

MODELING HYPOTHETICAL CONSENT

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Arguments based on hypothetical consent are widely used in legal, political, and moral philosophy. The notion of hypothetical consent has been important to political philosophy at least from the 17th century, when the first classical forms of contractarian political theories were formulated. In bioethics, especially in literature concerning medical paternalism, arguments based on hypothetical consent have drawn much attention. In recent years, these arguments have become popular in legal theory as well. In fact, one finds these arguments not only in law review articles but in actual court opinions.¹

Although the notion of hypothetical consent is central to many contractarian arguments, it is highly ambiguous. Hypothetical consent is often characterized merely by saying that it is what someone “would have wanted” or “would have consented to.” However, this kind of characterization is open to several different interpretations, not all of which have any moral force. Before we can plausibly use hypothetical consent-based justification, we should have a clear understanding of what it actually means when someone has hypothetically consented to something and why it is supposed to have moral force.

I begin by exploring how hypothetical consent differs from various forms of actual consent, and from where actual consent derives its moral force. After all, our intuition behind the arguments from hypothetical consent is often that hypothetical consent is sufficiently similar to actual consent to have a similar kind of moral force.

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¹The proponents of economic analysis of law in particular have surprisingly often based their arguments on the notion of hypothetical consent. See, e.g., Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1992), p. 93.

ACTUAL CONSENT VS. HYPOTHETICAL CONSENT

Consenting is a way of committing ourselves. By giving our consent, we are putting ourselves under moral duty to accept something. The normative force of consent is derived from the moral significance of autonomy. Competent persons have the right to direct their own lives, and by giving their consent, they are using this right. Consent has binding moral force because it promotes individual autonomy, which is valuable in itself. An argument from consent can be formulated as follows:

AC: *S* has consented to *x*; therefore, *S* is obliged to accept *x*.

The argument says that if I have given my consent to something, then I have a moral duty to accept it. By giving one's consent, one puts oneself under an obligation. AC does not say that if someone has given consent to something, it is *morally permissible* to do it. For example, it is not morally permission for someone to kill me just because you have consented.

AC seems to suggest that every act of consent creates an obligation for the one who consents. However, only certain types of consent have moral relevance. It is one thing to ask which acts count as consent, and another to ask which acts of consent have moral force. In fact, the basic problem of all political, legal, and moral theories which employ consent-based justifications is how to distinguish the acts of consent which have some moral force from those which have none. To distinguish between these two, we need to introduce a notion of *valid consent*. Valid consent is an act of consent which creates a moral obligation. We can, thus, reformulate the argument from consent into the argument from valid consent:

AVC: *S* has given valid consent to *x*;
therefore, *S* is obliged to accept *x*.

Valid consent requires the autonomy of the agent, since only the autonomously given consent has moral force. For example, if I give all my money to a mugger who is holding a gun to my head, I am not obliged to accept that he takes all my money, although I am certainly giving my consent to that. Consent under this kind of coercion is not given autonomously, and therefore it is not valid.

Consent has to be given intentionally and voluntarily, but to be valid, it also needs to be autonomous. Consent is autonomous only if it is given under the absence of external control. According to this interpretation, not all voluntary acts are autonomous. Autonomy presupposes freedom, but freedom does not presuppose autonomy.

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It is important to note that consent-based justification does not derive its moral force from the content of consent. Consent has a moral force independent of the wisdom of choice. Valid consent derives its moral force from the competent persons' right to direct their own lives. Because you have a right to direct your own life, I am not allowed to do certain things to you without your valid consent.

One may give actual consent in several different ways. One can do this, for example, by giving a promise or by accepting an offer, but consent need *not* be a verbal act. If I read a book, I give my consent to reading that book; if I go to a strip bar, I give my consent to seeing naked girls.

Hypothetical consent must be kept separate from these different forms of actual consent. By definition, hypothetical consent is not real consent at all: it is only *hypothetical*.² A common mistake is to confuse hypothetical consent with implicit or tacit consent.

