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Two Moral Task Accounts of Democratic Authority

Introduction

In *Law and Disagreement*, Jeremy Waldron makes the following claim about the practical relationship that the citizen has with obligation-imposing laws that issue from democratic processes:

The appeal of majority-decision is that it not only solves the difficulty that [moral disagreement amongst citizens] generates, but it does so in a respectful spirit, while its constraining authority consists in the fact that the problems it allows us to address . . . are problems that are on any account important and compelling. The two, then—constraint and respectfulness—combine to make a particular demand on each citizen . . . that *he should not insist unreasonably on what appears to him to be the right solution to the urgent problems we face, if the result of such insistence is likely to be that the problems we face do not get any sort of solution at all.*¹

Waldron is arguing that all citizens in a reasonably just democracy have a moral obligation² to obey all laws that issue from democratic processes. Put differently, reasonably just democratic States have the general moral authority to create binding moral obligations by issuing valid legal obligations.³ There are two parts to Waldron's argument. The first has to do with "respectfulness." The second has to do with the resolution of "important and compelling" moral problems. I will return to the notion of respect later, but it should be noted that this second part has been seen before. This second part resembles Hume's instrumental defense of the moral obligation to obey the law: "If the reason be asked of that obedience, which we are bound to pay

¹ {Waldron, 1999}, 117-18 (emphasis added).

² Throughout, "pro tanto" should be assumed to qualify obligations and duties. Here I make no distinction between obligation and duty.

³ As Joseph Raz describes it: "The obligation to obey a person which is commonly regarded as entailed by the assertion that he has legitimate authority is nothing but the imputation to him of a power to bind. For the obligation to obey is an obligation to obey if and when the authority commands, and this is the same as a power or capacity in the authority to issue valid or binding directives." {Raz, 1986}, 24.

to government, I readily answer, *because society could not otherwise subsist . . .*”⁴ Obedience to law, then, is a necessary instrumental means to preserve society.

Waldron and Hume’s arguments for political obligation⁵ are *necessary moral task accounts* of political authority. The moral task argument is stated perspicuously by Elizabeth Anscombe: “authority arises from the necessity of a task whose performance requires a certain sort and extent of obedience on the part of those for whom the task is supposed to be done.”⁶ Put more generally, she writes, “If something is necessary, if it is, for example, a necessary task in human life, then a right arises in those whose task it is, to have what belongs to the performance of the task.”⁷ There are two necessities involved here. First, it is the function of the State to achieve certain morally necessary ends. For example, arguably we need systematic solutions to moral problems concerning criminal justice, private law, healthcare, the environment, the economy, distributive justice, and so on. Second, the State then has a right to the necessary instrumental means to those ends.⁸

To be sure, Hume has provided us with a moral task argument. Hume contends that the State has a right to general obedience because general obedience, or perhaps just general conformity, is instrumentally necessary to preserve society, which is itself a necessary moral end. To obey a law is to take the law as one’s reason for acting, whereas conformity merely means

⁴ {Hume, 1985}, 481. Similarly, Hume writes, “society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation which we attribute to it.” {Hume, 1985}, 480.

⁵ Generally I use “political obligation” narrowly to mean a moral obligation to obey a valid law, although the concept is broader. If I deviate from the narrow usage, it will be clear.

⁶ {Anscombe, 1991}, 138. It should be noted that Anscombe is primarily concerned with justifying the State’s right to coerce, but the form of argument can be generalized.

⁷ {Anscombe, 1991}, 145. The second formulation is subtly different in that the individual or entity who performs the task holds the right to the performance. But we could think that this right is held by someone other than the task performer. For example, one’s fellow citizens.

⁸ Moral task accounts can also be understood to be based on the idea of the “common good.” David Estlund describes moral task accounts along the following lines: “urgent task theory holds that some tasks are morally so important that there is a natural moral duty to obey the commands of a putative authority who is well positioned to achieve the task if only people will obey.” {Estlund, 2008}, 132.

that one's behavior matched what the law required.⁹ The primary problem with Hume's argument ought to be apparent. Surely, society does not crumble if the State does not enjoy full conformity, let alone full obedience. This has been noted repeatedly. As Leslie Green notes, "[l]aw does not in fact enjoy exact obedience, and disobedience in certain small or unjust things does not bring cities to ruin."¹⁰ William Edmundson echoes this when he says that, "[t]he main objection is that civilization as we know it simply does not hang in the balance every time one of us jaywalks. Civilization has survived quite a lot of lawlessness, and some have feared, perhaps with reason, that perfect law-abidingness is as ominous as the prospect of anarchy."¹¹ Neither is it the case that the resolution of any particular moral task, such as maintaining an adequate social minimum, requires full conformity. As John Simmons notes, "Legal systems tolerate quite impressive levels of noncompliance without performing the tasks in question interestingly less well (than they would with greater compliance)."¹² Many upstanding citizens conform with the requirements of the law because their own private judgment about what ought be done approximates what the law requires. Many people conform because that is what everyone else does. And, a lot of people conform merely because they fear sanction. Nonetheless, neither general conformity nor general obedience to all laws by all people in reasonably just States is a necessary means. Call this *Hume's Mistake*.¹³

In the above iteration of the argument, Waldron commits Hume's Mistake. According to Waldron, the democratic State (or legal system) resolves necessary ("important and compelling") moral tasks. Surely Waldron is correct about this. On top of this, Waldron is correct that any

⁹ Raz draws the distinction between "compliance" and "conformity." {Raz, 1999}, 178.

¹⁰ {Green, 2002}, 537.

¹¹ {Edmundson, 1998}, 28.

¹² {Simmons, 2005}, 136.

¹³ Perhaps it is unfair to pin this problem on Hume, since numerous writers have committed similar mistakes. Hume, however, is generally cited as the example of a moral task account that fails with this false empirical claim.

citizen should, even *must*, not “insist unreasonably on what appears to him to be the *right* solution to the urgent problems we face, if the result of such insistence is likely to be that the problems we face do not get any sort of solution at all.”¹⁴ Obviously, it would be unreasonable—maybe even evil—for any individual citizen to insist on not complying with the law if the immediate and foreseeable result of this failure to obey would be a failure of a collective solution to an important moral problem. In such a circumstance, a citizen has a moral obligation not to insist on what he regards as the morally required course. The problem is that the individual citizen is rarely, if ever, in a circumstance where his individual compliance is marginally necessary to achieve the necessary moral goals of the State. This is just Hume’s Mistake again.

Successfully achieving important collective ends does not require general obedience. Nor does success turn on the marginal contribution of any one individual. It would be a highly unusual, even tragic, circumstance in which the solution to an urgent and necessary moral problem, one that normally stems from the collective needs of millions of people, hung on the compliance of any particular individual. In fact, it is the nature of collective action problems generally that they do not have this sort of structure, which is why collective action problems call out to be addressed in ways other than an appeal to the individual importance of the actions of any particular individual.¹⁵ Any moral task argument that rests on the instrumental necessity of any particular citizen’s obedience to law commits Hume’s mistake. Accordingly, moral task defenders of political obligation require additional moral principles to bind those individuals who fall outside the requisite number of people who must conform with the law to get things done.

¹⁴ {Waldron, 1999}, 117-18 (emphasis added). Presumably the citizen cannot insist *reasonably* on what appears to be the correct solution either. Waldron’s account is supposed to show that the law is preemptive even in the face of reasonable disagreement. The unreasonable citizen is not the primary target.

¹⁵ In fact, it is the failure of this assumption that motivates defenses of political authority as a mechanism to solve coordination problems.

With an eye toward Hume's Mistake, here I assess several recent moral task arguments from contemporary democratic authority theorists, specifically David Estlund and a more plausible version of Waldron's argument. The democratic theories are notable for several reasons. First, some version of a moral task account, I think, is the most plausible candidate for how the law can have a general, systematic moral power to change the normative situation of all of its citizens by creating rights, privileges, powers, and immunities, and most importantly obligations.¹⁶ Second, in the modern world, I take it, the majority of people share the sentiment that whether a system of government is democratic¹⁷ affects the extent of its political authority and affects what citizens ought to do in the face of exercises of that political authority. Yet, most modern authority theorists do not regard this as anywhere near a normatively decisive sentiment.¹⁸ The general sentiment is that democracy is not particularly relevant to whether citizens ought comply with the law.¹⁹ For this reason, accounts of political authority that focus specifically on the authority of democracy are of special interest. Nonetheless, I should note up

¹⁶ See generally {Perry, forthcoming}, 34 ("One way or another, any plausible general justification will have to proceed by appealing to a conception of the common good, the public interest, or some similar normative notion.").

