



Dudley Knowles
**POLITICAL
PHILOSOPHY**

Fundamentals of Philosophy
Series editor: John Shand

**Also available as a printed book
see title verso for ISBN details**

examine the imputation, hence testing whether they are indeed subject to the obligation which the state asserts. The state is resourceful. It advances a range of different claims in support of its imputation of consent. Let us look at these in sequence.

Original contracts

Rousseau's argument in the *Discourse on the Origin of Inequality* cites an historical (but fraudulent) contract between the people and the chiefs as the origin of government. Other models are available. In *Leviathan*, Hobbes describes the citizens covenanting with each other to accept the rule of whoever the majority of them authorize in a future election.³¹ Locke concurs. Free men unanimously agree to form a civil society, community, government or body politic,³² which then entrusts power to whatever form of government they see fit. Suppose each of these authors is relating the facts of the matter as they see or conjecture them to have been.³³ Would such a contract support an obligation to obey the authorized sovereign? Evidently it would. Is this argument useful? Everything depends on whether or not there ever was such a contract.

When Locke was writing, many clearly believed that such a contract was in place, at least in the version where the sovereign contracts with the people. Following the flight of King James VII of Scotland and II of England in 1688, Parliament resolved that 'having endeavoured to subvert the Constitution of the Kingdom, by breaking the original contract between King and people . . .' he had *de facto* abdicated. Locating the original contract and specifying its content was a cottage industry amongst the students of the 'Ancient Constitution'. The quest was hopeless. Nonetheless it is a familiar aspect of modern political practice that new constitutions or striking constitutional innovations are put to the people in a referendum so that the ensuing settlement can be recognized as legitimate. De Gaulle's Fifth Republic was instituted by referendum in 1958 and modified, again following a referendum, in 1962. Following the downfall of the Communist regimes, referendums proposing draft constitutions were held throughout Eastern Europe. Britain's membership of the EEC was endorsed by a

referendum in 1975 and a devolved parliament in Scotland was established following a referendum in 1998.

Such modern constitutional settlements differ in detail from the sketchy accounts found in the classics. The condition of unanimity at the first stage (again supposing these texts are offering descriptions) is not met. But they are sufficiently like the historical contracts for similar conclusions to be drawn. If the state, as it addresses its citizens in the appeal for obedience can point to something akin to an original contractual settlement, it has made a good start. Of course, there will be many qualifications, and some of these will emerge later when we ask how far the citizen's participation in democratic politics can be taken as consent. But for the moment we can accept that those who participate in the institution of government have the responsibility of contractors to accept the legitimacy of institutions they have endorsed. The consent argument can properly be applied in such circumstances to those who may fairly be described as contractors.

That said, it should be equally obvious that there are many regimes wherein such considerations do not apply. There may have been no constitutional settlement put up for popular approval, or there may have been one, but many present citizens have not been party to it. So far as it is the *contract* (or referendum) which is adduced as the occasion of consent, those who were not party to it cannot be held to be obliged to accept the outcome. The state must come up with other arguments if it is to establish that non-contractors have obligations.

Express consent

To consent expressly is to put one's name on the dotted line or otherwise publicly avow that one accepts some state of affairs. Married couples standardly consent twice over, first in reciting their vows, next in signing a register. Does anything work like that in the political realm? Some take explicit vows of allegiance – these may well be office-holders in the state, whose commitment to the specific duties of their office is assumed within an avowal of wide scope. And some countries go in for this sort of thing more than others, reciting 'I pledge allegiance . . .' and so on, at the drop

of a hat. Naturalization ceremonies constitute a public affirmation; in the UK, respecting traditions of modesty and reticence, aspirant citizens merely sign the appropriate form.

There can be no doubt that those who actively affirm citizenship in this fashion (supposing their actions to be rational, fully informed, uncoerced etc. . . .) have accepted an obligation, have undertaken the duties of the citizen. It is worth noting however that exactly what duties they have undertaken may be moot. The only time I have been called upon to give advice on the strength of my profession as a philosopher was when a student who had arrived at the final stage of the naturalization process – signing the papers – asked me if he could do so in good conscience. His problem was that the declaration he was invited to make required him to recognize the authority of ‘Her Majesty Queen Elizabeth II and all the descendants begat therein’ (I quote from memory). He was troubled because he couldn’t accept the principle of monarchy, not even the impotent, symbolic, soap-opera variety. Believing my disingenuousness to be sanctioned by the faint sniff of a philosophical problem lurking hereabouts, I told him not to worry. He could sign up in good faith since accepting a monarchical principle is not a duty of citizenship. Good British citizens can and do campaign for the abolition of the monarchy.

