The Egalitarian constitution: modern identity in three moral values

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Chapter 7: What is it like to be consensual?

Thomas Hobbes was the first to formalize the notion that only consensual obligations morally obligate. He says there is: '[n]o obligation on any man which ariseth not from some act of his own'.[1] Saying that obligation is based on/in consent includes duty for Hobbes. Said differently: they come together once one exits the *amoral* state of nature.[2] In the Hobbesian state of nature there is no good or bad, right or wrong, just aversion and attraction. After entering the pact with others, a moral necessity begins to unravel from the simple *do ut des* of the pact. Within it is included the moral obligation to do or refrain from doing such-and-such, so long as others agree to do or refrain from doing the same. This has been taken to mean my obligations are my own creation, arising ultimately from my consent, and after consent erects the pact, a moral necessity attaches to the original and subsequent decisions: I consent both to be active in consensual relations and to the content of such relations. True, Hobbes was offering a much less egalitarian reading of the facts, for one is compelled to play along with the pact not only by self-interest rightly understood but mostly by fear of violent death. Even if that reading of what came to be called 'social contract' was dropped by later contractarians, still the new prejudice of consensualism is fathered by Hobbes. It will define an age.

Like Luther before him Hobbes accepted the nominalist critique of scholastic realism and the ontological individualism that was central to nominalism.[3] This unites Hobbes, Locke, political philosophers of the Enlightenment, all the way to John Rawls and his followers today. All of them find the roots of political order as well as the motive for political obligation in a social contract – an agreement, either overt or implied, to be bound by principles to which all reasonable citizens can assent. Any breach does violence not only to the other but also – and most importantly for a philosophy based in self-interest – to the self. It is a repudiation of a well-grounded rational choice, where rationality is indexed to the utility of the individual. For Hobbes, however, is more direct. One is 'reasonable' strictly speaking insofar as one is a human animal that can calculate how to stop fear and pain by consensual relations for protection. Something closer to guile or cunning than to reason as a 'higher power'. As we have become modern we have become 'Hobbesian'; his philosophy has been so digested into the lives

[1] Hobbes, *Leviathan* (1651), XXI.

[2] *Ibid.*

[3] Michael Allen Gillespie, *The Theological Origins of Modernity.* (2009), 249-250.

of corporate and natural persons, that no one need anymore even defend the positions he teaches. His books don't need to be read as part of a secular liturgy in order for moderns to continue to practice the virtues he teaches.

There is a deep truth in contractarian theories: consent is constitutive of any society that could properly be called human. Obligations, particularly moral obligations, are as well. Depending on the type of society and the stage of development, a varying degree of such (moral) obligations might result from consensual choices. These, too, are present everywhere that humans are. Contract is the universal formal manifestation of these human promissory powers in all societies. The fact that contract is a nearly universal legal phenomenon goes a long way in illustrating the ubiquity of consensual obligations and suggests their necessity for the organization of creatures that are only weakly determined by instinct, and this need much direction either heteronomous or autonomous. Not all contracts are consensual, properly speaking, but any contractual determination of obligation could have otherwise been non-consensually determined. Where contract *per se* does not exist legally – either because the society is primitive or because the area of human life is too private – there are nevertheless promises, both personal and public, to which one is held responsible, that is, obligated socially and usually also morally, based on one's word. Whereas all of these social realities vary greatly in prevalence and import from society to society, culture to culture, age to age, and even person to person, the underlying natures remain fixed and universal.

Specifically, the relative importance of consent and, *a fortiori*, its importance in determining one's basic obligations, does not change what consent, obligation, or consensual obligations themselves are. Just as 'sovereignty' when understood as, for instance, 'a will that cannot be voided legally by another human will', in Pufendorf's phrase, exists in both an absolute monarchy and a democratic republic, even as the areas of life that are subject to that sovereignty wax and wane based on the way it is held, and over what it is held. So, too, goes it with consensual obligation.

As we shall see, moderns routinely reify obligations that are consensual, and consequently shy away from most that are non-consensual, which are not only *not* thought to be real, but are also degraded into historical accidents with terms like 'traditions' or 'cultural practices'. 'Non-consensual' itself has become a pejorative, a by-word often for some violence against a person's will. In many contexts 'non-consensual' loses its plain descriptiveness and becomes a normative charge that wrong was done for no other reason than

because something was: 'against my will' or done 'without asking me (and gaining permission)'.

The first part of the chapter explains what obligations are, beginning with a thought experiment about the preconditions of consensualism. The second part describes the increasing role of consensual obligations in modern moral life and self-understanding. I then explain how this provides a moral foundation and justification for political rule, and within such a realm, law-abiding behaviour of modern persons.

Thought Experiment: Self(less)-determination

Imagine a small group of New Age religious adherents immigrate to your country from California. They number not more than one thousand persons in all. This cult, which calls itself *iNo* (pronounced 'eye no'), rejects written texts as unnatural, including all that is written on screens. They profess to use texts, numerals, or symbolic representation only insofar as necessary for the survival of their community. Mostly, then, they begrudgingly become literate and numerate to the minimum levels merely as a concession to being allowed to persist. *iNo* asks its members to focus on action over contemplation, deeds over words, and community over self.

Texts are forbidden because they are both idolatrous and distracting. *iNo* believes that texts weaken both the mind and the moral character. Socrates and Jesus, the Buddha and Zarathustra: none wrote down their words for posterity; they, rather, spoke them out to their communities. The errors came when they were transmuted into written words, rather than imitated as deeds. *iNo* also forbids contemplation or quiet thought. One must express everything on her mind directly. Ideally, one should translate it into useful action or activity. Pantomime is their most popular pastime, which is always to be done in the presence of another. For these reasons, no one is ever to be left alone, whether waking, sleeping, birthing, bathing, pooing, or dying.

Like many progressive movements, *iNo* attempts to accomplish its goals, in part, by controlling the speech of its members. First person singular pronouns are only to be used for necessities. 'Inner life' is a temple of man, a superstition, another idol, a distracting ruin of Western metaphysics that remains in us. They add, following Foucault, inner life pretends to be our real self. But the external world is the temple of god, they believe, the temple of divine action through the body. Focussing on a linguistic construct like 'I' or

'you' only serves to involve everyone in the worship of our own illusory creations.

Such a stringent way of life of progressive enforced-poverty would be unsustainable without vast material resources. Their founder made her money in technology, founding the feminist technology firm *Peach*, and she has invested her income in a sovereign fund that now contains seventy billion dollars. The adherents have enough money to hire people to take care of all their daily needs, read to them, translate for them, all while they spend their time producing useful things like baskets and basketballs, hampers and hammocks. All necessary activity and relations with the state are paid for and accomplished by handlers; as is reading of texts and writing of necessary correspondences (literacy and numeracy being all but forbidden outside of its uses for labour-products). The sovereign fund will be able to support at least three generations of their descendants, even if they all stopped working today.

Would this be permitted as a form of education, religion, and way of life in any modern Western county? I imagine that it would not, and ultimately the argument against it would be that the children's 'autonomy' is impaired (using phrases like 'diminished life chances'), even though they have everything provided for them by a sovereign fund. As a result, they remain only functionally literate and semi-numerate; have no social use of personal indexical pronouns 'I', 'we' and 'me'; have no private space; and are forbidden from developing an 'inner life'.

