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On the Justification of State Authority through the Social Contract

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A Thesis in the Field of Government
for the Degree of Master of Liberal Arts in Extension Studies

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Abstract

This paper seeks to determine the justification for state authority under the social contract by examining two popular appeals. First, it looks at the idea that the contract grants legitimacy to the state based on residency, and that an individual who disagrees with its terms is free to leave. By closely examining the accounts in Plato's *Crito* and Robert Nozick's *Anarchy, State and Utopia*, I conclude that this exit clause as a theoretical possibility is not justified. The subsequent empirical analysis affirms the idea that the state is not left because of disagreement in significant numbers. Next, I examine modern work on hypothetical consent from Cynthia Stark and David Enoch to see if this model of consent works for the social contract and would grant legitimacy of their authority. I find that the condition of living in a state is sufficiently different from other accounts where hypothetical consent would be justified that this kind of consent cannot be extended to the social contract.

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Chapter I.

Research Question and Review of the Literature

A social contract is a hypothetical two-sided agreement between a government and the individuals governed by which those individuals give up some portion of their rights in order to secure the protection of the state. The extent of rights given up and the extent of protection received varies between the differing conceptions of the contract. There are some thinkers who believe individuals give up all of their rights for the protections government affords; others will claim that there are hard limits on which rights can ever be given up in any sort of exchange.

A contract, as traditionally understood, is a voluntary agreement between two parties, where terms and conditions are laid out for each. The social contract, while hypothetical rather than any real document, is only different in the idea that voluntarily entering the contract needs to be replaced with some notion of hypothetical consent. For the overwhelming majority of individuals throughout modern history, they were born into a state that already existed. The balance of rights and protections, the terms of the contract, had been decided without them. The social contract is not meant to be a description of how the state comes to be, but is rather an after-the-fact philosophical justification for something that already is. Because individuals never sign a social contract, there needs to be some other way they signal their acceptance of the terms of authority of the state.

This paper will look at two possible signals that justify the authority of the state. The first of these is based off of the continued residence of a person in that state. Put another way, if an individual does not want to live under the authority of a state for whatever reason, they may leave and choose to go to another. By not exercising this option, they are agreeing to the authority of that state when they choose to remain. The second justification is based on a kind of hypothetical consent; that the authority of the state can be justified because individuals, if they could choose to accept the governance of the state, would or at least should choose to do so. This distinction will be explored more in chapter three.

In order for the state authority to be justified according to the traditional contractarians such as Plato, Locke and Hobbes, the possibility to leave the state was always necessary as a way to justify the power the state wielded over people. The thought was “if you don’t like it, then leave.” If an individual chooses not to leave, that is sufficient justification for the state to exercise its authority over that person. Modern context shows how this is not a feasible approach in the modern age. It certainly is not the case that individuals can opt out of the state or state protections as they could historically. More than that, even if it is possible for an individual to leave a state on the basis of dissatisfaction with that state’s governance, the empirical data show that it is overwhelming economic opportunity rather than political dissatisfaction that drives movement away from a state. That leaves open the question for my research project: if individuals do not move away from the state in response to political dissatisfaction in real numbers, can the state still justly derive authority over the people on the basis of their

supposed acceptance of state authority? Is it still a social contract if individuals don't care to refuse to sign?

Research Question

The existence of the state as legitimately deriving authority over individuals has been a philosophical topic for discussion for centuries. Much of this justification is after the fact; states arose first and were justified only in hindsight, if at all. Throughout much of history, states were not bothered to be justified at all; their existence was their justification. Some authors in some societies questioned authority in political or philosophical works; for most states their existence was treated as sufficient for the justification of their authority over citizens. Consequently, there was never really a chance to ask the more fundamental questions about the existence of the state, as these were settled questions. "Should the state exist" is a question akin to "is gravity a good thing" in that the answer does not matter. Gravity does exist. As does the state. It can be hard to imagine the alternative to either of these.

While it may remain a mere thought exercise to subsequently inquire about the legitimacy of states, their inevitability never being in question, it remains important to know whether the proverbial emperor has no clothes. If the state exerts its authority over the people illegitimately, it may be cold comfort to say so.

This paper will look at the philosophical history behind the social contract, then look at two different methods for justification of the authority of the state. First, it will examine the possibility of validity of authority based on residency and the power of exiting the state as proof of the ability to consent to the social contract; then it will look at

conceptions of implied or hypothetical consent that do not rely on the possibility of exit from the state.

Two Different Contracts

One important clarification in the discussion of social contract theory is that there are some thinkers who have used the social contract as a way to explain the hypothetical agreement of individuals in a pre-social condition for a government to look after them, exchanging some of their individual liberties for some level of common security. On the other hand, most thinkers use the social contract as less of an origin story for the state and more a continuing justification for the authority the state yields¹. For this latter group, the social contract is not a hypothetical historical construction that leads to the state, but is rather a continuing relationship between the individuals who reside in an area and the government that protects them.

It is not as simple to sort social contract theories or theorists into one camp or another. Even as early as Plato, different applications of justified authority can be found amongst different works. For instance, Charles Khan writes:

In the first place there is no trace of a social contract in the *Crito*. Plato certainly knew of a theory of the social contract which began from a pre-political state of nature...in the *Gorgias* and in *Republic* II he describes such a theory...[t]he contract of the *Crito* is not a social compact: it is not an agreement among pre-political individuals who want to set up civic institutions to enforce principles of right and wrong and thus escape from the state of nature. (Charles H. Kahn, 1989)

¹ The only account this paper considers where the pre-social condition is meant to be possibly historical in Robert Nozick's *Anarchy, State ad Utopia*.

While Kahn is correct that the formulation in *Crito* is different from *Gorgias* in the kind of social compact that exists between individuals and the state, it does not follow that only one of these can be called a social contract.

Some writers are explicitly talking about a pre-social thought experiment and using the conditions and assumptions of those thought experiments in relation to the modern state. When Thomas Hobbes in his seminal work *Leviathan* describes the conditions under which a social contract is formed between citizens and the state, he does so from a pre-social state. Thomas Hobbes writes *Leviathan* in part as justification for the power of the king during the English Civil War. He claims that without a government, people would live in a state of nature without any kind of protection for their lives or property. Because this condition would be so terrible, “poor, nasty, brutish, and short,” individuals should accept the forfeiture of any and all liberties for the protection of the state (Hobbes & Gaskin, 1998, p. 84). The protections of the state, according to Hobbes, were offered as a way to rescue people from the heinous alternative of statelessness at the price of their liberties. Because the state of nature was so undesirable, any government, no matter how tyrannical, would be a preferable alternative for individuals.

John Locke and Jean-Jacques Rousseau similarly talk about what the political world looks like before the state or any kind of contract, though in less bleak ways. Because Locke believes that people are more inclined to good than evil, he is less sympathetic to Hobbes’ claims that in the state of nature everyone would be at each other’s throats.

Just as it is a mistake to try to conflate the kind of thought experiments that bring about the Enlightenment-era familiar conceptions of the social contract such as Hobbes, Locke and Rousseau with actual historical genesis of the state, it is similarly short-sighted to limit this kind of social agreement with some point in time, whether real or fictional. As far as the arguments in this paper are concerned, state authority could have be a single day old or over 1000 years. Gauthier puts it well when he writes, “[t]he theory itself concerns the rationale of relationships among persons, and between society and its members, rather than the cause of those relationships.” (Gauthier, 1977, p. 135). These relationships have existed as long as both the individual and the state have existed. They are as relevant today as they were at the beginning of the state, whether that is a historical or philosophical construction.

When the modern theorist John Rawls discusses his thought experiment, the original position, he does so not as a way to describe some actual story of genesis and instead as a way to determine what sorts of laws individuals would find just in their pre-social condition. Rawls then uses these conclusions as the theoretical basis for his veil of ignorance—the supposed intellectual tool individuals should use when evaluating potential social configurations to help determine what is just.

Robert Nozick on the other hand, noted critic of Rawls that he was, tries to bridge the gap between Rawls’ purely theoretical justification of state authority according to principles of justice as fairness and the more quasi-historical accounts of the inception of the state. The fundamental question for the purpose of this paper is not whether social contract should be understood only at the beginning of the relationship between the state and the individual. Instead, it takes Gauthier’s idea that so long as the relationship exists,

there is the question of justification, not just historically, but in the present tense. Is the state, as it exist in variations of democratic configurations in much of the world, justified to exert authority over the current residents of that state?

The Importance of Coercion

One important consideration in the validity of authority derived by the social contract is the idea of coercion. There is a major difference between decisions that are made freely by an individual and those that are made under duress, threat, or incentive. This latter category of contracts is not usually considered binding legally, nor should they be understood to have binding power theoretically or morally. If a mugger asks for my wallet with a gun pointed at me, I would give that wallet over. That should not be understood as a free exchange or a fair contract between the mugger and me. In the same way, if I were making a deal as a part of my business because my spouse is being held hostage by the other party in the negotiation, that contract would not hold up in court.

With regard to the social contract, what this means is that individuals must freely opt-in (or at the least, not opt-out) to the authority of a state in order for it to be valid². If it turns out that an individual is coerced in their acceptance of the contract, it should be taken as no more valid than either of the above examples. For a hypothetical consent formulation as will be explored in chapter three, this means that there cannot be undue

² There is a sense in which an opt-in model is always less coercive than an opt-out, though certainly less practical. Consider for example the way that organ donation works in many U.S. states. I have to positively affirm that I would like to be an organ donor by checking a box on an official state form. If I do not check that box, it is assumed I do not consent. An opt-out system, on the other hand, would be something more like websites that want to send me promotion material after I sign up with them. I check the box that says “I do not want to receive promotional emails.” If I do not check that box, it is assumed that I want those emails. Individuals are far more likely to overlook the requests in either opt-in or opt-out which means that opt-in systems have far lower rates of participation than opt-out. For the purposes of this paper, then, there are ways to look at the social contract as either kind of system.

influence exercised by any party to attempt to sway the decision of an individual whose consent is being measured. Coercion is essential to consider in all contracts, particularly when there is a clear power imbalance. What can one person do against a government?

Simply a power imbalance does not in and of itself signal coercion. It requires the kind of thumb-on-the-scale that examples above show. With the example of the mugger, it is coercion because of the threat expressed if I do not comply. The choice whether to give my wallet is directly interfered with by the mugger. In the same way, there is an important distinction between coercion and simply an unfavorable choice. If I am forced to choose between two bad situations, this is not coercion. Even in the instance that the bad situation was created by a more powerful entity that then offers the salvation, that is not coercion. This is the difference between why an individual might choose to pay taxes—the threat of government punishment that drives their action is certainly an example of coercion—and why an individual might choose to procure health insurance. While the alternative in the health insurance example is still a bad one, the threat of facing an illness without insurance is certainly not ideal, the individual could still freely choose this worse alternative to buying the insurance. Not that they would, but that they could, is the salient feature that separates it from coercion.

It could be argued that just as an individual could choose the less ideal or even the less rational, from a self-interest perspective, of two choices, so too, could an individual being mugged choose not to give over their wallet. It is nonetheless a coerced choice because one alternative—not giving the wallet—is made less desirable than it would be were the threat on the part of the mugging party not in the situation. This question of what is and what is not coercion is important to keep in mind, as a social contract that is

agreed upon under coercion should not be considered legitimate, but one agreed upon as the best option from a set of bad options can still be considered to be valid for the purposes of determining legitimate authority.

Historical Context on State Authority

Much of the debate over the social contract and state authority that seems to come from it happened during the Enlightenment period in European history. As more individualist notions in Western European history arose from the ashes of the increasingly less popular medieval Christian ideas of the worthlessness of peasant farmers, conceptions from Thomas Hobbes (Hobbes & Gaskin, 1998) to John Locke (Locke & Laslett, 1988) to Jean-Jacques Rousseau (Rousseau, 1968) punctuated the overall feeling of the time that governments needed justification. However, some of the earliest political philosophy on social contract and mobility comes from Plato (Plato, 1997).

In his dialogue *Crito*, Plato expressly ties the authority to the state to a kind of contract. As above, this is not the kind of contract that could be said to exist at the beginning of a state, but rather one that represents one individual, Socrates, who came to exist within a fully formed state, Athens. This dialogue is set in Socrates' prison cell after he has been convicted by the state of dishonoring the gods and corrupting the youth; he had been sentenced to die. While waiting in jail, his friends come to visit and offer him an escape. They have already paid off the guards and have a boat waiting to sail him away to a new land. Socrates rejects this offer on two grounds: first, he claims that running away would set a bad moral example to his children and followers; second he elaborates his idea of the social contract. Socrates says that because Athens did so much

for him—providing him an education, and facilitating the marriage of his parents among others—that Socrates owed the state the allegiance so long as he chose to live there. He could have fled the state and rejected their authority, but only before the state brought him up on charges.