¹⁷ When discussing democracy in this chapter, I only mean to refer to institutional forms of collective decision making that give each person equal political rights. Political offices should also be relatively open to all. This narrow understanding need not exhaust the concept of democracy. A broader historical understanding of the concept of democracy might include a general commitment to the sovereignty of free and equal moral persons. See {Freeman, 1990}, 339-48.

¹⁸ Jeremy Waldron contends that authority theorists merely pay "lip-service" to ideals of democracy. {Waldron, 1999}, 9.

¹⁹ On Joseph Raz's influential account of legitimate authority, the normal and most important "way of justifying a claim that someone has legitimate authority . . ." is to show 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 trying to follow the reasons which apply to him directly." {Raz, 1984}, 53. Some have claimed that the necessity of democracy can be embedded in the Razian approach. See {Christiano, 2008}, 252 n.22. For the reasons articulated by Scott Hershovitz, {Hershovitz, 2003}, I am quite skeptical of this possibility, as I was in the previous chapter skeptical of the possibility of reconciling the importance of rights with Raz's normal justification thesis. John Finnis's account should also be noted. According to Finnis, "the sheer fact that virtually everyone *will* acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that community." {Finnis, 1980}, 250. This is because *de facto* power is fundamental to resolving large-scale, complex social coordination problems necessary to achieve the common good. Accordingly, political authority can have the capacity to create moral obligations regardless of whether it is democratic political authority.

front that here I do not aim to resolve whether democracy is necessary for the State to have legitimate political authority. Instead, the question here is *how* democratic authority, with a putative capacity to create moral obligations, might be grounded in the need to resolve necessary moral tasks.

The discussion will have the following structure. First, I spell out some of the concepts that are central to thinking about political authority and political obligation. Second, I will describe the claim at the core of all the democratic authority accounts noted. This is the claim that democratic authority, with the capacity to create binding moral obligations (what I call, “Strong Moral Power”), is instrumentally necessary to resolve certain necessary moral tasks *in the morally required way*. What is morally required is specified by additional moral principles over and above those entailed by the need to resolve necessary moral tasks. I argue that both Estlund and Waldron fail to account for a content-independent moral obligation to obey democratic laws even with additional moral principles attached to the moral task argument. They fail to explain why citizens generally ought to take the practical stance of obedience toward democratic pronouncements. At the end, I sketch a necessary task account that I will spell out in following chapters that regards Strong Moral Power as itself a necessary end based in ideas from Kant and contemporary theorists, such as Thomas Christiano and Joseph Raz. I believe that this approach is the most likely to succeed.

Incidents of Political Power and Political Obligation

Legitimate political authority is not a univocal concept. To begin, there are various accounts of the nature of *political authority*.²⁰ Most broadly, authority is a moral power intentionally to change the normative situation of others.²¹ For lack of better terms, here I offer a schema of *incidents of political power* that have been associated with political authority.²² By this I mean to refer to some of the moral powers, rights, or privileges that a State might plausibly possess to order its citizens normative lives. There are also competing accounts of *legitimacy*.²³ Here I use the term only to mean that whatever incidents of power a State might possess, it legitimately possesses an incident of power if and only if a successful substantive moral argument can be offered to defend such possession. Accordingly, I use “justified” and “legitimate” interchangeably.

Take the following schema of incidents of political power²⁴:

	<i>Moral Power</i>	<i>Coercive Power</i> ²⁵
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²⁰ Political authority is historically most centrally associated with the intentional imposition of an obligation. Nevertheless, some theorists understand the concept of authority more broadly as possibly including a right to use force independent of the imposition of a moral obligation. See {Edmundson, 1998}, 35.

²¹ See {Raz, 2009}, 12.

²² “Incidents” is Wesley Hohfeld’s term. See {Hohfeld, 1919}.

²³ I do not defend any particular analysis of legitimacy here. The literature on legitimacy is thorny insofar as different theorists use the term in different ways. Some describe legitimacy as capturing a distinction between types of normative grounds for the State. For example, for John Simmons, legitimacy is about “the complex moral right [a State] possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties.” {Simmons, 2001}, 130. The normative grounds of a legitimacy claim are “transactional” (e.g., consent). {Simmons, 2001}, 155. Whereas, “justification” is about a comparative showing that the State is “on balance morally permissible.” {Simmons, 2001}, 126. Whereas other prominent theorists make no distinction between legitimacy and justification. See {Raz, 1986}. Other theorists focus on the difference between a power to impose an obligation and a right to use force. For example, for Estlund, justified political authority involves the moral power to create obligations, whereas legitimacy is about the right to use force to enforce obligations. See {Estlund, 2008}, 134.

²⁴ My thinking here was significantly helped by discussions in {Edmundson, 1998}, 35-47, and {Christiano, 2008}, 240-43.

²⁵ These are general powers in that they are supposed to apply to all citizens and all laws within the States jurisdiction. By distinguishing between Moral Power and Coercive Power, I am not suggesting that Coercive Power is devoid of moral import. Another thing to note is that I am only focusing on political authority with respect to obligations. We should understand authority much more broadly as a moral power to change a citizen’s normative situation, where this could include creating powers, permissions, liabilities, and immunities, in addition to the power to create obligations. See {Perry, 2005}, 273.

<i>Strong</i>	Moral <i>power</i> to create <i>binding moral obligations</i> by issuing legal obligations <i>with a</i> correlative moral duty to conform. ²⁶	Moral <i>claim-right</i> to issue and to <i>enforce</i> a legal obligation <i>with a</i> correlative moral duty of non-interference. ²⁷
<i>Weak</i>	Moral power to create <i>weighty moral reasons</i> by issuing legal obligations <i>with no</i> correlative moral duty to conform.	Moral <i>privilege-right</i> to issue and <i>enforce</i> legal obligations <i>with no</i> correlative moral duty of non-interference. ²⁸

The primary way to think about the above schema is in terms of what Hohfeldian incidents come with having each form of political power and the types of reasons that are created when a valid legal obligation is produced. Accordingly, the above schema merely describes conceptual distinctions between different incidents of political power that a State might possess. As a purely conceptual matter, there is no sense in which any incident is normatively better or worse.²⁹ Importantly, these incidents of power are not mutually exclusive. It is perfectly consistent to argue that the State legitimately possesses both Strong Moral Power and Strong Coercive Power, as apologists for the State generally would think. Or, the State could only have both Weak Moral Power and Strong Coercive Power.³⁰ Or, as a passivist might think, the State could possess only some form of Moral Power but no Coercive Power. Nonetheless, one could not consistently argue that the State has Strong Moral Power but does not have Weak Moral Power

²⁶ This incident is central for most authority theorists. See, e.g., {Green, 1988}; {Raz, 1986}; {Finnis, 1980}.

²⁷ This incident is central in {Edmundson, 1998}. For Edmundson, there is also a correlative moral obligation to comply with a “direct order” pursuant to enforcing a more general law. {Edmundson, 1998}, 52.

²⁸ This incident is central in {Ladenson, 1980}. Ladenson, however, uses “justification-right” to refer to a Hohfeldian privilege. Edmundson uses “justification-right,” as well. {Edmundson, 1998}, 43. Below, I largely ignore this incident of power. To my mind, {Raz, 1986}, 24-28, has provided convincing arguments against this account on both normative and conceptual grounds.

²⁹ I should note a dispute between Raz and Ladenson about whether a purely coercion-based account of political authority is *conceptually* defensible. Raz argues on conceptual grounds that “the justified use of coercive power is one thing and authority is another,” because “the exercise of . . . power is no exercise of authority unless it includes an appeal for compliance by the person(s) subject to the authority.” {Raz, 1986}, 25-26. If Raz is correct that Coercive Power cannot exist as a type of authority independent from (at least) a *claim* to have Strong Moral Power, then Coercive Power as a complete account of political authority is conceptually worse for wear.