Tacit and implicit consent are sometimes used as synonyms. However, we should make a distinction between these two forms of consent. Implicit and tacit consent are both *unstated*, but in a different sense. The basic difference between these two forms of unstated consent may be illuminated by the following examples.

First, suppose that a lecturer says to the audience: "Is it okay with everyone that we meet tomorrow one hour earlier than normally?" If the answer is silence, then we say that the audience has given its tacit consent to the lecturer's proposal. Tacit consent is given by being quiet; it is an omission, not an act.

Second, consider the following statement of consent: "You may play my piano while I am on holiday." In this statement, I *explicitly* consent to you playing my piano while I am on holiday, but this is the *only* thing I *explicitly* consent to. However, for you to play my piano, you must be able and allowed to come into my house. When I *explicitly* give you consent to play my piano while I am on holiday, I am, by this very same statement, *implicitly* accepting that you come into

²In a similar manner, Dworkin has written that: "A hypothetical contract is not simply a pale form of contract; it is no contract at all." Ronald Dworkin, "The Original Position," in *Reading Rawls*, ed. Norman Daniels (Oxford: Basil Blackwell, 1975), pp. 17–18. See also Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), n. 81; and Cynthia A. Stark, "Hypothetical Consent and Justification," *Journal of Philosophy* 97, no. 6 (2000), pp. 315–16.

my house while I am on holiday. We can put this implicit consent in a more general way:

IC₁: When one gives an explicit consent to x , one implicitly gives consent to all those things necessary to fulfill x .

However, this is not the only way one may implicitly consent to something. For example, if you start smoking and you know that with a certain probability p you will get lung cancer, then you have implicitly consented to the fact that you will get lung cancer with probability p . Thus, we can also make the following statement:

IC₂: When one gives an explicit consent to x , knowing that x entails y , one has given implicit consent to y .

Implicit consent is a form of unstated consent, but it is not tacit in a strict sense. The conditions for tacit consent are different from those of implicit consent. The basic difference between tacit and implicit consent is that tacit consent is an omission while implicit consent is an act; both are forms of actual consent. The basic question with tacit consent is: "Under what conditions can silence be taken as a sign of tacit consent?" It is clear that not every silence constitutes tacit consent. When we consider implicit consent, we are asking: "Does someone's explicit consent to y also imply consent to x ?"

Hypothetical consent, like implicit and tacit consent, is unstated, but while implicit and tacit consent are forms of actual consent, hypothetical consent is not. Because, quite simply, once I have given my consent, then it cannot be *hypothetical* any more. Hypothetical consent says that *I would have consented if asked*. For example, I would have accepted the offer, had you made it. Hypothetical consent may be formulated in general as follows:

HC: S would have consented to x ; therefore, S is obliged to accept x .

Because hypothetical consent is not consent at all in a proper sense of the word, it is more problematic to connect it with autonomy. In hypothetical consent, one is simply not practicing autonomy. In fact, the question here is: "Why should we think that hypothetical consent has any moral force at all?" Ronald Dworkin has formulated the problem as follows:

If, for example, I am playing a game, it may be that I would have agreed to any number of ground rules if I had been asked in advance of play. It does not follow that these rules may be enforced against me if I have not, in fact, agreed to them. There must be reasons, of course, why I

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would have agreed if asked in advance, and these may also be reasons why it is fair to enforce these rules against me even if I have not agreed. But my hypothetical agreement does not count as a reason, independent of these other reasons, for enforcing the rules against me, as my actual agreement would have.³

On the other hand, it seems that hypothetical consent has at least some moral relevance, and some appeals to hypothetical consent are justified. As Jeremy Waldron has noted:

Interfering with someone without his consent, but in a way which he would have agreed to be treated had he been asked, is *less wrong* than interfering with him in a way in which, even hypothetically, he would never have agreed to be treated.⁴

This is not enough to make interference legitimate, but it shows, at the least, that one's hypothetical consent seems to make a difference.

The reason why hypothetical consent is considered a form of consent is that it is thought to promote individual autonomy in a manner similar to actual consent. In other words, both get their moral force from people's right to direct their own lives. But our task is to show exactly how hypothetical consent is connected with personal autonomy.