This idea of opting into state authority by virtue of residence is continued into the seventeenth- and eighteenth-century political thought through Hobbes and Locke and into Rousseau. When Hobbes uses the threat of stateless anarchy, he looks to a state that can act as a protector of all those under its influence. Specifically, this is a geographical territory. In the famous illustrations to *Leviathan*, Abraham Bosse designed a larger-than-life monarch who looms over a city on the hill. The implication is clear: that ruler presides over that land. If an individual wants the protection of that ruler, not only does an individual have to give up their rights in exchange for security, but they must do so while living in a place the ruler can see. For Hobbes, there is no price too high to pay for that protection, as the alternative is so terrible. That means that individuals should be happy to exchange their “right to all things” for this protection (Hobbes & Gaskin, 1998, p. 87). Among the accounts of the social contract, Hobbes’ is certainly the most one-sided in favor of the state.

It is worth returning to the discussion on coercion here, as Hobbes’ construction of the social contract is explicitly coercive. In the Hobbesian view, individuals would accept the authority of the state because the alternative is too terrible to endure. The state of nature is so bad that individuals should clamor for a state to save them from it; no price is too high. This is an “offer you cannot refuse” which may seem to have a similar kind

of coercive power as it has in the classic film *The Godfather*, but is importantly different as discussed above.

On the other hand, John Locke believes that fundamental rights like life, liberty and property are bestowed on humanity by God and so cannot be forfeited to any state. He still believes that individuals should come together to form a government, though his argument is more democratic in nature. Specifically, Locke argues that a unanimous consent amongst the potentially governed is the only justification a state can have to exist. It is not as urgent a concern in Locke as in Hobbes, as the “state of nature” from Hobbes is described by Locke as a “state of peace” that can erupt into war, but rarely does (Locke & Laslett, 1988, pp. 110–114). Because the unanimous consent of the governed is required in Locke, those who would not otherwise consent to government can simply leave. As in Plato, there is a belief that there are opportunities for individuals to escape state authority.

Rousseau focuses more on democratic justification for the already existing laws than on the creation of society itself (Rousseau, 1968). His argument is that laws that are passed in a society must be in the interests of most of the society, rather than for the benefit of a few. Still, he does discuss the importance of a social contract as applying equally amongst people—everyone must forfeit the same rights to exist in the society. If the state no longer serves the people, they can revolt, as in Locke. No specific provision is made for individuals who do not want to be a part of the state but, given Rousseau’s preference for smaller city-states rather than large nations, it is not unreasonable to assume a degree of mobility like in Plato, where Socrates could flee from Athens to any number of neighboring cities to be free of the laws of one city.

Modern Context on State Authority

The political and philosophical contemporary literature on state authority seems to come from two distinct sources—John Rawls (Rawls, 1999) and his revitalization of social contract theory in *Theory of Justice* along with the libertarian answers to Rawls in James Buchanan (Buchanan, 1999) and Robert Nozick (Nozick, 2013) in the 1970s, and more modern traditional scholarship in academic journals that revisited the Enlightenment assumptions in the modern age.

Rawls' *Theory of Justice* provided a new model of the social contract based on his thought experiment of the original position. For Rawls, the question of the content of justice rather than the terms of justice; for him the outcome of this thought experiment was meant to show what sorts of societies would be just more than an explicit claim regarding whether any particular social organization could or could not be justified as a matter of consent.

He returns to Locke's idea of unanimous consent and asks the question: what kind of social organization can be justified behind a "veil of ignorance" where individuals are made unaware of their position in a society (Rawls, 1999, p. 213). From this original position, Rawls argues that everyone in their pre-social condition would agree on principles of equality of access to social institutions along with the economic difference principle—that any change from the original distribution of wealth should benefit the least well off before the well off. Still, the outcomes, while they are meant to provide normative guidance are not explicitly connected to justification³.

³ Justice and justification are similar in origin but different in application. A society can be just in terms of the distribution of resources, but if it got to that point based on the coercion of its citizens, that distribution would not be justified. Rather than a purely semantic difference, this distinction ends up informing much of the criticism Robert Nozick has of John Rawls. Specifically, Nozick claims that Rawls is looking at a

Explicit claims that individuals would opt-in to the social contract if they could are made by more modern defenders of Hobbes such as Gregory Kavka who claims in Hobbesian Moral and Political Theory that individuals with their own best interests at heart would agree upon democracy with certain economic protections in negotiation (Kavka, 1986). Rawls' justification of the outcomes of the original position are similarly rooted in self-interest. For Rawls, humans are rationally self-interested when stripped of their individuality or social outcomes as they are in his original position thought experiment⁴. Their desire to avoid the worst possible outcomes of a randomized social order would lead them to construct a hypothetical society with the least amount of social inequality, maximizing the minimum possible outcome.

What is relevant the idea of mobility is that, like Locke, Rawls looks to unanimous consent, but perhaps because of the modern realities of nations that existed in Rawls' 1970s that did not in the seventeenth century of Locke, Rawls does not detail any way for individuals to opt out of the contract at all. Instead, Rawls' focus was more about how the state should be ordered to best serve the people.

kind of snapshot view of distribution to call it unjust, while Nozick takes a more historical approach that will attempt to justify the unequal distribution of the present day.

⁴ This is not without controversy. Some believe that Rawls' experiment shows instead that individuals are particularly interested in justice and fairness rather than acting out of self-interested motives (Christiano, 1994). This view does not explain the current state of affairs adequately, however. If the majority view is not one of self-interest but is rather one of justice, that should mean that the current society is also just, not just the society designed in the original position. This is a case of the world reflecting the preferences of the individuals within it. If Rawls' conclusions are to be taken seriously, they need to be based on actual human nature rather than what is idealized. It is under this framework that Rawls says people accept a society that prizes equity over utility. It is only when individuals are stripped of their social knowledge, but maintain their rational self-interest that they, for fear of ending up amongst the worst treated in society, would opt for the fairer, if less prosperous alternative.

If the conclusion to be drawn from Rawls is instead of one of the beneficence of humanity, then it follows that people are incredibly ineffectual at organizing society around their interests. That would make the systematic inequality that exists in the modern world a question of practicality rather than anything else, and would fundamentally ignore the importance of the veil of ignorance.

After Rawls' Theory of Justice, the libertarians Robert Nozick and James Buchanan wrote in response to defend Goldwater conservatism (Bronner, 2004). As the American political reality changed from the massive increase in size and spending of government from New Deal policies in the 1930s to World War II and even through Eisenhower's massive infrastructure projects in the 1950s, some conservative intellectuals wanted to return the Republican party to some of its intellectual roots in smaller government. This movement was spearheaded by the ultimately unsuccessful candidate for president, Barry Goldwater. Nonetheless, some degree of intellectual and philosophical support for his ideas is clear in some authors of American philosophy of the period (Allitt, 2011). While it may not have been explicitly the goal of these authors to support his candidacy, especially since many wrote in the years after he ran and lost, there are still clear connections in their thought and his policy prescriptions for smaller, almost non-existent, governments.

In *Anarchy, State and Utopia*, Nozick talks about the lack of justification for any state beyond the "minimal state" that provides security to its citizens (Nozick, 2013, p. 26). In doing so, he draws somewhat on the earlier "Nature of Government," an essay by Ayn Rand in 1964 (Rand, 1964). Her minimal state includes provisions for military, police and the courts, though all three are fundamentally to protect property. There is an important distinction, claims T. M. Scanlon, between the kind of natural rights, of the sort that John Locke will say are divinely granted, and the rights to property that Rand and Nozick are supporting (Scanlon, 1976). Because the government is necessary to create the institution of, and then to subsequently protect private property, it cannot be understood as the same kind of right that Locke discusses as natural or God-given.

Nevertheless, Nozick takes this idea of the fundamental right to private property to critique Rawls' conception of the original position and specifically the idea that people can vote their rights away in that position. Nozick says that individuals cannot consent to a more expansive government.

Nozick also, in his construction of the minimal state, has a unique origin story for that state based on individual contracting. Essentially, in the state of nature, individuals are at risk of attack from stronger people. However, they are free to contract for protective services at an agreed upon price. This voluntary agreement that can be terminated at any time provides the hypothetical justification for the modern state, he argues. Over time, individuals who contracted for the same sort of protection would band together under common borders, founding the first instances of states. Individuals in Nozick's theoretical system are free to leave the state at any time, if they give up the protections that the state provided.

There is a fundamental difference in Rawls' conception of political obligation and the more libertarian view of preserving individual liberties in Nozick, according to Scanlon. Whereas Nozick claims the state derives its authority in part from the theoretical justification of a mechanism such as the social contract, Rawls, Scanlon claims, does not similarly depend on the legitimacy of the state through theory (Scanlon, 1976). Instead, Scanlon concludes that Nozick's justification for the minimal state is little more than a moral justification that individual liberties are a better overall social good than pure utilitarianism (Scanlon, 1976).

Nozick's conclusions are mostly palatable to James Buchanan, but the latter actually takes the idea of consent a step further. In *Limits of Liberty*, Buchanan notes,

“Anarchy is ideal for ideal men; passionate men must be reasonable” (Buchanan, 1999). The implication being that the government should be as small as possible to ensure that people are “ideal,” which in Buchanan’s case means protecting the right of the others who live in that society. The only valid purpose of government is protection of rights, both domestically by the police and courts and externally by the military. Along with this controversial assertion, he makes the claim that the minimum viable government is the minimal acceptable government; consent does not enter into it.

In David Gauthier’s *Morals by Agreement*, he argues, contra Buchanan, that any government is justifiable as long as it is agreed upon by consensus in good faith negotiations (Gauthier, 1986). However, for Gauthier, exactly what those agreements would look like are in large part dependent on mutual trust of citizens and the assurances they can provide one another, for instance to cooperate. Gauthier uses the ideas of mutual assurances and conditional threats as a way to solve the famous prisoner’s dilemma from game theory (MacIntosh, 2013). If individuals are in full open and honest communication, the mutually beneficial outcome will become apparent. This seems to agree with Nozick who similarly says in his entitlement theory that any deal agreed upon fairly is itself fair (Nozick, 2013). Comparing this to Rawls’ idea for a universal consensus, there is no veil of ignorance in either Gauthier or Nozick’s discussion. For them, lack of self-awareness of social position is not an element for theoretical consent.

Importantly, in “The Social Contract as Ideology,” Gauthier brings back Hobbesian conceptions of authority and calls them contractual to the extreme; that for Hobbes all humans are either in antagonistic relationships with each other or contractual ones (Gauthier, 1977). This means that even children are in contractual relationships

with their parents, and spouses to each other. Gauthier mentions that this seems to exclude other kinds of relationships such as those based in love (Gauthier, 1977, p. 163). Nonetheless, he claims that it is on the basis of love, and its corollary patriotism, that ensure the “coercive order” of the contractarian state (Gauthier, 1977, p. 163). For Gauthier, these emotions are manipulated by states to convince individuals to act outside of their mere contractual demands. For contracts to be fair, individuals have to have full information of the terms of that contract, requiring they have the same level of knowledge as the state within a social contract. Of course, there are claims that Gauthier (and Nozick by implication), imagine a system in which “demands for information are fantastic-too fantastic ever to be met or even to allow the theory to be used as a guide to improvements within the reach of present social policy” (Braybrooke, 1987). If this is true, then a more practical approach would be preferable. If a perfect contract is not possible, then perhaps working from the information that individuals already have is sufficient for a practical justification of a social contract, rather than an idealize condition where all people have access to perfect information.

Cynthia Stark talks about the implied nature of the contract in the modern age (Stark, 2000). Obviously, there was no original position as Rawls describes it; nor did either Locke’s pre-government state of peace or state of war exist. The way that she puts the problem “hypothetical contracts are not binding and so cannot generate obligations” (Stark, 2000, p. 316). However, Stark holds that there is no need for consent when it comes to governance. As with Scanlon, if there is no alternative, then there can be meaning for hypothetical consent. She claims that the critics of hypothetical consent “mistakenly assume that hypothetical consent is designed to be a substitute for actual

consent” (Stark, 2000, p. 332). So despite the fact that the hypothetical consent does not have the same power of obligation, it fundamentally does not need to in the context of modern state authority because it “is not designed to generate political obligation; rather it is designed to justify political principles” (Stark, 2000, p. 334).