Would 'equality' be able to defend this group's way of life and religion? Probably yes, it could in some way, if the 'freedom to determine one's own way of life' is appealed to as the content of equality. That use involves autonomy as self-direction, which could be used to guard against the forbiddance of *iNo*? But would that form of autonomy be more easily defended in terms of consensualism? Many fewer assumptions about the good and what constitutes a good life are required to defend consensualism. Rather than putting forward a theory of the self that is capable of, and best at, directing itself, one could more easily posit that it is not for us to lay obligations on others, that they should decide for themselves how they want to live. The conversation is then squarely about acceptable means. The need to seek consent will present many possibilities for getting around some of the excesses of the equality impulse. However, it also provides many ways around the good of the being at the heart of the egalitarian constitution: the sovereign self. Consensualism will show itself to betray autonomy.

The door to obligation

Looking to consent as the door to obligations tends to look for persons who would be able to consent. 'Adult human person' is the type – preferably literate and numerate, preferably individualist in her analysis of values and justice. Those anthropological assumptions allow 'self-interest' to be 'rightly understood' to exclude all sorts of heteronomous relations. Thus, say, servitude is *unlikely* to be chosen without even having explicitly to forbid it. The spontaneous construction of 'consentable' situations is imperative for this nomos to become a living virtue. However, without actually having a god's-eye view of the situation, the only way to *ensure* this is limiting in advance what is able to be subject of a consensual relation.

Voluntary slavery is often the spectre that emerges spontaneously in an extended discussion of consensualism. The paradoxes of willing what one cannot unwill, and having that will be respected – honoured even! – by one's political community, is one pole of a libertarian spectrum.[4] It sometimes also emerges in multicultural discourse within consensual nomos, when defenders of non-Western cultures assert that one is not to judge the choices of other cultures based on one's own standards – or a presumed universal standard, for that matter.[5] Who is to say that female genital mutilation or the euphemized version, 'female circumcision', is wrong?[6] Can't the subaltern speak for itself?[7] However, those who most strongly argue for consensual slavery (they would shudder to call it that), such as advocates for liberalized sex work, insist that the choice must be made by an 'informed adult'. The presumption is that shared by moderns at least since Pufendorf: if I have no master, then I am my own master. Whether one can even own oneself is not a settled question in modern philosophy; so, when self-ownership is denied, all the rights and privileges to control and dispose of one's property-in-oneself are nevertheless routinely granted. Yet, even if as John Stuart Mill teaches, we

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[4] The serious a libertarian position (thus anti-Rawlsian) is Robert Nozick, *Anarchy, State, and Utopia* (1974).

[5] There is a buffet of names for those that disagree with the multiculturalist position: 'Enlightenment fundamentalist', 'Eurocentric', 'ethnocentric', and just the straight accusation of 'racism'. Michael Walzer, *Spheres of Justice* (1983) and Alasdair MacIntyre, *Whose justice? Which rationality?* (1989) make non-multiculturalist arguments for tradition-based moral reasoning.

[6] It is almost *not* worth engaging philosophically with the point, except that it is everywhere in need of rebuttal. There is no philosophical defensible epistemology that seeks *truth* from the viewpoint either of 'nowhere' or of 'just here'. Truth is definitionally total. If one wants something else than truth, then the view from nowhere or the view from my front window will do. However, neither is commensurate with truth, which insofar as it is true obtains everywhere.

[7] Spivak, Gayatri Chakravarty. "Can the Subaltern Speak?" (2003 [1985]).

are each self-sovereigns, that might not imply the possibility either of slavery or suicide. Sovereigns of states cannot generally hand over their rights of rule to just anyone. Nor do they have *ius abutendi* over the state.[8]

It must be said that when consent is used as a justification for political rule, it is frequently *post facto* consent. This reveals something curious about consent's non-factual nature in all sorts of circumstances in which the moral permissibility of an act turns on whether one 'would have consented to it'. The moral unease that we have about imposing obligations on individuals may disappear if, when someone is later asked whether he would have consented, he says 'yes'. Or if it is the 'kind of thing anyone like him would find in his own interest.' This is the manner that both John Locke and John Rawls justify the social contract. But it is also the way in which standard law regarding wills and testaments handle disputes about funerary wishes when there are doubts: If the deceased practiced as a Buddhist all of his life, and did not indicate that he wished to have the Remonstrants inter him, then he will get a cremation from a Buddhist priest who is willing to perform it. In short, moderns agree on the authority for moral obligations in the life of the individual person. Duties are another matter, both for the ancients and the moderns, and it will do us good to distinguish between duty and obligation in the remaining analysis.

Obligation and duty

In English and other European languages, the words for obligation and duty are frequently used interchangeably. One could have an obligation to tell the truth, just as one had the duty to tell the truth. However, some recent philosophers rightly make a general distinction, at least in law, between obligations which are most often voluntary, and duties which need not be voluntary.[9] Civil law systems recognize a pre-legal 'duty of care' that can rarely be gotten around; they also recognize a large set of laws regarding obligations. But whereas duty excludes no person, one is only bound in obligation only when one *does some kind of thing* which could bring it about an obligation. This is nearly always voluntary (omission or commission). And it can only be ascribed to agents that could also be held responsible for actions: 'persons' under the law, rather than things or other non-personal beings, such as animals; or semi-personal beings, lacking some capacity for full personhood

[8] 'Can I be my own master?' is a question of Pufendorf's at *DING* 1061.

[9] See footnote 35, *supra* in Chapter 5.

either temporarily or permanently, such as minors, the severely infirm, mentally incapacitated, etc. Whether a person commits a delict by negligently driving his carriage through a market due to inattention, or willing contracts a marriage, he is presumed to have done these in some way voluntarily. This distinction assumed some level of consent contributing to obligations, and in that way shows itself to be downstream already from the modern consensualizing of obligations.

This conversation began in earnest in Plato's *Republic*, and its argument was substantially followed by Thucydides. Their focus was on justice. The just man was he who could 'see' his duty and then proceed to do it. That language replaced the customs and mores of the Homeric cycle wherein a different moral language is used than that of the 'just man'. The heroes, gods, and ordinary denizens of the various Greek *poleis* negotiated their separate obligations, which descended from different sources and relations. One might then have had a particular obligation to excel as a hero, or to observe an oracle, or to respect men of his own kind.[10] One might have been overtaken by a god, and now be at least obliged to follow that deity. With few universal duties—were there any?—and often conflicting obligations, there were conflicts. The Odysseus of the Homeric cycle, for instance, does not feel the need to work out which of his obligations are perfect and which are imperfect, and then prioritize them within a system of duties, each of which has ascending and descending importance. Said differently: obligation is a category of experience but not yet a category of rigorous cogitation for the very ancients.

As we approach Periclean Athens, and thus Hesiod, Solon, and Theognis, duty will be determined by the increased importance of 'justice'. All other considerations will pale in comparison. For instance, the great system of duties of piety and to *patria*, within which one found a place, had a status, and negotiated one's virtue—will be placed in brackets by the philosophers, and decimated by the mercenary equipollence of the Sophists. Some of those philosophers will evade the question, *What is justice?*, preferring to claim it does not exist; or that it is so simple as not to need elucidation; or that it is not fit to bother the time of a man who could be usefully employed in other things.[11]

We moderns have inherited the conversation about obligations and duties with its Greek philosophical rendering of justice and its Roman law

[10] Richard Dagger and David Lefkowitz, 'Political Obligation' (2014).

[11] *Ibid.*

formalism both about social institutions of justice and procedural approach to solving problems. This admixture has not become truly ours without Christian sincerity being added in good measure during the years that separate the fall of the Roman empire and the rediscovery of some forgotten sources of our culture by the humanists.

