



UNIVERSITY
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Consent and Loyalty as Bases of Legitimate Political Authority

by

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J.G. Allen
July 2013

Dedicated in gratitude to my mother

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INTRODUCTION

This thesis examines consent as the purported criterion of legitimate political authority and basis of political obligation in modern liberal democracies. Liberal consent theory posits autonomy as the basis of legitimate political authority, in as much as consent is an act of the individual's free, autonomous will. Voluntary subjection to political power transforms it into genuine political authority. On this view, consent is the mechanism by which autonomy is protected in social interactions generally, including those of a political nature. Only those political relationships that are based on genuine, autonomy-protecting consent are legitimate: only they can give rise to legitimate political authority over others and only they can give rise to real obligations to obey any rule set over us by another.

Based as it is on the value of autonomy, what does such consent look like? Above all it must reflect the free will of the 'consenter', in the sense of an intentional choice. Determining when a choice was free (and therefore meaningful for the purposes of consent theory) is more difficult than it appears, and it is on this point that the majority of consent theories fail on their own terms. To deem an act of consent valid where it is not truly the product of its author's will is extremely harmful of autonomy, for it legitimates interactions that are based not on autonomous choice but on power relations. To deem is to judge,¹ and to judge is to lay down rules that operate on another, which is the opposite of autonomous self-legislation. Any account that does not develop an adequate theory of free choice (especially in choice-constrained environments) will be actively destructive of autonomy. The main focus of Chapter 1 is to demonstrate how many liberal consent theories do this, and to develop an alternative account of consent – especially a test of the sorts of choices that can be deemed free for the purposes of consent theory – that is genuinely autonomy-protecting.

This approach to consent is applied to extant societies in Chapter 2. Such consent is not forthcoming in either extant or historical societies. If the 'strong' definition of consent from Chapter 1 is adopted, then it is clear that significant minorities display a

¹ The Wycliffe Bible gives a feel of the word's etymology when it translates the familiar 'judge not' passage in Matthew 7 as 'deme not...'

defect of one or the other element of consent. From the premise of radical individual autonomy, authority may not be legitimately asserted over non-consenters, and they may not be held under any valid obligation to obey the law. This forces a choice between conceding a measure of anarchism on the one hand, and a measure of tyranny on the other, or abandoning consent as the sole basis of political legitimacy and obligation. As a liberal, I tend to reject the kinds of radical social transformation that would be necessary to ensure universal genuine, autonomy-protecting consent (if this is even possible) to avoid the choice between anarchy and oppression. Likewise, if we do indeed have a right to radical individual autonomy, I refuse to compromise it in order to accommodate features of the modern social state that I find desirable. To the extent that the value of autonomy and welfare come into conflict we must make a choice as to which value trumps. I suggest that we do this through an exercise of 'reflective equilibrium' in which we assess how well the premise of radical autonomy actually gels with other values that we find important, such as ensuring a basic measure of welfare for vulnerable subjects. As social organization exists to promote welfare, rather than autonomy, I sooner choose to abandon the premise of radical individual autonomy. Autonomy may still play an important role, for example in a utilitarian framework in which autonomy is recognised as a value in itself, conducive to utility. This suggests a utilitarian framework for answering the questions: when is political power legitimate and when does the individual bear a duty to obey the law?

In Chapter 3, I attempt to justify an approach that utilises a fiduciary model for a utilitarian 'impartial benevolent spectator'. This attempts to marry an element of John Locke's political philosophy that implies a teleological (rather than consent-based) basis of political legitimacy with the utilitarian theory of John Stuart Mill. Locke argued that the product of the 'social compact' was an agreement to entrust the enforcement of our rights under natural law to a common judge and authority. If the government so erected breached its fiduciary trust with the people, they retained a right to resist its power as illegitimate usurpation. Thus, while his politics seem obviously based on the principle of consent, an essential function is actually performed by a fiduciary principle, borrowed from the principles of equity law, that is quite distinct. This fact, I believe, is often overlooked. The idea of a government subject to a strict duty to act in its subjects' interests, and with powers limited to what

is rational and appropriate to that end, meshes well with the utilitarian approach to the questions of legitimacy and obligation.

The task of fully developing this account is too ambitious for the current project. Rather, my aim in Chapter 3 is to justify the place of the fiduciary idea in Anglo-American constitutional theory and in its broader context in the history of political thought. From at least the eighteenth century, and arguably much earlier, government power has been conceived as a fiduciary power, or one held on trust (the terms are used interchangeably in the historical literature) for the benefit of the governed and its use limited by that end. Once it is recognised as an idea integral to the concept of constitutionally limited government, it can perhaps be used with less reluctance to suggest standards of conduct for governments and the people that run them. In particular, I believe that fiduciary theory can provide a framework for utilitarian ethics that is at once ‘humane’ and inherently practical. It embeds questions of utility – aggregate, rule-based, and individual – in a decision-making structure that is intuitive and useful for operational as well as policy decisions. By likening the impartial benevolent spectator to the figure of a trustee, I believe that this approach can justify the liberal democratic ‘state’, provide a useful and reliable behavioural norm for governmental decision-makers and guide its institutional design.

CHAPTER ONE

An Approach to Consent: Genuine Consent as an Act of Meaningful Choice

Introduction

Consent is posited as the criterion by which legitimate but unequal relationships of power are distinguished from illegitimate relationships the product of unequal power. Subsequent to an act of consent, the moral and legal colour of your acts towards me are changed. An act that would otherwise offend my autonomy is made consistent with it by virtue of the communication of my consent. To do this, however, the act of consent must truly reflect my autonomous will rather than the constraints that operate on it, for example as a result of my background or circumstances.

The way consent is defined determines whether that which we call ‘consent’ genuinely reflects a person’s will, that is whether its presence is a meaningful guarantor of their autonomy. The elements of consent must combine to ensure that, even and especially in difficult cases such as in the presence of overwhelming power and informational asymmetries, only a meaningful act of consent is allowed its transformative effect. Each element of consent, for example requirements for capacity, communication and volition, must be so defined as to circumscribe such things as mistake and acquiescence that should have no moral transformative force. Defective acts of apparent consent must be discounted, for to treat them as valid is to legitimate interactions, transactions and relationships that in fact violate the autonomy of one of the parties.

Unfortunately, most liberal consent theories fail to ensure that only meaningful acts of consent are treated as valid. They do so particularly because they fail to demand that an act of consent reflect a level of voluntarism that equates to freedom of will in any meaningful way. As A.D. Woozley observes, an agreement does not have to be free to be an agreement, but it does have to be free to be a valid one. The devil, of course, is in the detail: “How free is free?”² The question of voluntarism appears at first to be a

² Anthony Woozley, *Law and Obedience: The Arguments of Plato’s Crito* (University of North Carolina Press 1979) at 76, 104.

factual one into the consenters' state of mind. This is true to a certain extent, reflected in the dictum that the "state of a man's mind is as much a fact as the state of his digestion."³ However it is also one that involves a theory of will and a whole raft of normative judgment. This provides ample opportunity for different accounts of consent, some of which are more and some less protective of autonomy. One of the key failures of liberal consent theory targeted by radicals is its failure to account for the circumstances in which consent is given. The liberal approach to voluntarism focuses on the presence or absence of coercion or deception, which are in turn related to a theory of rights allowed the consentee, and in this process very important constraints on the individual will are often ignored because they do not arise from the actions of the person to whom consent is given.

In the sections that follow, I elaborate the critiques of consent that I find compelling and then attempt to create a definition of consent that I believe avoids them. What emerges departs from liberal orthodoxy in a number of respects, not least in the scope of non-agent-related constraints it takes into account *via* the requirement for meaningful choice between reasonably adequate alternatives. It is also more overtly a moral theory than a descriptive one, inasmuch as it attempts to expose normative assumptions that tend to remain tacit. Significantly, my account also restricts the ambit of 'tacit' consent greatly, and rejects theories of 'hypothetical' and majority consent outright. What emerges is a requirement for actual, personal consent given by a competent moral agent through an express speech act or clear non-verbal gesture, in an environment free of significant restraints on his or her will.

1. The Consent Theory of Political Obligation and Legitimacy

a) The Role and Value of Consent in Liberal Political Philosophy

The definition of consent must proceed from its role and value in political philosophy: we must state what we want consent to do before we can say whether it does so or not. Consent is intended to protect individual autonomy in social interactions, especially where the interests of the individual are vulnerable to intrusion or exploitation by another. Rather than focussing on the interests affected, however, consent focuses on protecting the autonomy of the individual to promote his or her

³ *Edgington v Fitzmaurice* (1885) 29 Ch 459 at 483 per Bowen L.J.

interests as he or she sees fit. Liberals are uniquely concerned with individual autonomy. Liberalism developed in the early modern period against a background of conservative political thought that submerged the individual as a constituent member of a greater, organic entity such as the family or the community.⁴ Rather than subsuming the individual's interests within a concept of the common good, liberalism turned this world-view on its head by positing the individual as the basic unit of moral, legal and social analysis, prior to society. Rather than prescribing a version of the good for all members of the group, liberals began to defend the individual's right to choose his or her own. Rather than understanding the individual good as derivative of the common good, liberals began to understand the common good as something akin to the sum of individual goods.

Consent is an important concept in liberal political, moral and legal philosophy because it is the mechanism by which individual autonomy is protected from impingement by other people and by the organised group itself. Group life necessarily impinges on individual freedom. Consent changes the moral and legal context in which an act towards the consenter is judged by conferring rights, powers and privileges on the actor. In this manner, consent is said to make another's action the product of the consenter's will and therefore consistent with his or her autonomy. Consent performs this 'moral alchemy' in a great variety of contexts, ranging from sexual relations to property transactions. In the political realm, consent is said to transform the moral context of coercive governmental power. Consent by the subject confers legitimate political authority on his or her government and gives rise to an obligation on his or her part to obey the laws it promulgates.

Consent is not equally important for all liberals. It is of paramount importance for those that believe voluntarism to be the only possible basis for legitimate authority, such as consent theorists. They claim not only that voluntary acts such as a promise constitute a basis of political obligation, but that they constitute the only possible basis of political obligation. Others, such as utilitarians, may ascribe it an important role but do not regard political voluntarism as a necessary basis for political legitimacy. They tend to address questions of legitimacy in terms of a government's promotion of individual and social welfare and utility. Utilitarianism remains the most

⁴ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Dartmouth 1996) at 49.

powerful rival of consent theory liberalism,⁵ and as such if consent theory fails on its own terms, the utilitarian framework presents itself as the obvious alternative.

Consent also has a slightly different role, or a slightly different value, for different brands of consent theory. For ‘contractarians’ in the Hobbesian tradition, who import little or no background moral theory into the doctrine of consent, consent itself creates value through the fact of inter-subjective, autonomous bargaining.⁶ Put simply, contract equals justice because it is the product of free agreement. However, such theories are often problematic from a liberal perspective because they take inadequate account of the circumstances the background of a transaction. Thus, for Hobbes, force and fraud can be characterised as ‘cardinal virtues’ in the state of nature because he holds that individuals have a right to do whatever is in their power to do. Consent in this environment cannot protect autonomy very meaningfully because it equates might with right. ‘Contractualists’ in the Lockean tradition, on the other hand, import a more fully-fledged moral theory of rights and duties into the state of nature and see consent not as creating value *ipso facto* but as protecting values already given, such as self-ownership and property. Not all value is created by agreement. The problem with this approach, in turn, is that it can ‘muddy the waters’ – rather than a factual enquiry and a theory of will, the Lockean consent machine has far more variables to calibrate before the light flashes green or red, as it were. The result, however, is likely to be a theory that is more protective of autonomy, which is evident on a comparison of Hobbes and Locke. As Wolfgang Kersting quips, “describe to me your state of nature and I will tell you what sort of state you want.”⁷

In turn, human dignity is the background moral theory that I believe makes autonomy a value to protect. Autonomy denotes the right to ‘self-legislation’ and to direct our own lives according to our own beliefs and values rather than being controlled by others pursuant to their conception of the good. Individuals have this right because they are possessed of a certain, inherent dignity by virtue of being human. Although we possess different attributes, capabilities and characteristics, we are all empirically

⁵ See for example John Rawls, *A Theory of Justice* (Belknap Press 1971) at 22.

⁶ For a more detailed explanation of this point, see Michel Rosenfeld, “Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory” (1985) 70 *Iowa Law Review* 769 at 785 – 800.

⁷ Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (Wissenschaftliche Buchgesellschaft 1994) at 317.

equal in our status as human beings, and this is what ultimately gives rise to our moral equality. From equality flows the concept of freedom, for moral equals cannot be in any natural relationship of dominance and subjection. For consent theory liberals, autonomy is the principle that gives expression to that freedom, for it expresses our right to direct our own lives. If we are in a relationship of subjection, our dignity demands that we have put ourselves there voluntarily.

b) The Elements of Consent

One way to probe a theory of political consent is to examine consent in other contexts, and then to ask whether theories of political consent provide the same measure of protection. Because the political relationship is so fundamental, all-encompassing and asymmetrical, our approach to political consent must be as strict, or even stricter, than in other contexts. Exploring how the elements of consent have been defined in different contexts can assist us to find the strongest possible definition of each element in turn. Asking why a teenage may consent to sex with another teenager but not with an older person, or why voluntary intoxication should be treated differently from involuntary intoxication, for example, can help determine what it is about agency that gives one person the capacity to consent and denies it to another.

Consent is found in the communication of a person's will to another, granting that other permission to do a thing that would otherwise be illegal or immoral. From this, it is clear that consent comprises notions of capacity or agency, of communication or expression, and of volition, which entails information, understanding, intentionality and freedom. Although often simply assumed, it also involves a normative element such as a theory of natural rights and duties that serves primarily to inform the decision what acts of consent should be discounted. These elements, in turn, interact with each other, with the background circumstances of the consent, and with the characteristics and state of mind of the person to whom consent is given. What results is a multivariate interaction of great complexity. With this in mind, it is easy to see how different definitions of consent are both inevitable and defensible. However, it is also apparent that differing accounts of consent will be more or less protective of autonomy, depending on how they define these elements.

First, rules are grouped under the rubric of capacity that discount an expression of consent on the basis of the consenters' lack of agency. These usually relate to matters such as age, mental or psychological development, incapacity, but also to things like temporary intoxication. They are directed at characteristics of the consenters that deprive him or her of moral agency on the basis of an incapacity to understand an action which he or she might otherwise be taken to consent.

Secondly, there is generally agreed to be some element of expression. Some form of communication is accepted to be an element of 'paradigmatic' consent at least, though opinions diverge whether consent itself is the social act of expressing consent or the subjective mental attitude of being disposed towards a certain act. Not only academic theories but also criminal statutes adopt different approaches, with some emphasising the will element of consent and others that of expression. Generally, the former lay more stock on the value of autonomy and the latter on consentees' rights to rely on objective manifestations of consent. In an important sense, defining consent as an attitude is more protective of autonomy because it is a subjective definition: regardless of what signs or expressions I may have given (which are always subject to misinterpretation), the final analysis is on my state of mind. However this is an impractical standard, as it can regress to a 'my word against yours' impasse, and it ignores the very social role that consent plays in regulating our behaviour towards each other. I attempt to justify an account that insists on both will and expression as discrete and necessary conditions, both insufficient without the other.

Thirdly, as consent is designed to protect individual autonomy, an act of consent must be a willed one. Volition is the most difficult element of consent to define. Generally, however, liberal consent theories are characterised by their definition of voluntariness by reference to 'voluntariness-reducing factors' such as coercion and deception. As coercion and deception are defined as an improper manipulation of power, threats or information, this approach necessarily centres on the pre-consensual rights of the person to whom consent is given. Depending on the view of rights taken, this can be extra-ordinarily narrow and radicals have rightly criticised this point. They have tended to point out that the sum of social relations can, while not created by the consentee and not necessarily even manipulated by him or her, nonetheless constrain a person's will in such a manner as to make his or her consent meaningless.

The liberal approach just outlined also illustrates the role of the normative element. Enquiry into each element of consent contains descriptive and normative components. A major problem is distinguishing the two. Murky voluntarism analysis can lead to normative assumptions being accepted as part of a descriptive analysis without discussion and justification. I attempt to capture the whole range of concerns about voluntariness – both those of consent theory liberals and their radical critics – in an independent criterion of ‘meaningful choice’. The element of choice in this criterion imports the theory of will that I utilise, and element of meaningfulness imports my normative theory of when an exercise of choice should be given the force of valid consent and when it should be discounted.

The value of human dignity demands an exacting definition of consent and gives content to the qualifier ‘meaningful’. Meaningful consent is consent that protects the individual’s autonomy and the fundamental dignity upon which it rests, even in dire or constrained circumstances. Consent that is not truly the product of an individual’s free will is not meaningful because it is actually the product of unequal power relations, for example based on unequal physical strength or economic need. A relationship of dominance based solely on power is incommensurate with the equal human dignity of its parties.

I develop all of these lines of enquiry in Section 2 that follows. In that Section I also address the doctrines of tacit, hypothetical and majority consent that, on my interpretation, have most often been deployed to answer defects in one or the other element. Rather than maintaining a ‘tight’ definition of consent that is genuinely capable of protecting autonomy, consent theorists have tended to attenuate the standard of volition required to establish a ‘valid’ consent. Once this approach has been rejected, I turn in Section 3 to develop my own account of consent that I believe is necessary to judge the legitimacy of political relations, if indeed consent is to be that standard.

c) The Consent Theory of John Locke

This Thesis focuses throughout on the consent theory of John Locke. This is for two reasons. First, Locke’s theory has been enormously influential in the development of the modern axiom that consent is the basis of legitimate political authority. Although

academics debate the point, the maxim that just government derives from the consent of the governed enjoys almost universal popular acceptance.⁸ Secondly, the fiduciary account of political legitimacy I introduce in Chapter 3 is inspired in large measure by Locke's presentation of government as a 'fiduciary trust' in his *Second Treatise*.

In many ways the consent theory of John Locke can be regarded as the departure point of modern liberalism.⁹ Thomas Hobbes made the revolutionary step of elaborating a secular and voluntary basis of civil authority, but his bleak characterisation of the state of nature justified his defence of an absolute sovereign. Locke's innovation was to use the social contract tradition to craft an account of consent that could only ever justify limited government, and reserve a right to resistance. Because humans are born free and equal, only their free consent can bring them legitimately under the rule of a government. He posited that pre-social humans in the state of nature joined together in a consensual union, forming a political body. In this state they were fully endowed with the full suite of natural rights, including self-ownership and its outgrowth, property. These natural rights could be seen as giving substance to the notions of equality and dignity. However, enjoyment of these rights in the state of nature was tenuous because each individual had to interpret and enforce his or her rights under the law of nature. Over-enforcement and mistake are inevitable, constituting in turn offences against the natural rights of others. Thus, they erected a common authority over them and entrusted it with the task of executing their natural rights. Because this conferral of power was for certain ends, it is limited to what is 'appropriate and adapted' (to use an anachronistic phrase) to those ends. If the government so entrusted should become destructive of them, the people are entitled to resist it as they retain a vestigial right to remove one 'trustee' and appoint another.

Locke recognised a problem that continues to vex consent theorists today: many of us do not make the sort of declaration of consent that would make our membership in the community and subjection to its government express. Locke therefore developed a theory of tacit consent whereby inheriting property serves as an act of tacit consent. Moreover, entering into or tarrying in a territory is held to be sufficient to subject the alien to its government's powers. This solves the problem that Locke had at hand:

⁸ See Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 1.

⁹ See A.C. Grayling, *Towards the Light: the story of the struggles for liberty and the rights that made the modern West* (Bloomsbury 2007) at 127.

justifying and bolstering William and Mary's newly acquired position on the throne, galvanising the English populace into a unified political community after a long period of civil and religious strife, and justifying the new model of limited, constitutional government established under the *Bill of Rights 1689*. His theory, as the most cogent and coherent expression of the ideas of his generation of Whigs, also served their American successors in justifying resistance to the British Crown and designing the architecture of their new constitutional order. However, as the output of Lockean scholarship attests, his theory is not without difficulties and even inconsistencies. Ultimately, I argue that modern Locke scholarship has tended to take the trust aspect of his theory for granted, focussing on consent. For a number of reasons that is mistaken. Although Locke might not accept the 'fiduciary utilitarian' alternative I propose to consent theory, both the fiduciary and teleological aspects of his politics are often neglected, if recognised at all. I will deal with this aspect of Locke's politics at length in Chapter 3.

2. A Critique of Consent Theory

Two themes predominate in critiques of consent. Those working within the individualist liberal framework tend to follow David Hume's 'standard indictment' that tacit consent is usually a product of necessity and not voluntary at all. Those working from the radical framework tend to argue that liberal consent theory ignores structural social inequalities in determining whether consent is voluntary; that is, the range of 'voluntariness-reducing factors' taken into account is too narrow to ensure genuine, autonomy-protecting consent. In the sections that follow, I sketch my reasons for why both of these critiques are well-placed. If consent theory (or indeed any alternative to it) is to stand, I believe it must answer or accommodate these criticisms. As such, it is important to examine them before I attempt to construct my own, stronger definition of consent.

a) Liberal Critique

Most liberal critiques of consent have followed David Hume's famous critique in "Of the Original Contract".¹⁰ Hume's most incisive criticism focuses on Locke's doctrine

¹⁰ David Hume, "Of the Original Contract" in Alasdair MacIntyre (ed.), *Hume's Ethical Writings: Selections From David Hume* (University of Notre Dame Press 1979).

of tacit consent, though Hume challenged the adequacy of the promise theory of obligation more generally, in favour of a teleological, utilitarian principle. According to Hume, we have an obligation to obey a government that is good in the sense that it does us good, not because we made any promise to it. Couching legitimacy and obligation in terms of consent is an unnecessary and illegitimate logical ‘shuffle’. This is a compelling argument, and the challenge for consent theorists is to counter it. In this section, however, I focus on Hume’s critique of tacit consent because it demonstrates some of the problem areas of consent theory generally and so can serve as the basis for developing a more complete theory of consent.

Tacit consent is the loose end that unravels the doctrine of political consent. Tacit consent is not an invalid concept entirely, because we intend things all the time without saying so: a lack of expression is not necessarily evidence of involuntariness. Locke himself identified the problem of tacit consent, however, when he asked “what ought to be look’d upon as a *tacit Consent*, and how far it binds, *i.e.* how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it at all”? ¹¹ He answers:

[T]o this I say, that every man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs forever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government.¹²

Despite the obvious truism that many people would probably declare, if asked, that they consent to the government under which they live, Hume does not find this compelling. He challenged Locke:

¹¹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II, §119 at 365.

¹² John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) *Second Treatise* §119 at 365. As Carole Pateman explains, this sort of reasoning was also explored by Socrates in the *Crito*, where ‘The Laws’ speak of an agreement made on reaching manhood and choosing to stay in the *polis*. “Any Athenian, on attaining to manhood and seeing for himself the political organisation of the State and us its Laws, is permitted, if he is not satisfied with us, to take his property and go wherever he likes.” Plato, (H. Tredennick trans.), *The Last Days of Socrates* (Penguin 1969) at 92. Cited in Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (University of California Press 1985) at 101.

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign manners or language, and lives from day to day by the small wages he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.¹³

In the eighteenth century, Hume's example was neither facetious nor merely hypothetical: through the practice of impressment, men did indeed find wake up to find themselves at sea.¹⁴ The problem with Locke's doctrine of tacit consent is that, rather than solving a defect of expression, it glosses over a defect of voluntarism, instead. While there are circumstances from which volition can be validly implied, just as often a lack of expression *is* evidence of involuntariness. Implying consent improperly from silence can easily impute consent to the unwilling.

Contemporary Lockeans have implied consent from tacit acts such as accepting membership in society, participating in democratic processes such as voting or standing for office, deferring to the judgment of the courts, or accepting the benefits of membership in the welfare state. While some of these actions, in some cases, probably are acts of tacit consent, Hume's critique remains incisive today. Consent theorists with a serious commitment to political voluntarism such as Harry Beran have taken pains carefully to circumscribe the role of tacit consent, and to insist that political consent be only personal and actual (whether express or implied). Beran characterises acceptance of 'full membership' in society after the age of political maturity as an act of tacit consent, as acceptance of membership in a rule-based association is tantamount to acceptance of its rules, as well.¹⁵

If the doctrine of tacit consent is to play any part in a revised theory of consent, it must be very carefully qualified to ensure that consent is not implied from mere acquiescence, which has no moral significance. As A. John Simmons observes, voting is often a way of expressing preference, rather than consent: I might be given a choice of how to die, but my choosing firing squad does not represent consent to the death

¹³ David Hume, "Of the Original Contract" in Alistair MacIntyre (ed.), *Hume's Ethical Writings: Selections From David Hume* (University of Notre Dame Press 1979) at 263.

¹⁴ See Nicholas Rogers, "Vagrancy, Impressment and the Regulation of Labour in Eighteenth-Century Britain" in Paul E. Lovejoy and Nicholas Rogers, *Unfree Labour in the Development of the Atlantic World* (Routledge 1994) at 102.

¹⁵ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 28.

penalty in general or my death in particular.¹⁶ The definition of consent is meant to help us differentiate the one from the other, but the doctrine of tacit consent prevents us from doing so. Upon reaching majority, being invited to vote, or being offered the benefits of a universal medical insurance scheme, I might accept the inevitable and make the best of my situation, without ever consenting to the system of government in any meaningful sense. As the government is going to control my life and impose its will on me anyway, I might as well use the agency I possess within it, and benefit from it, to the maximum extent possible. This simply does not fall into that narrow sort of acquiescence that can be equated with valid consent.

Ultimately, distinguishing meaningless acquiescence from meaningful consent is an essential aspect of any definition of consent. Later, I propose that the element of the definition of consent that best enables us to do this is the element of meaningful choice. An act of acquiescence should never be treated as consent where the individual had no meaningful choice in the matter. The acquiescence of Hume's 'poor peasant or artisan' to remain in his or her country of birth cannot be taken as an act of valid tacit consent. He or she really has no choice that we should regard as 'meaningful' because the alternatives are too unreasonable. In the modern context, actions such as using legal facilities provided by the government to buy or sell land, make a will or contract for the sale of goods do not amount to genuine acts of tacit consent because we have no meaningful choice but to use the legal and political order in which we live to exercise our basic our natural rights.

b) Radical Critique

Hume's critique alerts us to the problematical nature of voluntarism. Radical critiques have also focussed on this element of consent and, if their concerns are taken seriously, demand response. In particular, radicals such as Carole Pateman have pointed out that consent theory assumes autonomy, the very value it seeks to protect. As Pateman observes:

¹⁶ See A. John Simmons, "Consent, Free Choice, and Democratic Government" (1984) 18 *Georgia Law Review* 791 at 800; see also Marshall Cohen, "Liberalism and Disobedience" (1972) 1(3) *Philosophy & Public Affairs* 283 at 311.

Consent is central to liberal democracy, because it is essential to maintain individual freedom and equality; but it is a problem for liberal democracy, because individual freedom and equality is also a pre-condition for consent.¹⁷

Without taking into account the full range of factors that constrain *empirical* autonomy, liberalism legitimates illegitimate relations by asserting the ideal of *moral* autonomy. Pateman is just one of a school of feminist theorists that have criticised the ways in which liberal theory “idealise[s] notions of independence, autonomy, and self-sufficiency that are empirically unrealistic and unrealisable.”¹⁸ Liberal theory asserts moral equality as an axiom and then leaves the young, the weak and the poor to their own devices. This pays lip-service at the shrines of equality, freedom and autonomy, while (consciously or unconsciously) reinforcing the ideological framework of social relations that are actively destructive of these values.

Liberals generally assert that only certain constraints on the individual will are relevant to determine whether a consent is voluntary. In particular, they focus on factors such as coercion and deception that are based on the voluntary choice of other moral agents. For example, Joel Feinberg rejects constraint *simpliciter* as a factor capable of vitiating consent: “the inequality of the initial bargaining position is not in itself a voluntariness-reducing factor, since the strong and the weak party *can* make a perfectly voluntary agreement.”¹⁹ Consent is only vitiated, on this view, where the stronger party actually creates or manipulates the weaker party’s vulnerability, not merely where he or she benefits from it.²⁰

The problem with limiting vitiating factors in this way is two-fold. First, it presupposes a moral theory of rights and duties that often goes unstated. A theory of natural rights needs articulation and justification, for example with reference to the values it rests upon. Natural rights are capable of vastly different interpretation and their ambit is invariably contested. This allows consent theory to serve as an elaborate justification for a natural theory of rights that would be better presented and defended

¹⁷ Carole Pateman, “Women and Consent” (1980) 8(2) *Political Theory* 149 at 162.

¹⁸ Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20(1) *Yale Journal of Law and Feminism* 1 at 11.

¹⁹ Joel Feinberg, *The Moral Limits of the Criminal Law Vol 3: Harm to Self* (Oxford University Press 1989) at 249.

²⁰ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Dartmouth Publishing 1996) at 99.

on its own merits. Secondly, unless those bargaining with choice-constrained individual are subjected to extensive natural duties, the theory of consent that emerges from this approach is incapable of protecting autonomy. Rather, it is actively destructive of autonomy because it gives inequality-based power relations the appearance of consensual relations.

Radicals, on the other hand, tend to look at a broader range of factors, including social constraints on the will of the consenter that are more attributable to the ‘background’ than the will of another moral agent, such as the class or gender of the consenter. Radicals regard acts of consent to a contract of employment as vitiated by the social relations between capital and labour, for example, or acts of consent to sexual intercourse as vitiated by the social relations between men and women. I will argue that at least some of these ‘suspect’ consents would be invalidated by the requirement for meaningful choice because, where social relations really do constrain choice, the consenter has no reasonable alternatives but to acquiesce.

Keith Burgess-Jackson uses the illustration of a woman lost in the wilderness without food, water or shelter.²¹ A rescuer finds her, but demands sexual intercourse in exchange for transport home. Obviously, the woman’s choice is constrained in a way that is relevant. However, depending on whether or not we impose a duty to rescue, the liberal framework may or may not define the offer as coercive. In this context, liberal theory can become very problematic from the viewpoint of ordinary moral intuition, which is perhaps evidence that it is not protecting the autonomy of choice-constrained individuals in a way that is very meaningful.

Locke, for his part, would probably hold that such an offer was coercive. “[A] Man can no more justly make use of another’s necessity, to force him to become his Vassal, by with-holding that Relief, God requires him to afford to the wants of his Brother, than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery.”²² But this result is achieved through the imposition of a background moral theory, not through the bargaining interaction of two autonomous individuals. A theory of natural rights

²¹ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Dartmouth Publishing 1996) at 95.