³⁰ On Edmundson’s view, while the State *claims* Strong Moral Power, it only *legitimately* possesses Strong Coercive Power and perhaps Weak Moral Power.

because the fact that one has a moral obligation is itself a weighty moral reason. Nor could one consistently argue that the State has Strong Coercive Power but does not have Weak Coercive Power since having a claim-right entails having a privilege-right. In both columns, Strong entails Weak. Ultimately, which incidents of power the State *legitimately* possesses is a normative question. For example, the moral task accounts discussed here are normative arguments in defense of the possession of Strong Moral Power by democratic institutions. Theorists need to be clear about which incidents of power they are aiming to justify.

Most theorists agree that States at least *claim* to have Strong Moral Power, namely the capacity to create binding moral obligations that demand conformity.³¹ I agree with this important claim but will not argue for it here.³² Strong Moral Power is the incident of political power that is most tightly connected with a moral obligation to obey the law. This is not to say that all or any States justifiably have the authority claimed, or that the authority claimed need be “comprehensive.”³³ Even though the State claims a general moral power to create obligations, perhaps it only succeeds sometimes, or never. Perhaps it only succeeds in making what amounts to a request that only creates a moral reason that ought be weighed with other considerations. In this case, the State would only possess Weak Moral Power despite claiming more. However, if a State legitimately possesses Strong Moral Power and creates a valid legal obligation, then the citizen has a moral obligation to conform. What is distinct about Strong Moral Power is the nature of the moral reasons that it creates. If a State justifiably possesses Strong Moral Power, it

³¹ But see {Himma, 2001}.

³² It is more accurate to say that “the law” necessarily claims Strong Moral Power. Here I use “law,” “legal system,” “political authority,” and “the State” fairly interchangeably.

³³ Raz contends that the law claims comprehensive authority in that it claims to be able to regulate any domain of human activity. See {Raz, 2009}, 116. My view is that this is not correct as a conceptual or a normative matter: authority can have non-comprehensive jurisdiction.

actually creates the categorical and mandatory reasons that all political authorities aim to create when issuing legal obligations.

Formulated in the language of reasons, a legal obligation issued by a Strong Moral Power provides a person with a first-order reason to act as the law requires and a second-order “exclusionary reason” not to act for conflicting reasons.³⁴ In this way the reason becomes a “mandatory,”³⁵ as opposed to a merely weighty, reason to act. A moral reason is also “categorical” in that it has normative force for a person that is not contingent on the particular desires, goals, or aspirations of that person.³⁶ Weak Moral Power, on the other hand, is the capacity to create categorical moral reasons that have weight but no mandatory force. For example, a law that read, “No person *shall* ride a bicycle in the park,” would only have the normative force of, “No person *ought* ride a bicycle in the park.” Merely weighty moral reasons then are analogous to what Ronald Dworkin describes as “principles,” which “state[] a reason that argues in one direction, but does not necessitate a particular decision.”³⁷ Presumably, in having a right to enforce legal obligations with force, Strong and Weak Coercive Power primarily create first-order pragmatic reasons for action.³⁸ Breaking the law can have unpleasant consequences.

The moral obligations that Strong Moral Power³⁹ creates are also “content-independent.”⁴⁰ What this means is that a legal directive has binding force independent of the

³⁴ See {Raz, 1999}, 39. Raz’s earlier position was that legal directives excluded pre-empted both conflicting and non-conflicting reasons. {Raz, 1986}, 58. This was to avoid “double counting.”

³⁵ {Gardner, Macklem, 2004}, 465.

³⁶ {Gardner, Macklem, 2004}, 465.

³⁷ {Dworkin, 1977}, 26.

³⁸ Any duties of non-interference attached to Weak Moral Power or Strong Coercive Power would be categorical and mandatory reasons. A system of law that only had Coercive Power would be comparable to law from the perspective of Holmes’s “bad man” who treats law as placing prices on behavior. *See* {Holmes, 1897}.

³⁹ The other incidents of power can satisfy the content-independence constraint too. In the case of Weak Moral Power, a legal directive creates a weighty moral reason that is independent of the merit of the content of the legal

moral merit of the content of the directive. For example, if the law has Strong Moral Power and it requires a person to purchase health insurance, the person has a moral obligation to purchase health insurance that is independent of the moral merit or demerit of purchasing health insurance. That the law said so is sufficient reason. So, a defender of an obligation to obey the law would say. In this way, it is possible for the law to create binding obligations even when it makes decisions that are substantively wrong on the merits (within limits). In terms of the democratic process, a citizen would have a moral obligation to comply with a legal obligation that issues from a properly functioning democratic process regardless of the merit or consequences of the legal directive. The content-independent nature of authoritative reasons is comparable to the content-independent nature of the binding reasons created by promises. That a person made a promise is a reason to satisfy the promise that is independent of the merit of the promise. If Sue made a promise to give Joe money, she has a binding reason to give money to Sam even if she comes to think that giving money to Joe is a dumb idea. Maybe this is because he has told her that he will be using it to buy fast food for his children for the next year.

Contrast the type of political obligation that is entailed by Strong Moral Power with that which is entailed by Strong Coercive Power. To be sure, a species of political obligation is

directive. Similarly, whether a Strong Coercive Power has a right to enforce a legal directive might not turn on the merit of the legal directive being enforced but instead the fact that it is a valid legal directive.

⁴⁰ “Content-independent” is the standard term in the literature, but it has the potential to generate confusion. Sometimes whether a law creates a reason does depend on its content. For example, take an authority that only has the power to regulate the stock market. If this authority attempted to create a law regulating freshwater fishing, the law it created would not be binding and this would be because of the content of the law created. The law would be beyond its jurisdiction. What is more important, rather, is that a legal directive’s reason-givingness not depend on the *merit* of the law’s content. See {Gardner, 2001}, 209. Thus, to say that one had no moral power where one tried to exercise a moral power is different from saying that one had a moral power to create an obligation but the obligation was without merit. In the former case the question is whether a reason is created, whereas in the latter case the question is about the relevance of the underlying moral reasons to the issue of how one ought act. This is one reason why it is somewhat misleading to equate the type of political obligation that is entailed by Strong Moral Power with a “general” obligation to obey the law. An authority may have legal jurisdiction where it does not have moral jurisdiction, such that its moral power to create binding moral obligations does not exactly coincide with the authority’s legal authority to create valid laws. Thus, you would have no general obligation to obey the law even if you would have a general obligation to obey all laws that were issued within its legitimate authority (even those laws that were without merit).

involved in Strong Coercive Power. Citizens would have a moral obligation not to interfere in the State's creation and enforcement of legal obligations. In the case of democracy, this would amount to an obligation not to interfere with the democratic process and the enforcement of the legislation that results from that process. However, any individual law need not give the citizen any moral reason to comply independent of the substantive merits of the individual law. Neither Weak Moral Power nor Coercive Power entails a binding moral reason to obey the law.

There are some *prima facie* reasons why one might aspire to justify Strong Moral Power on the part of the State. First, as noted previously, Strong Moral Power is the type of authority that the State claims for itself. The State claims to order its citizens' normative lives in a particular way. According to Raz, this capacity is would be necessary for the law to achieve its function or purpose, which is to "mediate between ultimate reasons and the people to whom they apply."⁴¹ If Strong Moral Power is the primary purpose of the law, it makes sense that this is the type of authority that the law claims for itself. Second, Strong Moral Power with its capacity to create binding moral obligations comports with citizen's intuitions on the matter. As Simmons notes, "[m]any people feel . . . that they are tied in a special way to their government, not just by 'bonds of affection,' but by *moral* bonds. . . . [T]hey feel that they are nonetheless bound to support their country's political institutions and obey its laws"⁴² Third, the aspiration to justify Strong Moral Power can arise from concerns about the justifiable use of coercion. Dworkin insists that "no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations."⁴³ The idea is that coercion would need to be justified even in those cases where the law seems to get the matter substantively

⁴¹ {Raz, 1994}, 215. See generally {Shapiro, 2011} for a similar argument that relies on the centrality of "planning." This is not to suggest that Raz thinks that there is a obligation to obey the law.

⁴² {Simmons, 1979}, 3. This is not to suggest that any of these intuitions ought be regarded as decisive. Intuitions are merely pre-theoretical data points that can be rejected.