Taking up the cognitive approach to morality (rather than the conventional reception of traditional practices), moderns believe that we have perfect and imperfect obligations, based mostly on voluntary agreement or activity. Perfect obligations are moral claims on a person to perform some specific action, probably based on a prior action (including a promise) she has done which is understood to be the originator of the obligation. Imperfect obligations are those which tend to call one to repair a situation that she is morally wrapped up in. For instance, if one is involved in a car accident, the obligation to help others who are involved is hard to enumerate in perfect obligations. What are the specific actions that one *must* do or refrain from doing? Must one further endanger her life in order to help those who were also involved? What one cannot generally do is just walk away without moral censure. Even as the specific remedy is beyond general enumeration, there is still *something* required of the persons involved in the accident to assist. Perfect and imperfect duties are likewise received as part of the social and moral fabric. The paternal duty to feed one's children, and the general duty of charity, respectively reflect this perfect and imperfect distinction, present in all known civilized peoples of the world.

When thinking about these terms, the question is in how far they apply to the preconditions and conditions of contractarian thinking. Do we have, as Hobbes suggests, neither obligations nor duties in nature, only acquiring them in the pact for mutual protection? Or is there some basic duty that even Robinson Crusoe would find on his island, as Pufendorf would argue? The division made between duty and obligation seems to have very little influence on the debate about moral responsibility to obey the law. In part this is perhaps because both ordinary language and philosophy are imprecise about their uses, often using them interchangeable. Compare 'I have a duty to keep this promise' with 'He has an obligation to tell the truth'. Nevertheless, John Rawls argues that when citizens who find themselves in a reasonably just political society have a 'natural duty' to support its just institutions, but no general obligation to obey its laws. That duty would tend to require obedience

to the products of those institutions, the laws and regulations.[12] So, 'political obligation', as it is sometimes called, 'moral duty to obey the law' is derived from a more general duty.[13] This background helps to situate the terms a bit, and to indicate that while moderns have quarantined moral obligation away from all non-consensual considerations, moral duty might still be out in public. I argue later that the large role that duty plays in modern moral values is the psychological lynchpin without which the mechanism falls apart. Personal autonomy inserts itself into the egalitarian mind as the metaphysical foundation of that duty. It is a generalized need to respect individual persons, beginning with oneself. That is returned to necessarily later, after I detail the weakness of consent amongst ostensible equals ultimately to protect persons from others (including governments) as well as from themselves.

The authority of consent

All obligation appeals to some authority. The self is the final authority in consensual obligations. What that means is not wholly clear. Nevertheless, there could be another way to think about the grounding of the authority which does not deny that the final consulted authority is the individual person, but which explains why, as Leslie Green put it when commenting on Ronald Dworkin, 'consensual obligations may at base be grounded in an unmentioned but necessary general duty'. Ronald Dworkin places such duty at the base of any obligation: 'a duty to honour our responsibilities under social practices that define groups and attach special responsibilities to membership'.[14] The caveat: group members must 'think that their obligations are special, personal, and derive from a good faith interpretation of equal concern for the well-being of all its members'.[15] We see that here, instead of personal autonomy, universal equality is used to bolster the necessity for consensual obligations. The alter-conscience is always attempting to direct all the constituents of the egalitarian mind. As becomes clear later in this chapter, equality is not enough to protect persons from consenting to all sorts of evil.

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[12] John Rawls, *A Theory of Justice* (1999 [1971]), 97; Also of interest is Also: John Rawls, 'Legal Obligation and the Duty of Fair Play' (1964).

[13] Richard Dagger and David Lefkowitz, 'Political Obligation' (2014).

[14] Ronald Dworkin, *Law's Empire* (1986), 198.

[15] Leslie Green commenting on Ronald Dworkin, *Law's Empire*, 201, in Green, Leslie, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* (Winter 2012).

In ordinary language the idea of 'consent' implies a normative power to bind oneself, which is always the property of a person or group considered to have the moral powers, if sometimes only *in potentia*. Those powers include the ability to direct responsibility for action onto themselves either now, in the future, or in the past. 'Consent' is about decision-making capacities and ultimately involves decisions of permissibility of action that could otherwise violate the (moral) law of persons or property.[16] Consent also involves time. There is a 'whenness' about consent. Or, at least that is what is sought if someone says she did not consent to something. The question is about when it was or was not given. It always has to be construed to precede the activity that is consented to, even when that is not factually true, as with the social contract after the first generation, when the consent becomes implied by something as mundane as not willingly leaving a territory for a stretch of time.

Politically, 'consent of the people' is a common way to justify political rule, and in our day, a state monopoly on violence is routinely justified in juts that way. This serves for many theories as a test of legitimacy, 'it being argued that the state or government would have no right to direct a person's behaviour unless that person's consent to be governed had been given.'[17] Notwithstanding its late popularity, there is a broader tradition of seeking the assent of the people that is very old. Appian of Alexandria in his *The Wars of Spain* [xliv] says that whenever the Romans granted certain privileges, they added: 'This arrangement will stand so long as it is agreeable to the Senate and the Roman people'.[18] 'Agreeable' is here somewhere between assent and acquiescence. Although in some ways consensual or at least voluntary, two equal parties are not contracting for a relation of rule by one. Before the emergence of the modern value of consensualism, hierarchy, community, reason, and a number of other considerations ensured that consent played a smaller role in relations, and that when it did, it was nearly never between equals. The modern positing of universal equality pushes toward at least a *mythos* of consensual governance of, by, and for equals. In such a construal, the duty to obey the law in one's particular community is morally obligatory because one has consented to it.

[16] 'Consent' as: a noun is defined as 'agreement or permission that something should happen'; as a verb as 'to agree that something should be done'. A&C Black Dictionary of Law, 5th edition. P Collin ed (London 2007).

[17] 'Consent' in *The Concise Oxford Dictionary of Politics* (2009).

[18] Pufendorf *DING*, Bk. VIII, Ch. X, 1347.

As a concept consent is most often separated out from assent, acquiescence, submission, or a number of other terms for some sort of permissive attitude to activity.[19] Acquiescence or, more to the point, inward agreement, is what is meant. What is implied, but rarely spoken about is 'the attachment of an agent's will to a proposal, action, or outcome, such that the agent accepts (some share of the) responsibility for the consequences and/or legitimizes an action or state of affairs which, in the absence of consent, would lack legitimacy or legality.' In this way, consent changes the character of the activity that is present in the world. What otherwise would be sexual violence becomes kinky sexual relations; battery becomes boxing; theft becomes gift. It should be clear by now that although the model of consent is the individual natural person, groups and corporations and states likewise consent as one part of ordinary contract, no matter what they might get called in practice.[20]

Both in morals and in law illegitimate actions can be made licit with the consent of he who is likely to be harmed by them. But the whole illegality or immorality of the act can rarely be removed in some cases. There can be 'consensual victims'. And pleading in a court of law or morality that someone consented (and so there is no harm or crime) is not always a valid defence. That has been true always and everywhere for consensual harms, but particularly when the law or moral values in question are modern nomoi. Protections clearly derived from personal autonomy or universal equality often manifest themselves in law as consumer protection or anti-discrimination laws. Those frequently cannot be gotten round by consensualism. The law is paternalistic in this case on behalf of the persons of law whose liberty to consent in the future must be preserved. Onerous interest rates or unfair working conditions because of a racial difference would only perpetuate the inequalities of bargaining power and life outcomes between persons, thus preferring one group or conception of the good to others. It is understood that '[e]quality laws have traditionally been founded and legitimated in grounds that they further goals of State neutrality, individualism, and the promotion of autonomy'.[21] This was done, as we shall see, sometimes so that consensualism can preserve itself perpetually by outlawing non-consensualism of certain kinds. But it is more often personal autonomy that is brought in to curb the liberties of consensualism.

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[19] 'Consent', from *The Concise Oxford Dictionary of Politics* (2009), was used for parts of this paragraph.

[20] Pufendorf, *DING*, Bk. VIII, Ch. XI, 1350.