²² John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) I, §43 at 188.

and duties is a defensible approach to questions of justice, but then it appears that all consent theory does is assert natural obligations based on pre-consensual rights. Though it may help us to identify these rights and test their plausibility, this sort of theory actually has less of the justificatory force than consent theory claims for itself.

3. Revised Consent Theory

If these criticisms are given due weight, it appears that consent theory needs to resolve two issues. First, it must revise its use of devices such as tacit consent that attenuate the standard of voluntarism required to find a valid consent. Secondly, it needs to broaden the scope of its enquiry into how the circumstances in which consent is given actually affect the will of the consenter, and to articulate the normative as well as descriptive elements of this enquiry.

A survey of the consent theory literature displays a great variety of approaches, many of which are incredibly confusing. As the problem of tacit consent shows, it is often difficult to keep one element (i.e. expression) distinct from the other (i.e. volition). As the problem of coercion shows, it is often difficult to tell what is a factual enquiry (i.e. the freedom of the consenter's subjective will) and what is a moral one (i.e. whether a consentee was acting within his or her rights in putting pressure to bear on the consenter). One of the major challenges of this examination has been making sense of the consent literature itself. The attempted definitional 'overhaul' is not the first attempt to revise the consent doctrine, and is not the most sophisticated. However, it represents a contribution to the field of consent theory because it is a bold attempt to organise the concept and to deal with its issues methodically and sequentially to determine the existence of consent in a manner that is genuinely protective of individual autonomy.

a) Tacit Consent

The first task in a revised theory of consent is to decide the place of tacit consent: is it a useful and valid concept, and if so, how do we tell tacit consent from mere acquiescence? According to J.P. Plemenatz, we still have a case of actual tacit consent "[w]hen silence may legitimately be regarded as acquiescence, and whenever

such acquiescence constitutes the granting of permission.”²³ This passage gives no guidance on how to distinguish such cases from mere acquiescence. Plemenatz does, however, give the following suggestion:

Any action or inaction may serve as an expression of consent so long as some such expression is necessary before the person to whom it is addressed can have the right to perform the action in question, and so long as it is made with the intention of informing him that the giver does permit him to perform it.²⁴

Though perhaps a good way to frame the problem, it leaves the central question unanswered: how do I know what your silence, in the particular circumstances, was intended to communicate? Interpreting non-verbal acts, let alone silence and omission, will always have as much to do with my preconceptions about how you ought to act in a given set of circumstances as with your actual state of mind. My interpretation of your action (or inaction) will depend on my knowledge of your situation (and my knowledge of your subjective appraisal of your situation). It is these assumptions that will guide my interpretation of what it means if you fail to act in such a manner. But so soon as I have to decide whether silence was intended to communicate permission, I am laying down norms of behaviour that operate on you in a manner potentially antagonistic to the very aims of consent theory.

Cognisant of these and other difficulties, Harry Beran offers the following conditions that serve to qualify the assumption of consent by inaction:

- (1) The situation is such that consent or dissent by certain persons is required.
- (2) Absence of dissent by these persons by a certain time counts as consent.
- (3) Dissent is possible for these persons and its expression is not unreasonably difficult.
- (4) There are no conditions which defeat the claim that such silence counts as consent.
- (5) The potential consenters/dissenters are aware that conditions (1) to (4) obtain.²⁵

Beran uses an example of a board meeting in which the chairman proposes that the next, mandatory, meeting be held on a different day than scheduled. Asking whether there are any objections, the chairman interprets agreement by some and silence by

²³ John Plemenatz, *Consent, Freedom and Political Obligation* (Oxford University Press 1968) at 8.

²⁴ John Plemenatz, *Consent, Freedom and Political Obligation* (Oxford University Press 1968) at 8.

²⁵ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 8.

the others as consent and closes the meeting.²⁶ Beran argues that silence in this case ought to be construed as tacit consent, which seems probable if we assume that a board member with prior commitments, for example, ought to register his or her disagreement. Ultimately, the most steadfast criterion to distinguish consent from acquiescence is whether the consenter had a meaningful choice between reasonable alternatives. This is the thrust of Beran's conditions, above, especially (3) that dissent is possible and its expression is not unreasonably difficult. (This criterion will be developed in subsection (f), below).

Interpreting silence as consent always impinges the consenter's autonomy. So long as rules of interpreting silence as consent are known (particularly by the consenter), then this impingement will be reasonably narrow. This notwithstanding, in my view, we cannot safely make such assumptions about silence as consent to political authority because of the criterion of meaningful choice. Even where I know that voting, for example, is customarily interpreted as tacit consent to the political authority under which I live, I may have no real choice but to vote. So, for example, standing for office within a government might qualify as a valid act of tacit consent (even in the absence of a 'constitutional oath of office'), whereas merely voting for a candidate in an official election would not. In general, however, we cannot create a *numerus clausus* of valid acts of tacit consent, because so much is highly contingent on the circumstances of the 'consenter'. It is therefore to be used as a broad-stroke imputing device with the utmost caution.

b) 'Hypothetical' and Majority Consent

Hypothetical consent is a device that attenuates the standard of voluntarism required for a 'valid' consent to political authority even more extremely. It is often traced to a seminal pair of articles by Hannah Pitkin entitled "Obligation and Consent".²⁷ Observing that Locke's doctrine of tacit consent actually widens consent so as to make it almost unrecognisable, Pitkin reinterprets Locke to mean something quite different from personal, actual consent.

²⁶ The example is from Simmons. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) at 79.

²⁷ Hannah Pitkin, "Obligation and Consent – I" (1965) 59(4) *The American Political Science Review* 990; "Obligation and Consent – II" (1966) 60(1) *The American Political Science Review* 39.

[W]e are led to the position that you are obligated to obey not really because you have consented; your consent is virtually automatic. Rather, you are obligated to obey because of certain characteristics of the government – that it is acting within the bounds of a trusteeship based on an original contract... In truth, the original contract could not have read any otherwise than it did, and the powers it gave and limits it placed can be logically deduced from the laws of nature and conditions in the state of nature.²⁸

As voluntarists, Pitkin observes, we are bound to feel disappointed, even betrayed at this realisation, but it seems to her that such a theory is a better response to the problem of political obligation according to Locke's own premises. This leads us to a "surprising" new doctrine in which obligation depends on the nature or quality of the government in question, and not on any act of consent: you do not "consent to be obligated, but rather are obligated to consent, if the government is just."²⁹

It may be regarded as a new interpretation of consent theory, what we may call *hypothetical* consent. For a legitimate government, a true authority, one whose subjects are obligated to obey it, emerges as one to which they *ought to consent*, quite apart from whether they have done so. Legitimate government acts within the limits of the authority rational men would, abstractly and hypothetically, have to give to give a government they are founding. Legitimate government is government that *deserves* consent.³⁰

In some respects, this anticipates Rawls' theory of justice, which is even more abstracted, and rather more Kantian than Lockean. It posits a natural duty to obey a just government, and incidentally determines 'justice' by reference to a highly idealised standard of rational consent. Hypothetical consent theories seem to accommodate Hume's critique by adopting something very similar to Hume's suggested alternative: a duty to obey a government, irrespective of consent, based on the fact that it is good. The difference is rather in how Rawlsians and utilitarians define 'good'. This is an acceptable approach, but is problematic from the viewpoint of consent theory because it does not make political legitimacy contingent on an individual's communicated will. It may incidentally protect autonomy, but not in the

²⁸ Hannah Pitkin, "Obligation and Consent – I" (1965) 59(4) *The American Political Science Review* 990 at 996.

²⁹ Hannah Pitkin, "Obligation and Consent – I" (1965) 59(4) *The American Political Science Review* 990 at 999.

³⁰ Hannah Pitkin, "Obligation and Consent – I" (1965) 59(4) *The American Political Science Review* 990 at 999.

way consent theorists insist it must. In particular, the standard of rationality it adopts will always function to impute consent to the irrationally unwilling.³¹

While teleological ‘quality of government’ theories are defensible, they should be advocated as such, and not as sub-species of consent theory. In particular, teleological theories of political legitimacy that utilise a rule-utilitarian approach and incorporate a robust theory of individual rights present a compelling alternative to consent theory liberalism, as Hume contended.³² If such an approach is to be adopted, however, this should be done with a frank admission of the limits of consent, and the abandonment of its compelling rhetorical value. While hypothetical consent may have some residual justificatory value,³³ it cannot give rise to political obligations or legitimate non-ideal, real-world political relationships.

c) Majority Consent

Another possible appeal is to the democratic principle through the device of majority consent. Legitimacy is said to flow to a government from the fact that a majority of its subjects are consenting. This is more often encountered in popular and political statements than in the academic literature, but there it is a common attitude and so actually perhaps of greater importance. This interpretation of majority decision-making is seriously flawed, however, because it confuses my consent to membership in a political community (and subsequently, to the authority of its government) with my consent to be bound by majority decision once I am already a member of it. We need to distinguish clearly between majority decisions made within a constituted political community, and a majority decision to constitute a political community. ‘Majority consent’ makes no sense in the latter. According to Locke:

When any number of Men have so *consented to make one Community* or Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude the rest.³⁴

³¹ See Mark E. Kann, “The Dialectic of Consent Theory” (1978) 40(2) *The Journal of Politics* 386.

³² See David Hume, “Of the Original Contract” in David Hume (Alasdair MacIntyre ed.), *Hume’s Ethical Writings: Selections From David Hume* (University of Notre Dame Press 1979).

³³ See Cynthia Stark, “Hypothetical Consent and Justification” (2000) 97(6) *The Journal of Philosophy* 313.

³⁴ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §95 at 349.

When Locke talks about majority decisions, he is talking about the former. Confusion stems from two sources. First is the fact that Anglophone social contract theorists deny the existence of the ‘double contract’ utilised by German natural law contract theorists such as Samuel von Pufendorf. Pufendorf posits two social contracts: one between the members of society to create a political community, and one between the body politic and the government. The Anglophone social contract theorists deny the existence of the second contract, positing that the creation of government is merely the subject matter of the initial contract. In this manner Hobbes denies that the sovereign can ever breach an agreement to which he is not a party, and Locke asserts that a government can be dissolved for breach of governmental trust while society subsists. In truth, while Locke’s transfer of authority from individuals to government is not a contract, but the settlement of a trust arising from the political contract, recognising it as a second and separate transaction helps to avoid the majority consent fallacy.

The second source of confusion is the sloppy introduction of Rousseauian, radical majoritarian ideas into the Lockean framework.³⁵ The question of majority consent really gets to the heart of the tension between individualism and the imperatives of political organisation. Often, consent theorists start from premises that favour the autonomy of society’s constituent members, but then introduce elements into their definition of consent that favour the needs of organisation. The terms ‘member’ and ‘organisation’ themselves reflect the conservative medieval conception of society as an organic, natural whole, and old notions of realism are always at the gate. As J.W. Gough remarks, pleas for extreme individualism often flow in the next sentence into little more than a right to be consulted when the need to give one’s own consent is satisfied by the allowance of a voice in an election.³⁶

However strictly we conceptualise of (personal) consent to join a community as opposed to (majority) consent to particular decisions in its government, modern democratic practice blurs the distinction. Nowhere is this more evident than in Australia, where voting is compulsory. The courts have been entirely unsympathetic

³⁵ See Hilail Gildin, *Rousseau’s Social Contract: The Design of the Argument* (University of Chicago Press 1983) Chapter 2; Jean-Jacques Rousseau (C.E. Vaughan ed.), *Du Contrat Social, ou Principes du Droit Politique* (Manchester University Press 1918) at xxiii.

³⁶ John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 63.

to those who have abstained from voting on ideological (except religious) grounds. As the High Court declared in *Judd v McKeon*:³⁷

[Mr. Judd's objections] amount to no more than the expression of an objection to the social order of the community in which he lives. In our opinion such an objection is not a valid and sufficient reason for refusing to exercise his franchise.³⁸

Because democratic participation is compulsory, democratic participation cannot be seen as a form of valid tacit consent which legitimates the binding nature of majority decisions over 'fundamental' dissenters. As this imputes the will of the majority to the individual despite his or her empirical state of mind, it is inconsistent with the principle of autonomy as the basis of legitimate political authority. In conclusion, then, consent theory should not be applied to justify the expediciencies of majority decision-making over non-consenters, especially those that appear to reject their membership in society as presently constituted. Power over non-consenters must be justified by reference to some other principle, if at all. In practical terms, this means that we should treat at least some minority voters, for example, as non-consenting subjects. As Locke writes, in a little known and seldom cited passage from 1660:

Nor do men, as some fondly conceive, enjoy any greater share of this freedom in a pure commonwealth – if anywhere to be found – than in an absolute monarchy, the same arbitrary power being there in the Assembly (which acts like one person) as in a monarch, wherein each particular man hath no more power (bating the inconsiderable addition of his single vote) of himself to make new or dispute old laws than in a monarchy. All he can do (which is no more than kings allow petitioners) is to persuade the majority, which is the monarch.³⁹

d) Capacity

Capacity appears a fairly straightforward question, but is crucial to developing a theory of genuine, autonomy-protecting consent. Capacity refers to the individual's characteristics that make him or her competent as a moral agent to consent to actions that might be harmful to his or her interests. As information, or rather understanding, is an essential element of volition, the facultative capacity to understand matters of a

³⁷ (1926) 38 CLR 380.

³⁸ *Judd v McKeon* (1926) 38 CLR 380 at 382 per Knox CJ, Gavan, Duffy and Stark JJ. see also John Hirst, *Looking for Australia: Historical Essays* (Black Inc. 2010) at 129-30.

³⁹ This passage appears in paragraph 5 of an unpublished manuscript written by Locke in 1660, housed with the Lovelace papers in the Bodleian Library. It is cited in J.W. Gough, *John Locke's Political Philosophy: Eight Studies* (Oxford University Press 1968) at 181.

certain nature is essential before we can say that a person's interests will be protected by the consent mechanism. Where a person lacks the capacity to understand the nature or likely consequences of another's action, he or she cannot consent to it in a meaningful way.

Capacity is an important element in the definition of consent because if we treat the consent of an incompetent person as valid – that is, allow an act of consent to change the moral context of an action potentially harmful to their them – we will regard actions as legitimated that might be exploitative or abusive. As an incompetent person cannot protect his or her interests even though we protect his or her autonomy, it is appropriate for us to protect his or her interests more directly through some substantive, rather than procedural, criterion of justice. On the other hand, if we deny the capacity to consent to a person who does possess the faculties for rational, self-interested choice, we have ourselves destroyed his or her autonomy. Denying a person the capacity to consent is itself an offence to his or her status as an autonomous agent.

The difficulty of capacity stems from the tension between an individual's empirical faculties and competence and the needs of efficiency and certainty that militate for arbitrary cut-offs such as age limits. It is clear, for example, that some people are competent to consent to sexual acts such as intercourse and that others are not. Young children are physically, mentally and thus sexually immature people. Their consent is not capable of changing the moral and legal context of an act of intercourse because they lack the capacity to understand the nature and consequences of a sexual act, and perhaps because a sexual act with a very young person will always be harmful to them. This is a moral norm that is well justified by the empirical capabilities of young children. The moral judgment is that we do not consider children competent to promote their interests through autonomous choice, and so deny them the autonomy to consent to certain types of action. Where troubles start is when we consider teenagers with different developmental profiles. In Tasmania, for example, a 16 year-old may not consent to sex acts with a 25 year-old, but they may with a 19 year-old.⁴⁰ 17 year-olds, on the other hand, may consent to intercourse with a person of any age. Obviously, some 16 year-olds are more mature than some 17 year-olds, but

⁴⁰ See *Criminal Code Act 1924* (Tas) s. 124.

expediency demands an age-based cut-off to give sexual partners certainty regarding criminal liability and to make prosecution more efficient.

In the context of political consent, should we adopt a similar approach or should we insist on case-by-case analysis to ensure meaningful consent? Voting and standing for office are limited to those over 18 years of age.⁴¹ This is an aggregated, blanket cut-off that sometimes has little to do with the empirical maturity and competence of the individual. As so often, the exception proves the rule: people of unsound mind are disqualified from voting in Australia. A person who, by reason of unsound mind, is incapable of understanding the nature and significance of enrolment on the electoral roll and voting is not entitled to be enrolled or to vote in any election.⁴² This obviously requires a case-specific evidentiary basis before an elector can be disqualified. Generally, it seems a defensible approach to assume that everyone of a certain age – probably in their late 'teens to early twenties – is capable of valid political consent, but to err on the side of caution when it appears this might not be the case through immaturity or mental incapacity.

e) Consent as a Performative Act

Many of the problems associated with analysing voluntarism in consent stem from the fact that consent is binary, whereas voluntarism is graduated. Consent is both a “social act” and an “attitude”.⁴³ As Tom Beauchamp observes, “[t]he language of ‘consent’ covers both a *decision in favour* of a proposed course of action and an *authorisation*. Authorisation is a permission-giving act. It could be performed even if the consent were not informed”⁴⁴ or voluntary. On this point, consent theorists typically diverge between those that find the decision, attitude or disposition more important, and those that find the communication, expression or authorisation more important. It appears important to choose between these approaches, as the former defines consent as will and the latter defines consent as act.

⁴¹ *Commonwealth Electoral Act 1918* (Cth) s. 93(1)(a).

⁴² *Commonwealth Electoral Act 1918* (Cth) s. 93(8)(a).

⁴³ See Emily Sherwin, “Infelicitous Sex” (1996) 2(2) *Legal Theory* 209 at 216.

⁴⁴ Tom L. Beauchamp, “Autonomy and Consent” in Franklin G. Miller and Alan Wertheimer (eds.), *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 57.

Heidi Hurd, for example, defines consent as an attitude. She explains the two elements of consent by analogy to the *mens rea* and *actus reus* of criminal law, and argues that the *actus* of consent is neither necessary nor sufficient.⁴⁵ This approach is also adopted in certain criminal statutes, for example the *Criminal Code 1892* (Canada), which was interpreted by the Supreme Court of Canada in *R v Ewanchuk*.⁴⁶ The *Code* provides consent as a defence to sexual assault in s. 273, which defines consent as ‘free agreement’. As interpreted by the *Ewanchuk* Court, consent “is purely subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred.”⁴⁷ Initially, this approach seems to be highly protective of autonomy because it relies on the actual, subjective will of the ‘consenter’ to change the moral context in which the act of sexual touching is judged. This is, indeed, the strength of the will theory of consent. Essentially, the contest between the will theory and the expression theory of consent is between two innocent parties. The value of the consenter’s autonomy is pitted against the value of the consentee’s reliance. Which trumps? If autonomy is the value that consent seeks to protect, it is autonomy that we must choose.

However, the expression theory of consent is not without merit, either. Defining consent as an act, rather than attitude, recognises the social function of consent. Consent is always consent to the conduct of another person. It is communication that defines consent as a concept distinct from straight voluntarism. For a state of mind to change the moral and legal context of a *social interaction*, it is essential that it be communicated; it is the act of communication that grants permission and confines the scope of my actions to a sphere determined by you. Often, the hardest cases involve mistaken belief in consent, and in these cases the will theory of consent offers little solace to innocent but mistaken consentees. The expression theory of consent gives moral transformative force to (justified) reliance, not just autonomy. Reasonable reliance is seen as capable of transforming the moral context in which a subsequent act is judged.

⁴⁵ See Heidi M. Hurd, “The Moral Magic of Consent” (1996) 2(2) *Legal Theory* 121 at 135.

⁴⁶ [1999] 1 SCR 330.

⁴⁷ *R v Ewanchuk* [1999] 1 SCR 330 at 333 per Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ.

Although the commitment to autonomy that is inherent in political voluntarism requires us to prioritise the value of autonomy over reliance, there is some residual role for the element of expression. The will theory of consent becomes convoluted, if not necessarily problematic, when it faces the problem of mistake. As the *Ewanchuk* Court held:

The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent in the *mens rea* stage of the enquiry... There is a difference in the concept of 'consent' as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and ['consent' as it relates to] the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus* 'consent' means that the complainant in her mind wanted the sexual touching to take place. In the context of the *mens rea* – specifically for the purpose of honest by mistaken belief in consent – 'consent' means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual conduct with the accused.⁴⁸

This approach is confusing if nothing else. It also achieves little clarity in deciding when valid consent is present. Franklin Miller and Alan Wertheimer observe that really, “the central question is whether a consent *transaction* between A and B is morally transformative, and in particular, whether [it] renders it permissible for A to proceed.”⁴⁹ It is also inaccurate to say that expression promotes only the value of innocent reliance. Rather, it too performs a valuable role in promoting consenters' autonomy. Autonomy is protected not only in that consent is motivated by desire, but also in that consent is expressed as an act of *choice* that is respected by others. You do not respect my autonomy only in that you only have sex with me when I want to, but when I *say* I want to. A consent theory of political obligation protects autonomy not when all subject *desire* to be citizens, but when all *choose* to become citizens though a meaningfully free act of choice. We express our autonomy through choice, not desire, and to the extent that choosing requires an act of expression, this is a necessary if insufficient element of genuine, autonomy-protecting consent.

Recognising the value of both approaches to consent, is a synthesis possible? I argue that a definition of consent that contains *both* a requirement for a performative act of

⁴⁸ *R v Ewanchuk* [1999] 1 SCR 330 at 335-6.

⁴⁹ Franklin G. Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent” in Franklin G. Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 79.

consent *and* a subjective attitude of consent is coherent, and highly protective of autonomy. That this ‘choice theory’ of consent is hard to satisfy is not a valid criticism because my purpose is to develop the account of consent that is most protective of autonomy. I suggest that we should take an approach akin to J.L. Austin’s approach to performative utterances. Austin introduced a distinction into the philosophy of language that mirrors a distinction long recognised by lawyers and which can be useful in the definition of consent. In *How To Do Things With Words*,⁵⁰ Austin distinguished between utterances that assert some fact, and others that actually perform a ‘speech act’ by virtue of being spoken. These statements, such as ‘I promise’, ‘I apologise’ or ‘I consent’ are important primarily for the fact of being spoken, not for the truth-value of the statement.⁵¹ If I apologise without being sorry, then my performative act of expression is said to be ‘unhappy’. Klaus Jacobsen observes that a speech-act such as an apology may be unhappy because it is made by someone other than the person who has to apologise, because it is made without any intention of making an apology, or because it is made with some intermediate degree of intention.⁵² This approach clearly delineates the tasks of identifying the performative act and *then* deciding whether it was done with a sufficient degree of voluntariness.

f) Voluntarism

For those concerned primarily with its value protecting autonomy, the central element of consent is voluntarism. It is the free exercise of the consenter’s will (as opposed to the consentee’s reliance, for example) that changes the moral context of the action in question. The free exercise of the will is embodied in the act of choice: there has been no relevant exercise of the will until a choice is made. Two issues confound the apparently straightforward question of whether an act of consent was voluntary. First, voluntarism is graduated. This makes it necessary to decide how much voluntarism is necessary for an act of consent to be considered ‘substantially’ voluntary and treated the same as a completely voluntary one. This is necessary because the social function

⁵⁰ John Langshaw Austin, *How To Do Things With Words* (Harvard University Press 1975).

⁵¹ See John Langshaw Austin, *How To Do Things With Words* (Harvard University Press 1975) at 58-9.

⁵² Klaus H. Jacobsen, “How to Make the Distinction Between Constative and Performative Utterances” (1971) 21(85) *The Philosophical Quarterly* 357 at 357.

of consent demands a binary choice between valid and invalid consent.⁵³ Secondly, voluntarism is a moral as well as an empirical concept, as only some forms of influence are considered relevant. A theory of pre-consensual rights and duties actually gives consent theory much of its content. This is a useful way to view the divergence between liberal and radical thought: radicals are willing to take different constraints into account in deciding whether an act of consent is voluntary and therefore has the power to change the moral context of an action.

The problem of graduated voluntarism has vexed moral and political philosophy since its earliest days. In the *Nicomachean Ethics*, Aristotle observes that an action may still be ‘voluntary’ although compelled by circumstances or by will of another.⁵⁴ It is possible, he argues, to act ‘against one’s will’ out of a sense of duty, compulsion to avoid some evil, or even as an act of ‘better judgment’. Sometimes we desire one thing but choose to do another based on higher ideals, or fear of consequences. Such actions are not really ‘involuntary’ in either an ordinary sense, or according to most philosophies of will. Locke, for example, distinguishes between will and desire. Although Locke’s theory is probably comprehensible without accepting the theology that informs it,⁵⁵ such early modern theories are sometimes difficult to work with because of their premises in natural law as conceived as divine will versus divine reason.

For my present purposes, the very point of the voluntariness requirement – the very point of consent theory generally – is to discount some acts of will and give others moral transformative force. For this purpose, it is necessary to distinguish will from desire. Autonomy serves to protect acts of will, not states of desire. In a very real sense, a hand forced by duress is played with the greatest possible degree of desire: a mother threatened with harm to her child wants nothing more than the safety of her child, whatever the cost.⁵⁶ As Andrew Robertson writes:

⁵³ Attempts to construct a graduated spectrum of consent, with varied levels of legitimation, are unsatisfactory because they ignore the essential binary dichotomy between valid and invalid consent. For an example see Tom W. Bell, “Graduated Consent Theory, Explained and Applied” (Chapman University School of Law Legal Studies Research Paper 09-13)

⁵⁴ Aristotle (R.W. Browne trans.), *The Nicomachean Ethics* (Henry Bohn 1835) III.I at 54-5.

⁵⁵ For a discussion, see James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press 1993) Chapter 6.

⁵⁶ John Dalzell, “Duress by Economic Pressure I” (1942) 20 *North Carolina Law Review* 237 at 238.

The very broadest conception of voluntariness would accommodate any action motivated by deliberate decision, regardless of the conditions under which that decision is made. It is well accepted that even highly coerced agreements involve some exercise of will or choice, however truncated or twisted that choice may be. A slave chooses to work rather than suffer the violent consequences of his or her refusal.⁵⁷

Your decision to comply with my coercive demand is ‘involuntary’ because of the nature of my threat, not because it is really unwilled. (This is the strength of the liberal examination of whether I was ‘acting within my rights’). My threat to exclude you from a party, for example, or to destroy a trivial bauble or gadget of yours will not render your decision to sleep with me involuntary, though my threat to harm you will.⁵⁸ Your actual, subjective will to sleep with me may be clearer in the second case than in the first: in a perverse sense, your desire to do so will be stronger, as the stakes are higher. However, as Morris Cohen observes, the freedom to choose the lesser of two evils is “surely the opposite of what men value as freedom.”⁵⁹ This leads to the second confounding factor, which is the fact that the most important aspects of voluntarism analysis are moral rather than factual.

My proposed solution is to separate the voluntarism element into two discrete elements, starting with Robertson’s empirical, ‘broadest conception’ of voluntarism and then moving to a narrower, moral one. The first, a requirement for subjective voluntarism, isolates so much as possible the empirical question of whether the putative consent was actually an exercise of the individual’s will at all, whether *meaningfully* voluntary or not. In this stage of the test, we ask simply whether the act of consent was willed, and not why it was willed. Motivation by fear the result of coercion, for example, would be sufficient. The second limb is a requirement for meaningful choice, and I argue that this ensures the absence of all improper influences before we consider an act of consent to be valid. On this approach, coercion is not found in overbearing your will but in compelling your choice. As we express our autonomy through an act of choice, rather than an act of desire, our focus on the question of voluntarism should be whether you had reasonable choices

⁵⁷ Andrew Robertson, “The Limits of Voluntariness in Contract” (2005) 29 *Melbourne University Law Review* 179 at 184-5 (citations omitted).

⁵⁸ Peter Westen, “Some Common Confusions About Consent in Rape Cases” (2004) 2 *Ohio State Journal of Criminal Law* 333 at 351.

⁵⁹ Morris R. Cohen, “The Basis of Contract” (1933) 46 *Harvard Law Review* 553 at 569.

available to you and not primarily on what you desired. This approach appears to de-emphasise the importance of subjective will, but actually promotes the sort of thing ‘men value as freedom’.

The choice theory of will explains how there can exist degrees of voluntariness in a relevant and workable sense. Some choices are completely voluntary, or should be so regarded, because there was a range of choices open. We can safely presume that the choice actually taken was a free act of will in such circumstances. In other cases, a choice is less voluntary because the choices and alternatives available to it are not very reasonable, and in others a choice is involuntary because the choices are completely unreasonable. ‘Choice’ presupposes options and correctly includes these in the enquiry as to whether an act of consent was free in the way that a pure will theory of consent does not. The strength of radical critiques is their observation that options – alternatives and the lack thereof – are part of the background to a decision that has moral relevance. Before consent should be allowed to change the moral and legal context of an act, its pre-consensual context must be appraised including the alternatives to consent. The ‘acting within rights’ approach does not do this adequately, but I contend the ‘meaningful choice’ approach I advocate in subsection (ii) below does.

i. Subjective Voluntarism

Hobbes’ theory of consent is the most notorious example of an amoral, that is purely psychological, concept of ‘free will’. As in the state of nature “every man has a Right to every thing, even to anothers body”,⁶⁰ consent to political authority procured by fear is valid. Sovereignty acquired by force is different to that acquired by ‘free agreement’ only in that the former is motivated by fear of the sovereign, and the latter by fear of one’s fellows: “In both cases they do it for fear: which is to be noted by them that hold all such Covenants, as proceed from fear of death, or violence, voyd, which if it were true, no man, in any kind of Commonwealth, could be obliged to Obedience.”⁶¹ While modern voluntarists tend to reject this account of political

⁶⁰ Thomas Hobbes (Richard Tuck ed.), *Leviathan* (Cambridge University Press 1991) at 90.

⁶¹ Thomas Hobbes (Richard Tuck ed.), *Leviathan* (Cambridge University Press 1991) at 138.

authority,⁶² (not least to avoid Hobbe's rigorous conclusion from their premises), it is a good starting point to separate the factual question of voluntarism from the moral ones. Constrained, as opposed to physically compelled, actions are still attended by some attitude of volition, and the true question is not whether they were willed as a psychological fact but whether they were voluntary as a moral act.

