THE JOURNAL OF PHILOSOPHY

VOLUME XCVII, NO. 6, JUNE 2000

HYPOTHETICAL CONSENT AND JUSTIFICATION*

The social-contract tradition in moral and political thought can be loosely characterized as an approach to justification based on the idea of rational agreement.[1] This tradition contains a variety of theories that are put to a number of uses.[2] My exclusive focus here will be contract views that rely upon *hypothetical*, as opposed to *actual*, consent.[3] My main objective is to defend

* I owe thanks to Akeel Bilgrami, Stephen Downes, Timothy Hall, Thomas E. Hill, Jr., Robert Johnson, Christopher W. Morris, Ram Neta, David Phillips, Tom Reid, A. John Simmons, Tony Smith, John D. Walker, Nicholas White, and William H. Wilcox for their helpful conversations with me about hypothetical consent or for their invaluable comments on earlier drafts of this essay.

[1] Christopher W. Morris, "A Contractarian Account of Moral Justification," in Walter Sinnott-Armstrong and Mark Timmons, eds., *Moral Knowledge? New Readings in Moral Epistemology* (New York: Oxford, 1996), pp. 216-42, especially p. 216.

[2] For discussions of differences within contractarianism, see Morris; James S. Fishkin, "Towards a New Social Contract," *Noûs*, XXIV (1990): 217-26; Jeffrey Paul, "Substantive Social Contracts and the Legitimate Basis of Political Authority," *Monist*, LXVI, 4 (1983): 517-28; Samuel Freeman, "Reason and Agreement in Social Contract Views," *Philosophy and Public Affairs*, XIX, 2 (Spring 1990): 122-57; and Brian Barry, *Theories of Justice* (Berkeley: California UP, 1989), pp. 320-51.

[3] Examples of hypothetical-consent theorists include: Thomas Hobbes, *Leviathan*, C.B. Macpherson, ed. (Harmondsworth: Penguin, 1968); John Rawls, *A Theory of Justice* (Cambridge: Harvard, 1971); David Gauthier, *Morals by Agreement* (New York: Oxford, 1986); and T.M. Scanlon, "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (New York: Cambridge, 1982), pp. 215-43, and his *What We Owe To Each Other* (Cambridge: Harvard, 1998). Examples of actual-consent theories include: John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1952); Jean-Jacques Rousseau, *The Social Contract and Discourses*, G.D.H. Cole, J.H. Brumfitt, and John C. Hall, eds. (London: Everyman, 1973); and Joseph Tussman, *Obligation and the Body Politic* (New York: Oxford, 1960). For an interpretation of Locke as a hypothetical-contract theorist, see Hannah Pitkin, "Obligation and Consent," in Peter Laslett, W.G. Runciman, and Quentin Skinner, eds., *Philosophy, Politics and Society*, fourth series (Oxford: Basil Blackwell, 1972), pp. 45-85. For an argument that Rawls does

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hypothetical-consent theories against what I call the *standard indictment*: the claim that hypothetical consent cannot give rise to obligation.[4] I begin by explaining the standard indictment in more detail; next, I argue that the standard indictment does not apply to *moral*, as contrasted with, *political* contractarianism[5]; finally, I argue that, on a certain understanding of the relation between political legitimacy and political obligation, the standard indictment does not count against political contractarianism.

I. THE STANDARD INDICTMENT

Hypothetical-consent theories aim to justify principles by positing an idealized choice situation, occupied by idealized agents who must decide upon (or "consent to") rules that should govern their interactions with one another when they are in actual, nonidealized society. The idea is that a principle is justified if it would be chosen by such agents under such circumstances. The nature of the idealization that occurs in hypothetical contractarianism varies, depending upon theorists' views about impartiality, rationality, motivation, and the like. We can distinguish, though, between two general approaches to idealization. Some contractarians, such as T.M. Scanlon and John Rawls, include moral claims in their descriptions of the hypothetical

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not offer a genuine contract theory, see Jean Hampton, "Contracts and Choices: Does Rawls Have a Social Contract Theory?" this JOURNAL, LXXVII, 6 (June 1980): 315-38. For discussion of consent theories of political obligation generally, see Harry Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987); and A. John Simmons, *Moral Principles and Political Obligations* (Princeton: University Press, 1979), pp. 57-95.

[4] I call this criticism the standard indictment because of its ubiquitous acceptance. See Ronald Dworkin, "The Original Position," in *Reading Rawls*, Norman Daniels, ed. (New York: Basic, 1975), pp. 16-52, especially pp. 17-21; Daniel Brudney, "Hypothetical Consent and Moral Force," *Law and Philosophy*, X (1991): 235-70, pp. 235-40; Hampton, *Political Philosophy* (Boulder: Westview, 1997), pp. 65-66, and her "Feminist Contractarianism," in Louise Antony and Charlotte Witt, eds., *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Boulder: Westview, 1993), pp. 227-55, especially pp. 233-35, 241-42; Henry Phelps-Brown, *Egalitarianism and the Generation of Inequality* (New York: Oxford, 1988), pp. 494-95; Simmons, "Liberal Impartiality and Political Legitimacy," *Philosophical Books*, XXXIV, 4 (1993): 213-23, especially pp. 220-21; and Jonathan Wolff, *An Introduction to Political Philosophy* (New York: Oxford, 1996), pp. 48-50. Some proponents of hypothetical-consent theories grant that hypothetical consent does not bind, but hold that it nonetheless has some justificatory force. See, for example, Paul, p. 519; Freeman, p. 146; Fishkin, pp. 220-21; Morris, p. 219; Gerald Gaus, *Value and Justification* (New York: Cambridge, 1990), p. 328; and Barry, *Justice as Impartiality* (New York: Oxford, 1995), pp. 55-56. For a criticism of the hypothetical structure of Hobbesian contractarianism that is distinct from the standard indictment, see Thomas Christiano, "The Incoherence of Hobbesian Justifications of the State," *American Philosophical Quarterly*, XXXI, 1 (January 1994): 23-38.

[5] Henceforth "contractarianism" will be used to denote the hypothetical variety.

agents and their circumstances. These moral claims place constraints upon the choices of the hypothetical agents; for instance, Scanlon attributes an explicitly moral motivation to the hypothetical choosers and specifies that they choose under conditions that preclude coercion. Following Christopher Morris, I call theories such as Scanlon's *morally constrained.*[6]

Other contractarians, such as Thomas Hobbes and David Gauthier, do not include any moral claims in their idealizations. Hypothetical agents are ideal only in their capacities (especially their rational capacity) and their circumstances are ideal only with respect to the information available to them. Again following Morris, I refer to these views as *morally unconstrained.*[7] In any case, the proposed idealization cannot be so extreme as to threaten the applicability of the rules generated to actual people. The purpose of idealizing, for all contract theorists, despite their differences in approach, is to eliminate the influence of irrelevant factors in the decision process of the imagined agents.

