order to meet (ii) authorities must satisfy *The Principle of Epistemic Equity*. The Principle of Epistemic Equity is a moral principle that is incumbent upon authorities. It states that authorities are morally required to level the epistemic playing field between themselves and their subjects. The Principle of Epistemic Equity can therefore be seen as a solution to the Epistemic Challenge. Meeting The Principle of Epistemic Equity involves accepting the *responsibility* for reducing the

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<sup>1</sup> I mainly focus on (ii) and the epistemic conditions required for consenting because this is, I think, what separates my theory from other consent theories of legitimacy. However, I do develop an argument for condition (iii) in Chapter 3.

epistemic burden between authorities and subjects and this involves making key changes to the structure of authority and amending the conduct of authorities. The revised theory of consent is a theory of consent which is capable of sidestepping the Epistemic Challenge and making political consent possible.

The revised theory of consent that I argue for bests the problem raised by the Epistemic Challenge since the onus is on authorities to level the epistemic playing field between themselves and their subjects. It also stresses that this burden should continue to fall on the authority even after they have become fit for legitimacy or have received the consent of their subjects and they *are* legitimate.

Structurally this thesis proceeds in the following way. In Chapter 1, I distinguish between the concepts of authority and legitimacy. I then turn my attention to the issue of obligation and duty. I argue that these concepts are distinct and that each concept entails different consequences for subjects.

In Chapter 2, I examine some prior formulations of consent theory and I consider the main objections to them. I then introduce my own objection to these formulations (the Epistemic Challenge) and show how PCT's fail to meet it.

In Chapter 3, I outline in the main the argument for the three-step consent model I propose and describe why this version of consent theory is superior to other versions. I outline *The Tripartite Formulation of Consent* and I then present The Principle of Epistemic Equity. Thereafter I attempt to explain why authorities ought to meet The Principle of Epistemic Equity. I then set out further necessary conditions for legitimacy that I call *Equitable Burdens*.

In Chapter 4, I change course and examine another contemporary theory of legitimacy that, I think, presents a significant challenge to my own: Joseph Raz's 'service conception' of legitimacy. In this chapter I consider Raz's theory in extensive detail. I do so because I believe that through the service conception of legitimacy Raz has provided a very rich account of legitimacy which deserves

a full treatment. Raz has proposed that an authority is legitimate only when it provides the best means (what Raz terms ‘reasons’) for a subject to conform to the reasons for action that she actually (already) has. According to Raz authorities are legitimate only when they *serve* their subjects in this manner. I will attempt to provide a comprehensive overview of Raz’s work in this area before moving on to criticise the Razian view in Chapter 5.

In Chapter 5. I will suggest that the service conception *might* be capable of doing what Raz believes it can do in terms of legitimating an authority, but only if it makes room for the revised theory of consent. However, in writings spanning more than three decades Raz has dismissed consent theory with admirable consistency. Specifically Raz dismisses the possibility that consent plays any meaningful role in legitimating an authority. I will argue against Raz on this score and stress that consent is vital to legitimacy, even in Raz’s own theory, and I will show that his thoughts on consent fall short in a number of ways. I argue that the inclusion of a *consent condition* within the framework of the service conception would provide Raz with more latitude in claiming that the service conception is the most robust and correct theory of legitimacy, but unless this condition is included Raz’s theory falls as short as any other. In contemporary philosophy Raz’s is the most influential theory of legitimacy. If it doesn’t work we need to go another way. I show that Raz’s theory *is* deficient and for that reason I argue that we must look back, to consent theory, in order to go forward.

In this thesis I argue that consent is sufficient for legitimacy and I attempt to outline a necessary set of criteria for legitimacy-by-consent. In my attempt to do so I recognise that certain necessary conditions must be met in order to make political consent plausible, let alone possible. I argue that while these necessary conditions are mainly epistemic there are other necessary conditions that an authority must satisfy for legitimacy; however, these further necessary conditions are not epistemic in nature and do not bear directly on The Principle of Epistemic Equity.

Finally, I do not claim that there aren't other theories of legitimacy that are effective and robust — there may be other theories of legitimacy that would succeed at making legitimacy possible. However, if these theories are out there they have yet to reveal themselves. I claim that the revised consent theory of legitimacy that I argue for in what follows is but one plausible theory.

# *Chapter 1. Political Authority, Legitimacy and Obligation*

## *(1) Introduction*

In this short chapter I make a key distinction between (i) political authority and (ii) legitimacy. After introducing some important definitions that I will make use of throughout this thesis I make some preliminary comments on the concept of practical authority and theoretical authority. Thereafter I consider the distinction between obligations, duties and political obligations. Concerning the nature of obligations I show that there is a sharp distinction between what I shall call ‘ordinary obligations’ and political obligations and that the threshold for becoming obligated in the ordinary sense is significantly lower than the threshold that must be reached in order to incur obligations to a political authority. A consequence of consenting in ordinary cases is that we accept that certain obligations result when we do so. Similarly when a person consents to a political authority they politically obligate themselves; it is through their consent that subjects obligate themselves to obey the authority to whom they have consented. For that reason I feel it incumbent to discuss the nature and limit of obligations.

## *(2) Definitions*

As this work is concerned with several key (and often interrelated) concepts in political philosophy it will, I think, benefit the reader if some important definitions are introduced up front. Unless otherwise indicated these definitions will carry through the entirety of this essay. These terms are: *power, authority, rights, legitimacy, non-legitimacy, coercion, ordinary obligations, political obligations and duties.*

- (1) *power*: *power* is the capacity or ability to direct or influence the behaviour of others through creating (non-moral) reasons for acting.
- (2) *authority*: *power* that is used by political institutions.<sup>2</sup>
- (3) *legitimacy*: *legitimacy* is the right to exercise authority and generate (limited) valid obligational ties between authorities and subjects.
- (4) *non-legitimacy*: any exercise of power/authority that is not *legitimate*.
- (5) *coercion*: *coercion* is a threat issued that is intended to enforce compliance.
- (6) *political obligations*: *political obligations* are moral requirements that individuals incur<sup>3</sup> through their own conscious actions which are owed to political entities.
- (7) *ordinary obligations*: *ordinary obligations* are moral requirements that individuals incur in ordinary walks of life that are not owed to political entities but rather to other individuals.

### (3. 1.) *Practical Authority*

Practical authority is concerned with changing the behaviour of others. A simple example will illustrate this. Consider the following:

Police Officers: Police officers are a class of individuals who possesses practical authority. When the police officer commands a knife wielding suspect to ‘drop the weapon’ she creates a reason for the suspect to do as she says.

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<sup>2</sup> As stated in the Introduction ‘authority’ denotes ‘political authority’ unless indicated otherwise.

<sup>3</sup> By ‘incur’ I mean to bring upon oneself.

### *(3. 2.) Theoretical Authority*

Theoretical authority is concerned with reasons for belief. Take Joseph Raz. Joseph Raz is not a practical authority. He is however widely recognised as a brilliant legal, moral and political philosopher. However, no reasons for *acting* in certain ways are created by Raz's authority. That said, his authority may create reasons for belief. Thus, Raz is clearly a theoretical authority.

### *(4) Obligations or Duties?*

I have defined legitimacy as the right to exercise authority and generate (limited) valid obligational ties between authorities and subjects. There is a reason why I have defined legitimacy in this way: I think that there is an important difference between (1) actions that arise from a person's words, choices and preferences and (2) actions that are expected of persons that have nothing to do with our words, choices and preferences. Actions that are required as a consequence of (1) are obligations. Actions that are required as a consequence of (2) are duties. In this essay I am trying to outline a consent theory of legitimacy. I am arguing that one of the ways to achieve political legitimacy is through consent — i.e., through the words, choices and preferences of subjects. Legitimacy-by-consent can be said to generate certain obligations on the part of political subjects because of the structural similarities between consenting and incurring an obligation: both are voluntary. In order to understand their nature and scope of a political obligation it is necessary to first establish what an obligation is.

Some theorists have written as though obligation and duty are interchangeable terms. Others have taken the view that obligations and duties are not one and the same and that there is an important distinction between them. There is, I think, a great deal of conceptual confusion in philosophical writings on duties and obligations. By looking to the writings of H. L. A. Hart we can begin to

understand why this confusion has persisted. According to Hart, the terms duty and obligation ‘are roughly synonymous.’<sup>4</sup> Because he views them as synonymous this led Hart to argue that many *obligations* are derived from moral rules. Moral rules, says Hart, ‘impose obligations and withdraw certain areas of conduct from the free option of the individual to do as he likes.’<sup>5</sup> It is reasonable to suppose, even purely for the sake of argument, that there are, certain moral rules or prohibitions which all individuals must respect, regardless of inclination or preference. We can say individuals have a duty to respect these rules and prohibitions. Call these *natural duties*. Hart elsewhere indicates that these sorts of duties can be moral or legal and that in many cases they overlap. Where non-legitimate authorities provide or force motivating reasons onto their subjects to  $\phi$  it may be the case that subjects already have a moral duty to  $\phi$ . One example is the duty which subjects have to follow laws instituted by non-legitimate authorities if the content of the law ought to be upheld regardless of the laws existence.

Murder: The prohibition against murder which exists in all legal systems is a helpful example of where a moral duty and a legal one converge. People have both a moral duty not to murder others and a legal duty not to do so. Therefore if a non-legitimate authority were to enforce such a law it ought to be upheld, despite the fact that the authority is non-legitimate.

Again, the requirement to follow such laws under a non-legitimate authority cannot be construed as an obligation since obligations are voluntary undertakings. However, if the authority were legitimate it could be construed as an obligation.

Contra Hart, Simmons has written that obligations unlike duties, ‘require special performances...’<sup>6</sup> According to Simmons this fact, ‘is reflected in language — we “oblige

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<sup>4</sup> H. L. A. Hart, 1961, *The Concept of Law*, Oxford: Oxford University Press, p. 238

<sup>5</sup> Hart, 1961, p. 7

<sup>6</sup> A. John Simmons, 1979, *Moral Principles and Political Obligations*, Princeton: Princeton University Press, p. 14

ourselves” but do not “duty ourselves”...’<sup>7</sup> I take Simmons to be in agreement with my definition of obligations — that they are in voluntary undertakings. So, the question we must ask then is this: how do individuals go about obligating themselves? While it is difficult to say conclusively how many ‘types’ of obligation persons may incur I will focus only on two sorts of obligation: what I will call *ordinary obligations* and *political obligations*. That other types of obligation(s) exist and that they are of much philosophical interest goes without saying. However it is certainly beyond the scope of this essay to give them further consideration, let alone a full treatment.

### (5. 1.) *The Form of an Ordinary Obligation*

Some philosophers have concluded that many obligations are promissory in nature. According to Beran *all* obligations are derived from promising. Beran writes that ‘Consenting, agreeing and promising are alike in that they put the person who consents, agrees or promises to do X under an obligation to do X and give[s] the person who receives the consent, agreement or promise a right to X being done. *The obligation and the right are correlatives.*’<sup>8</sup> There is a sense in which Beran is correct and that this is an appealing and plausible possibility, at least in the case of what I have called *ordinary obligation*.

If I make a promise, or signal my agreement to drive my friend to the airport it is safe to say that I have obligated myself to do so. On the agreed upon day, barring any unforeseen or unexpected difficulties like a medical or a family emergency or some other event beyond my control, I should honour that promise and honour my obligation. We cannot say here that I have a duty to drive my friend to the airport since a duty has been defined as a more rigid and inflexible concept, a concept which carries with it additional force and expectation. If I were the first person to arrive in the

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<sup>7</sup> Simmons, 1979, p. 14

<sup>8</sup> Harry Beran, 1986, *The Consent Theory of Political Obligation*, London: Croom Helm, p. 5 (my emphasis)

immediate aftermath of a serious traffic accident it would be entirely appropriate to state that I have a duty to do what I can to help or, at the very least to call an ambulance. But I am not obligated in this scenario, because I have not made any kind of commitment to the individuals who are injured. But, my duty, my *natural duty* towards others, to be a good person or a good citizen, is to report the accident and help in any way I can.<sup>9</sup>

On the other hand promissory obligations can only account for the existence of what I have called ordinary obligations that is, obligations which are generated in commonplace scenarios in every day life (except in some very limited circumstances). The kind of obligations that I have in mind are those obligations that people might owe to their family members, to their friends, to their coworkers and to other members of their communities. These obligations exist in virtue of, among other things, familial ties, the common association or bonds of community and proximity; these sorts of obligations are what Dworkin has called ‘associative or communal obligations.’<sup>10</sup>

Dworkin writes that, ‘Associative obligations are complex, and much less studied by philosophers than the kinds of personal obligations we incur through discrete promises and other deliberative acts.’<sup>11</sup> Indeed, these sorts of associative relationships are complex; no two are exactly alike. In Dworkin’s view these associative obligations are much like the obligations that are incurred through promise making. Going beyond this slightly I suggest that Dworkin’s associative relationships are precisely what make the creation of promissory, ordinary obligations possible. These ordinary obligations certainly, I think, vary in terms of their importance and as such will vary in moral substance and normative importance. A promise to water a neighbour’s plants will carry less moral force — depending on who you ask — than a promise made to a friend to care for their beloved cat while they are out of town.

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<sup>9</sup> In this example I have in mind a duty that is analogous in one way or another to the Rawlsian duty to be just or even with Kant’s ‘Categorical Imperative’ that ‘I ought never to proceed except in such a way that *I could also will that my maxim should become a universal law.*’ (Kant, *G* 4:402)

<sup>10</sup> Ronald Dworkin, 1986, *Law’s Empire*, Cambridge, Ma: Harvard University Press, p. 196

<sup>11</sup> Dworkin, 1986, p. 196

### (5. 2.) *Political Obligations*

Political obligations can not be equated with ordinary obligations. While political obligations can, on occasion, share form (i.e., some political obligations can be promissory in nature) this is where the similarity ends. Beran would disagree with this assessment. In his analysis of the promissory nature of obligations Beran argues that the promissory model can be extended to explain the obligations which are owed to political authorities. However, I think that this is a significant oversimplification. While it is *feasible* that some individuals *might* incur political obligations through making promises, very few individuals will ever *actually* incur political obligations through promising.

Those who might incur political obligations through the promissory model are individuals such as those who agree to fill certain positions within government, the judiciary or other related ancillary institutions. These individuals will typically swear certain oaths or make explicit promises, some spoken, some contractual that do generate specific political obligations. The promissory model might be said to extend even further — it may be thought to extend to individuals who emigrate from one state to join another and who voluntarily decide to become citizens of their new home state rather than remain resident aliens in it. Perhaps the argument can be made that resident aliens also make certain promises to the states in which they reside that are somewhat obligatory in nature. However, it may be more accurate to suggest that resident aliens owe some duties rather than obligations which they must, on occasion, discharge.

Other examples of where political obligations may be generated in this way could include the custom of reciting the Pledge of Allegiance in the United States or the act of reciting the Australian citizenship affirmation. In both cases individuals explicitly affirm and express their fidelity to one particular nation and to certain key principles that that nation is thought to value and/or uphold. Are

those who recite these pledges and make such affirmations therefore obligated to obey the state in question? To some it might seem that they are. However such conclusions quickly become spurious after some consideration.<sup>12</sup>

The worry that lingers in each of these examples is exactly *what* political obligations, if any, are incurred by those who accept certain positions or those who affirm their loyalty to a nation through oaths and/or pledges. In the case of those individuals who incur political obligations through their acceptance of a governmental, judicial or institutional position there is no question that *some* political obligations are incurred, however it seems that these will be role specific and limited in nature and in how far they actually bind. Can the same reasonably be said of individuals who become citizens of another state, reside in a state other than the one in which they were born, or of those citizens who make affirmations and/or pledges? I think not. I think that if these individuals do incur any political obligations, these political obligations would be very limited in scope and demand.

### *(5. 3.) Why Obligations Matter*

An important feature of valid consent is that it is generative of obligations. Where individuals give their consent they put themselves under a moral requirement to do certain things or to act in certain ways. This is true both in ordinary cases and where consent is given to political authority. I take consent to be sufficient for legitimacy and per my definition of legitimacy where an authority is legitimate subjects are obligated to obey. Per my definition of political obligation these can only be created through a person's conscious actions. Being politically obligated means being under a moral requirement to obey that authority specifically because subjects have willingly entered into this

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<sup>12</sup> This is especially true of the Pledge of Allegiance in the United States since, quite often, the individuals reciting the pledge are young children. It would be difficult to justify the claim that children are politically obligated because of this act. While this raises interesting questions, considering them further is beyond the scope of this essay.

state of affairs. If such moral requirements do exist it is worth giving further consideration to what this process will then involve.

## Chapter 2. *The Fatal Flaw of Prior Consent Theories*

### (1) *Introduction*

The view that it is the consent of the governed that transforms political power into legitimate political authority is not new. Versions of consent theory have existed, in one form or another, since Plato but they fully flourished and came into fashion during the mid-to-late seventeenth century. One of the most famous exponent of consent theory is John Locke, whose *Second Treatise of Government* is arguably the archetypal example of an argument made in favour of the consent perspective. Harry Beran has written that the consent perspective ‘is the most commonly accepted theory of political obligation in the history of Western political philosophy.’<sup>13</sup> Of course, since Locke’s day consent theory has continually fallen out of fashion. Today it is generally accepted as a truism in political philosophy that consent theory falls flat and ultimately fails since consent theories cannot adequately explain (i) the nature of authority, or (ii) the nature of political obligation(s). However, there have been some dissenters from this popular view.

In this chapter I argue that there is common flaw which beleaguers many prior versions of consent theory: I argue that these prior consent theories (hereafter referred to as PCT's) have failed because they, perhaps unknowingly, have typically placed too high an epistemic burden on the prospective consenters. Put another way, I demonstrate that subjects cannot actually give valid consent to authority after the manner that most PCT's claim, because potential consenters cannot possibly obtain enough knowledge of and/or about the authority that requires their consent in order to be legitimate. I am of course referring to information about the authorities prior conduct, as well as sufficient information concerning its aims, its future projects and its desired ends such that that

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<sup>13</sup> Beran, 1987, *The Consent Theory of Political Obligation*, p.1. This view is echoed in Hannah Pitkin’s (1965) ‘Obligation and Consent — I’ and elsewhere.

there is the possibility of subjects giving consent that is suitably informed and therefore valid. Since I assume that most PCT's rely on some form of actual consent this presents a significant challenge to these theories, because on this view giving actual consent is not possible. I will call this difficulty the *Epistemic Challenge* and I will show that well known PCT's fail to meet that challenge.

The purpose of this chapter is simple: to expose and elaborate on this inherent flaw in PCT's. To expedite this process I will briefly examine several of the most well know versions of consent theory and I will show that, among other failings, each of these has in common the fact that they fail to satisfy the problems exposed by the Epistemic Challenge. This will set the stage for outlining and advocating my own, more robust revised theory of consent where the burden of creating suitable conditions for valid consent lies with the political authority, in Chapter 3. This revised theory therefore shifts the epistemic burden from potential consenters on to authorities.

## *(2) Affirmation, Consent and Informed Consent*

H. L. A. Hart pointed out that when dealing with concepts like consent:

‘we may have adequate mastery of them for the purpose of their day-to-day use; and yet they may still require elucidation; for we are puzzled when we try to understand our own conceptual apparatus. We may know how to use these concepts, but we cannot say how or describe how we do this in ways which are intelligible to others and indeed to ourselves.’<sup>14</sup>

Hart’s comments are especially applicable to a puzzling concept like consent. While people often speak of consent in ordinary day-to-day discourse, and indeed in philosophical discourse, I suspect

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<sup>14</sup> H. L. A. Hart (1957) ‘*Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*’, University of Pennsylvania Law Review, Vol. 105, pp. 953 - 975, p. 964

that there is a great deal of conceptual uncertainty when they do. The fact that that consent exists on a kind of spectrum adds significantly to the problem. That is to say there is not one big thing that we can point to called ‘consent’, especially not when its target is a political authority.

On some accounts consent is a mental state. On others consent is a performative act. According to Westen, consent primarily designates ‘a state of mind of acquiescence.’<sup>15</sup> I believe that Westen is only partially correct in his analysis. The best analyses might agree in principle only on the point that consent is unequivocally a form of agreement or a kind of affirmation. However, is consent simply agreement? I think not. I will argue that in order for it to be valid the consent has to go beyond mere agreement and/or affirmation, at least morally speaking. Part of the trouble here is that we can and often do make agreements and signal affirmations that are not, strictly speaking, consent acts.