In the first instance, it is necessary only to distinguish outright compelled actions from those that are done with a degree of will, albeit will that is ultimately vitiated. Some attitude of subjective voluntarism thus emerges as the third necessary condition to valid consent. This approach also allows us, at this stage, to separate acts of consent procured by out and out compulsion, as opposed to coercion; although neither will be a valid expression of contractual assent, for example, there is a salient difference between the case where I agree to sell you my house under duress and where you have literally forced my signature with your hand. In the first case, we may need a second instance of review, whereas the first is clearly involuntary. We can also eliminate apparent acts of consent that were made in a purely accidental fashion, or under a mistake that goes to the nature of the performative act in question (as opposed to some mistake as to the intended or likely consequences of the act). We could also, arguably, eliminate acts of consent that are made by this latter form of mistake, or by deceit, as the consenter subjectively intended something quite different.

ii. The Requirement for Meaningful Choice

The most important question going to the voluntariness of an act of consent is whether it was made in circumstances that afforded the consenter a meaningful choice between morally acceptable alternatives. Both 'meaningful' and 'reasonable' are qualifiers that limit the scope of choice and the scope of alternatives that I argue should have moral significance. My choice should be regarded as meaningful only where I have reasonable alternatives open to me. An alternative is 'reasonable' if you could reasonably demand that I do it instead of choosing to consent. This might be

⁶² See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and Political Authority* (Princeton University Press 1993) at 38-9. Michael Detmold has put the Hobbesian framework to good use, however, in explaining why conquered people (such as Indigenous Australians) must be treated as equal citizens immediately. As all citizens' acquiescence is motivated by fear, and that acquiescence serves as consent to membership in the political community and subjection to its sovereign, the acquiescence of a conquered people is no different and must have the same consequences. See Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Taylor & Francis 1985) at 53.

assessed by reference to a theory of natural rights and duties, by a theory of dignity, or by a theory of fundamental interests, which a chooser should be in no cases asked to sacrifice. In keeping with the utilitarian framework I suggest in the next Chapter, I advocate a fundamental interest approach to the question of reasonable choice. A person is ‘choice constrained’ when all of the alternatives open to him or her affects or destroys a fundamental interest he or she has in his or her life, freedom, bodily integrity, property or that of a related person. Consent usually requires us to sacrifice some interest in order to preserve or promote another, but generally we hope that the exchange can be something approaching the Pareto standard; ideally, both parties hope that what they sacrifice is less than what they stand to gain. Constellations that are not so are, *prima facie*, choice constrained.

In this sense threats that are too mild or that affect an irrelevant interest are irrelevant; if I threaten to break your phone unless you have sex with me, refusal is still a reasonable option because your phone is not really a fundamental interest. A broken phone is orders of magnitude less bad than coerced sexual intercourse, and other remedies exist to address my wrongdoing.⁶³ (In the case that you are stranded and your phone is the only hope of rescue, the conclusion is very different). In my suggested framework, refusal remains a meaningful choice in the former but not the latter case. This approach provides a framework for discussing, rather than assuming, the theory of natural rights and duties that gives consent theory its content, including those based on association and need,⁶⁴ and for ensuring that only truly voluntary acts of will are given moral transformative force. There are many interests that you are allowed to pursue at my expense, and others that you are not. The wrongfulness of my action in forcing or manipulating your choice between fundamental interests is still a relevant consideration, but it is not used to eclipse so completely the role that background constraints play.

⁶³ On this point, see Peter Westen, “Some Common Confusions About Consent in Rape Cases” (2004) 2 *Ohio State Journal of Criminal Law* 333 at 351.

⁶⁴ See “Necessité Oblige” in Tony Honore, *Making Law Bind* (Oxford University Press 1987); See also Arthur Ripstein, “Three Duties to Rescue: Moral, Civil, and Criminal” (2000) 19(6) *Law and Philosophy* 751.

Liberals tend not to couch the enquiry in terms of meaningful choice. They tend to focus on the presence or absence of ‘voluntariness-reducing factors’⁶⁵ that result from the wilful conduct of another moral agent, such as coercion. Coercion is, by definition, wrongful or illegitimate pressure and not pressure or constraint *simpliciter*. Joel Feinberg argues that consent is only vitiated where another person creates or (wrongfully) manipulates some constraint, need or vulnerability.⁶⁶ Robert Nozick argues that an action is voluntary no matter how severely constrained it is by nature or by the actions of other people, so long as those other people are acting within their rights.⁶⁷ “Other people’s actions place limits on one’s available opportunities. Whether this makes one’s resulting action non-voluntary depends upon whether these others had the right to act as they did.”⁶⁸ The totality of choices and constraints combine to form a ‘choice environment’ which may constrain my freedom, but only coerces me in a morally relevant manner where one or more persons in the chain have acted improperly: “Z does choose voluntarily if the other individuals A through Y each acted voluntarily and within their rights.”⁶⁹

Most obviously, this approach fails to capture radical concerns about social constraints on individual will that arise not from the targeted action of an individual moral agent (i.e. the consentee) but rather from the sum total of social relations. I may not have created or even manipulated your poverty, but consent should not be allowed to legitimate a contract of employment that contains unfavourable terms, such as termination at will or a wage below the poverty line. I may not have created or manipulated the system of patriarchy that pervades society, but consent should not be allowed to legitimate a marriage in which we have unequal rights, for example to property, divorce or custody. Radicals have criticised the liberal approach because it excludes non-agent-related constraining factors such as gender and class relations that combine to constrain individual will in a way that is morally relevant. This is a

⁶⁵ See Joel Feinberg, *The Moral Limits of the Criminal Law Vol 3: Harm to Self* (Oxford University Press 1989) at 261, 264.

⁶⁶ See Joel Feinberg, *The Moral Limits of the Criminal Law Vol 3: Harm to Self* (Oxford University Press 1989) at 249.

⁶⁷ Andrew Robertson, “The Limits of Voluntariness in Contract” (2005) 29 *University of Melbourne Law Review* 179 at 184.

⁶⁸ Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) at 262.

⁶⁹ Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) at 263.

serious criticism, because “justice cannot be indifferent to the lives people can actually live.”⁷⁰ The source of constraint may not be the targeted actions of another individual, or even his or her manipulation of an unfortunate situation.

The liberal approach is demonstrably inadequate because that most conservative of institutions, the courts, have adjusted the legal doctrines of duress and fraud so as to capture ever more attenuated shades of ‘wrongdoing’ in constrained transactions. As Rick Bigwood explains, unequal bargaining power is an “endemic, and doubtless a necessary, feature of human existence.”⁷¹ This requires the law to distinguish what sort of bargaining is acceptable, and what is not acceptable: to capture the distinction between “illegitimate, coercive pressure, hence duress, on the one hand, and ordinary legitimate commercial pressure on the other.”⁷² Doctrines such as undue influence and unconscionable dealing show that the doctrine of duress does not protect vulnerable individuals’ contracting autonomy adequately. Courts routinely apply very passive concepts of ‘exploitation’ and impute ‘wickedness’ based on things that a contractual promisee ought to have known, but perhaps did not. Distinctions between ‘non-coercive exploitation’ and situational unfairness have in some jurisdictions become very fine.⁷³ According to Bigwood, a general shift is perceptible in Commonwealth jurisprudence from ‘exploitation’ to ‘transactional neglect’ of extra-contractual duties.⁷⁴ For example, under the doctrine of unconscionable dealing, if I know or ought to know that you labour under a ‘special disadvantage’, I am bound to positive obligations to protect your interests.

Simmons also uses the language of unconscionability to differentiate ‘mere’ opportunism that is still ‘within my rights’ from exploitation that is not. He uses the

⁷⁰ Amartya Sen, *The Idea of Justice* (Belknap Press 2009) at 18.

⁷¹ Rick Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto Law Journal* 201 at 202.

⁷² Rick Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *University of Toronto Law Journal* 201 at 203.

⁷³ See Rick Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’” (1996) 16 *Oxford Journal of Legal Studies* 503; see also Joel Feinberg, “Noncoercive Exploitation” in Rolf E. Sartorius (ed.), *Paternalism* (University of Minnesota Press, Minneapolis 1983) at 201.

⁷⁴ See Rick Bigwood, “Contracts by Unfair Advantage: From Exploitation to Transactional Neglect” (2005) 25(1) *Oxford Journal of Legal Studies* 65 at 70.

example of a man in a desert offered water at the price of title to his property.⁷⁵ As the offeror has neither created nor manipulated the situation, his offer is not coercive. Simmons solves the problem through the imposition of natural duty, for example to offer goods essential to survival at a reasonable price. He bases this in turn on a Kantian conception of dignity, whereby one must not treat others instrumentally “as beings with less moral significance than oneself.”⁷⁶ Thus, the value of human dignity justifies a theory of natural duties. We must refrain from using our full suite of natural rights when bargaining with someone in a constrained position. “However difficult it may be to draw neat, clean lines here, it seems undeniable that some contracts, even without the presence of duress, involve sufficient wrongdoing that they are not morally (and ought not to be legally) binding.”⁷⁷

I contend that both liberal and radical concerns can be subsumed within a requirement for meaningful choice. Radicals essentially argue that social relations vitiate a meaningful exercise of individual will. I suggest that the social relations that really have this effect do so because they deprive the individual of meaningful choice. An impoverished worker’s consent to work in a sweatshop is not valid because we cannot reasonably demand that he or she refuse the job. Such refusal would compromise his or her ability to subsist and meet the basic necessities of a dignified life. This presumption is much weaker where an independently wealthy person chooses to perform work that is demeaning or poorly paid, because they truly have a choice in the matter. Likewise, the more nuanced liberal concerns for preventing unconscionable bargaining are triggered in situations where the consenter has no meaningful choice. My decision to transfer you title to my home for a drink of water is more likely to stand up against scrutiny where I was *not* in danger of dying of thirst. A person’s consent to an exploitative bargain is not valid because we cannot reasonably demand that he or she refuse the transaction. If I cannot, for whatever reason, refuse consent, what possible relevance could the act of consent hold? As Carole Pateman states, “[u]nless refusal or withdrawal of consent are real

⁷⁵ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Consent* (Princeton University Press 1993) at 237-8.

⁷⁶ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Consent* (Princeton University Press 1993) at 239.

⁷⁷ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 239.

possibilities, we can no longer speak of ‘consent’ in any meaningful sense.”⁷⁸ The importance of meaningful choice is what underlies the idea of exploitation itself. The presumption of exploitation in an improvident bargain is always much stronger in the presence of choice constraint, so much so that we would probably characterise even a very improvident bargain as consensual where it is to the disadvantage of the stronger party.

Although this involves a significant departure from liberal orthodoxy, the consequences are not as drastic as one might expect. In difficult cases, liberals break ranks anyway: at some point, liberals will all impose moral standards on interactions. The requirement for meaningful choice is just an attempt to organise them and unify them under a single rubric. Feinberg, for example, deems actions to be illegal or immoral where the circumstances make an act of consent “coerc[ed] in effect”, provided the resulting terms are “harsh” or the parties’ gains are “disproportionate.”⁷⁹ This probably corresponds to Simmons’ notion of unconscionability. Randy Barnett opines that “in the absence of consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just.”⁸⁰

But that approach necessarily assumes a natural theory of rights and duties against which we can assess what is just and what is not. Hardliner libertarians like Nozick are the exception that proves the rule in this regard, but their position is problematic anyway because a theory of rights is necessary for the concept of coercion to make sense. (I have no right to coerce you, but coercion is defined as acting outside my rights). What emerges, then, is the final and arguably most important limb of enquiry into the validity of an act of consent. The question is whether the consent given as an act of meaningful choice. If I had no meaningful choice but to acquiesce because I lacked alternatives that did not compromise my fundamental interests or violate my inherent human dignity, and this acquiescence gave rise to my apparent act of consent, my consent is not valid.

⁷⁸ Carole Pateman, “Women and Consent” (1980) 8(2) *Political Theory* 149 at 150.

⁷⁹ Joel Feinberg, *The Moral Limits of the Criminal Law Vol 3: Harm to Self* (Oxford University Press, Oxford 1989) at 249.

⁸⁰ Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, Princeton 2004) at 48.

Conclusion

Liberal theory sets the doctrine of consent a truly Herculean task. In this Chapter I have sought to identify some ways in which consent theory commonly fails to protect autonomy in the manner that its background moral theory demands. I believe that many of these shortcomings can be addressed through a more rigorous definition of what we mean by consent, and in particular the conditions that must be satisfied before an act of apparent consent is treated as valid. It is imperative that only valid consent be allowed to change the moral and legal context in which an action that could be harmful to individual autonomy is judged.

In particular, this involves a case-by-case approach to capacity that ensures only acts of consent by those with the competence to understand the nature of political obligations are treated as valid. It involves a strict and methodical approach to the remaining three elements of consent, starting with a definition of consent as a performative act – choosing between alternatives in a manner that communicates that choice to the relevant audience. While clear non-verbal gestures can obviously serve as performative acts expressing consent, the notion of consent by tacit conduct is inherently difficult. It does have a role to play in political, moral and legal philosophy, but must be treated with caution. We must be very careful not to use the doctrine of tacit consent to impute consent in the absence of voluntarism.

Voluntarism is by far the most difficult element of consent. It is rendered more difficult by the fact that voluntarism is a graduated phenomenon, whereas consent is necessarily binary. It is rendered more difficult still by the fact that voluntariness is more a moral than a factual notion, and that the theories of mind and will that traditional consent theory utilises are complex and confounding. One possible solution to this is to separate the factual from the normative stages of voluntarism analysis, through independent requirements for subjective voluntarism (irrespective of vitiating factors) and for circumstances that afford meaningful, as opposed to illusory, choice. If a person has no choice but to consent to an action, the act of consent cannot change the moral and legal context of that action; it is, simply, given as a part of the context in which the action is to be judged anyway. Although we cannot equate factual autonomy with moral autonomy, nor presume factual autonomy the way we assume moral autonomy, *some* degree of factual autonomy is a necessary prerequisite

for any meaningful act of consent. At a minimum, a ‘chooser’ must have a choice – at best the choice not to choose at all, and at worst the choice between an evil and a reasonable alternative – but a choice between two untenable evils is an illusory choice that cannot serve as a criterion of justice in any serious moral theory.

Insights from individualist liberals like the utilitarian David Hume are instructive, but so too are insights from radical critics such as Carole Pateman. If consent is to serve a useful role in liberal political philosophy, it must come to terms with these critiques. As Mark Kann observes, the value of Lockean consent theory lies in its recognition of the individual’s right to commit himself to others, while that of its Marxian critique lies in the recognition that individual commitment takes place in particular social circumstances. “New consent theories”, he concludes, “must reconcile the two.”⁸¹

Such a reconciliation may not be possible. In the next Chapter, I apply this definition of consent to the circumstances in which we find ourselves as subjects of liberal democratic governments. With Simmons, I argue that a carefully defined theory of consent does not legitimate modern liberal democratic practice, or at least not universally. Unless we compromise the standard of consent required, many individuals subject to governmental power are not under its authority consensually. In that Chapter I explore the alternatives available to us at that unhappy point, before moving in the final Chapter to advocate an alternative approach in which consent plays an important but subsidiary role.

⁸¹ Mark E. Kann, “The Dialectic of Consent” (1978) 40(2) *The Journal of Politics* 386 at 408.

CHAPTER TWO

The Unconscionable Social Contract: De Facto Governmental Power over Non-Consenting Subjects

Introduction

In the last Chapter I argued for a particular definition of consent to ensure acts of consent are only treated as ‘valid’ where they genuinely reflect the unconstrained, autonomous will of the consenter. This represents a departure from many mainstream definitions of consent to the extent that it attempts to define consent *both* as a performative act *and* a state of desire, and to the extent that it takes some agent-independent constraints on consenters’ will into account under a discrete requirement for meaningful choice. In particular, this approach rejects the doctrine of tacit consent as a valid approach to the question of legitimate political authority except under carefully defined circumstances, limits the relevance of majority consent to consensus *after* the formation of a political community, and rejects the doctrine of hypothetical consent outright.

In the Chapter that follows, I seek to apply the definition of consent developed in Chapter 1 to existing social conditions. In Section 1 I examine a class of subject that epitomises a defect of each element of genuine consent in turn. In relation to capacity I use the example of children, in relation to volition I use the example of Indigenous people, in relation to expression I use the example of native-born property inheritors, and in relation to meaningful choice I use the example of refugees. Individuals in most of these classes are not only subject to governmental power, they are *more* subject to it than the average resident of a liberal democracy. The point of this Chapter, then, is to prove the *de facto* exercise of governmental control over non-consenting subjects: to identify, as it were, a silent crisis of legitimacy for consent-based democracy.

In Section 2 I turn to the question of partial legitimacy, and argue that the non-consent of these minorities presents a real problem for liberal democratic theory. If political voluntarism is to be taken seriously, as consent theorists claim it must, then every extant society faces a problem of partial legitimacy. From this point, there are four

possible approaches. The first is to accept the need for radical social transformation to bring society into line with the demands of genuine consent. The second is to accept the fact of some illegitimacy and non-obligation in extant polities as a philosophical matter, but reject the political implications of this insight. The third is to compromise the standards of consent so as to provide at least a basic measure of legitimacy for extant liberal democratic societies, for example by utilising a doctrine of tacit consent. The fourth is to revise the premise of radical individual autonomy that seems so irreconcilable with the kinds of social organisation liberals, especially social democrats, find desirable. Ultimately I suggest the fourth alternative as necessary to achieve a Rawlsian 'reflective equilibrium' between widely held beliefs and assumptions about desirable social organisation on the one hand, and the widely espoused doctrine of autonomy, on the other. Autonomy still plays a very important role in political philosophy, but in my view one that is subsidiary to welfare as a basis of political legitimacy.

In this Chapter, as in the entire examination, I have deliberately attempted to maintain an individualist focus. Classes and categories can serve as useful heuristics, even within a thoroughly individualistic framework. Obviously, the content of this Chapter illustrates that I believe individuals can be usefully categorised into 'classes'. However, despite the similarities we share with others, and the usefulness of grouping like cases together when exploring social phenomena, the advantages or disadvantages we face as members of a class are primarily due to our possession as individuals of the attributes that allow our categorisation. Individual, not group consent is required if individual autonomy is to be protected from impingement by the group. Accordingly, although I speak of classes of non-consenting subject, they are classes of subject that have not consented as individuals, rather than as classes.

1. Non-Consenting Subjects in the Liberal Democratic Polity

Although we often think of liberal democratic societies as ones based on broad societal consensus, I seek to argue in the following four subsections that this is not the case. There exists in every society a number of people who either cannot or will not consent to their government, or at the least have not in fact done so. In Chapter 1, I discussed and rejected the 'attenuating devices' of tacit, hypothetical and majority consent on the basis that they impute consent to the unwilling. These approaches must

be rejected with particular rigour in the ‘borderline’ cases discussed below. The point I seek to make in this Section is primarily a descriptive one: any given society, our own included, contains a significant minority whose subjection to governmental authority is not legitimated by meaningful consent. This makes every society at best only partially legitimate by the standards of consent theory, and every society therefore exercises political power over individuals and demands their obedience in an illegitimate, oppressive manner.

a) Lack of Capacity

Capacity is an aspect of consent theory that is relatively non-contentious, at least to the extent that everybody agrees a certain degree of competence is necessary to ascribe political agency to a person. A number of people lack the capacity to consent to being subject to a government because they lack the competence to understand the nature of the political relationship and the consequences of consenting to it. Such people include those with severe cognitive impairments, the mentally ill and the immature. This is recognised, for example, in the rule that disqualifies the mentally ill and impaired from voting.⁸² Of these classes, I will focus on children, because they are by far the largest group, are in many ways the most vulnerable, and because it is a phase of life in which every person passes. It is, moreover, a very important phase because our start in life affects our chances and interests long after we attain capacity. Moreover, if my arguments in the remaining subsections are accepted, the children of non-consenters are more likely to come under the direct control of ‘their’ government than others.

Children are a significant minority in every society. Those under the age of 18 constitute around a third of the world’s population, and much more in the least developed nations,⁸³ and yet they receive little more than a footnote in both classical and modern consent theory. Ethan Leib and David Ponet state emphatically that “[c]hildren are the orphans of political theory and embarrass their parents’

⁸² *Commonwealth Electoral Act 1918* (Cth) s. 93(8)(a).

⁸³ See United Nations Department of Economic Affairs, Population Division, *World Population Ageing 1950 – 2050* (United Nations, New York 2001) Chapter III. Available for download at <http://www.un.org/esa/population/publications/worldageing19502050/> (accessed 27 August 2012).

democracies.”⁸⁴ Children are not adequately addressed in the consent framework because the concept of consent is really only applicable once capacity is assumed. It can have little to say with regards to those who obviously lack it. According to Alisdair MacIntyre:

In most moral philosophy the starting point is one that already presupposes the existence of mature independent practical reasoners whose social relationships are the relationships of the adult world. Childhood, if noticed, is a topic that receives only brief and incidental attention... The neglect of childhood parallels the neglect both of old age and of experiences, at all stages of life, of disability and dependence.⁸⁵

Hobbes, for example, accepts that children, like the cognitively impaired and mentally ill, will be subject to the powers of a guardian under the social contract, but appears to be unconcerned about their plight in the state of nature:

Likewise Children, Fooles, and Mad-men that have no use of Reason, may be Personated by Guardians, or Curators; but can be no Authors (during that time) if any action done by them, longer then (when they shall recover the use of Reason) they should judge the same reasonable. Yet during the Folly, he that hath right of governing them, may give Authority to the Guardian. But this again has no place but in a State Civill, because before such estate, there is no Dominion of Persons.⁸⁶

Locke, for his part, seems more concerned about the matter, but dodges the issue with a semantic twist when he concedes that “[c]hildren, I confess are not born in this full state of *Equality*, though they are born to it.”⁸⁷ Elsewhere he states that “we are *born Free*, as we are born Rational; not that we have actually the Exercise of either: Age that brings one, brings with it the other too.”⁸⁸ This is because Locke conceives of reason being constitutive of personhood, and therefore a prerequisite to any claim of natural freedom: “if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of Reason... he is *never capable of being*

⁸⁴ Ethan J. Leib and David L. Ponet, “Fiduciary Representation and Deliberative Engagement with Children” (2012) 20(2) *The Journal of Political Philosophy* 178 at 178.

⁸⁵ Alisdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court 1999) at 83.

⁸⁶ Thomas Hobbes (Richard Tuck ed.), *Leviathan* (Cambridge University Press 1991) at 113.

⁸⁷ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §55 at 322.

⁸⁸ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §61 at 326.

a Free Man... but is continued under the Tuition and Government of others, all the time his own Understanding is incapable of that Charge.”⁸⁹

Locke seems to assume that, pending full membership as a rational, adult person in society, children are simply subsumed into the family, their interests represented by their parents. Coercive, governmental power thus appears mediated by the parental relationship: the government exercises power over the parents, who have consented to it, and the parents exercise power over the children, tempered by affection and the natural duties of preservation and maintenance.⁹⁰ “A *Child* is *Free* by his Father’s Title, by his Father’s Understanding, which is to govern him, till he hath it of his own.”⁹¹ Practically, this may be how it often happens. But it is an organic, federal conception of society that this theory forms, not a voluntaristic one. For Locke, the family represented a realm of natural authority which he sought to distinguish from the political realm where (*contra* Filmer) no such natural authority could exist. But this does not engage sufficiently with the facts of life, because in Locke’s day (and even more now), governments exercised coercive power directly over minors all the time, sometimes against the will of their parents. In the seventeenth and eighteenth centuries this was under the doctrine of *parens patriae*, though statutory powers regulating vagrancy, labour and illegitimacy did exist,⁹² and today a much greater number statutory powers exist by which a government can interfere with the parent-child relationship directly.⁹³ Governments have long arrogated power over incapacitates to itself. This demanded more attention of Locke and the other early social contract theorists, and it certainly requires more attention today.

Locke asserts that a government may stand *in loco parentis* should a parent die and fail to appoint a guardian: “if the Father die, and fail to substitute a Deputy in this

⁸⁹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §60 at 325-6.

⁹⁰ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §63 at 327.

⁹¹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §61 at 326.

⁹² See Nicholas Rogers, “Vagrancy, Impressment and the Regulation of Labour in Eighteenth-Century Britain” in Paul E. Lovejoy and Nicholas Rogers, *Unfree Labour in the Development of the Atlantic World* (Routledge 1994).

⁹³ See Lawrence B. Custer, “The Origins of the Doctrine of *Parens Patriae*” (1978) 27 *Emory Law Journal* 195; George B. Curtis, “The Checkered Career of *Parens Patriae*: The State as Parent or Tyrant?” (1976) 25 *De Paul Law Review* 895.

Trust, if he hath not provided a Tutor to govern his Son during his Minority, during his want of Understanding, the Law takes care to do it.”⁹⁴ In modern welfare systems, the same should happen when a parent derelicts his or her duty towards the child. Locke asserts in a related passage that parental power “so little belongs to the *Father* by any peculiar right of Nature, but only as he is the Guardian of his Children, that when he quits his Care of them, he loses his power over them, which goes along with their Nourishment and Education, to which it is inseparably annexed, and it belongs as much to the *Foster-Father* of an exposed Child, as to the Natural Father of another.”⁹⁵ The assertion of governmental authority over children is particularly difficult as parents are denied by Locke any natural right over them that could surrendered under the social contract. By its own terms, then, consent theory does not provide a very good framework for approaching this sort of case, a fact reflected in Locke’s repeated use of the language of guardianship and trust.

Although children lack rationality, they do not lack the interests that adults possess, nor do they lack the basic human dignity on which the principle of autonomy is based. That is, although they lack the conditions requisite to autonomy, they have interests that can be prejudiced, neglected and exploited. Further, they are possessed of a dignity by virtue of which we cannot treat them as things to be used, instrumentally, to further our own ends. Therefore, we need to look for a different framework to protect children within the liberal democratic polity. It is still imperative that we have some basis to distinguish between legitimate exercises of authority over children from illegitimate exercises of power.⁹⁶ The best that consent theory has to offer is the proposition that parents generally appoint the government as guardian of their children under the social contract. Alternatively, children are in a state of nature *vis-à-vis* the political community and therefore its government.⁹⁷ Children therefore present a powerful case against the adequacy of consent theory as a theory of political

⁹⁴ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §59 at 325.

⁹⁵ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §65 at 328.

⁹⁶ See Evan Fox-Decent and Evan Criddle, “The Fiduciary Constitution of Human Rights: (2009) 15 *Legal Theory* 301.

⁹⁷ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 21; See John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) *Second Treatise* §60 at 325.

legitimacy. By virtue of its most fundamental and necessary assumptions, consent theory cannot explain the relation between incompetent subjects and the government under which they live as anything but one based on *de facto* overwhelming power governed by the laws of nature. This makes consent theory flatly inappropriate to normalise this sort of relationship.

b) Lack of Expression

Locke developed his theory of tacit consent to justify political authority over those born into an existing political community: we who missed the moment at which the social compact was concluded and a common political authority erected in perpetuity. Because Locke wanted to justify the doctrine of resistance and bolster the position of William and Mary on the English throne, he needed to utilise the compelling rhetoric of consent. But to some extent, he also justified the historical English constitution and the social, legal and property relations that went along with it. It seems Locke was more of a political than a social radical, and so he needed to compromise on the principle of personal voluntarism to a significant degree. Thus, he developed a doctrine whereby possession and enjoyment of land signified tacit consent.⁹⁸ Although a father cannot bind his son to political authority, he can attach conditions to the inheritance of land that he owns, including that its heir accept membership in the political community.⁹⁹ Indeed, such a position is natural enough from the perspective of English land law where the rights of a fee simple owner are far from absolute. As Gough explains, what was “really doing, under the guise of erecting a form of government on the basis of freely consenting individuals, was to describe the operation of the traditional English constitution in terms of the political philosophy current in his age. The notion of consent, never strictly analysed, and involving some element of legal fiction, had come to be embodied in this constitution in the course of its historical development.”¹⁰⁰

⁹⁸ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §119 at 366.

⁹⁹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §120 at 366.

¹⁰⁰ See John Gough, *John Locke's Political Philosophy: Eight Studies* (Oxford University Press 1964) at 70-1.

Critiques of Locke since C.B. Macpherson have tended to focus on the position of non-propertied individuals in his consent theory.¹⁰¹ Subject to the social compact but not fully party to it, according to Macpherson Locke's labouring classes are a sort of denizen within his theory of citizenship.¹⁰² While this is very important, I will focus on problems with property owners within the Lockean framework, or rather with property inheritors. Although they may still occupy a relatively privileged position within society, I wish to press the point that property inheritance cannot serve as an act of tacit consent and argue that many people born into an existing polity epitomise a want of expression to political authority despite their having a 'stake' in the territory it controls.

Traditionally, persons have been seen as the primary subject matter of the Lockean social compact. Property owners gather and, by an act of voluntary consent, form a political community with their property as its territory. The primary agreement is for personal subjection, and land is brought under the social compact by prescription incidentally.¹⁰³ I challenge this interpretation and offer an alternative one whereby land is brought under a social compact by consent and authority over persons is essentially prescriptive, to the extent that persons wish to remain connected with (or are dependent) upon land subject to a social compact. This is a much more conservative doctrine and one that I think we must reject. The idea of a political community without a territory – a sovereign government without a sovereign territory – is nonsensical in the social contract framework.¹⁰⁴ Once land is brought under a social compact it can never be removed although persons are (theoretically) free to remove themselves from the territory.

The very point of consent theory is to prevent our birth within this or that jurisdiction from subsuming us into a natural, organic community and subjecting us to its

¹⁰¹ See C.B. Macpherson, "The Social Bearing of John Locke's Theory" (1954) 7(1) *The Western Political Quarterly* 1; also *The Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press 1962);

¹⁰² See C.B. Macpherson, "The Social Bearing of John Locke's Theory" (1954) 7(1) *The Western Political Quarterly* 1 at 4, 6.

¹⁰³ See for example Julian H. Franklin, "Allegiance and Jurisdiction: Locke's Doctrine of Tacit Consent" (1996) 24(3) *Political Theory* 407 at 412.

¹⁰⁴ An example in this respect is the 'cybercountry' Wirtland, an 'internet-based sovereign country' that probes the concepts of 'legitimacy and self-sustainability of a country without its own soil.' Any person can apply for 'witezanship' as a 'Wirtlander' receiving identification cards. The 'nation' also mints its own coinage. See www.wirtland.com (accessed 11 September 2012).

government. Locke's *Treatises of Government* were directed in part against Robert Filmer's claim that birth places "absolute and indefeasible" obligations based on parentage, rather than personal volition: "[t]he notion of consent (here understood as tacit consent) provides us with a concept which enables us to place limits on the obligations incurred by that accident of birth."¹⁰⁵ But in his theory of consent, land ownership and inheritance undermine this effort.

Locke lays out his theory in a series of passages of the *Second Treatise*. First, he asserts that individuals are free to withdraw from the country of their birth and set up a new government in another place.¹⁰⁶ He then asserts that parents cannot bind their children with any act of compact because of the personal nature of consent to membership in a political community and subjection to government. However, they may attach conditions to land including a condition that obliges the child to be a member of his political community, if the child wishes to inherit his parent's property.¹⁰⁷ He then concludes that inheritance subject to such conditions is an act of tacit consent to political authority.¹⁰⁸ Locke opines that land follows its owner in to the social compact: "it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land... should be exempt from the Jurisdiction of that Government, to which he himself the Proprietor of the Land, is a Subject."¹⁰⁹ However, once brought under a government in this manner, land cannot be removed from it, ever: Commonwealths

¹⁰⁵ Iain W. Hampsher-Monk, "Tacit Concept of Consent in Locke's Two Treatises of Government: A Note on Citizens, Travellers, and Patriarchalism" (1979) 40(1) *Journal of the History of Ideas* 135 at 138.