Along the same lines, Elisabeth Ellis notes that the social contract is an idealistic fantasy that can never exist in actuality (Ellis, 2006). More important to her is that the particular conditions placed on individuals are onerous, to the point where they would never opt into such a contract even if they could (Ellis, 2006, p. 544). She offers an alternative through Kantian moral deliberation rather than Locke or Rawls’ political universal assent. This kind of argument is similar to the standard put forth in Stark, that rational individuals should be assumed to make rational choices and that those choices are in favor of political authority (Stark, 2000).

David Enoch’s argument against hypothetical consent accounts of the legitimacy of political authority relies on the supposed rationality of actors, and their goals within a political system (Enoch, 2017). If the goals of an individual are for protection, then, along with Hobbes, it would follow that a state is a preferable condition to statelessness. If the goals of an individual are known, then hypothetical consent can be assumed in the service of those goals. Enoch considers examples of patients in a medical setting whose goals (the preservation and extension of their lives) are either known or assumed. In those cases, it is reasonable to say that a particular procedure, even if not specifically condoned by the patient ahead of time, is justified. However, Enoch recognizes a difficulty in applying this to state authority. Namely, if the goal of individuals is to preserve their sovereignty or at least “if the autonomy relevant to political authority is

centrally about sovereignty...then what follows is that hypothetical consent accounts of legitimate political authority are hopeless” (Enoch, 2017, p. 35). What makes a medical emergency different from the political is that the goals of the individuals in the medical system are generally more likely to be known, and possible to achieve through medical intervention. Moreover, because, unlike the comatose patient unable to verbally make their wishes known, many individuals who hold political opinions about the importance of individual sovereignty are able to express these views, it would be “entirely ludicrous” to think that a state can justify acting in their best interest when their stated interest opposes it (Enoch, 2017, p. 35). It is not that the goods of the state are functionally different from the medicine offered the patient, but rather that in most instances, the individual considered in social contract analyses are at least somewhat capable of expressing their assent. If this is true, individuals should not feel bound by the social contract in any real sense and that state authority is theoretically unjustified while simultaneously inescapable, as Simmons claims (Simmons, 2013).

Michael Huemer argues in *The Problem of Political Authority* that even if there is no social contract, this does not mean there is no government (Huemer, 2013b, p. 137). Government can, in his view, and should exist even without inherent justification. For Huemer, instead, this authority comes from the implied good the government can do for the citizens. That the citizens may be better off with a government than without one is sufficient grounds to justify the authority of that government. This view is similarly supported, under the name of permissive legitimacy in Jiafeng Zhu (2015). This idea does not mean that an individual can ignore the laws of such a government either; they do this at their peril. A government can still enforce its power over a given territorial area even

without the consent of the governed. Huemer argues that this consent may be impossible given the necessary coercion of even minimal states. Huemer offers this example of an individual seeking to enforce protection on neighbors for a price: they will be able to demand money (coercion) or to accept free riders (Huemer, 2013a, pp. 3–4). What they cannot do is to ethically opt out—just as an individual in the United States cannot live in the U.S. and opt out of protection from the military.

Permissive legitimacy may be a good way to look at a government's existence absent justification, but justification still matters. It is important to understand whether a system is fair, even if it cannot, or even should not, be changed. Understanding whether the state is justified in its authority should matter for anyone living within that state. Huemer, Zhu and those who agree with them are answering a different question than what is being treated in this paper. They begin with the idea that the state is not justified as a premise to their further argumentation; it is that premise I wish to examine. Their argument may be an important follow-up to mine, but it remains outside the scope of my current focus.

The Argument

In this paper, I will look at justifications of state authority of two different kinds: those justifications that are predicated on free movement of individuals, and then those justifications that are not predicated on the ability to leave the state. The first of these is common in the understanding of state authority historically. This paper will examine some of the finer points in historical philosophical texts and supplement these theories with the modern reality of the impracticality of movement on political or philosophical bases.

Second, the paper will look at more of the modern literature surrounding hypothetical consent--none of which relies on the idea of exiting the contract as necessary for derivation of authority. Instead, these authors claim that there are circumstances in which the consent of an individual can be inferred, even when there is no opportunity to deny that consent. Normally, this is understood as acting in the best interest of the individual in question. Whether that can be known, and what responsibility the state has to honor those preferences will be considered.

Chapter II.

Mobility and the Exit Clause

Having an exit clause, or some kind of mechanism built into the social contract that would allow one party--individuals--to leave that contract, seems like a good idea. This is especially true, as individuals do not have the ability to choose the place of their birth. After all, any contract that is meant to be binding in a legal sense must be agreed to by parties. Absent any kind of signing of a document, there is no other way, besides leaving the country, that an individual can present their dissatisfaction with the terms of that contract and ultimately reject it. This section will examine the theoretical idea of exiting the contract as that refusal, and whether this is legitimate. I ultimately find that the exist clause is not a compelling way to gauge dissatisfaction with the state because of both theoretical and practical limitations.

First, this section will look specifically at the circumstances surrounding the imprisonment of Socrates in Plato's *Crito* as well as Nozick's construction of the minimal state, as the former is one of the clearest explanations of when exit from a state is and is not morally acceptable while the later looks at economic refusal rather than necessarily leaving. Second, this section will look at the reality of modern mobility between countries. Ultimately, it will conclude that theoretical exit is neither really possible nor justified and that practically, exit for political reasons, especially philosophically high-level political reasons, does not happen with any real frequency despite intense political dissatisfaction in an example country, the United States. That means, then, that there is

no good way to gauge the acceptance of the social contract by the people living in a particular state. The legitimacy of state authority cannot therefore be based on the claim that staying in the state constitutes consent.

Plato's Theoretical Analysis of Mobility and the Exit Clause

In the *Crito*, when his compatriots come to Socrates' rescue, Socrates refuses to leave his imprisonment. Besides the bad example he believes his potential jailbreak would set for his children, he also claims that he owes his life to the state. He believes the state exercises legitimate authority over him and that he must accept the rulings and laws of the state because of his living there. He discusses this living in two ways: first, he talks about the debt he owes to the state by virtue of the things it has done for him that he must repay. Second, he discusses the ongoing choice that he had to leave the state before he was subjected to their judgment for his supposed crimes. These two are at odds with each other. This paper's objections will be: (1) Socrates can leave Athens but not all states; (2) Socrates can never have the morally clean slate he implies is required to exit a state. If either of these objections is true, it cannot be said that there is a real exit clause in the social contract per Socrates' presentation.

Specifically with regard to the debt that Socrates owes Athens, he argues that the institution of marriage allowed his parents to couple and start a family. The state then provided his education in his formative years and continued to provide for his defense against external threats. If he objected to the laws of Athens, he could have left far before this instance in the *Crito*, when the state had already found him guilty of violating their laws and had sentenced him to death. It is clear in his trial as reported in Plato's *Apology* that Socrates did object to those laws. If objection to the laws gives an

individual enough of a reason to leave as state, Socrates ought to have done this well before. He could have gone somewhere else that had different laws that were more to his taste. Socrates had a problem with one state in particular—Athens—rather than the concept of a state⁵.

There is an important difference between looking at justification of a contract when there are alternatives as opposed to situations in which there are not. Let's say that I am choosing an internet service provider. In the United States, there may only be one provider in my area. If I work the kind of job that requires I have internet, that one internet provider acts as a kind of monopoly in an economic sense. They could charge me twice the going rate, and I would probably have to pay it. Even though I could move to another area to escape that company, I still must have internet. Barring some dramatic change such as leaving my job and finding some lifestyle in the twenty-first century where internet is not required, I am beholden to one company or the other. This is not a free choice, but neither is it a coerced one. It is simply a bad choice I must make between two bad options. Similarly, I can leave one state to find refuge in another, but unless I am going to find a way to live stateless, I cannot escape the reality of some social contract. If an individual is dissatisfied with particular laws in one country, they may, with considerable effort, move to another. What they cannot do is to move away from all jurisdictions. Every government on Earth has some kind of obligation for their citizens. There is some kind of trade-off between the rights an individual must concede in exchange for the security of that state. This is true whether an individual is a citizen, a

⁵ Certainly, there are historical examples of particular states, particular governments, that have exceeded their authority under a social contract. Tyrannical regimes and fascist dictatorships are among the most obvious examples of these. But because the goal of this paper is to answer the question of whether any government can exercise legitimate authority, it does not help to cherry-pick the worst examples.

non-citizen resident, or even a visitor to that state. Just because an individual is not a citizen of the Czech Republic does not mean that the police should ignore that individual when they are pickpocketed in Prague. The particular protections of the state may be stronger for individuals who are citizens, of course.

While it may have been true in Socrates' day that escaping from one jurisdiction to another was easier than it is in modern times, his plan for escape does not include forever being a fugitive on the run. Instead, he picks a specific location where he believes he will be warmly received by their ruler and their society. Socrates' complaint is with the laws of Athens under which he was charged and found guilty, namely: dishonoring the gods and corrupting the youth. Traveling to some other country where they do not have these laws or where he has at least not yet broken these laws would be a sufficient escape from his current predicament and charges. What Socrates cannot escape without living in the uninhabited, ungoverned woods somewhere, is the idea that some government has dominion over him no matter where he lives. If his idea that exiting the state is a meaningful alternative to living under a social contract, there would have to be some way to leave from the jurisdiction of all states. He can leave a state, but not the state. Even if it were possible to move to a place where there is no social contract enforced, the prerequisite of leaving with a morally clean slate is impossible.

The condition of not yet breaking the laws on leaving the state is an impossible burden to meet because of the services already rendered. As Socrates says, the institutions of Athens allowed for his parents to get together and have a child. If this is to be assumed as a debt upon the child, as Socrates implies, there is no way of knowing when this debt is repaid. Presumably, if one is allowed to leave the state only when their

balance of obligations is zeroed out (i.e. when they do not in that moment owe more than they have given up), this debt of parental marriage or even childhood education would be somehow amortized over a lifetime paying the state back. This is particularly true with regard to education. You receive public education when you are young, then pay taxes later in life to pay back what you received.

It is possible, as Socrates implies in the text, that this debt can never be repaid. Because it was the State that allowed Socrates' parents to marry and create him, there may be no amount of good service to the state that would ever make up for this amount of assistance in his early life. Supporting this is the fact that Socrates, at this point in his life about seventy years old, is still bringing up the debt owed to the state over his genesis.

A major practical problem with this conception of the debt owed to the state is that it would seem to morally disallow immigration. Every individual is born somewhere, and if the debt of that birth can never be wiped away and therefore that person always has a debt to that state, it would seem as though leaving the state voluntarily would mean leaving in arrears. Presumably, when a person labors and gives back to the state over their lifetime, this is one way that that debt is repaid. If an individual moves to a new city, country or continent, they would instead be giving their labor to a state to which they owed no previous alliance. This is of course ridiculous and not how the modern world is understood. Nor is it likely that Socrates would claim that if someone immigrates to a new country that person is less beholden to the laws of the state. The debt an individual owes to the place of their birth is too restrictive for the globalized reality of the modern world. Even if this debt could somehow be wiped clean, the idea that an individual would only be able to leave the state before they had committed an

infraction against it still leaves too little room. That an individual is born in a particular country does not make that government's power more legitimate over them than any government in which they happen to be residing at any other time.

Second, if the social contract is understood as a moral rather than legal consideration, the point of infraction of a law becomes more relevant than when an individual is either charged or convicted by the courts. Because the legal and the ethical are different, it should follow that if Socrates was guilty of corrupting the youth, that would have been true at the moment of the teaching that corrupted, regardless of when he was charged or if he was convicted. In a moral sense, there is no need to wait for the courts to pronounce guilt on a murderer. It would surely be unethical for someone to commit a murder, then, before they are caught, to flee the state claiming they didn't agree with the murder laws. They are either guilty or innocent by virtue of the actions they took at the time they took those actions. When, then, could Socrates have ethically left Athens? His teaching, assuming it did actually corrupt the youth, did so over years. He could not have left the state ethically at any point after he had broken the so-called agreement to uphold their laws as a part of a social contract.

It does not count as consent to the social contract by Socrates staying in Athens for his whole life if it was never permissible for him to leave. At the moment of infraction against the laws of the state, one is no longer free to leave the state. In the case of Socrates, the point where he first corrupted the youth may have been his first teachings. Much of Socrates' early life remains the subject of dispute--history does not have any of the original writings of Socrates, if those even exist. What is known is known through other sources, some contemporary, some less so. Plato was writing

dialogues featuring Socrates as an interlocutor decades after the teacher's death. All of this to say, it may be impossible to determine when Socrates first corrupted the youth. When Socrates first committed the offense against the State could have been in his teenage years. It is not easy to know when one has broken the moral law of the State in cases such as these.