[21] S Fredman, *Discrimination Law* (2011), 14,15.

But w*hat* does one consent to? Sometimes, it is an action that I must perform in the future, or must refrain from performing. Or it is permission that something be done to me. It can be habitual, repeated, or one-off. There is a difference between 'I consent to do/say/arrive …' and 'I consent that … be permitted to …' which is as morally relevant as the difference between crimes of commission and omission. It also changes the moral character of remedies for wrong-doing, as we generally see a failure to act as more serious than failure to permit another to act. Compare a construction worker failing to show up for a job to a person not allowing a construction worker to complete a project. Obviously, these forms of consent are in some ways so different that it is hard to measure them on the same scale. It is both true that 'the whole of private law…is the law of consent', and the understatement that the word consent 'is not necessarily used in the same sense in all aspects of the law'.[22] Nevertheless, the point would seem to be sound that the consensual obligations that bind us more as moral obligations are those that require us to promise to act or refrain from acting, rather than those that permit another to act, in which we merely acquiesce to the action of another.

(Self-)knowledge and equity

As a concept, consent can involve a broad swathe of attitudes regarding permissibility of action. It can be anything from grudging acquiescence to enthusiastic agreement.[23] When considering the legitimizing force of consent this fact cannot be forgotten. Explicit and express consent has plausible legitimizing force. When there is an inference from action that something short of express or explicit consent is present, many difficulties arise. How does one know at which point full consent ends and something short of it begins? One answer is that anything short of active dissent can be construed as (tacit or implies) consent. The problem is not new in law or politics; neither is the 'quietist' solution. The old problem in political philosophy is of consent to a social contract that never expressly or explicitly happened historically. Since no such 'contract' or 'agreement' exists in fact, there was no time or place when it could have been consented to expressly—it lacks a 'whenness'. Locke recognizes this problem, and sees non-revolt and participation in the order that the agreement has formed as tacit consent, in

[22] Peter W. Young, *The Law of Consent* (1986), 7-9 implies that wildly differing views—'varied meanings'—obtain.

[23] 'Consent', in *The Concise Oxford Dictionary of Politics* (2009) was used for parts of this paragraph.

the way that those who continue to live by roads in some way consent to the risks of the traffic that passes by.[24] As a form of quasi-consent, this has not generally been interpreted as a satisfactory answer to the problem of the nature and causes of consent, either in politics or in private law, and especially not in personal relations. If I took the wrist watch of a guest at my house on a private island, and then argued that he forfeited it by the mere abiding on my island, there is little doubt that protests would be expected.

Regarding questions of knowledge and equity, since responsibility and legitimacy follow from consent in different settings, there has been much thought about the conditions in which consent may be given. Undue influence, coercion, duress, and other pressures on the will to decide outside of self-interest well understood, are considered in this light. We should remember that formally consent does not have to be free, but can be extorted.[25] It is unclear under modern nomos just how important consent 'freely given' is in *determining* obligations as well as determining the broader category of what is permissible. What would constitute unfreedom, and just how much liberty is needed for it to be considered a free choice, are open questions. Again, those relate to the open question of the doctrine of the free will, which is everywhere relied upon by moderns but insufficiently developed and had even been routinely denied by modern determinism of the natural science.

One way round this is philosophically problematic, but often convincing within narrow confines of choice theory. Pufendorf saw that: 'everyone is presumed to know what he wishes to do'.[26] This presumption serves not only as the ultimate as the basis of personal autonomy but also as a point of departure for modern human sciences such as classical economics.[27] All the more, most persons are assumed to be right in thinking they are well acquainted with what they actually want, and that which they want (to do) is also in their own in best interest. In debates about euthanasia, for instance,

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[24] John Locke, *Second Treatise*, sec. 119; Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979), 50ff (on tacit consent), 726ff (on modern 'total consent' [my term], wherein the law takes over in governing a relation according to status after initial consent is given. Atiyah sees this as a decline in consent from nineteenth-century consensualism; whereas I see it as a solidifying of the self-sovereign who stands behind the consent, whose word is law).

[25] Pufendorf, *DING*, Bk VI, CH. VIII, 1086. Patrick Atiyah, 'Economic Duress and the Overborne Will' (1982) 98 LQR 197, argues 'that it was wrong to use the phrase "coercion of the will" in the test for duress. Duress does not eliminate free choice, it just creates a choice between evils.'

[26] Pufendorf *DING*, Bk,. VII, Ch. VII, 1102.

[27] The *locus classicus* is George J. Stigler and Gary S. Becker. 'De Gustibus Non Est Disputandum'. *The American Economic Review*. Vol. 67, No. 2 (1977), 76-90.

the question for moderns usually concern whether we are to respect a person's wish to die, not whether we believe that dying is really the wish of the person, or whether dying is the best or even a good option for the person.[28]

For a long time in European philosophy, at least since Karl Marx, there has been a strand that openly considers desires that were ill-gotten to be artificial and inauthentic—especially those derived from heteronomous relations to market(ing) or society. Latter-day Marxists have played up notions such as 'false consciousness' and 'false needs'.[29] That participated in bolstering the Rousseauian cult and *cultus* of 'sincerity', with the converse accusation of 'inauthenticity' for the insincere in their preferences. One can be deceived about who one really is, and thus feel and act in a sort of 'bad faith' about what one wants and what is in one's own interest. (I explore this Rousseauian strand in the chapter below on personal autonomy.) However, neither Marx nor Rousseau dismiss the possibility that a properly formed person could be completely attuned to his own properly-understood self-interest, could be fully autonomous, and therefore fully free. That is the meaning of *amour de soi* in Rousseau, and perhaps the opposite of 'alienation' in Marx.[30] In choosing a way of life one wants to avoid self-deception as much as avoiding harming others. But one need not be authentic in order to consent. Said differently, one can consent to something one does not desire, for instance, for instrumental reasons. I choose to work not against my will but against my desire to do nothing instead, because I want money more. And that desire for money bears little relation to my 'true self' or 'authentic needs'. Alienation from one's true self might be one harm (or at least cost) of relying too much on consent for the organization of the moral life of equals. It certainly seems to permit market relations to a degree which Marx and Rousseau would condemn.

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[28] I thank Prof Rocco Buttiglione for this example from a private conversation.

[29] Marcuse, The *One-Dimensional Man* (1991 [1964]), 9, illustrates the point: 'We are again confronted with one of the most vexing aspects of advanced industrial civilisation: the rational character of its irrationality. Its productivity and efficiency, its capacity to increase and spread comforts, to turn waste into need, and destruction into construction, the extent to which this civilisation transforms the object world into an extension of man's mind and body makes the very notion of alienation questionable. The people recognise themselves in their commodities; they find their soul in their automobile, hi-fi set, split-level home, kitchen equipment. The very mechanism which ties the individual to his society has changed, and social control is anchored in the new needs which it has produced.'

[30] Joshua Cohen. *Rousseau: A Free Community of Equals* (2010)., 124-126.

For the moral certainty under consensualism that one is not, at the very least, manifestly harming another's self-understood interests, what is relied on is broadly speaking 'circumstances free from coercion or improper influence'. An asymmetry of knowledge between parties, or inadequate or insufficient knowledge on one or both sides can render influence improper, if not coercive. Adequate knowledge for the sort of decision that is being made is required, as well as sufficient knowledge of what the decision involves. Together those allow conditions in which 'informed consent' becomes possible. That is, 'consent given by a person who has the information required to give meaning to the attachment of his or her will to the proposal, action, or outcome.'[31]

After conditions for informed consent are met, the potential consenter is left to her own devices, and expected to do a full-faith analysis of things before choosing. But there is still a problem about choice. Like with autonomy, consent would seem to require a choice being actually possible. This is at times spoken of as a 'genuine choice'.[32] That need not be the language used, since the word choice already implies 'genuine' in the sense of there being more than one option, or at the very least the option to do such and such or to refrain from doing such and such. 'Genuine' is often being used further to indicate the need for 'circumstances free from coercion or improper influence'.