¹⁰⁶ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §115 at 363.

¹⁰⁷ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §116 at 363-4.

¹⁰⁸ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §119 at 365-6.

¹⁰⁹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §120 at 366.

do not permit any parts of their dominions to be dismembered.¹¹⁰ Those who leave the jurisdiction must quit the land by donation or sale.¹¹¹

The alternative is a scenario more familiar to the German natural law theorists in which property rights are held only to exist in the state civil, and not the state of nature. ‘Ownership’ would then be limited to the title that members receive back as a concession from the ‘state’ on their accession. On this model, inheritors would inherit land subject to the overriding title of the government, a situation not at all unlike the reality under the common law radical title of the crown. This would be a coherent approach, but it was not Locke’s, and it would also conflict fundamentally with his characterisation of property rights in the state of nature.

Locke’s conclusions, then, are not really reconcilable with his premises. Every person has a ‘double right’: first to the ‘freedom of his person’, and second “to *inherit*, [before any other Man], with his Brethren, his Fathers Goods.”¹¹² Property rights are, after all, natural and pre-social, and so the right to inheritance is prior to and independent of the voluntary bounds of society. Locke is concerned to show that his claim of basic individual freedom is consistent with his system of obligation by inheritance with strings attached.¹¹³ Despite the child’s fundamental freedom and natural right to inheritance, Locke wishes to prevent children seceding with their parent’s land, and in so doing imports vestiges of an organic, medieval conception of society into his voluntaristic scheme. It is an essentially prescriptive scheme whereby jurisdiction over persons arises from the political community’s jurisdiction over land.¹¹⁴

An example of this is the plight of Israeli Arabs who accepted citizenship in the newly formed State of Israel in order to avoid forfeiting their land. Those who refused to do

¹¹⁰ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §117 at 364.

¹¹¹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §121 at 367.

¹¹² John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §190 at 410-11

¹¹³ Paul Russell, “Locke on Express and Tacit Consent: Misinterpretations and Inconsistencies” (1986) 14(2) *Political Theory* 291 at 299.

¹¹⁴ See Julian H. Franklin, “Allegiance and Jurisdiction in Locke’s Doctrine of Tacit Consent” (1996) 24(3) *Political Theory* 407 at 4123-4.

so left the territory in the hope of imminent victory over the fledgling Israel Defence Forces, and as this hope proved to be misplaced, occupy a marginalised position relative to those that accepted citizenship to this day. That is not to say, however, that the choice to accept citizenship by all Israeli Arabs was a meaningfully free choice, nor that the inheritance of such property by the children of the 1948 generation constitutes the kind of patriotic acceptance and support of the State of Israel that Locke's theory of tacit consent by inheritance might imply. Certainly those Arabs that accepted citizenship and retained their property have rejected the legitimacy of the government under which they live to a lesser extent than the refugees in the Occupied Territories, but their acceptance of the polity as constituted is by no means absolute. This is evidenced by their exemption, for example, of Muslim Arab Israelis – in contrast to other Arab communities such as the Druze – from military service.

As outlined above, other social contract theorists such as Samuel von Pufendorf and James Tyrell, avoid some of this tension by characterising property ownership as a product of positive, rather than natural law: “private property normally arises when a group of individuals occupy a territory and then divide the land within it either by allotment or by permitting its individual members to occupy.”¹¹⁵ They tend to assume the natural relationship between the act of political union and the perpetual claim of jurisdiction over a territory as given. I believe that a similar assumption actually underlies Locke's theory, though it is in direct tension with some of his central claims about citizenship and the nature of legitimate political authority. “[S]ince property entails no governance, and governance entails no property, a commonwealth's jurisdiction over territory cannot arise directly from the social contract, which involves only submission of the person.”¹¹⁶ But it does. The social contract that emerges from this interpretation of the *Second Treatise* is more Burkean than Lockean: a great society of the living, the unborn and the dead,¹¹⁷ a medieval idea in early-modern clothing as it were. Those born within a polity are, as a matter of fact, subsumed within it without much regard for their consent.

¹¹⁵ Julian H. Franklin, “Allegiance and Jurisdiction in Locke's Doctrine of Tacit Consent” (1996) 24(3) *Political Theory* 407 at 416.

¹¹⁶ Julian H. Franklin, “Allegiance and Jurisdiction in Locke's Doctrine of Tacit Consent” (1996) 24(3) *Political Theory* 407 at 418.

¹¹⁷ See Edmund Burke (J.D.C. Clark ed.), *Reflections on the Revolution in France: A Critical Edition* (Stanford University Press 2002) at 87.

The eighteenth century relationship between land ownership and political power was direct and not meaningfully consensual; a fact of which Locke was undoubtedly aware as secretary for Shaftesbury, a ‘Lord Proprietor’ of the Carolina Province. The *Fundamental Constitutions of Carolina* (1669) that he helped to draft in this capacity were more conservative than liberal. Applying his theory of tacit consent is perhaps even more problematic today, however, than in his own day. On the one hand, land ownership is far more widespread, and its relation to social status and political franchise is much less direct: although it obviously has bearing on the former, property requirements that were taken for granted as conditions for suffrage and office have long been removed. On the other hand, global population has increased dramatically and substantially all territory has been brought under the sovereign ownership of a recognised government. Today, there is no America, nowhere to begin a new commonwealth “*in vacuis locis*.”¹¹⁸ There is no (even nominally empty) habitable area on earth to which dissidents might leave. This has inspired libertarian “seasteading” plans to create floating, artificial islands on the high seas as a refuge from more-than-minimal governments.¹¹⁹ As land and the resources attached to it become more valuable, the doctrine of tacit consent through ownership actually becomes less rather than more tenable. If we bear a serious commitment not only to the principle of voluntarism but to the concepts of freedom and equality that underlie it, then we should regard a large number of subjects, even those with a substantial stake in its assets, as non-consenting.

c) *Lack of Volition*

The relationship between a government and its Indigenous peoples exposes further tensions between property, membership of a political community and territorial jurisdiction. In this subsection, I argue that Indigenous dissent to political authority presents a fundamental challenge to the legitimacy of New World democracies such as Australia, New Zealand, Canada and the United States. This is because Indigenous people base their dissent on a claim of right over the same territory that is claimed as part of the colonial government’s jurisdiction. If we follow modern anthropological

¹¹⁸ See John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §121 at 367.

¹¹⁹ In 2011 PayPal founder Peter Thiel invested in a ‘seasteading’ project off the San Francisco coast. The website of the project is accessible at www.seasteading.org (accessed 20 November 2012).

and legal developments to their logical conclusion, the grounding legitimacy of the entire constitutional order is undermined. The only recourse in this case is to the *de facto* existence of overwhelming colonial majority populations, but this exposes a relationship based on power and the historical exercise of force and not consent between the colonial population and its government, on the one hand, and their Indigenous subjects, on the other.

A strong and a weak claim is possible on the basis of Aboriginal prior occupation. The strong claim is that, once eighteenth-century anthropological prejudices are rejected, Aboriginal prior occupation equates to Aboriginal prior sovereignty, and the colonial government is not legitimate even by the standards of eighteenth-century British law of settlement and conquest.¹²⁰ The weak claim is simply that the fact of prior occupation is the *de facto* basis for present-day Aboriginal dissent. As personal, actual, voluntary consent is required to legitimate political authority, the fact of (even irrational or mistaken) Aboriginal dissent based on a (perceived) claim of prior right is a problem.

The weak argument is easily made out. A review of recent Aboriginal protests, centred in ‘tent embassies’ in the capital cities, is ample proof that a number of Aboriginal people reject the legitimacy of the colonial polity on the basis of a claim of prior right. In a recent protest, the Prime Minister and Leader of the Opposition were spirited from a venue surrounded by Aboriginal protesters following an upgraded security assessment. The next day, a large group of Aboriginal protesters overwhelmed a police cordon at Parliament House in Canberra, burning the Australian flag and chanting “always was, always will be Aboriginal land.”¹²¹ Contested use of public space is a common feature of tent embassies, as a recent protest in Brisbane demonstrates. After a period of encampment, the ‘Brisbane Sovereign Embassy’ was cleared from a city council owned park to make way for a Greek cultural festival.¹²² The protesters openly challenged the council’s authority to

¹²⁰ See Samantha Hepburn, “Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*” (2005) 29 *Melbourne University Law Review* 1.

¹²¹ See Emma Griffiths, “Tent Embassy protesters march on Parliament” (ABC News Online, 27 January 2012) reported at <http://www.abc.net.au/news/2012-01-27/protesters-march-on-parliament-house/3796988> (accessed 27 August 2012).

¹²² See Brittany Vonow, “Aboriginal protest weeps city as police clear ‘Brisbane Sovereign Embassy’ from Musgrave Park” (*Courier Mail*, 16 May 2012) reported at

regulate their use of the land in question, also chanting “always was, always will be Aboriginal land.” Finally, the embassy was dispersed through the presence of over 200 police officers.

I wish to develop the stronger claim, however, because it is more controversial and also because it exposes a glaring inconsistency in Australian constitutional legal theory since rejection of the *terra nullius* doctrine and recognition of prior occupation. The sovereignty claim is expressed in the strident idiom of Tasmanian Aboriginal activist Michael Mansell:

We did not consent to the taking of our land, nor of the establishment of the nation of Australia on our country. Our consent to being subsumed within the Australian nation was neither sought nor given. Our sovereign rights as a people remain intact.¹²³

This argument does not enjoy wide support in the Australian community as a whole, and has not received any legal recognition to speak of. In *Coe v Commonwealth*,¹²⁴ for example, Mason C.J. of the High Court of Australia said that authority “is entirely at odds with the notion that sovereignty adverse to the Crown resided in the Aboriginal people of Australia.”¹²⁵ Yet this argument has a solid basis in Lockean theory. It is not contentious that the British Crown annexed the entire territory of Australia unilaterally in 1788 without Indigenous peoples’ consent being obtained.¹²⁶ This leaves the Australian government in a relation of conquest over its Aboriginal subjects:

[T]he *Inhabitants* of any Country, who are descended, and derive a Title to their Estate from those, who are subdued, and had a Government forced on them against their free consents, retain a right to the Possession of their Ancestors, though they consent not freely to the Government, whose had Conditions were by force imposed on the Possessors of that Country. For the first *Conqueror never having had a Title to the Land* of that Country, the People who are Descendants of, or claim under those, who were forced to submit to the Yoke of a

<http://www.couriermail.com.au/news/tensions-build-in-brisbanes-musgrave-park-as-police-expected-to-clear-brisbane-sovereign-embassy/story-e6freon6-1226357212245> (accessed 27 August 2012).

¹²³ Michael Mansell, “Back to Basics – Aboriginal Sovereignty” (September 1998) accessed at <http://www.kooriweb.org/gst/sovereignty/back-to-basics.html> (27 August 2012).

¹²⁴ (1993) 118 ALR 193.

¹²⁵ *Coe v Commonwealth* (1993) 118 ALR 193 at 200.

¹²⁶ Barbara J. Hocking, “Conclusion: A Change of Sovereignty – During the Age of Empire” in Barbara Ann Hocking (ed.), *Unfinished Constitutional Business? Rethinking Aboriginal Self-Determination* (Aboriginal Studies Press 2005) at 277.

Government by constraint, have always a Right to shake it off, and free themselves from the Usurpation, or Tyranny, which the Sword hath brought in upon them, till their Rulers put them under such a Frame of Government, as they willingly, and of choice consent to.¹²⁷

It is difficult, in hindsight, to understand how the Australian colonial governments denied Indigenous peoples land rights under the doctrine of *terra nullius* until the landmark case of *Mabo v Queensland*.¹²⁸ As Frank Brennan observes, a constitutional theory that posits a popular basis of sovereignty must accept the sovereignty of any pre-existing community in its territory.¹²⁹ Working within a legal and political framework influenced fundamentally by Lockean theory and recognising the sovereign rights of at least some forms of native community, *terra nullius* served nicely to deny sovereignty by denying occupation. What is even harder to understand is how, once *terra nullius* was overturned in *Mabo*, Australian parliaments and courts yet continue to deny that prior occupation amounts to prior sovereignty.¹³⁰ The present situation is described by Jeffrey Goldsworthy:

No constitutional recognition is currently given to [A]boriginal sovereignty, or to any agreements or treaties between the British government and the original [A]boriginal inhabitants. Although the High Court recently recognised native title to land as a matter of

¹²⁷ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §192 at 412.

¹²⁸ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

¹²⁹ Frank Brennan, “The Indigenous People” in Paul Finn (ed.), *Essays on Law and Government, Volume One: Principles and Values* (Law Book Co 1995) at 34. The problem with this approach, of course, is how exactly ‘community’ is defined, especially in relation to a heterogeneous population such as contemporary Australian Aborigines. Significant differences exist in the identities of different Aboriginal communities in different parts of the country, and some communities such as that in Tasmania have been the subject of bitter political controversy within the (contested) community itself. Elsewhere I have advocated a highly individualist approach to group definition, in the context of ‘group consent’ to genomic research, that is not entirely consistent with the position I advocate here. See Jason Grant Allen, “Group Consent and the Nature of Group Belonging: Genomics, Race and Indigenous Rights” (2010) 20(2) *Journal of Law, Information and Science* 28.

¹³⁰ Ultimately, Samantha Hepburn concludes that the doctrine of *terra nullius* was a “convenient heuristic” rather than an “accepted constituent of Australian settlement history.” “The rejection by the High Court was little more than posturing; it did not alter the indelible fact that there is no legal rationale for the acquisition of Australian territory” in the English legal framework. See Samantha Hepburn, “Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*” (2005) 29 *Melbourne University Law Review* 1 at 15; see also Gerry Simpson, “*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence” (1993) 19 *Melbourne University Law Review* 195 at 197.

common law, it expressly declined to disturb the basic legal premise that the British Crown acquired full sovereignty over the land and its inhabitants.¹³¹

As Evan Fox-Decent writes of the Canadian experience, while courts have developed “elaborate tests to determine the existence and nature of Aboriginal rights, Crown sovereignty is taken as an immutable fact against which Canadian law relating to Aboriginal peoples must fashion itself.”¹³²

The original tent embassy established in Canberra in 1972 made a list of demands of the Australian government, including greater self-determination, land rights (including an Aboriginal-controlled federal state in the Northern Territory), recognition of Aboriginal customary law, access to and control of resources, and so forth. If fulfilled, many of these claims would have brought its self-appointed ‘ambassadors’ securely within the fold of the existing constitutional order. Indeed, many claims for Aboriginal justice are not for the mass deportation of colonial populations or, necessarily, destruction of the current constitutional order. This sort of agency *within* the existing political system and legal order is a form of dissent repudiating the legitimacy of that order until such time as these demands are met: in Locke’s words, “till their Rulers put them under such a Frame of Government, as they willingly, and of choice consent to.”¹³³ Although Aboriginal land rights have been recognised under the common law since the *Mabo* decision, Aboriginal dissent remains widespread and, more fundamentally, the rat gnawing at the roots of Australian political legitimacy has been dutifully ignored. Generally, official responses have relied on the constitutional and democratic nature of the Australian political system as an adequate remedy for Indigenous dissent, but of course this is only possible through elaboration of tacit, hypothetical, and majority consent fictions to explain how Aborigines have been brought into the Australian constitutional fold consensually at some point in time since Federation.¹³⁴ Ultimately, then, one or both

¹³¹ Jeffrey Goldsworthy, “Australia: Devotion to Legalism” in Jeffrey Goldsworthy (ed.), *Interpreting Constitutions* (Oxford University Press 2006) at 107.

¹³² Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press 2011) at 63.

¹³³ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §192 at 412.

¹³⁴ Generally, see Frank Brennan, “The Indigenous People” in Paul Finn (ed.), *Essays on Law and Government, Volume One: Principles and Values* (Law Book Co 1995) at 35-7 on the ‘Mason

of the claims must stand and it falls to consent theory to answer the challenge. This being the case, we should regard at least a significant minority of Indigenous people as non-consensual subjects of overwhelming governmental power.

d) *Lack of Meaningful Choice*

Subjection to some government somewhere is an offer none of us can refuse, for the simple reason that there exists no vacant America, as there did for Locke: there is nowhere left for *voortrekker*¹³⁵ (not least because we are now unwilling to ignore Aboriginal property rights).¹³⁶ This notwithstanding, the decision to remove myself from the country of my birth and seek residence in another place, inhabited by a different political community and under its system of government, superficially appears as a valid act of consent to that government (of tacit consent, at least). Indeed, the immigration and naturalisation process may involve express declarations of such intent. As Simmons observes, naturalised citizens who have taken an explicit oath of allegiance to their new country are “perhaps the clearest candidates for the status of express consenter in today’s societies.”¹³⁷

On the other hand, as Simmons continues, “even those oaths will seem to be fully voluntary acts of consent only where immigrants were free to seek refuge in other host countries, or to remain in their country of birth.”¹³⁸ In at least a number of cases, these are not safe assumptions to make. There are important differences between refugees and asylum seekers, on the one hand, and skilled, family and business migrants, on the other. A business migrant who meets the Australian capital requirements and is free of infectious diseases probably has the choice to stay in his or her country of origin, or at least to choose between a number of advanced economies with different social and political systems. While the experience of some asylum

doctrine’ of popular sovereignty, particularly his discussion of *Theophanus v Herald and Weekly Times Ltd* (1994) 68 ALJR 713 at 744-5.

¹³⁵ Afrikaaner pioneers who left the British jurisdiction of the Cape Colony to the South African interior in the 1830s and 1840s. See Eric Partridge, *Words at War, Words at Peace: Essays on Language in General and Particular Words* (Ayer Publishing, 1948) at 118.

¹³⁶ See James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press 1993) Chapter 5.

¹³⁷ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 219.

¹³⁸ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 219.

seekers is consistent with a meaningful level of voluntarism, the majority of refugees and asylum seekers simply do not have the sort of meaningful choice that allows us to take even an express consent at face value. The difference is perhaps illustrated by the comparison of a West German communist emigrating to the German Democratic Republic, and an East German intellectual defecting to the Federal Republic of Germany.

Though still a numerical minority, ‘migrants of necessity’ are an extremely important category for the consent theory of political legitimacy. A person’s autonomy is no less worthy of protection by virtue of his or her place of birth, or even method of entry into a country’s territory. Refugees can no more come under the power of a government, despite coming into its territory, than any other free person. As Locke asks, early in the *Second Treatise*:

[B]y what right any prince or state can put to death, or punish an alien, for any crime he commits in their country[?] It is certain their laws, by virtue of any sanction they receive from the promulgated will of the legislative, reach not a stranger: they speak not to him, nor, if they did, is he bound to hearken to them. The legislative authority, by which they are in force over the subjects of that commonwealth, hath no power over him. Those who have the supreme power of making laws in England, France or Holland, are to an Indian, but like the rest of the world, men without authority: and therefore, if by the law of nature every man hath not a power to punish offences against it, as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country; since, in reference to him, they can have no more power than what every man naturally may have over another.¹³⁹

The only way to assert authority over aliens is to construe their entry as an act of tacit consent. Because the conditions that prompt a refugee or asylum seeker to leave his or her home territory are not imposed by the host, standard consent theory would seem to suggest that seeking asylum can be considered an act of tacit consent so long as the conditions of entry – for example mandatory detention on arrival – are known by custom or promulgation. Because liberals tend only to take agent-related constraints into account as voluntariness-reducing factors (the agent, in this case, being the government of the host country), the conditions refugees are fleeing are irrelevant to the question of consent, however so terrible.

¹³⁹ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §9 at 290.

My answer to this again refers to the importance of meaningful choice between reasonable alternatives. The qualifiers ‘meaningful’ and ‘reasonable’ betray the fact that normative assumptions are at play here, as in all of consent theory. It is a moral judgment what counts as a morally meaningful choice and what counts as a reasonable alternative. A choice is meaningful where the alternative is reasonable, in the sense that we could reasonably demand that another person make it without offending any of fundamental interests. In discounting an act of consent where this qualifier is not satisfied, constraints are imposed on the bargaining freedom of the consentee in the form of natural duties. To refer to Simmons’ example again, agreeing to transfer title to my business in exchange for water while lost in the desert is not a transaction that consent theory should validate, because the alternative (dying of thirst) is not a reasonable one. This implies a natural duty not to ‘exploit’ the unfavourable circumstances of another, at least beyond a certain point, in pursuit of self-interest. I could not demand that you accept death by thirst as an alternative without offending a basic duty to aid you (at least where the cost of that aid is no more than a glass of water. Things would be different if I had only one glass of water for myself). This natural duty is triggered where the consenter is so constrained *by whatever factors* that the only reasonable avenue is acquiescence. I might have a natural duty to aid you even where your own wilfulness or folly has put you in dire straits. Illusory ‘choice’ should not be counted as consent because it does not involve a meaningful exercise of choice, except in the most nominal sense.

Many refugees and asylum seekers simply lack the sort of meaningful choice that would satisfy the demands of genuine, autonomy-protecting consent. Hannah Arendt writes with poignant irony of her experience as a refugee in Europe and then the United States:

We did our best to prove to other people that we were just ordinary immigrants. We declared that we had departed of our own free will to countries of our choice, and we denied that our situation had anything to do with ‘so-called Jewish problems’. Yes, we were ‘immigrants’ or ‘newcomers’ who had left our country because, one fine day, it no longer suited us to stay.¹⁴⁰

The implication is clear that Arendt and her contemporaries in fact had no meaningful choice after the rise of the National Socialist regime and the passing of the

¹⁴⁰ Hannah Arendt, “We Refugees” in Marc Robinson (ed.), *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) at 111.

Nuremberg Laws. The choice to stay in Germany after its government stripped Jews and other minorities of so many economic, social and political rights was not one that we could reasonably demand they make. Ecological refugees, who simply happen to cross a border following a food or water source or fleeing a natural disaster, illustrate this type of choice-constraint even better. We cannot reasonably demand that a person stay in an area affected by floodwater, for example, even if the alternative takes them across a political border. Though contemporary debates in Australia, North America and Europe obscure the fact, it bears remembering that the majority of the world's refugees do not seek or achieve asylum in some far-flung, wealthy, liberal democracy. Those that do tend to be younger, wealthier, better educated, and male;¹⁴¹ those with the highest degree of mobility and agency within the refugee population, in fact. The majority of the world's refugees live in extremely marginal conditions in a contiguous or closely neighbouring country, which may fare little better than their own. According to a recent United Nations High Commissioner for Refugees, 80% of the world's refugees are hosted in developing countries. Pakistan, for example, is the country with the highest gross number of refugees in the world. It has 710 refugees per dollar of per capita GDP – also the highest in the world.¹⁴²

Despite these problems with imputing genuine, voluntary consent to refugees and asylum seekers, governments assert very real power over entrants, and especially those that have not entered into the sovereign territory in accordance with its government's positive laws. Irregular entrants – 'illegal aliens', '*sans papiers*' and 'unlawful non-citizens' – are often treated as tantamount to criminals. According to Saskia Sassen, policies "criminalise what may not intrinsically be a criminal act in the name of controlling a somewhat untenable situation."¹⁴³ The fact that irregular entrants lack the proper documents for entry is easily represented as an act of choice, so that they can be argued to have consented to the procedures and sanctions that the

¹⁴¹ See Klaus Brinkbäumer, *Der Traum vom Leben: Eine afrikanische Odysee* (Fischer 2006) at 171.

¹⁴² See United Nations High Commissioner for Refugees, "World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries" (20 June 2011) reported at <http://www.unhcr.org/4dfb66ef9.html> (accessed 27 August 2012); for the full report see United Nations High Commissioner for Refugees, *Global Trends 2011* (United Nations, Geneva 2011) available for download at <http://www.unhcr.org/4fd6f87f9.html> (accessed 27 August 2012).

¹⁴³ Saskia Sassen, "Is This the Way to Go? Handling Immigration in a Global Era" (2003) 4 *Stanford Agora: An Online Journal of Legal Perspectives*.

host government imposes on them. The argument runs: ‘if asylum seekers don’t like the way they are processed or treated in our country, they should not have come here’.

This treatment often includes detention, sometimes for prolonged periods and, in the context of national security concerns, may be almost indeterminate.¹⁴⁴ Characterising this as consensual, despite their desperate circumstances, legitimates governmental conduct that should need justification on objective grounds. Irregular entrants are most usually dealt with through the military, police, other executive departments and non-governmental charitable organisations.¹⁴⁵ (A long-standing controversy in Australia has been whether irregular entrants should be processed within the sovereign territory or ‘offshore’, with a recent return to offshore processing).¹⁴⁶ Within this offshore enclave of executive authority, rolling changes to the *Migration Act 1958* (Cth) are often designed to avoid so much judicial review as possible. The recent repeal of s. 198 of that Act, for example, is seen by some human rights experts as an attempt to remove the protections of natural justice and to limit judicial review.¹⁴⁷ Immigration litigation, that “unwanted stepchild of constitutional jurisprudence”,¹⁴⁸ thus becomes ever more technical and removed from the core issues that irregular immigration actually presents liberal democratic practice. Wolfgang

¹⁴⁴ A current case before the Australian High Court concerns a man who has been found to be a refugee, but denied a visa due to an adverse security assessment. He, along with about 50 others, are now essentially in indefinite detention because no other country has agreed to take them and he cannot challenge the Australian Security Intelligence Service assessment. See Elisabeth Byrne, “ASIO, Govt face High Court indefinite detention case” (ABC News Online, 18 June 2012) reported at <http://www.abc.net.au/news/2012-06-18/high-court-to-hear-detention-challenge/4075988> (accessed 30 August 2012).

¹⁴⁵ See Wolfgang Heuer, “Europe and Its Refugees: Arendt on the Politicisation of Minorities” (2007) 75(4) *Social Research* 1159 at 1163, 1169.

¹⁴⁶ See Chris Merritt and Lauren Wilson, “New offshore processing regime bars appeal on asylum” (*The Australian*, 18 August 2012) reported at <http://www.theaustralian.com.au/national-affairs/new-offshore-processing-regime-bars-appeal-on-asylum/story-fn59niix-1226452971340> (30 August 2012).

¹⁴⁷ See the comments of Phil Lynch of the Human Rights Law Centre and Australian Human Rights Commissioner Gillian Triggs reported by See Chris Merritt and Lauren Wilson, “New offshore processing regime bars appeal on asylum” (*The Australian*, 18 August 2012) reported at <http://www.theaustralian.com.au/national-affairs/new-offshore-processing-regime-bars-appeal-on-asylum/story-fn59niix-1226452971340> (30 August 2012).

¹⁴⁸ The metaphor is taken from Linda Kelly, “Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Alien Rights” (1996) 41 *Villanova Law Review* 725 at 715.

Heuer calls this a ‘spread of lawlessness’ that is inherently dangerous to the rule of law.¹⁴⁹

The crucial role of international law norms illustrates the inadequacy of consent theory to normalise governmental relations with outsiders. William Booth observes:

While what John Dunn has called the ‘preponderance of force’, illegitimate and legitimate, may explain the early modern preoccupation with justice as between the state and its citizens, issues of justice generally are still today analysed primarily within the circumscribed framework of the polity... [M]embership and its distribution are scarcely raised as questions, a curious and powerful omission made all the more striking by the fact that it is embedded in a theory committed to an ‘impartial consideration of justice.’¹⁵⁰

Consent theory is concerned with legitimacy, rights and obligations *within* a community of consenters,¹⁵¹ and subsuming questions of justice and legitimacy between government and refugees within the consent framework is inutile. As a result, constitutional law disputes have had to do much of the work that political philosophy has declined to perform in relation to non-citizen subjects and questions of membership.¹⁵² None of this is to say that we owe any person absolute rights of refuge or asylum, or that we owe them absolute rights to any resources once they arrive. Especially in countries where resources for citizens are scarce, duties towards non-citizen subjects will have to be balanced with duties towards citizens first, and it may be that higher duties are owed to ‘insiders’ despite the outsiders’ common humanity: the rights of the citizen are greater than the bare rights of man, as it were. But it does say that consent theory fails to provide an adequate framework for answering such difficult questions, and it does say that governmental authority over such persons is not governed by consent.

¹⁴⁹ Wolfgang Heuer, “Europe and Its Refugees: Arendt on the Politicisation of Minorities” (2007) 74(4) *Social Research* 1159 at 1163, citations omitted.

¹⁵⁰ William James Booth, “Insiders, Outsiders and the Ethics of Membership” (1997) 59(2) *The Review of Politics* 259 at 267.

¹⁵¹ On this point see Giorgio Agamben, “We Refugees” (1994) 49(2) *Symposium* 114; see also Frances Daly, “The non-citizen and the concept of ‘human rights’” (2004) 3(1) *Borderlands E-Journal* http://www.borderlands.net.au/vol3no1_2004/daly_noncitizen.htm (accessed 12 February 2011).

¹⁵² William James Booth, “Insiders, Outsiders and the Ethics of Membership” (1997) 59(2) *The Review of Politics* 259 at 272.

2. The Problem of Partial Legitimacy

In the Section above, I have tried to make empirical arguments within the Lockean consent framework to prove that all existing societies are, at best, only partially legitimate. If consent is taken as the only possible basis of political legitimacy, and there are a number of non-consenting subjects within a government's jurisdiction, that government cannot exercise legitimate power over them and they are not obligated to obey its laws. The problem of partial legitimacy thus forces us to choose between rejecting the consent framework, or adopting one of two positions within it.¹⁵³ Edward Harris writes:

The problem of political obligation confronts the liberal theorist with three alternative courses of action. First, she may assert the conceptual and practical significance of the concept of political obligation for liberal political theory and the liberal democratic state. To support this assertion, she must then provide an adequate account of political obligation that coherently reconciles this concept with the other foundational concepts and assumptions of liberalism. If she is unable to formulate an adequate account of political obligation, the liberal theorist has two remaining alternatives. She may assert the significance of political obligation and give up the liberal theoretical framework in favour of some alternative theory that does explain the concept. Or she may deny the significance of political obligation and argue for the coherence of a revised liberalism that reconciles the remaining concepts with the claim of philosophical anarchism.¹⁵⁴

The second option involves rejecting the consent framework and adopting an alternative one, for example a utilitarian theory of legitimacy and obligation such as the one that David Hume advocates as an alternative to Lockean consent theory. The remaining options involve adopting a version of consent theory that is, in the case of the first option, uncomfortably conservative or, in the case of the third option, uncomfortably anarchic. Mark Kann states the problem in the following terms:

A government cannot be fully legitimate if all its citizens cannot consent. While it can be partially legitimate if some of its citizens consent, both anarchy and tyranny remain an omnipresent threat... Government has the right to make claims on full consenters but it has virtually no right to demand obedience from non-consenters. However, if it makes no claims

¹⁵³ See John Plemenatz, *Consent, Freedom and Political Obligation* (Oxford University Press 1927) at 3.