Hypothetical-consent theories have a counterfactual structure: a rule is justified if ideal agents in ideal circumstances would have agreed to it. *Hypothetical* consent is not to be confused with *actual* consent about hypothetical circumstances. For instance, if one agrees to drive a friend to the airport if the friend's car is still in the shop, one actually consents even though she consents to do something that, at the time of her consent, is a hypothetical scenario.[8] Hypothetical consent is also not to be confused with tacit consent. *Tacit* consent is a kind of actual consent, contrasted with *express* consent, whereby an agent's actions (such as acceptance of benefits) is taken, in particular

[6] See Morris, "Justice, Reasons and Moral Standing," in Jules L. Coleman and Morris, eds., *Rational Commitment and Social Justice: Essays for Gregory Kavka* (New York: Cambridge, 1998), pp. 186-207, especially p. 189. Allen Buchanan makes a distinction similar to Morris's but calls morally constrained views 'moral contractarianism' and morally unconstrained views 'bargaining theory contractarianism'—"Justice as Reciprocity versus Subject-Centered Justice," *Philosophy and Public Affairs,* XIX (1990): 227-52, p. 246. For a critical treatment of the morally unconstrained nature of Hobbes's view, see Arthur Ripstein, "Foundationalism in Political Theory," *Philosophy and Public Affairs,* XVI (Spring 1987): 115-37. For a discussion of the significance of the moral constraints embedded in Rawls's view, see Barry, *Theories of Justice,* pp. 337-40. For a criticism of Barry's approach, see Matt Matravers, "What's 'Wrong' in Contractualism?" *Utilitas,* VIII, 3 (1996): 329-40.

[7] Typically morally constrained contractarianism has its roots in Immanuel Kant, while morally unconstrained contractarianism has its roots in Hobbes.

[8] Thanks to Akeel Bilgrami for noting this possible confusion.

contexts, as a sign of his consenting to the benefit-conferring arrangements.[9]

The standard indictment of hypothetical-consent theories states (as I mentioned above) that hypothetical contracts are not binding and so cannot generate obligations. Consider Ronald Dworkin's account of this objection, which is directed at Rawls. He says: "hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all" (*op. cit.*, pp. 17-18). Of the obligations that are purportedly generated by hypothetical consent, Dworkin says:

> [I]t may be that I would have agreed to any number of...rules if I had been asked in advance.... 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 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 (*op. cit.*, p. 18).

Because it appears to do no justificatory work of its own, hypothetical consent is often referred to as a "metaphorical" or "heuristic device."[10] Hypothetical consent, on this view, simply highlights or reveals what is reasonable or what is just; it serves to illuminate a position that is independently justified. As Dworkin states:

> [Y]ou use the device of hypothetical agreement to make a point that might have been made without that device, which is that the solution recommended is so obviously fair and sensible that only someone with an immediate contrary interest could disagree. Your main argument is that your solution is fair and sensible, and the fact that I would have chosen it myself adds nothing of substance to that argument. If I am able to meet the main argument, nothing remains, rising out of your claim that I would have agreed, to be answered or excused (*op. cit.*, p. 18).

[9] In his review of Scanlon's *What We Owe To Each Other*, entitled "Reasons and Unreasons" (*The New Republic* (May 24, 1999): 34-38), Colin McGinn mistakes hypothetical for tacit consent. For a treatment of tacit-consent theories of political obligation, see Simmons, pp. 75-95.

[10] The idea that a hypothetical contract, or hypothetical consent, is a "heuristic device" or a "metaphor" is endorsed by Scanlon in "Nozick on Rights, Liberty and Property," *Philosophy and Public Affairs*, VI (Fall 1976): 3-25, especially p. 17; and by Freeman, p. 135; and Morris, "The Relation between Self-interest and Justice in Contractarian Ethics," *Social Philosophy and Policy*, V, 2 (1988): 119-53, and "Justice, Reasons, and Moral Standing," p. 189.

II. MORAL AND POLITICAL CONTRACTARIANISM

There is reason to think that the standard indictment does not indict all varieties of hypothetical contractarianism. In order to see this, we must acknowledge some differences between *moral* and *political* contractarianism. Contractarian approaches to morality seek to justify moral principles; they purport to tell us what moral obligations we have. For example, Scanlon, who offers a morally constrained view, and Gauthier, who offers a morally *un*constrained view, both seek to show that agents have a reason to conform to certain basic moral principles, such as those requiring us to refrain from harming others or obliging us to be truthful.[11] Contractarian approaches to political authority seek to justify political principles (as in the case of Rawls's argument for principles of distributive justice), a particular form of government (as in the case of John Locke's argument for representative democracy or Hobbes's argument for absolute monarchy), or the authority of the state generally.[12] But let us set aside these differences in emphasis found in the political-contractarian tradition, and concentrate upon principles that are to be upheld by the state. It seems fair to say that whether a social-contract theorist focuses upon principles, forms of government, or sovereignty generally, he wishes to justify such principles.

Locke, though he is probably best understood as an actual-consent theorist, is instructive here. While he may have been primarily concerned with justifying representative government, he was also interested in justifying certain political principles, such as the prohibition on vigilante justice or the right of citizens to own property. By political principles, then, I am referring to rules that are more abstract than actual laws. We can imagine, for example, a variety of laws, perhaps mutually incompatible, that would be consistent with a general principle permitting private ownership. I take it that these abstract principles are typically what political philosophers seek to justify.

The problem of political obligation, on this understanding of political principles, is not felicitously expressed as a worry about the grounds for obeying the law per se. Rather, it concerns the source of the bindingness of abstract principles of justice and the grounds for state enforcement of these principles. As stated above, the principles

[11] Gauthier, like Hobbes, may be interpreted as offering a justification for both morality and political institutions.

[12] Hobbes, Locke, Rousseau, and Kant (*The Doctrine of Right* in *The Metaphysics of Morals*, Mary Gregor, ed. and trans. (New York: Cambridge, 1991)) all seem to be concerned, at least to some degree, to justify the very existence of political authority.

themselves are not, strictly speaking, enforced. Instead, laws implementing them are enforced. I shall assume for the sake of argument that political principles are capable of being successfully implemented by laws and that those laws are binding and worthy of enforcement, provided the principles underlying them are. References below to the enforcement of principles are to be understood as references to the enforcement of laws that successfully implement those principles.