The moral of this story, and it applies to original contract arguments too, is that it is not obvious or uncontroversial what the duties of the citizen include, even when these may fairly be judged to be the upshot of express consent, for it is not clear what even those who expressly consent, actually consent *to*. This is worth stating because the state is greedy when it tracks down its citizens’ obligations and is likely to assume that, if the citizen can fairly be deemed to accept any duty, she must accept the lot, capaciously and optimistically specified. Even those who accept the duties entailed by their express consent, should take a cautious, if not quite sceptical approach to detailed specifications. The state drafts the terms of the agreement and is a master of the small print, not to say the unspoken implications and the traditional understandings.

All that said again, the limitations on the applicability of this argument are obvious. I haven’t expressed any such consent, nor have many of my fellow citizens. Nor should we be expected to

welcome the open solicitation of such consent. Oaths of allegiance, unless they are the procedures of states which solicit the enthusiasm of the new recruit, are suspect, a familiar stratagem of tough states which invite martyrdom or self-imposed exile as the optimum way of dealing with inconvenient but conscientious dissenters. The state has widened its net and trawled in more obliging citizens. But the net evidently needs to be widened further. It looks to adduce tacit consent.

Tacit consent

To begin with, we need a clear example of tacit consent. What we are looking for is an example of behaviour which non-controversially assumes an obligation which does not derive from a contract or an explicit act of consent, behaviour which nonetheless may be said to express consent. Suppose I see, unexpectedly, a group of my students in a bar and join them at their invitation. I am lucky, and as soon as I sit down, one of them announces that it is her round and she buys us all drinks. The rounds continue and I take a drink each time one is offered. When my turn comes around, I say 'Thank you very much for your kindness. I've enjoyed your company. I have to be off' and leave. Have I done wrong? Of course I have. I've broken the rules. What rules?

The demand that the rules be specified, were anyone to make it in these circumstances, would be impertinent. My behaviour is not acceptable. I cannot say that there aren't any rules, nor that the rules aren't clear. The rules which govern our behaviour in circumstances of the sort that I have described are not explicit in the sense of being written down in the definitive field guide to social conformity. There are no explicit prescriptions that I know of which should govern one's response. It's just that I know, or, stretching the point that innocence demands of incredulity, should know, that I have undertaken an obligation to reciprocate my students' generosity. I have tacitly consented to the practice whereby the company buys a round of drinks in turn.

In the modern literature on political obligation the philosopher who brought tacit consent to the forefront of discussion was John Locke. Locke asks exactly the right question. Granted that one

who consents to government acquires an obligation to obey, and granted *a fortiori* that tacit consent is consent,

the difficulty is, what ought to be look'd upon as a *tacit Consent*, and how far it binds, *i.e.* how far anyone shall be looked on to have consented and thereby submitted to any government, where he has made no Expression of it at all.³⁴

Scholars of Locke have distinguished two strands in his answer to this question. First, tacit consent is witnessed in the enjoyment or possession of land which is under the dominion of the government. In the background is the supposition that all property within a territory is susceptible to the law of the land for only thus could citizens enjoy their property in security. Hence the convention that underlies the attribution of consent is that property holders submit to the government that regulates property to their advantage. This convention we must take it is as well understood as the rule of boozers' etiquette which requires that rounds of drinks be purchased in turn. If Locke is right, the state can present its bill to those who enjoy property, even to those who are 'barely travelling freely on the Highway' and demand of them obedience as the proper duty of the citizen (or transient alien).

The second line of argument is derived as a qualification of this first. Since 'The Obligation that anyone is under, by Virtue of such Enjoyment, to submit to the Government, begins and ends with the Enjoyment',³⁵ one who sells up and leaves can quit the obligation. There is a particular opportunity for explicit dissent, so one may suppose that those who do not take it tacitly consent. Thus the state may extend its reach even further, attributing consent and the duties entailed by it to those who choose to stay and, presumably, continue to enjoy the benefits of secure possession.

Are these arguments persuasive? In considering the first, we should recognize that everything depends upon the existence of the convention that Locke describes. Clearly, if there is such a convention in place and if everyone understands and accepts it, then we may fairly judge that those to whom it applies have the consequent obligation. If there is a rule or convention of the Common Room that those who take a cup of coffee pay 50p into the kitty, then those who enjoy the provision are obliged to pay. In

similar fashion, we need to investigate whether there is such a rule binding those who accept the benefits of the state. If there is, Locke's judgement is correct, but if there isn't any such convention, or if its existence is a matter of genuine dispute, then the state is not entitled to claim obedience.