¹⁵⁴ Edward A. Harris, "From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law" (1992) 92(3) *Columbia Law Review* 651 at 653-4.

on non-consenters, it tolerates a potentially dangerous anarchy within society. It if does make claims, it can do so only without [a voluntarist] justification, that is tyrannically.¹⁵⁵

True to the premise of radical individual autonomy from which consent theory proceeds, the choice would seem a clear one for whatever degree of anarchy genuine consent happens to require. Some consent theorists have taken this approach, which is at least internally consistent. We must reject all non-consensual political power as illegitimate and accept that non-consenting subjects have no political obligation to obey the laws. But to the extent that we aspire towards universal membership and equal legal and political rights within liberal societies, we cannot have a community of outsiders within society. This is in tension with other values inherent in the modern notion of the liberal nation state. Indeed, liberals tend to share a number of conservative assumptions that prevent them from embracing out-and-out political anarchism, even if their premises appear to demand it. They assume that certain forms of social organisation inherent in modern, liberal, social democracies are desirable even though these conflict with the essential premise of radical individual autonomy.

In the subsections that follow, I examine two attempts to retain the consent theory framework and reconcile it with the premise of autonomy. The first is Harry Beran's 'reform consent theory' presented in *The Consent Theory of Political Obligation*. Beran accepts the fact of partial legitimacy but attempts to avoid it by adopting a residency interpretation to tacit consent. Beran does not attempt an unqualified defence of the liberal democratic *status quo* by any means, but rather proposes a number of reforms that he believes would make existing societies more consensual (and therefore legitimate). Ultimately, however, his position compromises the voluntaristic premises on which consent theory is based and I believe has to be rejected. Further, he proposes reforms to render meaningful consent by a greater number of people more likely that would, in effect, make liberal democratic societies poorer places to live.

The second is Simmons' 'philosophical anarchist' consent theory presented in *On the Edge of Anarchy: Locke, Consent and the Limits of Society*. Simmons rejects attempts, including Beran's, to reconcile the premises of consent theory with the reality of political organisation, and so adopts a position akin to Robert Paul Wolff's

¹⁵⁵ Mark E. Kann, "The Dialectic of Consent" (40(2) *The Journal of Politics* 386 at 402.

‘philosophical anarchism’.¹⁵⁶ As voluntary consent is the only legitimate source of political obligation, and no government exists by consent, there is no general basis for obedience to the laws and individuals must search for alternative bases as appropriate. Many of us live in a state of nature *vis-à-vis* both our government and each other, our relations governed not by consent-based positive laws but by natural rights and duties. Positive laws should be assessed by the subject in each instance for independent reasons for obedience under natural law principles. Ultimately I believe that Simmons’ position ought to be rejected not because it compromises the principle of autonomy, but because it leaves it us at substantially the same position we would have been in without a consent theory of political legitimacy at all: in a state of nature *vis-à-vis* each other and the government, using a natural law theory of rights and duties to determine the important questions of justice, legitimacy and obligation, with an idealised standard of justice to guide us. If there are better alternatives to the sort of society that Simmons proposes which do not respect the premise of radical individual autonomy, it is worthwhile to question the premise itself.

Finally, I introduce the task for Chapter 3, which is to present a framework for judging political legitimacy in the absence of consent. I argue that ultimately non-voluntaristic values *can* confer political legitimacy, and further that autonomy can be adequately protected without insisting on the sort of radical liberty that I have found inconsistent with desirable forms of social organisation.

a) Reform Consent Theory

Beran is a rigorous consent theorist. He argues that consent is the only basis of legitimate political authority, that is the only basis of political authority consistent with individual autonomy. He insists on actual, as opposed to hypothetical, consent, and prefers express consent to tacit consent. However, in the end he makes two concessions to exigency that I argue, following Simmons,¹⁵⁷ compromise the premise of autonomy. These include a ‘membership’ theory of tacit consent that comes too close to a residency theory like Locke’s, and an apparent disregard for the problem of

¹⁵⁶ See Robert Paul Wolff, *In Defence of Anarchism* (Harper & Row 1970).

¹⁵⁷ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 202.

partial legitimacy, provided a government has the consent of a substantial majority of its subjects.

In trying to reconcile the desirability of ‘the state’ with the premise of radical individual autonomy, Beran is painted into a difficult corner which he escapes by compromising his premise. Beran proposes a ‘membership theory’ of consent whereby subjects consent when they reach an age of political majority and decide to become part of the political community in which they live, or to leave and join a new one. Beran views society as a rule-based association, and so we assume an obligation to obey the laws when we opt for full membership: membership of an association involves submission to its standing rules. While this theory is significantly ‘tighter’ than Locke’s theory of tacit consent (where simply entering the territory is enough), in my view Beran’s theory does not achieve the reconciliation it attempts because it involves an account of consent by residence that is considerably laxer than I have argued is necessary. In particular, it violates the requirement for meaningful choice, as Hume so emphatically argued in “Of the Original Contract”.¹⁵⁸ We could not reasonably demand that an individual born into a territory should leave, as he or she may have nowhere else to go nor any means to get there. This is, indeed, the plight of most of the world’s population. Nor could we reasonably demand that such a person accept some form of denizenship within the jurisdiction as an alternative to full membership. It is generally accepted that everybody has a right to citizenship and that children, in the English tradition at least, are entitled to citizenship by virtue of their birth in the territory. By positing that continued residence past a certain age amounts to acceptance of ‘full membership’ in a political community, including subjection to its rules and government, I believe that Beran’s theory imputes consent in much the same manner as Locke’s.

Beran further claims that “consent-based political authority and obligation is possible without utopian changes to existing liberal democracies”.¹⁵⁹ This claim is substantiated, he argues, “provided a very large majority of persons living in a state can be under such self-assumed obligation and authority.”¹⁶⁰ He concludes that a

¹⁵⁸ See David Hume, “Of the Original Contract” in David Hume (Alisdair MacIntyre ed.), *Hume’s Ethical Writings: Selections From David Hume* (University of Notre Dame Press 1979).

¹⁵⁹ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 153.

¹⁶⁰ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 153.

“nearly-just” state can still be an “authoritative” one, provided it has legitimate authority over “at least the majority of its citizens.”¹⁶¹ This is problematic because it downplays the problem of partial legitimacy by reference to the principle of majority consent, or perhaps just expediency. An individual dissenter might not agree that his or her government is ‘nearly-just’ at all, just because the majority consents to it. Legitimation for consent theorists is, as Fox-Decent asserts, a *relational* concept.¹⁶² It is the autonomy of human individuals, not human communities, which consent seeks to protect. It is only my own, personal consent that matters because the legitimacy or otherwise of the government is relational to me, the individual subject. If this approach is abandoned, then it speaks against the consent principle generally (and for an alternative) as an approach to the question of political legitimacy.

b) Philosophical Anarchism

Simmons begins from the premise of radical individual autonomy and voluntary self-obligation as the only source of legitimate political authority, as Beran. Simmons concludes, somewhat more strongly than Beran, that legitimate governments do not exist on empirical grounds. Like Beran, Simmons claims that consent theory can identify the changes in political arrangements that would make a society more genuinely voluntary.¹⁶³

Provided only that the society founded by its original members was able to acquire (via the consent of those members or others) appropriate rights of control over the land the society claimed as its territory, that society could legitimately exclude would-be immigrants, admit them only on condition of their consent to existing arrangements, or charitably accept them as members, of a different sort (not bound by the terms of the original charter). The same is true of the offspring of original members. Complications will abound, of course, if the opportunities of those excluded from the consensual society are in various ways severely limited by the conditions outside that society. But such complications are certainly not (for practical purposes) a *necessary* feature of the world.¹⁶⁴

¹⁶¹ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 153.

¹⁶² Evan Fox-Decent, “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen’s Law Journal* 259 at 272.

¹⁶³ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 268.

¹⁶⁴ A. John Simmons, “Consent Theory for Libertarians” (2005) 22 *Social Philosophy & Policy* 330 at 344.

In case we still need convincing, Simmons continues:

Like-minded persons could simply withdraw from their states and found such a society on unanimous, express consent, using as territory an island purchased from some sovereign power, or an independent reservation set aside for the purpose by a sovereign power persuaded of its utility, or (in the near future, perhaps), part of an extraterrestrial body taken by 'right of first occupancy'.¹⁶⁵

For the same reasons as I reject Beran's reform consent theory, I think that this aspect of Simmons' consent theory is of limited utility. Simmons seems to accept as much in an essay when he concedes that it would be a "fair complaint" against consent theory to show that it was "practically impossible" ever to satisfy the demands of consent-based legitimacy.¹⁶⁶ To this extent, he seems to reject the approach advocated by Nozick, wherein the territory of a 'dominant mutual protection agency' might be perforated "like Swiss cheese" by the properties of independents.¹⁶⁷ In practical terms, however, some lesser form of anarchy is the only moral option for Simmons. Despite his optimistic examples, Simmons does not place so much importance on his reform package, for while Beran opines that certain reforms would make societies 'substantially voluntary', Simmons concludes that "[s]erious political voluntarism commits us to the acceptance of philosophical anarchism."¹⁶⁸

This position asserts that we have no general, indefeasible obligation to obey the law because such an obligation can only arise from valid consent, which is not forthcoming. However, this does not mean that we have no obligation to obey particular laws at all.¹⁶⁹ There are other, non-consent-based grounds for obedience including natural duties to our fellow subjects. While philosophical anarchism generates a healthy scepticism towards the demands the law makes of us, it will not justify total disregard for laws that are just (by reference to natural law) and/or pragmatically useful. To the extent that a government promulgates and enforces laws

¹⁶⁵ A. John Simmons, "Consent Theory for Libertarians" (2005) 22 *Social Philosophy & Policy* 330 at 344, footnote 34.

¹⁶⁶ A. John Simmons, "Consent Theory for Libertarians" (2005) 22 *Social Philosophy & Policy* 330 at 344.

¹⁶⁷ See Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974) at 54.

¹⁶⁸ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 260.

¹⁶⁹ See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 267.

that are just and do promote the welfare of its subjects, we still have an obligation to obey. But even so, we cannot say that a non-consensual government is 'legitimate'.

[T]he mere fact that all existing governments or societies are illegitimate [in no way leads to the conclusion] that they are all morally equal. Governments may do more or less good, for their 'subjects' and for others, and they may do more or less harm... In short, governments may still, within the Lockean anarchist model, be properly said to exemplify to varying degrees all the virtues and vices that we normally associate with governments... We may even say that good governments are those that most deserve our free consent, those that it would be most reasonable for people to *make* legitimate (in existing or modified form) by the free contract (consent) and trust that establish the political relationship. The one thing we must *not* say, according to Lockean anarchism, is that good governments are, by virtue of those qualities that make them good, therefore legitimate.¹⁷⁰

Let's assume that I kidnap you, but then use my power over you exclusively and rationally in your interests so that your position at the end of it is actually better than it would have been had you enjoyed your autonomy undisturbed by me. I respect all of your fundamental interests, even doing all in my power to promote them. You end up wealthier, happier and better educated than you would otherwise have been. This is not unlike the situation of the modern subject of a liberal social democracy in terms of Simmons' theory. A government exercises illegitimate dominion over you, but does so in a manner consistent with natural law and always in your interests. According to Simmons, the fact that you are coerced *in your interest* can never legitimate governmental power. The fact that an invasion of autonomy is in the person's interests does not justify the invasion. However good my rule might be, it will never be legitimate.

So autonomy is the sole basis of legitimacy. Is a 'good' government for Simmons, then, one that respects our natural rights, or one that looks after our interests? It actually seems that the latter is the case, invading our autonomy (albeit in our interests, for e.g. through mandatory health insurance) hardly does the former. It would seem that our interest, rather than our natural rights or our autonomy, is the focus of the inquiry into 'good' government. Good government can be illegitimate, and legitimate government can be bad: this separates questions of the good and the legitimate in a manner that, at the least, requires us to determine a hierarchy between

¹⁷⁰ A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press 1993) at 261.

them. If this is really the choice to make, then I would every time choose to live under a good government. It would seem preferable to adopt a theory of government in which good government is, in virtue of that fact, legitimate. As Jeremy Bentham so forcefully argued, the question of the expedient can never really be separated from that of the right.¹⁷¹ Harold Laski opines, in turn, that the things men desire correspond, to some degree, to the things they need: “Natural rights are nothing more than the armour evolved to protect [men’s] vital interests.”¹⁷²

This would require abandonment of the premise of radical individual autonomy as the basic criterion of legitimacy. But is the premise, even in Simmons’ theory, worth that much anyway? That is, how radically autonomous is an individual subject to natural law? Although we are promised the jewel of radical individual autonomy, we are left holding the theorist’s account of natural rights and duties that operate on us whether we accept them or not. Because many of us do not actually consent, we live in a state of nature *vis-à-vis* our government. It is our natural rights and natural duties that will then, by default, determine the justice of that relationship. As consent theory is rhetorically very compelling, it bolsters the natural law theory onto which Simmons falls back by default. Likewise, even those of us who have consented to a government are under an obligation to disobey its laws if they are morally wicked and breach the precepts of natural law. Natural law is necessary to make meaningful consent possible, but also to normalise the relationship between subjects and government, whether consensual or non-consensual. If it is natural law that does the real work of political philosophy, and consent theory serves primarily to justify a sceptical approach to positive laws, then consent theory actually distracts us from the task at hand. That task is to articulate and justify a theory of rights and duties that is universally incumbent.

Simmons’ is for the most part a coherent and rigorous theory because it does not violate its fundamental premise, being radical individual autonomy. But it is of limited utility to guide modern liberal democratic practice, especially in communities that accept the government’s role in promoting social welfare, because it is so

¹⁷¹ See for example Jeremy Bentham, “An Introduction to the Principles of Morals and Legislation” in John Stuart Mill (Mary Warnock ed.), *Liberty and Utilitarianism: Including Mill’s ‘Essay on Bentham’ and Selections from the Writings of Jeremy Bentham and John Austin* (Blackwell 2003) at 20.

¹⁷² Harold J. Laski, *Political Thought in England from Locke to Bentham* (Harold Holt 1920) at 99.

mismatched with the sort of social organisation that we regard as necessary and desirable. As with Beran's reform consent theory, a theory of political legitimacy organised not around the principle of consent but around the principle of welfare might be preferable, especially when it includes a strong concept of normative rights. When these better alternatives are precluded by the premise of radical individual autonomy, it may be better to abandon the premise.

c) Reform

Can reform arguments save the premise of radical autonomy? If present modes of social organisation are inconsistent with autonomy, perhaps consent theory can be used to guide reforms that will render it so? Beran's consent theory is what he calls a 'reform' consent theory. It does not seek to justify the *status quo* of liberal democracy. Although it does assume that a high level of social organisation and institutionalised government is desirable, it serves primarily to show us what sorts of reform would make our political order more legitimate. Simmons, for his part, is content to live in an illegitimate society, so long as it is relatively 'good', and to pick and choose the laws he obeys. The implication from his theory, however, would also seem that societies could and should render themselves more legitimate by reforming their laws, institutions and practices so as to be more consensual.

But is the ideal of consent even a very good blueprint for reform? I believe that it is not, and that implementing some of Beran's suggested reforms, for example in relation to consent-by-membership, society could in fact become worse rather than better, at least when the subject's interests are taken as a measure. From the competing viewpoint of non-voluntarist, welfare-based theories of legitimacy, this could actually create a *less* legitimate society. As welfare and justice are the ways in which political legitimacy really matter to the average subject of governmental power, this cannot be ignored. Indeed, in a world in which billions of people barely subsist from day to day, no responsible theory of government can neglect welfare as its primary focus. If the main value of consent is to guide political reform, this problem alone should call the adequacy of the consent framework into question.

Beran opines that broad societal consent would be a more realistic project if "secession became more permissible, dissenters' territories were established, all

citizens educated to understand that authoritative political ties must be voluntary, and a convention established to the effect that continued resident in a state, when one ceases to be a political minor, counts as tacit political consent.”¹⁷³ The problem with this is illustrated by a principle elaborated in a 1956 economics paper by R.G. Lipsey and Kelvin Lancaster.¹⁷⁴ If one of the ‘optimality conditions’ for an ideal is impossible, fulfilment of the remaining possible conditions might not yield the ‘second best’ solution, but rather something much poorer. In this case, the first ‘optimality condition’ is universal consent, and the remaining optimality conditions are Beran’s reforms to achieve it. If the ideal of universal consent is not, ultimately, realistic, then fulfilling the remaining conditions (i.e. of dissenters territories and citizen education programmes) might result in something worse than a non-consensual society that has developed a defensible framework for dealing justly with non-consenters and promoting welfare generally.

Problems that arise from this observation abound. While we cannot know what such territories would look like, I suspect they might look more like a Rio *favela* or any existing refugee camp than a millionaire libertarians’ seaborne utopia.¹⁷⁵ This is especially so if dissenters’ territories are obliged, in like manner, to provide space and resources for *their* dissenters, and so on. Likewise, citizen education programmes could easily devolve (in an admittedly non-consensual society) to something Mao-esque, while the convention of accepting ‘full membership’ upon reaching majority would deprive individuals of the basic right of residence in the place of their birth. The right to some citizenship is increasingly recognised, and to this extent may be inconsistent with consent theory. It is even arguable that some people must be coerced to accept this right, for example Indigenous dissenters within a polity that offers universal free healthcare to citizens only. Most of us, at 18, lack the resources to do anything but accept full membership of the society of our birth, whatever it looks like. There would be further, serious problems with the children of those born in dissenters’ territories and their eventual ‘repatriation’.

¹⁷³ Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987) at 153.

¹⁷⁴ R.G. Lipsey and Kelvin Lancaster, “The General Theory of Second Best” (1956) 24(1) *The Review of Economic Studies* 11.

¹⁷⁵ See www.seasteading.org (accessed 21 November 2012).

This line of reasoning is explained well in Amartya Sen's *The Idea of Justice*. Sen levels general criticism at theories of justice that focus on ideal institutional designs to the neglect of realistic comparisons of relative justice. This focus, which he labels 'transcendental institutionalism', asks what 'perfectly just' societies would look like, and not how an extant one might be made 'comparatively more just'. It characterises the entire social contract tradition, and much other Enlightenment thought. Not only is transcendental institutionalism ultimately unfeasible,¹⁷⁶ he argues, but also redundant: "[i]f a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements [that are infeasible in practice] is neither necessary nor sufficient."¹⁷⁷ He continues:

Would not a theory that identifies a transcendental alternative also, through the same process, tell us what we want to know about comparative justice? The answer is no – it does not. We may, of course, be tempted by the idea that we can rank alternatives in terms of their respective closeness to the perfect choice, so that a transcendental identification may indirectly yield also a ranking of alternatives. But that approach does not get us very far, partly because there are different dimensions in which objects differ... and also because descriptive closeness is not necessarily a guide to valuational proximity... In general the identification of a transcendental alternative does not offer a solution to the problem of comparisons between any two non-transcendental alternatives.¹⁷⁸

Of course, Beran is right to assert that provided the number of dissenters is relatively small, society otherwise relatively just, and the government is otherwise relatively good, living in a 'nearly-just' society with 'substantial authority' is probably quite acceptable. This is not really an honest conclusion from his premise of radical individual autonomy, which dictates that the *only* source of legitimacy is voluntary self-obligation. As Simmons insists, no matter how good or just a society is or how much it promotes its subjects' welfare, it is not *legitimate* in relation to any single person without his or her meaningful consent. If we wish to defend the necessity of the sort of social organisation and coercive political authority necessary to a modern liberal, social democratic order, we may need to abandon the premise of consent.

d) A Non-Voluntaristic Basis for Political Legitimacy

¹⁷⁶ Amartya Sen, *The Idea of Justice* (Belknap Press 2009) at 10.

¹⁷⁷ Amartya Sen, *The Idea of Justice* (Belknap Press 2009) at 15.

¹⁷⁸ Amartya Sen, *The Idea of Justice* (Belknap Press 2009) at 16-7.

The proposition that there is a general political obligation independent of consent is obviously controversial for consent theory liberals because they assert that only voluntarily assumed political obligations are legitimate ones. Accepting natural obligations recognises natural associations, and therefore threatens to subsume the individual into the organic entities of family, community and nation. However, social organisation is very important and is generally regarded by liberals as desirable. So concessions are made as to what is considered ‘voluntary’ for the purposes of consent to political authority, in order to make something like the kind of social organisation we observe in modern liberal democracies at least theoretically capable of legitimacy. Or, they reach the conclusion of philosophical anarchism that posits an extensive theory of natural rights and duties that regulate not only the terms of our consent, but (because these are kept strict) our non-consensual interactions with the government and with each other. I have found no satisfactory consent-based account of political obligation and legitimacy that reconciles the premise of radical individual autonomy with desirable forms of social organisation. On the contrary, I have found that most consent-based theories either serve to justify excessive impingement on autonomy, or to preclude desirable levels of social organisation.

John Rawls describes a process used to reach ‘reflective equilibrium’ between abstract premises and moral intuitions about how things actually work: the point at which “our principles and our judgments coincide.”¹⁷⁹ As Kukathas and Pettit describe it, a reflective examination of abstract postulates is necessary against considered intuitive judgments of justice before a conclusion is reached: to develop a theory justice is to identify principles that lead to intuitively sound application in concrete cases.¹⁸⁰ In the preceding Sections I have tried to show through an approximate application of Rawls’ approach that the principle of radical individual autonomy does not coincide with my considered judgments about desirable modes of social organisation. As a result, I conclude that it is necessary to find an alternative basis of political legitimacy and obligation.

¹⁷⁹ John Rawls, *A Theory of Justice* (Belknap Press 1971) at 20; see also Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge University Press 1996) Chapter 1.

¹⁸⁰ Chandran Kukathas and Phillip Pettit, *Rawls: A Theory of Justice and its Critics* (Stanford University Press 1990) at 7.

At this stage, a number of possible avenues are open: a Rawlsian approach whereby legitimacy is said to flow from the two principles expounded in *A Theory of Justice*, or perhaps a Dworkinian approach in which obligation could flow from natural, ‘associational’ duties,¹⁸¹ and legitimacy from the diligent discharge of such natural duties. In the course of this examination, however, a preoccupation with interest, welfare and utility developed, by which I have become convinced that the proper focus of political theory is on how governments can promote (and avoid prejudicing) our *interests*. It is true that in many areas of life, I myself know best what promotes my utility, and am best placed to do so with the means at my disposal provided I am left in peace to do it. It is also true that a self-directed life produces a unique and very important sense of happiness, which no amount of rational or benevolent coercion can reproduce. Sometimes it is really better to have my own problems than to be under another’s more competent tutelage. With this in mind, autonomy must play an important role in any theory of legitimacy and obligation, even one focussed upon interest and welfare. This is not an objection, as the utilitarian theory of John Stuart Mill illustrates. In the Chapter that follows, I propose a utilitarian basis for legitimacy and obligation that operates within a fiduciary framework for controlling governmental power over individuals. Conceiving governmental power as a limited, fiduciary power, held by government only for certain ends and limited to the honest and proportionate pursuit of those ends, the fiduciary theory of government constrains governmental action towards individuals in much the same way that consent theories attempt to do.

Conclusion

When a robust definition of consent is applied to actually existing societies, it becomes apparent that a significant minority of individuals subject to governmental power – indeed, those most vulnerable to it – are not consenting. Children and the mentally incompetent necessarily lack capacity. Those inheriting property within a territory might never have made any expression of their consent at all, but must acquiesce to subjection or forfeit the very natural rights to property and inheritance that Locke claims society was instituted to protect. Many Indigenous people do not want to belong to the colonial society imposed on their traditional territory, or at least

¹⁸¹ See Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) at 197.

deny its legitimacy as presently constituted. Refugees and asylum seekers might appear to be migrants of choice, but often have to 'choose' in situations where their fundamental interests are so threatened as to be effectively compelled. As all societies will contain some such people, no society is better than partially legitimate.

This problem of partial legitimacy poses a dilemma for consent theory between the integrity of its premises and other considered judgments about the imperatives of social organisation. This dilemma consists in the obviously untenable choice between anarchy and oppression. Attempts to resolve this dilemma, such as that found in Simmons' and Beran's consent theories, are ultimately unsatisfactory. Simmons offers us nothing more than the state of nature under a good but illegitimate government, and Beran succumbs to the temptation to compromise the premise of radical individual autonomy for majority consent. Both offer us a consent-based platform for reform that would likely result in something substantially worse than we have. This being the case, the process of reflective equilibrium brings us to the point where we must abandon the postulate of radical individual autonomy because it is inconsistent with our considered judgments about anarchy, social organisation and oppression. We must find an important but subsidiary role for autonomy, for example based on its value in promoting utility. It is to that task that I now turn in the final Chapter.

CHAPTER THREE

The Trust Theory of Government: the Impartial Benevolent Spectator as Fiduciary?

Introduction

In Chapter 1, I explored what sort of consent would be capable of protecting individual autonomy from impingement. In Chapter 2, I argued that genuine, autonomy-protecting consent is impossible for at least a significant number of subjects even in liberal democratic polities. The ‘transcendental’ ideal of a truly voluntary society is not a very useful framework for regulating the conduct of existing governments or designing better institutions, as the apparent second-best is often something much worse than the *status quo*; nor is ‘philosophical’ anarchism very fruitful as it separates questions of the legitimate and the good in a way that renders it impotent to answer many of the live, practical questions political philosophy is called upon to solve. Through a process of reflective consideration, I concluded that rather than rejecting the sort of political order that liberal, social democratic government requires because it violates individual autonomy, we should abandon the premise of radical individual autonomy instead. This approach, however, requires a non-voluntaristic basis for legitimate authority and obligation. The task of this final Chapter is to present a utilitarian framework for governmental legitimacy over non-consenting subjects.

I present a theory of governmental authority that uses the concept of fiduciary loyalty as the criterion of legitimacy. I contend that the fiduciary theory of governmental authority is interesting for consent theorists in two respects. First, it provides an important gloss on social contract theory by stipulating the conditions on which power is transferred by consent from the people to the government. This function is consistent with the contractarian approach, because (à la Locke) it explains the conditions on which autonomous individuals cede authority to their government. Secondly, it can be used to formulate a credible alternative to consent theory. By stipulating minimum conditions for *any* relationship of governmental power, whether consensual or not, a utilitarian fiduciary principle can provide a criterion of legitimacy

for non-consensual relationships, too. This position enables a total rejection of the premise of radical autonomy and posits a purely non-voluntaristic basis for legitimate political authority. Authority is legitimate where it is used exclusively in the interests of the governed and in a manner that is proportionate and rationally related to a defensible account of their collective good. Autonomy holds great importance in such a theory as a source and measure of utility. I believe that such an approach helps to reconcile the tension between liberal insistence on the importance of individual autonomy, on the one hand, and liberal acceptance of extensive government authority and social organisation, on the other.

I do not attempt to present a fully developed theory of fiduciary government in this Chapter,¹⁸² though in Section 4 I do apply it to the problematical cases outlined in Chapter 2. In particular, I do not attempt to develop the practical ramifications of accepting the theory for constitutional and administrative law, for example relating to judicial review or ministerial responsibility. What I do attempt is to present the theory of ‘trustee government’ as a defensible framework for addressing the problem of legitimacy. In Section 1 I sketch out some of the details of such a theory. In Section 2, I trace the history of the fiduciary theory of government, which is bound up with the history of the idea of popular sovereignty itself. The teleological conception of government – that government exists to serve certain ends – and a fiduciary standard of governmental duty has long been used as a limit on governmental power, from at least the middle ages. In this historical task I follow Paul Finn, who has written extensively on the ‘forgotten trust’ between people and government in the Anglo-American constitutional tradition.¹⁸³ I seek to trace the history of the trust theory of government even further and to place it in its Continental European and Classical context. It is my hope that such a perspective might reduce some of the scepticism the theory currently faces, opening the door to explore its theoretical underpinnings and practical ramifications later. In Section 3, I address four major objections to a public fiduciary law. Notwithstanding the strengths and history of the fiduciary theory of

¹⁸² For a recently published fiduciary theory of political legitimacy (albeit a non-utilitarian one) see Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press 2011).

¹⁸³ See for example Paul Finn, “Public Trust, Public Fiduciaries” (2010) 38 *Federal Law Review* 333; “Integrity in Government” (1992) 3 *Public Law Review* 243; “The Abuse of Public Power in Australia: Making Our Governors Our Servants” (1994) 5 *Public Law Review* 43; “Public Officers: Some Personal Liabilities” (1977) 51 *Australian Law Journal*.

government, the idea is not generally accepted either by the courts or the academy in any jurisdiction. I attempt to refute these objections and conclude that the fiduciary theory of government is worthy of increased attention both to legitimate the *status quo* of liberal democratic practice and to guide its reform into the future.

1. The Trust Theory of Government

The trust theory of government is an expression of popular sovereignty that recognises the need for professional, institutional administration. The ultimate sovereign right of the people is recognised by imposing trust-like, fiduciary duties upon those involved in the business of government, who are necessarily separate from the body politic even if they are drawn from and comprise a subset within it. These duties require them loyally to serve public rather than private interests to the best of their ability. So far, the fiduciary theory of government merely provides a gloss on the consent theory of government, because it elaborates the exact nature of the relationship that results from an act of political consent. It is wholly consistent with the idea of government as a fiduciary agent for those who consent to its power: who, in the Lockean model, transfer to it the authority to enforce their natural rights. More controversially, I believe that the criterion of fiduciary loyalty can actually supplant that of consent and so legitimate properly exercised governmental authority over non-consenters. While this appears as more a conservative than liberal claim, I think that it is necessary because liberals generally accept the exercise of governmental power over many non-consenting individuals in a way that I have argued is irreconcilable with the premises of consent theory.

a) The Fiduciary Norm

The fiduciary norm demands of a person conduct loyal to the interests of another in preference to his or her own. Often, fiduciary relationships are defined tautologically as relationships in which fiduciary duties inhere. Typical of the English legal tradition, the literature typically approaches the norm inductively, through examination of cases in which the courts have applied it, rather than from any broad principle. Courts of equity originally imposed what a broad discretionary remedy to ‘breaches of confidence’ such as those between a trustee and his or her beneficiary.¹⁸⁴

¹⁸⁴ Leonard Sealy, “Fiduciary Relationships” [1962] *Cambridge Law Journal* 69 at 70-1.