Chinese Food: After spending the afternoon with my friend Steven dinner time arrives. Steven suggests that we eat and he presents me with the following choice: ‘Indian food or Chinese food?’ Suppose I choose Chinese food; we should not say I have *consented* to eating Chinese food. I might prefer neither Indian food nor Chinese food. However, a third choice has not been given, indicating that Chinese food and Indian food are Steven’s preferences. I might quickly choose between the best of the two options presented because I too am very hungry and in order to avoid further delaying dinner. This is an example of *affirmation* or *agreement*, but not consent. In Chinese Food I make a choice. However, it is not appropriate to speak of this choice in the language of consent or consenting. Other conditions would need to be met in order to say this was consent.

I have a reason for proposing a conceptual distinction between mere affirmation and consent. Strictly speaking I take consent to be a distinctly moral property. Consent simply involves more — often much more — than giving one’s agreement or affirmation generally does. Though it is the

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<sup>15</sup> Peter Westen, 2003, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, Aldershot: Ashgate, p. 3

case that giving consent always involves an element of agreement or affirmation, consenting, properly understood, goes far beyond simply agreeing or affirming something. Therefore this presents a challenge: how does one settle on a robust theory of consent that will prove capable of settling the conceptual confusion which surrounds the concept of consent in such a way that it does not hinder progress?

One further difficulty that must be considered is as follows. Suppose we are faced with three different scenarios (A), (B) and (C). In each of these scenarios a person might be faced with the prospect of consenting. However each of the scenarios (A), (B), and (C) will invariably require different levels of understanding such that the person's consent can be called suitably informed and therefore valid. The understanding required to consent to opening a bank account is not the same as the understanding required for consenting to sign a mortgage agreement. The understanding necessary for consenting to marry another is not the same as the understanding necessary for consenting to have sex with them. And none of these is identical to the type of understanding that will be required to enable an individual to consent to take part in a medical procedure or an experimental medical trial. In each example the specific consent act requires a different level of awareness, understanding and acceptance of risk. Therefore, as I noted above, consent exists on a spectrum.

A unifying condition in each of the above examples is that, as Westen points out, consent begins as 'a mental category by which we organise our experiences of the world.'<sup>16</sup> In other words, consent necessarily begins in the mind. However, though consent is a mental process it often requires an outward expression of some sort in order to furnish it with a fitting degree of moral validity. That fact aside it is therefore appropriate first and foremost to call consent a mental process of some kind. More specifically I suggest that there are actually three components that are required in order

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<sup>16</sup> Westen, 2003, p. 3

for us to say that consent to  $\varphi$  has been provided in a general sense. The three central components involved in consenting are: (i) Recognition: that is, possessing a reasonable understanding of the salient details that  $\varphi$  or  $\varphi$ -ing will involve and recognising to whom one's consent will be given; (ii) Trust: Trust in the target of one's consent, their motives, intentions and so on; and (iii) Willingness: willingness involves an eagerness for and an acceptance of the change(s) that will be brought about in one's normative conditions by  $\varphi$  or by  $\varphi$ -ing. Willingness provides a kind of moral permission. Steps (i), (ii) and (iii) are mental states since each of these processes begin and do their work in the mind. I shall call (i)-(iii) *The Tripartite Formulation of Consent*.

While consent is a mental process there is a sense that each consent act should be seen as materially *sui generis*; whether the consent in question can remain a mental state or if it requires a communicative act — an outward expression — will of necessity be entirely context dependent. In some cases mental acquiescence will be suitable for consent, while at other times it will not be sufficient and something will need to be said or expressed.

In our everyday lives we can say that where (i)-(iii) are met individuals are positioned to give their consent to other individuals. The consent is said to be *valid* where the individual's consent is (a) suitably informed and (b) given freely. I call (a) the informedness requirement and (b) the requirement that consent is given freely. Where (i)-(iii) are met alongside (a) and (b) we have suitably informed consent that is valid in ordinary cases. However, where individuals find themselves deliberating on whether they should consent in 'high stakes' situations — situations where providing consent will result in the consenter being expected to meet greater demands — a higher threshold must be met by the target of their consent in order to render the consenter's consent valid.

In order to understand what it takes for consent to be valid in high stakes scenarios we begin from the same starting point as the general or generic form of consent already outlined. By this I mean that in high stakes cases consent also originates in the mind, it must be given freely, and it must be

suitably informed in order to render it valid in moral terms. The form of consent is the same, however the epistemic threshold for consenting is far greater. I suggest that in order to be in a position to give suitably informed consent to a political authority a higher epistemic threshold must be met, over and above the more typical day-to-day or ordinary examples I described above where consent plays a role.

### (3) *The Epistemic Challenge*

I will now consider prior versions of consent theory. My argument against PCT's rests on the claim that the majority of these fail to transcend the Epistemic Challenge. Simply put, the 'consent' that these PCT's call for cannot be valid consent, since it cannot be properly informed and, as I have already shown, consent must be suitably informed in order to be furnished with validity. The failure to overcome the Epistemic Challenge is a fatal flaw that beleaguers most (if not all) PCT's. The failing of these theories lies in the fact that they place too high an epistemic burden on the individual, i.e., on the consenter and pay little attention to what is expected of the authority. Historically, as well as under current political conditions, individuals could not — and cannot — actually give consent to an authority for that reason. The reality of this claim is borne out, I think, by a simple fact: that subjects<sup>17</sup> cannot obtain enough knowledge of and/or about an authority to make their consent valid. Subjects are simply not in a position to obtain or gain sufficient information about the authority's conduct, aims or future projects to allow for their consent to be anywhere near suitably informed. Whether stated or implied every PCT relies on the notion that consent be informed. However, each PCT fails to meet the informedness requirement (a). Therefore the Epistemic Challenge is a *defeating condition* for PCT's. Consider an example:

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<sup>17</sup> Each subject is a potential consenter.

Car: If Davis approaches her friend Jones and asks to borrow Jones' car Jones has two possible options. Jones can (1) agree to allow Davis to borrow her car (in other words consent to Davis' request) or, (2) she can decline Davis' request. Suppose that Jones chooses (1) and consents to Davis' use of her car because she has no reason to choose (2) and because she is happy to allow Davis to use her vehicle in this instance. We would say that there is no issue here.

However, suppose that later Jones discovers that Davis has a suspended license due to Davis' (previously unknown to Jones) habit of driving while intoxicated. Had Jones known about this fact it is likely this would have impacted her decision. She would in all likelihood have declined Davis' request if she had been in possession of all the facts. This is an example of what Beran, following J. L. Austin calls a 'defeating condition.'<sup>18</sup>

The concept of a defeating condition is particularly useful for illustrating what I take to be the main error inherent in PCT's. For consent to be informed consent must qualify as an act of reason and deliberation. However, one cannot possibly *consent* to political authority in a reasoned and deliberative fashion because one simply cannot possess: (i) the salient facts that one must be in possession of in order to consent in an informed way, or (ii) key details about the individual, body or group to whom one is considering giving one's consent to. The fact that individuals lack this fundamental level of epistemic understanding means that they cannot legitimate a supposed or potential political authority through the mechanism of consent in the way that PCT's have claimed. I shall call this failing a failing to meet the Epistemic Challenge. I argue that the Epistemic Challenge is a defeating condition which PCT's cannot meet.

#### *(4) Examining Prior Consent Theories (PCT's)*

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<sup>18</sup> Beran, 1986, p. 6

In this section I will briefly examine several well-known versions of consent theory. I will expose the main flaws of these versions of consent theory and will show how they each fail to overcome the Epistemic Challenge in their own way. I believe that one common factor which unites each PCT that I discuss is that they each rely on suitably informed consent. I want to suggest that giving actual consent under the conditions proposed by these PCT's is not possible. I begin now with Hobbes' contractarian theory.

(4. 1.) Hobbes<sup>19</sup>

According to Hobbes 'the Right of possession is called Dominion; so the Right of doing any action, is called \*AUTHORITY...So that by Authority, is alwayes understood a Right of doing any act...'<sup>20</sup> Hobbes quite famously held a rather pessimistic view of human nature. Consider as evidence of this claim the well-known comment from Chapter XIII of *Leviathan* 'Of the Naturall Condition of Mankind, as concerning their Felicity, and Misery' where Hobbes remarks that in the state of nature the life of man is '... solitary, poore, nasty, brutish, and short.'<sup>21</sup>

We cannot divorce Hobbes' theory from his worldview. Dunn has written that Hobbes was, at the very least a 'practical atheist'; someone for whom 'if God does exist...his existence makes no practical difference to the sane conduct of human life.'<sup>22</sup> And, as Gautier has also pointed out, 'God makes no difference to the structure of Hobbes' moral and political system and indeed, since God in his commands simply reinforces the laws of nature, God makes no difference even to the content of

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<sup>19</sup> Where I quote from Hobbes and from other early modern authors and their works I will retain the original spelling, punctuation and emphasis.

<sup>20</sup> Thomas Hobbes, 1651, *Leviathan*, Tuck, R., (ed.), 1996, *Leviathan*, Cambridge: Cambridge University Press, p. 112

<sup>21</sup> Hobbes, [1651]/1996, p. 89

<sup>22</sup> John Dunn, 1983, 'From applied theology to social analysis: the break between John Locke and the Scottish Enlightenment' in Istvan Hont and Michael Ignatieff., (eds.) (1983) *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, Cambridge: Cambridge University Press, p. 119

Hobbes' system.'<sup>23</sup> These comments help explain Hobbes' extreme pessimism. For Hobbes, even if God *exists*, God's existence has no tangible effect on human behaviour. Life will therefore remain 'nasty, brutish and short' in the state of nature.

A motivating factor working behind the scenes of the Hobbesian social contract is the belief that persons are naturally self-interested. However, Hobbes thinks that upon reflection people will recognise the best means for obtaining what is in their self-interest to obtain and this will eventually lead them to consent to governmental authority. According to Hobbes they do this through a covenanting, or contracting procedure. Through '*Pacts and Covenants*' the 'Body Politique were at first made, set together and united...' says Hobbes.<sup>24</sup> Later Hobbes argues that through the process of contracting — a process where one makes binding agreements — individuals can 'reduce all their Wills, by plurality of voices, unto one Will...' and thereby create political authority.<sup>25</sup> In this way Hobbes's is a theory of the legitimacy of authority. And authority, for Hobbes is the solution to those problems that exist in the state of nature.

Hobbes' account faces three significant challenges. First there is the question of how reliable this pact or covenant can really be if human nature is as Hobbes describes. According to Plamenatz Hobbes believed that 'man is not by nature sociable...he meant [men are not] 'fit for society...''<sup>26</sup> In order to be capable of explaining how consent creates obligations and authority there are two necessary characteristics that a consent theory must contain. Consent theory must (i) begin from an optimistic view of human nature, and (ii) hold an optimistic outlook with regards to the capabilities that people possess. Hobbes' account is too pessimistic to accomplish this.

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<sup>23</sup> David Gautier, 1977, 'Why Ought One Obey God? Reflections on Hobbes and Locke', in *Canadian Journal of Philosophy*, Sep., 1977, Vol. 7, No. 3, p. 435.

<sup>24</sup> Hobbes, [1651]/1996, p. 9

<sup>25</sup> Hobbes, [1651]/1996, p. 120

<sup>26</sup> John Plamenatz, *Man and Society: Volume One*, London: Longmans, p. 221

Secondly, but less importantly, Hobbes' account succumbs to Hume's well-known objection that there never was a state founded on any actual contract. The gist of Hume's objection to contract theory is that if consent is to play a role in legitimating authority, then only *actually* contracting has any moral relevance. Since there is no evidence of this occurring anywhere in history there is no reason to suppose it did.<sup>27</sup>

Thirdly the Hobbesian account fails to meet the problem posed by the Epistemic Challenge. Suppose that we grant to Hobbes certain conditions that he sets out throughout *Leviathan* regarding (for example) legitimacy, authority, covenanting and the like.<sup>28</sup> Even so, individuals living in the state of nature would not, as Hobbes claims, have a reason to submit to a Sovereign because, short of actively harming their subjects, it appears that the Hobbesian sovereign could claim potentially unlimited and unrestricted power over subjects so long as the sovereign meets one key condition: that the sovereign protects their subjects from the inconveniences of the state of nature.

It is not immediately clear, to me at least, that rational individuals would view the situation in quite the way that Hobbes describes. I think it far more likely that rational agents surveying their options would conclude that they simply don't know and can't know enough about the Hobbesian sovereign to be capable of consenting to their authority. Therefore they would not consent to it. In all likelihood they would choose to remain in the state of nature. However, if they did consent to Hobbes' conditions their consent would be severely handicapped, because it would not be informed on account of the facts as described. The fact that these rational agents cannot know enough about the motives, intentions or goals of the Hobbesian sovereign is a defeating condition which renders the Hobbesian social contract entirely ineffectual. For that reason the Hobbesian sovereign is not legitimate and Hobbes' contractual theory is not one of appropriate legitimation.

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<sup>27</sup> See Book III of David Hume, [1738-40], *A Treatise of Human Nature*, Selby-Bigge, L. A., (ed.), revised by Nidditch, P. H., 1975, 2nd edition, Oxford: Oxford University Press and Hume's 'Of the Original Contract' in David Hume, 1987, *Essays, Moral, Political and Literary (Various Editions)*, E. F. Miller (ed.), Indiana: Liberty Fund

<sup>28</sup> Unfortunately it is beyond the scope of the present work to provide more than a glancing overview of the finer points of the Hobbesian view.

#### (4. 2.) *Locke's Contract*

Consent plays multiple roles in Locke's theory of government. For the sake of brevity and to avoid repetition I will focus on just one area of Locke's species of contractarianism, namely the legitimating function that consent plays toward legitimating authority. For Locke consent is the source of legitimate political authority. According to Locke when individuals came together, moved from the state of nature into civil society and established government they effectively relinquished their executive power to execute the 'law of nature' which they each held in the state of nature. They did so by agreement, or consent. Locke thinks that after first consenting to the creation of civil society people then made an additional promise: to obey the government. Locke attributes their ability to consent in this way to the making of promises. For Locke the promising act constitutes express consent. Making this promise therefore created a tie of political obligation between citizens and political authorities. Locke writes,

'Nothing can make any man so, [i.e. a member of a political society under political authority], but his actually entering into it by positive engagement, and express promise and compact. This is that, which I think, concerning the beginning of political societies, and that *consent which makes any one a member of any common-wealth.*'<sup>29</sup>

By first freely consenting to enter into political society individuals make a promise to abide by the laws of society and submit to political authorities. Vitally, their consent must be given freely. It

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<sup>29</sup> John Locke, 1690, *Two Treatises of Government*, Laslett, P., (ed.), 1988, Cambridge: Cambridge University Press, ST. 122 [my emphasis]

cannot be coerced from them. Coerced consent naturally invalidates a political authority. Similarly, a man's consent cannot be obtained through force.<sup>30</sup>

Making and keeping promises are, according to Locke, linked back to God. The promise has a divine provenance. Locke said of promises that they '...are so great, and so strong...that omnipotency itself can be tied by them. *Grants, promises, and oaths, are bonds that hold the Almighty.*'<sup>31</sup> Consent is therefore understood by Locke to be a promise making process.

There are conflicting readings of Locke's views on the limits of consent.<sup>32</sup> On one reading consent explains only the origin of political legitimacy; in other words consent only explains how certain individuals at some specifiable time became answerable to particular political obligations. Another reading holds that consent 'is simply not the reason why Locke thought most men obliged to obey the legitimate exercise of political authority.'<sup>33</sup>

On my reading of Locke I find that Locke held that consent is unquestionably the root of legitimate political authority *and* the source of the individual's obligation to obey political authorities. Locke himself writes that:

'...by consenting with others to make one body politic under one government, [man] puts himself under an obligation, to every one of that society, to submit to the determination of the *majority*, and to be concluded by it...' <sup>34</sup>

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<sup>30</sup> Locke, [1690]/1988, *ST*. 186

<sup>31</sup> Locke, [1690]/1988, *ST*. 196

<sup>32</sup> See for example Dunn, 1967 'Consent in the Political Theory of John Locke' in *The Historical Journal*, Vol. 10, No. 2, pp. 153-182, and A. John Simmons, 1993, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society*, Princeton: Princeton University Press, among others.

<sup>33</sup> John Dunn, 1967, p. 156

<sup>34</sup> Locke, [1690]/1988, *ST*. 97

Clearly Locke means that by putting themselves under an obligation to submit to the will of the majority men also consent to submit to the authority of government for as long as it remains legitimate. Only some authoritative body can effectively legislate and bring to pass the object of a determination agreed upon by a majority of citizens.

John Dunn takes a rather narrower view than the that I have described as being Locke's own regarding consent. Simmons on the other hand takes a broader view of Lockean consent that is, I think, more in line with my own interpretation. According to Simmons consent is a blanket term:

'covering all instances of deliberate, voluntary alienation of rights (and undertaking obligations) — including not only what we might narrowly call consenting, but also promising, contracting, entrusting and so on.'<sup>35</sup>

Locke's theory of consent also fails to meet the conditions of the Epistemic Challenge as I have defined it in Section (2) in much the same way that Hobbes' contractarianism fails to meet its conditions. Once again we are faced with the fact that there is simply no guarantee that rational individuals living in the state of nature who are weighing their options will have any reason to consent to entering into civil society and bringing themselves under political authority. Having never experienced life under the constraints that would inevitably follow it is not plausible that their consent could be informed in any meaningful way. Consequently I think it clear that an inevitable consequence of Locke's hypothetical individuals lacking this fundamental baseline of epistemic awareness or understanding — which baseline is indispensable in order to transform their 'consent' into morally relevant informed consent — is that they cannot legitimate a potential political authority through the mechanism of consent as Locke's vision describes. If these individuals were

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<sup>35</sup> Simmons, 1993, p. 69

furnished with certain guarantees then their consent would not fall in the face of the Epistemic Challenge, but Locke provides no such accommodations or guarantees in his theory.

In spite of this shortcoming Locke's vision of individuals departing the state of nature and entering into civil society through the mechanism of consent is entirely plausible. But, the mechanism of promising need not play any significant part in such an arrangement. Certainly individuals could make promises one to another, or they could enter into contracts based on promissory arrangements, but the absence of promise making isn't necessarily defeating. Since in this condition individuals would coexist in a state of relative equality the Epistemic Challenge isn't insurmountable, as it is on the issue of allegiance to authority.

#### *(4. 3.) Democratic Participation as an Act of Expressed Consent*

One popular version of consent theory which appears at least *prima facie* capable of demonstrating a plausible real-world example of where *actual* consent can be capable of legitimating political authority is the view that participation in democratic processes is an expression of actual consent. This view has been advocated by, among others, Downie (1964), Plamenatz (1967) and Raphael (1970). Democratic participation versions of consent theory typically begin with a simple example: a group of people find themselves in a position where some decision or decisions must be made which will affect all members of the group. The required outcome is viewed by most or all members of the group as being binding on all members of the group.<sup>36</sup> It is proposed that a democratic procedure should be adopted — usually in the form of a vote, or an election — to secure an outcome. Where this process goes ahead and where certain conditions are met, the outcome of the vote is held up as an actual expression of consent since everyone involved consented to the outcome

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<sup>36</sup> In this scenario it is also generally assumed that achieving unanimity of views is simply not feasible in the timeframe afforded, or entirely impossible.

by participating. According to this version the fact that each individual participates in the process signals their willingness to accept the outcome. It argues that participants consent to the outcome even where it is the case that the outcome returned is not the outcome that they desired or voted for; by virtue of the fact that they participated in the process, so the argument goes, they have consented to the outcome. This is the basic framework of the argument that democratic participation equals consent. The democratic participation version of consent theory argues that this model is the same as that adopted during an election or during other democratic votes.