As time has gone on, codes of laws in many countries have only grown more and more complex. In the United States, more than 3,000 federal laws were counted as of 1982 before The U.S. Justice Department gave up counting (Fields & Emshwiller, 2011). Adding state and local laws to this number would grow this number even higher. No person can likely be sure they are not in violation of some law. No person, therefore, can rightfully leave the state using Plato's criterion in the *Crito*. It does not matter whether an individual has been charged with an infraction; simply having broken the law (which it is nearly impossible to prove an individual has not) is sufficient disqualification for ethically leaving a state, assuming the charge is sufficiently serious.

It could be argued that the moral impermissibility of leaving the state is not the same as the impossibility of such an exit. This is true. However, the point Plato is making in *Crito* is that the social contract is morally binding on Socrates' conduct. It is certainly the case that his compatriots, who had already bribed the guard in Socrates' prison and had a boat at the ready could have, with Socrates' consent, left Athens. That Socrates chose to stay was because he believed in the morally binding power of the social contract.

What I am arguing is that the idea of having a legitimate contract might be based on a real ability to exit the contract, within the legitimate terms of that contract. If

Socrates had left Athens, he would have violated the terms of the contract as he saw them. If the social contract is to be binding, one possible justification is that the possibility of leaving is real and fair within it. Consider a cell phone contract that locks the user in for three years of service. It is not sufficient to say “well, I could just not pay my bill, change my name and flee the country if I don’t like it, therefore the contract is fair.” It is important for the legitimacy of the contract that, if an exit clause is a measure of its justifiability, that exit can happen legitimately as well.

For the sake of Socrates, it is important to qualify the severity of offenses that should bar one from ethically leaving a State. It cannot be said that any person who breaks any law violates the social contract in such an egregious way that they are barred from exit. Many laws, such as moderate speeding on roadways, are all but expected to be violated. It has to be that there is some category of law, based on the terms of the social contract itself, that can provide this sort of disqualification. Those laws in which infraction is tantamount to a crime against the existence or the safety of the state itself are the laws that most likely have this qualification. While that may bring down the number of offenses that strip an individual of their ethical mobility under Socrates’ conception, it is still impossible to know exactly how many laws this entails.

The obvious solution to this is that it is not the nature of the crime that matters, but the punishment the state metes out for its violation. The reason Socrates was unable to leave Athens was because the state had imprisoned him for his crime. The problem with this standard, though, is both that penalties for crimes, when they are determined by trial, are subjective. Sometimes an offense that carries jail time for one person will not for another. Even in the case of the trial of Socrates, his detractors who trumped up the

charges against him wanted him exiled rather than killed⁶. They did not know that the law would require Socrates' death until the conclusion of the trial. There is not a good way for us to, prior to conviction and sentencing, determine what kind of crime results in imprisonment. It is still the case that Socrates' idea of an exit clause is, in reality, not one.

Nozick's Argument

A different kind of social contract that also relies on individual exit in Robert Nozick's conception of the minimal state. Nozick's account gives a hypothetical origin story based on consent to account for how modern governments might similarly have that consent. Importantly for Nozick, though, not every part of a modern government can be justified—only those pieces and actions that are supported by his story. Essentially, Nozick will claim that those functions of government that can be explained in his origin story as a free agreement between the individuals and the state represent justified authority the state has; all other functions of government that are not explained as a free exchange are not justified. In practical terms, this means that military and police are acceptable government authority, but little else is.

The notion of free exchange, particularly, is important for our discussion. As with the above emphasis on coercion, for Nozick, the idea that any exchange is only valid if it is freely entered is an essential underpinning for contracts. Specifically, Nozick sets forth

⁶ This is one of the ironies of the trial and death of Socrates. It is generally believed that Socrates' political enemies wanted him to leave the city so they charged him with a crime that would get him exiled. When he is found guilty, his unrepentant attitude during the sentencing phase of the trial is what upgraded his punishment from exile to death. When his friends come to free Socrates in *Crito*, it is likely that they, by taking him out of Athens, would be giving those enemies that first charged Socrates exactly what they originally wanted—exile for Socrates. Perhaps that is among the reasons that Socrates chose to stay and accept his death sentence, though this is not one of the reasons articulated in the text.

this idea in his discussion of entitlement theory in *Anarchy, State and Utopia*. In that text, he claims that we should feel entitled only to those things that are either the direct product of our labor, much in the way that Locke talks about property, or to those things that are the proceeds of free exchange. For an exchange to be free, it cannot have coercive elements. For example, Nozick discusses the seemingly exorbitant salaries that athletes command for their employment—his example in 1973 is the salary of Wilt Chamberlain, then \$250,000 per year. The question for Nozick is not one of value or worth. It does not matter to him what value Chamberlain produces for the audiences watching him or even the team owners who hire him. What matters is what the owners agree to pay the players. Of course, this is often bounded by questions of value—if Chamberlain’s presence on their team yields the owners an additional \$150,000 in ticket sales from people who specifically want to watch Wilt play, it is unlikely they would pay the athlete more than this; their profit motive is the motivation for their salary offer. However, if they do decide to pay more than the athlete brings in in revenue, and both sides agree to this contract, that is all that is required for it to be fair, in Nozick’s argument.

When it comes to a social contract, the same sort of argument would apply about coercion. The social contract can only be valid if the exchange of individual liberty for common security is freely and fairly agreed upon by the consenting parties, or is the product of a free and fair exchange that has been passed down over time. It is this latter seeming exception that sets the stage for Nozick’s story of the origin of the state. In addition to the idea that we are only entitled to the product of our labor and the complementary idea that we are entitled to that which we freely and fairly exchange,

there is a third piece to the entitlement theory. The repeated historical application of the first two principles sets up what may look like current inequalities but, for Nozick, are just the natural consequences of freedom over time.

As an example, if I inherited money from my grandfather for which I did not work, it would seem as though this violates the entitlement theory. After all, that money is neither something I earned nor something for which I traded fairly. However, Nozick would say that money was my grandfather's, that he presumably did work for, and so he has the right to use it as he chooses. He can enter an agreement, freely and fairly, to give that money away, or to pass it to his descendants or to build a statue of his dog with it. It is his. That means that while the initial disbursement may have been contemporaneous with the life of the owner of that money, the consequences can last well into the future.

Let us say, then, that there was an actual historical period, pre-state, where individuals had the ability to freely contract with the nascent state. The consequences of those negotiations could similarly extend far into the future. Maybe it is the case that while I cannot agree to the contract, my great-great grandfather can and his decision is still binding to me. While Nozick does not extend his logic that far, it is actually not much of a stretch. Instead, Nozick justifies the current state on the fact that the past state was just. He does say that the seeming inequality that is seen in the world when he was writing, brought up by Rawls and others, only seems unfair because we are limiting our scope to a "time slice" of a longer historical story (Nozick, 2013, p. 153). That same idea could be brought to bear in the case of the social contract: it only seems unjustified in the modern age because we are limiting our view to the present day, and if we were willing to extend our view backward to the historical origins of the state, it would be clear that at

that time the state was freely and fairly agreed upon by all members. The problem with this claim, though, is that even at the outset of the historical state, which Nozick does discuss (albeit more as a hypothetical than a historical fact), there exists the very coercion and lack of mobility that undermines the social contract as one of active consent.

Nozick has his readers imagine a time before there was government, a kind of Hobbesian state of nature. This would be world where might makes right and humans would have no protection from outsiders besides what they could do themselves to defend the fruits of their labor. In such a society, Nozick believes that some people who were talented producers but not good at defending themselves or their property would solicit the services of those who could protect in exchange for payment. Over time, these protection companies would find more and more clients and would establish territories of protection, the predecessor to the borders of nations, in which they would protect the occupants.

Nozick recognizes the problems with this origin story for the minimal state: the economic free rider problem, and the extent to which protection is a common good that cannot be refused. First, in the inception of one of Nozick's protection societies, no good option is available for someone which wishes to deny the contract at this early point. If one house on a block wanted not to hire the services of the protection group, it is not as though that kind of carve out is feasible.

When a state protects its residents against threat from outside invasion, it protects them all, even if only some wish for that protection. A part of this is geographical; Kansas has less to worry about from an invasion of the United States than does a border or costal state. If Canada declared war on the United States, Florida would likely be

fairly safe. That said, the U.S. expects all citizens to contribute to the common defense. There is not a feasible way to provide fewer defensive services to one person than to another in the same territory.

Historically, this strategy was tried with firefighting companies before they were incorporated into the individual cities in which they reside. When fire companies were private, individuals had to purchase fire insurance from that company. Those who were up to date on their payments received a badge they displayed on the outside of their homes to indicate their good standing with the company; if their house was on fire, they called that company to help put it out (Oviatt, 1905). Fire does not respect property boundaries, however. It is far more efficient from a damage prevention standpoint for any given firefighter to put out any fire they can rather than relying on the badge system, even if that particular household for whatever reason, whether because they could not afford to pay, chose not to pay for ideological reasons, or simply forgot to pay their monthly upkeep.

For example, on a street with houses numbered one, three, five in that order, houses one and five bought insurance and three did not. If house three catches on fire, houses one and five should be concerned about the fire spreading (not to mention any moral sentiments regarding the safety or well-being of their neighbor). They would likely call the fire insurance company with whom they had previously contracted. What that fire company would do is wait outside their client's house to see if the fire spread, only putting out the fire when it did. Of course, what would be best for the person living in house one is if the fire company put out the fire at house three. Protection of this sort cannot be discriminatory and still achieve the desired outcomes.

The other option is that an individual who would reject the formation of such a society of protection in territory that included their property would have the option to leave before the society was formed. This runs contrary to Nozick's own claims that individuals are entitled to the product of their labor and should never be forced to give it up under duress. Whether the vacating of one's property claims is done in a modern eminent domain context or some historical analogue, it certainly would qualify as an exchange made under duress, and therefore coercive. While Nozick doesn't directly discuss this possibility, it might be the only way to practically resolve the situation. As above, this kind of coercive contract cannot be accepted as legitimation.

Just as with Socrates' account in the *Crito*, what Nozick puts forward as a possible mobility- or residence-based argument is faulty. There is not a way for an individual to freely reject the formation of the mutual protection society that is meant to form the basis of Nozick's minimal state. Individuals cannot opt out by moving, except under the very duress that Nozick says makes a deal coercive and illegitimate in the first place. The social contract, then, cannot really be exited by an individual theoretically. Individuals can, and do, exit states all the time. The next section looks at the empirical causes of leaving a state to look at whether these can give evidence of the social contract being quit. Ultimately, it holds that these exists for purely political reasons are few and far between. They are possible, but not practical.

Empirical Analysis of Mobility due to Political Dissatisfaction

One question connected to this paper concerns the empirical data surrounding leaving the state. People do leave particular states for a variety of reasons. To see whether they are exercising their exit clause, it is informative to look past the raw

numbers to try to understand the motivations for people who leave. Some individuals do leave the state for political reasons, though this is fewer than those who leave for economic opportunities. If staying in the state represents a form of consent to the social contract, it might either be the case that some of those leaving the state do so because they wish to revoke that consent, or that everyone within the state freely consents to its authority. Alternatively, it might be the case that those who stay behind do not approve of the authority of the state but do not feel they can or should have to move. Finally, it could be the case that people recognize the futility of moving because, as above, escaping a state is distinct from escaping all states. For the social contract to have a valid exit clause, it must be the case that individuals who wish to opt of the contract have a reasonable way to do so. Evidence points to the contrary, however, as it is neither reasonable theoretically, nor widespread practically, despite evidence of the high levels of discontent.

If exiting a particular state is a viable way of refusing to consent to its authority, it should follow that the rates of emigration would increase in conjunction with a change in political party rule. Specifically, individuals whose consent to be ruled is based on their preferred political party being in power should be the first to leave when this is no longer the case. There are numerous anecdotal accounts of individuals claiming that they would leave the country if some candidate is elected. Each new election in the United States seems to bring a new wave of celebrities who threaten to do precisely this. In the United States, the best way to measure this effect is through tracking the renunciation of citizenship over time.