As the term ‘trust’ crystallised in the course of the eighteenth century into its modern technical meaning, the term ‘fiduciary’ was used to cover relationships which bore hallmarks of the relationship between trustee and *cestui que trust* but which lacked its proprietary features.¹⁸⁵

Fiduciary law’s incremental development has, for the most part, been based on an *ad hoc* justification of particular equitable remedies in the case at hand rather than on a systematic exegesis of the doctrine. Further, significant differences have emerged between the fiduciary jurisprudence of different common law jurisdictions, especially in the United States. This makes general assertions about the ‘fiduciary norm’ and its doctrinal basis difficult. Sir Anthony Mason famously described the fiduciary doctrine as a “concept in search of a principle.”¹⁸⁶ Fiduciary duties are implied into relationships categorically, for example between lawyer and client, in which the experience and policy of the law regards such an expectation as appropriate. Alternatively, they may be expressed or implied in contractual language. In both these cases, the fiduciary character of the relationship stems from the express, implied or presumed intention of the parties. In other cases, what Paul Finn calls relationships fiduciary ‘in fact’, fiduciary duties are actually imposed on the parties, possibly against their actual intentions, by virtue of some feature of the relationship such as knowledge or power asymmetry, influence and ascendancy, induced reliance and so forth.¹⁸⁷ (The effect of the fiduciary doctrine here mirrors, in some respects, a raft of other equitable remedies to contractual and pre-contractual wrongdoing such as unconscionability-based doctrines). While different jurisdictions have favoured one or the other basis as the source of fiduciary duty, and no stable consensus has emerged on its ultimate basis, all these features can be seen as so many justifications for one party’s expectation that the other will act in his or her interests in the circumstances. This, in turn, is based on a ‘public policy’ or moral theory about how individuals should react to vulnerability, reliance, unilateral power, and so forth.

¹⁸⁵ Leonard Sealy, “Fiduciary Relationships” [1962] *Cambridge Law Journal* 69 at 71.

¹⁸⁶ Sir Anthony Mason, “Themes and Prospect” in P.D. Finn (ed.), *Essays in Equity* (Law Book Company 1985) at 246.

¹⁸⁷ Paul Finn, “Contract and the Fiduciary Principle” (1989) 12 *University of New South Wales Law Journal* 76 at 93.

To say that a relationship is fiduciary is to assert that it possesses a certain character: in every fiduciary relationship, we accept that one party may justifiably believe the other to be acting in his or her interests.¹⁸⁸ Jurisdictional differences relate to when and why this is the case, but even there an adequate overlap is observable to give the rubric of ‘fiduciary law’ some definite province. Most often, fiduciary relationships involve a separation of ownership and control over property or rights, or delegation of the performance of a task by one person to another.¹⁸⁹ In both cases there is a separation of management and interest that creates incentives for mismanagement through either intentional, self-interested action or a lack of care. In particular, fiduciary duties are vital in comprehensive, administrative relationships wherein one party has the unilateral ability to affect the other’s interests.¹⁹⁰ Fox-Decent argues in the context of fiduciary public law that the existence of discretionary, unilateral power of an administrative nature is an adequate basis for the imposition of fiduciary duties.¹⁹¹ Although other ‘triggers’ such as induced reliance, voluntary undertaking and vulnerability will often be present in the same case, it is the fact of administrative, purpose-directed discretionary power that is decisive. It is in the context of these relationships that the incentives for mismanagement are most potent and the trusting, reliant or vulnerable party is least capable of self-help.¹⁹²

The fiduciary doctrine responds to these problems by imposing a strict duty of loyalty upon the fiduciary to his or her principal. This is achieved through two negative duties: the duty not to profit from the relationship and the duty to avoid conflicts of interest between the fiduciary’s own interests and those of his or her principal. These two duties are aimed at preventing self-interested mismanagement. In appropriate cases the latter also implies a rule against assuming competing duties towards others, for example in the case of a lawyer who represents two parties in a transaction. A host

¹⁸⁸ See Paul Finn, “Contract and the Fiduciary Principle” (1989) 12 *University of New South Wales Law Journal* 76 at 83.

¹⁸⁹ See Leonard Sealy, “Fiduciary Relationships” [1962] *Cambridge Law Journal* 69 at 74. Sealy identifies two further categories of fiduciary relationship that are more technical.

¹⁹⁰ See Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press 2011) at 29, referring to *Frame v Smith* [1987] 2 SCR 99.

¹⁹¹ Evan Fox-Decent, “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen’s Law Journal* 259 at 299.

¹⁹² See Robert Cooter and Bradley J. Freedman, “An Economic Model of the Fiduciary’s Duty of Loyalty” (1990) 10 *Tel Aviv University Studies in Law* 297.

of other duties apply in particular fiduciary relationships, especially the trustee-beneficiary relationship, which assist in assuring both loyalty and care. Some of these, at least, are highly relevant to the governmental relationship and have analogues in the canons of administrative law. Although duties of care are generally a question of tort, rather than fiduciary, liability, the fiduciary relationship does affect the question. Matthew Conaglen, for example, has explored how the duty of loyalty protects the performance of other, non-fiduciary duties.¹⁹³ However, the fundamental fiduciary duty is that of loyalty, and only once the fiduciary character of governmental authority is accepted can we explore what other, related duties might apply from the law of trusts, agency or guardianship.

b) The Forgotten Trust: The Fiduciary Norm in the Public Context

The relation between an individual and the government to which he or she is subject displays all of the features that would ordinarily lead to the imposition of a fiduciary relationship. The relationship is often involuntary, non-bargained, unequal, comprehensive, administrative, institutional and marked by gross asymmetries of information and power. The power of a trustee or guardian pales in comparison to the authority wielded by government officials, especially those with significant discretionary authority.¹⁹⁴ Most other relationships that bear such features have become established categorically as fiduciary.

Historically, the governmental relationship has indeed been accepted as categorically fiduciary. The trust theory of government was a commonplace of constitutional theory from the seventeenth to the nineteenth centuries.¹⁹⁵ In Australia, the High Court held as late as 1923 that a member of parliament holds a “fiduciary relation towards the public”.¹⁹⁶ This means that for the entire formative period of modern Anglo-American constitutionalism, the fiduciary nature of public authority was accepted to flow from the fact of popular sovereignty. It was an assumption, sometimes tacit but often

¹⁹³ Matthew Conaglen, *Fiduciary Loyalty Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2011).

¹⁹⁴ Robert G. Narels, “The Government as Fiduciary: a Practical Demonstration from the Reign of Trajan” (2001) 35 *Richmond Law Review* 191 at 199.

¹⁹⁵ See John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 138; see also Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 131.

¹⁹⁶ *R v Boston* (1923) 33 CLR 386 at 410 per Higgins J.

express, in the mind of every English and American Whig that informed every treatise, letter, speech, pamphlet, declaration and bill. Finn describes the relationship between government and the people as “the most fundamental of fiduciary relationships in our society”¹⁹⁷ that stamped its mark on common law political thought for over 300 years.¹⁹⁸

The fiduciary norm provides much of the conceptual substructure undergirding the institutions of both Westminster and Washington democracy. It is a powerful expression of the idea of popular sovereignty. This is the theory that ultimate political authority resides in the people, not in any person, institution or organ of government. The democratic principle flows from the doctrine of popular sovereignty – if the people is (or are) sovereign, then they deserve to direct their government. More fundamentally, however, the claim of sovereignty stipulates whose *interests* a government is entitled to serve. Claims of popular sovereignty are therefore wholly consistent with institutionalised, even monarchic government, so long as public and not private ends are sought by it. The fiduciary expression of popular sovereignty is a demand for honesty, integrity and accountability in those to whom authority is delegated. If the monarch possesses sovereignty, he or she does it on trust for his or her subjects, and not in a personal capacity. If Parliament possesses sovereignty, it does so on trust for the people its members represent and not for its own or its members. Popular sovereignty is, in turn, an expression of the value of equality because it recognises that no-one has a natural right to rule over another for his or her own sake, because this treats that other as something less than equal.

c) Trust and Consent

The fiduciary model of government can relate to consent in two ways. First, it might be said that the fiduciary principle provides the basis on which subjects consent to the authority of their government. In the Lockean system, individuals transfer the powers of enforcement of their natural rights to a common authority, the inherent stipulation being that these powers are limited to that purpose. So far, the fiduciary theory of

¹⁹⁷ Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 131.

¹⁹⁸ Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 131.

government is consistent with consent as the basis of legitimate authority, providing a gloss on that theory. This is non-contentious in as far as it is an accepted and integral, if neglected, aspect of Locke's theory. Secondly, it might be argued that the principle of fiduciary loyalty supplants that of consent. As meaningful consent is impossible for so many subjects of governmental power, but universal coercive governmental authority is desirable for purposes of social organisation and collective action, that power is legitimate so long as it is used exclusively for the benefit of those subject to it and consistently with the fundamental equality of each individual.¹⁹⁹

Because I have argued the rejection of a voluntaristic basis for political legitimacy, I will seek to develop the second model of fiduciary government. Of course this does not detract from the moral force of meaningful consent to political authority where it is actually forthcoming. As John Plemenatz concludes, "to say that consent is not the only basis of political obligation is not to say that it is not, when given, a basis of obligation... Consent cannot be the sole basis of the duty [to obey the law], though it may well be one of them."²⁰⁰ Consent confers a particular type of legitimacy, but as interest and utility is the ultimate ends of government, one that is secondary in importance to the question whether a government honestly and effectively pursues a defensible account of the common weal.

The main concern in articulating a theory of government, whether consent or loyalty-based, is to limit the powers of the government so justified. In this respect, the fiduciary model is also superior. The bland observation that a principal has empowered an agent, or that a settlor has empowered a trustee, might explain the basis of his or her authority, but does little to set limits upon it or prescribe remedies for breaching these limits. As Ethan Leib and David Ponet observe, the very notion of representative government is fiduciary, whether representatives are characterised, recalling Burke's speech to the Electors of Bristol, as 'trustees' or 'delegates'. Both these private law analogues are fiduciary.²⁰¹ And again in Locke, it is the fiduciary

¹⁹⁹ It might also be noted that consent plays a different role in fiduciary law, namely that of legitimising a breach of an existing fiduciary relationship. That might constitute a third way in which consent might relate to a fiduciary theory of government.

²⁰⁰ John P. Plemenatz, *Consent, Freedom and Political Obligation* (2nd Ed., Oxford University Press 1928) at 3.

²⁰¹ Ethan J. Leib and David L. Ponet, "Fiduciary Representation and Deliberative Engagement with Children" (2012) 20 *Journal of Political Philosophy* 1; see also David L. Ponet and Ethan J. Leib,

concept that bears this heavy burden. Although his theory seems to be one based on consent, the crucial right to resistance is premised on a theory of breach of trust and fiduciary obligation. As consent is promissory and so prescriptive for the future, only withdrawal for breach, and not withdrawal of consent *simpliciter*, justifies resistance to the power of an established government.

As trust does most of the hard work in Lockean consent theory anyway, I argue that it does so even in the absence of consent. Non-consensual but virtuous government and consensual but wicked governments present a ‘hard case’ for consent theory. They put its justificatory potential to the test. Since the Nuremberg trials, it is accepted that a consensual but wicked government is not legitimate and that its subjects have not an obligation to obey its laws but rather an overriding obligation to disobey them. We have not only a moral, but a (criminal) legal duty to withhold our consent and cooperation from unjust governments. Likewise, the fall-back theory of natural law on which Simmons relies would tell us that we have many overriding obligations to obey a non-consensual but virtuous government. A fiduciary criterion of legitimacy would, from Simmons’ perspective, fail because it is not a promissory source of political obligation and thus purports to base political legitimacy on something other than individual voluntarism. I argue that these cases actually demand some alternative criterion of legitimacy to normalise the non-consensual political relationship anyway, and that utilitarian values emerge from under even the consent theory liberal approach to wicked regimes. The value of the fiduciary theory of government is that it elevates this most important consideration to the centre stage of political theory, and embeds them in the premise of equality. Even where consent is possible but not forthcoming, I maintain that the fiduciary criterion of legitimacy serves an important function in ensuring a basic level of equal and dignified treatment because it recognises that every individual – even a dissenter – has interests as a human person. Those interests deserve being weighed equally with those of others, and may not be subordinated to those of his or her governors.

“Fiduciary Law’s Lessons for Deliberative Democracy” (2011) 91 *Boston University Law Review* 1249.

d) *Trust and Agency as Fiduciary Models*

Important differences exist in the modern law of trusts and fiduciary relationships, not least that trusts always involve a separation of legal and equitable title whereas other fiduciary relationships do not. However, in the literature of the eighteenth century no such clear distinction was yet made. Throughout this Chapter ‘trust’ and ‘fiduciary’ are used with little distinction. This notwithstanding, it is important to specify what sort of fiduciary model, exactly, I am proposing.

Fiduciary theories of government can naturally proceed either from abstract premises of right, or from utilitarian premises of interest. The former model, in which government holds rights on behalf of its subjects, could be described as a ‘trustee model’. The rights are determined by natural law, for example, and to this extent a part of the ‘constitution’ as it were of the trustee government is also determined by natural law. The outside terms of the relationship, at least, between ruler and ruled are likewise fixed by natural law. The latter model sees government perhaps better described as an agent than a trustee, for this agent is empowered to determine its principals’ interests in the particular case and bound to use its powers to promote them. Such a relationship can be quite open-ended, such as that found in an enduring power of attorney settled in anticipation of illness or debilitation. The terms of such a relationship are determined primarily by the interests – the needs and welfare – of the subject, not by an abstract construct of rights and duties. *A priori* rights may appear play a very important role, for example in circumscribing certain conduct outright, but it is also possible to construe this as a sort of rule-utilitarianism rather than a theory of moral rights.

Locke’s trustee theory of government provides the main focus and the inspiration for this Chapter as a whole. It is quite apparently a theory that is based primarily on a concept of abstract, *a priori* right. However, I have argued in general against this approach and have rejected the *a priori* premise of radical individual autonomy as the criterion of political legitimacy in favour of an interest-based, utilitarian approach. This notwithstanding, I will continue to use ‘trust’ and ‘fiduciary’ interchangeably for the remainder of the Chapter, not least to avoid confusion when engaging with the historical literature. The distinction made above is, in any case, not so clear-cut. Trustees of infant beneficiaries, for example, or of trusts for advancement and

maintenance frequently bear the burden of a great latitude of discretion in determining the interests of their beneficiaries who cannot do so for themselves.

2. The Forgotten History of the Forgotten Trust

Paul Finn has described the fiduciary relationship between government and the people as a ‘forgotten trust’.²⁰² In a number of articles and chapters written from the 1970s to the present, Finn has done perhaps more than any other to revive the public fiduciary doctrine in Anglo-Australian law. Finn’s work has focussed primarily on the English legal and constitutional tradition, and particularly on the period from the seventeenth to nineteenth centuries. In this Section, I trace the idea and its historical predecessors further back. Its roots lie deep in the history of Western political philosophy, and I contend that it deserves a place in modern political theory commensurate to its history.

a) The Lex Regia and the Publicists

The fiduciary theory of government, like the consent theory of government, is an expression of popular sovereignty: the notion that authority to rule comes from the people, rather than from the *de facto* exercise of power, from prescriptive right or from a divine source.²⁰³ I argue that the people’s authority to rule flows from the axiom that it has the right to have its interests as the proper ends of government. There are different sources for the notion of popular sovereignty. There are shades of it in the Germanic tradition of kingship, in the biblical story of David’s election by the Elders of Israel,²⁰⁴ and most obviously in the Greek democratic tradition.²⁰⁵ In this Section, I wish to concentrate on an offshoot of the last, which is the most proximate source of the idea of popular sovereignty in the history of ideas of medieval and early modern thought, the Roman ‘*lex regia*’. As Michael Wilks observes, the influence of Roman law doctrines, combined with Aristotelian ideas, inspired a host of

²⁰² Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995).

²⁰³ The trust theory of government was seen early on as a trust settled by God, but in time the popular theory of sovereignty won out. See John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 142.

²⁰⁴ See Israel Finkelstein and Neil Asher Silberman, *David and Solomon: In Search of the Bible’s Sacred Kings and the Roots of the Western Tradition* (Free Press 2006) at 235.

²⁰⁵ See Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society and Politics in Fifth-Century Athens* (University of California Press 1989).

constitutional principles: “[b]oth the idea of popular sovereignty and of a ‘mixed’ government [are] in direct line of descent from Greek and Roman political theory.”²⁰⁶

Aristotelian political philosophy assumes a teleological approach, in the sense of one directed towards certain ends. Man is assumed to be a social animal and the ends of man to consist in the social life of the *polis*. A legitimate government is one conducive to the common good. This teleological principle – that government is directed towards the common good – was adopted by the Romans from classical Greek philosophy as a guiding principle of their republicanism. Cicero expresses it in fiduciary terms by analogy with private law in *De Officiis*:

Those who propose to take charge of the affairs of government should not fail to remember two of Plato’s rules: first, to keep the good of the people so clearly in view that regardless of their own interests they will make their every action conform to that; second, to care for the welfare of the whole body politic and not in serving the interests of some one party and betray the rest. For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care, and not of those to whom it is entrusted.²⁰⁷

The republican Rome that Cicero knew came to an end shortly after his death, with Octavian’s rise as the first emperor Augustus. Although Augustus’ ascendancy marked the end of the republic, Augustus claimed that his institution of the empire was in fact to *restore* the cause of the republic after a period of civil war. Thus, he shrewdly proclaimed in his official propaganda that the Roman people had conferred their *imperium et potestas* – authority and power – on him to exercise on their behalf.²⁰⁸ Whether such a transfer ever happened is contested. Either way, Justinian repeated Augustus’ assertion centuries later when he codified the Roman law in the *Digests* and *Institutes*, in a passage which came to be known as the *lex regia*. Some have interpreted the *lex regia* as a contrivance after the fact to justify the transition from republic to empire, and by others as the grant of power by the popular assembly at the inauguration of each emperor’s reign. According to Joseph Canning, it is

²⁰⁶ Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 153.

²⁰⁷ Cicero (Walter Miller trans.), *De Officiis* (William Heinemann Ltd 1913) I §25 at 87. The terms used in the original Latin are of course not ‘guardianship’ and ‘trust’ but rather ‘*tutela*’ and ‘*commissi*’ – the point, however, is carried by these Roman law cognates adequately.

²⁰⁸ Claude Nicolet (P.S. Fallas trans.), *The World of the Citizen in Republican Rome* (University of California Press 1980) at 21.

probably a later, juristic construction adopted by Justinian as historical.²⁰⁹ Justinian himself seemed to add the *lex regia* as an argument to ‘cover all bases’, as he asserted the right to rule *de jure divino*. Whatever its historical status, and despite its contradictory assertion of absolute power, the *lex regia* survived as an artefact of Roman republicanism through the period of the empire. Fossilised in the *corpus iuris civilis*, it was available for proponents of popular sovereignty in the middle ages and early modern period.

As an ember of popular sovereignty, the *lex regia* was used by both sides in the centuries-long struggle between papal and secular monarchic power. This was a momentous conflict of ideas, for it was only after the triumph of the latter that the debate between monarchic and popular sovereignty could reignite. And in this struggle the *lex regia* was even more influential as a precedent of venerable pedigree. The struggle between secular and papal monarchic power occupied several centuries of European history and dominated the same centuries of European political thought. Otto von Gierke’s magisterial *Political Theories of the Middle Age*, translated by F.W. Maitland, provides an overview of the Aristotelian, hierocratic and Germanic ideas at play in the debates between the so-called ‘publicists’. Michael Wilks’ equally magisterial *The Problem of Sovereignty in the Later Middle Ages* gives a more detailed account of this aspect of medieval and early modern thought. Its importance to us is the role it played in the contest between King and People once that between King and Pope was concluded in the former’s favour. As Hwa-Yong Lee writes:

Given that the *Corpus Iuris Civilis* does not say clearly whether the *lex regia* implies the people’s full and permanent transfer of power to the emperor or only a limited and revocable concession to him... one of the major topics for debate amongst ‘civilians’ in the thirteenth and fourteenth centuries was the debate about who had jurisdiction: whether the *lex regia* had been a revocable grant and in consequence the Roman people retained the sovereign capacity to make laws generally valid throughout the empire, or whether by *lex regia* the emperor obtained its full power because the people had permanently conferred their rights on the emperor.²¹⁰

²⁰⁹ Joseph Canning, *A History of Medieval Political Thought 300–1450* (Taylor & Francis 2006) at 9.

²¹⁰ Hwa-Yong Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (Peter Lang 2008) at 65.

In this debate, the idea of *limiting* governmental power was more important than the modern notion of *separating* governmental power into various organs. Although classical notions of government made of mixed government existed, and some *de facto* separation of popular assembly and the courts existed, governmental power coalesced in the person of the monarch to a great degree for most of the middle ages: much more than when, for example, Montesquieu was inspired by the English practice to birth the modern doctrine.²¹¹ The teleological principle, expressed as a fiduciary norm incumbent on governors, was a convenient, compelling and coherent means to articulate such limits on governmental power in the face of claims to absolute right. According to Wilks:

Far too little emphasis has been put upon the means employed to keep the ruler within the limits assigned to him. And, finally, it has never been adequately appreciated that the occasional right of the ruler to act against the liberties of the subject was counterbalanced by the casual right of the people to act over and against the ruler.²¹²

In the first instance, the monarch was expected to obey the ordinary laws; Wilks explains that this fossil of the republican tradition was never eclipsed by the absolutist pretensions of Justinian or the papal monarchists that followed him. However, in extraordinary circumstances, it was agreed that the monarch could abrogate the ordinary law. However, in this use of extraordinary power *causaliter*, the monarch was also bound to act for the good of the community and not in a private capacity. This interpretation of the King as *legibus solutus* was resurrected in the thirteenth century and, paradoxically, “worked up into a general principle by the Post-Glossators as a means of halting the absolute monarchs.”²¹³ The ruler was acknowledged to be absolute, but only in the sense he could ignore the law in certain cases and for certain purposes. “The whole conception of the ruler as *vicarious Dei* in the hands of the Thomists becomes a means of subjecting the ruler to law.”²¹⁴

²¹¹ See Charles du Secondat Baron de Montesquieu (Anne M. Cohler, Basia C. Miller and Harold Stone eds.), *The Spirit of Laws* (Cambridge University Press 1989) at xix; see also Harold Laski, *Political Thought in England from Locke to Bentham* (Holt 1920) at 63.

²¹² Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy With Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 210.

²¹³ Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy With Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 206-7.

²¹⁴ Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy With Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 214.

As perhaps only he could do, von Gierke summarises the sweep of medieval thought as follows:

The relationship between Monarch and Community was steadily conceived as a relationship which involved reciprocal Rights and Duties... Lordship therefore was never mere right; primarily it was duty; it was a divine, but for that very reason very onerous, calling; it was a public office; a service rendered for the sake of Peoples, not Peoples for the sake of Rulers. Therefore the power of a Ruler is, not absolute, but limited by appointed bounds. His task is to further the common weal, peace and justice, the utmost freedom for all. In every breach of these duties and every transgression of the bounds that they set, legitimate Lordship degenerates into Tyranny. Therefore the doctrine of the unconditioned duty of obedience was wholly foreign to the Middle Age. Far rather every duty of obedience was conditioned by the rightfulness of the command... [Despite the absolutist theories of both papal and lay writers], still in the Middle Age absolutistic theory invariably recognised that the Monarchy which it extolled to Sovereignty was subject to duties and limitations, and (what is more important) there steadily survived an opposite doctrine which, holding fast the notion that Monarchy is Office, would concede to the Emperor and other princes only a *potestas limitata* and a right conditioned by the fulfilment of duty.²¹⁵

In Aristotelian terms, the duty to serve the common weal over personal interest is the hallmark of a just political order. This idea was carried over into the middle ages, expressed as a fiduciary principle and ultimately refined through the use of the trust metaphor in the early modern period. For example, John of Paris accepts the monarch's authority over his subjects' goods but interprets to mean protection, rather than possession. "The prince has the power of judging and discerning the goods of his subjects, although he does not have dominium of the thing itself."²¹⁶ Or again, William of Ockham defines as a tyrant "one who disregards his subjects' interests not as one who disregards their wishes."²¹⁷ Perhaps the idea of consent was too nascent and fragile at this stage to provide a curb to royal power, although it should be noted that consent meant very personal consent at this time. (In the reign of Richard III,

²¹⁵ Otto von Gierke (F.W. Maitland trans.), *Political Theories of the Middle Age* (Cambridge University Press 1987) at 34, 35 and 36.

²¹⁶ John of Paris (J. LeClercq ed.), *De potestate regia et papali* (J. Vrin 1942) at 190, cited in Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy With Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 214.

²¹⁷ Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) at 108. See William of Ockham, "Dialogus" in Melchior Goldast (ed.), *Monarchia Sancti Romani Imperii Vol. 2* (Hanover 1611).

Peter des Roches refused to pay a tax because he, as an individual, had not consented to it).²¹⁸ Ockham here pre-empts Locke, who despite his advocacy of consent as the basis of legitimate authority identifies breach of fiduciary loyalty as the trigger for justified resistance.

b) Johannes Althusius

For my present purposes, the Westphalian jurist Johannes Althusius marks the transition to early modern thought in the fiduciary theory of government. Althusius is, unfortunately, almost entirely unstudied among Anglophone political theorists, though his *Politics* anticipates not only the modern doctrine of federalism but, I believe, Locke's trustee theory of government as the basis of the right to resistance. Althusius uses the fiduciary theory of popular sovereignty to justify the Dutch republican war of independence from Spain, much as Locke uses it to justify the glorious revolution (which a number of modern scholars view as a Dutch invasion).²¹⁹ An English translation of the *Politics* appeared only in 1964,²²⁰ and I could find no literature in English examining the deep parallels with Locke's *Second Treatise*.²²¹ Even according to an 1893 German history of modern philosophy, Althusius was recognised as the chief of the 'monarchomachs' (a school of thinkers opposed to the idea of absolute sovereignty) until the beginning of the eighteenth century, after which he fell into "undeserved oblivion" until a mention by von Gierke in 1880.²²²

Although the question of sovereignty eventually settled into a contest between king and people, the terms of the debate – and its absolute stakes – are still marked by the original contest between pope and king.²²³ The sovereignty theory of Jean Bodin is

²¹⁸ Albert Pollard, *The Evolution of Parliament* (Longman's, Green & Co 1920) at 143.

²¹⁹ See for example Jonathan I. Israel, "The Dutch Role in the Glorious Revolution" in J.I. Israel, *The Anglo-Dutch Moment: Essays on the Glorious Revolution and its World Impact* (Cambridge University Press 2003) at 105.

²²⁰ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964).

²²¹ Bettina Koch compares Althusius and Hobbes in Bettina Koch, *Zur Dis/Kontinuität mittelalterlichen politischen Denkens in der neuzeitlichen politischen Theorie: Marsilius von Padua, Johannes Althusius und Thomas Hobbes im Vergleich* (Duncker & Humblot: Berlin, 2005).

²²² Richard Falckenberg (A.C. Armstrong trans.), *History of Modern Philosophy from Nicolas of Cusa to the Present Time* (3rd Ed., Holt & Co 1893) at 44.

²²³ See Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge University Press 1964) Part II Chapter I, "The Sovereign Prince".

typically regarded as the point of departure for modern sovereignty theory, and his theory is one of absolute sovereignty in the locus of a single person or body.²²⁴ Bodin defines the essence of sovereignty much as we do today: as the power to make law binding on its subjects.²²⁵ Although he allows the possibility of sovereignty resting in the people or in a body of magnates,²²⁶ Bodin asserts an exception to the general inalienability of sovereignty for the irrevocable transfer of power from the people onto a monarch (as in the absolutist interpretation of the *lex regia*).²²⁷ Bodin further denies that a true sovereign can ever be the subject of resistance.²²⁸

Althusius argues against this conception of sovereignty. If sovereign power originated, as the *lex regia* suggests, in the people, then surely it is inalienably theirs, regardless to whom its administration is entrusted. As Charles Merriam explains:

Over against the theory outlined by Bodin... stood that of the school of political writers characterised by their enemies [such as William Barclay] as ‘monarchomachs’. The historical basis of their doctrine was the religious intolerance and persecution which followed the course of the Reformation, and necessitated the development of a theory of resistance for the use of the minority party. Enthusiastic adherents were found in France, Scotland, Germany, Spain, and in the ranks of Jesuits and Reformers alike. The central features of the doctrine were the original and inalienable sovereignty of the people, the contractual origin of government, the fiduciary character of all political authority, and the consequent right of the people to resist and destroy the existing rulers whenever found guilty of a breach of trust. These theories, already widespread in the Middle Ages, were revived and were stated, if possible, more clearly and concisely, while their application was bolder and more sweeping than ever before. Among the writers, and by far the ablest was Johannes Althusius, whose work [*Politics*] was easily the most scientific of his time and school.²²⁹

²²⁴ See Charles E. Merriam Jr., *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press 1900) at 7.

²²⁵ Jean Bodin (M.J. Tooley trans.), *Six Books of the Commonwealth* (Blackwell 1955) at 43.

²²⁶ Jean Bodin (M.J. Tooley trans.), *Six Books of the Commonwealth* (Blackwell 1955) at 66.

²²⁷ Charles E. Merriam Jr., *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press 1900) at 8.

²²⁸ Jean Bodin (M.J. Tooley trans.), *Six Books of the Commonwealth* (Blackwell 1955) at 67.

²²⁹ Charles E. Merriam, *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press 1900) at 8.

Althusius works broadly within the contractarian tradition, as he accords the notion of consent or *pactum* a central place as a principle of social organisation.²³⁰ But his work also features a strong Aristotelian element, in which humans are characterised as naturally social and political animals, and in which the bonds of association (both private and public) are presented as organic, real and natural. He writes, for example, (after citing Aristotle), that “it is evident that the commonwealth exists by nature, and that man is by nature a civil animal who strives eagerly for association.”²³¹ The pact only serves to institutionalise the real bonds that bind individual ‘symploites’ in their symbiotic relations to each other, comprising a federalistic whole of families, guilds, villages and so forth.²³²

Althusius’ political theory is pragmatic in that it recognises the popular source of sovereignty without claiming the need for its popular *exercise*. He accepts the institutionalisation of government and governors’ incentives to mismanage public affairs to serve their personal interests.