I will admit that at first blush this looks to be an intuitively appealing approach. If it can be shown to be the case that mere participation in a democratic process is a sufficient expression of consent which is capable of legitimating a political authority then we should accept, or at least concede, that the consent theorist has done their job effectively. Plamenatz advocates for accepting this view. In his analysis of Locke's *Second Treatise* he expresses sympathy for Locke's project and accepts that, generally speaking, people *do* consent to the authority of rulers. He claims that this consent is expressed in democratic participation. Plamenatz writes: 'When you vote for a person or a party that wins an election, you directly consent to his or to their authority, and you also consent indirectly to the system of government.'<sup>37</sup> 'Furthermore,' Plamenatz continues, 'by taking part in the election you consent indirectly to the authority of the persons that win it, even if you vote against them.'<sup>38</sup> However, it quickly becomes apparent that the democratic participation model of consent also fails to meet the conditions of the Epistemic Challenge.

The democratic participation version fails to overcome the Epistemic Challenge because political parties (would be authorities) generally campaign on a series of promises and pledges in an attempt to woo the electorate into 'lending' their party or their candidate their vote at that time. However — and this is especially true of western, liberal, parliamentary democracies — when the political party

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<sup>37</sup> This argument is considered and rejected below.

<sup>38</sup> Plamenatz, 1963, p. 239

or their preferred candidate wins an election and takes office — the process of becoming an acting authority — it is quite often the case that campaign pledges and manifestos are tossed aside in favour of alternative legislative agendas and priorities that often were not advertised during the run-up to the vote or election.<sup>39</sup>

Now, theorists who advocate for the democratic participation model would have us believe that we must set these concerns aside if we intend to take part in the process. ‘You may not agree entirely with how the game gets played,’ they will say, ‘and you may not like some of the rules; but, if you’re on the field chasing the ball you are choosing to abide by them. You are still playing the game!’ Following reasoning like this leads adherents of the democratic participation model of consent to say that voters consent by voting. This is clearly false. The simple fact that voters cannot know with a reasonable degree of certainty what legislative agendas will be prioritised or enacted by the victorious party or candidate when they take office means that their vote is not valid consent. The democratic participation version of consent theory therefore does not satisfy the requirement that one’s consent be suitably informed. For that reason an authority claiming legitimacy based on consent by democratic participation lacks it on these grounds. For these reasons the democratic participation version fails to meet the conditions of Epistemic Challenge.

#### *(4. 4.) Membership Versions*

It has been argued that continued membership in the state should be viewed as a form of consent or as an expression of consent. Such arguments are known as a *membership versions* of consent theory and they often begin by arguing that the state is an institution which exists to promote the interests of its members. The job of the state, its defenders claim, is to promote ‘liberty, democracy and

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<sup>39</sup> While holding this view may lead to my being accused of excessive cynicism I think that it constitutes an accurate reflection of actual political realities.

human welfare.<sup>40</sup> According to membership versions, giving consent under these conditions consists in simply accepting membership in the state and accepting all that this membership entails. Those who are born into the state tacitly consent while those who voluntarily become members of the state expressly consent at the moment of accepting membership.<sup>41</sup>

In theory the main consequence of accepting membership in a political community, tacitly or expressly, is that one agrees to obey the rules of that community. However, according to the membership version a further consequence of agreeing to obey these rules is that one is therefore obligated to *obey* any further rules that are made by the political authorities in that state. According to Beran, when one accepts membership ‘consent...is given to the state as an artificial person.’<sup>42</sup> Therefore those who act on behalf of the state are to be obeyed by new members in perpetuity. However, I would suggest that there is a subtle yet distinct difference between accepting on the one hand: (a) that one must abide by the established rules of a new community, and on the other accepting (b) that new members are thereafter obligated to obey the authority of its institutions, institutions that have the ability to impose new rules/laws that did not exist at the time that membership was accepted. This shows that consent must be understood as being exhaustible. When an individual consents, they typically do not consent in perpetuity.

Surgery: Suppose that I find myself in an unfortunate accident and I require some kind of life saving medical procedure. I can give my consent to a surgical team and thereby authorise them to perform the procedure that will save my life. However, the surgical team do not have my consent to operate on me at will for an unspecified period of time into the future. If in five years the surgical team track me down and whisk me back to hospital to conduct a similar procedure, required or not, they do not have my consent to do so unless I offer it up again. The consent that I express is

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<sup>40</sup> Beran, 1986, p. 26

<sup>41</sup> Beran, 1986, p. 26

<sup>42</sup> Beran, 1986, p. 31

expressed relative to conditions as they are at the time of my consenting. The same is true of accepting membership in a political community and it is also true of the authorities which govern these communities. These facts expose how the membership version of consent theory fails to meet the conditions of the Epistemic Challenge.

The membership version fails to meet the challenge set by the Epistemic Challenge in a way that is reminiscent of the failure of democratic participation versions. If an individual joins a political community I certainly agree that they accepted membership and accepted the conditions of that community. They consented, but only to the conditions of the community as they were — or appeared to be — at the time of accepting. It would be completely unreasonable to assume that this consent should be viewed as binding from that moment forward. It is entirely possible that conditions in the community might change over time, and in such a drastic fashion that the community no longer resembles the community to which the individual's consent was once given. If such a change were to occur it is likely that this change will have been precipitated by the authority at the head of the community. Therefore the consent which individuals give, to the community and to the authority in charge can not be considered suitably informed consent. I think these facts would be more than sufficient to nullify an individual's prior consent act(s). And the fact that consent can be nullified by conditions beyond the individual's control and that were previously unforeseen or even unimagined shows that the membership version of consent theory fails to overcome the Epistemic Challenge.

#### *(5) Voluntarist vs Contractualist Theories.*

In this Chapter I have, of course, not considered every version of consent theory. However, roughly speaking consent theories can be situated into one of two camps: *contractualist* theories and *voluntarist* theories of consent. Theories which belong to the voluntarist family posit that an

authority is legitimate insofar as it has the actual consent of its subjects. On the other hand, theories which belong to the contractualist family hold that legitimacy can be achieved through a form of consent known as hypothetical consent. According to theorists who advocate for theories belonging to the contractualist camp hypothetical consent can legitimate if consent *would* be given under a set of idealised conditions. Unless suitably adapted consent theories of both kinds will fail to meet the conditions of the Epistemic Challenge.

At first blush it seems that voluntarist theories occupy a stronger conceptual position than contractualist theories, for surely if subjects actually consent then there can be no question about the legitimacy of the authority they consent to. And on that point I am inclined to agree with proponents of voluntarism. However, critics of voluntarism are quick to point out the obvious flaw in these theories, namely that mass consensus would be necessary to create legitimacy and that it is too difficult to attain mass consensus of the sort voluntarism require. This is because the desires, wills and preferences of subjects will never be so aligned that there is mass consensus on *any* issue, never mind an issue as complex as that of legitimacy. This is a consequence of living in a pluralistic society.<sup>43</sup>

A possible way around the trouble this raises is for the voluntarist to argue that an individual's consent confers legitimacy on an authority for that individual alone. However, this solution can only paper over a crack. Legitimacy cannot exist on a case-by-case basis. While legitimacy may not require en masse consent of the sort critics of voluntarism demand, legitimacy certainly requires majority consent of some sort.<sup>44</sup> This impasse might lead one to accept, as Simmons does, that 'no

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<sup>43</sup> The pluralistic nature of modern society makes achieving widespread consensus incredibly difficult, if not impossible.

<sup>44</sup> This phrase 'majority consent of some sort' is very vague. It could mean that only the consent of 51% of the population is necessary for legitimacy, it might mean the consent of 100% of the population is needed or it might refer to anything in between. While I do take 'majority consent' to mean somewhere between 51% and 100% of a population, in what follows I will not attempt to settle the baseline for legitimacy beyond this since to do so certainly goes beyond the scope of this chapter and the scope of this essay.

*existing* states are legitimate,<sup>45</sup> a conclusion which I have some sympathy for. The question remains however whether a voluntarist theory *could* provide a workable solution, or if legitimacy is impossible on this view. Under idealised conditions the voluntarist could certainly argue that they provide the solution that consent theorists have been looking for; however, the requirement that conditions be idealised renders voluntarism essentially redundant in my view.

If theories in the voluntarist family do not provide a suitable solution to the problem of legitimacy does the answer lie in a theory belonging to the contractualist camp? Well, theories of a contractualist bent are, it turns out, just as problematical as their voluntarist counterparts. They are problematic because the need for idealised conditions once again takes centre stage in contractualist accounts. Indeed, going back to Kant contractualist accounts have relied heavily on sets of hypothetical idealised conditions to motivate their claims. If conditions need to be idealised, and these idealised conditions can never be met, then a theory which acknowledges that conditions are not so, but continues to insist ‘but if *they were*...’ cannot be the answer either. So, it would seem that voluntarist theories and contractualist theories are each as ill equipped as the other for charting a course to legitimacy.

And of course both voluntarist and contractualist accounts fail to best the Epistemic Challenge. Voluntarist theories fail to best the Epistemic Challenge because individuals under authority simply cannot obtain enough information about the intentions of authorities to enable them to make an informed decision on whether or not to consent to them — thus making unanimous or widespread consent impossible. Contractualist accounts fail to best the Epistemic Challenge because these specify that the consent of subjects legitimates authority where consent would be given under certain idealised conditions — that is, a set of idealised societal conditions, not a set of epistemic

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<sup>45</sup> A. John Simmons, 2001, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press, pp. 155–6 [my emphasis added].

conditions. Contractualist accounts argue only that if conditions in society meet some requirement *X*, *Y* and *Z* then consent can be given. There is no reason to suspect that these requirements bear in any way on the epistemic status of individuals. Of course a contractualist theory might be able to *sidestep* the Epistemic Challenge. One of the idealised conditions contained in the theory could be the condition that the epistemic burden on subjects is alleviated. But, while a theory of this kind might sidestep the Epistemic Challenge it would ultimately fail because it would likely be unrealistic in some other way.

### *(7) Conclusion*

I believe that The Epistemic Challenge is a strong argument against the viability of prior versions of consent theory. The Epistemic Challenge shows how PCT's have failed to account for the epistemic imbalance between authorities and subjects. However, not all theories of consent need fall into this trap. The way to legitimacy-by-consent involves neutralising the Epistemic Challenge. This process is, I think, easier than I have been indicating. A revised theory of consent which emphasises that there is a requirement for *epistemic equity* between authorities and subjects would defeat the Epistemic Challenge. The existence of epistemic equity between subjects and authorities would be a defeating condition for the Epistemic Challenge. Introducing and outlining a revised consent theory of this kind will be the task which I take up in Chapter 3.

#### *(7. 1.) Some Arguments against Consent Theory*

Before moving on to take up this task in Chapter 3. I will say a little about arguments *against* consent theory in general. Philosophers who hold competing and contrasting views on most issues will inevitably come together in agreeing that consent is not realistic as a sufficient ground for

legitimacy. Raz is a prominent anti-consent theorist. He has written that consent cannot be taken to be the basis of legitimacy because consent can only bind ‘if there are good reasons to enable people to subject themselves to political authorities.’<sup>46</sup> In other words, consent can only be a secondary source of legitimacy. Something must come before consent. And, if something is prior to consent Raz thinks this renders consent essentially meaningless.<sup>47</sup> Even where one freely consents, says Raz, ‘...it does not follow that it is binding.’<sup>48</sup> Raz thinks that legitimacy, if possible, is only possible through other, more robust means.<sup>49</sup>

Some philosophers like the philosophical anarchists R. P. Wolff have argued that consent does not create legitimacy because in order for the legitimate authority to remain legitimate each individual subject would need to consent to each act undertaken by it. Wolff writes that while a ‘contractual democracy’ (i.e., one based on this kind of continually renewing or regenerating consent) would indeed be legitimate,<sup>50</sup> however, it is not feasible because this legitimacy would be achieved only when citizens’ ‘forfeit of their autonomy...’<sup>51</sup> The idea of forfeiting one’s autonomy is a condition which Wolff finds essentially intolerable. Thus, for Wolff also consent is an insufficient source of legitimacy.

While some of Wolff’s arguments about autonomy are persuasive, I remain unconvinced by his conclusions about consent. I see no real conflict existing between an authority which has been legitimated by consent and the autonomy of individuals living under it. It goes without saying that there are avenues in life where we would be wise to defer to the judgement of others. Among other things people seek legal advice, medical advice, they hire plumbers, painters and builders. We are

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<sup>46</sup> Joseph Raz, 1986, *The Morality of Freedom*, Oxford: Oxford University Press, p. 89

<sup>47</sup> I will criticise the Razian view of consent in Chapter 5.

<sup>48</sup> Raz, 1986, p. 89

<sup>49</sup> Raz thinks that the service conception accomplishes this. The task of outlining the argument of the service conception and providing a criticism of it will be taken up in Chapters 4. and 5.

<sup>50</sup> According to Wolff the authority of its government would be legitimate for the same reason.

<sup>51</sup> R. P. Wolff, 1970, *In Defence Anarchism*, New York: Harper and Row, p. 70

constantly deferring to the judgement of others over areas of our lives where we might otherwise exercise autonomy. Where individuals are content to defer to the expertise of others in certain areas we can say that there is a sense in which people forfeit autonomy *all the time*. There does not seem to be anything immediately unreasonable in such an arrangement. Wolff, however, goes to great lengths to demonstrate that this arrangement *is* more than unreasonable — he claims it is unconscionable — in the first chapter of his *In Defence of Anarchism*. But, if people make such arrangements and (qualifiedly) accept the consequences of forfeiting their autonomy and remain willing to do so, then I see no reason why the same cannot be true of the relationship between subject and authority. Of course the matter of qualification matters a great deal; however, consent should not be dismissed wholesale as a source of legitimacy like Wolff and Raz claim. In the next chapter I will show that when a more robust theory of consent is available consent can become sufficient for legitimacy.

# *Chapter 3. Consent, Epistemic Equity and a Revised Consent Theory of Legitimacy*

## *(1) Introduction*

In Chapter 1. I examined the concepts of *authority* and *legitimacy* and in Chapter 2. I exposed and examined major flaws that I see as plaguing prior formulations of consent theory (PCT's) and criticised them accordingly. Somewhat paradoxically I have also until now asserted on several occasions that consent is a source of legitimacy, However, I have yet to show exactly *how* consent can be a sufficient source of legitimacy. That is the purpose of this chapter.

In the first half of this Chapter I put forward a new theory of consenting and focus on elaborating the constituent parts involved in creating the mental state called consent — the structure of consenting that I introduced in the previous chapter. In a sense the first half of this chapter has two primary aims. It aims to (a) describe what consent is, and then (b) demonstrate where consenting is valid.

In the second half of the Chapter I introduce The Principle of Epistemic Equity and I argue that only an authority which exhibits ideals and behaviours that satisfies The Principle of Epistemic Equity can be legitimated through suitably informed consent. I claim in that in order to give suitably informed consent subjects must be in possession of certain facts that, more often than not, they do not possess. In order to empower their subjects to validly consent authorities must accept that the burden falls on them to facilitate overcoming the Epistemic Challenge. By doing so authorities enable the consent of their subjects to be suitably informed and therefore valid. The revised consent theory of legitimacy that I argue for can be viewed as an effort to provide a set of necessary conditions which enables authorities to receive their subjects valid consent.

## *(2) Re-Introducing Consent*

In Chapter 2, I introduced and briefly described the process involved in consenting. This led to my claiming that there is no ‘big thing’ called consent. Rather, consent is, in Plamentaz’s words ‘personal and deliberative’<sup>52</sup> in each case. I therefore suggested that the state of mind we call ‘consenting’ is actually a composite. Consent is a combination of smaller mental states, an amalgamation of constituent parts if you will that, when taken as a whole, constitute a fuller mental state called consenting. I introduced these constituent parts as: (i) recognition, (ii) trust, and (iii) willingness and I have called this theory of consent *The Tripartite Formulation of Consent*.

## *(3.) The Tripartite Formulation of Consent*

The theory of consent I am here proposing is grounded on the argument that the mental state we call consenting is actually a composite of three elements. These are (i) recognition, (ii) trust, and (iii) willingness. These elements combine and form The Tripartite Formulation of Consent. Each of these elements now warrants its own consideration.

### *(i) Recognition*

Recognition is a consequential element of consenting since without recognition giving one’s consent is not — logically — plausible. Call this the *recognitional requirement*. The reason why the

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<sup>52</sup> Plamentaz, 1963, p. 223

recognition requirement is essential is rather elementary: in order to give one's consent, either actually or hypothetically, one must be aware of — that is recognise — the target to whom one will give their consent. In other words, in order to consent in a given situation it is necessary that persons recognise to whom they will incur an obligation as a result of consenting. Although recognition is just one constituent part of the process of consenting, it is perhaps the most fundamental requirement needed in order to give consent for this basic reason.

### *(ii) Trust*

In order to provide consent that meets the informedness requirement it is necessary that trust is involved. Trust is positive belief in a person, in what they say or in what they can do for you or for others. Where I rely on someone to meet their commitment(s) — call such commitments  $\varphi$  — it is necessary that that person be competent enough to do  $\varphi$ .<sup>53</sup> For that reason trust can be said to exist by degree. The degree to which trust is warranted is situational. For trust to truly exist between A and B it must be actually justified while in some other situations trusting can be situationally appropriate.

#### *(ii.i) Justified Trust*

Where trust is *justified* the truster must have prior evidence<sup>54</sup> that the person is trustworthy. For example, John is justified in trusting Gina if (and only if) Gina has earned his trust. If John has a

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<sup>53</sup> Here  $\varphi$  represents whatever it is I am trusting a person to do, to be, to begin, to complete...and so on. Consider once again our waitress from the example at fn 5: it is reasonable to expect that she is competent enough to bring me my order, but it would be entirely unreasonable to trust that she is competent to fly a plane which would get me to New York City.

<sup>54</sup> 'Prior evidence' can exist in several forms. The most common form would be personal experience. Other forms of prior evidence could include personal testimony, written evidence, video evidence and so on.

history of asking Gina to do  $\varphi$  (or some task like  $\varphi$ ) and Gina has consistently done  $\varphi$  (or some other task like  $\varphi$ ) we can say that John's trust in Gina that she will  $\varphi$  is — on this occasion — justified.

*(ii.ii) Situationally Appropriate Trust*

However, there will also be situations where A 'trusts' B without having any hard evidence that B is competent or deserving of trust. In order for trust to be given in these situations, trusting must be situationally appropriate. By this I mean that in order for the possibility of giving one's trust to be considered it must be in response to a situation that warrants trusting. For example, it is situationally appropriate to trust a bank to hold my money since holding money is, fundamentally, the service that banks provide. Now consider the following examples which demonstrate the upshot of the position I am proposing here:

(1) Valet: Should I trust the valet at the restaurant where I will eat dinner to park my car? Trusting the valet is situationally appropriate — even though I don't know the valet and I cannot vouch for their driving ability, spacial awareness or skill at reverse parking — because the valet's job is to park cars for patrons. I assume that the valet is competent (they actually got the job, they have not been fired thus far, they are wearing a valet's uniform and standing next to a sign which reads 'Valet Parking') so I trust them with my keys and think nothing more of it. While my trust cannot be actually justified — because (among other reasons) I cannot vouch for the valet's parking skills — since my trust is situationally appropriate my trust *can* be given since, under the circumstances, my trusting is situationally appropriate.

(2) Climbing Mount Everest: Suppose that upon turning thirty-nine James decides that his life needs excitement. James decides to attempt to fulfil one of his lifelong goals. He declares, 'by the time I am forty I will have reached the summit of Mount Everest!' James goes through the necessary training and familiarises himself with the the theory of high altitude climbing. However,

he still acknowledges that Everest is a dangerous beast. James realises that he will need a guide — an expert in the field of mountaineering. James does some additional research and decides that he wants Reinhold to be his mountain guide. Reinhold is an expert mountaineer who has made a career for himself guiding people to the summit of Mount Everest. The testimonials Reinhold has received speak for themselves. I believe that it would be situationally appropriate for James to trust Reinhold to be his guide to the summit of Everest, even though he has never guided James to the summit of Everest before. It is situationally appropriate to trust Reinhold because James knows that Reinhold has reached the summit of Everest on multiple occasions. While James' safety on Everest cannot ever be fully guaranteed I think that James can trust that Reinhold will be the best person to help him see his goal accomplished.

Both (1) and (2) are examples of scenarios where trusting another is situationally appropriate. James's trust in Reinhold to guide him to the top of the world is justified and my trust in the valet, though somewhat less justified, is justified based on the prevailing conditions as I understand them. While James can ascertain more information in example (2) than I can ascertain in (1) I am still in a position to gain enough information in (1) to warrant handing my keys over to the valet.