There are two basic questions to be answered in regard to all arguments using hypothetical consent:

1. How should we model or understand hypothetical consent?
2. Why is one obliged to accept the rights and duties implied by hypothetical consent?

When we appeal to hypothetical consent, we should know what it means to say that someone has *hypothetically* consented to something. If we are trying to justify policies or practices by appealing to hypothetical consent, we should, in addition, be able to say why hypothetical consent has or is supposed to have any moral force.

To answer these questions, I will take a closer look at different types of hypothetical consent arguments. In all cases we have to ask two questions. First: "Is this an appropriate way to model hypothetical consent?" And second: "Why does one have to accept the obligation imposed by the argument?"

³Dworkin, "The Original Position," p. 18.

⁴Jeremy Waldron, "Theoretical Foundations of Liberalism," *Philosophical Quarterly* (1987), p. 139.

FOUR BASIC TYPES OF HYPOTHETICAL CONSENT ARGUMENTS

Hypothetical consent arguments can be construed or modeled in several different ways. We can distinguish four basic types of hypothetical consent arguments, characterized by:

- (i) the features of consenting agents, and
- (ii) the features of the situation in which consent is given (hereafter called the choice situation).

By combining these two variables, we get four basic models of hypothetical consent argument based on:

- 1. actual agent in actual choice situation,
- 2. actual agent in idealized choice situation,
- 3. idealized agent in actual choice situation, and
- 4. idealized agent in idealized choice situation.

Because both the choice situation and the consenting agent can be idealized in multiple ways, there are several different kinds of arguments of types 2, 3, and 4. Nonetheless, these are the basic models, and they all have some common features. Because of these common features, they also face similar kinds of problems.

1. Actual Agent in Actual Choice Situation (HAA)

The idea behind the first type of hypothetical consent argument we consider is that since an agent would have consented *ex ante* to a certain policy, it is justified to impose that policy *ex post*. We can put this argument in a general form as follows:

HAA: *S* would have consented to *x* in the circumstances she was in at t_1 ; therefore, *S* is obliged to accept *x* at t_2 .

According to HAA, for example, it is justified for a court to impose certain terms of contract *ex post* because the contracting parties would have consented to these terms when they entered into the transaction. The intuition behind the argument is that a person's actual consent to a policy provides a good moral reason to impose that policy on her, and hypothetical consent is sufficiently similar to actual consent to have a similar kind of normative force. In other words, the fact that a person would have consented *ex ante* to the imposition of a particular policy *p* is a sufficient moral reason to impose that policy *p* on her *ex post*.

One way to defend this kind of hypothetical consent argument is to say that by using HAA, one promotes individual autonomy in a way

similar to what is being done in the case of actual consent. By applying HAA, in other words, we promote one's freedom of choice, because this is the choice that one *would have made*. This kind of defense, however, does not seem to be successful.

If *S* had chosen *x* at t_1 , then *x* *would have* promoted *S*'s self-interest at t_1 . On the other hand, if we know that *x* was *against* *S*'s self-interest, then we cannot plausibly argue that *S* would have chosen it. (I am *not* saying that it is impossible to choose against one's preferences, but if we do not know *S*'s actual choice, then we should not assume that she would choose something that is against her preferences.) To say that one would have chosen something is simply to say that *it was* in one's self-interest. HAA thus claims that *S* is obliged to accept *x* at t_2 , because it was in her self-interest at t_1 .