⁴³ {Dworkin, 1986}, 191.

wrong. Finally, Strong Moral Power is the kind of authority that pervades the idea throughout the social contract tradition that individuals must substitute “public judgment” for their own “private judgment.” The citizen does not just balance the State’s directives as considerations along with other considerations but to some extent surrenders her private judgment of what reason requires.

With this conceptual scheme in mind, I now turn to the substantive moral task arguments offered by democratic authority theorists. Democratic authority theorists offer normative arguments for how the law can be truthful in its claim to have Strong Moral Power. Waldron aims to provide a normative “basis” for “why the *peremptory* tone of its claim upon us is not ‘Here’s a basis for dispute-resolution which you should accept if you agree with it.’ It is rather: Here’s a basis for dispute resolution which you are to accept whether you agree with it or not.”⁴⁴ Similarly, Estlund aims to provide the “moral basis or justification”⁴⁵ for “the moral power to require or forbid actions”⁴⁶ Similarly, Christiano defends an account of democratic authority that includes the “power to impose duties on citizens.”⁴⁷ In what follows, I argue that the modified moral task arguments offered by Waldron and to a lesser extent Estlund do not live up to this aspiration. This is primarily because their accounts do not uniquely justify the need for Strong Moral Power over and above the other incidents of power. While Estlund and Waldron, in the end, are able to avoid Hume’s Mistake, I argue that their arguments are indeterminate with respect to whether the State must possess the Strong Moral Power to create binding moral reasons with its say-so.

⁴⁴ {Waldron, 1999}, 7 (emphasis added). I read Waldron as not merely claiming that the law claims this type of authority but that this type of authority can be justified by his substantive moral arguments.

⁴⁵ {Estlund, 2008}, 137.

⁴⁶ {Estlund, 2008}, 143.

⁴⁷ {Christiano, 2008}, 241.

This is not to suggest that their arguments could not be used to provide a moral basis for any combination of the other incidents of power detailed above, for example, Weak Moral Power or Strong Coercive Power. In fact, because their arguments are indeterminate with respect to which incident of political power is justified, I could not claim otherwise. But their arguments are not sufficient to ground the Strong Moral Power that the State, democratic or otherwise, claims for itself. Nor would they account for the kind of obedience countenanced by the authority to impose obligations. Thus, Waldron and Estlund have not successfully defended a content-independent obligation to obey the laws of reasonably just democratic states. In the end, I sketch an account, following the likes of Kant and Christiano, that has the prospect of living up to this aspiration. This account does not conceive of general compliance merely as an instrumental means to a separate moral end but instead understands Strong Moral Power as an end in itself.

Waldron on the Requirement of Equal Respect

Democratic theorists outfit moral task arguments with additional normative architecture to account for Strong Moral Power and the obligation to obey laws the laws of reasonably just democracies. Remember that Waldron's overall view combines a claim about necessary moral tasks with a principle of respect. However, he commits Hume's Mistake in the moral task component of his argument when he says that the citizen "should not insist unreasonably on what appears to him to be the *right* solution to the urgent problems we face, if the result of such insistence is likely to be that the problems we face do not get any sort of solution at all."⁴⁸ If this is a necessary premise in Waldron's overall argument, then we should reject the overall argument. But, let's look at Waldron's argument on the assumption that he does not make this

⁴⁸ {Waldron, 1999}, 117-18 (emphasis added).

problematic claim. Let's replace the problematic claim with the unproblematic claim that there are necessary moral tasks that can be resolved through collective democratic processes and a sufficient, though not exact, level of conformity with law. Now, let's focus on the respect component to bring the non-conformers into the fold and to see if this can explain why Strong Moral Power is the uniquely required normative order. Recall that Waldron argues that one of the virtues of majority-decision is that "it not only solves the difficulty that [moral disagreement amongst citizens] generates, but it does so in a respectful spirit . . ."⁴⁹ Likewise, to say that something—a law—is authoritative is to say that it can "command respect among people who disagree" about whether it is justified.⁵⁰ He goes on to write that

[T]he dignity of legislation, the ground of its authority, and its claim to be respected by us, has to do with the sort of *achievement* it is. Our respect for legislation is in part the tribute we should pay to the achievement of concerted, co-operative, co-ordinated, or collective action in the circumstances of modern life.⁵¹

In talking about collective action, Waldron is talking about collective action through democratic decision making, namely public voting for representatives and laws according to a rule of bare majority decision.

A Hobbesian dictator can coordinate collective action too and clearly this would be an achievement. The authoritarian solution to collective action problems, however, does not do so in a "respectful spirit." Democracy, on the other hand, engenders respect:

[M]ajority-decision respects the individuals whose votes it aggregates. It does so in two ways. First, it respects their differences of opinion about justice and the common good: it does not require anyone's sincerely held view to be played down or hushed up because of

⁴⁹ {Waldron, 1999}, 117-18.

⁵⁰ {Waldron, 1999}, 101.

⁵¹ {Waldron, 1999}, 101.

the fancied importance of consensus. Second, it embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement.⁵²

Accordingly, democracy expresses equal respect for citizens despite divergent views on what the common good requires.

There are two objects of respect on Waldron's account. First, the achievement of the democratic process in resolving necessary moral tasks collectively, and second, the persons who are afforded an equal vote in the democratic process.⁵³ The actual collective process and its outcome deserve respect, as the collective process and the collective decision are an "achievement."⁵⁴ The democratic process engenders respect for persons by giving them an equal right to participate. So by respecting the democratic process, presumably, one is also respecting one's fellow citizens. Or we might say that a collective decision process that is respectful and addresses a necessary moral task obligates one to show respect for the outcomes of that process because we have an obligation to respect our fellow citizens as equals.

As was noted earlier, it cannot just be that Strong Moral Power arises from the mere instrumental capacity of the State to solve certain moral tasks. Moral tasks can be solved without the general conformity that would presumably come from every single person treating the democratic process as having Strong Moral Power. And other incidents of the State (or combinations thereof) can be equally as instrumental in generating enough conformity to achieve the moral task. General obedience is not necessary. In light of this, the requirement of equal respect engendered by democratic decisions *prima facie* adds something suitable to the account

⁵² {Waldron, 1999}, 109.

⁵³ Presumably there is a sense in which even persons who do not vote are respected. They are given the right to vote if they choose.

⁵⁴ {Waldron, 1999}, 101.

for how citizens can be bound individually. A requirement that individuals show respect binds all individuals more directly than an obligation for individuals to play a non-decisive role in the resolution of a collective moral task. This is because a duty of respect is generally not an instrumental requirement.⁵⁵ The idea instead is that there is something of value already in existence, here the admirable and respectful collective process in which respect-worthy citizens have engaged to resolve an important moral task, and this value places a certain demand on all citizens to show respect.⁵⁶ But what is actually required of the citizen who is required to respect the outcome of a democratic decision? Waldron's account has it that citizens are required to show respect with obedience. In this way, democratic laws are morally binding.

Nevertheless, obedience is not uniquely required by a duty of respect. Respect can be shown in ways that do not require Strong Moral Power. Here are several possibilities for how we could interpret a duty of respect.⁵⁷ First, a requirement of respect could be a requirement only that one have a certain type of attitude toward the object of respect. For example, I might respect the craftsmanship in a piece of furniture, but have no qualms about using it to start a campfire. What is important to note about this interpretation is that it does not require an individual to do anything in particular beyond have a certain type of mental state, here an attitude of respect. With respect to the law, we might imagine a person faced with a legal directive saying, "I respect your decision and the effort that went into it, but I am going to do my own thing." In this case, the person has the mental attitude, but the requirement that he have this

⁵⁵ In some cases, we might think that one has an obligation to show respect because it will make someone else feel better, but this is not a standard case of a duty of respect.

⁵⁶ This seems to be true of other objects of respect. For example, a masterpiece painting demands respect from all persons regardless of whether all persons have anything to do with creating the masterpiece. Once the masterpiece exists, all are required to respect it in some way.

⁵⁷ There are likely more, but these will do.

attitude does not give him reason one way or the other to comply with the directive. This is the weakest form of respect.