We can see the differences between moral and political contractarianism by looking at the differences between the principles said to be justified by each type of theory. The differences I shall enumerate revolve around the issues of *bindingness* and *compliance*. Consider first the issue of *bindingness*. Notice that the standard indictment might be interpreted in one of two ways. It might be seen, first, as a global claim directed at any theory that employs hypothetical consent. On this account, the standard indictment states that the source of the bindingness of normative principles does not lie in the truth of a counterfactual claim about consent, but instead rests elsewhere. Perhaps it lies in some natural fact about certain action types (they promote utility, for instance) or is a consequence of the universalizability of an action's maxim. In other words, interpreted globally, the claim that hypothetical consent is not binding represents the rejection of a certain metaethical view of the source of normativity.[13]

But careful attention to the usual formulation of the standard indictment suggests that this interpretation is mistaken. Recall Dworkin's assertion: "my hypothetical consent does not count as a reason, independent of...other reasons, for enforcing...rules against me, as my actual agreement would have" (*op. cit.*, p. 18). The comparison to actual consent suggests a second, narrower interpretation of the standard indictment. It suggests that critics of hypothetical-consent theories are not concerned with the problem of the bindingness of moral rules generally, but rather with the bindingness of those principles to which one might think consent is especially relevant. And most moral principles do not fall into this category: for instance, few moral theorists would claim that one must obey moral principles requiring us to respect persons or refrain from harming them unnecessarily only if we have consented to those principles.

If advocates of the standard indictment were worried about the issue of bindingness generally, they would have just as much reason

[13] For a discussion of the problem of bindingness, see Christine Korsgaard, *The Sources of Normativity* (New York: Cambridge, 1996).

to question the bindingness of a principle generated by actual consent as they would that of a rule generated by hypothetical consent.[14] Indeed, they would have reason to examine the bindingness of moral principles said to be grounded in natural law, human psychology or dispositions, social convention, human reason, and so on.

So, the standard indictment does not apply where hypothetical consent is used as a method for justifying moral principles—that is, where it is offered as the source of the bindingness of moral oughts—for in those cases it is irrelevant that hypothetical consent does not bind in the way that actual consent does. The bindingness of hypothetical consent in moral contractarianism is not intended to mimic that generated by actual consent. Likewise, it is a mistake for moral contractarians to respond to the standard indictment by asserting that hypothetical consent is the next best thing to actual consent[15]; for actual consent, as I suggested above, is surely not a good candidate for the ground of most moral obligations. Of course, one can become bound by consenting, and one may be acting immorally if one fails to meet one's consent-based obligations. But promises and contracts hardly exhaust the whole of morality. Indeed, most of our moral requirements, unlike certain principles of justice, have nothing to do with actual consent.

Consider next the problem of *compliance*. Moral contractarianism, as Morris has pointed out, can have two distinct purposes. Some moral contractarians aim to justify moral principles; they wish to show which principles we are morally bound to follow. Others aim to give reasons for compliance; they wish to show that agents have reasons to fulfill moral obligations.[16] As Morris puts the point:

[14] See David Hume, *A Treatise of Human Nature*, 2nd edition, L.A. Selby-Bigge, ed. (New York: Oxford, 1978), pp. 516-25, for a discussion of source of the bindingness of promises. See also Michael H. Robins, "Promissory Obligations and Rawls's Contractarianism," *Analysis*, XXXVI, 4 (1976): 190-98.

[15] Gauthier makes this puzzling claim in personal correspondence with Morris. See Morris, *An Essay on the Modern State* (New York: Cambridge, 1998), p. 126, note 28. The idea that hypothetical consent is a substitute for actual consent or is designed to solve problems faced by actual-consent theories of political obligation seems to be fairly widespread. See, for instance, Brudney, p. 235; Rawls, *A Theory of Justice*, p. 13; and Thomas Nagel, *Equality and Partiality* (New York: Oxford, 1991), p. 36. See also Simmons, "Liberal Impartiality and Political Legitimacy," pp. 220-21.

[16] If one is a strong internalist, this claim will seem incoherent. That a principle is morally binding counts, on some theories, as a reason for abiding by it. For discussion of the internalism-externalism debate, see W.D. Falk, "'Ought' and Motivation," reprinted in *The Collected Papers of W.D. Falk* (Ithaca: Cornell, 1986), pp. 21-41; David Brink, *Moral Realism and the Foundations of Ethics* (New York: Cambridge, 1989), pp. 37-79; and Michael Smith, *The Moral Problem* (Cambridge: Blackwell, 1994), pp. 60-91. Morris discusses the relevance of this debate to moral contractarianism in "A Contractarian Account of Moral Justification."

> One might think...that the outcome of hypothetical rational agreement determines the nature and content of fundamental moral principles, without thinking that agents are necessarily provided thereby with reasons for action. Compliance may be another matter, because agreement may not always suffice to ensure that individuals in certain situations have reason to act in accord with mutually advantageous principles.... By contrast...[some]...theorists think that rational agreement can provide reasons for compliance.... The two aims of contractarianism are independent, and one does not entail the other.[17]

In this context, compliance is understood in terms of reasons (or in some cases motives) for acting morally. The philosophical worry is that agents lack reasons (or motives) for obeying moral principles. Contractarian theorists who address the compliance issue, then, are, in essence, seeking to answer the question, 'Why be moral?'.

Importantly, this question has little to do with enforcement by an external authority. But contractarian political theories are directly concerned with the issue of enforcement. Indeed, political contractarianism might be described as a theory designed to justify the state's enforcing certain rules against citizens. The centrality of state authority to contractarian political theories explains why Dworkin frames his criticism of Rawls in terms of enforcement. He says: "hypothetical contracts do not supply an independent argument for the fairness of *enforcing* their terms" (*op. cit.*, pp. 17-18). So, where the issue of compliance to moral rules pivots around the reasons or motives agents might have to fulfill their obligations, the issue of compliance to political principles pivots around the conditions under which the state is justified in forcing its citizens to obey.