If this is correct, then the argument is heading for trouble. To say that one would have consented to a particular state of affairs at time t_1 is to say that it was compatible with one's preferences at t_1 . But why should I now, at time t_2 , accept something that was my preference at t_1 , if my preferences have changed? The only possible answer seems to be that one is not allowed to change preferences, but this answer could not be correct. There is nothing morally improper about changing one's preferences when circumstances change, so there is no reason to hold me to my earlier preference. This is illustrated clearly in the following example by Daniel Brudney:

Suppose I wake up and find the air warm and hear the pounding of the surf. I get in my car to drive to the mall to buy a surfboard. But the freeway is jammed and by the time I reach the mall a cold rain has swept through town. I change my mind and buy a book instead. Had I reached the mall quickly I would have bought the surfboard, but with changing circumstances come changing preferences. Unless I have put my initial preference into action, perhaps by calling the surfboard store and asking them not to sell their last board, there is nothing morally suspect about my decision to buy a book when at last I reach the mall.⁵

The mistake behind HAA lies in its assumption that one is not morally allowed to change one's preferences when circumstances change. If the justification for HAA is that it promotes one's self-interest, then

⁵Daniel Brudney, "Hypothetical Consent and Moral Force," *Law and Philosophy* 10 (1991), p. 239.

if one's preferences change, there is no reason to hold one to one's earlier preference.

There is also another problem with HAA. It could be the case that the agent possesses information at t_2 that was unavailable at t_1 . It is hardly an acceptable conclusion that I am now, at t_2 , obliged to buy your broken-down car because I would have wanted to buy it at t_1 when I did not know it was broken.

2. Actual Agent in Idealized Choice Situation (HAI)

Let us turn now to the second type of hypothetical consent argument. In the HAA, we asked what the agent would have chosen in the actual circumstances. It is probably more common, however, to model the hypothetical consent argument so that we ask what the agent would have chosen in somewhat different circumstances. This model of hypothetical consent argument can be put in a general form as follows:

HAI: S would have consented to x in the idealized circumstances C ; therefore, S is obliged to accept x now in the different kind of circumstances C_2 .

A crucial question with arguments of this type is how the circumstances are idealized. The term "idealized circumstances" is too ambiguous if we want to evaluate the normative force of HAI arguments. Circumstances can be idealized in many ways. Let us consider two fundamental ways of doing this:

1. Facts of the actual choice situation may be changed, and
2. information available about the facts of the actual choice situation may be changed.

If the choice situation is idealized through changing the facts of the actual choice situation, the HAI argument seems to have no moral force whatsoever. It might be true that you would have bought my car if it were in good working order, but that is no reason for you to be obliged to buy my car when it has broken down. Changing the facts of the situations is thus prohibited when using HAI.

Let us now consider the situation where the circumstances are idealized regarding the information available. The choice situation may be idealized in two ways regarding information: there can be more or less information available than in the actual choice situation. Let us consider first the case in which the agent is deprived of some relevant information in the choice situation. There may be several reasons for using this type of hypothetical consent argument. The most obvious

reason is that by idealizing the choice situation, those features of the agent which are thought to be “morally irrelevant” can be disregarded. In other words, the choice situation can be idealized so that the agent does not know whether she will in the end actually benefit or lose from her choice.

If the agent does not know some relevant features of the situation, then she does not know whether her decision will benefit her personally. This variation of HAI says that *S* is obliged to accept policy *p*, because *S* would have consented to the policy *p* in the situation where she did not have information on some relevant features of her situation.

This variation of HAI, however, seems to get into deep trouble. First, one may ask “what reasons does an agent have to comply with the hypothetical terms to which she would have agreed in totally different circumstances?” In fact, the case when there is less information available resembles the situation where the facts of choice situation are changed. It might be true that if you had not had the information that my car had broken down, you would have bought it. However, that is no reason for you to be obliged to buy my car. I will turn back to the problematics of idealized choice positions later.

Let us now turn to the case when there is more information available. This is perhaps the most widely used variation of HAI argument. Compared to former variations, this also seems to be more reasonable. It sounds quite reasonable that you would not have bought my car if you had had the information that it was not functioning, and therefore you are not obliged to accept our transaction. This example uses HAI in negative form, in other words:

HAI₂: *S* would *not* have consented to *x* in the idealized circumstances *C*; therefore, *S* is *not* obliged to accept *x*.