But there is a third sense of 'genuine' that tracks the meaning of 'authentic'. She who has the power of choice should be choosing what she believes to be her desired choice. It is not only that she should choose what is in her self-interest, rightly understood, but that as much as reasonably possible she desires the things that are in her interest. She should *feel* that those are the right thing for her to choose. Since her choice is then not only informed, but also formed by her 'true self', the metaphysical ground of being has now been brought to bear on the authority of the choice. How could it be doubted that this is the correct way to bind persons to promises? How could it be doubted that this is the one true source of moral obligations?

How can consent obligate?

Well, for one, it is ground made of sand. Since consent is given by a certain authority, can't it be withdrawn by that same authority? Moreover, isn't the

[31] 'Consent' from *The Concise Oxford Dictionary of Politics* (2009).

[32] *Ibid.*

ability to withdraw consent in fact essential to the perpetuation of consensualism? Otherwise, it could easily become a route to voluntary forms of personal servitude or despotic rule. In statecraft, the parallel testcase is whether a king can break his own oath, for example, in a pact that he has made. Pufendorf describes kings as being in a state of 'natural liberty', who can 'refuse to be obligated'; 'nor does he have to secure of the other a release from a thing which, of its own nature, is incapable of producing an obligation or right.'[33] Pufendorf later adds: 'no obligation could be contracted if every man could reserve to himself the right not to perform it, if he so chose.[34] Another way to ask the question, then, is: 'If everyone were a king, how could anyone be obligated?' It is said that 'the will' obligates. That is factually true according to modern values. But if the will remains unexplained, the assertion of its binding force either is a form of intellectual alchemy or it just names the problem and proceeds to push explanation off to another level of description.

In practice, consensual values function as a reinforcing cultural fact. As nomos and virtue, and ultimately as a moral value, they create conditions of obligation. A moral imperative emerges to stick by what one has agreed to, and a legal framework to enforce it, along with the reputation that one collects if he fails to abide by his word. Since consensualism is valued, it is also enforced, even upon oneself. The other nomoi participate in this as well, like back up laws of nature. For, autonomy and equality, as law-like practices of self-rule and fair treatment, are betrayed by not adhering to consensualism. Consensual obligations relate to what natural rights were founded upon, for instance: 'the defence and assertion of my safety, my property, and my rights', and rights belong to persons, those multifarious stations of autonomy.[35] Contract in the modern sense is the epitome of an instance in which there is a consensual obligation at work.

Natural liberty and natural equity stand behind consensualism, as I have suggested above. They also prove to be its weaknesses as an account of moral obligation. There is 'natural equity' under which commonly gambling debts fall; it relates to one's honour. When everyone is a prince, then one must show that the prince 'had obligated himself to pay it', and that that should trump his natural liberty not to pay.[36] The presumption of natural liberty in all, which provides also the background for universal equality and personal

[33] Pufendorf, *DING*, Bk. VIII, Ch. X, pp. 1342-3.
[34] *Ibid.,* p. 1344. *Cf.* Grotius Bk. II, Chap. XIV. 3.
[35] Pufendorf, *DING*, 1312.
[36] *Ibid.*, 1345. See Cicero *De Officiis*, Bk. II, xxiv.

autonomy, grants and removes the security of promissory powers. In two (or more) sided consensual obligations, *from which one can be released by another*, it also creates a very complex game theory approach by which one could get round obligations by promising certain things to certain persons in certain ways, and thus not really promising anything at all. It is patent that the presumption of liberty is necessary for modern values, but it does put each person both above and below the moral obligations that are necessary for life together. The paradox is that as authentic sovereigns, they are both able to loose themselves from obligations that are eventually not 'pleasing' to them; yet, they are also able *in principle*, to alienate even their own liberty from themselves.

Should 'the good' be understood as an authority here? Could it save the paradigm? Even the good under the auspices of self-interest rightly understood or 'the good as it is understood by the agent' might provide a manner to regulate what is otherwise only determinable by the will.[37] Again, in consensualist doctrine, any authority that is set up to check the will of the individual person is an imposition that must justify itself. Any justification that does not increase the consensualist consensus is an unwarranted imposition on the authority of the individual person. Personal autonomy and universal equality are both self-evidently in the service of greater consensualism and perpetual consensualism. Reason, the good, justice, or any other heteronomous consideration are manifestly not.

Remember that all of this sets out to moderate the alter-conscience, to tame equality by putting a gate in place at the door of the person. That gate is manned by she who would suffer when equality gets away with itself. However, the gatekeeper is not a reliable enough protection, neither against the egalitarian siege nor the vacillations of her understanding of her self-interest. Something more robust than formal equality and consensual governance is needed to make this egalitarian mind work as the head and conscience of an egalitarian constitution. Two obvious options are available: a deontological grounding that is argued to be prior to the self; or a context that so binds the possibilities of the egalitarian mind that it routinely works in the interest of the individual person. In such a case neither the alter-conscience nor the value of consensualism—nor especially the couple in

[37] If Aristotle is right that men only do what they perceive to be good (acting 'under the aspect of the good'), then it could work. The job of the legislature is then to train men in recognizing the good. If, however, Christians are correct that men do wickedness sometimes even when they know it to be bad for them or for others, then self-assessed goods are not necessarily a trustworthy guide.

concert—could hijack the life of the very persons that the egalitarian constitution is meant to benefit. Personal autonomy as a value purports to provide a deontological grounding. As a virtue, it provides the context of choice that makes one mind out of two otherwise disparate values. One chapter each follows, on personal autonomy as a value, 'to be an end in oneself' and as a virtue 'being self-sovereign'.

From status to contract

It has been said that society's movement from ancient to modern is marked by a change in social organization 'from status to contract'.[38] What could that mean for the moral life and personal identity of moderns? Although the *nature* of consensual obligations remains the same, the differences are marked between moderns and the ancients (and non-moderns, such as contemporary tribal societies in Afghanistan or Papua New Guinea). The extreme importance of consensual obligations to the experience of being a moral human, as well as being a legal agent – not to mention its political manifestations in liberal democracy ('consent of the people', the will of the majority) – make up a large part of what it is like to be modern. Very crudely, to be modern is to get to choose one's obligations; not to be modern is to have them *handed* to you. 'Modern' here is opposed to 'traditional'.

'To hand (on)' is literally what '*traditio*' means. To be modern is to prize and prefer consensual obligations over those that are handed to oneself, and wherever possible to swap ascriptive obligations for self-chosen ones, both personally and as a matter of social and political policy. Where that is technically impossible, obligations are to be defended in moral terms approaching consent, which is actually the conceit of most social contract theories. It should be 'as if' one consents to political rule when he does not revolt or rebel; similar justifications are used for ordinary obligations within a social-legal system. Two somewhat extended examples may serve to flesh out the caricatures that I have so far been appealing to, one of a world in which the most important obligations are consensual (cf. in social contract doctrine's imagining…), and another of a world of mostly non-consensual obligations. Those who find themselves on the side of the former would

[38] Maine, Henry J. S., *Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861). He makes more of a distinction between the uncivilized and the civilized, so that contract can already be seen replacing status in, for instance, Periclean Athens. However, the complete removal of all but a few universal statuses, and the contractualization of vast areas of human society, could be understood either as hyper-civilization or full modernity.

describe the difference as that between a world of freedom and one of duty. But as we shall see, it need not be so. Since the reader is almost certainly a modern person, she is probably favourable to the former and less favourable to the latter. So, I shall choose an example of the former that is a bit grotesque and that of the latter which is rhetorically voluptuous—thus, correcting for prejudice. For, we are not often good judges in the areas of life where we are eminently self-interested. Before the examples, a few more comments on the theme of this chapter.