To ground an argument for compliance with moral principles in hypothetical consent is to argue that the fact that one would have agreed, under certain special circumstances, to follow a moral principle counts as a reason for following the principle under present circumstances (*ibid.*). There is no problem created in this case by the fact that agents have not actually been in those special circumstances and have not actually agreed to follow a particular principle; for the hypothetical agreement in moral contractarianism is not intended to provide grounds for enforcing the hypothetically agreed-upon principles. Hypothetical consent is not designed to justify an institutionalized authority's coercing someone to abide by a rule; rather, it is intended to show that one has a reason to follow it of her own volition.

[17] "A Contractarian Account of Moral Justification," p. 218.

By contrast, hypothetical-consent theories of political obligation can be interpreted as offering grounds for enforcement of rules issued by the state. If these theories are indeed designed to justify enforcement, then they suffer from the problem Dworkin identifies. For instance, if I agree to pay someone $25.00 to weed my garden, and I fail to pay him, then he has a right to extract from me the money I promised him. In other words, he has a right to enforce the agreement. But if someone weeds my garden and then tells me that I must pay him $25.00 because I would have agreed, had he asked, to pay him that amount to weed my garden, he has no right to extract that money from me. He has no right, in other words, to enforce the "agreement." (Or, alternatively, there is no agreement for him to enforce.) The truth of the counterfactual gives him no moral claim against me.[18] So, when theorists aim to justify enforcement of rules by a political authority, it seems that, if they wish to rely upon consent, they must rely upon actual consent. Only actual consent sanctions coercion.

In summary, the difference between actual and hypothetical consent which lies at the heart of the standard indictment is irrelevant to moral contractarianism. Moral principles, except in the special case of promises and contracts, have not been and are not plausibly justified by appeal to actual consent. The bindingness of most moral principles undoubtedly has a different source. So it does not count against hypothetical-consent theories of morality that hypothetical consent does not bind in the way that actual consent does. Furthermore, the main virtue of actual consent is that it sanctions enforcement—if one fails to uphold an agreement, the promisee is licensed to force compliance. But in the case of fulfilling moral obligations, compliance is not a matter of force but a matter of having a reason or motive for action. And since hypothetical consent is sufficient to show that one has a reason for action, it is suited for moral contractarianism, although it is insufficient to justify coercion.

A number of theorists have not properly appreciated the difference between moral and political contractarianism. Consequently, they mistakenly assume that these two forms of contractarianism are vulnerable to the same criticisms and have at their disposal the same

[18] This is because the truth of the counterfactual claim says nothing about the disposition of my will. As Jeremy Waldron points out: "When we move from asking what people actually accept to asking what they would accept under certain conditions, we shift our emphasis away from the will and focus on the reasons that people might have for exercising their will in one way rather than another"—"Theoretical Foundations of Liberalism," *Liberal Rights: Collected Papers, 1981-1991* (New York: Cambridge, 1993), pp. 35-62, here p. 55.

resources for responding to criticisms. Samuel Freeman (*op. cit.*), for example, holds that Dworkin's version of the standard indictment applies to Gauthier's view. But to the extent that Gauthier is concerned to show why people have a (nonmoral) reason to abide by moral principles, the standard indictment does not apply. Gauthier, in essence, argues that abiding by moral principles is in the interest of persons conceived as instrumentally rational, self-interested utility maximizers. Assuming his argument is successful, Gauthier shows why it is rational for us willingly to be moral. He does not show that the state is sanctioned in forcing citizens to comply with its policies. He does not, in short, justify coercion. Hence, the fact that his argument is based upon hypothetical consent, which—as the standard indictment says—is not capable of justifying enforcement, does not undermine his approach.

Several theorists, including Brian Barry, Arthur Ripstein, and Thomas Nagel, attempt to appropriate Scanlon's moral contractarianism for the purpose of justifying political principles—without recognizing the hazards involved in this project. Scanlon maintains that an act is wrong "if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement."[19] In other words, a moral principle is justified if it would not be rejected by hypothetical agents imagined to be reasonable, informed, and uncoerced. Of this view, Nagel says: "Although Scanlon is discussing contractualism as a moral theory, the extension to the conditions of political legitimacy is quite natural, substituting 'enforced conformity' for 'unforced general agreement'."[20] Nagel overlooks the fact that the difference between "enforced" and "unforced" is philosophically crucial. Like Gauthier, Scanlon does not attempt to justify coercive enforcement of justified principles by a political authority so his view is similarly immune to the objection that hypothetical consent cannot bind in a way that sanctions enforcement. Yet Nagel maintains that Scanlon's procedure can justify enforced compliance to political principles. But, as we saw above, the counterfactual structure of Scanlon's theory disqualifies it as a method for justifying political obligations; the fact that ideal agents would agree to certain principles of justice does not sanction enforcing those principles against actual agents who have not in fact agreed.

[19] Scanlon, "Contractualism and Utilitarianism," p. 223.

[20] Nagel, pp. 36-37. See also Barry, *Justice as Impartiality*, pp. 67-79; and Ripstein, pp. 134-35.

III. POLITICAL LEGITIMACY AND POLITICAL OBLIGATION

The first step in my effort to undermine the standard indictment of hypothetical-consent theories was to show that it does not count against contractarian justifications of morality. The next step is to discuss a distinction, within political contractarianism, between *political legitimacy* and *political obligation*.[21] Although some discuss the differences between these two notions,[22] legitimacy and obligation are often assumed to be conceptually inseparable. The nature of the conceptual tie, however, is understood differently by different authors. In what follows, I briefly discuss three common ways of seeing the conceptual relation between legitimacy and obligation. I next identify a problem shared by all of these approaches. Then I offer a way of understanding the relation between legitimacy and obligation which both avoids this problem and helps make sense of hypothetical-consent theories of political authority. My suspicion is that the standard indictment of hypothetical-consent theories depends upon a particular way of seeing the relation between legitimacy and obligation which is both flawed in its own right and different from the way the hypothetical-consent theorist sees it.

On what might be called the *strong view*, it is part of the meaning of "legitimate authority" that one is obligated to obey it. This view is advanced by Hannah Pitkin:

> To call something a legitimate authority is normally to imply that it ought to be obeyed. You cannot, without further rather elaborate explanation, maintain simultaneously both that this government has legitimate authority over you and that you have no obligation to obey it.... Part of what "authority" means is that those subject to it are obligated to obey (*op. cit.*, pp. 62-63).

While it is nonsense to say that I am not obligated to obey an authority to which I am subject—as this would amount to saying that I am not obligated to an authority to which I am obligated—it is *not* nonsense to claim that I am not obligated to a legitimate authority. The meaning claim that Pitkin makes is true not in virtue of the phrase 'legitimate authority' but in virtue of the phrase 'subject to'.