Second, there is a moderate possibility. While this form of respect does not require a particular mental attitude, it does require a particular mental process. Specifically, it requires that we at least take the object of respect as having some sort of practical relevance and as carrying some sort of weight in our deliberations about what we are going to do. A clear example of this is that of a parent making a request of their adult child. At least in the paradigm case, the adult child, as a matter of respect, is obligated to give some consideration to their parent's request to act in certain ways, perhaps even substantially weighty consideration. But this does not mean that the adult child must ultimately act on that request to the exclusion of all other considerations. Or, that the adult child does anything wrong by not going along with what the parent says. The request (even if communicated more like an order) does not provide an exclusionary reason. Along these lines, requiring respect for democratically created law could mean that one is required to consider a democratically generated law as carrying (significant) weight in one's deliberations. So we can imagine a person saying, "I see your point about the fact that this law was the majority decision of my fellow citizens and that fact weighed heavily in my deliberations, but ultimately other moral considerations compel me to do otherwise." Nevertheless, sometimes a democratic law would be a weighty consideration that tips the balance toward compliance. In describing this form of respect, I mean to bring to mind Weak Moral Power. With Weak Moral Power, the law creates a weighty moral reason that the reasonable citizen must take into consideration, but the citizen is not compelled to comply to avoid violating a moral obligation.

Third, there is a moderately strong form of respect in which a requirement of respect creates a claim-right for the object of respect. On this account, the requirement of respect could amount to a requirement of non-interference with the object of respect. Here, no particular practical attitude is required, but particular actions with respect to the object are foreclosed. We speak this way when we say that an individual is required to respect the fact that a baseball game is taking place. Clearly, a non-player is not required to wear the uniform (even if the umpire orders so), but he is required not to interfere with play. In a democracy, we might think that the moderate requirement of respect requires that one not interfere with the democratic process, for example, by refraining from breaking voting machines or spreading false rumors about what is contained in the legislation of a ballot initiative. Perhaps the citizen also does not interfere in enforcement of the democratically produced laws. Yet, this does not entail that one exhibits any moral failing, at least as far as respect goes, if one fails to obey a democratic referendum and regards it with disrespect and disdain.⁵⁸ Respect on this account merely requires a duty of non-interference, which is to say that mere possession of Strong Coercive Power could adequately satisfy a duty requiring this form of respect. Non-interference with the democratic process is one way in which we can respect that process.

The fourth and final route would be to interpret the duty of respect to require that a person obeys the commands of whoever or whatever commands and is entitled to respect. Only if one obeys does one show adequate respect. For example, perhaps respecting one's parent entails that one obeys their commands. Similarly, a requirement to respect a democratically produced law entails that one obeys that law. This last idea brings us right to the idea of Strong

⁵⁸ In constructing this version of the requirement of respect I have William Edmundson's account of political authority in mind. On Edmundson's account, there is no general obligation to obey the law, democratic or otherwise, however, one is required not to interfere in the direct administration of the law by a State official. See {Edmundson, 1998}, 49-70.

Moral Power in which democracy has the capacity to create moral obligations that demand compliance. It is this version of respect that Waldron must defend if respect is supposed to fill the gap left by the moral task component.

Nonetheless, we need more argument to understand why only this fourth interpretation is morally necessary. If not, the duty of respect is indeterminate on the different incidents of power that the State could possess. Perhaps it is important to note that the law, democratic or otherwise, does not merely make a claim to respect. Instead, the law demands conformity full stop. As Joseph Raz puts it,

The law's claim to authority is manifested by the fact that legal institutions are officially designated as 'authorities', by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed⁵⁹

Raz is making a conceptual point about legal authority. Nonetheless, it is this feature of authorities that most directly captures the idea of an obligation to obey legal directives that issue from legitimate authorities or legitimate collective decision procedures. The idea is that the law says, "I do not care if you respect the decision or not. You are still required to get on the bandwagon or get in the paddy wagon."

The upshot of this discussion is as follows. On top of the moral task component Waldron makes the point that democratic authority demands respect because it is a respectful achievement. This additional feature is supposed to combine with the fact that democratic authority is instrumental in resolving moral tasks to account for how democratic institutions can

⁵⁹ {Raz, 1994}, 215. In arguing against consent theories, Raz puts this point in another way: "Governments decide what is best for their subjects and present them with the results as binding conclusions that they are bound to follow. A government does not merely say to its subjects: 'Here are our laws. Give them some weight in your considerations. . . .'" {Raz, 1994}, 359.

have Strong Moral Power. The difficulty is that not all accounts of respect require that an individual take any action in particular or that an individual regard a directive as a sufficient and binding moral reason to conform. We would need additional argument to explain why obedience is the only way in which a citizen can show respect for the outcome of a democratic process. If the other forms of respect are adequate then there is no reason to think that the other incidents of political power are not adequate as accounts of the practical relationship the citizens could have with their State. Why does the citizen need to show *that much* respect?

One might object that insofar as all incidents of power equally capture a notion of respect, why not just concede Strong Moral Power to the State? The problem with this approach is that it lands us in an overbinding problem.⁶⁰ While the morally upstanding citizen wants to do his moral duty, he does not want to be morally bound more than is necessary. While he is not living up to unnecessary obligations, he can pursue his own meaningful projects or he can pursue what he regards to be his moral obligations in the way he sees fit. Similarly, he does not want to be criticized, held to account, or sanctioned on the ground that he violated a moral obligation that he did not need to have. Moreover, to fully comply with his general obligation to meet the law's requirements, this likely means that he is required to surrender much of his own personal judgment on how to live his life in accordance with what morality requires of him. While autonomy is not of overriding importance in all cases, surely it is important. If the upstanding citizen can do what is morally required of him without surrendering his own independent judgment, then it is not necessary to impose an additional constraint via Strong Moral Power. Thus, we need to account for how giving the State the moral power to impose obligations is necessary for the morally upstanding citizen to remain morally upstanding.

⁶⁰ Green describes this general problem as one of “being more tightly bound . . . than is warranted by the point of commitment.” {Green, 1988}, 116.

Estlund on Fairness and Normative Consent

David Estlund argues that the need to achieve certain moral ends—in a way that lives up to the additional moral requirements of fairness and normative consent—might ground democratic authority and the obligation to obey. In *Democratic Authority*, Estlund defends a view of the authority of democracy that he calls an “epistemic proceduralist account of democratic authority.”⁶¹ Estlund argues that democracy “serve[s] urgent collective tasks with institutions that can be publicly seen to have some decent tendency (better than or at least nearly as good as any other and also better than random) to produce good or correct decisions.”⁶² The overall idea is that the democratic process has a robust epistemic capacity to figure out what justice requires by pooling the wisdom of the citizenry through the voting process. Estlund explains that, for him, “[a]uthority is the moral power to require or forbid actions, not merely the moral power to do things that happen to result in requirements or prohibitions”⁶³ Democratic authority, then, involves an “intentional” exercise of Strong Moral Power. Thus, democratic institutions, when the democratic process is functioning correctly, have the moral power to create laws that morally bind citizens.

Note first Estlund’s moral task component. There are “urgent collective tasks”⁶⁴ that must be addressed. At bottom, the duty to obey laws issuing from the democratic process is a species of duty “to contribute to the solution of great humanitarian problems”⁶⁵ On

⁶¹ {Estlund, 2008}, 136. I will leave to the side the objection that epistemic procedural confuses practical authority with theoretical authority. The former creates reasons for action, while the latter merely creates reasons for belief. Although it might be foolish to ignore the claims of a scientific authority, one is not morally bound to believe a scientific authority. On this model, a failure to comply with democratic law is not a moral failure but an epistemic failure.

⁶² {Estlund, 2008}, 137.

⁶³ {Estlund, 2008}, 143.

⁶⁴ {Estlund, 2008}, 137.

⁶⁵ {Estlund, 2008}, 145.

Estlund's account, the democratic process employs a robust epistemic capacity to hone in on the correct solutions to these humanitarian problems. Thus, complying with a democratic law is an instrumental contribution toward an end that the democratic process identifies as morally compelling. Presumably the democratic process also determines what are the morally compelling means to address our urgent tasks.