Consent is about permissibility, and who gets to grant permission. It places the onus on the prospective doer of an act that affects other persons to have gained acceptance of the intended act *before* it can be completed *licitly*. The modern value motivating consensual relations is about consent in this sense. But it is also about much more than just granting formal and moral license to one's activity. It involves *who* gets to determine *the quality* of the activity, its utility. Consensual relations leave a very large part of human action in the realm of (moral) indifference. The determination of an act's or activity's quality, whether it be pleasing or painful, beneficial or harmful, good or bad, is determined by the person who is subjected to it, rather than by any account of the intrinsic goodness or badness of the actions. The amoralizing of large areas of human life is necessary if the assumption is that morality of an action begins and ends with consent. Else, moral obligation could be no respecter of consent.

Since under consensual rule as much of life as reasonably possible is meant to be determined by the person whom it most affects, consensualism then routinely turns to authenticity, or 'sincerity' as it used to be called, as an ultimate personal and then social arbiter of what any given person should do or be required to do.[39] In US Supreme Court cases, for instance, rather than an acceptable religious orthodoxy determining standing, phrases such as 'sincerely held religious belief' routinely are used.[40] The ideal, although not stated in the following phrase, is that permission to trespass beyond the boundary of the 'person'—however that boundary is defined in any given

[39] Charles Taylor, *The Ethics of Authenticity* (1992), especially, 'The Sources of Authenticity, 25-30. 'The ethic of authenticity is something relatively new and peculiar to modern culture. Born at the end of the eighteenth century, it builds on earlier forms of individualism, such as the individualism of disengaged rationality, pioneered by Descartes, where the demand is that each person responsibly think for [herself], or the political individualism of Locke, which sought to make the person and…her will prior to social obligation. …It is a child of the Romantic period, which was critical of disengaged rationality…', 24.

[40] *Cf. Burwell v. Hobby Lobby*, 573 US (2014).

culture[41]—can only be given by she who possesses what I bill 'authentic sovereignty'. The meaning of the phrase will be worked out in this chapter. My claim is that the moral value of consensualism *supports* authentic sovereignty of the person, but not that consensualism necessitates it. The doctrine of consensualism as a modern value can be summarized as: 'a moral obligation can only be acquired by agreement of the person whom it is to bind.' Ascription or inheritance of moral obligations is impermissible; neither does nature bind us to behave in predetermined ways because of, say, our sex or age or descent. What I am identifying as consensualism, others have referred to in part as 'ethical individualism'.[42] But I shall go further than they do in emphasizing the connection of arbitrary individual consent to the normative modern understanding of moral action.

Consensualism as value and virtue

If an adult resident, of native stock, of any modern city, say, Rome, Warsaw, Duisburg, Lisbon, London, or New York, was stopped and was asked 'Who are you?', we might expect the answer to include three parts and not much more: name, occupation, and citizenship. If the resident were asked to say more about himself, we might soon hear about her children, where she lives, the type of home she has, about her 'partner', and other things that flow downstream from her choices. Only later would we expect to hear about her parents. Certainly, nothing would tend to be said about her grandparents unbidden. Ancestors quite likely have nothing to do with her self-understanding.[43] Educational attainment, wealth, and career success would probably feature largely as part of her identity, for instance, whether she has

[41] There are substantial differences in what is counted as one's property: in some places one's reputation is closely associated with one's person in a way that only physical property could be elsewhere. *Cf.* libel laws in English law that famously heavily police reputation to US patent laws that protect one's property nearly four score after death.

[42] Ronald Dworkin says, '…so far as choices are to be made about the kind of life a person lives, … he is responsible for making those choices himself.' There is great permissibility in what is chosen, 'so long as that life has not been forced upon someone by the judgment of others that it is the right life for him to lead'. *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002), 6.

[43] Tocqueville saw this already in the America of the early nineteenth century: '…not only does democracy make every man forget his ancestors, but it hides his descendants, and separates his contemporaries from him; it throws him back upon himself alone, and threatens in the end to confine him entirely within the solitude of his own heart.' Tocqueville, *Democracy in America*, Vol. II, Sec. II, Ch. II (1899[1835/1840]).

university education, or was a small-business owner. She is probably not very religious, but if she is that may warrant mention, as it would be maintained mostly by a deliberate choice. And, although she may self-identify as a citizen of, say, Italy or Poland, it is just as likely that she would see this as incidental, and have chosen another affiliation or her primary occupation as constitutive of her identity. The same would obtain *mutatis mutandis* if the answers came from a man.

Now, imagine meeting a man on the streets of Geneva or Prague, Trieste or London, Oslo or Amsterdam circa 1600, and asking him who he is. Imagine that the city is within Christendom, and he is a native of it, being either Christian or Jew. His answer would probably include his name, religion, the political community or household of which he is a citizen or resident or servant. Next in order might be who his 'people' are: his family, probably favouring that of the father for identity, unless the mother was from nobler stock. At some point his occupation might get mentioned, depending what it is and how honourable it is. A mayor of the town, member of a religious order or of a guild, might find it very relevant. A shepherd, servant, or peasant might not—unless the house he serves in is honourable. There is literary evidence of much that would pass between the proverbial city dweller and the passer-by. *Don Quixote* by Cervantes is the uncanny, eponymous tale of the knight-errant and his squire Sancho Panza. Sancho is often portrayed as personifying decent peasant wisdom against the excesses of the erring knight. His prejudices for home, the Catholic Church, and inherited ways against all his master gleans from books of chivalry, indicates that he is serving as a foil for Don Quixote. He might also be serving as the narrative voice of a reasonable if incontinent man of his age. Whenever Sancho comes upon strangers he introduces himself in much of the way that I described above. He begins with his name, his service as a squire to his master, his Christian identity (which could have been more emphasized there than elsewhere because of the long presence of the Moors in Spain), his home town, and so on.

Notably, all of Sancho's identifiers involve webs of reciprocal duty, derived from moral or political, or social obligations, many of which are non-consensual or not fully consensual. Or, they were consensual upon entering, such as his service to Don Quixote, but cease to be consensual after the promise is made. Moral obligation is present in everything from the name (a baptismal name), his religion (conferred at the time of baptism and socially enforced), his employment (a consensual master-servant relation), his

residency (part of a fief or principality to which he is in some way bound to serve and cannot merely exit or renounce at will).[44]

Returning to the contemporary woman on a European city street: some may look at her answers in terms of 'individualization' that has occurred in modernity. That should not be downplayed. Individualization is, nevertheless, shorthand for many facts of self-understanding and social relations, values, and virtues. One such involves duties and obligations to others, where they come from, and how they relate to personal identity. If we imagine that they flow from certain self-understanding, so that an individualist, in Durkheim's words, 'organic' identity would produce or participate in duty or moral obligation differently than a more traditional, again in Durkheim's words, 'mechanistic' social organization, then we get one side of the picture.[45] We could also reverse our perspective, so that duty and obligation require the socialization, indoctrination, and enculturation of a compatible self-understanding—producing, variously, individualistic/organic and traditional/mechanistic identities. These are nearly never complete relational systems. Even under an individualist/organic self-understanding, mechanistic relations persist. But as one commentator put it, '[p]eople in organic associations do often feel obligations to other members, but we [now] normally seek an independent ground to justify them'[46]

For the individualist, the acquisition of obligations, and the duties that can be enumerated based on them, is not 'given' in in any way. It is neither a fact of birth, inheritance nor history; neither nature, reason, nor cosmological order. Neither is it divinely mandated, nor is it based on status. Moral obligations are either based on acquiescence to a request (in both cases either express or implied), or on active 'contractual' engagement in the world (one

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[44] Patricia Crone, *Pre-industrial societies: Anatomy of the Pre-Modern World* (2015 [1989]), esp., the introduction, 'What is a Complex Society?' and the chapter on 'Society and the Individual'.