This point may seem obvious – indeed it is obvious – but it is worth making since it alerts us to an equivocation in the argumentative strategy employed by the state. As represented by Locke, it looks as though the state is arguing two points at once, claiming both that if there is such a convention then obligations follow, and further, that there is in fact such a convention and citizens should recognize in consequence their proper duties. Of course, it is perfectly open to the state to advance both of these claims. The first thesis is conceptual and, I think, should be readily accepted. The second thesis, by contrast, states a matter of fact concerning the existence of a norm or moral rule and this is contentious. As we have seen, there are anarchists in the field, and they will deny it. We shall return to this question later when we consider the implications for political obligation of the fact that citizens are in receipt of benefits. It may be that one can argue for a different conclusion: that those who accept the benefits of the state ought to accept the duties of citizenship, even if, as a matter of fact, they do not. They ought to recognize such a convention, even if as things stand there is no such convention to presently bind them.

A second oddity about this argument deserves notice and it was brought to prominence by Hume.³⁶ Suppose there is a rule in a particular society that those who receive benefits from the state incur the duties of the citizen. There are many reasons why such a rule may carry conviction. Some may claim that each citizen finds such a rule to be in their best interest, others may say, in utilitarian fashion, that observance of such a rule maximizes the well-being of citizens, and there are plenty more arguments in the offing. But once such a rule is recognized as bearing on citizens' obligations, why should one take the further step of claiming that the acceptance of benefits witnesses consent, albeit tacit? If the rule is in place, and if a citizen does accept the benefits, does not that, on its own, establish the fact of the citizens' obligations without one's having to establish the further or entailed fact of their tacit consent?

If we return to the example of boozer's etiquette, we see that a crucial feature of it was that the person who incurred the obligation freely accepted the drinks in full knowledge of the rule of reciprocity which operates in pubs. He need not have accepted the drinks or he could have accepted a drink after having given an explanation that he would be unable to reciprocate. These precautions would have discharged any obligation on him to pay for a round. It is the fact that these choices are, and are known to be, open to him that makes it reasonable to speak of consent of the tacit variety. It is not obvious that such conditions operate in the case of the state, which standardly does not present us with the option of not taking up the goods and remaining a free agent. Many of the benefits touted, good maternity care, the cod liver oil and the orange juice, free educational provision, are dumped at the door of the unwitting recipient. Many of the rounds of drinks will have been bought before the child becomes an adult and is expected to pay.

Nonetheless, there is something to this argument. If someone feels that they have accepted benefits from the state believing that this brings with it an obligation to obey, they may fairly judge themselves to have consented to the regime. Some who accept this argument may make every effort to dissociate themselves from the benefits, detaching themselves physically from the state which provides them. They may exile themselves to the wilds of Montana or Idaho, living a life which is self-sufficient apart from periodic trips to the local rifle store. This is Militia Man, the bane of all theories of political obligation. Whatever grounds may be cited in favour of his consent he will disavow sincerely – which is not to say that all other arguments that can be adduced in favour of his having the duties of the citizen must fail.

This example requires us to examine the second mark of tacit consent, viz. the lack of explicit dissent. Again, as with the example of the pub, one can think of circumstances wherein the lack of explicit dissent can fairly be taken to witness assent. If the woman in charge of the meeting asks us if we have any objections to register against her proposal and we remain silent, our silence, we should think, testifies explicitly to our consent for all that it is tacit. This is a useful convention which expedites the business of committees, though it opens the door to a lot of

hypocrisy and self-deception when a subsequent account of one's conduct is called for. We know when politicians ominously write in their diaries, 'I remained silent' that something is up. The space created for disingenuous strategies alerts us to the fact of an unwritten convention in the background. Can such a convention be attested in the case of the citizen's duties?

Again it might be. A citizen may feel compromised by her unwillingness to dissent when an opportunity for dissent was available and judge that her silence has implicated her in the policies in which she acquiesced. This is a duty of citizens which often goes unnoticed, but passive citizenship as well as active participation can require that one has a duty to take some responsibility for the actions of the government. As with the acceptance of benefits, the fact of the citizen's not expressly dissenting can serve to attest consent and ground consequent obligations.