Is there such a thing as *unjustified trust*? Unjustified trust may be said to exist in situations where a person has no concrete evidence that the person they are trusting to  $\phi$  will come through for them. John may put his trust in Liam to fix his bike, but John's 'trust' will be misplaced if Liam has never fixed John's bike before, or indeed if John has no hard evidence that Liam is capable of fixing a bike. John's trust in Liam is neither (a) justified, nor (b) situationally appropriate. Therefore John's 'trust' is not trust, properly understood. Unjustified trust is therefore not trust in the proper sense. For that reason using the word trust is inaccurate and misleading. It might be more accurate to call unjustified trust 'hope,' or 'wishful thinking,' or perhaps 'misplaced trust.' What ever it is, it is not trust as I have defined it.

### (iii) Willingness

I propose willingness be taken as the third component in The Tripartite Formulation of Consent.

Consenting involves giving moral permission and it is only logically possible to give one's permission to some normative change in one's conditions where one wills what is being proposed. Where one wills  $X$  they desire a particular outcome, or they prefer a particular outcome among several other outcomes. Thus, to say that A wills  $\varphi$  is to say that A desires  $\varphi$ , prefers  $\varphi$  from among other potential outcomes, or desires that someone will  $\varphi$ .

Borrowing: Greg gives Alison permission to borrow his car. Alison needs to borrow Greg's car to collect her husband from the airport. Alison has explained this to Greg and Greg is of the opinion that this is a suitable reason for Alison to borrow the car. Here Greg has a choice between two outcomes: (1) Alison uses his car, or (2) Alison does not use his car. Since Greg is willing to allow Alison to borrow his car his preference is that Alison use his car on this particular occasion. Alison uses Greg's car.

Borrowing 2: A few days later Greg is approached by Harry who asks to borrow Greg's car. Greg recognises Harry, but he can't immediately place him. Harry reminds Greg that he is a friend of Alison and that they met at a dinner party several months ago. This jogs Greg's memory and he recalls the pleasant conversation they shared that evening. Greg even recalls that they exchanged details and had discussed playing a game of golf together. Harry asks once again 'May I borrow your car?' Greg recognises Harry, recalls the pleasant conversation at the dinner party and feels that he might be able to trust Harry based on his limited recollection. Here Greg has a choice between two outcomes: (1) Harry uses his car, or (2) Harry does not use his car. Greg prefers option (2) to (1) based on the situation as he sees it. Therefore Greg is not, on this occasion, willing to allow Harry to borrow his car.

This scenario in Borrowing meet the conditions for consent. The recognitional requirement is satisfied in Borrowing because Greg recognises Alison as an appropriate target for his consent. The trust requirement is satisfied since Greg trusts Alison to use his car. And finally the willingness condition is satisfied because Greg's preference is that Alison uses his car on this occasion, therefore we can say that Greg is willing that the arrangement go ahead. In Borrowing Greg clearly consents to Alison borrowing his car.

In Borrowing 2 the necessary conditions of trust and recognition are met — though not to the same extent as in Borrowing. However, Greg does not will Harry's use of his car. Thus, Greg is not able to consent in a rational way to Harry borrowing his car under the conditions described in Borrowing 2. Suppose Greg did begrudgingly allow Harry to borrow his car under the conditions described in Borrowing 2 because Harry informed him that it was a life or death matter. We cannot say that this agreement constitutes consent since, although Greg agrees, he does so begrudgingly as he is not properly willing to allow Harry's use of his car. Though, it would be admirable if Greg allowed Harry to use his car for a life and death matter, it would not meet the requirements set out by The Tripartite Formulation of Consent.

Importantly, Borrowing and Borrowing 2 differ in a significant way. In Borrowing Greg's willingness to allow Alison to borrow his car. He prefers outcome (1) over outcome (2) where Alison is concerned. This is not exactly the case in Borrowing 2.

### *(3. 2.) Introducing The Next Steps*

Conditions (i)-(iii), The Tripartite Formulation of Consent, is a revised theory of consent which seeks to explain what mental elements are involved in consenting in the ordinary sense. Where people recognise the target of their consent, trust them and their motives and are willing to accept what their request entails, then they consent to their request(s). A's consent is said to be *valid* in the ordinary sense when the three elements of The Tripartite Formulation are satisfied and where they are (a) suitably informed and (b) give their consent freely. I call (a) the informedness requirement and I call (b) the requirement that consent is given freely. Returning for the moment to Borrowing: Greg has consented to Alison's request. He knows Alison, recognises her request, he trusts her and he is willing to allow her use of his car. Greg has satisfied The Tripartite Formulation. Additionally he is suitably informed, since he knows Alison's reasons for asking to borrow his car, and as far as we know he has not been coerced, so he gives his consent freely. His consent is valid.

I have now laid out a theory of what consent is, and I have shown where it is valid in ordinary cases.<sup>55</sup> Of course this is not the agenda of this thesis. I am concerned with where consent can be validly given to political authorities. Consenting to a political authority is an example of what I shall call consenting in a *high stakes situation*. When one considers consenting in some high stakes situation, where (i)-(iii) are satisfied alongside (a) and (b) we can also call that consent valid — as it was valid in ordinary cases. A high stakes situation is one where more is entailed by consenting therefore more is required in order to satisfy (a) and ensure that the consent is *valid*.<sup>56</sup> In the case of consenting to political authorities the stakes are high because subjects become politically obligated when they consent. Political obligations are requirements which entail some limitations on individual freedom. Because political obligations are 'requirements' of this sort for Simmons, they

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<sup>55</sup> In doing so I have built on the work of Chapter 2. Section 2.

<sup>56</sup> It goes without saying that (b) is also of great importance. However, since (a) is more difficult to satisfy I shall focus on it at this time.

are ‘independent of our desires to perform or not’<sup>57</sup> and they should, he claims, therefore be performed, despite the individual’s inclinations and preferences. Such a view of political obligation is clearly a rather demanding one. It is demanding in that it stipulates that much is required of subjects who are obligated. For Simmons to be correct in claiming that political obligations place demands of this sort on subjects I suggest that he must be open to the following caveat: since becoming politically obligated involves a moral requirement to *do* certain things, a similarly high moral demand must be placed at the door of the authority to whom one is said to be obligated in order to ensure equity in the situation. That is, an authority would need to satisfy The Principle of Epistemic Equity.

For these reasons when one is faced with the option of giving one’s consent to an authority, at first blush we again notice the lingering presence of the Epistemic Challenge throwing up problems for the informedness requirement. Therefore, in order to ensure that the potential consent is valid the authority that is the target of the potential consent must enable their subjects to validly consent by accepting that the burden falls on them to facilitate overcoming the Epistemic Challenge. Doing so will partially satisfy the requirement that subjects’ consent be suitably informed. In order to overcome the Epistemic Challenge an authority must satisfy The Principle of Epistemic Equity. The Principle of Epistemic Equity is specific and demanding.

In high stakes scenarios the conditions which must be met in order to give valid consent are more demanding than those conditions which must be satisfied in ordinary cases. For that reason consenting to authority cannot be viewed in the same light as consenting in common place situations. Consenting to a political authority is different than, for example, consenting to let someone borrow your car, consenting to have sex, or consenting to a medical procedure. Although

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<sup>57</sup> Simmons, 1979, p. 7

these cases are certainly morally significant, the consequences of consenting to authority are more far-reaching.

#### *(4) The Principle of Epistemic Equity*

The Principle of Epistemic Equity is a moral principle which is incumbent on authorities to follow. The Principle of Epistemic Equity is straightforward. It states that authorities are morally required to level the epistemic playing field between themselves and their subjects. It is motivated by the intuition that where consent is required in high stakes cases each of the parties involved must share a similar level of understanding. Where one party occupies an epistemically advantageous position over another the burden for levelling the epistemic playing field falls on the party who has the epistemic advantage. Consider an example:

Kidney: Jeff suddenly falls gravely ill. His life depends on his receiving a donor kidney. Luckily his husband George is a suitable match and can donate a kidney. When the doctors ask George if he will volunteer one of his kidneys George does not hesitate. Unbeknownst to George, however, Jeff has been planning to ask for a divorce for some time. When Jeff finds out that George will give his kidney he faces a dilemma: tell George of his plans and risk not receiving his kidney, or say nothing. Jeff opts to say nothing. George's willingness to donate a kidney does not change Jeff's plan to ask for a divorce.

In Kidney Jeff occupies an epistemically advantageous position over George. He knows that he plans to terminate the relationship, and he knows that this may influence George's decision. In order

to ensure that George is in possession of the same relevant facts Jeff should share his plans. This would facilitate epistemic equity between Jeff and George in Kidney.<sup>58</sup>

The burden for meeting The Principle of Epistemic Equity must therefore fall to authorities. Since they are in an epistemically advantageous position they must assume the burden for overcoming the Epistemic Challenge by levelling the epistemic playing field between themselves and subjects. There are numerous ways that they can accomplish this.

#### *(5) The Need for New Qualifying Conditions*

I will now attempt to set out a plausible account of how authorities can satisfy The Principle of Epistemic Equity. They do so by meeting what I shall call ‘qualifying conditions’ for consenting to authority. These qualifying conditions are qualities which must be embraced by an authority in order to make them qualified to receive the consent of their subjects. By exhibiting these qualities an authority can address the epistemic disparity between themselves and subjects. By introducing and providing a brief analysis of these qualities I intend to partially demonstrate how subjects can consent to authority in a valid way. I suggest that where authorities conduct themselves in line with these conditions they make themselves *fit* to receive the valid consent of their subjects. They qualify themselves to receive their subjects consent.<sup>59</sup>

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<sup>58</sup> While I have claimed that The Principle of Epistemic Equity comes into play where the target of potential consent is authority it does not follow that epistemic inequality cannot also come into play in ordinary scenarios.

<sup>59</sup> I will now elaborate on what I mean when I say an authority is *fit* to receive their subjects consent. Fittingness should be seen as a byproduct of the way that authorities behave. Where an authority puts its subjects in an epistemic position to provide consent that is valid their doing so makes the authority fit to receive that consent. In a sense it qualifies them to receive it. Fittingness for consent is a consequence of satisfying The Principle of Epistemic Equity by attempting to level the epistemic playing field between themselves and subjects and it is a consequence of their adopting certain practices and behaviours that go beyond the epistemic as will be shown in sections (8) and (9) below.

Consider again my claim that authorities occupy an epistemically imbalanced position over subjects. This imbalance exists because authorities possess, among other things, greater facts, information, data and resources than subjects. Authorities know the reasons and motivations behind their actions and they have the means at their disposal to turn those motivations into reality. Their subjects on the other hand possess none of these advantages — and even where subjects *do* possess some of this information it is often as limited as it is hard to come by and it rarely matches the authority's information. The continuing existence of such an epistemic imbalance means that the subject's consent will fail to meet the standard set by the revised theory of consent. For this reason I will now attempt to lay out a plausible accounting of how the informedness requirement might be met.

Is this demand realistic? Some will surely say that it is not. There is a line of thought which has run through the entire history of political thought which argues — either implicitly or explicitly — that political authorities should have an epistemic advantage of some kind over their subjects. Plato's distinction between the Producer, Auxiliary and Guardian classes in the *Republic* is, I think, the archetypal example of this line. In Plato's ideal society the Guardians — and to a lesser extent the Auxiliaries — are individuals who possess certain intellectual faculties or capabilities which distinguish them from members of the lower Producer class. Thus, members of the superior classes in Plato's ideal society are considered capable of making decisions which affect the community as a whole, on any issue they deem as essential to the good of the society. Of course, Plato's is an idealised story and has no bearing on the real world. However, the line of thought introduced in the *Republic* has persisted, I think, in one form or another ever since.

Admittedly this is a rather bleak prognosis. It is therefore necessary to determine what *qualifiers* or qualifying conditions make one's consenting to authority valid. The solution lies in shifting the burden from consenters to authorities. This is the only way to right the epistemic imbalance

between subjects and authorities. And, only authorities can facilitate this process and clear the way for equity between themselves and subjects.

*(6) The Argument for Satisfying The Principle of Epistemic Equity*

In order to bridge the epistemic gap between subjects and themselves authorities must attempt to satisfy The Principle of Epistemic Equity. Where authorities make a genuine attempt to satisfy The Principle their subjects are put in a greater position to give suitably informed consent. Where The Principle *is* satisfied subjects can — and should — give consent because they are suitably informed. In order to satisfy The Principle of Epistemic Equity, authorities must make themselves, their motives and their workings known. Doing so allows them to bypass the problem raised by the Epistemic Challenge and therefore enables their subjects to give valid consent to them. Satisfying The Principle involves displaying adopting certain qualities. I suggest that these qualities are: (i) integrity, (ii) transparency, (iii) truthfulness and (iv) correct representation.<sup>60</sup> Where these qualities are adopted the epistemic disparity between subjects and authorities can be said to lessen to a suitable degree and that subjects can then give valid consent, because subjects can be considered suitably informed. Making this change — meeting The Principle of Epistemic Equity — is an important step towards achieving epistemic *equity* between authorities and subjects. The purpose of epistemic equity is to ensure that the informedness requirement is satisfied. But, where an authority does not attempt to meet the informedness requirement their subjects cannot be suitably informed, therefore they cannot validly consent.

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<sup>60</sup> This is not intended to be an exhaustive list. There may be other qualities that can go towards satisfying The Principle of Epistemic Equity. In presenting (i)-(iv) I am suggesting qualities which, to my mind, are best suited to satisfying The Principle.

(i) *Integrity*

In order to partially comply with The Principle of Epistemic Equity an authority must act with integrity towards its own subjects and towards other nations and peoples. Most discussions on integrity focus on the integrity of individuals. That is because integrity makes sense as a personal quality. For example, Raz's analysis of personal integrity in *The Morality of Freedom* sees integrity as almost a personal virtue. Raz writes that where a person has integrity, he 'is loyal to his commitments.'<sup>61</sup>

Suppose a person of great personal integrity is promoted to some high public office, or that they are elected to power and are therefore in a position to lead their government. We may reasonably expect that person to lead with integrity; however, if the department that they are promoted to or the government that they are elected to lead does not prioritise principles of integrity then their personal integrity will likely have little-to-no influence on the behaviour of the department, or of the government they lead. Rather, the person of great integrity may instead find that their personal integrity is considered a weakness by those around them. They may find that their integrity, rather than being a benefit, is a hinderance.

Susan Babbit has alluded to this in her work on personal integrity. On Babbit's view a need exists for establishing a morally robust account of personal integrity since this bears directly on the integrity of the political institutions that surround us. This involves recognising that many existing social structures:

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<sup>61</sup> Raz, 1986, p. 355

‘...are of the wrong sort altogether for some individuals to be able to pursue personal integrity, and that questions about the moral nature of society often need to be asked first before questions about personal integrity can properly be raised.’<sup>62</sup>

In other words, in order for individuals to pursue *individual integrity* moral questions about the integrity of political institutions must first be raised. Babbitt thinks that the answer to questions about the integrity of political institutions will inevitably bear upon ‘...what kind of society it is’<sup>63</sup> that we are living in. These questions must be directed towards authorities in the first instance because the character of political authority impacts the character of society and by extension its members. Thus, according to Babbitt, the character of society is a reflection of the character of its authorities.

What does authoritative integrity entail? According to Huberts integrity of this kind does not concern everything in politics. Integrity of this kind specifically concerns ‘behaviour, process, and procedure (in a broad sense).’<sup>64</sup> That is, behaviour, processes and procedures of authoritative institutions, not of individuals. Authoritative integrity is therefore concerned with the way that the authority conducts itself. In order to have integrity of this sort the authority must ensure that their conduct is morally upright and consistent — in their dealings with their own subjects, as well as when dealing with other nations and peoples.. Consider an example:

Oil Shortage: There is an oil shortage in X. The government in X can procure oil from neighbouring country Y since Y is oil rich. X would not ordinarily seek assistance from Y, but the situation is becoming dire. The government of Y agree to supply oil on one condition: X must

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<sup>62</sup> Susan Babbitt, 1997, ‘Personal Integrity, Politics and Moral Imagination,’ in Samantha Brennan, Tracy Isaacs, and Michael Milde (eds.), *A Question of Values: New Canadian Perspectives on Ethics and Political Philosophy*, Amsterdam and Atlanta: Rodopi, pp. 107–31, p. 118

<sup>63</sup> Babbitt, 1997, p. 118

<sup>64</sup> Leo. C. Huberts, 2018, ‘Integrity: What it is and Why it is Important’, in *Public Integrity*, 20: Sup. 1, pp. 18-32, p. 20

supply chemical weapons to be used against some regionally centralised minority group in Y. If X is to act with integrity they cannot agree to these terms. By agreeing to Y's conditions X would enter a relation of the wrong sort altogether. By agreeing to Y's conditions X would surely sacrifice their integrity.

An authority pursuing legitimacy should attempt to avoid relations of the wrong sort. Having integrity as an authority involves ensuring that their conduct is morally upright and consistent — in their dealings with their own subjects, as well as in dealings with other nations and peoples. This would be a good start towards meeting the integrity requirement. Satisfying the integrity requirement would partially facilitate meeting the informedness requirement, because although the informedness requirement is primarily about practical knowledge — it is concerned with knowledge of what the authority does and how they do it — it must be seen to have a moral dimension too. This means that subjects must know how political authorities conduct themselves, but also they must know that they conduct themselves in the right way: with integrity.

### *(ii) Transparency*

In order to give consent that is suitably informed authorities must be trustworthy and being trustworthy involves being transparent. How can individuals come to understand society in the correct way if access to pertinent information — specifically information which authorities use for policy making decisions, etc — remains unavailable to them? An authority which acts in this way is not transparent. A lack of transparency bolsters the claims made by the Epistemic Challenge. Where an authority does not foster a transparent atmosphere between itself and its subjects, its subjects cannot be suitably informed. In order for A to suitably inform B in the correct way all salient details must be made available to B. If A hides any details from B, or deliberately fails to give B all of the salient details, B cannot be suitably informed in this case. For the same reason an authority cannot

satisfy the informedness requirement if they withhold information from their subjects. The requirement for transparency should therefore be seen to impact on the way that the authority-subject relationship develops. Transparency could also be called ‘openness.’ Birkinshaw stresses that transparency and openness are ‘widely applauded as remedies for the deficiencies and operations of government where government claims to be democratic but where it falls short of its rhetoric.’<sup>65</sup> The Epistemic Challenge draws attention to the epistemic deficit between authorities and subjects, but a government which acts transparently would certainly begin the process of remedying the Epistemic Challenge. Clearly I am largely in agreement with Birkinshaw on this point. Where authorities operate and make decisions that impact on the lives of subjects — even in a small way — it is, I think, necessary that subjects should have access to pertinent information regarding these decisions.

Because I Say So: Many children have heard ‘because I say so!’ in response to asking a parent ‘why?’ Suppose that Ava’s mother tells her to vacuum the living room and the downstairs hallway. ‘Why?! Why do I have to?’ Ava asks. ‘Because I say so, that’s why! Now do it!’ snaps her mother. It is likely that in this situation Ava will begrudge her mother for asking her to vacuum the living room and downstairs hallway.

Because I Say So 2: Suppose that instead of replying ‘Because I said so, that’s why!’ Ava’s mother responds ‘Because Grandma is coming, and I want the house to be presentable for her and I have a couple of other tasks that I need to finish before she gets here. If you vacuum you would be doing me a huge favour.’ I imagine that in Because I Say So 2 Ava would be much more cooperative than in Because I Say So because her mother has been transparent regarding her reasons for asking Ava to vacuum.