Of course, there are huge problems with this assumption. Not only do many people lack the means to simply leave a country on a whim, it is also the case that more repressive regimes may in fact restrict this movement after coming to power. For these reasons, looking at the United States, where individuals are fairly free to leave, is more productive. To be sure there are still financial barriers to leaving the United States within some groups in the population; however, these barriers will be equally present in both the observed emigration during non-election years as well as the observed election year emigration. So long as there is not systematic refusal on the part of a government for perspective emigrants to leave the country, which at least has not historically been the case in the U.S. compared to other countries, other biases based on demographic factors are minimal (Agadjanian & Gorina, 2019; Hammar et al., 2021).

The act of renouncing citizenship is the final commitment away from the United States. Examining this avoids counting people who travel abroad for work but still feel connected to the United States. Just because an individual lives overseas does not make them no longer a citizen; they can still vote, pay taxes, and, for all intents and purposes, uphold the social contract. Therefore, only those who have renounced their citizenship should be counted as affirming the exit clause. This is a much smaller value than those that live abroad. Approximately nine million U.S. citizens live abroad while only several thousand or so renounce citizenship each year (The Conversation, 2020).

On the other hand, it could be argued that those living abroad but have not renounced their citizenship are waiting for an opportunity to move back. For instance, if someone dislikes the change in political power, they may temporarily leave a state to wait for the political pendulum to swing back in their preferred direction. There is an

important difference between systemic dissatisfaction of the sort that would culminate in renouncing citizenship with the temporary dislike of a particular politician or leader.

Systemic political dissatisfaction is one reason individuals may choose to opt out of the social contract. As a phenomenon this has been well-studied both inside and outside the United States (Cebula & Paul, 2002; Holmes & Manning, 2013; Kanji & Tannahill, 2017). One thing that Kanji and Tannahill point out in their research on Quebec that agrees with Holmes and Manning is that economic conditions, whether inequality or general poverty are often at the root of this dissatisfaction. On the whole, there is a scholarly consensus that dissatisfaction is usually long-brewing; oftentimes this ferments for years or even decades until it reaches a breaking point (Lyons et al., 1992; Martini & Quaranta, 2015). This is often because individuals are dissatisfied with a ruling party because of their actions rather than their ideals. Put another way, people might be upset that their party loses an election but are more likely to be dissatisfied years later when they see the bureaucratic incompetence of the party that ended up winning. It is more often these bureaucratic factors, specifically as they connect to economics that breed this dissatisfaction (Cebula & Paul, 2002).

Political dissatisfaction in the United States is particularly high. Over time dissatisfaction as a measure has grown across both Republican and Democratic parties (Lerman & Acland, 2020). This could be connected to economic conditions—wealth inequality has grown in the United States in the last generation to its highest level since the 1920s (O'Connor, 2020; Saez & Zucman, 2016). Another possible explanation for this dissatisfaction is more explicitly connected to the state of party politics. Political polarization in the United States is a well-studied phenomenon. Negative polarization, or

the idea that the candidate or party an individual doesn't support is disliked or even hated has risen sharply since 1994 (Abramowitz, 2018; Campbell, 2016; Fiorina, 2017; Hare & Poole, 2014; Ward, 2017). This idea that an individual strongly dislikes or hates the opposing party makes it easy to see how one's preferred party losing an election can have an effect on dissatisfaction (Iyengar & Krupenkin, 2018; Iyengar & Westwood, 2015). As above, it is important to keep this kind of temporary dissatisfaction separate from the kind of dissatisfaction that would lead to exiting a society once and for all. The question remains whether this smaller-scale dissatisfaction over the party in power is enough to drive people from their homes and to opt out of the social contract by moving elsewhere. There could be instances in which this one factor—one's party losing an election—is the proverbial straw that breaks the camel's back. That person might move away from the country wholesale at that point, and never want to come back. This realistically does not happen with the sort of frequency that maps to the levels of political discontent in the United States

Individuals in the United States also believe overwhelmingly that the country is in bad shape. One common survey question, which has been asked over time, is the "right direction/wrong track" question. Survey respondents are asked whether the country is headed in the "right direction" or on the "wrong track." While the data gathered from this question often synchs up with political party affiliation to an extent, with Republicans more likely to say that Democratic governments are leading the country down the wrong track and vice versa with Democratic respondents, the numbers generally are much lower than would be expected under strict party votes. For instance, United States polling firm Morning Consult held that, as of November 2023, that only

twenty seven percent of U.S. adults polled believed the country is heading in the “right direction” (Rappoport-Hankins, 2023). NBC news similarly reported that more than seventy percent of respondents to their surveys have claimed the United States is on the “wrong track” over a period of eighteen months, showing a “sustained level of pessimism” never seen “in the 30-year-plus history of the poll” (Todd et al., 2023). Similar studies by Gallup polling over the last decades show that the last time U.S. citizens were “very satisfied or somewhat satisfied” with the way things were going in the country, as opposed to “very satisfied or somewhat dissatisfied” has been below fifty percent since January 2002⁷. This is more than a single-party, single-election phenomenon. Most people are dissatisfied most of the time with their government, but they simply do not leave.

Individuals leave their home country for many reasons. The primary reason someone leaves their home country for another is to pursue greater perceived opportunity in the country where they wish to reside (Alonso, 1987; Faist, 2000; Speare, 1974; Stouffer, 1940). This term “opportunity,” though, can be nebulous. It is not as simple as saying that economic conditions are the sole determinant when it comes to opportunity, though it is a major factor (Speare, 1974). Alden Speare works out a more comprehensive measure of “satisfaction” in his seminal 1974 work that includes economics alongside the political. Another measure to consider is the overall rate of development within a country, though this is complicated to work out exactly the effect

⁷ 2002 was also the last time Congressional approval in the United States reached that benchmark. Considering there have only been two years in the last fifty that this number has been at fifty percent or higher, it is maybe worth treating these as an outlier response to the September 11, 2001 terror attacks that also skyrocketed presidential approval rating in the short term. Since 2002, Congressional approval has fallen steadily. 2009 was the last year it even reached twenty percent. Four out of five respondents have held that they disapprove of Congress every year since.

this has on migration. The more developed a country is, normally the freer its people are to leave; the more developed the country is, however, the less these same people are interested in leaving (Hammar et al., 2021).

Without a doubt, people also leave the country for political reasons. Some are forced out and become refugees; others choose to leave. When a government has a wholesale regime change, this is often the cause of refugees being created who are forced to flee an unstable political situation (Zolberg, 1983). In an illustrative case study from Kyrgyzstan, researchers Agadjanian and Gorina note that the confluence of economic and political instability in the country directly influences the rate of emigration (Agadjanian & Gorina, 2019). Similar work has been done studying Nepal (Williams & Pradhan, 2008). Some modern theorists even claim that studying migration itself can lead to more revelations regarding the underlying stability of a country (Faist, 2013). This is particularly noted in the countries of immigration—receiving countries—rather than those of emigration (Gebremedhin & Mavisakalyan, 2013). It is important to note that this sort of movement, while very common, is rarely free.

Movement to or from a country can be a show of political support, but is much more commonly not. It certainly does not rise to the level of agreeing with a social contract simply because an individual or family, in an emergency situation, has to leave one country for another. To treat this kind of influx from the unstable to the relatively more stable or economically prosperous parts of the world as consent to the social contract does not seem to be accurate. Their motivation in moving is different.

One difficulty with tracking this information and securing data with regard to how many people leave a country is that in most places they are not required to inform their

country of residence that they are moving away (Burggraf, 2019). In fact, most individuals living outside of their home country retain their citizenship status and are classified as “expatriates.” While flippant, perhaps the best characterization comes from tax analyst Janette Saxer in a blog post: “When it comes to knowing how many Americans currently live outside of the US, and where they live, it seems no one has much of a clue. Even the American government is unsure” (Saxer, 2019). In order to measure how many people this includes, the best way is to measure all of the incoming individuals to every other country and then work out what percentage come from the target country (Schachter, 2006). Realistically, this means that estimating emigration really is only possible from the countries with reliable immigration patterns. Even still, expats do not necessarily bear a grudge against their home country. The population that, while significantly smaller, may be the most fruitful to analyze are those who have given up their citizenship in terms of formal renunciation.

In the United States, an individual can choose to give up their U.S. citizenship. This is done comparably rarely, with the number of cases each year ranging from 2000 to 5000 (Cain, 2014; Mitchel, 2015). It is nonetheless difficult to measure exactly how many individuals renounce, as the data is in different places and does not always agree. The primary source of renunciation data is with the Federal Register of the IRS who have, since 1988 reported quarterly the names of people who have forfeited their citizenship. One difficulty with this is that there is another source of data, the National Instant Criminal Background Check system that keeps an independent count of these individuals, as per U.S. code, anyone who has renounced their citizenship is not allowed to legally carry a firearm (Department of Alcohol Tobacco and Firearms, 1997; Mitchel,

2015) Therefore, whenever anyone checks if an individual is eligible for a gun permit, they can check the database and see these former citizens excluded. The discrepancy between the number excluded by this database category and the IRS count of renunciations changes every year. There may be yet another way to calculate based on data from the State Department. Beginning in 2015, the State Department began assessing a fee for citizenship renunciation; these fees are being tracked and reported each year (Department of State, 2015). These data are too recent to be useful, however. Mitchel does note, however, that over time the values given by these sources converge on what may be the “true number” (2015).

The majority of renunciation cases are for tax purposes, as individuals living abroad but still maintaining U.S. citizenship have certain tax obligations to the United States (Denson, 2015; Mercado, 2020; Woolley, 2017; Worster, 2017). In the past few years, the number of renunciations has increased in lock step with changes to the tax code that disadvantage U.S. citizens abroad; as a result, the overall number of renunciations has increased every year since 2014 (Woolley, 2017). A new law that sought to increase reporting obligations and close loopholes regarding foreign accounts, the Foreign Account Tax Compliance Act, was passed that year that may be responsible for some of the increase (Denson, 2015).

Still, there are documented cases, both in the U.S. and abroad of individuals renouncing their citizenship for political reasons. Most of the cases that are reported are of activists or celebrities, but these still give insight into why a person might leave their country on supposed political grounds. A group of forty-five dissatisfied British Jews forfeited their Israeli citizenship in response to their dissatisfaction with the actions of the

government (Davis, 2002). In an autobiographical article, Irus Braverman tells his own story of dissatisfaction with the Israeli government that made him consider renunciation (2018). With regard to U.S. citizens renouncing, there have been famous examples such as the novelist Henry James who renounced his citizenship in response to U.S. neutrality early in World War I (Edwards, 1969). When a lesser-known artist renounced his citizenship in response to U.S. policy in Vietnam, it made national news (The Washington Post, 1966). Even more recently, the idea of renouncing U.S. citizenship in response to U.S. policy was discussed as an option of protesting the ostensibly colonialist approach to Puerto Rican governance (Font-Guzmán, 2013). The plural of anecdote has never been data; these narrative examples, while compelling, do not give a good idea of the scope of individual renunciation in the way the IRS data do.

Every election cycle in recent memory has a different kind of renunciation threat, though. Major media personalities, celebrities and even politicians threaten to leave the country, and sometimes to renounce their citizenship, if the party they support fails to win the presidency (The Conversation, 2020). In 2016, a number of celebrities made the same threat, though to date none of them who publicly said they would leave after Donald Trump won the election did so (Greenho & Greenho, 2016). Notably, in 2020, Donald Trump himself threatened to leave the country if he lost his reelection (Wilstein, 2020). He did not.

Even these political examples more often express discontent with a particular government rather than government more generally. As stated above, governance in the modern world is not really escapable. Instead, it is a case of “meet the new boss, same as the old boss.” Even if an individual leaves their country of residence, as few do, they do

so to go to another state that more closely aligns with their values. Plato's arguments about the ability to leave the state rely on a world which no longer exists: one with vast wilderness where one could truly be free of government control. Nozick's idea of opting into the state for one's own protection from external threats through military and internal threats through police is as much an assumption of an individual's behavior as Hobbes makes, saying that what is best for the people is governance. Neither of these stories offers a real alternative or way to escape the contract, either by movement in the case of Plato or by consent in the case of Nozick. The empirical truth behind movement is that it is mostly economic.

Chapter III.

Hypothetical Consent without Moving

Modern constructions of the social contract usually avoid discussion of the possibility of exit. This is perhaps because, as I concluded above, the possibility of exit is not really used in society by many, certainly not proportionate to the number of individuals who are unhappy with the governance of the state. As well, there are the practical issues of territorial claims, immigration restrictions, and the bureaucratic implications of being stateless—shedding statehood would be difficult if not impossible to accomplish. The justification for authority in current systems is instead based on implied consent of the governed, without a practical or theoretical alternative.