But remember: both of these arguments, authoritative when rehearsed by citizens, can be spoken in the voice of the government and in this context, they may carry little conviction. They will carry *no* conviction where dissent is costly to the citizen, exposing them to risks of harm. The state that pursues dissenters efficiently cannot cite the lack of dissent in support of its legitimacy. Locke had in mind, as an occasion of express dissent, the citizen's opportunity, 'by Donation, Sale or otherwise, [to] quit the said Possession', to leave the country, perhaps along with other dissenters, founding a new society in empty lands.³⁷ The state may echo this judgement, telling us that our continuing presence marks our tacit consent. Such a claim deserves Hume's mocking response:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.³⁸

Hume's strictures are just, but there is a rider to the dialectic which he did not acknowledge. There have been plenty of cases

where citizens have possessed the resources to emigrate and have identified a state which would welcome them, a state they, too, would welcome as infinitely better than the one they want to quit, and yet they have not been permitted to emigrate, or else the process of emigration has been made hazardous, overcostly or humiliating. One thinks of the predicament of Jews in the former Soviet Union. This episode makes it clear that states which frustrate their citizens' wishes to emigrate cannot attribute to such citizens a tacit consent deriving from their continuing residence. Nor can it use such an argument in the case of citizens who do not wish to leave. That these conclusions are obvious shows that the argument for tacit consent from the lack of explicit dissent need not be as crude as it is in Locke's statement, nor quite as vulnerable as Hume's counterexample suggests.

Arguments from tacit consent, in these familiar forms, do apply to some. The state has widened its net yet again and caught some more citizens in it. But there will still remain plenty of citizens who can, in good faith, reject its imputation. So the state seeks out further arguments.

Quasi-consent

In *Democracy and Disobedience*, Peter Singer discusses the specific question of whether citizens of a democratic state have particular reasons to accept the duties of the citizen as determined by majority rule. Thus far, we have spoken of the state and ignored the nature of its constitution. We could have been discussing any old state. The only question in hand was whether the citizens actually consented through the mechanisms of original contract, express or tacit consent. Singer introduces the notion of quasi-consent to explain the distinctive form of not-quite-consent which is implicit in the behaviour of voters. Their behaviour, he believes, mimics consent. They act *as if* they consent and the same normative conclusions may be drawn from their behaviour as are drawn in the case of actual consent.³⁹ If we describe the action of voting, taking the polling card and handing it over to the polling officer, receiving a voting slip and crossing the box in a private booth then placing the voting paper in a ballot box for counting, nothing

amounts to express consent. It would be easy to require valid papers to include a signature affirming that the voter consents to abide by the outcome of the ballot. To my knowledge, such a statement is never demanded as a condition of participation. So if voting attests consent, it is not express consent.

Singer tries to distinguish tacit consent from quasi-consent, claiming that the attribution of tacit consent, as explained by Locke (or some of his prominent interpreters), supposes that citizens actually give it – if not expressly, then ‘as saying in their heart’ that they consent, as acknowledging at the moment that they act in the manner from which consent can be inferred that they do so willingly.⁴⁰ The phenomenon of quasi-consent, by contrast, attests the implications of voting behaviour, specifically that citizens should accept that their participation in the voting process requires them to abide by the majority result, whether or not they realize that this is what they have committed themselves to. I don’t see the difference. If one had flown in from Mars and had been entertained by a group of hospitable students, if one was truly ignorant of the ruling conventions of pub visiting, tacit consent could fairly be repudiated. The only points at issue are: (i) is there a rule in place governing everyone’s behaviour; (ii) did the Martian or the guest know the rule; and (iii) in case they didn’t, ought they to have done so? Should the Martian or the lucky teacher have done their homework before they entered the pub? Generally, ignorance, as displayed by a ‘No’ answer to (ii), will excuse, though the excuse stretches the point if the answer to (iii) is deemed to be ‘Yes’. If we conclude that the beneficiary did, or ought to have, understood the ethical implications of his behaviour we will judge that he has the same duties as one who expressly consents.

But this is to prejudge the issue. I endorse Singer’s terminology of quasi-consent, not because it has a normative structure different from that of tacit consent – it doesn’t – but because it signals a distinctive argument which finds application in the specific context of voters’s behaviour. The quasi-consent the voter attests is attributable on the basis of a convention which is unique to the context of democratic decisions. I would have no dispute with the philosopher who insists that participation in democratic decision procedures is a third mark of tacit consent. But it is worth insist-

ing that this mark is distinctive. It is not a case of benefits accepted or dissent foregone.

The argument for the conclusion that the voter has consented to abide by the decision taken by the majority elaborates our understanding of the voting process. It articulates what the voters believe (or ought to be able to work out) that they are doing. Think of any occasion of voting: for or against a strike by the workers who are being balloted, for a representative to serve in a parliament or a local council, for or against a policy proposal put to a referendum. In every case it is supposed that the majority decision is binding on all those who take part. This is an assumption that can be challenged. I have spoken, for example, to some who voted in a strike ballot and did not accept that they were obliged to accept the outcome. They thought that, if striking would violate a personal obligation of service to the university authorities, they should do everything in their power to prevent others from striking, which efforts included voting against a strike, whilst not accepting the outcome should (as happened) the majority decision go against them. Such are the frustrations of the picket-line at a university.

