

"Reply to Mr. Arnold's Comments on  
Political Authority and Consent"

I am grateful to Mr. Arnold for his comments on my 'Political Authority and Consent' (PA&C below). He points to some areas where this paper needs at the very least supplementation.

Preliminary Clarification

It is true I say 'very little about consent or how real it must be' in PA&C. But I do mention in note 19 that I deal with the topic in my 'In Defence of the Consent Theory of Political Obligation and Authority' (Ethics, April 1977). I claim there that the consent which creates political obligation and authority consists in acceptance of membership in the state. I also claim that this acceptance of membership must be free from such 'defeating conditions' as coercion and deception.

The above makes clear that my arguments in PA&C are meant to be arguments for what Mr. Arnold calls the strong consent thesis (that is: if P is under political authority, then P must have consented).

Mr. Arnold writes that I distinguish between 'three senses of authority, authority over (or the right to command) authority with (or the power to influence) and authority on (or the title to be believed)'. In fact I deliberately refrain from speaking of different senses or concepts of authority; instead I speak of types of authority or uses of 'authority', so as not to beg any questions in the theory of meaning. (See note 13 of PA&C). Perhaps authority is what Wittgenstein called a family resemblance concept.

Mr. Arnold's objection to my second argument for the strong consent thesis.

'The second argument does not go through formally. It needs buttressing by an argument about some focal meaning uniting the three senses...'

Reply: The needed argument is on p.21 and p.4 of PA&C:  
'....the concept of authority is needed in our conceptual map for referring to those situations where conformity of action or belief is brought about without coercion and without rational persuasion'. (p.4)

Mr. Arnold's objection to my first argument for the strong consent thesis.

I claimed that in non-political situations, consent is generally accepted as a necessary condition for some sane adults being under the authority of others. Mr. Arnold claims there are too many counter-examples to this claim: e.g. children, the weak and sick, prisoners and conscripts.

Reply: Prisoners and conscripts as counter-examples beg the question against the strong consent thesis. For the authority-over of prison officials and army leaders is delegated political authority. Hence the strong consent thesis can explain how lawfully imprisoned or conscripted persons can be

under the authority of certain officials. For in accepting membership in the state one agrees to obey the constitution, all validly enacted first order laws, to accept the penalties for breaking such laws, and one puts oneself under the authority of all lawfully appointed officials of the state. In short, in accepting membership in the state one agrees, inter alia, to accept the authority-over of lawfully appointed prison officials, should one ever be lawfully imprisoned.

Children are a special case. They are morally and rationally immature and are to be brought to a position of maturity by adults. They are under adult authority whilst immature but cease to be under it once they reach maturity. The very fact that they cease to be under adult authority once they reach maturity suggests that they are a special case. Hence, it is at least doubtful whether we can understand the concept of authority by looking at the authority-over relation between adults and children.

Many philosophers distinguish between logically primary and logically secondary instances under a concept. (or uses of a concept). The importance of the distinction lies in this: an understanding of a logically secondary use of a concept presupposes an understanding of the logically primary use of that concept. I cannot at present prove that authority-over children involves a logically secondary instance of authority-over. But the immaturity of children gives such a claim sufficient plausibility to make the objection from children inconclusive.

Why do we speak of authority-over at all in such cases, if the strong consent thesis is correct yet the child's consent is not a necessary condition of adult authority over the child? Possibly, because, if the child were, per impossibile, sufficiently rational to decide whether (s)he needs a guardian, (s)he would consent to the guardian relation.

By the 'weak' or 'sick' Mr. Arnold presumably means those incapable, temporarily or permanently, of making reasonable decisions about their own welfare. My remarks about authority over children can be adapted to such cases.

The authority of the constitution (or the bible)

This is a use of 'authority' different from those discussed in PA&C. It is the authority of something impersonal.

The shorter Oxford English Dictionary offers this definition:

- 7. The quotation or book acknowledged to settle a question or give conclusive testimony.

Hence I suggest we properly speak of the authority of the constitution

- iff (a) it has the potential to settle disputes as to what is first order law
- (b) it is acknowledged as such by (atleast) most members of the state in question.

The analysis of this use of 'authority' - by means of characteristics (a) and (b) - follows the same pattern as the analysis of the three uses of 'authority' discussed in PA&C (See page 21, paragraph 2).

Philosophers of law seem to be of little help to anyone interested in explaining what the authority of the constitution consists in.

Salmond on Jurisprudence, 11th edn., ch.5, seems to have the following view (very freely interpreted). The authority of enacted law is derived from the authority of secondary rules via the authority of individuals legally appointed to office. The authority of secondary rules (rules of recognition and of the constitution in general) is underived.

Let me quote from Salmond: 'It is requisite that the law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived. (p.137) Speaking of 'the rule that acts of parliament have force of law', Salmond writes that 'lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of'. (p.137)

Even if true this does not make it improper for theorists of law to ask what non-legal entity creates the authority of the constitution.

Hart (The Concept of Law) appears to suggest an answer when he writes:

If a system of rules is to be imposed by force on any, then there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating authority, the coercive power of law and government cannot be established (p.196, stress supplied).

Needless to say, this is congenial to my consent theory of authority. But I wish Hart had said more on the authority of law, as distinct from the existence of law.

If the suggestion is that the voluntary acceptance of the constitution by some gives it authority with respect to all - then I would like to hear the arguments that establish this privileged position of the few in creating authority.

#### The distinction between a legal and a moral right to govern

PA&C defends only the claim that consent is a necessary condition of political authority when it is understood as involving a moral right to rule (and a moral obligation to obey). Hence, Mr. Arnold, in trying to show that there can be a legal right to rule without consent, is not threatening my thesis.

However, I would add that I have some doubt whether this distinction between a moral and a legal right is really tenable, if the distinction makes legal rights non-moral rights. Consider obligations. We speak of moral, legal, parental and social obligations, amongst others. I am inclined to think that we have here not a distinction between moral obligations on the one hand and various sorts of non-moral obligations on the other. After all parental obligations are moral obligations; and social obligations are often reciprocal obligations (e.g. to return a dinner invitation) and reciprocal obligation is a type of moral obligation. Hence I am inclined to think that legal, parental and social obligations are moral obligations in particular contexts.

Hence I am inclined to regard legal rights as moral rights created by law. But I do not think that the laws of usurpers and conquerers who rule without the consent of the (majority of the) governed create moral rights. Therefore, I am inclined to distinguish between the existence of law and the creation of rights (and obligations) by law.

In other words, the Hartian conditions for the existence of law can obtain although the legal system is not voluntarily accepted by the governed. Then the legal system exists but it creates no rights or obligations.

Mr. Arnold presumably thinks 'law exists' entails 'legal right exists' but does not entail 'moral right exists'. I am inclined to cut the entailment one step earlier.

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