Majority-rule voting procedures are not the only procedures that can be authoritative. On the epistemic proceduralist theory, we can account for the authority of a "spontaneous" jury that pops up in the state of nature in the same way that we can account for the authority of the democratic process. In the state of nature, we need to address the important moral tasks of public exoneration and criminal justice. There are multiple options. Anarchic private vengeance. A counsel of learneds.⁶⁶ Or, a jury system of six randomly selected community members who decide on guilt. According to Estlund, the jury system will possess "original authority" and the capacity to create binding moral obligations with its decisions insofar as it is "more likely to promote substantive justice than the anarchic arrangement, and [is] also better than a random procedure for choosing decisions."⁶⁷ Accordingly, the jury system, no matter how it comes about, even if by magic or corporate fiat, possesses Strong Moral Power in virtue of its comparatively better instrumental capacity to determine innocence and to cause people to comply.

⁶⁶ There is an ambiguity here in Estlund's view. Estlund rejects the authority of a counsel of learneds on the ground that Strong Moral Power in the hands of a counsel of learneds would not satisfy a "qualified acceptability" constraint, meaning that "any political measure is illegitimate if there are possible qualified objections to it." {Estlund, 2008}, 49. The conclusion is that expertise is not an acceptable basis upon which to justify political authority because it involves invidious comparisons. This is supposed to be a direct response to the expertise portion of Raz's account of authority. The problem is that on Estlund's account, qualified acceptability is only relevant to the issue of the justifiable use of force (legitimacy); it is not relevant to the issue of whether someone has the authority to create obligations. {Estlund, 2008}, 134. Raz's account is about justified authority, not the use of force. Accordingly, we cannot reject the authority of the counsel of learneds on the basis of the qualified acceptability constraint. Rather we can only question whether they can use force to enforce their morally binding decisions. So, it is unclear why a counsel of learneds could not gain authority.

⁶⁷ {Estlund, 2008}, 139.

Let us focus more on the instrumental role that democracy plays in resolving moral tasks. Democratic decision making is morally justified and is capable of morally binding decisions because of its comparative instrumental success, compared to non-democratic institutions, in making correct decisions about justice. Democracy does this by pooling the wisdom of the citizenry through the voting process.⁶⁸ This is not to say that “democracy almost always gets the right answer.”⁶⁹ Rather, “democracy has some modest epistemic value . . . , [and] its outcomes are legitimate and authoritative in a purely procedural way.”⁷⁰ It is not that democracy’s authority hangs on the fact that it merely performs better than a decision process that chose randomly (say by flipping a coin).⁷¹ Rather, democratic decision making is *much better* than a random procedure and very reliable when it comes to avoiding “primary bads”: “war, famine, economic collapse, political collapse, epidemic, and genocide.”⁷² And, since democracy is *much better* than random at avoiding primary bads, Estlund continues, we can infer that it is also *at least* better than random at determining what is required by justice and the common good.⁷³ Thus, the Strong Moral Power that the democratic State possesses is partially grounded in its instrumental capacity to identify and achieve good or just resolutions to necessary moral tasks

To start, we might worry that Estlund makes Hume’s Mistake.⁷⁴ Remember that Hume’s Mistake is the claim that the State must have a right to general conformity to achieve its moral

⁶⁸ We need not get into the details of the truth of this claim or the explanation for how democracy does this. See {Estlund, 2008}, 159-83, for the account.

⁶⁹ {Estlund, 2008}, 116.

⁷⁰ {Estlund, 2008}, 116.

⁷¹ {Estlund, 2008}, 160.

⁷² {Estlund, 2008}, 163 (emphasis removed). This parallels Amartya Sen’s remark that “no substantial famine has ever occurred in a democratic country” {Sen, 1999}, 51

⁷³ {Estlund, 2008}, 160.

⁷⁴ In describing one component of his view of democratic authority, Estlund writes, “urgent task theory holds that some tasks are morally so important that there is a natural moral duty to obey the commands of a putative authority who is well positioned to achieve the task if only people will obey.” {Estlund, 2008}, 132. This description is ambiguous between two readings. The first reading makes Hume’s mistake and claims that the task can only be completed if *all* people obey. The second reading does not make Hume’s mistake and reads “if only people obey”

ends successfully, such that success hangs on the conformity of any particular individual. Nonetheless, Estlund writes, “[e]ven where authority is, in a certain way, based on its addressing some great need, the obligations it generates are not conditional on . . . whether obedience is the most effective way for me to help address the underlying great need.”⁷⁵ This suggests that the instrumental relevance of any given person is not the main issue and that Estlund is sensitive to Hume’s Mistake. Yet, why does that person have to obey? Estlund outfits his moral task account with two supplemental ideas: 1) a duty of fair contribution and 2) normative consent.⁷⁶ These supplemental ideas can plausibly fill the gap. The duty of fair contribution is the most persuasive supplement, so let us begin there.

Doing One’s Fair Share

According to Estlund, it is not just that we have an obligation to help solve humanitarian problems. Rather, we have a duty to do our “fair share” to solve humanitarian problems.⁷⁷ Thus, while it is true that humanitarian problems can be resolved without the obedience of everyone, general obedience is necessary to resolve humanitarian problems in such a way that everyone is doing their fair share. It is unfair for some merely to treat the State as having Weak Moral Power when most others treat it as having Strong Moral Power.

along the lines of *enough people, some people, or most people*. I assume the latter is Estlund’s intent. It should also be noted that conformity, not obedience, is the more accurate description of the instrumental need.

⁷⁵ {Estlund, 2008}, 151.

⁷⁶ Estlund actually claims that moral task theory and fair contribution theory falls under “the umbrella of normative consent theory.” {Estlund, 2008}, 131. However, as I will contend, normative consent does no theoretical work whatsoever, so it is an umbrella best discarded. Moral task theory and fair contribution theory can be combined without normative consent theory.

⁷⁷ In this way, Estlund’s moral task account is comparable to “fair play” accounts of political obligation. As Hart describes the view, “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions have a right to a similar submission from those who have benefited from their submission.” {Hart, 1955}, 185. Simons describes the most defensible way in which fair play could bind one to a joint enterprise. See {Simmons, 2001}, 1-42. While Estlund’s account employs the fair share requirement, this is not based on the idea of voluntarily accepting benefits or receiving benefits and free-riding on others. {Estlund, 2008}, 147.

Nevertheless, the fair share constraint does not uniquely pick out Strong Moral Power to the exclusion of the other incidents of the State. This is because fairness is indeterminate with respect to which “practical stance”⁷⁸ all individuals must have toward the State. A duty of fair contribution merely says that among the social orders that resolve the moral task, we must choose among social orders that treat all citizens equally. To be sure, defenders of the related principles of fairness do not restrict fairness to the notion of equal obedience. Rather, fairness requires “similar submission,” according to Hart,⁷⁹ and “similar acquiescence,” according to Rawls.⁸⁰ But, submission and acquiescence need not amount to general obedience. Fairness is a formal constraint. It does not say anything yet about why general obedience rather than some other practical stance is necessary for fairness. It just says that we ought be how everyone else is. To begin, take a social order in which the State claims both Strong Moral Power and Strong Coercive Power but only actually possesses Weak Moral Power and Strong Coercive Power. In this case, the State has a right to enforce its legal directives but citizens are only morally required to treat the State’s directives as weighty moral reasons that ought be taken into account along with their other private judgments about what reason recommends. All citizens are also equally subject to force in the event that they break the law. Clearly, this State would get things done. This is probably what is going on in most industrialized countries today. In a majority of cases, the threat of sanction and the additional weight of reason would tip the citizen’s scales toward compliance. In the reasonably just State, many citizens would comply because they already thought there was good reason to. In many cases, this is probably because they see most other people contributing to the task, and they want to equally contribute. Moreover, since everyone would take the same practical stance, it is unclear why all persons are not doing their fair share.

⁷⁸ {Simmons, 2001}, 109.

⁷⁹ {Hart, 1955}.

⁸⁰ {Rawls, 1999}, 209.

In the end, then, fair contribution theory does not help us to single out Strong Moral Power as the only morally acceptable social order.