In the next chapter I shall have more to say about democracy. For the moment, all I can say, of what is repeatable, against the voter who repudiates the majority decision, is that they do not understand the point of the exercise in which they were engaged. In a reputable democracy, no one has to vote pro or con a particular policy. Anyone can abstain, or, where filling in a voting paper is compulsory, spoil their vote. Perhaps this is an innocent construction of the reality of voting in all regimes in the modern world. Perhaps those who wish a plague on both their houses will be found out and persecuted. All one can do, given the many ways things can go wrong, the many resources of the manipulators of any decision procedure, is to insist that whatever reasons there may be for deciding issues by democratic processes should commend themselves to participators. Where these reasons are acknowledged, those who take part in democratic procedures should abide by the outcome.

This may not be obvious. Certainly, as we have seen, there is no rule book which states the convention and those who have the right to vote do not have to pass a test establishing that they

understand the ethical implications of voting. There is no way of making a case for the thesis that voters consent to abide by the result of the ballot other than by insisting, lamely, that ‘there is a conceptual connection between voting and consenting’.⁴¹ The conceptual connection can be articulated by explaining the point of the voting process. It is not a method of canvassing opinion, a poll designed to establish which policy or representative is most favoured, which information may be taken into account when a decision is taken. It is, itself, a way of taking a decision. Once the votes are counted, the decision is made. There is no logical space for further decision-making of the sort that might provide an opportunity for demurral between the act of voting and the announcement of a decision.

We shall see in the next chapter that there are many reasons for taking decisions in a democratic fashion. We have here encountered one that is of the utmost importance – that democratic decisions bind those who participate in the making of them to an acceptance of the result. Where the result is the establishment of a government, voters have assumed the duties of citizenship as these will be defined by the state. Although I cannot think of any objections to this argument – yet again the state has found a good one – it should not be thought that it entitles any specific regime to claim universal allegiance. The real world is a messy place and there are many qualifications that need to be registered.⁴² Most obviously, since the argument establishes that those who participate as voters take on the duties of citizenship, this entails that one clear way of repudiating the obligations is not to participate. If you don’t want to be bound by a decision to strike, don’t take part in the ballot.

This limits the scope of the state’s appeal since we can be sure that some – Militia Men again – will refuse to enter the polling booth, or entering it, spoil their paper or, indeed, strip off in protest as Jerry Rubin advised voters to do in the 1968 Presidential Election in the United States.⁴³ But the story gets messier still. If we are thinking of elections to a representative assembly, the assembly may have structural flaws which limit the legitimacy of its decisions. It may represent an entrenched majority, directing its policies towards the violation of minority rights. It may contravene an explicit mandate, either failing to introduce policies

announced in the manifesto of the winning party or introducing policies unannounced at the time of its election. Considerations such as these reveal that the consent adduced by voting does not amount to the issue of a blank cheque. The consent will, in practice, be qualified by further understandings of what it is rational for the citizen to accept. Some qualifications, e.g. the requirement of respect for minority rights, may lead to the withdrawal of all authority with respect to the state's decisions. Others, concerning the detail of the mandate, may lead citizens to challenge the validity of specific laws. Thus some in the UK who were led to protest the Tory Poll Tax legislation of 1988 by refusing to pay the locally raised charge, were willingly to continue paying income tax.

Having advanced the argument adducing quasi-consent on the part of voters, the state will find that it has gathered in more support for its claim to allegiance, that more citizens will recognize that the duties of the citizen are incumbent on them or that there are further grounds for them to acknowledge duties which they already accept. If it is lucky, the state will find that all citizens have in fact consented to the duties it imposes. If it is scrupulous, it will make every effort to ensure that citizens are willing to do so. It should not anticipate this measure of success, since the anarchist, for one, has deep reasons for resisting its charms, and as the persistence of bloody-minded Militia Man shows, some will do anything to resist the imputation of consent. If folk don't actually consent, whether in an original contract or constitutional settlement, expressly, tacitly or in the manner of voters, their consent cannot be used to ground their duties.

This result will not satisfy the state, which is ambitious. It will seek to find other grounds for imputing duties to its recalcitrant citizens, other reasons for bolstering the allegiance of those who do consent.⁴⁴ Perhaps it will seek to establish that those who don't consent ought to do so and claim in consequence their hypothetical consent or their partnership in an hypothetical contract. We shall examine these arguments next.

Hypothetical consent and hypothetical contract

Dworkin tells us, in a famous quotation, that ‘A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all’.⁴⁵ This tells us that there is some work to be done in establishing the credentials of arguments that rely on hypothetical consent or contract. They cannot rely on the normative implications of actions of consent or contract. Their force must derive from elsewhere.