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<sup>65</sup> Patrick Birkinshaw, 2006, ‘Transparency as a Human Right’ in Christopher Hood & David Heald, (eds.), *Transparency: The Key to Better Governance?*, Oxford: Oxford University Press, p. 49

It is often claimed that having authority entails a right to privacy, a right to keep ‘sensitive’ information *classified*. This so-called right is an ancestor of the line of thought introduced in Plato’s *Republic*, and it is often justified by making reference to concerns over national security. These arguments claim that state authorities will be less effective if they cannot act privately. And of course, there may be certain instances where there is some limited right to privacy and authorities can point to these where appropriate. However, these should be considered outlier cases, not the norm. A further problem is that authoritative rights to privacy are often interpreted as extending beyond issues of national security. Authorities are predisposed to claim that certain facts *must* be withheld from subjects because, generally speaking, subjects lack the requisite capacity to be in possession of sensitive information, or perhaps that it is unnecessary for them to be made aware of certain details or facts, because these are not relevant to them. Adopting attitudes of this sort is a serious threat to legitimacy. In order to be fit for legitimacy and indeed to maintain legitimacy an authority must prioritise transparency. Prioritising transparency involves at the very least: (i) making information accessible, (ii) ensuring that where subjects want information they know where to find it, and (iii) ensuring that access to that information is not restricted.

### (iii) Truthfulness

In order to meet The Principle of Epistemic Equity an authority must tell the truth. They must be truthful. There is no way to be epistemically equitable without fidelity to truth. There are, I think, two central elements involved in telling the truth. Bernard Williams identified these in his late work

*Truth and Truthfulness* as ‘Accuracy’ and ‘Sincerity’. These are, according to Williams ‘the two basic virtues of truth.’<sup>66</sup> I will now say a little more about each of these elements.

Accuracy directly relates to truthfulness because where a person is accurate they share correct information with those around them. According to Fricker, ‘whether or not one is Accurate in what one reports to fellow inquirers depends, for instance, upon how hard one tries, how tenacious one is in getting past mere appearances, how much care one takes, and on many other aspects of epistemic conduct.’<sup>67</sup> Similarly an authority is accurate when they make a concerted effort to make themselves, their motives and their machinations known to subjects without withholding any details. Here tenacity is essential, for the temptation to withhold information, or to share only some facts and not others will undoubtedly be strong.

The second element of truthfulness is sincerity. According to Williams, ‘Sincerity basically involves... a disposition to come out with what one believes.’<sup>68</sup> Of course Williams speaks here of sincerity as a virtue of individuals, but we are concerned with sincerity as a virtue of institutions. In order for an authority to be sincere they must share correct information and not attempt to ‘spin’ it in a certain way. In other words, they must share the facts as they are and must not attempt to cast them in a more favourable light. Sincerity involves sharing facts as facts. There can be no agenda at work other than the agenda of ensuring epistemic equity.

Where an authority is committed to truthfulness — that it, to relaying information in an accurate and sincere fashion they partially satisfy The Principle of Epistemic Equity.

#### *(iv) Correct Representation*

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<sup>66</sup> Bernard Williams, 2003, *Truth and Truthfulness: An Essay in Genealogy*, Princeton: Princeton University Press, p. 44

<sup>67</sup> Miranda Fricker, 2009, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford: Oxford University Press, p. 111

<sup>68</sup> Williams, 2003, p. 45

In Chapter 2. I argued that the model of consent as democratic participation fails to best the Epistemic Challenge. I argued that the reason for this is that though a party or individual may claim to have your interests in mind when they run for office there is no guarantee that they will actually keep their promises, pledges or fulfil their manifesto. I argued that these are regularly tossed aside in favour of alternative legislative agendas and priorities that often were not advertised or alluded to during the run-up to the vote or election. If an authority has no intention of representing their subjects after the manner they originally claimed then they cannot satisfy The Principle of Epistemic Equity. Therefore I argue that in order to further facilitate epistemic equity authorities ought to adopt a policy of correct representation. Or, put another way, authorities should do what they say. They should correctly represent themselves, their intentions and — if they attain office — they should thereafter represent subjects in the way they claimed they would. They cannot change course once they have secured victory. To do so would betray their subjects. They would have failed to correctly represent themselves and they would fail to correctly represent their subjects if they did.

*(6. 1.) The Principle of Epistemic Equity and What Comes Next*

Overcoming the Epistemic Challenge is the greatest test that a consent theory of legitimacy faces. I have attempted to show that an authority which conducts itself in line with The Principle of Epistemic Equity lays the groundwork for overcoming the Epistemic Challenge. By meeting The Principle authorities satisfy the informedness requirement thereby making it possible for subjects to give their valid consent. My focus on the epistemic conditions that an authority must facilitate in order to enable consenting is what separates my revised theory of consent from other consent theories. The revised theory of consent would be sufficient for legitimacy.

I have argued throughout this work that informedness is a necessary condition for legitimacy-by-consent. But is informedness all that is required? It is not. Although I have primarily focused on an

authority's commitment to epistemic equity there are, I think, other factors that must be considered. In what remains of this chapter I will argue that a wider commitment to equity is necessary for legitimacy.

### (7) Equity

The earliest discussion of equity in Western philosophy comes from Ancient Greece and is found in Plato's *Definitions* where *ἐπιείχεια* (*epieikeia*) is defined as 'ceding one's rights and advantages;' and 'the good discipline of a rational soul in respect of what is admirable and contemptible.'<sup>69</sup>

Nussbaum, following Plato has taken the view that *epieikeia* or equity is a form of 'flexible situational judgment' and that it is contrasted with 'the exceptionless [*sic*] and inflexible mandates of law or rule.'<sup>70</sup> Discussion of the concept of *epieikeia*, or equity, is also found in Aristotle's *Nicomachean Ethics* where Aristotle, discussing his concept of justice, considers the role that equity plays. According to Nussbaum, in Aristotle's view equity 'may be regarded as a "correcting" and "completing" of legal justice.'<sup>71</sup> In other words, for Aristotle, equity brings balance where imbalances persist.<sup>72</sup> Obviously Plato and Aristotle were concerned with equity from the standpoint of legal justice since equity was viewed by the ancients as bringing balance and fairness to the retributive tendency of legal systems. There is however another sense of equity worth considering. A sense of equity that, in my view, is essential in a theory of legitimacy. Equity is the solution to the

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<sup>69</sup> *Definitions 412b* in John M. Cooper (ed.), 1997, *Plato: Complete Works*, Indianapolis/Cambridge: Hackett Publishing Company, p. 1680

<sup>70</sup> Martha Nussbaum, 1993 'Equity and Mercy', in *Philosophy & Public Affairs*, Spring, 1993, Vol. 22, No. 2 (Spring, 1993), pp. 83- 125, p. 87

<sup>71</sup> Nussbaum, 1993, p. 93

<sup>72</sup> Aristotle, *EN 1137b10 -12* 'Hence the same thing is just and decent; while both are excellent, what is decent is superior.' (In the Hackett edition of the *Nicomachean Ethics* Terence Irwin translates 'equitable' as 'decent.' I will however continue to follow Nussbaum and will use 'equity/equitable' in the place of decent since equity is, I think, a more fitting translation).

epistemic imbalance that presents the biggest challenge to the viability of legitimacy. Equity between an authority and its subjects would put the Epistemic Challenge out of action.

Resolving the epistemic imbalance certainly involves requiring an authority to act fairly towards its subjects. However, strictly speaking equity is not just fairness in the ordinary sense of the word. ‘Fairness’ is not a precise enough descriptor. For one thing *equality* is often seen as a way of achieving fairness, but equality, while admirable, is often a flawed approach to solving moral problems. To begin with, fundamentally there can be no equality between authorities and subjects. The fact that the authority-subject relationship is definitionally unequal makes equality between the two impossible. The dynamic at work between authorities and subjects is definitionally unequal because authority<sup>73</sup> is a top-down concept.<sup>74</sup> This means that the interplay between authorities and subject is hierarchical; authorities are at the top of the social order and subjects occupy varying classes below. In effect authorities hold all the aces while subjects are left with the suit cards. This means that equality between a political authority and its subjects is an impossibility. A legitimate authority would most certainly encourage equality *amongst* its subjects, but it cannot foster equality between itself and its subjects. Thus, authorities must facilitate equity instead.<sup>75</sup>

#### *(8) Meeting The Requirement That Consent is Given Freely*

I have previously claimed that consent must be given freely in order to be valid. I will now suggest how an authority can meet this requirement. In attempting to show how this can be so I will

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<sup>73</sup> Practical authority in particular

<sup>74</sup> This top-down dynamic is more applicable to practical authorities — particularly political authorities — and does not always hold in relation to theoretical authority.

<sup>75</sup> Even where an authority sought to encourage equality between subjects equity would be needed in order to level the playing field between the best-off and worst-off in society. Only once inequality has been curbed through equity can equality between individuals in society become a reality.

introduce a set of necessary conditions that must be met by an authority in order to further qualify them to be legitimate. I call these *Equitable Burdens*. Since consent is sufficient for legitimacy, it is necessary that authorities ensure that their subjects can consent freely. One way that they can do so is by bearing the Equitable Burdens. Where an authority accepts the existence of Equitable Burdens they ensure that consent can be given freely as a result. This involves acting in certain ways and *doing* certain things.

### *(8. 1.) The Equitable Burdens*

I argue that an authority must bear certain Equitable Burdens in order to satisfy the requirement that consent be given freely. These are: (i) respect for autonomy, (ii) avoidance of abusive conduct, (iii) neutrality and (vi) commitment to principles of justice. Equitable Burdens apply only in cases where a political authority is the target of a person's consent. I will now expand on each of the conditions in turn. An authority which accepts these Equitable Burdens also satisfies the second crucial condition for consenting: that consent is: (b) able to be given freely

#### *(i) Respect for Autonomy*

Autonomy is a pervasive concept in moral and political philosophy. R. P. Wolff has defined autonomy as 'a combination of freedom and responsibility; it is submission to laws which one has made oneself. The autonomous man, insofar as he is autonomous is not subject to the will of another.'<sup>76</sup> For Wolff, the autonomous person may comply with a directive issued by an authority, but not because he has too, or because he has been told to do so. Rather the autonomous person does it because they so choose. In this sense, according to Wolff autonomous persons are 'in the

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<sup>76</sup> Wolff, 1970, p. 14

political sense of the word, *free*.<sup>77</sup> Following Wolff I take autonomy to describe: being free of external pressure or coercion and therefore able to live in accordance with one's desires and preferences — insofar as these don't infringe on the ability of others to do the same.

Often, however, the autonomy of persons is not respected by authorities. This is because authorities have a tendency to use coercion as the means of enforcing compliance and to extend powers they already hold. An authority which employs coercive means (whether successfully or unsuccessfully) cannot be a respecter of autonomy. As William Godwin pointed out, 'Coercion... annihilates the understanding of the subject upon whom it is exercised...'<sup>78</sup>

Of course, legitimate authorities will regularly operate in a way that not all subjects agree with. This is an inevitable consequence of living in a pluralistic society, as Beran has pointed out.<sup>79</sup> However, this fact does not necessarily clash with the *respect for autonomy* requirement. When an authority is legitimate they will no longer have a need to resort to coercive measures since, as was shown in Chapter 1., subjects are in a strong sense obligated to obey, even where they disagree with the content of the instruction. So, while some may disagree with the content of certain directives issued by the authority, these will not necessarily infringe on the autonomy of subjects — as long as the content of the directive is broadly in line with the permissions granted by their subjects consent. Where the directive meets these conditions — and in order for the authority to maintain legitimacy all directives would need to remain within the boundaries set by the consent of its subjects — subjects have an obligation — a moral reason — to comply. The presence of this obligation to comply necessitates that subjects ought to comply. For that reason authorities need not resort to the use of coercion. In this way authorities continue to respect the autonomy of their subjects by not *forcing* compliance, but they can still expect compliance since subjects have obligated themselves

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<sup>77</sup> Wolff, 1970, p. 14

<sup>78</sup> William Godwin, [1793]/1985, *An Enquiry Concerning Political Justice*, London: Penguin, p. 639

<sup>79</sup> Beran, 1987, p. 66

to comply through consenting. Where an authority respects the autonomy of subjects and avoids the use of coercion it can be said that it partially satisfies the requirement that consent be given freely.

*(ii) Avoidance of Abusive Conduct*

In a sense this principle speaks for itself. An authority which acts in an abusive way towards its subjects acts unjustly towards them. An unjust authority is necessarily non-legitimate and therefore cannot make claims to legitimacy. An authority which avoids abusive conduct — and who makes this fact known — makes it possible that subjects consent can be given freely. ‘Abusive’ here describes actions, policies and practices which go beyond the mildly coercive.<sup>80</sup> I have in mind here authorities who actively persecute some or all of their subjects as well as actions by authorities towards subjects that are harshly punitive or retributive. It is reasonable to assume that an authority that acted in such a way would demand its subjects consent.<sup>81</sup> By contrast those authorities who avoid abusive conduct are not legitimate simply because they do so. Avoiding abusive conduct is therefore a necessary condition for legitimacy.

*(iii) Neutrality*

In *Anarchy, State and Utopia* Nozick declares: ‘A state or government [an authority] that claims his [its subjects’] allegiance (as other individuals do not) therefore scrupulously must be neutral between its citizens.’<sup>82</sup> And Raz has written that governmental action ‘should be neutral regarding

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<sup>80</sup> Of course some coercive acts will be classed as abusive conduct. However, it is not fair to say that all coercive acts are abusive. All abusive acts are coercive, but not all coercive acts constitute abuse.

<sup>81</sup> They could do so by, for example, running an election in which there is only one candidate and participation in the process is made mandatory.

<sup>82</sup> Robert Nozick, 1974, *Anarchy, State and Utopia*, New York: Basic Books, p. 33

ideals of the good life.’<sup>83</sup> In a pluralistic society people are entitled to hold different — and often competing — beliefs. People are expected to tolerate each other’s beliefs, even when the views that other hold don't match their own. But what of authorities in these societies? What are their responsibilities? Rawls has pointed out that a traditional theme in liberal political thought is that authorities ‘must not favour any comprehensive doctrines and their associated conception of the good.’<sup>84</sup> Fundamentally authorities must remain neutral on conceptions of the good. This means that authorities should not aim to promote a particular conception of the good, even where there is a consensus in society in support of its doing so. Richard Kraut believes that the principle of authoritative neutrality argues that authorities ‘...should leave individual citizens free to make up their minds about which ends they will pursue, because this is a matter about which the government has no special competence...’ therefore authorities must ‘accept a certain division of labor regarding ends and means.’<sup>85</sup>

Of course it may be argued against that principle of neutrality that where an authority supports a particular conception of the good its subjects may be more inclined towards consenting to them where they share that conception with the authority. While this arrangement would certainly make consenting *easier* it would, I think, provide only a limited justification for consenting. This may seem counterintuitive. One might wonder: if consent is a source of legitimacy and the consent of all members of a society can be secured through favouring a particular conception of the good would this be only a limited justification for legitimacy? I argue the this would create only a limited legitimacy because its subject’s consent could arguably be revoked as soon as the authority deviated even slightly from what subjects consider to be right or ‘good.’ This would cheapen consent and

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<sup>83</sup> Raz, 1986, p. 110

<sup>84</sup> John Rawls, 1993, *Political Liberalism*, New York: Columbia University Press, p. 190

<sup>85</sup> Richard Kind, ‘Politics, Neutrality, and the Good’, in *Social Philosophy and Policy*, Volume 16, Issue 1, Winter 1999, pp. 315 - 332, p. 316

cheapen legitimacy. Although the consent given could be called valid if it met the conditions we have discussed in this chapter valid consent should not be so easy to revoke once given.

Consent is more valuable, more moral and valid where an authority is neutral regarding conceptions of the good. However, a dedication to neutrality does not handicap authorities from:

- (i) operating in a way that guarantees the protection of certain basic civil liberties and rights and ensuring that a just legal system is enforced — a system that is itself neutral towards individuals. This system should prohibit the most serious crimes such as rape, theft, murder, fraud, and other crimes of that nature;

and,

- (ii) promoting the general welfare of their subjects by providing them with key resources that they will need in order to lead autonomous, worthwhile lives or by assisting them in acquiring these resources for themselves.

Inevitably there will be widespread disagreement on all manner of issues, moral or otherwise in any pluralistic political society. And this fact certainly throws up challenges to a theory of legitimacy by consent. A legitimate authority will need to account for this fact. The Equitable Burden of neutrality enables an authority to deal with disagreement in pluralistic political societies. The inclusion of a requirement for neutrality in the face of widespread disagreement within society ensures that subjects can give consent freely since no one conception of the good is prioritised over another. Since there will be no favouritism all members of society can consent freely knowing that their consent will not disadvantage them thereafter. Where a legitimate authority maintains a commitment to neutrality it shall, I think, be capable of maintaining its legitimacy as long as it acts

impartially with respect to the content of such disagreements — and of course, where it meets the other necessary conditions of legitimacy we have discussed.

*(iv) Commitment to Principles of Justice.<sup>86</sup>*

In a pluralistic society individuals must be just toward one another and a legitimate authority must be committed to principles of justice. Being committed to principles of justice is conceptually related to the *neutrality condition* (discussed above) in that in order to be committed to these principles an authority must be neutral regarding what is ‘right’ or what is good. As Rawls points out ‘Justice is not to be confused with an all-inclusive vision of a good society; it is only one part of any such conception.’<sup>87</sup> Through a commitment to principles of justice authorities signal that they have the best interest of their subjects as their guiding principle, and this contributes towards meeting the conditions of legitimacy. Assuming that they are rational where subjects know that authorities are committed to meeting principles of justice in society they are in a stronger position to provide consent which meets the requirement that consent be given freely.

On the surface it may seem that there is a contradiction between the neutrality requirement and the requirement that authorities be committed to principles of justice. That it is a mistake. As Nozick has pointed out:

‘Not every enforcement of a prohibition which differentially benefits people makes the state non-neutral. Suppose some men are rapists . . . Would a prohibition against rape be non-neutral? It would, by hypothesis, differentially benefit people; but for potential rapists to complain that the

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<sup>86</sup> I will not argue for a particular theory of justice in this paper. The revised consent theory of legitimacy can certainly be adapted in order to furnish a particular theory of justice, or to argue for a new/revised theory of justice. However, doing so is beyond the scope of this essay.

<sup>87</sup> Rawls, 1958, ‘Justice as Fairness’, in *The Philosophical Review*, Apr., 1958, Vol. 67, No. 2, pp. 164-194, p. 165

prohibition was non-neutral between the sexes . . . would be absurd. There is an independent reason for prohibiting rape . . . That a prohibition thus independently justifiable works out to affect different people differently is no reason to condemn it as non-neutral, provided it was instituted or continues for (something like) the reasons which justify it . . . similarly with the prohibitions and enforcements of the minimal state .'<sup>88</sup>

This applies, I think, not only to prohibitions that authorities might impose, but also to policies or practices that legitimate authorities might institute.

Hunger: Some children go to bed at night extremely hungry, others do not. The government decides to introduce a meals programme which attempts to stop children going to be hungry each night. This programme would feed those children in need but would not provide for children who are already provided for. Could a government be seen as non-neutral if it introduced such a programme? I think not. Surely all right thinking people are against allowing children to go hungry. The government could not be condemned for introducing the meals programme since doing so does not violate the neutrality principle. Therefore there is no contradiction between conditions (iii) and (iv).

#### *(10) A Partial Conclusion*

I acknowledge that meeting The Principle of Epistemic Equity is difficult. Similarly, meeting the further conditions for legitimacy — what I have called Equitable Burdens — is highly demanding. The revised consent theory of legitimacy that I have argued for in this chapter places a great deal of expectation on authorities. But, the difficulty of meeting the challenge does not override the

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<sup>88</sup> Nozick, 1974, pp. 272-3

veracity of the argument. The argument must not be viewed as an exercise in utopian thinking. The qualifying conditions that the theory introduces and outlines do not constitute an idealised set of conditions — rather these conditions are practical and they are entirely achievable. In Chapter 2. I argued that The Epistemic Challenge was a defeating condition which PCT's cannot meet. I believe that the existence of epistemic equity between subjects and authorities would be a defeating condition for the Epistemic Challenge.

## Chapter 4. Raz, Authority and the Service Conception

### (1) Introduction

In Chapter 2. I considered the failings of prior versions of consent theory (PCT's) and in Chapter 3. I laid out my own, more sophisticated, revised version of consent theory. I then argued for a theory of legitimacy which relies on this revised theory of consent and showed how authorities can make consenting possible (through meeting the The Principle of Epistemic Equity and bearing Equitable Burdens). I will now turn my attention to a competing theory of legitimacy, namely Joseph Raz's 'service conception' of authority. In contemporary political philosophy Raz's theory is considered to be the most influential and credible theory of legitimacy. If it doesn't work we need to go another way. In my view Raz's theory is deficient and for that reason I will argue that we must look back — to consent theory — in order to go forward.