[45] Both 'organic' and 'mechanistic' involve parts contributing to the whole that is their actual identity. Each has meant what contemporary thinkers mean by 'organic' at some point in intellectual history. In traditional societies there is a solidarity that is 'mechanical', wherein each part is similar to others in its class of parts (remember Gellner's tripartite division of society into *Plough, Sword, and Book*). This commonality of members within each segment, and the use of each segment to the other segments, holds society together. Modern societies exhibit organic solidarity, with highly specialized parts, functionally differentiated like the *essential* organs of a body. Durkheim, *The Division of Labor in Society* (2014 [1893]), Bk. 1, Chs. 2-3.

[46] Leslie Green, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* (Winter 2012); in this connection, *cf.* Christopher H. Wellman. 'Associative Allegiances and Political Obligations', *Social Theory and Practice* 23 (1997); A.J. Simmons 'Associative Political Obligations'. *Ethics* 106 (1996).

goes out and promises something, the promise is accepted, and thus a moral obligation arises); or they are tortuous, being based in some unforeseen or unforeseeable result of one's activity (if I run over your koala with my bike accidentally). We talk about both the acquiescence and the promissory powers in terms of 'consent', and the obligations that result from harm as tort or delict, the errors of negligence or omission. The philosophic position that tries to extend this form of relations in human life against ascriptivism is called 'consensualism'.

However, 'consent' or 'consensual' are not terms that most modern persons use to describe the world they want to live in, except perhaps in narrow conversations about sexual consent or contract law. 'Having a choice' or 'freedom', the 'right to vote', 'being heard', and other idiomatic phrases indicate what is sought without using the term. Some of those phrases carry along conceptions of equality or autonomy. All of them assume the decision should be taken by individual persons for whom the resulting activity might benefit of harm. It is generally thought that that very 'power of choice', which we call 'the will', should not be removed from the means of acquiring or exercising legal, civil, and personal obligations. But it understood to be necessary for the acquisition of moral obligation: without it there are no such obligations. In rejecting obligations and most duties that come from without, we enhance the power of man. As Burke says, 'men love to hear of their power, but have an extreme disrelish to be told of their duty. This is of course; because every duty is a limitation of some power.'[47] In this case, the power of choice would be curbed. Consensualism thus teaches that relations not founded on consent are *ipso facto* under suspicion of being founded on coercion.[48]

Consensualism provides the normal form of modern obligations. But there is also harm. In the law, the words used for this are delict or tort, which I return to below. Before the modern age it was understood that most obligations, especially moral obligations, arose simply from existing *as a particular person in a given place and time*. Contract or delict could add to or subtract from these obligations. But one's inherited identity and ascriptive obligations were intertwined. Modern human rights have returned us partially to this identity-obligation dyad, but in a general way. *All humans* inherit the obligation to relate (or refrain from relating) in certain ways *qua* human being,

[47] Edmund Burke, *An Appeal from the New to the Old Whigs* (1791), in 'The Tendency of Democracy to excess in the Exercise, and in the Desire, of Power'.

[48] Roger Scruton. *The Face of God* (2012), 64.

which might be better spoken of as a general duty. Nevertheless, in the two orders of obligations, the ancient tends toward ascription and inheritance, and the modern tends toward consensual acquisition plus generic duties as part of being human.

Law is the great non-consensual system that permeates both orders, if differently. As we became modern, there were increasing estrangements from the belief that law and moral obligation were regularly coterminous. Whereas only the Sophists had formerly taught the artificiality of the law[49], in the early modern age it became fashionable to posit that, 'the state, or polis, is nonessential: it owes its origin to a human decision, i.e., to a free contract, not to a necessity of some kind.'[50] A pre-political reality must lie behind our real world. This 'state of nature', whether portrayed in an optimistic light or a pessimistic shadow, is one wherein pure natural law is in force (Grotius, Pufendorf, Locke), or from which natural law can be derived (Hobbes, Rousseau). Having a rationalistic, pre-political natural law or law of nature to ground the order of society is very different from believing that the political community is 'natural'. Thus, for 'natural law thinkers' following Grotius, much of what is later decided in terms of the arrangement of social life is a matter indifference, namely, so long as the basic principles of natural law are neither betrayed nor rendered in principle impossible to follow. But note that society need not *ensure* that they are followed. This new foundation allows much more room for the input of the individuals who will make up society in determining what it consists in, including even their input in the original contract. In this light, Pufendorf sees two contracts, one for society, and then one for what sort of governance society will have. Consent becomes what is needed to originate and organize human social life. I belong to a society because I in some way 'want to'.

'Belonging', which for the ancients was always already present for persons in a community that was itself 'eternal', has disappeared.[51] Membership, as a claim on a person, has thus been supplanted by individual will. Membership includes various statuses, as we saw in the discussion of proportional equality above, and St Paul's usage of it in his corporeal theology of the Body of

[49] Heinrich Rommen, *The Natural Law* (1998 [1936]), 26.

[50] *Ibid.*

[51] Cf. Burke, A Vindication of Natural Society (1756) offers a defence. Burke mocks the conceit of contractarian thinkers: 'Society is indeed a contract...', he concedes, and quickly defines away as 'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'. So, not a contract at all. *Reflections on the Revolution in France* (1790), XX.

Christ. Those statuses relate to each other and gain identity through exchanges of honour, deference, service, and obedience. Even relations of enmity serve this function. But, ideally, such relations consist in friendship, kinship, as well as those between: man and woman, young and old, countryman and foreigner (often enough as host and guest), wife and husband, rational being and non-rational being, slave and master, freeman and freedman and slave, religious and secular, 'Greek' and barbarian, noble and common: all related through duty and obligation. Nature, history, and culture provide most of their content, and so they are wedded to the past on all accounts. Consensual relations work at the edges and sometimes between the ranks, and also fill out the actual lives of those who are related by status.

If relations are mostly contracted, the present remains more apropos to those concerned than the past does, and the personal more than the social. To see how little this affected the relations of the ancients, think of what Jason and Medea owe each other in Euripides's *Medea*? What do the heroes owe each other in Sophocles *Ajax*? Why? Status and membership dictate moral obligations in the first place, so that Medea's status as a foreigner and woman mean much more than they might under conditions of consensualism. Similarly, Ajax's nearness of relation to the other heroes, allowing for the intimacy that he betrayed by trying to kill them, must be taken in to account. He is not a man who simply did not meet the terms of an agreement, who thus should by general means be punished for the deeds under fair and impartial criminal law. Ajax betrayed the other heroes as only one of very near relations could have. It was a completely *partial* betrayal the punishment for which, if it is to be just, must fit the crime. Turning over both the nature of crime and the question of whether it is even criminal to the arbitration of individual will is not without its problems.

Could anyone consent to that?

Germany gave the world probably the most famous recent case involving the final frontier of consent. Armin Miewes was discovered to have killed another man and, before doing so, to have co-cannibalized the many organ of the 'victim'. For this he is affectionately known as *Der Metzgermeister*. The other cannibal present was the 'victim' himself. Did Mr Miewes commit murder? No, said he, it was consensual, and he had videotape evidence to prove it. They had made an agreement before the acts were committed. In fact, the second cannibal, Mr Brandes, had answered an advertisement placed by Mr Miewes for just such a dinner date. They had co-conspired. Or, so as not to

bias the point by using a pejorative, they had *contracted* with one another for certain privileges.[52] And, as we know '*pacta sunt servanda*'.