Hypothetical consent works like this: hospital patients are generally asked to consent to surgical procedures being carried out on them. Otherwise, the invasion of their bodies would be an assault. Yet some patients, notably those who are comatose, cannot give consent. In such circumstances, it behoves the surgeon to ask a hypothetical question: would the patient consent were he conscious, rational and fully informed of the nature and likely success of the proposed operation? Surgeons’ temperaments dispose them to intervene, to save life or cure illness or advance medical science, so it is important to see that the answer to the hypothetical question may be ‘No’. The way to answer the hypothetical question is to gather the sort of information that friends and family can provide so that the surgeon has as good an idea as is possible of how the patient would decide. This may be easy – the patient may have clear religious beliefs which proscribe surgical procedures of the sort envisaged. Or perhaps the patient has told his family that he does not wish any more expensive, painful interventions which have little chance of success. Or perhaps he has told people that he would grasp at any straw to have a longer life of even meagre quality. Using this sort of information, the surgeon takes the decision she believes the patient would have reached, substituting her judgement for his. It is useful to speak of hypothetical consent here because it signals that the decision is being taken from the point of view of the patient, mustering the sort of information that would have been relevant to his decision, were he in a position to make it. The surgeon, considering what would be best overall, may well have reached a different decision, taking into account values such as the advance of medical knowledge or techniques which may mean little to the patient.

Hypothetical consent, thus construed, looks as though it has

little part to play in working out whether citizens have duties to the state. Why should one seek to establish it if there exist mechanisms for finding out whether or not citizens actually consent? What kind of information about citizens' preferences could be a substitute for that elicited by asking them? The only sort of presumption that could motivate the investigation of hypothetical consent is that of widespread irrationality. One must assume that citizens, like the patient, but for different reasons, are incapable of judging rationally whether or not they have the obligations with which they are charged by the state. This assumption we should take to be false. Who would openly acknowledge that it holds for themselves? Just because we understand so clearly the circumstances which call for the investigation and imputation of hypothetical consent, we should be very reluctant to use this strategy in seeking to derive citizens' duties.

Hypothetical contract is a close cousin of hypothetical consent. As an argument form, it suffers from not having available a simple example or model which illustrates the domain of its possible application outside the context of philosophical dispute. Perhaps some sorts of historical judgement require arguments which hypothesize a contract. One way of deciding whether or not the Treaty of Versailles was a good thing, or whether those who imposed it should be criticized for the harshness of their impositions on Germany in 1919 is to ask whether we would have proposed or accepted its terms. But the fit with hypothetical consent is imperfect in an important fashion. In the case of the patient, it is *his* reasoning we are attempting to reconstruct. In the case of the Treaty, it is our own judgement that we are seeking to apply in the circumstances of decision-making available to the original parties.

We can best judge the applicability of an hypothetical contract by trying to deploy it in the present case. Again we should adopt the perspective of the ambitious state. We are supposing that it has failed to establish consent where its attribution matters most, in the case, that is, of the recalcitrant citizen. If we haven't established that he does consent, can we show him that he ought to? Can we get him to accept that he ought to agree to the state's imposition of the duties of citizenship although he hasn't in fact done so? Can we claim that other things he believes require him to accept the conclusion he disavows?

We can take it for granted that accepting the duties of citizenship is costly. The state exacts its impositions. It threatens its citizens with penalties for non-compliance. As we saw when discussing the challenge of the anarchist, these powers are unattractive to anyone in their reach. The hypothetical contract argument attempts to show that a rational citizen should accept these powers as legitimate as the price of achieving goods that he values more. The decisive move is made when the citizen recognizes that he faces a social problem, not a personal dilemma, when he realizes that an acceptable solution embraces others besides himself. The simplest way to outline this model of reasoning is to bowdlerize Hobbes, the master of this line of argument.

First, imagine that we are living without the state, in the state of nature. We seek to advance our own interests, placing a premium on the preservation of our lives. Yet we find ourselves systematically thwarted. We find, each of us as individuals, that our pursuit of power, both to satisfy our desires and to protect ourselves from others who seek to use our powers for their own ends, is continually frustrated by the power-seeking activities of others. In the state of nature, nothing constrains this pursuit of power. Since as things stand, no one is getting what they want, the circumstances of human interaction need to be changed. Since the unimpeded pursuit of our own interests undermines its own achievement, the rules of the game need to be revised.