In *The Morality of Freedom* Raz introduced a theory of authority and legitimacy which he called the 'service conception' of authority. The service conception is generally viewed as a robust theory of legitimacy and is held in high regard among political philosophers. Since its introduction in 1986, Raz has returned to the service conception in a number of later works, especially in his 2006 essay 'The Problem of Authority: Revisiting the Service Conception.'<sup>89</sup> which is both his most recent and his most thoroughgoing attempt to refine the argument of the service conception and to bolster it against its critics and their critiques. Through the service conception Raz attempts to identify those conditions which are necessary and sufficient for justifying how one agent can legitimately hold authority over another agent or over groups of agents. The service conception is Raz's attempt to cut through the theoretical chatter and to get at the heart of those most central

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<sup>89</sup> Joseph Raz, 2006, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006): pp. 1003 – 1044.

issues in political (and moral) philosophy, namely legitimacy and authority. In brief, the service conception states that authority is only justified when it provides the best means (reasons) for a given subject to conform to those reasons for action that she actually (already) has.

Admittedly the service conception is both robust and challenging, especially following Raz's reconsideration and reevaluation of the theory in his 2006 paper. The argument of the service conception undoubtedly presents a compelling challenge to other theories of authority and legitimacy, my own included. In this Chapter I will present a detailed introduction to Raz's work on legitimacy and authority before setting out an interpretation on the finer points and details of Raz's arguments, the sum of which constitute the service conception. This will involve walking the reader through the theory in some detail. I will begin by discussing Raz's work on freedom, especially how freedom relates to authority. I then introduce the service conception and outline its basic premise and purpose. Thereafter I discuss the service conception's two conceptual motivators, namely (i) what is the nature of authority and (ii) why having authority means possessing a *right* to rule. I also describe Raz's view on the difference between theoretical and practical authority. From there I outline the argumentative methodology that Raz utilises to make the case for the service conception. Finally, I introduce what Raz takes to be a key consequence of the service conception. This discussion lays the groundwork for a detailed critique of Raz's theory in Chapter. 5.

## *(2) Raz on Freedom and How Freedom Relates to Authority*

I begin my examination of Raz by briefly explaining my take on Raz's views on freedom and how freedom relates to authority across his body of work.<sup>90</sup> I begin in this way because — in my opinion — in order to fully understand the purpose of the service conception and in order to adequately outline its argumentative contours it is necessary to explain why Raz believes that one individual

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<sup>90</sup> These arguments are spread across *The Morality of Freedom* and several of Raz's later essays.

can (legitimately) be in a position of authority over another. Further, I think that if Raz's goal is to successfully argue that some individual A can possess authority over individual B he must establish (i) that there are demonstrable limits to the scope of individual freedom, and (ii) that since there are such limits to individual freedom then individuals can come to be under the authority of another.<sup>91</sup> In that spirit Raz begins his exegesis of the concept of authority in *The Morality of Freedom* by stating that a 'doctrine of freedom' is 'part of the doctrine of authority.'<sup>92</sup> Freedom, says Raz, is often viewed as a distinct value especially by political philosophers working in the liberal tradition. Usually the concept of freedom is considered to be fundamental by such writers. However according to Raz while it may be the case that freedom is a 'distinct' value, it is nevertheless a value 'which is intimately intertwined with others, and cannot exist by itself.'<sup>93</sup> Raz is critical of individualist political theories and of credos of limited government, which often regard the very existence of government as being a threat to liberty. Raz is willing to concede that government can indeed be a hinderance to individual liberty and that governments can pose a direct threat to the individual. However he tells us that he is more interested in other conceptions of government, especially those conceptualisations of government which view the role of government as being about enabling their subjects to 'enjoy greater liberty than they otherwise would.' i.e., greater than the freedom they might enjoy in some hypothetical world without government.<sup>94</sup> For Raz freedom — here understood as the freedom 'to perform certain actions in certain circumstances' — is ultimately valuable for individuals 'only if it serves *other* values.'<sup>95</sup> Thus, it seems that there is no intrinsic value in freedom for its own sake, or at best it could be argued that the intrinsic value of

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<sup>91</sup> Raz believes that authority entails legitimacy. For that reason I will operate under this same assumption during my discussion of his work unless otherwise stated.

<sup>92</sup> Raz, 1986, p. 23

<sup>93</sup> Raz, 1986, p. 19

<sup>94</sup> Raz, 1986, p. 18

<sup>95</sup> Raz, 1986, p. 17 (my emphasis added in italics)

freedom is severely limited. Indeed for Raz freedom is valuable if, and only if, it enables one to take advantage of other valuable capacities.

An example should illustrate this point clearly. Consider the freedom that individuals have to speak openly and freely in Western liberal democratic societies. Is the individual's freedom to speak openly and without reservation in a given situation valuable in itself, or is this freedom valuable only in so far as it serves other values? If Raz is correct, and most will agree that so far he is, then freedom of speech is valuable only if speaking freely opens up an individual's access to other valuable situations, scenarios or opportunities which have the potential for bearing out valuable outcomes. Suppose further that some person or persons use this freedom to speak freely with the intent to decry governmental malfeasance or ineptitude. Now, the simple act of expressing one's frustration might be cathartic but beyond the catharsis of doing so, actually speaking out in this context might be of some (albeit limited) value to the individual. Its value may be further limited given certain conditions, i.e., if speaking out is all people can do. However, if freedom of expression is coupled with additional freedoms such as (among other things) the freedom to engage in dialogue with others, the freedom to assemble and discuss, to propose alternative courses of action and alternative solutions, with the freedom to campaign against government and to agitate for alternative solutions, then certainly the freedom to speak freely is more valuable as a consequence. It is certainly valuable according to Raz's account. Seen in this way I think it is clear that many freedoms (freedom of speech being just one example) can only be *truly* valuable as a means to accessing other valuable states of affairs or outcomes. Many freedoms are only instrumentally valuable. Raz's assessment is therefore quite reasonable. If Raz is correct in his belief that the value of freedom is dependent on the existence of other values that having freedom serves, then freedom in and of itself is not valuable.

At this early stage in his analysis Raz is primarily interested in critiquing individualist (primarily liberal) theories which declare the boundlessness of freedom. He begins after this fashion because

in doing so he creates the conceptual space for a rich discussion of authority and its scope. If freedom is not intrinsically valuable then there is nothing inherently wrong so to speak in the existence and exercise of authority. In contrast to individualist theories Raz holds that since freedom is so limited in its scope it follows that there exists the reasonable possibility that individuals can possess authority over other individuals. Having established this important initial detail we can now consider the service conception.

### *(3) Introducing the Service Conception*

The service conception is an attempt to identify those conditions which are necessary and sufficient for holding authority over others. The service conception is therefore a general account of authority. Of this, and other, general accounts of authority Raz says: ‘all that one can ask of a general account of authority, [is] that it establish what it takes for there to be legitimate authority, rather than that it should show who has authority over whom and regarding what.’<sup>96</sup> The purpose of the service conception therefore is not to show who actually possesses authority in a given situation. It is often the case that we simply have to look around us, so to speak, and it is quite easy to identify who has *power*; however, establishing who has *authority* is less easy. The purpose of Raz’s service conception is therefore to state the general conditions under which people can be subject to the authority of another. If people know and are able to identify what conditions must be met in order to possess authority then they will be better placed to identify *who* has authority. To that end the service conception states that authority is only justified when it provides the best means (reasons) for a given subject to conform to the reasons for action that she actually (already) has. The service conception is made up of two constituent parts, the *normal justification thesis* and the *dependence*

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<sup>96</sup> Raz, 2006, p. 1014

*thesis* and these conditions are supported by a third thesis, namely the *pre-emption thesis*. Arguably there is also a fourth condition which could be labelled the *recognition condition*.<sup>97</sup>

### (3. 1.) Two Problems

Raz thinks that there are two problems about authority which drive the service conception. One problem is theoretical and the other is moral. The theoretical problem is: how should we understand the standing of an ‘authoritative directive’ (this is what Raz calls the product of exercising one’s right to rule). And the moral problem is: how can it be morally correct or permissible to subject one’s will over another?

According to Raz the solution to the theoretical problem is as follows: ‘if [a] directive is issued by someone who has a right to rule, then its recipients are bound to obey [that directive].’<sup>98</sup> So, the directive of an authority is ‘binding’ on those people that fall under said authority and they therefore have a duty to obey it. Y can have authority over X only if there are sufficient reasons for X to be subject to duties that Y seeks to impose on them through authoritative directives. This is so because the directives issued by an authority ‘aim to constitute reasons for their subjects and are binding on their subjects because they are so binding.’<sup>99</sup> Raz is quick to acknowledge that these facts do not tell us anything about who has authority. So far we haven’t even established ‘that anyone can ever have authority’ over others.<sup>100</sup> However, Raz thinks that one important objective has been accomplished: we can understand ‘what has to be the case if some people have authority over others.’<sup>101</sup> Raz thinks

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<sup>97</sup> I say no more on the *recognition condition* at this time, but arguing for its existence will form a significant part of my critique against the service conception in the next chapter.

<sup>98</sup> Raz, 2006, p. 1012

<sup>99</sup> Raz, 2006, p. 1012

<sup>100</sup> Raz, 2006, p. 1014

<sup>101</sup> Raz, 2006, p. 1014

that this is all that can realistically be expected of a general account of authority: that it tells us under what conditions authority can be legitimately held. Thus a general account of authority can provide a suitable answer to the theoretical problem.

As well as providing an answer to the theoretical problem, a general account of authority should also be capable of answering the moral problem (how can we reconcile the fact that individuals with autonomy can be subject to the will of another in the way in which individuals are so subjected when they fall under (are subject to) the authority of another?). Raz is of the opinion that the two key components of the service conception, the *normal justification thesis* and the *independence condition* combine to answer the moral problem.

Having shown that the service conception describes the conditions for holding authority legitimately, and having identified the two problems which precede the service conception we are left wondering: what exactly is *authority*?, and what does *having authority* involve? The service conception therefore has to satisfactorily answer two important conceptual concerns: (i) what is the nature of authority, and (ii) why having authority means possessing a *right* to rule. I will briefly consider Raz's deliberation on these conceptual issues before considering the most salient features of the service conception as Raz presents them.

### (3. 2.) *Two Conceptual Problems*

#### (3. 2. 1.) *The Nature of Authority: Theoretical and Practical Authority*

It is important to note that the service conception of authority is primarily an argument which relates to practical authority and practical authorities. Raz begins his account of general authority by providing a simple definition of the concept. 'A person is an authority' says Raz 'or has authority

only if some of his utterances are authoritative.’<sup>102</sup> Raz puts forward the following basic definition of the concept of authority over persons:

Y has authority;

Y decreed that X has to do A;

Therefore, X ought to do A.<sup>103</sup>

Raz suggests that many of the competing conceptions of authority are essentially contrasting or slightly differing interpretations of the formulation above. The inferential formulation above is most relevant to practical authorities. In order to show in the main how practical authorities operate over subjects Raz must differentiate practical authority from *theoretical* authority and practical authorities from theoretical authorities.

### (3. 2. 2.) *Theoretical Authority*

In *The Morality of Freedom* Raz explains that theoretical authorities often function successfully thanks to the ‘recognition condition.’ The recognition condition holds that if one accepts an utterance as authoritative, doing so is, in effect, accepting that the authoritative utterance is a reason to *believe* that one has a reason to act as directed. For that reason authoritative utterances are reasons for *belief*, but not strictly speaking reasons for acting. Raz’s elaboration of the difference between practical and theoretical authority in *The Morality of Freedom* is rather brief. He mainly sets out the difference between the two conceptions of authority at all in order to introduce the *no difference thesis* in a later chapter, which is then contrasted with the *normal justification thesis* later

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<sup>102</sup> Raz, 1986, p. 28

<sup>103</sup> Raz, 1986, p. 28

still. However, Raz does provide a more elaborate description of a theoretical authority in his 2006 essay on the service conception ‘The Problem of Authority.’ Here Raz explains that theoretical authorities are simply:

‘experts whose knowledge and understanding of the matter on which they are authorities is both exceptionally extensive and remarkably systematic and secure, making them reliable guides on those matters. Their word is a reason for holding certain beliefs and discarding others.’<sup>104</sup>

For Raz, a theoretical authority is therefore that authority which is capable of providing an agent with reasons for holding certain beliefs or providing reasons for abandoning certain beliefs and adopting other beliefs instead. In short theoretical authorities are capable of changing or altering a persons belief(s) and no more. The advice which theoretical authorities provide ‘does not depend on their advantageous situation relative to the matter under consideration...’ Instead they ‘derive their conclusions not from observation, which requires an advantageous position, but by inference from evidence...’<sup>105</sup> They are as Raz says, experts on a particular subject.

If I start to suffer from a toothache and decide that it is in my interest to to consult a dentist about it, I do the sensible thing when I eventually consult a dentist. When it comes to dental wellbeing a dentist is a theoretical authority. If her advice is that I brush my teeth three times a day, but I previously thought that brushing twice a day was good enough to maintain good oral hygiene then I would be wise to follow her advice. The authority that my dentist has is capable of altering my belief about how many times a day I should brush my teeth.

### *(3. 3. 3.) Practical Authority*

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<sup>104</sup> Raz, 2006, p. 1032

<sup>105</sup> Raz, 2006, p. 1033

Practical authority and practical authorities are on the other hand, ‘of a special kind.’<sup>106</sup> This is because practical authorities affect ‘what is to be done’<sup>107</sup> and are not primarily concerned (if they are concerned at all) with what is to be believed. Raz does not argue that the recognition condition actually affects the balance of reasons that persons have for complying with the utterances of legitimate authorities, these — the utterances of legitimate authorities — ‘are not themselves reasons for action, nor do they create any such reasons.’<sup>108</sup> This is why Raz thinks that practical authorities cannot rely simply on a recognition condition, as a theoretical authority can. If a practical authority *were* to rely on the recognition condition this would lead one to the conclusion that authority does not actually change people’s reasons for acting. Relying on a recognition condition would result in what Raz calls the ‘no difference thesis.’

Raz defines the no difference thesis in the following way: it ‘asserts that *the exercise of authority should make no difference to what its subjects ought to do*, for it ought to direct them to what they ought to do in any event.’<sup>109</sup> For this reason Raz thinks that it is quite possible that theoretical and practical authorities have very little in common beyond sharing the same ‘basic structure.’<sup>110</sup> Raz confirms this view more elaborately in ‘The Problem of Authority’ where he remarks, ‘It is implausible to think that what is a successful analysis of what it is to be an authority in theoretical matters makes no contribution at all to an understanding of the notion of authority, of what it is to have practical authority.’<sup>111</sup> So, while theoretical and practical authorities share some conceptual similarities, they have fundamentally different functions and create different outcomes.

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<sup>106</sup> Raz, 1986, p. 29

<sup>107</sup> Raz, 1986, p. 29

<sup>108</sup> Raz, 1986, p. 29

<sup>109</sup> Raz, 1986, p. 48 (emphasis in the original)

<sup>110</sup> Raz, 1986, p. 29

<sup>111</sup> Raz, 2006, p. 1035

Practical authority is the ability of one agent to create, through issuing authoritative directives,<sup>112</sup> reasons for acting in a certain way for others. Practical authority is ‘essentially the power to require action’<sup>113</sup> from others. A person (or institution) is a practical authority (or has practical authority) only if their authoritative utterances ‘are themselves a reason for action.’<sup>114</sup> Where theoretical authority can create new reasons for belief or for changing or reshaping one’s beliefs, authoritative utterances can instead be looked upon as being ‘content-independent’ reasons for acting.<sup>115</sup> A reason for  $\phi$ -ing will be a content-independent reason if there is no direct connection between the reason for  $\phi$ -ing and the act of  $\phi$ -ing in itself. The reason for  $\phi$ -ing is ‘in the apparently ‘extraneous’ fact that someone in authority has said so [to  $\phi$ ] and within certain limits his saying so would be reason for [performing] any number of actions...’<sup>116</sup> Considered in this way a practical authority could in theory issue a command that I (a) leave the building and walk around the perimeter a certain number of times before returning, or (b) command that I stay inside the building until otherwise directed. In either case the fact that I was directed to act in a certain way will be a content-independent reason to act. I might have preferred to stay inside, for example, or I might have preferred to leave all together; however, my preferences no longer matter, for I must do as instructed by the authority.

Raz explains that ‘orders’ and ‘commands’ are the sorts of expressions that are typical of a practical authority. Returning to an earlier example, my dentist cannot order or command me to brush my teeth three times a day. She can only make the suggestion that I do so. Raz says that only those who ‘claim authority can command.’<sup>117</sup> However, what I think he ought to say is that only

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<sup>112</sup> Or, *commands*.

<sup>113</sup> Raz, 1986, p. 38

<sup>114</sup> Raz, 1986, p. 35

<sup>115</sup> Raz, 1986, p. 35

<sup>116</sup> Raz, 1986, p. 35

<sup>117</sup> Raz, 1986, p. 37

those who claim *practical* authority can command. Further, a theoretical authority can only *request* or *suggest*; a practical authority can certainly make request but they alone can command. The command issued by a practical authority (what might be termed a ‘valid command’) is now labelled as a ‘peremptory reason.’<sup>118</sup> In other words, valid commands from an authority are thought to impose obligations on the subject to act in accordance with that specific command.

Another important difference in kind between theoretical and practical authority is that ‘the notion of *legitimate* authority is confined to practical authority.’<sup>119</sup> Raz uses the example of the expert on eighteenth-century farming methods to illustrate this point. He explains that one may be an expert on eighteenth-century farming methods, but such experts ‘cannot be *de facto* authorities or legitimate authorities on the subject.’<sup>120</sup> Further to this distinction only in matters that are practical and not theoretical ‘can we say that someone has authority, or lacks it. In theoretical matters, someone either is or is not an authority, but no one *has* authority.’<sup>121</sup> I will say no more on the distinction between theoretical and practical authority. Between *The Morality of Freedom* and ‘The Problem of Authority’ Raz is able to adequately distinguish between the two. For Raz the most important feature of being under a practical authority is that:

‘it opens a way of improving one’s conformity with reason. One achieves that by conforming to the authority’s directives, and (special circumstances apart) one can reliably conform only if one has reliable beliefs regarding who has legitimate authority, and what its directives are. If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one’s belief in its authority is haphazard, and cannot (again special circumstances apart) be reliable. Therefore, to

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<sup>118</sup> Raz, 1986, p. 37

<sup>119</sup> Raz, 2006, p. 1034 (my emphasis added)

<sup>120</sup> Raz, 2006, p. 1034 (my emphasis added)

<sup>121</sup> Raz, 2006, p. 1034 (my emphasis added)

fulfil its function, the legitimacy of an authority must be knowable to its subjects...[and if this condition is not met] there is no authority over the matter, because to exist authorities must be knowable.<sup>122</sup>

It is clear that only a practical authority (and a political authority is necessarily a practical authority) can meet the requirements of the service conception. Only a practical authority can (justifiably) provide the best means for its subject to conform to the reasons for action that they actually have. For now enough has been said about this distinction to allow us to continue to the second conceptual feature with which the service conception is concerned, the so-called 'right to rule.'

#### *(3. 3. 4.) The Right to Rule*

It has already been noted above that Raz thinks that legitimate practical authorities possess the right to be authoritative. This is the 'common view' of authority, the 'right to rule' which some individuals possess over others. 'It is common' says Raz, 'to regard authority over persons as centrally involving a right to rule,' and where that right exists it is frequently correlated with 'an obligation to obey.'<sup>123</sup> Throughout his discussion of authority Raz generally takes it for granted that political authority necessarily comes 'with a claim of legitimacy.'<sup>124</sup> That is because, as far as Raz is concerned, governments not only issue authoritative directives but in addition they also claim the *right* to issue those directives. This is a claim of legitimacy. If subjects acknowledge or recognise that their rulers are legitimate they must also recognise that their rulers have this right and are

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<sup>122</sup> Raz, 2006, pp. 1025 - 1026

<sup>123</sup> Raz, 1986, p. 23

<sup>124</sup> Raz, 1986, p. 23

legitimate.<sup>125</sup> Raz explains that, ‘Practical authorities [unlike theoretical authorities], impose duties on people. They have authority *over* people. They have normative powers over people.’<sup>126</sup> Only a practical authority is capable of changing my normative situation, even if changing my belief is beyond them.