One advantage of HAI—and naturally also its negative form HAI₂—lies in its confirmability in principle. Judgments about what *S* would have done in such and such circumstances can be confirmed by asking *S* what she would have done. Of course, there are cases when it is difficult to imagine what to do in certain conditions, and one’s word about what she would do in such circumstances is not reliable. For example, if you ask someone how much money she would give to charity if she had one million dollars, the amount she says she would give is probably much greater than she would give if she had the money in reality. The car example suggests that when a person lacks some relevant information, it could be sometimes plausible to appeal to one’s hypothetical consent.

Let us consider another example. In *On Liberty*, John Stuart Mill argues that:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.⁶

This argument can also be presented in the terms of hypothetical consent. It is justified to turn him back because he would consent to that if he knew that the bridge is unsafe.

The general form of argument is the following:

HAI₃: *S* would give her consent to *x* if she had the relevant information; therefore, *S* is obliged to accept *x*.

Applying this to Mill's example, *S* is obliged to accept the interference because *S* would give her consent to the interference if she had the information that those who interfere have—information that would change her choice.

The most important advantage of HAI₃ is that it respects individual autonomy. It does not impose any alien goals on an agent, and so it does not conflict with the right of a competent person to direct his own life. In fact, HAI₃ can be seen to facilitate the achievement of goals held by the agent.

There are, however, two problems with HAI₃. First, there are occasions when we might appeal to HAI₃ in a manner which fails to respect a person's most basic beliefs. Someone can, for example, claim that if a Jehovah's Witness believed that there is no God, she would have consented to a blood transfusion, and is therefore obliged to accept the blood transfusion. Although it could be true that there is no God, this conclusion does not seem plausible. To avoid this problem, we must clarify what it actually means to say that someone would have consented to something if she had had the relevant information for making her decision. This condition only requires the agent to be *aware of all evidence* or arguments relevant to her choice. The question

⁶John Stuart Mill, *On Liberty*, in *On Liberty; Representative Government; The Subjection of Women*, ed. Millicent Garrett Fawcett (Oxford: Oxford University Press, 1963), p. 118.

is not what one would choose if she had *beliefs* that she lacks in reality, but what she would choose if her *epistemological decision base* were in some respect different. Although a Jehovah's Witness would choose differently if she believed that there is no God, this is not the thing we are interested in. The question we should ask is what she would choose if she had all the relevant information for making her choice. Even if there were strong evidence that God does not exist, she surely can still believe in God.⁷

We should also note that some beliefs are central to the subjects' conceptions of their own personal identity. There is a vast difference, for example, between preventing someone from drinking poisoned wine and imposing a transfusion on a Jehovah's Witness. The belief that one ought to drink poison is not central to anyone's conception of her personal identity, but the belief that God exists might be.

The second problem with HAI₃ is more complicated: We do not need the whole idea of hypothetical consent in HAI₃ types of justifications. HAI₃ claims that one is obliged to accept *x* because it is in her self-interest. If *x* is not in one's self-interest, then the argument simply fails. Because the justificatory force of HAI₃ relies solely on one's preferences, there is a good reason to ask if it is a form of consent justification at all. The problem is that the argument builds consent analytically into the ordering of a person's preferences. There is absolutely nothing in the concept of consent that is not already contained in a statement about one's preferences. To say that one would consent to the move from one state of affairs to another adds nothing to the claim that one prefers one state of affairs over the other. It seems to be exactly the same thing to say that something is justified because it increases one's welfare, and to say that it is justified because one would give a consent to it.⁸ Thus, HAI₃ seems to be merely a welfarist argument in a contractarian disguise.

This objection, however, assumes that one is the best (or is at least a reliable) evaluator of one's own interests. If one is not a reliable evaluator of one's self-interest, it will not be the same thing to say that something is justified because it increases one's welfare, and to

⁷See Donald VanDeVeer, *Paternalistic Intervention* (Princeton, N.J.: Princeton University Press, 1986), p. 80.