[21] Throughout this section, I shall drop the modifier 'political' for ease of exposition. Unless otherwise specified, 'obligation' and 'legitimacy' should be assumed to mean 'political obligation' and 'political legitimacy'.

[22] For example, Waldron, pp. 45-50; William A. Edmundson, "Legitimate Authority without Political Obligation," *Law and Philosophy*, XVII (1998): 43-60; and Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy and Public Affairs*, IX, 2 (Winter 1980): 134-59. For a critique of Ladenson, see Joseph Raz, "Authority and Justification," *Philosophy and Public Affairs*, XIV (1985): 3-29.

By using that phrase, Pitkin covertly imports the notion of obligation into the notion of legitimacy. Indeed, the first statement of the quote is plainly false, and its passive construction obscures an important point. For me to "call something" a legitimate authority is not necessarily to imply that I should obey it.

Assume, for example, that the government of Canada represents a legitimate authority. As a citizen of the United States, I am not, under normal circumstances, required to obey its laws. I am required to obey some of its laws when I am in Canada, but others, such as those requiring military service or permitting voting, simply do not apply to me. I am not capable of being subject to them, at least while I am subject to the laws of the United States government.[23]

There are also cases where I am capable of being subject to a legitimate authority but am still not, on conceptual grounds, obligated to obey it. Assume for the sake of argument that the authority of the Pope is legitimate. Surely, I am capable of subjecting myself to that authority. Yet there is no conceptual barrier to my recognizing the authority of the Pope's edicts and yet not being obligated to abide by them. I may simply choose not to subject myself to them.

Notice that a similar conceptual line cannot be drawn between legitimacy and obligation in the case of moral principles. It is self-contradictory to claim that we are not bound to abide by legitimate moral principles. The very fact of their legitimacy binds us. If a moral prohibition on, say, torture, is legitimate, then moral agents are bound by it. By contrast, as I stated above, it is conceptually possible for a set of political principles to be legitimate, for one to be capable of subjecting herself to them, and yet for her not to be subject to them, without thereby failing to fulfill an obligation. Certainly, some argue that one is who is capable of being subject to a legitimate political authority is morally required to subject herself to it. That is, some argue that people have a moral duty to obey just governments (that apply to them).[24] But those who hold this view must provide an argument for it. It does not follow directly from the fact that political principles are legitimate that one who is capable of being subject to them must obey them. In other words, to claim that one is morally required to obey legitimate governments is to introduce one possible

[23] For a discussion of the jurisdiction problem, see Waldron, "Special Ties and Natural Duties," *Philosophy and Public Affairs*, XXII, 1 (1993): 3-30. See also Mark C. Murphy, "Acceptance of Authority and the Duty to Comply with Just Institutions: A Comment on Waldron," *Philosophy and Public Affairs*, XXIII (1994): 271-77.

[24] For example, Rawls, *A Theory of Justice*, pp. 333-41; and Waldron, "Special Ties and Natural Duties." See also Simmons, *Moral Principles and Political Obligations*, pp. 143-52.

ground of political obligation, which itself must be justified. So, the existence of a moral requirement to obey just political systems, if there is one, is compatible with the conceptual distinctness between justification (or legitimacy) and obligation which we find in political theory but which is absent in moral theory.

Another view of the relation between legitimacy and obligation, called by one author, the *obligationist view*, states that a government is legitimate if and only if its citizens are required to obey it.[25] A weaker version of this view states that obligation is a necessary condition for legitimacy; a political system is legitimate if citizens are required to obey its rules.[26] On both of these views, legitimacy is understood in terms of obligation. As a consequence, the right of the state to coerce citizens is bound up with its legitimacy: if legitimate states are simply those to whom citizens are obligated, and being obligated sanctions enforcement of unfulfilled obligations, then legitimate states are permitted to coerce.

Notice that the considerations brought to bear against the strong view pertain also to both varieties of obligationism. Those considerations severed the conceptual link between legitimacy and obligation by showing that legitimacy is not sufficient for obligation—one is not necessarily obligated to obey a legitimate authority. We have reason, then, to search for an alternative conception of the relation between legitimacy and obligation.[27]

I propose the following alternative view. Think of a theory of legitimacy as giving a justification of political principles or arrangements. A legitimate principle or institution is one that is justified.[28]

[25] The term 'obligationist' is from Rex Martin, "Two Models for Justifying Political Authority," *Ethics*, LXXXVI, 1 (1975): 70-75. According to Martin, both Hobbes and Locke are obligationists. David Copp calls the obligationist view, the "traditional" view. According to him, the traditional view includes the idea that citizens' obligations to obey (and concomitantly the state's right to rule) rest in the consent of the governed—"The Idea of a Legitimate State," *Philosophy and Public Affairs*, XXVIII, 1 (Winter 1999): 1-43. The strong view is, in fact, a version of the obligationist view since it entails that obligation is necessary and sufficient for legitimacy. But I take it the obligationist view need not be understood as a meaning claim, and so might be interpreted as slightly weaker than the strong view.

[26] See, for example, Raz, p. 5; and Fishkin, p. 218.

[27] For further critique of the obligationist (or traditional) view of legitimacy and obligation, see Copp, pp. 8-14.

[28] In "Justification and Legitimacy," which was published after this paper was composed, Simmons challenges the equation between justification and legitimacy offered here. He also suggests that those who distinguish between political obligation and political legitimacy (a distinction he rejects) are, in fact, noting a distinction between legitimacy and justification. If I interpret him correctly, Simmons's motivation for distinguishing legitimacy from justification is similar to my motivation for distinguishing legitimacy from obligation, namely, the worry that a political

Think of a theory of obligation as giving an account of why and under what circumstances citizens are required to obey justified rules or arrangements. On this account, first, legitimacy is a necessary, but not a sufficient, condition for obligation. Second, and consequently, in the justification of political authority, legitimacy is logically prior to obligation. Third, and again consequently, the justification of political principles or arrangements does not establish the right of the state to coerce; citizens are justifiably coerced to follow the rules of the state only if they are obligated to follow those (justified) rules.