This is an example of consent involving permission to do something which would otherwise immediately constitute the worst kind of violence to life and limb, as the moral character of what was done seems to turn on whether it was 'consensual'.[53] The story becomes a murder when consent is absent. And there is a truth in this that even traditional societies understand. For instance, trespass, which is the general English term for tortuous crimes, 'is almost impossible to maintain if the "victim" has consented to what has happened.'[54] However, there are plenty of legal and moral ways to cross land that fall outside of express permission by the owner or controller of the land. Consensualism renders innocent what otherwise could not be done in any case, so that *something different actually happens*, morally, socially, legally, and personally. The will is law. If one owns his own body under conditions of 'equal freedom', and if Mr Brandes has 'self-sovereignty', being fully personally autonomous, it only makes sense – once the logic is followed unflinchingly – that he should be able, at least in principle, to consent to being cannibalized and killed. This would be done literally 'at his pleasure', as was once said about kings. As Waldron says, we are all aristocrats now.

And who are *we*, society, to say that it is wrong? Not sharing membership in a moral vision of the world with Messrs Mewes and Brandes, such as Lutheran Christianity was once in Germany, we all must suspend our judgment in the face of the truth that *de gustibus non est disputandum*.[55] To be really modern, we need to revert from shared moral status to the procedures of private contract. If we were ethicists of the particularly modern sort, we might even argue that the relation between the parties is a pact or private contract—self-legislation through natural promissory powers, as it were. The consent that the killer gave could even have, *a fortiori*, created a moral obligation to fulfil his promise: '*pacta sunt servanda*'. The promisor might even

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[52] A 2004 German case with a retrial, between 2005-06, in the federal court, resulting in life sentence for murder.

[53] I return to moral obligations below, some of which are still non-consensual, and consent cannot remove the duty of care and other obligations, even where sometimes an *ius abutendi* applies.

[54] Peter W. Young, *The Law of Consent*. (1986), 3.

[55] This phrase is often abused to mean that one cannot judge the taste of another. However, it seems to have meant that taste was something that we are not going to argue about, since all those with good taste know what the good and the best are, and those without it do not know anything at all. Discussing it is thus futile; it is a category mistake to think it is something that can even be disputed in anything like the way that a proposition concerning whether taxes should be 15 percent or 53 percent could be. This is a point I gleaned from Bas van Bommel.

be found guilty, at least in the court of conscience, if he does not punctiliously perform his promised acts. Strange as it may seem, when moral obligation *descends from consent*, there is nothing intrinsic to the process preventing such contracts. The side constraints are only what is still recognized as a universal duty. Those duties, under modern values, increasingly function merely to preserve the prerogatives of the individual person, including her life, so long as she wishes to have them preserved.

Now, this is far from the experience of most modern human beings – even modern Germans – in all but two aspects. First, as a modern man one is tempted to respond even to this cannibalistic wish (after initial revulsion) with, 'Well, if that is what he wanted…' A less gruesome example would suffice, say, doctor-assisted suicide of someone who is tired of living with a disease. Second, consent is the glue that is supposed to make moral obligation stick to choices.

Privatization of public law

This has resulted also in a privatization of the fundaments of public law. Furthermore, it is not only in private or personal dealings that consent has come into the foreground in modernity. A common way that we now individually and collectively justify the monopoly of violence held by liberal democratic governments is 'consent of the people' (cf. Rousseau). Whatever it may actually mean in practice is beside the point of our high valuation of it. The moral neutrality, or non-judgmentalism about what is chosen, and the exclusive focus on whether it was consensually, that is, *properly* chosen, is a mark of what it is like to be modern. Hence, the extreme example of a tasteless Teutonic choice.

Consensualism is meant to moderate the excesses of equality, exhibited by the alter-conscience. However, as will continue to be shown throughout the rest of this chapter, consensualism is not enough of an augmentation, especially regarding the public law. For instance, if consent becomes the end all of permissibility, then according to Hobbes the state cannot injure a citizen. He compares it to a master-slave relation, and a master cannot commit an injury against his slave.[56] Pufendorf sees the implications of Hobbes's argument as: 'whatever is done by the state is understood to be done with the citizen's consent; and of course it is a maxim that no injury is

[56] The position of Hobbes in *De Cive* viii, 7. 'Injury' is used in a technical sense, including what we now call 'harm'.

done him who is willing to receive it.'[57] The Mewes problem of contractual sovereignty might be rare in private law, but it stands at the heart of the justification of the monopoly of violence in the state.

There are conceptual ways round this, but all of the obvious ones involve returning an ancient concept to the table. In the extended form of passage just quoted, Pufendorf disagrees that injury only consist in the violation of pacts. He also says that there is a pact between the monarch and citizen which has extra-contractual moral considerations. But Pufendorf makes these claims by restoring a thick concept of 'duty' from the ancients to the early modern world. He is attempting to smuggle a duty-based ethic with implied ascriptive obligations into a contractarian framework. He even wishes to place duty logically prior to contracting. Once the dual social contracts are in place (the contract for mutual support, and the contract for the type of constitution), the will of citizens is subjected to that of the state, interpreted and limited by the end of the state. Before that, however, there is duty in nature which cannot be foregone by mere contractual powers. If the goal of contracting is to preserve one's life, that cannot be sacrificed for the sale of the contract. Or, as Pufendorf (after Grotius) says, 'in moral matters that thing is regarded as necessary which is required to obtain some end, and that cannot be done which prevents or destroys this end'.[58] He agrees with the tradition that 'no obligation to obedience arises unless another has a lawful power over me', and that an obligation 'is an intrinsic bond, so constraining the mind, that, if a man does not perform something, he is guilty of sin'.[59] It binds 'by the intrinsic demand of conscience'. But, notably, he does not say that obligations *only* descend from consent. They come from 'law', ultimately derived from duty to God, to oneself, and to fellow man, ascribed as obligations onto our being at or before birth.

Again and again, 'law', that is justly placed logically before man, will return to attempt to pull the consensualist trend back into the fold of natural moral obligations (What else is human rights law buy a law for personal autonomy?). However, it will ultimately only partially succeed once consensual moral obligations present unsolvable problems on their own terms, both in undoing autonomy (for, even slavery can be contracted) and in granting far too much power to political sovereigns on one side of a

[57] Pufendorf *DING,* 1103.

[58] *Ibid*., VIII, XI, 1352.

[59] *Ibid*., 1113.

contractual relation, thus rendering equality a moot point for achieving individual happiness.

Consensualism needs autonomy

Left to its own devices consensualism fails both to bring about more equality and to preserve the consenting person from (self-)harm. It cannot even preserve consensualism, for there are no external brakes against consenting to permanent non-consensual relations, which would almost always be inegalitarian as well. Finally, even the authority of obligating, which is seen to rest in the consent of the bound, dissipates when it is interrogated. First in is resolved into 'the will', and then into noting that can be a moral anchor. Consent has its uses for controlling the totalizing impulse of equality, instantiated as the alter-conscience. But it can do its work of moderating what is permissible only if it does not also have to be judge of what is permissible. Another place needs to be sought, another firmer value, that when active provides both the moral anchor and the content of the relations between equals, so as not neither to err on one side and betray equality nor to err on the other and to betray the self. Autonomy will serve as that axiological perfection and metaphysical anchor. Autonomy will also complete the egalitarian mind so that it can function amongst other minds in what can be called an egalitarian constitution.