⁸See Jules Coleman, "The Foundation of Constitutional Economics," in *Market, Morals, and the Law* (New York: Cambridge University Press, 1988), pp. 135–38.

say that it is justified because one would give consent to it. Let us consider again the blood transfusion case. One might argue that a blood transfusion is actually in the Jehovah's Witness's self-interest, although she would not give her consent to it. On the basis of one's self-interest, it would, thus, be justified to impose a transfusion, but on the basis of one's hypothetical consent, it is not.

On this account, the reason why it is not morally right to impose a transfusion on a Jehovah's Witness cannot be one's self-interest. The reason, instead, must be that *one would not give her consent to it* (assuming she is not able to express her will). It would violate her autonomy. One may disagree with my example and argue that it is, in fact, in the interest of the Jehovah's Witness to refuse to agree to a transfusion. However, it is not at all difficult to imagine other examples where one clearly is not a reliable evaluator of one's self-interest in a sense that one does not know what is best, given one's goals. In that kind of case, it seems justified to say that although a certain policy p would be in the agent's best self-interest, it is not accepted because one would not give one's consent to it. In other words, any other kind of policy would go against one's autonomous will. Under these assumptions, HAI₃ seems to be a plausible form of hypothetical consent argument.

3. Idealized Agent in Actual Choice Situation (HIA)

In the models of hypothetical consent presented above, the agent who was in a hypothetical choice situation had the same properties and beliefs as the agent who was supposed to be under an obligation to accept the choice of the hypothetical agent. However, this is not the only possible way to make a hypothetical consent argument.

Instead of asking what the actual agents would have wanted, one may also ask what an idealized agent would have wanted. This kind of argument does not say that the actual agent under consideration would have consented to a policy. It says that a similarly situated agent with certain ideal properties would have consented to that policy. The argument can be put in a general form as follows:

HIA: Idealized agent A would have consented
to x in the circumstances agent S was in at t_1 ;
therefore, S is obliged to accept x at t_2 .

Agents may be idealized at least in three respects: their preferences, beliefs, and cognitive capacities. One reason for using this kind of hypothetical consent argument is that we do not know the preferences, beliefs, or cognitive capacities of the actual agent. An agent may be

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unable to express herself or be unreliable. Then, for example, we can argue that a person with preferences, beliefs, and cognitive capacities that the majority of similarly situated agents have would have consented to policy p , and, therefore, one is obliged to accept policy p . Another, and probably more common, form of HIA argument goes as follows:

FRA: Fully rational agent A would have consented
to x in the circumstances agent S was in at t_1 ;
therefore, S is obliged to accept x at t_2 .

One problem with the FRA is that an action that would have been chosen by a fully rational person is not necessarily the same that some actual agent S would have chosen. The choices of a fully rational person A and the choices of an actual agent S may in many cases coincide, but it is not always so. Because the choices of a fully rational agent and an actual agent are not identical, FRA fails to respect individual autonomy. Therefore, it does not seem possible to call this a form of hypothetical consent.

One may argue that S would change her choice if S were aware that a fully rational person would choose differently. A person always prefers the choices of fully rational persons if her choices are not the same. What is going on here is that we are trying to justify one form of consent argument by appealing to another. It is justified to appeal to the choices of fully rational agents because if S were aware of the choice of a fully rational person, she would make this choice. This argument, however, seems to be a purely welfarist justification.⁹ The notion of hypothetical consent is playing no independent role in the justification.

We should also note that, although I may always prefer the choices of a fully rational agent, in the case of hypothetical consent, I am not

⁹There is one possible escape from this conclusion. Jules L. Coleman has proposed that we can see the relationship between rational bargaining and hypothetical consent as epistemic, not analytic. In other words, what would have been rational for parties *ex ante* does not entail what parties would have wanted to do, but it is still the best evidence of it. In the absence of contradictory evidence, it is justified to infer that the parties would have consented to whatever would have been the outcome of rational bargaining between them. By changing the analytic interpretation to epistemic, we can connect the HAA with individual autonomy. See Jules L. Coleman, *Risk and Wrongs* (New York: Cambridge University Press, 1992), p. 170.