IV. THE JUSTIFICATORY FORCE OF HYPOTHETICAL CONSENT

If we understand the relation between legitimacy and obligation in the way that I have proposed, we can begin to see the nature of the justificatory force of hypothetical consent. Hypothetical consent is designed to show that political principles are justified. In other words, principles that would be chosen by ideal agents in ideal circumstances are legitimate. The fact that they would have been chosen is the ground of their legitimacy. Hypothetical consent does not show that one is obligated to follow such principles, or that the state is licensed to enforce such principles. On this understanding of hypothetical-consent theories, it is clear that the fact that hypothetical consent is not binding is not a problem. If hypothetical-consent theories are not designed to establish political obligation, then it is not a criticism of them that they are not successful in doing so.

Nonetheless, one might think that hypothetical consent has no justificatory force whatsoever and so is not even capable of conferring legitimacy upon principles, let alone generating political obligation. This seems to be the position of those who refer to hypothetical consent as a "metaphorical" or "heuristic device." Such theorists, as I stated above, conceive of hypothetical consent as embellishing a position that is ultimately justified by means other than hypothetical consent.

There are two kinds of independent justifications that authors who take the "heuristic device" view have in mind. Most commonly, the independent ground supposedly illuminated by hypothetical consent is the quality of the principles or institutions chosen. The reasoning is as follows: since hypothetical choosers are ideal, they would choose the best principles; in other words, they would choose the principles that ought to be chosen (in comparison with actual agents, who, because they are not fully rational, have impure motives and the like,

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authority's being justified does not entail an obligation to obey it, or a right of that authority to coerce people to obey it.

would not likely choose the best political principles). But on what grounds are the hypothetically chosen principles the best principles, or, the principles that ought to be chosen? The answer must be that they ought to be chosen because they are just. But in this case, the argument from hypothetical consent is empty. So, critics maintain, independent grounds must be provided to support the justice of the principles that would be chosen by hypothetical agents.[29] And if this is the case, hypothetical consent drops out of the argument.

Another way in which hypothetical consent is regarded as a metaphorical device is that it represents the correct form of reasoning about political principles.[30] This idea is best understood in terms of Rawls's notion of pure procedural justice. "Pure procedural justice," he says, "obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure, such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."[31] Ideal agents' consent in ideal circumstances represents a fair procedure.[32] The sense in which hypothetical consent is, in this case, metaphorical is simply that the procedure described, since it is ideal, never actually takes place. Nonetheless, the principles that result from our thinking (that is, we moral agents) about how hypothetical agents would reason are justified on the grounds that our thinking in this way is the correct way of reasoning about political principles. Whatever principles are the outcome of our thinking in this way are just principles. The difference between the first and second interpretations of the metaphorical nature of hypothetical-consent theories can be stated succinctly as follows. On the first account, idealized agents would choose principles because those principles are just. The device of hypothetical consent merely illuminates the justice of these principles. On the second account, principles are just because idealized agents would

[29] See Hampton, *Political Philosophy*, p. 66; Pitkin, p. 56; and Dworkin, pp. 37-53. This interpretation of hypothetical contractarianism treats it as a case of what Rawls calls perfect procedural justice; see *A Theory of Justice*, p. 85.

[30] See Hampton, "Feminist Contractarianism," p. 242; Gaus, p. 328; and Rawls, *Political Liberalism* (New York: Columbia, 1993), pp. 273-74.

[31] *A Theory of Justice*, p. 86; see also pp. 274-75.

[32] The deliberation of hypothetical agents is not *a case* of pure procedural justice, since, according Rawls, pure procedural justice must be actual—*A Theory of Justice*, p. 86. Rather, the deliberations of hypothetical agents model or represent a case of pure procedural justice; if agents actually deliberated behind a veil of ignorance, the outcome of their deliberations would be just solely on the basis of the fairness of that procedure. Rawls's position about the hypothetical nature of his version of the social contract, and its relation to pure procedural justice, is stated clearly in *Political Liberalism*, pp. 273-74. See also Barry, *Justice as Impartiality*, pp. 213-16.

choose them. The device of hypothetical consent represents a fair procedure capable of yielding just principles.[33]

The first account of the metaphorical aspect of hypothetical-consent theories is based upon an incorrect interpretation of (most versions of) hypothetical contractarianism.[34] Those who maintain that hypothetical contractarians are forced (by the counterfactual structure of their theories) to base the justice of their principles ultimately on independent grounds seem to be unaware of the availability of the procedural interpretation. (Or perhaps they think that the procedural alternative is so implausible that it cannot be the correct view.) Both Rawls and Nagel state explicitly, however, that political principles are just, on their views, because they would be chosen by idealized agents, and not the other way around. Moreover, they are careful to explain why arguments for political principles designed to govern pluralistic societies must not be based on considerations beyond hypothetical rational agreement.

The second account of the metaphorical nature of hypothetical-consent theory gets the theory right. But one wonders what the point is of calling hypothetical consent a heuristic device on the correct interpretation.[35] The fact that the agreement never actually takes place does not make the agreement metaphorical. It makes it hypothetical. Moreover, it is misleading to say that the correct form of moral reasoning that is represented by hypothetical agreement is the actual justification for political principles, while hypothetical agreement is merely a heuristic device. If principles are justified in virtue of the fact that they are the outcome of a certain form of reasoning, and that reasoning requires deliberating about what hypothetical agents would agree to, then hypothetical agreement is central to the justification. There is no self-sufficient argument that can be sepa-

[33] Morally unconstrained theories do not justify principles on the ground that they would be the outcome of a *fair* procedure, but they, nonetheless, justify principles on the ground that they would be the outcome of a procedure that captures morally relevant facts about human nature and human relations. In that respect, morally unconstrained views can be seen as invoking a pure procedure. For discussion, see Ripstein, p. 118.

[34] An exception is Pitkin, who states: "[Y]our obligation to obey depends not on any special relationship (consent) between you and your government, but on the nature of the government itself.... In one sense, this nature of the government theory is a substitute for the doctrine of consent. But it may also be regarded as a new interpretation of consent theory, that we may call the doctrine of *hypothetical* consent" (pp. 61-62).

[35] A hypothetical *contract* is indeed a metaphorical notion and Dworkin is right to say that it is no contract at all. But it does not follow from this fact that hypothetical consent is a metaphorical notion. Hypothetical consent represents a counterfactual claim, and counterfactuals are not necessarily metaphorical.

rated from the notion of hypothetical consent. So hypothetical consent, on the best interpretation of hypothetical contractarianism, is not plausibly seen as a heuristic device, nor is it necessary that it be accompanied by independent justificatory grounds.