There are four possibilities: the first, the status quo wherein we each of us struggle for power, is hopeless. The second possibility is that I have all the power, but no one else will accept that. The third option is that someone else has all the power, but that won't suit me. The final possibility is that no one has power over anybody else. We can achieve this outcome by all of us renouncing the private pursuit of power, by handing over our powers to some third party who will establish the conditions of peace. We conclude that it is rational for agents who wish to preserve their lives under conditions of commodious living to accept a sovereign power to rule over them. The result of our several deliberations is that each of us judges that if we do not have a sovereign we should institute one; if we do have a sovereign we should keep it, recognizing its authority.

You will have plenty of reservations about this story. But look at

the outcome. We have portrayed an exercise of practical reason undertaken by each party to the conflict as giving rise to a mutually acceptable solution. It is not that everyone has agreed with each other in the way of shaking hands or signing a treaty. The agreement that has been modelled is agreement in the minimal sense of congruence in the reasoning undertaken and the conclusion reached. We each reach the same conclusion, since we all reason in the same fashion from the same premisses. Matters stand *as if* we had made a contract. It might be objected that this is a poor sort of contract. After all, if we are all asked to write down the answer to the following sum: $2 + 2 = ?$, and we all write down 4, what is gained by representing the agreed answer as the outcome of a contract? It is as though we had agreed, but what are the implications of this? We should certainly *not* conclude that $2 + 2 = 4$ on the basis of a hypothetical contract.

This objection forgets a central feature of the story. Unlike the mathematical case, as each person reviewed the possible outcomes, they were forced to consider the responses of others and restructure their priorities in line with their judgements of what outcome others could reasonably be expected to accept. Each person conducted the moral arithmetic separately, but each person found themselves having to take into account the anticipated responses of others. The first preference of each, that he or she has all the power, could not survive the obvious thought that this would not be acceptable to others. So each ‘contractor’ trimmed their aspirations, seeking only solutions that would be mutually agreeable. A hypothetical contract works as a device for modelling the practical reason of individual agents seeking an answer to a common problem where it is a condition of the acceptability of a solution that everyone agrees to it because agreement is the only way forward.

I find this model of reasoning explicit in Hobbes, implicit in Locke, and both implicit (in *The Discourse on the Origins of Inequality*) and explicit (in *The Social Contract*) in Rousseau – but I shan’t defend these attributions here. It remains to be seen how far it amounts to a cogent argument in favour of sovereign authority and the citizens’ duty to accept it. One implication of the use of this argument form should be made explicit. I mentioned earlier that there was something objectionable about the application of a

hypothetical consent argument to settle the question of political obligation. It seemed to presuppose that citizens cannot work out for themselves whether they have the obligations of citizens, that they are treated as irrational when arguments were imputed to them which they would likely reject. The hypothetical contract argument does not carry this implication. On the other hand it must accommodate the inconvenient fact that persons may be ignorant of the values and preferences of other persons, or that they may discount these in their reasonings, and thereby may be unable, in so far as they fail to take these things into account, of reaching a solution to problems which they throw up for themselves. The hypothetical contract model articulates an ideal process of reasoning. Moral ignorance or short-sightedness, if not straightforward irrationality, makes application of the model necessary in circumstances where we cannot expect those to whom it applies to respect either its premisses or its conclusions.

In particular, it represents a democratic sovereign as a fair compromise between conflicting claims to power. We can test this thought by seeing how such an argument applies to Militia Man. Note that although he has withdrawn to the wilds of Montana or wherever, he hasn't succeeded in inoculating himself from the contagion of other members of his society. He still makes claims against them, notably that they keep off his land, and reinforces these by threatening to use his automatic rifle. He makes a claim even in this restricted domain, so it is important to work out how it might be adjudicated when it comes into conflict with the claims of others. If he is wise, he will not rely on physical force or weaponry. An alliance of rival claimants will get him sooner or later, as Hobbes foresaw. He can't insist that he isn't a threat. His neighbours will worry that he may take pot-shots at straying cattle or children. Whatever his antecedent principles about big government and the like, he should realize that he has to make an accommodation, which amounts to accepting a procedure for the arbitration of conflicting claims. He has to do this because otherwise everything he holds dear is threatened. The state puts itself forward to recalcitrants such as Militia Man as adjudicator of disputes and enforcer of valid claims. Hobbes would accept any third party as long as it can settle disputes effectively. Just in case Militia Man distrusts the state, it can offer him a place in the

making of rules and the settling of claims as a participant in democratic decision procedures. He would do well to accept the offer, but if he doesn't its terms may fairly be imposed upon him anyway.⁴⁶