making a choice at all. Someone else makes the choice for me, and justifies it by the fact that a fully rational person would have consented to it, and that I would choose what a fully rational person chooses. However, it is a different thing for me to actually change my mind and make a new choice. If I do change my choice because it is not the one a fully rational agent would have made, I am practicing my autonomy. But in the argument presented above, I am not making a choice at all; someone else makes it for me. It is important to see that not only the content of consent but the act of consent itself matters. To be able to choose is valuable in itself. As Gerald Dworkin puts it: "To be able to choose is a good that is independent of the wisdom of what is chosen."¹⁰

The main problem with HIA is that it allows imposing goals on *S* that she would not autonomously choose. The other problem is that there seems to be no reason for the real life agents to comply with the hypothetical terms to which ideal agents would have agreed.

4. Idealized Agent in Idealized Choice Situation (HII)

The last type of argument from hypothetical consent under consideration is an argument where both the consenting agent and circumstances are idealized. We may formulate this in a general form as follows:

HII: Idealized agent *A* would have consented to *x* in the idealized circumstances *C*; therefore, agent *S* is obliged to accept *x* now in the different kind of circumstances *C*₂.

There are some obvious reasons for using this kind of hypothetical consent argument. Arguments of type HII are usually thought to have some special moral force because the self-interest of the agents can be disregarded. By HII, it is thought to be possible to use consent-based justification (that is, autonomy-based justification) for decisions where there are both losers and winners. In other words, it is possible to say that the losers of some policy decision would themselves have consented to that policy.

John Harsanyi has used this kind of argument to argue that it is possible to exclude nonethical subjective preferences if an individual's preferences:

¹⁰Gerald Dworkin, "Paternalism," in *Paternalism*, ed. Ralf Sartorius (Minneapolis: University of Minnesota Press, 1983), p. 27.

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indicate what social situation he would choose if he did not know what his personal position would be in the new situation chosen (and in any of its alternatives) but rather had an equal chance of obtaining any of the social positions existing in this situation, from the highest to the lowest.¹¹

The argument says that because an idealized agent *A* from some idealized choice position would have found it in her own interest to agree to the policy *p*, those agents who lose from that policy decision are obliged to accept that policy.

Rawls's argument based on the idea of an original position, where rational egoists make a choice behind the veil of ignorance, is perhaps the most famous example of this kind of argument. The choices are thought to have moral force when the veil of ignorance is removed and the agents have revealed their actual characteristics.

Behind the veil of ignorance, the agents do not know their race, gender, age, natural abilities, conception of good, and other similar things. Agents are also supposed to be rational, not envious egoists. Thus, in Rawls's argument, both the choice situation and the choosing agent are idealized. Rawls's idea is that choices made in this kind of choice position have moral force which makes agents obliged to accept policies they have chosen behind the veil of ignorance after the veil has disappeared.

I have my doubts. Why should we think that the choices of idealized agents who do not know their personal characteristics apply to either the winners or losers of the chosen policy? It does not seem to be "their" choice at all. We can bring the same objection against HII which I gave earlier to HIA: Real life agents seem to have no reason to comply with the hypothetical terms to which ideal agents in the ideal circumstances would have agreed.

Not everyone is happy with my criticism, and Rawls's argument seems to touch some of our deepest moral intuitions. My criticism does not deny such intuitions, nor do I say that Rawls's argument cannot be used to determine *the content of our duties*; it might (or might not) be an excellent heuristic tool for this. The object of my criticism is

¹¹John Harsanyi, in his famous papers "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking" and "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility," both in *Essays, Social Behavior, and Scientific Explanation* (Dordrecht: Reidel Cop., 1976), p. 14.

elsewhere: Rawls's argument is unable to prove the *existence* of any duty. This is an important distinction when we consider the normative force of hypothetical consent arguments.¹² In fact, Rawls himself does not seem to claim that our duties are derived from the original position. In *A Theory of Justice* he writes, "A fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us."¹³ This duty is independent of the principles derived from original position.