So far, I have established that hypothetical contractarianism can be interpreted in a way that makes hypothetical agreement essential and nonmetaphorical. But I have not shown why it is plausible to think that hypothetical consent has justificatory power. In what follows, I make this case. My sketch is not an original argument for the justificatory utility of hypothetical consent. Rather, it is a rehearsal, at a very general level, of the approach taken by hypothetical-consent theorists. I do not wish to defend hypothetical consent as providing the best ground for political principles, as that would require looking at the details of individual theories and rebutting specific objections to them. I merely wish to show that hypothetical-consent arguments, contrary to what some critics have said, are not empty.

The basic idea is this. First, we need principles that can be justified to everyone in society. On morally constrained views, this requirement is rooted in a normative principle, central to liberalism, which states that all persons have the same moral standing. If all are equal in standing, then no one, or no group, is justified in having authority over others which those others have no reason to recognize. On morally unconstrained views, the requirement that principles be justifiable to everyone is based upon the need for compliance. If principles are not justifiable to all, then those to whom they are not will have no reason to comply. And since, on morally unconstrained views, one person's incentive to comply hinges on the compliance of others, the need for universal compliance is central to the theory. Second, we need principles that do not depend upon a particular moral view, or, at the very least, do not depend upon any controversial moral commitments. On some views, such as Rawls's, this constraint is a consequence of the fact of pluralism. In many contemporary societies, people have widely divergent conceptions of the good as well as different ideas about the ground of morality. On other views, such as Hobbes's, this constraint is based upon a commitment to moral subjectivism. So, if principles must be justified to all and cannot be grounded in any particular moral perspective, on the basis of what can they be justified?

This problem can be solved by adopting as the criterion of rightness for principles the fact that they would be chosen by agents idealized in a certain way. Ideal agents are, first, fully rational in the sense that they desire the most effective means to their ends. On some views, ideal agents are also described as reasonable; they want to

engage in fair cooperation on terms that others can accept.[36] Second, they are equipped with a particular motivational capacity, ranging from self-interest to an interest in exercising a sense of justice. And, third, they are endowed with a particular understanding of human wants or needs. In morally constrained contractarianism, this understanding is derived from a moral conception of the person. In morally *un*constrained views, it is derived from a descriptive view of human nature. Finally, on some approaches, ideal agents lack information seen as morally irrelevant to their deliberations.

Because ideal agents are fully rational, equipped (supposedly) with a psychologically plausible motivational capacity, knowledgeable about matters relevant to human relations, and, in some cases, ignorant about matters irrelevant to human relations, whatever principles or institutions they would choose are those any actual agent has reason to adopt. That actual agents have reason to adopt them shows that they are justified. Whatever one might think of this type of argument, it is a mistake to argue that its appeal to hypothetical consent renders it empty.

V. THE SOURCE OF POLITICAL OBLIGATION

If hypothetical consent justifies principles but does not generate obligation, on what is political obligation based? And what use is it to show that principles are legitimate without demonstrating that people are bound to follow them on pain of sanctions implemented by the state? A good way to answer this question is to examine the arguments for political obligation offered by two influential hypothetical-consent theorists. This approach allows me to show, at the same time, that these hypothetical-consent theorists, contrary to the interpretations of their critics, do not typically rely upon hypothetical consent to justify political obligation.[37]

First consider Rawls's view, which is, recall, the subject of Dworkin's formulation of the standard indictment. It is clear that Rawls does not believe citizens to be obligated by his principles of justice simply on the ground that the parties in the original position (the hypothetical choice situation) would choose them, for he explicitly offers an alternative basis for such obligation. He asserts that obligations, by

[36] For a discussion of the reasonable and the rational, see Rawls, *Political Liberalism*, pp. 48-54. For a discussion of the Kantian roots of this distinction, see Arnold I. Davidson, "Is Rawls a Kantian?" *Pacific Philosophical Quarterly*, LXVI (1985): 48-77.

[37] I shall not discuss the means by which Hobbesian hypothetical-consent theories generate political obligation. On some interpretations, Hobbes distinguishes between legitimacy and obligation insofar as he claims that subjects are permitted to resist attempts on the part of the sovereign to exercise its legitimate power—see Ladenson.

definition, "arise as a result of our voluntary acts."[38] He also claims that "[t]here is no political obligation, strictly speaking, for citizens generally" (*ibid.*, p. 114). So, if Rawls believes citizens are required to obey political principles, he cannot hold that this requirement has a voluntaristic basis. And, indeed, he does not. "From the standpoint of justice as fairness," he says, "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" (*ibid.*, p. 115).[39] Rawls's support for this claim is that such a duty would be chosen in the original position; it is a moral principle, as opposed to a political principle, justified by means of hypothetical consent.[40] As such, the claim that hypothetical agreements are not binding does not undermine it, for the reasons identified above in the discussion of the differences between moral and political contractarianism. Rawls, then, denies the existence of a conceptual link between legitimacy and obligation, providing instead an argument for a moral connection.

Another hypothetical-consent theory of legitimacy is offered by Nagel, who appears to view political obligation as deriving directly from political legitimacy. For example, he says: "If a system is legitimate...no one is morally justified in withholding his cooperation from the functioning of the system...."[41] In other words, no one has grounds to disobey the principles guiding the system. He says, in addition, that "the issue of political legitimacy [is represented by] the history of attempts to discover a way of justifying coercively imposed political and social institutions to the people who have to live under them."[42] But a closer look at Nagel's view indicates that he rejects the way the problem of political obligation is framed by those who push the standard indictment:

> The search for legitimacy [on contractualist accounts] can be thought of as an attempt to realize some of the values of voluntary participation, in a system of institutions that is unavoidably compulsory. Subjection to a

[38] *A Theory of Justice*, p. 113.

[39] This view represents a shift in Rawls's thinking. Originally, he held that our duty to obey political principles is based upon the duty of fair play. See his "Legal Obligation and the Duty of Fair Play," in Sidney Hook, ed., *Law and Philosophy* (New York: University Press, 1964), pp. 3-18. See also H.L.A. Hart, "Are There Any Natural Rights?" *Philosophical Review*, LXIV (April 1955): 175-91; George Klosko, "Political Obligation and the Natural Duties of Justice," *Philosophy and Public Affairs*, XXIII (1994): 251-70; and Carol Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (Berkeley: California UP, 1985), pp. 113-33.

[40] *A Theory of Justice*, p. 115.

[41] *Equality and Partiality*, p. 35.

[42] Nagel, "Moral Conflict and Political Legitimacy," *Philosophy and Public Affairs*, XVI (1987): 215-40.