In explaining the notion of hypothetical consent, I have done little more than elaborate an argument form and illustrate its use in sketchy fashion. Despite its ancient provenance, of all the classical arguments underpinning political obligation it is the most underdeveloped in the kind of detail it requires. It looks to be vulnerable at two specific points: the first concerns its Hobbesian antecedents. It assumes an ambitious theory of human nature, a universalist psychology. Hobbes's own version, stressing self-interest, is unattractive, but these can fairly be seen as weak, rather than strong premisses. We may be concerned with many other goods than self-interest, but if our lives are at stake one interest is indubitably threatened, an interest that cannot be compromised without all other interests being sacrificed too. The Militia Man may say, 'Give me liberty or give me death', but this is better understood as an appeal against colonial tyranny rather than the modern bureaucratic state's practice of sending out income tax forms. It is odd that one who willingly pays purchase tax in order to buy a rifle should genuinely think martyrdom a rational alternative to the payment of other taxes. Stronger versions of the grounding premiss offer greater hostages to fortune, but may succeed in deflecting objections. Locke identifies life, liberty and property as the goods which we require a state to protect. Rousseau would have us recognize as legitimate a state that protects our life and property under conditions of maximal liberty and equality, assuming that were we not vulnerable in respect of these goods there would be no point in a political association.

Since these premisses amount to empirical claims at least in so far as they attest universal desires and values, they are clearly vulnerable. Nonetheless it is hard to find spokesmen for opposing positions. I can imagine religious opinions to the effect that these things do not really matter. In the order of things, they count for little against the purity of the soul and the promise of salvation. Such views generally preface an argument for theocracy rather than a religiously motivated propagation of anarchy. Still, I guess it is a distinctive position. We have seen cult members dying on television rather than accept state regulation of their weaponry.

This should alert us to the second vulnerable aspect of the hypothetical consent argument. It requires us to accept that the goods that we value cannot be protected or promoted without the state; it requires a denial of the anarchist claim that the state as we have encountered it, or as any political utopia is likely to develop, will ultimately threaten the things we most value. This, too, is at bottom an empirical claim, so I shall leave adjudication of it to the reader.

The benefits of good government

The arguments from consent or contract that we have been examining have claimed either that we do or have contracted or consented to the duties of citizenship or, in the case of hypothetical contract, that we ought to accept the duties of citizenship. In the case of actual consent, it is strictly speaking irrelevant why we consent. That we express marriage vows binds us to our partners. Why we do so is immaterial to the reality of our obligations – and the same must be true of the duties of citizenship. Nonetheless, we can expect a state which wishes to elicit our consent to give us grounds for doing so, and the obvious way for it to proceed is for it to provide us with benefits. As we have seen, there may well be circumstances in which our willing receipt of benefits is an index of tacit consent, although the supply of benefits is not, of itself, a reason for imputing it. Arguments which employ the notion of hypothetical consent also rely on the state delivering the goods. The strategy which underlies the argument is an exploration of the claim that the costs of obedience are the price a rational agent will pay to receive the benefits of others' compliance. In plausible versions of each of these arguments we reach the conclusion that we ought to accept the duties of citizenship through attesting consent as a result of an examination of the benefits we shall attain. This makes good sense. Why should anyone consent to the imposition of duties unless they expect to benefit? Why should anyone contract with others to limit their liberty unless their interests are advanced or their values promoted by so doing?

It is worth stopping at this point, though, to reconsider the force of Hume's question. Why seek out or presume consent when the benefits of government are apparent? Doesn't the fact of universal

advantage itself constitute good reason for us to accept the duties of citizenship without taking the unnecessary circuit of attesting consent? It might, as we shall see, but if in fact consent is elicited or contracts undertaken that is an important fact which the state can be expected to emphasize. In the case of hypothetical contract, there is no contract to be attested. As I have emphasized before, consent arguments are perfectly acceptable. We can expect those who have consented to recognize their force. But some will not consent. They will not expressly consent or be party to anything that resembles a contract. As soon as they suspect that tacit consent may be presumed, they will act differently or explicitly repudiate the imputation. They will not vote or otherwise participate in democratic decision procedures. And they will challenge the applicability of premisses employed to derive hypothetical contracts.

Does the state have further arguments at its disposal? Yes it does. Both of the further arguments we shall consider proceed directly from the supposition that the state benefits its citizens, in the manner Hume thought sensible. In what follows, I shall assume that Hume was right on the matter of fact. If he wasn't, the arguments that follow have no purchase. This qualification is of more than academic importance, however, to the state that wishes to claim our allegiance and the citizen who wishes to appraise its claims. It requires that the state which presses our obligations to it should demonstrate how the citizens' advantage is served. It places a burden of proof on the state which accords with the instincts of liberalism.

The principle of fairness

This argument states that considerations of fairness require those in receipt of benefits from the state to reciprocate by accepting the appropriate burdens, by accepting the duties of citizenship. In modern times it was first sketched by H.L.A. Hart:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have the right to