The mere fact that agents are impartial in the choice position is insufficient to make the outputs of the choice position anyone's duty. Justification for imposing significant losses on someone cannot simply be that the loser would have consented to it behind the veil of ignorance. In no sense is it the *loser's* choice; *losers* would not consent to that policy.¹⁴ The basic problem with this kind of argument is that it makes no sense at all to speak of choosing or consenting to something in the absence of knowledge of one's personal social position, preferences, tastes, etc. The hypothetical choice of an ideal agent in ideal circumstances is in no sense any real agent's choice, and therefore there seems to be no reason to talk about one's hypothetical consent.

CONCLUSION

In this article, I have analyzed different ways of understanding hypothetical consent arguments. There are three kinds of problems with all arguments using the notion of hypothetical consent: conceptual, substantive, and technical. The conceptual problem concerns how we should understand the notion of hypothetical consent. The substantive problem concerns the normative consequences of this kind of argument. The technical problem concerns the way to determine what someone would have wanted.

I have argued that the appeals to hypothetical consent are often either unjustified, or, when they seem to be justified, can be presented in welfarist terms, and the whole idea of hypothetical consent becomes

¹²See Brudney, "Hypothetical Consent and Moral Force," p. 253.

¹³John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), p. 115.

¹⁴See T.M. Scanlon, "Contractualism and Utilitarianism," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (New York: Cambridge University Press, 1982), pp. 122–23; see also Thomas Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979), ch. 8.

pointless. Only one model of hypothetical consent argument under very restricting assumption may have independent moral force. This argument includes the following assumptions:

- (1) agent is not able to choose according to her self-interest (agent does not know what is best for her),
- (2) agent lacks relevant information for her choice, and
- (3) agent would choose differently if she had the relevant information available.

If I am right, then appealing to one's hypothetical consent in all the other cases is unjustified, or, if justified, simply a utilitarian argument, leaving the idea of hypothetical consent with no independent role in justification.

BIBLIOGRAPHY

- Brudney, Daniel. "Hypothetical Consent and Moral Force." *Law and Philosophy* 10 (1991).
- Coleman, Jules. "The Foundation of Constitutional Economics." In *Market, Morals, and the Law*. New York: Cambridge University Press, 1988.
- . *Risk and Wrongs*. New York: Cambridge University Press, 1992.
- Dworkin, Gerald. "Paternalism." In *Paternalism*, edited by Ralf Sartorius. Minneapolis: University of Minnesota Press, 1983.
- Dworkin, Ronald. "The Original Position." In *Reading Rawls*, edited by Norman Daniels. Oxford: Basil Blackwell, 1975.
- Harsanyi, John. "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking." *Journal of Political Economy* 61. Reprinted in *Essays, Social Behavior, and Scientific Explanation*. Dordrecht: Reidel Cop., 1976.
- . "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility." *Journal of Political Economy* 63. Reprinted in *Essays, Social Behavior, and Scientific Explanation*. Dordrecht: Reidel Cop., 1976.
- Mill, John Stuart. *On Liberty; Representative Government; The Subjection of Women*. Edited by Millicent Garrett Fawcett. Oxford: Oxford University Press, 1963.
- Nagel, Thomas. *Mortal Questions*. New York: Cambridge University Press, 1979.
- Posner, Richard. *Economic Analysis of Law*. 4th ed. Boston: Little, Brown, 1992.

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- Rawls, John. *A Theory of Justice*. Oxford: Oxford University Press, 1972.
- Raz, Joseph. *The Morality of Freedom*. Oxford: Clarendon Press, 1986.
- Scanlon, T.M. "Contractualism and Utilitarianism." In *Utilitarianism and Beyond*, edited by Amartya Sen and Bernard Williams. New York: Cambridge University Press, 1982.
- Stark, Cynthia A. "Hypothetical Consent and Justification." *Journal of Philosophy* 97, no. 6 (2000).
- VanDeVeer, Donald. *Paternalistic Intervention*. Princeton, N.J.: Princeton University Press, 1986.
- Waldron, Jeremy. "Theoretical Foundations of Liberalism." *Philosophical Quarterly* (1987).