Carrying this thought forward we can posit that practical authorities are capable of issuing commands which in themselves either (a) create new reasons which displace other pre-existing reasons that a person may have had for acting in a certain way, or for refraining from acting at all, or (b) emphasise an existing reason for action that persons may already have but do not prioritise. Raz calls reasons of this sort ‘pre-emptive reasons.’<sup>127</sup> Pre-emptive reasons are reasons which are capable of overriding most other reasons a subject may have.<sup>128</sup> As far as Raz is concerned this thesis can only be correct in the case of *legitimate* authorities. Interestingly, according to Raz *de facto* authorities assume the guise of legitimacy. According to Raz a *de facto* authority is that authority which claims legitimacy or is recognised as being legitimate by others.<sup>129</sup> While I would be inclined to call such authorities *de jure*, Raz does appraise the differences in kind between *de facto* and *de jure* authority. In either case, Raz would say that such authorities have a ‘right to rule’ on these bases.

#### (4) Tackling the Service Conception

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<sup>125</sup> To what extent subjects must ‘understand’ this right is never made clear. It is, as I see it, a profound weakness in Raz’s overall theory and one which I intend to tackle in a later section.

<sup>126</sup> Raz, 2006, p. 1035 (my emphasis added)

<sup>127</sup> Raz, 1986, p. 42

<sup>128</sup> I will say more on pre-emptive reasons in Section 1. 4. 4.

<sup>129</sup> Presumably Raz means that this recognition will come from other practical authorities as well as by subjects under those authorities.

As we have already noted the purpose of the service conception is to set out the necessary and sufficient conditions for when an individual can have authority over another. The service conception is simply ‘an account of authority, which includes an exploration of what it is to have authority, to be subject to authority, when one has authority or is subject to it, and like questions.’<sup>130</sup> Raz sets out the main theses of the service conception in the following way:

‘The suggestion of the service conception is...First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not...[and secondly]...that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority.’<sup>131</sup>

For Raz these facts support the view that in virtue of their membership in a political community citizens have ‘much more’ and ‘much less’ than a simple obligation to obey the law of the political community.<sup>132</sup> They are *more* obligated in that they owe additional duties, such as the duty to be good citizens and promote the good for their fellow citizens and *less* obligated because often the laws of the political community have little impact on the day-to-day lives of those people who are members of that political community. Again, what we must bear in mind here is that the service conception simply aims to show that the purpose of authority is to help subjects conform better to reason. Having stressed the point again it is now time to look at the first part of the service conception, the *normal justification thesis*.

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<sup>130</sup> Raz, 2006, p. 1006

<sup>131</sup> Raz, 2006, p. 1014

<sup>132</sup> Raz, 2006, p. 1014

(4. 1.) *The Normal Justification Thesis*

The *normal justification thesis* is the first constituent part of Raz's argument which, taken as a whole, comprises the service conception of authority. Raz describes the *normal justification thesis* in the following way:

'The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.'<sup>133</sup>

According to the *normal justification thesis* if Y is to be considered an authority Y must be capable of showing that X (the supposed subject) is more likely to comply with reasons for  $\phi$ -ing (again, reasons which X already has) if X accepts that Y's directives are authoritatively binding, and as a consequence she follows Y's instruction, rather than following those reasons which already directly apply to her. Raz's example is that of the case of a person whose reason for following his friend's advice is that the friend 'will be hurt if he does not [accept his advice].'<sup>134</sup> While this may be a perfectly acceptable reason for accepting advice, it is certainly not the 'normal reason' for accepting advice. Raz thinks that while it is regrettable that the friend will be hurt if his advice is not followed, after reasonable consideration of the advice, it is most likely the case that the friend did not intend his potentially hurt feelings to be the prime motivating factor for accepting his advice. It is quite likely that the friend will be 'doubly hurt' if he discovers that his advice was

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<sup>133</sup> Joseph Raz, 1994, *Ethics in The Public Domain: Essays in the Morality of Law and Politics*, Oxford: Oxford University Press, p. 214

<sup>134</sup> Raz, 1986, p. 53

accepted for that reason.<sup>135</sup> No, the normal reason for accepting a piece of advice is that it is good advice.<sup>136</sup> In this way the *normal justification thesis* resembles the reason we often accept advice; because it is good advice and we do well to follow it. For Raz, since it is often the case that our acceptance of the authority of another or of some institution is one of the ways we use to reinforce or define our own identities as members of a group, or of a nation this presents as further evidence of the validity of the *normal justification thesis*.<sup>137</sup> These are, for Raz, sound reasons for accepting the *normal justification thesis*.

#### (4. 2.) *The Dependence Thesis*

Raz puts forward the following definition of the *dependence thesis*: '*all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.*'<sup>138</sup> Raz says that authorities ought to be limited in the scope of their directives by the kinds of reasons on which they ought generally to rely when making and issuing directives. This is so, says Raz, because authoritative directives, even when authoritative, are not beyond the scope of reasonable questioning. And since authoritative directives are not beyond being challenged they should be based on reasons which already apply to the subjects of the directive. Reasons of this sort 'determine the conditions of the authority and the limits of its rightful power.'<sup>139</sup> However, since in everyday life it is not always easy for people to identify what these already existing reasons are for  $\phi$ -ing authorities are necessary to solve problems and make life easier. Raz believes therefore that

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<sup>135</sup> Raz, 1986, p. 53

<sup>136</sup> Of course this is not always the case; sometimes advice can be authoritative in itself.

<sup>137</sup> Raz, 1986, p. 54

<sup>138</sup> Raz, 1986, p. 47 (emphasis in the original)

<sup>139</sup> Raz, 1986, p. 46

there are several ways that an authority acting in line with the principle of the *dependence thesis* will make a difference to what its subjects ought to do.

Firstly, many of the every day actions which people perform are not ‘uniquely determined by reason.’<sup>140</sup> Raz uses the example of legislation concerning paying tax to explain how this is so. Sometimes it will be more beneficial to receive tax payments monthly, and other times it will be beneficial to receive them quarterly. Some reasons favour monthly payments, some reasons favour quarterly payments. It is the job of the authority to decide which scheme is the most acceptable. Without the intercession of the authority individuals would have a choice of when to pay tax (but not *if* they should pay tax). However the authoritative directive makes a difference in this case because it sets the correct schedule for tax payment. Though subjects already have reasons for paying tax, now they know when to pay.

Secondly, the *dependence thesis* creates conventions which are themselves effective solutions to co-ordination problems. ‘It is often the proper job of authorities to issue directives for this purpose [of solving co-ordination problems]’<sup>141</sup> says Raz. By issuing authoritative directives which solve co-ordination problems authorities supply subjects with reasons that they did not have before. The subject may have had a reason to act in a certain way prior to the utterance of the directive, however they may not have known that they should act in this way. The *dependence thesis* provides a solution to these sorts of problems by creating conventions. Once a convention is created subjects have an additional reason — a reason that is independent of the directive — for acting in accordance with the convention created. This, according to Raz, is a solution to the *no difference thesis* discussed above. Take a convention like which side of the road we should drive on. In general people *do* have good reasons for driving on one side or another — i.e., because everyone else on the road is doing so. However, when an authority decrees that all road users must drive on the right side

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<sup>140</sup> Raz, 1986, p. 48

<sup>141</sup> Raz, 1986, p. 49

of the road instead of the left, then the co-ordination problem has been solved once and for all and a convention has been created that can be followed by everyone going forward.

*(4. 3.) The Dependence Thesis and the Normal Justification Thesis Combined*

Together the *dependence thesis* and the *normal justification thesis* constitute the service conception of authority. Raz calls them ‘mutually reinforcing.’<sup>142</sup> If ‘the normal and primary way of justifying the legitimacy of an authority is that it is more likely to act successfully on the reasons which apply to its subjects’ (the *normal justification thesis*) then ‘it is hard to resist the dependence thesis.’<sup>143</sup> Together the conditions simply state that authorities should do what they were appointed to do and when authorities act in this way, we have before us, according to Raz, a comprehensive view of the nature and the role of legitimate authority. The function of an authority ‘their role and primary normal function is to serve the governed.’<sup>144</sup> These two conditions combine and show that authority is justifiable only when it provides subjects with the best means (reasons) for conforming to the reasons that she already has. Now, we should also note it is not the case that the role of an authority is to promote or further the interest of its subjects. The purpose of authority is not to direct subjects towards a particular conception of the good. Rather, the function of authority according to the service conception is to help subjects act according to reasons which bind them. It tells us that the function of authorities should be to mediate between people and the right reasons which apply to them in given situations, allowing subjects to ‘take their cue from the authority whose pronouncements replace for them the force of [their own] dependent reasons.’<sup>145</sup> In this way the service conception answers the moral problem that Raz previously introduced.

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<sup>142</sup> Raz, 1986, p. 55

<sup>143</sup> Raz, 1986, p. 55

<sup>144</sup> Raz, 1986, p. 56

<sup>145</sup> Raz, 1994, p. 214

#### (4. 4.) *The Pre-emption Thesis*

The service conception is bolstered by the *pre-emption thesis* which according to Raz states:

*‘the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.’*<sup>146</sup>

When we consider the strength of the reasons for undertaking a certain action it is clearly the case that the reason for the rule cannot then be added to the rule itself as an additional reason for acting. As Raz says, ‘We must count one or the other but not both.’<sup>147</sup> The *pre-emption thesis* assumes that authoritative decrees are a byproduct of a decision making process that is undertaken by agents who are themselves set on determining what it is that subjects ought to do, and that they should direct those subjects to act on that basis. Such authorities are legitimate when abiding by their directives or complying with their decrees will help subjects better conform to reason.

Raz believes that an authority should improve a subject’s conformity with reason by overriding what the subject would do without it, when in performing some action they would not be conforming with reason. ‘The pre-emptive force of authority is part and parcel of its nature,’ says Raz.<sup>148</sup> In other words, an authority simply cannot succeed qua authority if it does not pre-empt those background reasons that its subjects actually have for acting in a certain way.

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<sup>146</sup> Raz, 1994, p. 214 (emphasis in the original)

<sup>147</sup> Raz, 1986, p. 58

<sup>148</sup> Raz, 2006, p. 1019

*(5) Some Consequences of the Service Conception*

Raz thinks that one consequence of the service conception is that it limits the levels of power that political authorities are thought to possess. He writes, ‘my account has the consequence that political authorities are likely to have a more limited authority than the authority many, perhaps all of them, claim to have, and that people generally believe that they have.’<sup>149</sup> Political authorities may have more limited authority than is often believed for the simple reason that there likely exists several concepts called ‘authority’ in any society, each of which are descended ‘from the very same ancestor’<sup>150</sup> but are actually altogether different. If A and B both ponder the concept of authority it is quite possible that A and B are thinking about concepts that are slightly different, or that they are thinking about entirely different concepts altogether. This applies both to theoretical and practical authority. Raz explains that concepts are ‘social beings, owing their features to a community of speakers in ways that may elude any one of them, or indeed all of them.’<sup>151</sup> Raz tells us that if there are a number of concepts of authority prevalent in society these differing conceptions will naturally compete with one another. It is therefore likely that our understanding of the scope of authority in different circumstances is naturally more limited than it is often thought. Raz thinks that these details suggest that the scope of political authorities is therefore more limited than people ordinarily think.

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<sup>149</sup> Raz, 2006, p. 1008

<sup>150</sup> Raz, 2006, p. 1011

<sup>151</sup> Raz, 2006, p. 1011

## Chapter 5. Raz, Consent and the Service Conception

### (1) Introduction

Having explored the nuances of the service conception in the preceding chapter I will now expose what I consider to be the biggest weaknesses in Raz's theory of legitimacy. Recall the claim that Raz's theory is widely accepted as the most plausible theory of legitimacy among contemporary political philosophers. I argue against prevailing wisdom that the service conception actually fails to provide an adequate account of legitimacy because, even if we grant that Raz's premises are basically sound, consent would still be necessary to motivate his claims and make his theory plausible.

### (2) Raz and Consent

Raz has turned his attention to the the issue of legitimacy by consent in various works. He has approached it in the works previously discussed, especially *The Morality of Freedom* and 'The Problem of Authority' and he has given the issue further sustained treatments in his essay 'Government by Consent'<sup>152</sup> and in his editors introduction to *Authority*.<sup>153</sup>

The reader of these works will immediately register that Raz's views on consent and consent theory in general are admirably consistent. Raz has long maintained that consent theories are simply

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<sup>152</sup> Joseph Raz, 1994, 'Government by Consent' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Oxford University Press, pp. 356 — 369.

<sup>153</sup> 'Introduction' In Joseph Raz (ed.) *Authority*, 1990, New York: New York University Press, pp. 1–19  
90.

ill-equipped to account for the existence of legitimacy and that consent cannot confer legitimacy on a political authority. Consent is, says Raz, plainly insufficient for conferring legitimacy. However, he is open to the possibility that consent may be capable of playing a small role in the process of legitimacy. If so, he argues that consent's role could only be 'marginal and secondary'<sup>154</sup> in the process of legitimating political authority. In an illuminating passage from *The Morality of Freedom* Raz describes the shortcomings of consent theory. He writes:

'A...consideration against allowing consent to political authority general validity turns on the undesirability of allowing the validity of consent which binds for life, is open-ended, and affects wide-ranging aspects of a person's life....Regarding political authorities, the most obvious danger is of a change of government or a change of circumstances which turns a reasonably just government into an unjust one. Human knowledge is as yet unable to predict such changes.'<sup>155</sup>

Here Raz seems to be suggesting that a consequence of acknowledging the validity of a doctrine of political consent is that one must accept that one's consent could only be given to specific individuals who hold political office, and not to the institution or body to which those individuals belong. It would seem that Raz's main concern here lies with the fact that membership in these bodies is never constant; political offices are constantly changing hands, either by design or through the passage of time. Raz thinks that as a consequence of this subjects cannot consent to the authority of an institution because they are simply unable to predict any negative consequences this process might trigger. Subjects cannot possibly know what potential dangers may befall them if they consented to the institution, not the individual. Raz has in mind dangers which might come to pass

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<sup>154</sup> Raz, 1994, p. 356

<sup>155</sup> Raz, 1986, p. 90

as a direct consequence of giving one's consent to an institution which then fell into the wrong hands.

Subterfuge: Suppose that after years of scheming and plotting Frank manages to secure the highest position within his nation's government. Frank's modus operandi is to hold power and to wield it for his own gain. Frank intends to eventually impose his sole will over all subjects. He desires complete control. If consent does confer legitimacy and consent was given to the institution — not to the individual or individuals that occupy positions within that institution — subjects would arguably have little recourse against Frank if he put his plan into action. Subjects would have consented, and the consequence of consenting is that they must accept Frank as legitimate even where his actions are unjust. Raz thinks that a possible outcome like this demonstrates how subjects can not possibly give consent to an institution. Consent can only be given to individuals if what Raz says is true.

Raz then argues 'on instrumental grounds' that consent can only be binding in the way that consent theorists claim it is 'if it is so qualified that its effect is almost entirely confined to reinforcing independently existing obligations to obey.' In other words:

'one may [only] validly consent to obey a government whose authority can be established in accordance with the normal justification thesis. Such a consent is binding, and is not trivial as it reinforces one's motivation to respect that government's authority. But it cannot be used as a way of endowing anyone with authority where that person had none.'<sup>156</sup>

So, according to Raz, if consent were given with the object of legitimating authority and thereafter obligated subjects to obey, the conditions under which it was given would simply reinforce prior obligations that subjects already have to obey. The consent would be superfluous. For this reason,

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<sup>156</sup> Raz, 1986, p. 90

according to Raz, consent can only play a marginal and secondary role in the process of legitimacy. Raz does agree that consent could potentially bind someone to respect an authority which has already met the conditions of the service conception, especially the conditions of the *normal justification thesis*. However, the influence of consent goes no further than this, and consent certainly does not serve to confer legitimacy on that authority. Meeting the conditions of the service conception is what matters. It goes without saying that I believe Raz is mistaken on this score.

Raz also considers this position in his editors introduction to *Authority*. ‘Why,’ asks Raz, ‘should consent be seen to make a difference?’ He thinks the answer lies in the claim that consent theories allude to ‘the benefits of consent...’ in particular, consent theories — if correct — make ‘the governed less likely to be alienated and embittered...’<sup>157</sup> Raz makes it clear that he is specifically targeting actual consent theories, not hypothetical consent theories with this remark. He thinks that hypothetical consent is largely irrelevant.<sup>158</sup> In his ‘Introduction’ Raz also argues that not only do consent theories fail to account for legitimacy, they also fail to meet the anarchist challenge since, ‘unless heavily qualified they are unconvincing in their own terms.’<sup>159</sup>

A second criticism Raz advances is that in modern industrialised society a system of indirect democracy is better able to secure ‘responsible and responsive’ government which provides a higher level of welfare than a theory based on contractarian consent. That is, a theory, ‘which gives everyone veto power once in their lives, and no power later on (unless people use their veto to impose a requirement of further consent.’<sup>160,161</sup> This claim is puzzling. Aside from Hobbes’s version of contractarianism I am not aware of a version of consent theory which views consent as once in a

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<sup>157</sup> Raz, 1990, p. 11

<sup>158</sup> Raz, 1990, p. 18

<sup>159</sup> Raz, 1990, p. 11

<sup>160</sup> Raz, 1990, p. 11

<sup>161</sup> Presumably in this section Raz has something like a societal referendum or plebiscite where all qualifying members of the society can express their consent, or not.

lifetime veto power. Locke — without doubt the most famous exponent of contract theory— certainly did not view consent as performing a function of this sort. Locke believed that not only should a legitimate political authority be limited, but its claims to legitimacy are handicapped by a non-consenting polity. This leads Locke to formulate the famous ‘right of resistance’ that he argues for in the last two chapters of the *Second Treatise*. Indeed, according to Ashcraft the consent story that is told in the *Second Treatise*:

‘...is the locus of Locke's arguments about political morality. His normative theory of rights, his attack on absolutism, his views on representation and the separation of powers, and his vindication of resistance and revolution are all made intelligible and defensible in the *Second Treatise* primarily with reference to the story of the social contract...’<sup>162</sup>

The existence and validity of the Lockean right to resistance hinges on the possibility of consent being revokable. For that to be possible consent must play a continuous role in legitimacy. I must assume therefore that Raz is not targeting Locke with this particular criticism. Well, if not Locke then who? Perhaps Raz has an opponent like Hobbes in mind with this criticism.

Thereafter Raz once again looks toward R. P. Wolff ‘and others’ who conclude that only consent ‘to every single act of the government can be consistent with responsibility for one’s own life.’<sup>163</sup> This conclusion, says Raz, results in ‘the total denial of the possibility of legitimate authority’<sup>164</sup> since providing consent to every act of government is simply impossible. Raz thinks that relying on this principle of personal responsibility would also have more far-reaching implications; it would

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<sup>162</sup> Richard Ashcraft, 1989, ‘John Locke: Social Contract Versus Political Anthropology’ in *The Review of Politics*, Vol. 51, Issue 1, Winter 1989, pp. 3–28, p. 6

<sup>163</sup> Raz, 1990, p. 11

<sup>164</sup> Raz, 1990, p. 11-12

lead to condemning ‘those who let their doctor decide for them whether to undergo an operation or not, those who buy property or bonds and hire an agent to handle them...’<sup>165</sup> Raz wonders whether taking adequate responsibility for one’s life actually requires ‘continuously deciding for oneself on every aspect of one’s affairs.’<sup>166</sup> Raz argues that it would be unreasonable to expect individuals to take so much responsibility for their own lives. In response I am left wondering whether consent theorists actually call for this level of personal responsibility. Is this a requirement implied by consent theory? Perhaps some voluntarist accounts of consent rely on a robust requirement for personal responsibility requirement.

However, let us now return briefly to the argument of the Epistemic Challenge. Recall that the Epistemic Challenge claims that subjects cannot consent to authorities because they cannot obtain enough information about what their consent will entail. The Epistemic Challenge has shown that those theories which Raz argues against actually fall at the first hurdle anyway, because subjects *cannot* validly consent to authority on the grounds that those theories set out. So, while Raz’s is right to criticise these versions of contract theory, he does so for the wrong reasons.