If it is the case that the exit clause is invalid, the only way to justify the state is through hypothetical consent⁸. The act of exiting the state is as close as an individual can get to communicating the level of their discontent with that state, besides empty threats in op-eds easily forgotten. Other measures, such as voting, protesting, communicating with elected representatives, only go so far. They are the difference between having a fight with your spouse and filing for divorce. Only the finality of the divorce filing communicates that the relationship has ended; anything short of this is an impotent expression of discontent, hollow threats ignored by the one with the power. Only when an individual leaves the state is it clear that contract is over. It is only at the point of

⁸ This excludes permissive legitimacy as justification. As above, I do not think this qualifies as justification as much as retroactive rehabilitation of unjustified states.

renunciation that an individual has truly exited the state. At least, that is how it should be. Because the leaving of the state cannot be done legitimately, per Plato or Nozick, and is not done practically, per the data, this action does not reflect the true level of dissatisfaction with the social contract. There is no way to measure whether an individual does or does not accept the terms of the social contract, so we are left with hypothetical consent.

One prevalent argument regarding the social contract in modern scholarship is the idea that individuals would consent to governmental authority if there were a way for the government to solicit that consent. As Stark puts it: “a rule is justified if ideal agents in ideal circumstances would have agreed to it” (Stark, 2000, p. 315). Given this understanding of hypothetical consent, there are two different cases to consider: first, whether hypothetical consent can take the place of explicit consent in the case where an individual could give consent, but for whatever reason does not; second, whether hypothetical consent can take the place of explicit consent in cases where an individual is unable to give consent. In this chapter I examine whether a notion of consent is possible for those living in a state, first in conditions where it would be possible to obtain consent then second where it would not. I look at concepts of hypothetical consent as addressed in Cynthia Stark and David Enoch’s work on the subject. Ultimately, I conclude that we cannot say that individuals have hypothetically consented to the social contract.

Hypothetical Consent where Consent is Possible

Say I am driving my car in a busy city, and I stop at a red light downtown. While stopped, an individual comes up to me in my car, sprays cleaning solution on my window. After they clean this off with a squeegee, they knock on my drivers’ side

window expecting remuneration. Do I owe this person money? For the sake of this example, let us further say that my car window was dirty before, and, had that person bargained with me beforehand, I may have been inclined to pay two dollars for the express cleaning—after all, I only have as long as the light stays red. Stark addresses a similar example in her article, concluding that the individual doing the work “has no right to enforce” the hypothetical agreement that was likely to but never did take place (Stark, 2000, p. 321). The order of events is imperative for contracts: first the terms are set and agreed to; then the services are performed. When these pieces are not in that order, consent is not valid.

There are several reasons this is the case. First, though my hypothetical initially involved a car window that was dirty, let us instead say I had recently been to a carwash that had applied a coating to my windshield to help it resist rain. In cleaning my windshield subsequently with whatever tools the window washer had at his disposal, it is certainly possible he did more harm than good to my car. Second, it is unlikely that this individual was evaluating cars based on who needed their windshield cleaned the most when deciding to come over to my car. This is more likely to be a decision based on which car is closest to him when he stops, or which car is most likely to pay him for his services—perhaps this is based on the perceived value of the car in question, or perhaps he has other criteria for selection. Third, and this will be discussed more below, but this individual probably had time to ask before cleaning my windshield. He chose not to do so in a way to make me as the driver feel obligated to reimburse him for the service he has performed after the fact. He is relying on my idea of fairness, that services require

monetary compensation, to get me to pay even when I did not solicit or agree to the performance of those services.

In fact, in some circumstances, an even stronger claim is warranted than simply claiming the contract is invalid. It is not just the case that an agreement is invalid, but that the individual acting without express consent may even be acting in a morally wrong or non-consensual way. An individual, when romantically interested in another person, ought to know better than to make a move without consent being firmly established. The defense “they would have consented” is akin to “I knew they wanted it” or “they were [non-verbally] asking for it” with regard to their unacceptable moral or legal status. Consent must be active, enthusiastic and non-coerced. If someone mows my lawn without my express consent to do so, the question is not whether I should feel obligated to pay that person, but whether I ought to call the police to report criminal trespass. Whether they did a good job is immaterial.

To return to the state, it is not clear how the state would solicit consent for a social contract from the individuals who reside within it. In some ways, the predicament is similar to the window washer in that, while both parties are able to give consent, there is not a good opportunity for that consent conversation to happen; for Stark this is sufficient to exclude the possibility of the “right to extract...money from me” for the services rendered (Stark, 2000, p. 321)⁹. However, just as a long conversation is unlikely to happen at a stoplight, there are alternatives. The window washer could hold up his squeegee while raising his eyebrows outside my car window, allowing for a simple nod to confirm intent. Governments, similarly, have the ability to get a snapshot of public

⁹ This sort of scenario about failure to communicate and the determination of consent is similar to several examples in David Enoch’s work, treated below.

approval that might serve as a signal mechanism to communicate some form of consent. In the United States, after all, each household is asked to fill out a census every ten years so the government can gather a number of demographic pieces of information. It might be possible to add a single question to that census to attempt to discern consent to governance from its citizens.

There is no reason for the government to add such a question to the census because the government has no intention of changing their behavior in the case of a negative response. The same reason the window cleaner does not take the time to ask me if I want my window cleaned, the government does not ask if its citizens consent to governance. The window cleaner realizes it is more profitable to simply do the work, then solicit at my window afterward for money. The government simply provides services, then demands payment in the form of forfeiture of some level of rights or freedoms in exchange. Although this exchange is barely acknowledged, perhaps because living in bad faith is preferable to confronting the reality of this relationship.

In democratic societies like the United States, there are often services that people explicitly do not want the government to provide that they nonetheless do. Taking the government at its best for the sake of argument, let us say that their actions do reflect the majority will. Taking some controversial policy that two-thirds of individuals within the state support would still leave one-third who do not. That still would mean that many people are having their proverbial windows cleaned even if they did not want them to be. The major difference is that I can say no to the window cleaner. Even after the service has been provided, I have the agency to simply drive off without paying. I may even be justified in doing this for a number of reasons: simply because the contract is not valid, as

above, or because I feel he did not do a good job with cleaning, or because I don't have any cash on me at that moment. None of these opt-out options is possible with the social contract.

An action that directly affects a person cannot be justified without having consent from those who are able to do so. This may mean that many actions that many people take are not justified. Nonetheless, hypothetical consent can only stand in in cases where explicit consent is not possible. Where explicit consent is possible to seek, it must be sought. Stark disagrees, and claims that because the purpose of hypothetical consent is to “justify political principles” rather than to “generate political obligation” then hypothetical consent is enough to guide moral principles and possible political authority on that basis (Stark, 2000, p. 334).

Stark's Distinction between Principle and Obligation

In Cynthia Stark's formative article, “Hypothetical Consent and Justification,” she defends the idea of justification based on the assumed good of parties unable to consent explicitly (Stark, 2000). In defending hypothetical consent against what she calls the “*standard indictment*: the claim that hypothetical consent cannot give rise to obligation” (Stark, 2000, p. 314), she first distinguishes between moral and political obligations. This difference, based on their bindingness and enforceability, leads to a conclusion that hypothetical consent, when applied in the moral sphere “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” (Stark, 2000, p. 320). Notably, they do not rely on actual explicit consent. Political consent Stark sees as more reliant on explicit consent. As above, with her example of an individual doing work first

and then demanding payment based on a contract not agreed to by both parties, her discussion on the power to enforce agreements depends on that agreement being made beforehand, rather than hoping for remuneration in hindsight (Stark, 2000). You can show, though hypothetical consent, that one has a reason to take an action (moral contractarianism), but not that they must (political contractarianism).

Stark next distinguishes between political legitimacy and political obligation, in an effort to show that the standard indictment fails to defeat arguments for the binding power of hypothetical consent, even in a weaker form (Stark, 2000, pp. 323–325). In short, legitimacy can be supported; obligation cannot. She claims that legitimacy can arise from moral principles and is logically prior to political obligation. For Stark, this relies on Rawlsian principles. Specifically, she holds that if a principle is acceptable to an ideal agent, it provides a rational reason that others should follow it volitionally. An ideal agent, like in Rawl’s original position, is understood to be a rational actor with self-interested motives who nonetheless would choose systems based on mutual cooperation (because they are most benefitted by those systems). Here, Stark is saying that what those ideal agents choose should be the basis for what kind of systems and principles are legitimate. This endorsement by ideal agents provides a necessary but insufficient condition for obligation.

The question then is: is the justification of the state based on moral principles rather than political ones binding? Stark says no, with the caveat that individuals should be constrained by moral reasoning. Relying on the thought experiments of Rawls and Nagel, Stark claims that there are sufficient benefits to cooperation with a morally legitimate state that there arises a “weak” form of obligation to do so (Stark, 2000, pp.

330–331). She clarifies that “Rawls does not believe citizens to be obligated by his principles of justice simply on the ground that parties in the original position would chose them” (Stark, 2000, pp. 330–331). Instead that they “arise as the results of our voluntary acts” (Rawls, 1999, p. 113). It is important to keep in mind here that this only applies in instances where the state is morally in the right. It is from that moral right that the legitimacy arises that is necessary to undergird its potential authority. Something may be ethically or rationally impermissible but still allowed by the state; something can be ethically impermissible and yet mandated by the state. In these cases, where the moral and the political are at odds, the state cannot generate even the weak form of authority that hypothetical consent can bring.

Even if Stark is correct here, the problem with this, though, is two-fold. First, other formulations of the social contract do try to generate the stronger form of political obligation from the hypothetical consent formulation. This is most notable in some of the historical Enlightenment-era constructions such as Hobbes and Locke. For Hobbes, the duty to obey the sovereign comes from the fact that the state of nature is so much worse than life under even the most tyrannical of governments. This is certainly a political obligation. Nor does it matter, in Hobbes’ formulation of the social contract, how just or unjust the state is. Stark’s conception cannot justify these, though no fault of her own. The terms of this state are simply agreed upon by the citizens because it is better than the state of nature as the alternative. For Stark, this would not be compelling. This kind of arrangement is similar to an example she gives near the end of her article. She asks us to imagine “a merchant [who] sells a product she wishes not to...because she is threatened by a powerful gang in her neighborhood” (Stark, 2000, p. 333). She claims this is

“analogous to political systems where citizens are either forced or have a strong incentive, to abide by policies that they do not accept” (Stark, 2000, p. 333). She recognizes that “hypothetical contractarian accounts rule out arrangements “such as these” (Stark, 2000, p. 333 n.47). Coercive governments cannot have legitimacy and therefore do not have obligation or justified authority.

My argument against this supposed moral obligation is that this is as coercive as a political one. Stark justifies cooperation with the idea that individuals accept the social terms for their own sake, that “the source of their authority is in the agent’s own rational willing” (Stark, 2000, p. 333). The problem is, this is also the case for Hobbes’ contract. If the basis of rational willing is simply the weighing of options in a cost benefit framework, then it is also rational to choose governance when the alternative is the state of nature. To return to Stark’s own example here, the merchant who does not want to sell the goods, but a local gang is forcing her to is also acting rationally in acquiescing to their demands is a clear example of coercion. Stark tries to pose a non-coercive second case in which the merchant, despite her reservations about selling the product still does so because of the market capitalist system; she runs a business and needs to make the money that product. Stark’s claim is that this second scenario, which still involves selling a product the merchant would rather not, is not coercive because of her ultimately free choice in the matter. She can choose between selling the product and reaping the reward, or not selling the product and her business suffering. She says of this second case, which is meant to model what she calls morally unconstrained contractarianism, “individuals are motivated to adhere to political principles, whether they accept them or not, because it is to their advantage to do so” (Stark, 2000, p. 333 n.47). To this I would say the threat to

the merchant's livelihood of not participating in the capitalist market system is just as real a threat to her well-being as is the gang members who coerced her choice in the first example.

Second, the distinction between justifying principles and generating obligation depends on a level of voluntarism that is not present in the modern state. Stark claims that hypothetical consent can "establish that agents have reasons to follow certain political principles" and therefore which principles "should structure and guide political institutions" (Stark, 2000, p. 334). The idea being that the state can use the supposed results of hypothetical consent to make themselves more in line with public good as determined through rational moral principles. In that way, the authority of the state can be derived through hypothetical moral obligations rather than the less justifiable political ones. This point at the end of the article relies on an unrealistic account of both human and governmental rationality. It is not enough to say that something is rational for rational agents, therefore it is binding on non-rational ones. Consent is functionally different from legitimation in that, as above, individuals can consent to things not in their best interests as well as not consent to things that are in their best interests. Using what is in the best interest of an individual as the standard for hypothetical consent does not work¹⁰.