The people first associated themselves in a certain body with definite laws (*leges*), and established for itself the necessary and useful rights of (*jura*) of this association. Then, because the people cannot manage the administration of these rights, it entrusted their administration to ministers and rectors elected by it. In so doing, the people transferred to them the authority and power for the performance of this assignment, equipped them with the sword for this purpose, and put itself under their care and rule... For this reason, the citizens and inhabitants of the realm are collectively but not individually, like a ward or minor, and the constituted members like a guardian in that they bear and represent the person of the whole people. Just as a ward, although he is master of the things he has yielded to a guardian for care and administration, cannot act in any matter nor incur an obligation without the authority and consent of the guardian, so the people, without the authority and consent of its administrators and rectors, cannot administer the rights of the realm (*jus regni*), although it is the master, owner and beneficiary of them. What a guardian rightfully does regarding the things and

²³⁰ See Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 19.

²³¹ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 20.

²³² Carl J. Friedrich, “Preface” in Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at ix.

persons of his wards, ministers of a commonwealth for the most part perform them for the united inhabitants of the realm, together with their goods and rights.²³³

This separation of ownership and control triggers, however, the fiduciary duty of loyalty and provides a framework for a theory of limited government. Althusius' theory proceeds from a robust assertion of popular sovereignty that subsists irrespective of the form of government. He rejects the distinction between a 'realm' and a 'commonwealth' (*regnum* and *respublica*) as useless, because "ownership of a realm belongs to the people, and administration of it to the king."²³⁴ Although working from within a legal system that lacks both a general fiduciary norm and the separation of legal and equitable ownership that characterise the English trust, Althusius probes for ways to articulate the essentially fiduciary quality of his concept of sovereignty and government. In doing so, he uses almost every civilian law cognate to the common law trust. Consider the following from the preface to his 1603 edition:

I concede that the prince or supreme magistrate is the steward, administrator, and overseer of these rights. But I maintain that their ownership and usufruct properly belong to the total realm or people... [T]heir administration, which has been granted to a prince by a praecarium or covenant, is returned upon his death to the people... This administration is then entrusted by the people to another, who can aptly be one or more persons. But the ownership and usufruct of these rights have no other place to reside if they do not remain with the total people. For this reason, they do not become articles of commerce for one person... [If] a prince should wish to exercise ownership of them acquired by some title or other, he would thereby cease to be a prince and would become a private citizen and tyrant.²³⁵

Althusius' constitutional order thus flows from a premise of bifurcated ownership and control, and the result has a distinct fiduciary character. That is to say, Althusius reconciles the apparent inconsistency between popular sovereignty and elite (even monarchic) government with a number of civilian law doctrines that, in combination, import a fiduciary duty of loyalty as the hallmark of legitimate rule and as the basis of a right to resistance following its breach.

²³³ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 89.

²³⁴ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 62, citing Cicero, *The Republic* III, 27 and St. Augustine, *City of God*, II, 21.

²³⁵ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 5.

This is evident when we examine each of the terms he uses. First, the terms ‘steward’, ‘administrator’ and ‘overseer’ imply a relationship of agency. In Anglo-American law, agency is a paradigmatic fiduciary relationship, and in civilian legal systems the agency relationship is attended by duties of loyalty. The idea of stewardship and administration, however, implies something more; it implies agency including bailment over a right or thing that does not belong to the steward. This brings Althusius’ concept even closer to that of a trust. Secondly, ‘usufruct’ entitles a person to the use and profits of a thing, but does not amount to a right of ownership. The assertion of usufruct *and* ownership in combination amounts to the nearest possible assertion of what an equity lawyer would call beneficial ownership. The rights of usufruct *and* ownership *but not* administration, moreover, resembles the sort of rights that equity affords the beneficiary of a trust. Thirdly, this concept of bare administration precludes the administrator deriving any benefit of the property in question. Deprived of benefit and ultimate ownership but given the rights of ordinary dealing and administration, such a person does resemble a trustee. Indeed, Althusius denies the prince the right of sale, which is an essential incident of ordinary ownership. Lastly, the terms ‘praecarium’ and ‘covenant’ are instructive. The *praecarium* is a sort of Roman law ‘gratuitous bailment at will’. It was originally unenforceable in the courts, but later came to be protected by the praetor through an action called the *interdictum de praecario* in a development not unlike the recognition by the chancellor of the rights of a *cestui que use* and later the beneficiary of a trust.²³⁶

Although he often speaks of consent, its most important role is in constituting the political community of symbiotes, or ‘universal association’. Althusius claims that an administration is “just, legitimate and salutary” when it “seeks and obtains the prosperity and advantages of the members of the realm.”²³⁷ He uses this teleological principle of government – a ‘quality of government’ approach not unlike Locke’s *salus populi suprema lex est* or a ‘quality of government’ hypothetical consent theory – to establish limits to the administration’s power. Governmental power is “bound to the utility and welfare of the subjects, and is circumscribed both by fixed limits... and

²³⁶ See Eugen Ehrlich (Walter L. Moll trans.), *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936) at 193.

²³⁷ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 92.

by the just opinion of the universal association [that is, the community]. Therefore it is neither infinite nor absolute.”²³⁸ In particular, the limits of governmental power are transgressed “when in the administration entrusted to them, [governors] seek their personal and private benefit rather than the common utility and welfare of the universal association.”²³⁹

c) *The Anglo-American Tradition*

Finally we come to the Anglo-American constitutional tradition. Both the fiduciary principle and the rule of law is exceptionally developed in the English tradition. Not surprisingly, then, it is in English legal and political theory that we see the most frequent and sophisticated fiduciary characterisation of governmental power. Almost without exception, the important thinkers and actors in English political history were propertied men. Almost without exception, they would have had contact with the trust, either as a trustee or a beneficiary, or indeed both. Locke himself was even engaged in the administration of the Chancery as secretary to the Lord Chancellor, his patron the Earl of Shaftesbury.²⁴⁰ Although we should exercise caution, following John Dunn, in assuming that ‘trust’ is always intended to import the legal notion,²⁴¹ we can safely assume that the word is used with cognisance of its status as a technical legal term. This is an important insight from legal history that is probably missed by many political philosophers unfamiliar with the taxonomy of English law and the *Rechtsinstitut* of the English law trust.

The fiduciary theory of sovereign power was used in the indictment and execution of Charles I by the House of Commons. The king was indicted for subversion of the powers entrusted to him by the people of England, that is for a breach of fiduciary duty. In the bill of indictment, the king was said to have been “trusted” with a “limited power” to govern according to the law, by his “trust, oath and office” obliged

²³⁸ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 92-3.

²³⁹ Johannes Althusius (F.S. Carney trans.), *The Politics of Johannes Althusius* (Beacon Press 1964) at 93.

²⁴⁰ Peter Laslett, “Introduction” in John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) at 26.

²⁴¹ See John Dunn, “The concept of ‘trust’ in the politics of John Locke” in Richard Rorty, J.B. Schneewind and Quentin Skinner, *Philosophy in History: Essays on the historiography of philosophy* (Cambridge University Press 1984).

to govern for the “good and benefit of the people” and not himself. His treason and high crimes consisted therein, that he used his powers for the “advancement and upholding of a personal interest” against the public interest of the people “from whom he was entrusted” with kingship.²⁴²

This is just one important example of a pervasive theme in English political thought. Modern commentators often see the trust theory of government as an innovation by Locke, but as John Gough explains in a short study on Locke’s theory of political trusteeship, the idea predates him. It was a “political commonplace before Locke’s time” and “very common in the seventeenth century.”²⁴³ From its usage in the fifteenth and early sixteenth centuries, Gough observes that the term is used in its more general meaning of ‘trustworthiness’ or ‘confidence’, rather than with the legal institution of the trust in mind. However, from the early sixteenth century, speech of ‘officers’ and ‘offices’ of ‘public trust’ begin to point in the direction of the political trust as found in Locke.²⁴⁴ The language of trust in its legal-metaphorical sense is used to express the idea that the king (or executive) is a trustee for the people, and that the members of Parliament are trustees for the electorate.²⁴⁵

In the early sixteenth century, the idea of public office as trust was capable of a very literal interpretation. ‘Offices’ themselves were viewed as a form of property, along with their fees and emoluments; Blackstone classified them in his great taxonomy of English law as ‘incorporeal hereditaments’.²⁴⁶ At this time, offices could be bought and sold as a form of personal property.²⁴⁷ Finn explains that originally ‘public’ officials were regarded as King’s officers, and subject to the sort of trust we would

²⁴² The indictment of 20 January 1648 is reproduced in Samuel Rawson Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution 1625-1660* (Clarendon Press 1906) at 371. Geoffrey Robertson provides an excellent narrative of the trial in Geoffrey Robertson, *The Tyrannicide Brief* (Random House 2010) Chapter 10.

²⁴³ John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 138.

²⁴⁴ John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) 141.

²⁴⁵ John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 142-3.

²⁴⁶ William Blackstone, *Commentaries on the Laws of England: Book I* (Clarendon Press 1775) Chapter 3.

²⁴⁷ See Koenraad Wolter Swart, *Sale of Offices in the Seventeenth Century* (Martinus Nijhoff 1949) at 47.

now describe as an agency relationship.²⁴⁸ In the tumult of the seventeenth century, the ‘king’s officer’ became the ‘public officer’ (and, as Maitland wryly comments, the king’s debt became a public one, too).²⁴⁹ From very early on, however, offices of public trust were subjected to limitations in this regard, and could not be leased or sold. From the seventeenth century it was held that “property in an office would be subject to certain restrictions if the office constituted an implied trust.”²⁵⁰ A number of actions were available against officers of public trust. They were prevented from delegating discretion in the performance of office to a deputy, and could forfeit the office for certain types of misfeasance, nonfeasance or refusal to exercise an office.²⁵¹

As Laslett observes, although his theory of political legitimacy is based on consent, Locke tends to use the language of trust “whenever he talks of the power of one man over another.”²⁵² Trust itself has double meaning – it implied faith in another, on the one hand, but also, in its legal meaning, it implies a mechanism to enforce faith-keeping and deter its breach. In particular, Locke’s right to resist an unjust government is predicated on a theory of trust. This is of the utmost importance: the very point of his consent theory of political obligation does not operate without the ancillary theory of trust.

[T]he Legislative [despite being the supreme power in a constituted commonwealth] only being a Fiduciary Power to act for certain ends, there remains still *in the People a Supream Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. For all *Power given with trust* for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the Power devolve into the hands of those that gave it.²⁵³

²⁴⁸ Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 132.

²⁴⁹ Frederick Maitland, “The Crown as Corporation” in David Runciman and Magnus Ryan (eds.), *State, Trust and Corporation* (Cambridge University Press 2003) at 42, footnote 35.

²⁵⁰ E. Mabry Rogers and Stephen B. Young, “Public Office as a Public Trust: A Suggestion That Impeachment For High Crimes and Misdemeanors Implies a Fiduciary Standard” (1975) 63 *Georgetown Law Journal* 1025 at 1028.

²⁵¹ See *Sir George Reynel’s Case* (1612) 77 Eng. Rep. 871; see also *Earl of Shrewsbury Case* (1611) 77 Eng. Rep. 798 and *Bennet v Easedale* (1626) 79 Eng. Rep. 821.

²⁵² Peter Laslett, “Introduction” in John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) at 112.

²⁵³ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §149 at 384-5.

In this passage, Locke posits not a simple consent-based relationship between parliament and the people but a very special one that is limited by the fiduciary norm. Locke's radical doctrine of the right of resistance is based squarely on the doctrine of breach of trust. Although Locke claims that political legitimacy flows from subjects' consent, the right to resist an unjust government cannot rest on the doctrine of consent, because consent for Locke is binding for the future. Once a person has consented to membership in a political community and that community has erected a government, he or she is bound for life and the government retains the right of enforcing individuals' rights at natural law indefinitely. Resistance to governmental power is only justified when that government has acted in breach of the terms on which its powers were entrusted to it. As in Althusius' *Politics*, Locke's *Second Treatise* uses the trust as a device to express powerfully the doctrine of popular sovereignty. The duality of ownership and the separation of (beneficial) and control expressed so awkwardly by Althusius is rendered simple for Locke in the English language of the trust.

Locke holds resistance to be justified in four circumstances, and thereby identifies four concrete bounds which limit the exercise of governmental power by all its branches, and which justify resistance when they are transgressed:²⁵⁴

These are the *Bounds* which the trust that is put in them by the Society, and the Law of God and Nature, have *set to the Legislative Power* of every Commonwealth, in all Forms of Government. First, They are to govern by *promulgated establish'd Laws*, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough. Secondly, These *Laws* also ought to be designed *for* no other end ultimately but *the good of the People*. Thirdly, they must *not raise Taxes* on the Property of the People, *without the Consent of the People*, given by themselves, or their Deputies. And this properly concerns only such Governments where the *Legislative* is always in being, or at least where the People have not reserv'd any part of the Legislative to Deputies, to be from time to time chosen by themselves. Fourthly, The *Legislative* neither must *nor can transfer the Power of making Laws* to any Body else, or place it any where but where the People have.²⁵⁵

²⁵⁴ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §142 at 381.

²⁵⁵ John Locke (Peter Laslett ed.), *Two Treatises of Government* (Cambridge University Press 1960) II §142 at 381.

Thus, Locke identifies breach of governmental trust with violation of some of the central doctrines of the rule of law. The fiduciary principle is an expression of popular sovereignty that contextualises the rule of law, stipulates when governmental power is illegitimate, and justifies resistance.

The fiduciary theory of government remained common in the eighteenth century, and was advocated by conservatives and Whigs alike. One famous advocate of a fiduciary theory of government is Edmund Burke. According to Lee, politics and government are basically matters of trust for Burke: “The essence of this trust lies in the exercise of power being for the ultimate benefit of those over whom it is exercised, and hence in being in the end accountable to them. When the exercise of political power is contrary to this purpose, it loses its legitimacy.”²⁵⁶ The notion of trust, for Burke, is just as much an expression of the moral autonomy and equality of the individual as consent theory.

[All political power] set over men, [and all] privilege claimed or exercised in exclusion of them [is] wholly artificial, [and] so much a derogation from the natural equality of mankind at large, [that it] ought to be some way or other ultimately exercised for their benefit... If this is true with regard to every species of political dominion... then such rights, privileges, or whatever else you choose to call them, are in the strictest sense a trust; and it is of the very essence of a trust to be rendered accountable.”²⁵⁷

American radical Whigs were informed by the same ideas as their English forbears and counterparts such as Locke and Burke, and they exerted a considerable influence on the founding institutions of that country. Robert Natelson explains the canon utilised by the founders of the American constitution, which comprised classical and biblical works, the Continental publicists and jurists such as Hugo Grotius and Samuel von Pufendorf, and English Puritan and ‘Country Party’ writers such as Locke, Algernon Sidney and John Milton.²⁵⁸ The common thread drawn by the

²⁵⁶ Hwa-Yong Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (Peter Lang 2008) at 15.

²⁵⁷ Edmund Burke, “Speech (December 1, 1783) upon the Question for the Speaker’s Leaving the Chair in Order for the House to Resolve Itself into a Committee on Mr. Fox’s East India Bill” in Edmund Burke (Peter James Stanlis ed.), *Edmund Burke: Selected Writings and Speeches* (Transaction Publishers 1963) at 446, as abridged in Hwa-Yong Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (Peter Lang 2008) at 15.

²⁵⁸ Robert G. Natelson, “The Constitution and the Public Trust” (2004) 52 *Buffalo Law Review* 1077 at 1095.

American founders between these sources was actually the fiduciary nature of governmental authority: according to Natelson, this principle is common to all.

This is evident in the written instruments of the independence era. One example is the *Constitution of Pennsylvania 1776* (USA), which, after a very Lockean preamble, declares:

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sort of men, who are a part only of that community, And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community most conducive to the public weal.

The *Virginia Declaration of Rights 1776* (USA) utilised similar language and ideas in its first three Sections:

I. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

II. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.

III. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

The just government appears from these texts not to derive from consent so much as from the capacity to produce the greatest degree of happiness and safety, and fidelity to the trust invested in it for this purpose. Consent is inextricably linked to the idea that the powers of government are limited by its purposes, that is the purposes for

which it was instituted by the people. It is a purpose-oriented, teleological principle that most stands out from the two instruments, not just the principle of consent. However, when Thomas Jefferson drafted the *Declaration of the United States of America 1776* (USA), he chose not to use the overtly fiduciary language of trust. The Continental Congress of the original 13 states declared:

That to secure these rights [of Life, Liberty and the pursuit of Happiness] Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it.

The fiduciary role of government is not absent from this formulation. Governments are instituted to serve certain ends, and when they become destructive of those ends they are subject to justified resistance. In the final paragraph, the congressional representatives appeal to the highest power, but ultimately exercise the Lockean right of the people to be the final arbiter of George III's breach of governmental trust. The Consent limb of the formula is sandwiched between a thoroughly teleological fiduciary theory of governmental legitimacy, but the sound-bite that 'just powers are derived from the consent of the governed' has become the more influential in the centuries since. Without lapsing into unproductive originalism, it bears noting that the American founding documents are more usefully interpreted in their context of eighteenth century English political thought.²⁵⁹ The Supreme Court of New Jersey, for example, used the doctrine to frame the following, uncontroversial, statement of standards in government:

[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When

²⁵⁹ For example, E. Mabry Rogers and Stephen Young have suggested that eighteenth century public fiduciary duty provides content to the otherwise ambiguous standard of misconduct required for 'high crimes and misdemeanours' in the impeachment provision of Article II of the *Constitution of the United States of America 1789* (USA). See E. Mabry Rogers and Stephen B. Young, "Public Office as Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanours Implies a Fiduciary Standard" (1975) 63 *Georgetown Law Journal* 1025.

public officials do not so conduct themselves and discharge their duties, their actions are inimical to and inconsistent with the public interest, and not only are they individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties. These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.²⁶⁰

According to Finn, the fiduciary theory of government probably enjoys its broadest acceptance in the United States.²⁶¹ An appreciation of the eighteenth century thought, which motivated the establishment of the independent union, renders that unsurprising. In the Section that follows, I look at some reasons why the theory has fallen into relative neglect even there, and some of the objections frequently presented against reviving it.

3. Objections to Public Fiduciary Law

Today, applying the fiduciary norm to the public setting in general is regarded as highly contentious. Finn explains that the efforts in the latter nineteenth century to consolidate and formalise governmental practice established the institutions of Westminster style government that we now take for granted. In the process of institutionalisation, the democratic principle retained prominence, but the doctrine of public trust was largely forgotten.

[W]ith the progressive enlargement of the electoral franchise in English after 1832, with the advent of cabinet government, with the consolidation of the twin political principles of ministerial responsibility (individual and collective responsibility) and, in Australia, with the passing of comprehensive public service legislation, the regulation and public recognition of the officers and agencies of government beyond the demands of administrative law, came to be seen very much in terms of electoral, parliamentary and employment accountability. The ‘Westminster theory’ of government was born of this. Apart from mandating a style of government, it provided, in principle at least, a political linkage between the conduct of government and the ‘will of the people’. This lay in its ‘circle of accountability’ through the

²⁶⁰ *Driscoll v Burlington-Bristol Bridge Co.*, 86 A.2d 201 (N.J. 1952) at 222-3, citations omitted.

²⁶¹ Paul Finn, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 131.

parliament. The casualty in legal thought in all of this was that the officers and agencies of government were the trustees, the servants of the people. The very idea that parliament itself could be a trustee was dismissed as a 'political metaphor'. That idea, moreover, conflicted with the acceptance given to parliamentary sovereignty itself.²⁶²

This explains the otherwise surprising fact that the fiduciary nature of all governmental power has been largely forgotten, especially outside the United States, in a sort of "collective amnesia."²⁶³ This has only been compounded in Australia since the 'New Administrative Law' of the 1970s, which is typically seen as an adequate 'package' of institutions and mechanisms to ensure governmental ethics, accountability and transparency. Today, we tend to reify these institutions rather than seeing them as instrumental to their ultimate ends. If we forget an institution's ultimate ends and theoretical context, we lack the best basis to appraise its performance and direct its reform when it appears challenged.

Objections to the application of fiduciary principles to public law usually take one of four forms, which I discuss in turn below. These are the multi-beneficiary objection, the paternalism objection, the democracy objection and the metaphor objection. I contend that none of these constitute a real bar to speaking openly of 'public fiduciary duties' owed by government institutions, representatives and officers to the public or individuals. Generally, these objections work within the Westminster framework and take the principle of popular sovereignty for granted. While on the one hand this demonstrates the success of the doctrine of popular sovereignty, there are signs that it is in danger of becoming an axiom that we assume even counter-factually. This is the concern of Paul Verkuil, who in a recent examination of government practise in the United States (especially post-9/11 contracting and privatisation of essential government function) proposed an agency model of popular sovereignty in response to the unprecedented delegation of governmental power.²⁶⁴ As Parliament itself exercises only a fiduciary power limited by its ends, the principle of popular sovereignty cannot get lost in the thicket of administrative law statute.

²⁶² Paul Finn, "A Sovereign People: A Forgotten Trust" in P.D. Finn (ed.), *Essays on Law and Government Volume One: Principles and Values* (Law Book Company 1995) at 11-2.

²⁶³ Paul Finn, "The Forgotten 'Trust': The People and the State" in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 131.

²⁶⁴ See Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatisation of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge University Press 2007).

Many objections to the public fiduciary principle are informed by contemporary notions of fiduciary law and contemporary institutions. Asking whether a fundamental principle of the governmental relationship fits with modern practice, however, makes a dangerous assumption that modern practice is ideal. Certainly, modern liberal democratic practice is good, but the very point of political philosophy is to ask how it might be better. In the Section above, I attempted to demonstrate that the public fiduciary doctrine is the best expression of popular sovereignty and the value of equality on which it is based. If my account of the history is accepted, then rejection of the fiduciary character of governmental authority divorces contemporary practice from its own historical and theoretical context. As the twenty-first century unfolds, Western-style liberal democracy faces a number of challenges to which it must respond. I contend that fiduciary loyalty is still an important criterion of governmental legitimacy, especially in cases where meaningful consent is absent or impossible. This is especially so in the many societies that are currently in the process of democratic transition, where questions of governmental legitimacy, popular sovereignty and the right to resistance are issues of particular import.

a) The Multi-Beneficiary Objection

Most objections to the importation of fiduciary notions into public law relate to the ‘multi-beneficiary problem’. How should a fiduciary government deal with competing interests within the political body? Surely government requires action that, at times, will favour one group over the other. Is this not inconsistent with the fiduciary duty of loyalty?²⁶⁵ John Glover represents the prevailing view when he categorically rejects the fiduciary framework as one suitable to questions of public law and public good:

[G]overnment must act in the public and not some sectional or personal interest. Laws must be applied equally and without unjustifiable differentiation. Particular loyalty or consideration to a race, or class, or a religiously or otherwise identifiable group must be warranted by some standard inherent in democracy. Procedural propriety in administration requires that fair decision-making procedures are observed. Individuals cannot be excessively advantaged or burdened consistently with the rule of law... Fiduciary obligations attributed to governments and public officials are radically inconsistent with these principles. The opposite of impartiality is mandated. Undivided loyalty amounting to positive discrimination must be

²⁶⁵ Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011) at 34.

shown in favour of the persons to whom fiduciary duties are owed. Interests of other persons and of fiduciaries themselves must be subordinated to the trust invested in fiduciaries, or which they have assumed to act. Owing conflicting duties to two or more persons is prohibited by first principles of fiduciary law. This is not mere rhetoric... [A]bsolute loyalty and the avoidance of conflicts are defining aspects of the fiduciary regime. Persons whose duties continually conflict must be regulated by some other and presumably a public law code.²⁶⁶

Glover's approach to the question of public fiduciary law is dogmatic in the sense that he places much stock on the public/private law dichotomy, and legalistic in the sense that he addresses primarily the question of civil liability on private suit as the consequence of a public fiduciary doctrine, rather than its import for institutional design and governmental ethics. The lynch-pin of his position is that fiduciaries are required to prefer the interests of some (i.e. beneficiaries) over others (i.e. non-beneficiaries). He seems to deny the proposition that a government can have a fiduciary relationship with the whole people. In this he disagrees with Locke, and the whole stream of public fiduciary law (which largely pre-dates the public/private law dichotomy in English law). Rather than confessing to a heterodox opinion, he seems to suggest that it behoves the proponents of public fiduciary law to defend their position. It is obviously difficult to transpose a modern, private, remedies-based doctrine onto the institutional architecture of contemporary Westminster democracy without further thought. Rather than simply giving rise to new causes of action against government institutions and officers, arguably the real significance of the public fiduciary doctrine is to reappraise the structures of Westminster democracy themselves in the light of a particular interpretation of popular sovereignty. In order to do this, however, it is necessary to dispose of the multi-beneficiary problem.

Fox-Decent proposes to counter objections such as Glover's by analogy with the law of trusts. The situation of a public fiduciary mirrors that of a trustee of a large discretionary trust such as a charitable purpose trust more than a lawyer or guardian. Such fiduciaries may favour the interests of one beneficiary (or group of beneficiaries) over those of another, but may not do so on an improper basis. In cases of multiple beneficiaries with competing interests, trustees must exercise their discretion with fairness and reasonableness as between the classes. This might arise in

²⁶⁶ John Glover, "Public Officials, Public Trusts and Fiduciary Duties" in Ken Coghill, Charles Sampford and Tim Smith, *Fiduciary Duty and the Atmospheric Trust* (Federation Press 2012) at 78.

the context of trusts for charitable purposes, as well in private trusts for persons where the beneficiaries' interests diverge.²⁶⁷

[I]n such contexts the duty of loyalty has to manifest itself as fairness and reasonableness because the fiduciary principle can authorise the use of fiduciary power only to the extent that such respects each person's co-equal status as a beneficiary... If a fiduciary were to favour one party arbitrarily at the expense of another to whom she owed the same duty she would necessarily violate her duty to the party suffering the relative disadvantage.²⁶⁸

This echoes Finn's observation some years earlier:

It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries possessing different rights, though obliged to act in the interests of the beneficiaries as a whole, the fiduciary is nonetheless required to act *fairly* as between the different classes of beneficiary in taking decisions which affect the rights and interests of the classes *inter se*.²⁶⁹

This might equate to a duty to evaluate the public purposes served by a decision, the proportionality of the means employed and the impact on any particular class of subject that is affected. Although one group or party's interest might be preferred to another, this must be for good reasons, and be proportionate to those reasons. If there is a good reason for treating two beneficiaries differently then the duty of loyalty, as so interpreted, has not been breached. Such a situation actually presented itself to the Supreme Court of Canada, who in *Wewaykum Indian Band v Canada*²⁷⁰ had to consider conflicting fiduciary duties owed by the Crown to two different Indian bands. The Court held that the Crown's duty in such a case is to act with loyalty, good faith and full disclosure and to act with diligence in what it reasonably regards as the beneficiaries' best interests. In particular, this involved being even-handed towards the various beneficiaries, including dealing fairly with other sections of the public (in this case settlers) with interests worthy of protection.²⁷¹

²⁶⁷ He uses the example of *Howe v Lord Dartmouth* (1802) 7 Ves 137, concerning conversion of assets in a will and apportioning income between life interest and remainder beneficiaries.

²⁶⁸ Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011) at 35-6.

²⁶⁹ Paul Finn, "The Forgotten 'Trust': The People and the State" in Malcolm Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) at 138; see also Paul Finn, *Fiduciary Obligations* (Federation Press 1977) Chapter 2.

²⁷⁰ [2002] 4 SCR 245.

²⁷¹ See *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 para [93], [96] and [97]; see also Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011) at 78-9.

Fox-Decent is correct that fiduciaries such as trustees and guardians bear conflicting duties towards different beneficiaries and are able to resolve the conflict by treating them impartially. Whether critics of public fiduciary theory will accept Fox-Decent's argument remains to be seen. While the argument is compelling, it relies on an analogy with a trustee duty that is not, strictly, fiduciary. We accept that trustees may loyally serve the interests of competing beneficiaries, but other types of fiduciary bear a stricter duty to avoid duty-duty conflicts. For example, a lawyer must decline to act for one or both parties where their interests fundamentally conflict. While the public fiduciary duty more resembles the trustee-beneficiary relationship (and predates the modern taxonomy of fiduciary law), critics such as Glover tend to see fiduciary loyalty as being owed only to a single, identifiable person or group (such as an Indigenous nation, as in Canada) and not as a general characteristic of the government's relation to all its subjects. They characterise the problem as a 'duty-duty' problem.

Here I wish to explore briefly an alternative casting of the problem by viewing the multi-beneficiary problem not as a 'duty-duty' conflict but as a typical conflict of fiduciary duty with personal interest. This has the advantage that, so long as I can identify a personal interest in the arbitrary or partial treatment of some beneficiaries, the duty-interest conflict that so presents is easier to solve. 'Interest-duty' conflicts present themselves to government administrators regularly, superficially in the form of 'duty-duty' conflicts. Special-interest politics, sectionalism, pork-barrelling and low-level corruption represent some of the major failures of modern democratic practice. I would go so far as to argue that this represents an endemic institutional flaw in the democratic model. The idea of representative government presupposes self-interested electors. Through dialogue between their elected representatives, electors' competing interests distil and condense into something fairly described as the common good. However, various distortions can enter this process and pervert its outcome. Election cycles are short and electors typically poorly informed. Certain electorates are virtually uncontested while others are highly marginal. Some interests are well organised and ably represented, sometimes with professional lobbyists, while others are atomised and marginalised.

Because of these features, it is distinctly in the elected representative's *personal* interest in election and re-election to pander to those sectional interests that will most likely assist his or her chances of the same. A government may reward its electors by fulfilling electoral promises, for example, but only where doing so is defensible by reference to common as well as sectional goods.²⁷² As governors have a duty to govern for the benefit of all, but an interest to pander to sectional interests, conflicts of duty and duty towards different sections of the public manifest in conflicts of interest and duty as well. Approaching the fiduciary duty of loyalty in this way justifies utilising the fiduciary framework in the public setting despite the multi-beneficiary problem.

b) The Democratic Objection

Another objection is that viewing government as exercising power *on behalf* of the people implies disunity between the government and the people. This might be said to conflict with the principle of government 'for the people by the people', one of the chief virtues of the social contract framework. This objection only makes sense when based on a radical, Rousseauian conception of 'democracy' in which perfect union between the people and its government is asserted. It makes no sense within a Lockean framework. It is true that Locke does not ascribe to the 'double contract' doctrine of the German natural law social contract theorists, but he does posit a transfer of legal authority from the people to a government that separates from its subjects. (This was recognised, for example, by James Madison when he argued for competing power centres in government to check the private ambitions of those individuals that control them.)²⁷³ The principle of popular sovereignty is in fact maintained by the fiduciary principle despite the disunity between the subjects and their government because the transfer of authority is limited and revocable in a way that Rousseauian democratic will is not. Further, insisting on an ideal unity between government and people ignores the very obvious problem that fiduciary theory seeks to address: the separation of ownership and control. Governmental actors and

²⁷² Gino Dal Pont explores the ethical aspects of election campaign politics with reference to fiduciary law in Gino Dal Pont, "An Ethical Framework for Governmental Responsibility to the Electorate" (1994) 10 *Queensland University of Technology Law Journal* 1.