> political system cannot be made voluntary: Even if some people can leave, that is very difficult or impossible for most of them. In any case all people are born and spend their formative years under a system over which they have no control. To show that they all have sufficient reason to accept it is as close as we can come to making this involuntary condition voluntary. We try to show that it would be unreasonable for them to reject the option of living under such a system, even though the choice cannot be offered.[43]

Indeed, Rawls makes a similar remark about the aim of hypothetical-consent theories:

> No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense.... Yet a society satisfying [hypothetical contractarian demands] comes as close as a society can to being a voluntary scheme, for it meets the principles that free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.[44]

Implied by these assertions is the idea that those who advance the standard indictment set a very high standard for political obligation—they assume that it must be voluntary. Hypothetical consent, they say, is not like actual consent and so cannot be the ground of political obligation. But a natural duty of justice, the principle of fair play, and the notion of gratitude—all of which have also been suggested as grounds for political obligation—are not like actual consent either.[45] Or, to put the point slightly differently, critics of hypothetical-consent theories mistakenly assume that hypothetical consent is designed to be a substitute for actual consent. But Nagel's

[43] *Equality and Partiality*, p. 36. See also Scanlon, "Nozick on Rights, Liberty and Property," p. 17, where he notes an "important difference between two types of consent theory. In theories of the first type, actual consent has a fundamental role as the source of legitimacy of social institutions. Theories of the second type start from the assumption that the institutions with which political philosophy is concerned are fundamentally non-voluntary."

[44] *A Theory of Justice*, p. 13. For discussion, see Simmons, *On the Edge of Anarchy* (Princeton: University Press, 1993), pp. 76-79.

[45] See, in addition to those works cited in footnote 39, Waldron, "Special Ties and Natural Duties"; Simmons, *Moral Principles and Political Obligations*; Klosko, "Presumptive Benefit, Fairness and Political Obligation," *Philosophy and Public Affairs*, XVI (1987): 241-59, "The Principle of Fairness and Political Obligation," *Ethics*, XCVII (January 1987): 353-62, and *The Principle of Fairness and Political Obligation* (Lanham, MD: Rowman and Littlefield, 1992); A.D.M. Walker, "Political Obligation and the Argument from Gratitude," *Philosophy and Public Affairs*, XVII (1988): 191-211; and Wolff, "Political Obligation, Fairness and Independence," *Ratio (New Series)*, VIII, 1 (April 1995): 87-99.

and Rawls's positions make it clear that hypothetical-consent theories are a nonvoluntaristic alternative to actual-consent theories.

But what are we to make of the assertion made by Nagel and Rawls that hypothetical-consent theories attempt to realize some of the values of voluntary participation and come as close as possible to making an involuntary condition voluntary.[46] This simple example illustrates what might be considered a weak notion voluntariness that is preserved by the type of hypothetical contractarianism Nagel and Rawls support. Imagine the following three cases. First, a merchant sells a product that she wishes not to (say, because the manufacturer permits dangerous working conditions) because she is threatened by a powerful gang in her neighborhood. Second, a merchant sells a product to which she is opposed because it is in high demand and she will go out of business if she refuses to sell it. Third, she sells this product because she is a strong believer in laissez faire and therefore has no moral qualms regarding its production. The first two scenarios are analogous to political systems where citizens are either forced, or have a strong incentive, to abide by policies that they do not accept. The third scenario corresponds to a system where citizens accept, for their own sake, the policies that they are required to follow. So we can identify within Nagel's claim that political principles are inevitably compulsory in the background a weak sense in which principles can be self-imposed, as Rawls says. If principles are justifiable to all (that is, if citizens can accept the principles for their own sake), then all have a reason consistent with their moral outlooks to follow them of their own volition. People may desire to disobey or be unwilling to obey because, for whatever reason, they do not lend credence to the reason they have to obey. (Perhaps they are moved by self-interest or desire or greed.) But, upon full reflection, they have reason willingly to obey. The sense in which the principles are self-imposed, then, is straightforwardly Kantian: the source of their authority is in the agent's own rational willing.[47]

[46] For a critique of Nagel on this point, see Simmons, "Liberal Impartiality and Political Legitimacy."

[47] All hypothetical contractarian accounts rule out arrangements analogous to the first scenario described above. The second case described above models the outcome of morally unconstrained contractarianism. In this outcome, political principles rest upon what Rawls calls a *modus vivendi*—*Political Liberalism*, pp. 145-48. Individuals are motivated to adhere to political principles, whether they accept them or not, because it is to their advantage to do so. Citizens, that is, have self-interested grounds for abiding by principles that they do not necessarily endorse. On my interpretation of Nagel and Rawls, the aspect of voluntarism that they believe is capable of being captured by hypothetical consent theory is not captured by morally unconstrained contractarianism. It is preserved only by morally

In the end, though, that agents have a moral reason to comply with political principles is quite different, from the point of view of pure voluntarism, from their being willing to comply. One has surgery voluntarily, for instance, only if she is willing. If she undergoes the procedure against her will, whether or not she has reason to have it done, then it is not done voluntarily. So the fact that the source of the authority of political principles is, in hypothetical-consent theory, located in citizens' rational willing does not make citizens' compliance to those principles voluntary, if those citizens are not in fact willing to obey and are, moreover, forced to obey by an external authority. So it is somewhat misleading for Nagel and Rawls to claim that hypothetical-consent theories reflect, to some extent, the voluntarist ideal.[48] The fact of the matter is that hypothetical-consent theories offer a nonvoluntaristic account of political authority whose virtues are its own.

VI. SUMMARY

I have argued that the observation that hypothetical consent does not have the binding power of actual consent does not pose a problem for hypothetical contractarianism. It does not pose a problem for moral contractarianism, because actual consent is irrelevant, except in the case of promises and contracts, to the bindingness of moral principles. It does not pose a problem for political contractarianism, because hypothetical consent, on this approach, is not designed to generate political obligation; rather, it is designed to justify political principles. Just as hypothetical consent can establish that agents have reason to follow certain moral principles of their own volition, it can establish that agents have reason to follow certain political principles of their own volition. In this respect, it can tell us which principles should structure and guide political institutions. Hypothetical-consent theorists justify state enforcement of these principles by means other than hypothetical consent, rejecting the assumption that seems to be held by critics of hypothetical consent, namely, that arguments for political obligation must be voluntaristic.

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constrained approaches that provide grounds for principles that individuals can accept for their own sake. Hence their support for the morally constrained version of contractarianism.

[48] Simmons makes a similar point in "Justification and Legitimacy," p. 761.