This is not to suggest that fairness ought not be relevant in any account of how all individuals have an obligation to obey the law. In fact, my view is that an egalitarian constraint would be necessary for such an obligation to bind all citizens equally. The criticism is merely that we have not yet explained why all citizens must take a practical stance of obedience, a practical stance in which they can be justified in treating the law as creating content-independent authoritative reasons that bind them. If the legal-obligation does not bind the instrumentally unnecessary person, it is unclear why he is not doing his fair share in failing to go along with the say-so of the State. I think Estlund realizes as much. As he notes, even if “I might get an obligation to direct my efforts to some local portion of the system that is addressing [some] need, something more would be needed to explain why I would be obligated to *follow orders*, to do what I am told because I am told.”⁸¹ This is where normative consent comes in.

Normative Consent

Perhaps the addition element of normative consent in Estlund’s picture will help us single out Strong Moral Power. The instrumental capacity to resolve an urgent moral task in a fair way is not sufficient to account for Strong Moral Power. Political authority must also be capable of garnering “normative consent.” And, not only is normative consent a condition of the existence of authority, it is also a partial ground. Normative consent does not require *actual* consent to the State having Strong Moral Power. In fact, a rejection of actual consent theories is something that unites democratic authority theorists generally. Thomas Christiano, for example, insists that “the legitimacy of authority is not predicated on a utopian degree of agreement among citizens on the

⁸¹ {Estlund, 2008}, 151.

substantive incident of justice that must guide the State's creation of law and policy."⁸²

Similarly, for Waldron, a theory that required broad consent by citizens to the laws that bind them would not be taking seriously the reasonable disagreement that pervades modern societies.⁸³ In fact, authoritative order is introduced as an alternative to the impracticality or impossibility of unanimity among citizens.⁸⁴

Estlund writes that, "[n]ormative consent names a moral obligation, when there is one, to consent to proposed new authority. It is . . . morally equivalent to a promise to obey. In the context of [the State of nature] it would be a moral obligation to consent to the proposed new authority of [spontaneous] juries."⁸⁵ Not all urgent tasks can ground political authority. Instead,

[n]ormative consent theory proposes that in the case of some urgent tasks, but not others, those who are commanded would, if asked, be wrong not to consent to the commander's authority for these purposes. The wrongness of refusing consent, rather than urgency itself, would be the explanation for why some urgent tasks ground authority and others do not.⁸⁶

The idea seems to be that with respect to some necessary moral tasks an individual is required to consent to treat the State as having Strong Moral Power when it has a sufficient instrumental capacity to address those moral tasks that it would be wrong not to address. The citizen would have a duty to consent regardless of "whether obedience is the most effective way for [the citizen] to help address the underlying great need."⁸⁷ In this way, the obligation does not depend on the merit of the directive. Similarly in a democracy, the bindingness of legal obligations

⁸² {Christiano, 2008}, 232.

⁸³ {Waldron, 1999},

⁸⁴ See {Finnis, 1980}, 248 ("For the need for authority is, precisely, to substitute for unanimity in determining the solution of practical co-ordination problems which involve or concern everyone in the community.").

⁸⁵ {Estlund, 2008}, 152.

⁸⁶ {Estlund, 2008}, 132.

⁸⁷ {Estlund, 2008}, 151.

would be content-independent since the democratic processes does not get it right all the time. Finally, if an individual has an obligation to consent but fails to consent, their non-consent is nullified and they have given *normative*, but not actual, consent to be bound. Normative consent is normatively equivalent to a promise to obey.

We might be tempted to understand normative consent theory along the following lines. Assume for the sake of argument that citizens would have a moral obligation to consent to authority under the conditions specified by Estlund. We might think that normative consent theory says that insofar as citizens comply with the moral obligation to consent by consenting, then they have a moral obligation to conform to the directives that the political authority issues. In such a case, we would be grounding the capacity of Strong Moral Power to create obligations in an actual promise to be bound. However, if there is no consent, then there is no moral obligation to obey. On this account, the promise creates the exclusionary reason, not the underlying moral reasons that justify the State. We might even expect that this would result in a fair number of citizens in a democracy having an obligation to obey the law insofar as we think of people generally as morally upstanding people who aim to satisfy their obligations. Presumably this would distinguish Estlund's account from an actual consent theorist who need not think that an individual exhibits any sort of moral failing in the event that she does not consent to be bound. It would also distinguish the view from those who think that we actually have a moral obligation not to consent to be bound.⁸⁸

Nevertheless, there are two difficulties with heading down this road. First, it does not capture Estlund's point, which is that normative consent is "morally equivalent to a promise to obey." The point is that the binding moral reason exists regardless of whether consent is given. Second, the view understood in this way would not ground a general moral power to create

⁸⁸ See, e.g., {Wolff, 1998}.

binding obligations insofar as there will be those who do not satisfy their moral obligation to consent to obey. To be sure, we might think that this is a moral failing on the part of those who do not consent to be bound. But it is a totally different moral failing than failing to comply with a valid law that morally binds. Instead, Estlund's view is just that failure to consent to a democratic State, one that resolves moral tasks in accordance with fair contribution theory, is nullified. Null non-consent entails normative consent. Normative consent is equivalent to a promise to obey.

Overall, I think there are three problems faced by normative consent. The first has to do with whether it does any normative work. The second has to do with whether it has morally problematic consequences. And the third difficulty is that it does not single out Strong Moral Authority. Regarding the first difficulty, if the fact that a person does not consent has no normative implications, we might be concerned about what additional normative work is being done by normative consent.⁸⁹ If the lack of consent is nullified because of the necessity of resolving moral tasks fairly, then one would think that the argument would be that one already has a moral obligation to obey authority in the first place. The normative basis for Strong Moral Power would just be the moral task and the duty to do one's fair share. Estlund is sensitive to this worry about normative consent:

[A] formidable objection is that the duty to consent already depends on prior *moral* facts, which might as well be taken as the moral basis for the authority itself, as well as for the duty to consent. The direct authority objection claims that the consent-requiring facts are

⁸⁹ Even if normative consent is doing no normative work, it might be doing dialectical work. Normative consent permits us to engage with consent theorists on their own terms without looking like we are begging the question. In the end, however, the consent theorist probably thinks the normative consent theorist is still begging the question.

already authority-establishing facts. This objection . . . claims that the facts are already a sufficient *moral basis* for authority.⁹⁰

So, why the detour? Estlund offers one possible reason: “[m]oral agents possess a special kind of freedom from each other’s authority. It cannot simply befall us, but can only arise subject in some way to our own will. . . . It does not say that there is no authority without consent, but only no authority that is not, in some way, connected to our will.”⁹¹ The explanation given of this idea is that “no one’s will is more authoritative, because of who they are, than anyone else’s, and so each of us is free of other wills and subject only to our own.”⁹²

The idea seems to be that a system of authority that recognizes persons as equally authoritative and not naturally subject to the will of others will be sufficiently connected to the will of each person such that there is no moral problem from the perspective of freedom.⁹³ However, there is no reason why we need the idea of normative consent for this. Instead, we need only be committed to the rejection of justifications for authority that posit some persons as having unequal, natural Strong Moral Power over others. This constraint does not require the idea of normative consent or the idea of a connection, however tenuous, between authority and the will. Instead, we just have something like Locke’s claim that all are naturally free and equal.⁹⁴ Normative consent is normatively inert still.

⁹⁰ {Estlund, 2008}, 130.

⁹¹ {Estlund, 2008}, 151. This route is a bit perilous. The consent theorist is going to agree with Estlund here and say that the requisite connection to the will is actual consent.

⁹² {Estlund, 2008}, 131.

⁹³ This point seems to be directed at what Stephen Perry calls the “subjection problem.” {Perry, 2007}. Nevertheless, this seems to be the idea that motivates the qualified acceptability constraint noted earlier and the point that authority cannot be grounded in invidious comparisons between persons. However, qualified acceptability is only relevant to the use of force, not authority.

⁹⁴ See {Lock, 1988}, 269 (“To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”). I take it that Locke’s claim is at least as plausible as normative consent and likely less controversial.

The second difficulty with normative consent is that it has potentially untoward consequences when looked at in other circumstances. Take the case of a neighbor, Cindy, who needs a car to travel across her state to build houses for orphans. Knowing about normative consent, she orders her neighbor, Bob, to fork over his car so that she can make the trip. He refuses, as he would like to use the car to go to the movies. Is his failure to consent invalidated? Seemingly so. Bob has given normative consent to Cindy's demand; therefore, it is as if he promised to give up the car. This strikes me as a deeply implausible implication. Surely Bob does not violate Cindy's right to his car when he refuses to give her the keys.