People are often not rational. Stark recognizes that writers such as Hobbes and Gauthier "do not include any moral claims in their idealizations" because "[h]ypothetical agents are only ideal in their capacities" and not in the way they live their lives (Stark, 2000, p. 315). Individuals often do not want what is best for all or even what is best for

¹⁰ More on this will be discussed in the section on David Enoch's work below, as it is this kind of situation that he treats directly in his article.

themselves. The idea that Stark advances, that individuals rationally ought to adhere to good political principles, is nice in the abstract, but not realistic. Consensus is not there, with political polarization at an all-time high in the United States. People, in the name of tribalism, routinely vote against their own interests in ways that show that a state simply trying to meet the needs, whether articulated or simply assumed, will often be rejected by the very people it is trying to help (Brabazon et al., 2019). While this is more referring to specific policies and parties rather than the broader questions of principles and government as a whole, that is exactly the problem. Individuals are short-sighted. If people are willing to cut off their proverbial noses to spite their faces in the age of negative partisanship, coming to agreement on these higher-level moral philosophical principles is fantasy. Even if the state did structure itself to meet the needs of the citizens, this would not guarantee the kind of buy-in to Stark's notion of political obligation.

Moreover, the idea that the state serves the needs of the people or is even set up to do so relies on this kind of assumption of rationality. Political leaders in democratic societies are incentivized by the electoral process to support policies for the short term rather than the long term. They are incentivized to enact policies that make them popular with citizens, rather than those that might be better for the long-term safety or security of the country. Promising new entitlement spending or tax cuts will always be more popular than promises for tax increases or austerity measures, even when the latter may be desperately needed. A politician has no incentive to vote in the best interests of the people; their incentive is to be popular with the people. Think of a child refusing to eat his vegetables. If one parent makes the child sit at the table until he finishes his broccoli

while the other is more likely to acquiesce to his demands and let him have ice cream instead, the child would likely, in that moment, pick the ice cream parent as the “favorite.” That does not mean that the parent is doing a better job of parenting or is doing better at promoting the child’s interests. Governments are made from people; people respond to incentives. If the goal of parenting were to have the child’s approval, then more parents would probably be ice cream parents than broccoli parents. That is much of the goal of politics: to get short term approval that leads to electoral success. Neither the citizens nor their governments are likely to rearrange or reorganize in favor of the public good as Stark claims would happen.

Citizens are unlikely to voluntarily assemble in rational self-interested ways in the long term. Governments are unlikely to serve those long-term needs either. Just as the parent may resort to coercive tactics to ensure the broccoli is eaten, a state acting in the interests of its people might similarly act coercively. That the goals of such coercion are morally admirable does not excuse their action. I cannot ethically hold a gun to someone’s head to force them to donate to a charity; Stark agrees with this in her example of the tradeswoman. A coerced choice is not the basis for valid authority under the social contract, and even at its best, Stark’s moral obligation that provides the basis for legitimacy and can over time form the basis for obligation is still a coerced choice. That the decision is in your best interests is immaterial to the coercive nature of the decision.

Enoch’s Hypothetical Consent

While David Enoch’s primary concern in “Hypothetical Consent and the Value(s) of Autonomy” is about the morally binding nature of hypothetical consent, he does

extend his analysis to the political as well. His initial line of argumentation is that hypothetical consent is based on reasons that those who are making a decision put onto a person unable to make their consent known (Enoch, 2017). Enoch discusses a medical example: “A patient arrives at your emergency room, unconscious. A blood transfusion will save her life. A blood transfusion is the kind of treatment that usually requires consent—without consent, it is usually morally impermissible to administer a blood transfusion” (Enoch, 2017, p. 6). To this he notes “the underlying normative reasons that make it the case that the patient would have consented (had she been conscious) also make it the case on their own—that you should administer the blood transfusion.” (Enoch, 2017, p. 10). He takes this to mean that the consent itself does not matter, because the reasons behind the consent are normative on their own.

I would pose a counterexample to show the value of consent. Let’s say, in this same situation of a blood transfusion, that the patient signed a document that said, “I do not want a blood transfusion.” There was no clarification of motive or reasoning. From this alone many doctors would not perform the transfusion. The only changed factor is the desire of the patient. Because the reasons have not changed as to why it is good for the patient to have the transfusion, consent in the negative (that is, withholding of consent) has some normative power. It is not hard to think of similar scenarios in which an individual makes their wishes known and, despite the reasons the contrary action might be better for that individual, those wishes are respected and their consent preference is upheld. With regard to the state, there may be some who would actively withhold consent to the social contract.

In Enoch's defense, this only shows the normative power of actual consent, rather than implied or hypothetical consent. If hypothetical consent is meant to stand in for consent, it would need to have this same normative power given compelling normative reasons. Perhaps it cannot, precisely because actual consent can be separated from the reasons behind it while hypothetical consent necessarily comes from those reasons. Enoch tries to navigate this difference by adding a wrinkle to his blood transfusion example. Specifically, he asks, about a situation in which "the unconscious patient arriving in your emergency room is a Christian Scientist and is therefore strongly committed, on religious grounds, to not allowing a blood transfusion" (Enoch, 2017, p. 14). From here, he makes the claim there is some difference between the reasons this patient would choose not to have a transfusion and the reasons we, presumably not Christian Scientists, would want to perform the procedure.

This supposed difference between the two sets of reasons is not clear. In the first scenario, when determining hypothetical consent we asked "what would the patient want?" Not knowing relevant factors about that patient, we imposed our own preferences (to preserve life, etc.) onto that patient. In the second scenario, where we at least know the patients' religious persuasion, we use our powers of deduction to come up with something like: Christian Scientists don't want transfusions; this patient is Christian Scientist; therefore, this patient doesn't want a transfusion. That is no less of a reason than in the first scenario. In scenario one we said "this person would want X because Y" then wondered whether the wanting is actually relevant as much as the reason (Y) is. Scenario two is identical in this regard. The only difference seems to be that we do not think reason Y in the second case is a good reason, or at least a reason we ourselves

believe to be true. If the purpose of hypothetical consent is to try to stand in for actual consent, then reasons are irrelevant, except as a way to try to deduce what the person unable to consent would have said were they able to do so. If the purpose of hypothetical consent is to do what is best for someone who is unable to consent, that is an entirely different matter.

If one party is unable to communicate consent, then hypothetical consent may be the only alternative. It is not clear how an individual communicates their consent to be governed under the terms of the social contract besides the exit clause as discussed above. It may be more instructive to imagine the state as the uncommunicative party rather than the individual living within it. Or, if it does communicate, it does so in a way different from what can be understood by the people.

Another example in the Enoch may fit this scenario better:

You want to cross a bridge. Unbeknownst to you, it is unstable, and if you get on it, you face great danger. For some reason, I can't convey this information to you sufficiently quickly (perhaps we don't share a language, and it will take time for the interpreter to arrive). I physically restrain you. (2017, p. 7)

In this example, it is not the person receiving the help but the helper that is unable to communicate. Arguably, communication is a two-way street in which it is not a failure of one party but instead a failure of both to understand each other. Still, the unconscious patient seems to not fit as well because it is implying the helplessness of the person to receive aid. In the case of the faulty bridge, the person attempting to cross could be made to understand, perhaps with an appeal to their deeper commitments regarding bridge safety or overall value of life.

Enoch holds that situations such as this one cannot be easily solved by trying to get inside the head of the person to whom we want to say they would have consented.

Understanding the reasons why a person might choose one thing over another is at the least daunting and at the most patronizing. This is only made simple in instances or hypotheticals where details are scarce. As soon as we add a relevant detail to the blood transfusion case, it complicates the calculation of hypothetical consent. We can complicate it further by saying that maybe this person who is a Christian Scientist has been expressing doubt about the teachings of the church online but is still a member. It becomes harder to know what they want with each new wrinkle like this. Maybe there is a patient who is not a Christian Scientist but was raised by them and still holds a belief against transfusion. Real people, as opposed to those who we conjure up for philosophical thought experiments are much more complicated and detailed. It is therefore difficult, maybe even impossible, to know what they would say for sure.

That is not to say we cannot extrapolate. In the same way that, when making a utility calculation about an unknown actor I put myself in their place to determine the pleasure or pain some action would cause them. All we have are the ordinality of our own pleasures and pains; if I am considering an action that would result in physical harm to someone, I am unlikely to assume that person is a masochist who would enjoy that pain. Of course, when presented with that detail, I adjust my calculations as best as I can to fit that new information. With the blood transfusion I assume the person values continuing to live more than valuing not having a transfusion, unless I am told they are a Christian Scientist and then I adjust. I either guess with incomplete information, or I impose my preferences, or most likely a mix of both.

To return to Enoch's bridge, that same uncertainty exists in the possible reasoning of the person with whom I am unable to communicate. Maybe the person heading toward

the bridge wanted to die. Maybe the person is OK with the risks, fully understanding them. Maybe the person believes they can fly (and is it really our job to try to disillusion them?) There are countless possible justifications for the action. The best that we can do is to put ourselves in their shoes and use our motivations to say why we wouldn't like to go on the bridge. This means that we might restrain the individual in the short term. However, if that individual persisted in wanting to cross the bridge once they have been adequately informed of the danger, the choice becomes their own. This sort of hypothetical consent, then, can only be said to be temporary. It certainly could not be used to justify something as long lasting as the social contract.

Enoch spends much of his article working through different scenarios of patients getting (or not getting) blood transfusions to try to explain the difference between acceptable violations of patient beliefs and unacceptable ones. He may be right that there is a difference between one patient who is scared of needles and another with a deeply held religious conviction. Enoch unsatisfyingly distinguishes between hypothetical consent as a possible basis for non-alienation but not for sovereignty, claiming, "I hope to say more about the relation between these two in future work" (Enoch, 2017, p. 32). He does at least go as far as to delineate between the moral permissibility of action when consent cannot be ascertained as opposed to when it could have been but was not ascertained.

The reality of the social contract, though, is that it is not a situation in which one person's consent cannot be known. There are certainly times when a person's commitment, or lack of commitment, to the established social order are on full display. Because the social contract is not a time-dependent hypothetical such as either the blood

transfusion, the red light or the faulty bridge, it is entirely different. There exists sufficient time for negotiation and discussion, if not the overt means to do it. Individuals within the state, can, and often do, show their discontent with the social contract, in a way Enoch acknowledges¹¹:

The thought, for instance, that in a real-life political disagreement that results in an impasse you can coerce me, insisting that there's really no problem with my liberty (or autonomy or some such) because the policy you're pushing down my throat is one that is approved of by my own deeper commitments, or one that I would accept under suitably described hypothetical conditions—that thought just seems entirely ludicrous. (Enoch, 2017, p. 35)

The reason it seems ludicrous is because, unlike those transfusion or bridge scenarios that are either time-limited or communication-limited, the political both takes time and often elicits complaint. We know there are people living within the state who are dissatisfied with that state. They may continue to live in that state for a variety of reasons that should not be confused with justifying state authority.

The Difference Between Discontent and Illegitimacy

Without a doubt, one of the hallmarks of a free democracy is the right to protest that very democracy. This is such an important fundamental right that the Founders of the United States guaranteed the right to peaceful protest in the First Amendment to the Constitution. Being discontent, and showing that discontent, is markedly different from opting out of a social contract.

In fact, protesting a particular government or policy may be proof that an individual does support the underlying structure of the country, and simply wants to see

¹¹ This discontent may be the first step to a true renunciation, or it might be the extent of an individuals' dissatisfaction. From this alone, it is hard to say.

some measure of change within it. It may be cliché to say that the opposite of love is not hate, but indifference, but that could be said to apply here, too. If an individual were truly done with a particular country, they would not be directing their energies to making it better.

That said, it can be difficult to know how many people are dissatisfied with the state to the extent that they question its legitimacy to govern. This must go beyond one particular administration or policy. A disaffected Democrat who dislikes an electoral outcome may say a government is not legitimate, but it is clear they are talking about one particular administration in the United States. If the election had gone the other way, they would not have this complaint. Instead, the kind of discontent that questions the legitimacy of the state has to look to the deeper structure of the political system and find fault there.