Finally, Raz targets consent theories because they ‘cannot be a sufficient foundation for legitimate authority.’ Raz claims that in modern industrial societies we need a doctrine of limited government — a doctrine which involves limitations on the scope of governmental authority, rather than the once in a lifetime veto power mentioned before. Under this model of governance, says Raz, consent could ‘legitimise an authority [but] only within the bounds of, or subject to the limitations articulated by that doctrine. Consent to the power of government *beyond these limits would fail to legitimate it.*’<sup>167</sup>

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<sup>165</sup> Raz, 1990, p. 12

<sup>166</sup> Raz, 1990, p. 12

<sup>167</sup> Raz, 1990, p. 12 (my emphasis)

What Raz sees as a failing on the part of consent theory I see as one of its main strengths. In advancing my own version of a consent theory of legitimacy I have focused on proposing a set of conditions which target the epistemic disparity between subjects and authorities so as to suggest how subjects can come to give valid consent — a consent which is suitably informed. Admittedly the need for valid consent sets high demands on an authority, but legitimacy is a demanding concept. The fact that consent can only be given under a narrow set of conditions does not weaken its force as a theory of legitimacy, as Raz suggests; instead the demandingness of consent and the limits it sets should be seen as the theory's biggest strength.

I have now provided an overview of Raz's main arguments against consent. However, if these arguments are effective — and this is a big if — they are only effective when their target is weaker formulations of consent theory than the version I have advanced. I will now show that consent actually plays a wider role within the structure of the service conception than Raz acknowledges.

### *(3) Consent and the Service Conception: A Preliminary Remark*

In *The Morality of Freedom* Raz claims that the theses which comprise the service conception specify that an authority is legitimate only when they (the authority) provide the best reasons for a given subject to conform to those reasons for action that she already has. Recall that it is the *normal justification thesis* which does the bulk of the normative work in this process. According to the Raz the 'normal' way of justifying the existence of A's legitimate authority over B:

'involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged

authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.’<sup>168</sup>

Now, I think the problem that Raz comes up against here is quite easy to identify. Even if the normal justification thesis does describe the ‘ordinary’ or ‘normal’ way of justifying authority the mechanism of consent would still be required within the process in order to move A’s authority beyond being simply *theoretical*. In an important sense consent is necessary to make authority *practical*. Without the existence of what I shall call the *consent condition* the normal justification thesis — and by extension the service conception as a whole— is in toto handicapped and becomes, all things considered, fatally limited. All that the service conception can do without the implementation of the consent condition, is suggest a plausible description of one avenue through which the authority of theoretical authorities becomes strengthened.

Let me elaborate. Even if it were the case that the service conception is indeed the most effective method for coming to understand when authority is legitimately held, it remains to be fully demonstrated because there are some vast conceptual gaps that Raz must fill before he can claim that a political authority which meets the conditions set by the service conception is legitimate.

#### *(4) Recognition: A Recap*

In Chapter 3. I argued that recognition plays a key role in the mental process we call consenting. I argued that in order to consent one must recognise to whom one’s consent is being granted. I formulated this argument in a fairly basic fashion, arguing that recognition is just one constituent in

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<sup>168</sup> Raz, 1986, p. 53

the tripartite formulation of consenting. I argued that though recognition is only one part of consenting it is perhaps the most fundamental part required for consent. Its fundamentality has to do with the epistemic conditions a person must be in possession of in order to consent. In order to consent one must recognise certain salient details about the target of one's consent — who they are, what they are claiming, etc. Of necessity this involves *knowing*. One must know to whom one will be giving one's consent. And, as I have claimed already, individual's cannot give consent that is valid if they cannot meet the standard of recognition. The recognitional requirement sets the standard which the other constituent parts of the tripartite formulation must then satisfy.

#### *(5) Recognition and The Service Conception*

To what extent is recognition necessary within the framework of the service conception? Or, to what extent do subjects need to recognise that an authority meets the conditions of the service conception? Raz spends some time early on in *The Morality of Freedom* discussing so-called 'recognition conceptions' of authority. Raz explains that recognitional conceptions of authority hold 'that to accept an utterance as authoritative is to regard it as a reason to believe that one has a reason to act as told.'<sup>169</sup> However, he does not incorporate the theoretical apparatus of 'recognition conceptions' into his own account of authority and legitimacy. On Raz's view recognitional conceptions are an entirely distinct group of theories pertaining to legitimacy. He claims that these recognitional conceptions of authority only account for 'the attitude[s] of people who accept the legitimacy of the authority' already. Beyond doing this 'recognition conceptions' are of little use since all they can accomplish is helping observers to 'most clearly discern what authority is by

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<sup>169</sup> Raz, 1986, p. 29

seeing what one acknowledges when acknowledging that a person has legitimate authority.<sup>170</sup> In other words, they explain legitimacy by pointing out authorities that are legitimate.

Raz does not think that there is an important place for recognition in a robust theory of legitimacy because recognition inevitably leads to what Raz calls *the no difference thesis*. According to Raz the *no difference thesis* is, ‘the view that authority does not change people’s reasons for action.’<sup>171</sup> He argues instead that the normal justification thesis can reasonably ‘account for the feeling that as a matter of meaning, recognition is a condition of possession of legitimate authority.’<sup>172</sup> This serves to render recognition redundant in his view.

In ‘The Problem of Authority’ Raz does concede that in order for an authority to ‘fulfil its function, the legitimacy of an authority must be knowable to its subjects.’<sup>173</sup> But it seems that Raz here means knowable in the same way that my saying ‘I know Boris Johnson is the Prime Minister of the United Kingdom’ signifies my knowledge about *who* occupies the position of Prime Minister. Raz takes knowable to mean ‘known as legitimate.’ It is not immediately clear how this can be the case. Raz continues ‘to exist, authorities must be knowable.’<sup>174</sup> Again this seems to imply that the authority must be knowable in the way that an American might know that Joe Biden is President. Raz suggest that there really is nothing more that authorities need to do to make themselves recognisable as legitimate other than meet the conditions of the service conception. His reasoning is that if authorities conduct themselves in line with the principles that he sets out<sup>175</sup> then these are sufficient and the authority will be recognisable as legitimate as a part of that process. It would

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<sup>170</sup> Raz, 1986, p. 28

<sup>171</sup> Raz, 1986, p. 30

<sup>172</sup> Raz, 1986, p. 56

<sup>173</sup> Raz, 2006, p. 1025

<sup>174</sup> Raz, 2006, p. 1026

<sup>175</sup> Principles that were considered in the previous chapter.

seem then that recognition can only play a marginal or secondary role in Raz's theory, much like consenting. This is flawed reasoning.

Raz's reasoning is somewhat flawed because the normal justification thesis does not accomplish what Raz thinks it does — at least it doesn't do so simply. The central failing of Raz's normal justification thesis becomes apparent when we contrast it with how authority is normally recognised in the real world. In reality people recognise political authority because they are familiar with its existence across various forms. As far as most subjects know and are concerned political authority has always existed, in one form or another — a form that they recognise — and they are therefore accustomed to following the demands these authorities make. Hume's account of 'long possession'<sup>176</sup> in Book III of his *A Treatise of Human Nature* is an interesting lens through which to consider how people become accustomed to following authority. Hume's conception of long possession is quite simple: the fact that an authority has existed for a significant period of time is sufficient to justify the claims made by these to the use of the power(s) which they claim to possess and which they use.<sup>177</sup>

Additionally and importantly subjects can easily identify authorities. Recognition therefore plays a principal role in the subject-authority relationship, because where people don't recognise the authority of the individual or institution then they are not really an *authority* in the way I have been describing. And, as was illustrated in Chapter 3., recognition is the first step towards consenting. So, if the service conception is going to be considered a candidate for best way of coming to understand when an authority is legitimate then I suggest that Raz has to acknowledge

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<sup>176</sup> 'Possession during a long tract of time conveys a title to any object.' David Hume, 1738-40, *A Treatise of Human Nature*, L. A. Selby-Bigge, (ed.), revised by P. H. Nidditch, 1975, (2nd Edition), Oxford: Oxford University Press, pp. 507-9 [T 3.2.3.9]

<sup>177</sup> Hume is not entirely clear on exactly how long counts toward 'long possession.' Writing in 1748 Hume concluded that since 'the settlement in the house of Hanover has actually taken place' and that restoring the Stuart line would only be possible through a civil war, the Hanover monarchs had a stronger claim to the throne of Great Britain than the deposed Stuarts. All of this suggests that 'long possession' need not be all that long to create political authority. See David Hume 'Of the Protestant Succession' for a further treatment of this subject. See also James Harris' *Hume: An Intellectual Biography*, Cambridge: Cambridge University Press, p. 239-40 for a deeper discussion of the background of this essay.

the need for the *recognition condition*. Of course, the need for recognition applies to practical authorities only.

Jeremy Waldron has pointed out that Raz's normal justification thesis fails to capture one important feature of political authority: its public dimension. Waldron has argued: '...it may be quite inappropriate for me to regard A as a public authority unless I am sure that many others do in fact so regard it (or are prepared to do so if they see that enough others are prepared to do so... etc.)'<sup>178</sup> In other words, how can I recognise A as an authority if no one else does. This criticism from Waldron is, I think, mostly in line with the criticisms I have put forward in this chapter. To an extent Raz has conceded this point in a reply made to Waldron in the collection *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*. Here Raz writes:

*Themes from the Legal and Political Philosophy of Joseph Raz*. Here Raz writes:

'[i]t seems plausible to add a condition for the legitimacy of an authority. Something like a requirement that people over whom it has authority should have reason to find out, and should be able to *find out* whether it has such authority (at a cost not disproportionate to the benefit in tracking the reason its supposed authority can bring). Perhaps it should also be a condition of the authoritative standing of any directive that those subject to it have reason to find out whether it exists and can find out its content.'<sup>179</sup>

Elsewhere Raz has claimed that 'Identification is a common and often proper ground for accepting authority.'<sup>180</sup> What is identification if not recognition? If Raz is therefore willing to make space for recognition in the service conception does this change matters? Let's say we accept Raz's late concession and grant that his argument is sound. Now that Raz has made room for *recognition* he

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<sup>178</sup> Jeremy Waldron, 2003, 'Authority for Officials' in L. H. Meyer, S. L. Paulson and T. W. Pogge (eds.), 2003, *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford: Oxford University Press, pp.45-69, p. 66

<sup>179</sup> Joseph Raz, 2003, 'Comments and Responses' in L. H. Meyer, S. L. Paulson and T. W. Pogge (eds.), 2003, *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford: Oxford University Press, pp. 253-74 p. 264 (my emphasis in italics)

<sup>180</sup> Raz, 1986, p. 55

would need to acknowledge that recognition is the first step in the process of consenting. Thus far I have attempted to show that if Raz is willing to make room for consent in the argument of the service conception he would make a stronger case for explaining how authority can be held legitimately. Even if we grant that Raz's formulation is correct I have shown that without the consent condition — or at least recognition — the normal justification thesis (and by extension the service conception) fails. All that the service conception can reasonably do without the mechanism of consent is propose a somewhat plausible description of one of the ways in which the authority of theoretical authorities is legitimate or becomes legitimate — and legitimacy is not typically seen as a characteristic that theoretical authorities require. Consider the following example, which illustrates the difference.

Carol the Amphora Expert: Carol is an expert the pottery of ancient Greece. She can be an authority on this matter without anyone ever recognising her authority. Let's say that Carol is a theoretical authority because she possesses a wealth of knowledge on this subject, having devoted years to study. However, since her interest is purely recreational and she does not work in a role we would commonly associate with knowledge of this kind — meaning she doesn't work in an academic capacity — then her authority will most likely go unnoticed. These facts do not diminish her authority on the subject of Greek pottery. This highlights a key difference in kind between theoretical and practical authorities. This difference is the need for acknowledging recognition as a species of consent.

#### *(6) Trust and The Service Conception*

Raz is sceptical of the role that trust plays in the subject-authority relationship. It is relatively easy to understand why Raz is so hesitant about trust. In the final chapter of *The Morality of Freedom*

Raz writes that because power ‘is corruptible, fallible and inefficient it should not be trusted. It should be hedged and fenced.’<sup>181</sup> While this view is not as pessimistic as the Hobbesian view of human nature, it is still plenty pessimistic. In Chapter 4. of *Ethics in the Public Domain*, ‘Facing Diversity: The Case of Epistemic Abstinence’ Raz takes a less pessimistic view of trust more generally, but not about trust in authority. Here Raz writes, ‘Trust is good in most circumstances, but there will always be circumstances in which any good turns bad and any virtue loses its value.’<sup>182</sup> We see a hint of pessimism here in Raz’s expectation that trusting can turn negative. As I have shown in Chapter 3. trusting is warranted only when trusting is actually justified or situationally justified. Anything else I have called ‘wishful thinking.’ In circumstances ‘in which... good [trust] turns bad’ I would argue that what was given was not trust. It was just another example of wishful thinking.

The question which must now be considered is whether Raz is right to be so pessimistic. I am inclined to suggest that his pessimism is warranted towards authoritative conditions as they presently exist. However, his pessimism could be absolved by an authority which strives to abide by the conditions set by the revised theory of legitimacy. I have of course argued that trust is essential to the authority-subject relationship if legitimacy is to be made possible. Is Raz therefore mistaken about trust? Does the service conception rely on trusting in the same way that it relies on recognition?

I am inclined to suggest that if the service conception is to live up to the claims Raz makes regarding its effectiveness, then trust must be involved. Specifically I suspect that there is an unspoken trust requirement built in to the service conception. Raz hints at this possibility himself. In ‘The Problem of Authority’ he writes: ‘If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one’s belief in its authority is haphazard, and cannot (again

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<sup>181</sup> Raz, 1986, p. 428

<sup>182</sup> Raz, 1994, p.77

special circumstances apart) be reliable.’<sup>183</sup> Raz refers here to the trustworthiness of our *beliefs*, not the trustworthiness of the authority itself. In Chapter 3. I argued that for A to be capable of offering B his consent, A must trust B. Though Raz does not acknowledge this relation I believe that it is not enough that A *believe* B to be trustworthy. Individuals hold all manner of incorrect beliefs and A could be mistaken in his belief that he can trust B. For that reason A must be *justified* in trusting B; a cannot simply *believe* that he can trust A. That means that B must *be* trustworthy: B must demonstrate that they can be trusted. I believe that Raz must concede that trusting our belief is not enough. He must concede that trust must be justified or at least situationally justified. I have argued that a mental state doesn’t qualify as ‘trust’ unless it is justified. Therefore justified trust must be seen as essential to the argument of the service conception.

#### (7) Willingness and The Service Conception

In Chapter 3. I argued that the third condition of consenting is willingness. I stated the willingness condition as involving the giving of moral permission. I argued that it is only possible to give one’s moral permission to a normative change in one’s circumstances or conditions when one is willing to accept what is being proposed. I will now show that willingness also has a part to play in Raz’s service conception. In *Ethics and The Public Domain* Raz writes:

‘The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the

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<sup>183</sup> Raz, 2006, p. 1025

directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.’<sup>184</sup>

The clue to the inclusion of the willingness conditions within the service conception lies in Raz’s suggestion that persons should ‘accept the directives...’ of another. Where one does so and ‘tries to follow them...’ rather than follow the reasons that apply to him directly this indicates a willingness to follow the directives of the authority. Where one is willing to forgo one’s own reasons for acting and to follow the reasons given them by another we can say that they satisfy the willingness requirement. Where one ‘accepts’ and ‘tries’ they in a sense give moral permission because they are willing to accept the normative change this will cause.

#### *(8) Revised Consent and The Service Conception*

In this Chapter I have argued that if there is the need for recognition, trust and willingness in the service conception — I have made this argument in Sections (5) (6) and (7) — then we see that there is an important sense in which consent does play a crucial role in the service conception after all. For that reason consent should be seen as integral to the argument of the service conception. Consent is not merely marginal and secondary as Raz has claimed. Rather we see that consent actually plays a central role in the service conception and should be seen by Raz as sufficient for legitimating authority. Of course, I recognise that the revised theory of consent that I have put forward throughout this work is new. It is not a widely known understanding of authority. Therefore Raz cannot be held entirely responsible for his mistaken views on consent. However, if he were willing to adopt the amendments I suggested then the service conception could also become a plausible theory of legitimacy.

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<sup>184</sup> Raz, 1994, p. 214

## *Conclusion*

In this thesis I have tried to accomplish two things. I have tried to show: (1) that traditional consent theory and consent theorists have failed to demonstrate that consent is a sufficient ground for political legitimacy because these theories have placed an unreasonable burden on the consentor. Prior versions of consent theory have not given adequate consideration to the role of the authority requiring consent and have not considered what authorities ought to do to put their subjects in a position to consent. For that reason these theories have failed to show how consent can be valid. However, despite the existence of these facts I have argued that consent theories of legitimacy should not be abandoned. Instead I have argued: (2) that consent can be a plausible source of political legitimacy if certain epistemic conditions are facilitated. Where certain epistemic conditions are established consent can be valid. However, the onus is on political authorities to establish these conditions, since they occupy an epistemically advantaged position over subjects.

To that end I have argued for a revised theory of consent which posits that consent is a composite of three mental states: (i) recognition, (ii) trust and (iii) willingness. I have called (i)-(iii) The Tripartite Formulation of Consent and have argued that it is sufficient for valid consent in ordinary cases when it is (a) suitably informed and (b) given freely. However, in order to validly consent in high stakes cases — cases where more is at stake as a consequence of giving consent (for example consenting to a political authority) — more attention must be paid to the two further conditions: (a) the informedness requirement and (b) the requirement that consent can be given freely. I have argued that an authority which satisfies The Principle of Epistemic Equity enables subjects to meet the informedness requirement and an authority that accepts that they must assume Equitable Burdens meets the requirement that consent can be given freely.

Thereafter I engaged with Joseph Raz. Raz's service conception is widely considered to be the most plausible contemporary theory of legitimacy. I argued that Raz's theory fails in its present state, but if Raz were to accept that his theory conforms to The Tripartite Formulation of Consent and accept that consent plays more than a 'marginal and secondary role' in legitimacy that it too could be considered as a plausible theory of legitimacy. I am therefore not advocating for a wholesale dismissal of the service conception. Rather, I think that Raz's theory surreptitiously relies on the three conditions for revised consent that I argued for in Chapter 3, namely recognition, trust and willingness. Therefore, if Raz were to accept that consent is actually essential to the service conception then the service conception could become a plausible consent theory of legitimacy. It remains to be seen whether Raz would accept this argument.

Unlike Raz, who has claimed that the service conception is the 'ordinary' way for authorities to be legitimate, I am not claiming that the revised consent theory I have advanced is the 'ordinary' or 'normal' way to confer legitimacy. I am claiming only that it is a plausible way to confer legitimacy. The revised theory of consent I have argued for makes consenting to authority a real possibility. The fact that prior versions of consent theory have failed to put forward a plausible theory of consent does not mean that consent should be discounted wholesale as a source of legitimacy. Rather consent theorists must improve their preferred version of consent theory and refocus their efforts to show how valid consent can be given and how it can be a source of legitimacy. I have attempted to do just this in this thesis. In focusing on the epistemic conditions required for consent I have departed from other consent theorists and I argue that as a result the theory that I have put forward does demonstrate how revised consent can be a ground of political legitimacy.

Two major consequences follow from the arguments that are advanced throughout this work. The first major consequence is that a very high bar is set for legitimacy-by-consent. Since The Principle of Epistemic Equity calls on authorities to make fundamental changes to how they operate, no

existing authority may be willing to take up the challenge of meeting it. However, if authorities intend to be legitimate — and they should — the benefits of paying the costs will make the costs worth paying. The second consequence is that, if authorities are not willing to pay these costs — and arguably they will not be willing — then legitimacy may remain out-with the reach of authorities. It is important to note that the claim I am making here is not that legitimacy is *unachievable*. Rather, achieving legitimacy is both possible and desirable, but all things considered it may be unachievable under present conditions. Of course, I am suggesting only that consent *can* be sufficient for legitimacy. This means that another theory (or indeed other theories) may also account for legitimacy. However, if these theories exist then in my view they have yet to reveal themselves.

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