²⁷³ See James Madison, "Federalist No. 10" in Alexander Hamilton, James Madison and John Jay (Jacob E. Cooke ed.), *The Federalist* (Wesleyan University Press 1961) at 56.

institutions *do* have interests separate from those they govern, and *do* have incentives to mismanage the powers and assets they administer. Oversight of these incentives are themselves a second-order collective action problem. This is one of the enduring problems of political philosophy, and any theory of government that fails to account for it is seriously wanting.

A more compelling democracy-based objection is based on the Diceyan account of parliamentary sovereignty. A.V. Dicey presents the standard account of the English constitution in *Introduction to the Study of the Law of the Constitution*.²⁷⁴ According to the orthodox interpretation, the principle of parliamentary sovereignty places the majority of elected legislators above constitutional institutions.²⁷⁵ Dicey himself declared that parliament is not, in a “legal point of view” a trustee for its constituents.²⁷⁶ Various features of the rule of law depend on the majority’s adherence to convention, and clear statutory derogations from important individual rights and freedoms are not subject to judicial review. Of course in Australia this doctrine is modified by the fact of a written constitution and the doctrine of judicial review,²⁷⁷ but in the absence of an express bill of rights or similar, the differences are smaller than they might otherwise be. If judicial review for breach of governmental fiduciary duty is held to be a consequence of the trust theory of government, it would appear that the sovereignty of Parliament has been violated. As Glover argues:

There is a risk the law’s integrity may be endangered if public officers are held to owe fiduciary duties to the public. First, parliamentary sovereignty is violated – to the extent that the fiduciary duties are enforced contrary to the terms of the public officers’ empowering legislation. Some things are not ‘constitutionally cognisable’ by the courts. ‘[T]he grundnorm with which the courts must work... is the sovereignty of parliament.’ Rights to enforce fiduciary obligations are almost certainly not so ‘deeply rooted in our democratic system of government and the common law as to be a basis for overturning statute law.’²⁷⁸

²⁷⁴ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th Ed., MacMillan 1959).

²⁷⁵ Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001) at 13.

²⁷⁶ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th Ed., MacMillan 1959) at 75.

²⁷⁷ See *Marbury v Madison*, 15 US 137 (1803); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

²⁷⁸ John Glover, “Public Officials, Public Trusts and Fiduciary Duties” in Ken Coghill, Charles Sampford and Tim Smith, *Fiduciary Duty and the Atmospheric Trust* (Federation Press 2012) at 77-8,

But this objection is based on an obvious misunderstanding of the fundamental nature of the fiduciary theory of government. The *Grundnorm* with which Parliament *and* the Courts must work is the sovereignty of the people. It is a notion of “simple and inexorable logic”:²⁷⁹ sovereign power resides in the people, and is devolved onto the executive, legislative and judicial institutions of government. To the extent that any organ of government holds an ounce of sovereignty, it holds it on trust for the people. Regardless of any Diceyan dichotomy between ‘legal’ and ‘political’ sovereignty, and whatever parliamentary sovereignty is taken to mean, “it cannot extinguish our sovereignty or the obligation of our parliamentarians to us.”²⁸⁰ Finn observes that Dicey’s view of Parliamentarians has, in fact, been roundly rejected in a series of Australian cases from 1875 that characterises MPs *precisely* as fiduciaries to the public.²⁸¹ Thus, where empowering legislation is enacted contrary to the terms of Parliament’s sovereign trust, that legislation must be reviewed by the appropriate branch of government (i.e. the Courts) acting as guardians of popular sovereignty, at least in its interpretative capacity. This approach is consistent with T.R.S. Allan’s argument for a different interpretation of Diceyan theory itself. As parliamentary sovereignty is a consequence of democracy, the rule of law limits the sovereignty of parliament to its purpose, and this limitation is enforced by the Courts.²⁸² (Althusius would characterise the Courts, perhaps, as ‘ephors’ to guard and enforce the trust held by the prince or assembly).²⁸³ Dicey thus leaves room for the dual sovereignty of Parliament and the Courts.

The final democracy-based objection to a fiduciary theory of government is that it is unnecessary as the ballot box provides ultimate accountability directly to the electorate. In private relations, consent can remedy what would otherwise be injurious

citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* [1989] 2 SCR 49 para [69] and *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

²⁷⁹ Paul Finn, “The Abuse of Public Power in Australia: Making Our Governors Our Servants” (1994) 5 *Public Law Review* 43 at 45.

²⁸⁰ Paul Finn, “The Abuse of Public Power in Australia: Making Our Governors Our Servants” (1994) 5 *Public Law Review* 43 at 45.

²⁸¹ *R v White* (1875) 13 SCR (NSW) L 322; *R v Boston* (1923) 33 CLR 386.

²⁸² See Trevor Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1993) at 12; Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001) at 25.

²⁸³ See Johannes Althusius (F.S. Carney trans.), *Politics* (Beacon Press 1964) Chapter XVIII “The Ephors and Their Duties”.

or a breach of faith. The fiduciary theory of governmental power is inconsistent with the ‘mandate’ given by electors at the ballot box. This is a totally ill-conceived objection, as the act of mandate-giving is what makes the fiduciary characterisation necessary. Imagine an individual giving an unlimited power of attorney every four years. Then assert, when his or her attorney acts in a self-interested manner, that the periodic renewal is an adequate remedy. Natelson observes that the mechanism of periodic election is insufficient to control the incentives for disloyalty borne by parliamentary representatives. “[O]ur law concedes very limited force to this argument in *private sector* relationships, such as incorporated and unincorporated associations, where managers are elected by those they regulate”²⁸⁴ and, it might be added, membership is more meaningfully voluntary. Even agents appointed directly by an employer are subject to fiduciary obligations and sanctions, not just to having their employment terminated. “Only in the public sector is it seriously contended that the ballot box is an adequate remedy for official malice, self-seeking, or incompetence.”²⁸⁵

The importance of a fiduciary character imputed to all representative relationships is born in by the following comments from Leib and Ponet:

There is... an eliminable gap between election and representation: the democratic institutions of representation control the relationships of representation but those relationships are not fully consensual ones. Ultimately, the relationships – even of the delegate form – have features of *discretion*, *trust*, and *vulnerability* built into them, which... are prototypically constitutive features of fiduciary relationships.²⁸⁶

It is precisely for this reason, as the same authors observe, that the very notion of representative government is properly understood as fiduciary. Whether construed as delegates, agents or trustees, political representatives are described using analogues of private fiduciaries. If there is indeed any mismatch with their essential role and private fiduciary law, as Glover contends, then the task would seem to develop a more appropriate and expressly public fiduciary law.

²⁸⁴ Robert G. Natelson, “The Government as Fiduciary: a Practical Demonstration from the Reign of Trajan” (2001) 35 *Richmond Law Review* 191 at 233.

²⁸⁵ Robert G. Natelson, “The Government as Fiduciary: a Practical Demonstration from the Reign of Trajan” (2001) 35 *Richmond Law Review* 191 at 233.

²⁸⁶ Ethan J. Leib and David L. Ponet, “Fiduciary Representation and Deliberative Engagement with Children” (2012) 20(2) *The Journal of Political Philosophy* 178 at 183.

c) *The Paternalism Objection*

A second objection to the fiduciary theory of government is that it treats subjects akin to children or wards that lack the competence to promote their own interests through the mechanism of consent. It thus threatens to unravel one of the main values of social contract theory, which prioritises and empowers the individual's political agency as a force constitutive of legitimate political authority. In short, it threatens the value of autonomy itself. If established, this is a serious criticism. However, as an objection to the fiduciary relationship between government and its subjects generally, it is without merit. The fiduciary relationship does not imply moral incapacity, inferiority or weakness, just factual vulnerability to another's unilateral administrative power and discretion. Of course, one will follow the other, but not always. Although many fiduciary relationships do, in fact, involve asymmetries of power and knowledge, in others (such as between a businessperson and his or her agent) the *fiduciary* may be the 'subordinate' party. Characterising a relationship as 'fiduciary' does not necessarily say anything about the capacity or agency of the parties, though it provides an excellent framework for normatising relationships that do, in fact, feature gross asymmetries in power and knowledge.

This noted, it is obvious that modern governments are more or less total in their relationship to the individual. Only self-imposed restraints on governmental power, mainly in the form of checks and balances *between* organs of the government, operate to protect the individual's rights. This is so especially in constitutional systems such as Australia which have very few enumerated constitutional rights. Individuals aggrieved with official action can go to see another official, such as an ombudsman, judge or commissioner. Very few individuals can meaningfully promote their own interests without the cooperation and self-restraint of government officials and institutions themselves. The longstanding proprietarian paradigm in Western political thought presupposes a degree of self-sufficiency that most people subject to governmental power have never possessed and do not possess today.²⁸⁷ One of my main concerns in this thesis has been the way in which consent theory assumes self-sufficiency counter-factually. Criticising its replacement, therefore, on the basis that it

²⁸⁷ See Hannah Pitkin, *Fortune is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli* (University of Chicago Press 1999) at 8.

assumes a level of dependence is somewhat perverse. There is nothing more disempowering or harmful as assuming a person to be free, treating him or her as if he or she were, when in fact he or she is not. Since at least the democratic reforms of the nineteenth century, Parliament is accepted to represent more than independent property holders. Many citizens are today dependent on their government for income, healthcare and other social services

Even if it is given some credence, the paternalism objection obviously applies differently to different individuals. Likewise, public fiduciary law posits different concrete duties towards different individuals insofar as a trustee will owe different concrete duties to differently situated beneficiaries. Where appropriate, the assumption of meaningful political agency within the relationship subsists. For those who lack the capacity for meaningful consent, fiduciary theory posits a relationship much more akin to a guardian and an infant or incapacitated ward, including a more discretionary power and a much stricter loyalty and accountability. For those subjects who could consent but choose not to, the fiduciary relationship would operate chiefly to protect their interests from being intentionally ignored or prejudiced by the fiduciary in favour of his or her more favoured subjects.

d) The Metaphor Objection

Even should all these objections be put aside, is the trust theory of government anything more than a metaphor? There is, certainly, an air of metaphor about it. And admittedly, a whole line of ‘political trust’ authorities support the notion that the fiduciary relation between a subject and his or her government is a trust merely in a ‘higher sense’ that cannot lead to legal consequences. In *Kinloch v Secretary of State for India in Counsel*²⁸⁸ the English House of Lords held that war booty captured and held ‘on trust’ for a group of soldiers by the Secretary of State was not the subject matter of a trust enforceable by the courts. This decision was based partly on construction of the remaining language of the Royal Warrant granting the money to the soldiers, and partly on a dichotomy drawn between trusts in the ‘lower’ and

²⁸⁸ (1882) 7 App Cas 619.

‘higher’ sense. This approach has been followed by a line of authorities holding ‘political’ trusts as unenforceable.²⁸⁹

There is, however, a difficulty with the notion of public fiduciary duties that the metaphor objection usefully highlights. A certain amount of vagueness and metaphor is necessary for the fiduciary notion to apply to the government of public affairs. On the other hand, if it is too vague, it loses the precision necessary to be enforceable and therefore anything more than metaphor.²⁹⁰ However, the metaphor objection proceeds from the assumption that the consequences of the public fiduciary doctrine include the full raft of rights ordinarily associated with a private fiduciary relationship such as between beneficiary and trustee. Some of these rights are clearly inappropriate to the governmental relationship. The metaphor objection starts from the wrong end of the question. Rather, we should begin by asking whether the governmental relationship is fiduciary, and then proceed to examine what implications are appropriate to draw from this *in the public setting*. The exact scope and content of every fiduciary duty is different, depending on the context and the nature of the parties: what is constant is the proscription of self-interested dealing in the administration of others’ affairs. It is obvious that not all of the “highly developed and technical institutions and rules” developed by the Courts of Equity will be appropriate to the public setting.²⁹¹ But some of them will be. The question, rather, is “how far the should be applied by way of analogy.”²⁹² Cutting off that enquiry by citing the most obviously inapplicable ones is a disingenuous approach to the matter.

Thus, the metaphor objection is not an objection to the ultimate enforceability of public fiduciary duties, but the expression of a blunt refusal to enforce them. If we adjusted our current institutions of official accountability to be more consistent with the ideal of public trust, the trust theory of government would certainly be more than a metaphor. The *private* trust was originally only a trust in the ‘higher sense’, until a

²⁸⁹ See for example *Tito v Wadell (No. 2)* [1977] Ch. 106; *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* [1984] 3 NSWLR 502; *Town Investments Ltd v Department of the Environment* [1978] AC 359; *Civilian War Claimants Association Ltd v The King* [1932] AC 14.

²⁹⁰ See James Coniff, “Burke and India: The Failure of the Theory of Trusteeship” (1993) 46(2) *Political Research Quarterly* 291 at 306.

²⁹¹ Kevin Ryan, “Comments” in Malcolm Cope, *Equity: Issues and Trends* (Federation Press 1995) at 154.

²⁹² Kevin Ryan, “Comments” in Malcolm Cope, *Equity: Issues and Trends* (Federation Press 1995) at 154.

certain chancellor decided to start enforcing ‘higher’ moral obligations that were non-binding at common law. It is well known that the courts of equity “turned what was originally an obligation on the conscience of the trustee [only] into as legally as binding an obligation as a duty imposed by common law or statute”.²⁹³

The value of the metaphor objection is to remind us that recognising the fiduciary character of governmental authority should not lead too directly to imposing private trustee duties and fiduciary obligations directly. The public fiduciary duty is more fundamental, and so necessarily more vague, than that. But the metaphor objection gives too little credit to the pervasive influence that the fiduciary theory can have not only on institutional design, but also public service ethics. And some of these might have more concrete ramifications, be it in increased judicial review, greater accountability for misfeasance in public office, enhanced freedom of access to information, or indeed a raft of other things. As Maitland remarks, there is a metaphor here. But, he continues, “I fancy that to a student of *Staatswissenschaft* [political science] legal metaphors should be of great interest, especially when they become the commonplaces of political debate.”²⁹⁴

The purpose of a metaphor is to make a complex idea simple to understand, ideally with so little conceptual distortion as possible. The metaphor objection tells us that, at least with regard to the *modern* fiduciary principle, there is a degree of distortion. But I contend there is less than in speaking about a social ‘contract’ or even ‘tacit consent’. Consent can just as easily be portrayed as a metaphor, and consent is even less amenable to enforcement in the Courts by a non-consenting subject. Not all duties are enforced by the Courts, but they are none the less duties for that. Parliament, for example, enforces the law and customs of Parliament that are not enforceable in the Courts. Of course consent theorists can hardly make the metaphor objection with any degree of sincerity. The social contract is a metaphor itself and is unenforceable except by the right to resistance (which in Locke depends on a trust metaphor). If the right to resistance is available to enforce the social contract, then it

²⁹³ John Gough, *John Locke’s Political Philosophy: Eight Studies* (Oxford University Press 1964) at 138.

²⁹⁴ F.W. Maitland, “Trust and Corporation” in F.W. Maitland (David Runciman and Magnus Ryan eds.), *State, Trust and Corporation* (Cambridge University Press 2003) 103.

must be available to enforce the social trust. If this is so, then the trust theory of government is more than an unenforceable metaphor, at least in this most fundamental sense.

4. The Theory Applied

a) Prima Facie Political Legitimacy

One of my chief concerns in Chapter 2 was with the internal coherence of liberal consent theory: most consent theory liberals hold as desirable forms of social organisation that are not consistent with the premises of consent theory. The first contribution of a fiduciary theory of public law, then, would be to justify contemporary constitutional arrangements in social, liberal democracies. Only if these arrangements are accepted as legitimate can the legitimacy of governmental interference with individual interests through welfare institutions, for example, be argued. In its application, the fiduciary theory of government suggests that a political order is legitimate if it faithfully pursues the interests of all those subject to its power without partiality or bias and according to a defensible account of the good. This is so even where that population includes those who cannot consent, such as children and the mentally impaired, those who have not consented, and those who will not consent, such as political dissidents and pre-colonial populations.

This would mean that the coercive governmental power over children and the mentally disabled, for example, is *prima facie* capable of legitimation. That is not to say that every interference with the parent-child relationship or assertion of government custody is legitimate. But in appropriate cases and where appropriately undertaken, such official actions may be legitimate. A government may assert authority to act in the interests of the child, perhaps interfering with the parental relationship of delinquent parents, provided it does in fact act in the best interests of the child. This explains something that most consent theorists, including Locke, take for granted. (It also provides a compelling argument why government interventions under the Stolen Generations policies, for example, were wrongful, as these

removals are now regarded as having been, subjectively and objectively, against the best interests of the children).²⁹⁵

In Australia, this would also mean that the extant political order can claim the sort of fundamental legitimacy it assumes in arbitrating land rights claims in its superior courts, balancing the rights of Indigenous Australians with those of colonial landholders, *provided* it can show itself to be doing so with the fiduciary loyalty (and the impartiality it implies) incumbent upon it. So, for example, the Australian government might have a greater claim to legitimate power over its Indigenous subjects than that of Malaysia, for example, in virtue of the fact that its ministers and courts have tended to act with greater (relative) integrity and impartiality towards their land rights claims.²⁹⁶

Because I have argued that the duty of loyalty translates to a duty of impartiality in the multi-beneficiary situation, it should be clear that this does not require a government to act in the partisan interest of one population. Rather, it requires it to balance competing claims according to a rational and defensible account of how the community's constituent parts fit together and with regard to their relevant needs. Consistent with my utilitarian approach, a situation is to be preferred in which overall happiness and good – including that arising from self-perceived autonomy – is to be preferred over all alternatives. The main task of government, on this interpretation, is to exclude all self-interested motives – encompassing the personal interest of government officials and the institutional interests of government organs – and all sources of bias against or towards one segment of the population.

b) Reform

So far, I have used the fiduciary theory of government to achieve an aim that consent theorists such as Simmons, for example, would regard as thoroughly conservative: I have used it to argue that extant liberal democratic constitutional orders *are* fundamentally legitimate. However, the real value of fiduciary public law lays in its

²⁹⁵ See Commonwealth of Australia, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Canberra 1997) at 216.

²⁹⁶ See for example Scott Guy, Barbara Ann Hocking and Jason Grant Allen, “Three Sorries and You’re In? Does the Prime Minister’s Statement in the Australian Federal Parliament Presage Federal Constitutional Recognition and Reparations?” (2009) 11 *Human Rights Review* 105 at 114.

potential as a guide for official conduct and reform. While I argued in Chapter 2 that the ideal of consent provides a very poor guide, I believe that the public fiduciary doctrine can do very well. Officials should regard themselves as trustees of the power they hold. This casts the subject as a beneficiary to powers and assets held on trust, entitled to expect loyalty, impartiality and perhaps even a degree of competence.

The question what fiduciary theory demands of constitutional reform will occupy a thesis in itself. Finn provides an overview of how contemporary governmental practice might be affected by the doctrine in his chapter “A Sovereign People: A Public Trust”.²⁹⁷ According to Finn, the fiduciary norm can be used to explain and evaluate doctrines of the common law such as Aboriginal sovereignty or the subject’s entitlement to reasons for administrative action. I believe, for example, that it would support a *prima facie* claim to reasons more extensive than under existing law. It can also inform the structure and practice of government, for example electoral practice, ministerial responsibility, anti-corruption, governmental secrecy and accountability. For example, it might suggest a different standard of proof to the criminal standard for the purposes of anti-corruption laws.²⁹⁸ As an expression to the principle of popular sovereignty, it provides the basis for institutions of Australian Westminster government such as representation, responsible government, federalism, the rule of law, and independence of the judiciary.²⁹⁹ At the least, when we see these institutions challenged by developments (for example privatisation and outsourcing), we should return to the fiduciary principle for guidance. More recently, Finn seems to have adjusted his earlier views about the practical implications of the fiduciary character of governmental power, particularly in light of the modern importance of statute.³⁰⁰ I would argue that the fiduciary principle should perhaps even apply to acts of Parliament, for example as a basis of judicial review with the courts standing as a sort of ‘ephor’ (to borrow from Althusius) or guardian of the ‘fiduciary constitution’.

²⁹⁷ Paul Finn, “A Sovereign People: A Public Trust” in P.D. Finn (ed.), *Essays on Law and Government Volume One: Principles and Values* (Law Book Company 1995).

²⁹⁸ See for example the argument that impeachment for ‘high crimes and misdemeanours’ in the United States Constitution was intended to utilize a fiduciary standard in E. Mabry Rogers and Stephen B. Young, “Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanours Implies a Fiduciary Standard” (1975) 63 *Georgetown Law Journal* 1025.

²⁹⁹ Paul Finn, “A Sovereign People: A Forgotten Trust” in P.D. Finn (ed.), *Essays on Law and Government Volume One: Principles and Values* (Law Book Company 1995) at 21.

³⁰⁰ See Paul Finn, “Public Trusts, Public Fiduciaries” (2010) 38 *Federal Law Review* 335.

Either way, its importance as a foundational principle of our constitutional tradition is unaffected. It is in this respect, and particularly the public fiduciary doctrine's justificatory potential, that the forgotten public trust doctrine should be revived.

c) The Impartial Benevolent Spectator as Fiduciary

The first two Chapters of this thesis were aimed at criticising the consent theory of political legitimacy. Once voluntarism is rejected as the basis of legitimate political power, it falls to appoint another basis, and I have advocated the utilitarian principle. I believe that utilitarianism is a compelling alternative to consent theory based first on consent theory's inconsistency with its own premises, and secondly on its impracticality as a standard to guide governmental conduct. In part, the fiduciary gloss I would put on classical utilitarianism is designed to bolster it against non-consent-based challenges, for example from a Rawlsian theory of justice. It could be argued that a Rawlsian conception of justice should guide a government's administration of its fiduciary powers, just as it could be argued that a government's role is to hold and enforce our natural rights and duties as a loyal trustee. But here in this final subsection, I wish to use the fiduciary notion I have argued is essential to understanding the nature and role of legitimate government to support a utilitarian conception of justice.

One of Rawls' main criticisms of utilitarianism is that it fails to take seriously the differences between persons.³⁰¹ The utilitarian 'impartial benevolent spectator' of classical utilitarianism is, according to Rawls, conceived as an ideal individual person. By the power of sympathetic imagination, this idealised chooser must decide what will satisfy the greatest number of rational desires for the greatest number of people subject to its choice, thus satisfying the utilitarian happiness principle. As this idealises the choices, preferences and desires of a whole society into the individual choice of one idealised person, this fails to take seriously the distinction between persons. Rawls proposes the hypothetical choice situation in the 'original position' as an alternative dialectic to determine what is just. This dialectic, in contrast to the impartial benevolent spectator, assumes the participation of different persons with different preferences and interests.

³⁰¹ John Rawls, *A Theory of Justice* (Belknap Press 1974) at 27.

The reality, however, is that decisions within a constituted polity are generally taken by one person, or a small group of persons within an institution, on behalf of many. Whether a philosopher (or government official) imagines him or herself to be an idealised spectator or an idealised group of participants, decision-making in both models requires imaginative speculation. For decision-makers in this position, asking what an idealised chooser might do in empirical circumstances to promote the welfare of all is arguably a more tangible and therefore appropriate standard of justice than asking what an idealised *group* of choosers would do in idealised circumstances to promote the notion of justice as fairness. What we are looking for is, after all, a guide for official conduct in the day to day business of government and public administration. In this, viewing officials as fiduciaries bound to promote the happiness principle according to the impartial judgment of a benevolent administrator is not an inappropriate standard of justice at all.

Egalitarians such as Rawls are typically concerned by the apparent lack of concern that utilitarianism affords the interests of the worst off individuals in society. One of the objections to Benthamite utilitarianism is that it may be used to justify absolute governmental power over individuals and interference with the fundamental interests of the few to benefit the many. Utilitarians, on the other hand, are concerned with egalitarians' neglect of overall welfare considerations. Rawls' principles of justice as fairness, for example, do not permit the achievement of large social gains if they come at even a small cost to the worst-off.³⁰² Perhaps the greatest contribution of fiduciary law to utilitarian theory is that it might be used to achieve a *via media* between these positions, by maintaining a utilitarian focus on social welfare while according individual interests adequate importance. It might be used, for example, to incorporate a right of resistance into utilitarian theory. Subjects might legitimately resist a government wherever its measures are actually destructive of utility, are destructive of the fundamental interests of its subjects, or are biased or partial.

Conclusion

The purpose of the preceding Sections has been to introduce, contextualise and defend the notion that fiduciary-type duties of loyalty to public purposes inhere in the

³⁰² See for example Chandran Kukathas and Philip Pettit, *Rawls: A Theory of Justice and its Critics* (Stanford University Press 1990) at 43.

governmental relation. If this is accepted, it follows that the fiduciary norm may provide a working standard for the role of impartial benevolent spectator which utilitarians in the Benthamite and Millsian tradition posit for government. Adopted as an interpretative approach, at least, this would reunite the current institutions of administrative law with their doctrinal basis, in which fiduciary-analogue duties of loyalty and impartiality were accepted as incumbent upon government actors whose implicit goal was to promote some teleological conception of social utility. As consent theory fails, in my view, either to legitimate or normalise desirable government institutions and practice, the utilitarian approach to legitimacy is to be preferred. By marrying Locke and Mill, as it were, I believe that a compelling and coherent theory of government can be revitalised and applied to the contemporary challenges facing liberal democracy. Such challenges include environmental management, internal and international security, management of the social welfare system and management of the increasingly debt-burdened national fisc. As Finn observed some two decades ago:

[L]egal, constitutional and political thought in this century in particular has not made the adaptations necessary to enable us to use ‘the public trust’, or for that matter any other normative idea, in a principled way to explain and justify the standards we may now wish to demand of officials... [W]e simply react ad hoc to remedy perceived ills – a register of interests here, a new criminal offence there – without addressing their place, their aptness, in our constitutional and governmental fabric.³⁰³

When some of the basic elements in that fabric are currently being undermined, it serves best to go back to the first principles that underlie it and reinforce them. My purpose in this Chapter has been to establish that a utilitarian principle of legitimacy enhanced by a fiduciary standard of loyalty provides the *Leitprinzip* of government.

³⁰³ Paul Finn, “Integrity in Government” (1992) 3 *Public Law Review* 243 at 245.

CONCLUSION

This thesis has sought to prove that consent is an inadequate framework for addressing the problem of political legitimacy and answering the question of political obedience. In the first Chapter I attempted to develop an account of consent that could genuinely protect individual autonomy in social interactions. This new definition turned on the element of meaningful choice as a discrete and necessary condition of valid consent. Applied to the question of political relations, this proved however to be too demanding a standard. In Chapter 2 I then attempted to show that consent as a touchstone of political legitimacy is too stringent for application in any realistically conceivable society, leaving us in some state of anarchy with a hopelessly ideal standard to guide us, or we must compromise the premises of the theory itself to accommodate desirable features of empirical liberal democratic political order.

As a result I have sought to argue that a utilitarian framework should be adopted to address the problem of political legitimacy. A government is legitimate insofar as it maximises the happiness of those subject to its actions. More importantly, I have sought to add a gloss to the classical utilitarian doctrine which is the addition of a fiduciary duty incumbent on governors to pursue the happiness principle with fiduciary loyalty. This, I believe, can address a common objection to utilitarianism that the good of the many is to be pursued even at great cost to one individual. The notion that government owes each individual a fiduciary duty may provide an alternative conception of the impartiality doctrine that would not allow the interests of one to be sacrificed so arbitrarily to the good of the rest. At the same time, this approach might help to maintain an adequate focus on social goods, which remain the chief end of social organisation.

The teleological approach inherent in a utilitarian theory of legitimacy brings us back into a neglected school of political thought. The fiduciary doctrine and its cognates have long given expression to the notion that governmental powers should be limited to the rational pursuit of legitimate ends, as defined by the interests of those subject to them. Where those powers are used to pursue ends that are not legitimate (or, I would argue, used irrationally or inappropriately even in the pursuit of legitimate ends), the trust between ruler and ruled is broken and claims to legitimacy and obedience forfeited.

The proposition that a general fiduciary relationship inheres between government and subject is not widely accepted today. One of my chief aims in this thesis was to prove that one exists, and that this doctrine has animated some of the most important developments in Anglo-American constitutionalism. Taken as the premise of a theory of governmental authority, this will have wide-ranging impact on a wide range of legal doctrines, political practices and administrative institutions. What I have not sought to achieve in this thesis is to present a fully developed account of this theory. My engagement with utilitarian theory has been somewhat superficial, and the exact scope of the fiduciary relationship I am proposing in particular instances left undefined. Nor have I attempted to explore the implications of the theory but in passing.

That is the subject matter of a subsequent investigation. In particular I believe my approach can shed new light on the questions of Crown-Indigenous fiduciary duties, the scope of judicial review of acts of Parliament, the administration of public resources and their revenues (for example sovereign wealth funds), the privatisation and outsourcing of inherently governmental functions, intergenerational equity in environmental management, to name a few. What I believe most commends the fiduciary approach is that it makes a body of legal principle available which, by way of analogy, might be applied to certain questions of public administration. This would provide a standard of conduct, and in appropriate cases a mode of accountability, that aligns better with citizen expectations of official behaviour than the extant administrative law regime. Those affected by administrative decisions, in my experience, find the administrative law generally disappointing. On the other hand, the standard of conduct the expect of official decision-makers closely resembles that which one might expect of a 'trustee', broadly construed.

By the same token, public fiduciary law might give officials a more practical standard against which to make decisions and evaluate their own behaviour. Officials are routinely asked to exercise judgment, often discretionary, that affects the fundamental interests of those subject to their decision. In this, they must be guided by a theory of justice, at the latest when the provisions of the relevant legislation fall to be interpreted. I believe that a utilitarian public fiduciary ethic provides the best standard for official decisions of all sorts. That is to say, an official should ask him or herself

what an impartial and benevolent person would decide so as to maximise the happiness of those affected by the decision, with particular (though still impartial) regard to particular individuals or groups where appropriate. The first step in such a person's reasoning should, I believe, be to take cognisance of the fact that he or she exercises powers and administers assets that do not belong to him or her, powers and assets that belong to those whom he or she governs. Personal interests and biases are probably the chief malady of good administration, followed by complacency and incompetence. The chief task therefore of a theory of government must be to eliminate these vices from official conduct. The fiduciary theory of government suggests that a public officer should identify those to whom he or she owes a duty of loyalty, identify any conflicting interests between them, and then take the decision which best balances them commensurate with the duty of loyalty owed to all.