There are those who openly question the state in this way, not simply as a way to vent political frustrations. The theory behind this sort of anti-state rhetoric comes from politically extreme writers on both the left and the right. Anarchists such as Emma Goldman and extreme Marxists openly pushing for revolution hold the banner for the left. On the right, this kind of so-libertarian-it-becomes-anarchy is championed by Murray Rothbard and some of his more adamant adherents in the anarcho-capitalist, Austrian economic tradition (Goldman, 2013; Kropotkin, 2017; Lenin, 2011; Rothbard, 2017).

For the Marxists, it is clear that if the goal is revolution, that entails a belief in the lack of authority of the state as it exists. To be sure, especially in the case of Soviet Marxism, Lenin and others believed in a strong central government to replace the existing one, but that this structure is only a necessary evil while the citizens transition away from

the capitalist economic system to the goal of communism. Modern Marxists certainly exist, both in terms of authorship and contributing to the existing canon but also in terms of casual supporters. Perhaps this group would be good first candidates for dissatisfaction that rises to the level of questioning governmental legitimacy. Of course, there are those who do not simply want a better government but want no government at all coming from the other side of the political spectrum.

Rothbard's position is rather that states by their very nature are founded on force. He relates them to a bandit king that has a monopoly on the use of force within his territory. For Rothbard, no states can ever be justified (Rothbard, 2017). Just as a gang leader might have "territory" that other gang leaders respect, or at least acknowledge, so, too, does a state stake territorial claims. These claims are maintained by protection money paid by those within gang territory—taxes—and are rarely happily paid. Rothbard sees taxes as a shakedown. This sort of extreme anarcho-capitalism similarly has its adherents. It is reasonable to extrapolate this sort of belief to the claim that a government is illegitimate. The issue is that those who subscribe to this ideology would likely find any government illegitimate. Even if this is true for some citizens, that they would reject any other alternatives does not move the needle of legitimacy for this particular state. It is reasonable to suppose that there are at least some people who reject the government based on legitimacy rather than based on the particular policies and politicians of the moment. If those people are still residing in the country or holding citizenship from that country, this would mean that either those people are living hypocritically or that even rejection of the legitimacy of the state is not sufficient reason to leave, perhaps because the alternative to living in that state is less desirable.

Perhaps the best measure we have of the dissatisfaction with the United States comes not from the polls about the approval of Congress, though these do paint a picture when changing party control does not seem to move the approval needle above twenty percent, but instead from adherence to these more radical ideologies. Whether there is concrete evidence of such beliefs is unclear, but an October 2023 poll from The University of Virginia's Center for Politics found that more than a quarter of US respondents think that the democratic system is broken and new forms of government need to be tried (Rascius, 2023). The motivation in this poll could have been somewhat political, as more Republicans (thirty one percent) than democrats (twenty four percent) agreed with the statement "Democracy is no longer a viable system" (Rascius, 2023). Additionally, more than thirty percent of respondents from both parties agreed with the statement "The situation in America is such that I would favor [Blue/Red] states seceding from the union to form their own separate country." Clearly, partisanship is at extremely high levels that could be spilling over into questions of legitimate government.

The truth is, we probably cannot know just how many people would opt-out of the social contract of the state if given a choice. We cannot know whether some of the motivation behind these poll numbers are, like Enoch's patient who fears needles, something a doctor can ignore in the moment (the patient will thank him afterward) or how many provide better reasons to object such as the Christian Scientist. This may mean that we can never truly know to what extent the social contract and the legitimacy of state authority are supported. It may mean that the legitimacy of the state is supported whole-heartedly by the entire population, though this seems as unlikely as the possibility that no one supports it.

Hypothetical Consent where Consent is not Possible

One thing is clear in Enoch's examples: the standards for hypothetical consent are much clearer in cases where the transfusion patient is awake before the procedure, rather than arriving to the hospital unconscious (Enoch, 2017, p. 23). Namely, they are no longer questions of *hypothetical* consent when actual consent can be ascertained. There is an important difference between this sort of situation and the sort discussed in the previous section. The person who came to mow my lawn could have asked my permission before they went ahead and did the work

Even in the case where someone cannot ask consent beforehand, say with the time constraints of the window washer at the stop light, it is a very different kind of impossibility for consent. I am still able to consent to the window washer, even if our present circumstances do not give me the time to do so. On the other hand, the patient who is unconscious is unable to give consent at all.

It is interesting to speculate on whether this is a material difference. It could be argued that the patient could have made their wishes known beforehand by means of a sort of advanced directive or medical proxy; this would serve a similar sort of consent purpose as if I had told the window washer beforehand that I would have accepted his services for an agreed upon price. In both examples, the current circumstances preclude any good-faith negotiation or express consent. The important difference remains that I remain capable of consent in the window washing scenario, while the unconscious patient is not.

As an example, let's say I attend a university for my undergraduate education and very much enjoy the social life. Perhaps I get involved in the fraternity system. Even if I

don't, I am having a good time. The university may have other policies in place I dislike, some of them may have even come before my enrollment decision. Because attending a university is an opt-in system, it may seem as though in agreeing to go there, I am implicitly agreeing to whatever administrative policies they have in place. This is, unfortunately, idealistic to a fault. The average eighteen-year-old making a college choice is far more likely to look at some superficial factors in their decision-making. What is more likely is that I make my college attendance decision on the issues that are important to me at that time rather than even taking a big picture view of what may be better for me in the long run. Universities know this and are increasingly courting new students though amenities such as luxury dorm living and lazy rivers (Koch, 2018).

If I agree to go to a college based on these superficial factors, do I implicitly agree to all of the other terms and conditions that come with that college experience? As a society, we have said through our laws that individuals who are of the age of majority are capable into entering into contracts. That means things like student loans agreements, that arguably an eighteen-year-old doesn't have a good sense of how long repayment would take. If I get to college and realize that the social life is one small part of the overall college experience, and I have to go to classes and do work, I may feel as though this was unfair (after all, they are unlikely to mention the Organic Chemistry final in the college's marketing materials).

The question is whether that kind of bait-and-switch tactic undermines the authority of the university. Clearly, just because I don't feel I made a good choice in attending college doesn't mean I am not subject to the rules of that institution. There really is no recourse in the case of a decision such as this one. I can transfer, but as with

the discussion of the exit clause above, this is not always easy for individuals to do and can come with significant costs. The question is not “is the authority of the college legitimate for all students?” but rather, “should it be legitimate to me if I misunderstood the kind of agreement I was entering into?”

First, consider that most people don’t opt-in to governance the way they opt-in to college. People are born into a society with rules already in place. Even if they did opt-in, they would likely not do so with their own rational self-interest at heart. Just as many high school juniors and seniors can be bought off by a new climbing wall at a college gym, it is certainly possible that people would choose where to live for superficial reasons. More charitably, it is probably the case that individuals do have compelling interests to live where they already do that would outweigh any concerns about the governance of a place. Because moving to another country is both onerous and expensive, it cannot just be put as a hypothetical question of “which state is better: A or B?” People have jobs; people have families. When deciding to move, all these factors are likely weightier in that decision calculus. Using the standard of what is best for the individual, even when it is known, does not avoid this. This is the argument for permissive legitimacy. Even if it is best for the individual to abide by the rules of the social contract, that does not mean it was entered into fairly. It is my claim that we cannot simply look to the good outcomes of the state as proof of its legitimate authority.

Imagine if, a presidential election were held and candidate A got more of the vote than candidate B, enough to make candidate A the winner of the election. If candidate B does not choose to accept this and seizes power in a military coup, it would not matter

how good of governance under B's rule the country would have. Legitimacy is about process.

Comparing Hypothetical Consent Models regarding the Social Contract

Looking at both the idea of hypothetical consent where it is possible to get consent and the idea where it is not possible, it seems the first fits the social contract better. It is certainly the case that, given the long time an individual resides in the state, and the fact that some form of limited communication between citizens and government is at least possible, and in some cases mandatory, that it would be possible to get an idea of consent to the social contract. Hypothetical consent is not necessarily free of coercion.

Just as the exit clause was not a valid way of establishing consent, neither should residence be indicative of granting that consent. Even removing the residency bias and looking at the decision to reside in a state as more of a pre-social condition, there are likely other inducements, economic and familial at least, that make a person want to live in one place rather than another. At best, this is unfree consent of the sort that Nozick says disqualifies fair exchange.

It is worth considering that not all coerced choices should be considered invalid. There is a big difference between me giving my wallet to a mugger who has a gun and me giving my wallet to someone who tells me of their tragic circumstances and desperately needs the money for what I discern to be a good reason. If my friends all want to go see a movie in which I am relatively uninterested, I may still go to the movie in order to spend time with them¹². I would not have freely chosen to attend this movie

¹² It would be more fitting in a discussion of hypothetical consent if I were somehow unconscious of my actions until I woke up in the middle of the movie theater realizing that my friends had taken me there.

but for their company. This is surely not coercion of the same sort. It is simply that the decision calculus has changed. What was a choice between movie and no movie now becomes a choice between movie (with friends) and no movie (alone). I can freely choose between these two. That does not mean I enjoyed the movie, but at the least it is fair to say I consented to it. Had the movie been truly objectionable to me, I would have opted-out and left my friends to see it without me.

Assuming individuals have knowledge of the obligations a state puts on them, the reason they choose to live there is immaterial to the question of consent, where there is a viable alternative. Looking first at that viable alternative idea, that is why the exit clause is so important. I had the ability to say “no” to my friends and to not see that movie. If I did not have that ability, for whatever reason, the fact that my friends were going would not in itself be enough to claim I consented to the movie. This is the same argument as Enoch makes with the needed blood transfusion—asking if it is in the patient’s best interest may be sufficient to determine some level of hypothetical consent.

Stark’s argument that the beneficial arrangement of state authority provides at least a moral obligation if not a political one is undercut by Enoch’s analysis. Stark bases this obligation on the idea that idealized agents, “fully rational in the sense that they desire the most effective means to their ends” would adopt a set of moral principles is sufficient to say that this provides a reason for any agent, idealized or not to adopt those principles (Stark, 2000, pp. 329–330). One such principle is cooperation within a civil society. Therefore, a civil society is morally justified. Enoch claims, on the other hand,

There are too many questions as to how to set up this hypothetical for me to go into that here. This example is meant to talk about consent versus coercion more generally rather than hypothetical consent specifically.

that people do have preferences that may even run counter to their own ends—a patient refusing a lifesaving transfusion, for instance. If we were to adopt Stark’s criterion, it would seem to say that forcing a transfusion on the Christian Scientist would be justified because a fully rational agent would support transfusions.

This is important for the present analysis because it is not immediately clear whether we can say that individuals living within a state have consented to it, either explicitly or hypothetically. To use the idea that it provides them with good as grounds for that hypothetical consent, as Stark seems to do, ignores the variety of human experience and seriously underplays the significance of deeply held convictions that may not fit an idealized agent’s rationality. On the other hand, Enoch does say that there are better or worse reasons to withhold consent, and that those worse reasons can even be justifiably ignored.

Chapter IV.

Conclusion

This paper examined two different possible justifications for state authority under the social contract and found them both insufficient. First, I looked at the possibility of justification through the exit clause, in order to see if, either theoretically or practically, people had a way out of the unjust state.

The theory that comes from Plato and Nozick on this is not compelling. Not only might it not be morally permissible to leave a state at any time, per Plato's conception, but Nozick's origin account shows how refusing to join a nascent state might not even be feasible.

The empirical analysis of mobility shows that the exit clause is not this kind of viable alternative. Given that, it hardly matters whether the choice is in the best interests of an individual to live in a particular state when there is not a feasible alternative for most people. It is very expensive to move; it often means leaving a job, maybe a family and community. These costs are not just high economically, but socially as well. That is why most movement only happens for major economic reasons.

Given the failures of the exit clause, my next examination centered around hypothetical consent. Here I looked at two modern articles for guidance by Cynthia Stark and David Enoch. Stark's claim for legitimacy was based on a moral legitimacy about what is best for rational actors, but this view is overly paternalistic and denies the reality of how people often do not act in their best interests (and should be allowed to do so).

Enoch gives several different scenarios in which hypothetical consent can and cannot be assumed. He ultimately concludes that people make their voices heard sufficiently that we do not need to rely on hypothetical consent.

There may be good reasons to live in a state. Hobbes' theory relies on the fact that living in a society under protection from the monarch is vastly preferable to the state of nature. Simply because something is the better of two bad options is not enough to justify its authority. It may not be a coerced choice to join a state under these conditions, but neither is the kind of affirmative enthusiastic consent that would justify state authority whole-heartedly.

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