Estlund might respond that normative consent is only relevant in the case of the State. We are not permitted to utilize it in the context of interactions between private citizens. This would not be a helpful response. What motivated the initial plausibility of normative consent is what Estlund describes as an "asymmetry" between consent and non-consent. Some cases of consent are invalidated. For example, unconscionable private contracts are void. So why not some cases of non-consent? The problem then is that the asymmetry that was criticized existed in the context of interactions between private citizens. So it would be ad hoc to quarantine normative consent only to the case of the State giving commands.

Yet, there is a third and final difficulty with normative consent. Let us grant for the sake of argument that there are urgent moral tasks that democratic authority is reasonably good at addressing and that democratic authority deserves and gets normative consent. This, nevertheless, is not sufficient to ground Strong Moral Power. This is because we have no reason to think, as described earlier, that the moral power to create binding obligations is the only incident of political power that can be used to resolve moral tasks effectively. We could

normatively consent to incidents of power besides Strong Moral Power. The result is that the view is guilty of overbinding.

We can explain this difficulty along the following lines. Estlund understands citizens as *authority-takers* much like consumers in a market are *price-takers*.⁹⁵ Whatever is on offer for normative consent exhausts the realm of possibility. So, if the State presents itself as having Strong Moral Power, as most agree that it does, and the State resolves important moral tasks in a fair way, then we are required to consent to such authority. But this is not how normative argument or even a competitive market works. When a person goes to a car dealer, they do not just buy whatever car the dealer offers at whatever price solely because the car will get them where they need to go. Rather, a car buyer shops for the most economical car that satisfies his needs. Surely, car buyers are price-takers in the sense that they are forced to choose from the prices that are present in the market. One ought not wait around to buy a good car for a dollar. And they are limited by the number of car options that actually drive. Nevertheless, there are always multiple options and a car buyer can forgo a more expensive car in favor of a less expensive option that satisfies the same driving needs. It is not the case that only one car is on offer for one price.

Similarly, we, like Estlund, can conceive of a citizen as facing a choice in a market for incidents of political power. What incident of political power ought the citizen consent to? Estlund conceives of democratic authority as offering itself as an entity that has the moral power to create moral obligations generally and that citizens then have a moral obligation to accept rather than reject this moral power. However, the normative space is not exhausted by whatever is on offer by the State. Authority cannot say “We want Strong Moral Power and Strong

⁹⁵ Green describes citizens in a large democracy as “law-takers,” which is distinct from but related to what I aim to capture here. See {Green, 1989}, 802.

Coercive Power. Take it or leave it.”⁹⁶ If Strong Coercive Power, on its own, or combined with Weak Moral Power, has the instrumental capacity to resolve the urgent moral tasks fairly, then there is no reason why all must give normative consent only to what is on offer. For example, citizens could normatively reject the idea that spontaneous juries have a general capacity to create binding moral obligations while at the same time normatively consenting to be forced to comply with the directives of the juries. Or, they could normatively reject the right of juries to force conformity while normatively consenting to the moral power of the juries to change the normative situation of citizens by creating weighty moral reasons to conform to the directives. Or, they could accept a normative power to bind, but only in some cases but not other. There are multiple options and combinations on the table, and a successful theory of normative consent (or actual consent) must be sensitive to the options in normative space. It must offer an account of why we must reject the other possible combinations of incidents of political legitimacy as not normatively good enough.

Absent a rejection of the other options, we have no reason to think that Strong Moral Power, understood as a general moral power to create binding moral obligations, is the only option available to consent to. Moreover, we cannot think that an obligation to obey the law is instrumentally necessary to achieve the moral ends of the democratic State because this would commit Hume’s Mistake. In the end, Estlund has not explained why the State must possess a general capacity to create moral obligations.

Political Obligation that is Constitutive of Our Moral End

Above I argued that instrumental democratic authority theorists have not adequately accounted for Strong Moral Power in light of the fact that urgent moral tasks can be resolved

⁹⁶ This is perhaps true at the margin of the state of nature, but we are not currently anywhere near this margin.

without the general conformity that Strong Moral Power demands. Additional moral principles were brought to bear, but our problem was not resolved. I end with a very brief sketch of an account of authority that I believe has more promise and learns from some of these lessons. I will argue for this account more fully in the next chapter.

My overall view is that the moral point of the law is to establish a public system of moral duties and rights where none existed before. The major purpose of the State is to create systematic moral obligations based on more indeterminate moral reasons, interests, and ends. I argued above that Jeremy Waldron's duty of respect was indeterminate with respect to which practical relationship the citizen must have with the democratic process. Nevertheless, I think that Waldron is correct that we do have a duty of respect to our fellow citizens and that this has some connection with political obligation. For Waldron, the obligation to obey the law is in some way derivative of the duty of respect. I think that this puts the cart before the horse. A better view is that complying with the law of a reasonably just system is a way of showing respect because complying with the law of a reasonably just system is complying with the moral obligations that we owe to our fellow citizens. By complying with law we are respecting the rights of our fellow citizens.

Above I argued that David Estlund's duty of fairness was indeterminate with respect to which practical relationship the citizen must have with the democratic process. I agree with Estlund that we have a duty of fairness. Put differently, I think that we must stand in a relationship of equality with our fellow citizens. But, not only must we stand in a relationship of equality with our fellow citizens, there is something very valuable about standing in relationships with our fellow citizens that are structured by rights and duties. It is this last component that Estlund's view leaves undertheorized, though I agree with him that we are satisfying a duty of

fairness to our fellow citizens when we comply with the laws of a reasonably just system addressed to collective moral tasks.

Theorists have described the view I am hinting at in multiple ways. For Kant, the point of the State is to create a public system of equal freedom, such that: “an action is *right* if it can coexist with everyone’s freedom in accordance with universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law.”⁹⁷ Arthur Ripstein describes this as a public system of “reciprocal limits on freedom.”⁹⁸ Similarly, Christiano describes democratic authority as necessary to establish “justice among persons” through “a settled and just legal system.”⁹⁹ What this means is that “the legal system of a reasonably just society *determines* how one is to treat others justly if one is to treat them justly at all.”¹⁰⁰ I think that Raz captures these points in the clearest way and paints an interesting picture of what the law is doing when it is legitimately exercising its authority:

What happens—and remember, we are talking here of morally legitimate law only—is that the law *modifies the way morality applies to people*. True, the result is that some moral considerations that apply absent the law do not apply or do not apply in the same way. But barring mistakes and other malfunctioning that can occur even within a just and legitimate system, the law modifies rather than excludes the way moral considerations apply and, in doing so, advances, all things considered, moral concerns rather than undermines them.¹⁰¹

The idea is that one of law’s functions is to structure our amorphous moral life with duties and rights.

⁹⁷ {Kant, 1998}, 6:230.

⁹⁸ {Ripstein, 2004}, 11.

⁹⁹ {Christiano, 2008}, 232.

¹⁰⁰ {Christiano, 2008}, 237 (emphasis added).

¹⁰¹ {Raz, 2009}

The account is more promising, I think, because it does not view political obligation only as an instrumental tool to achieve a separate moral end, and it aims to justify political obligation directly. Nor does it view political obligation merely as an instrumental means to achieve a separate moral end in a morally respectable way, for example, in a fair way or a respectful way.¹⁰² Nor does the present account run into the difficulty of alternative incidents of legitimate authority. Instead, the account regards political obligation itself as a constituent element of the moral end that democratic authority achieves when it is achieving its moral tasks.¹⁰³ In a sense, political obligation is an end in itself. There is no overbinding because the necessary moral end is to be bound in the way that Strong Moral Power requires. In fact, this is one of the major functions of having obligation-imposing laws.

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¹⁰² Though my view is close to this point.

¹⁰³ Insofar as a moral obligation to obey the law is constitutive of the moral ends of the State, satisfaction of that end is also instrumental in achieving itself. So, there is still an instrumental element. Nor do I claim that political obligation is the only end. We still care about achieving the separate moral tasks that our shared moral reasons recommend. I thank Andrew Cohen for asking a question that caused me to point this out.

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