

The Normative (In)Significance of Hypothetical Consent

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1. Introduction (and Some Examples)

A patient arrives at your ER, 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. And the patient in front of you is not giving her consent. Of course, she *cannot* – she’s unconscious. But perhaps you can still administer the life-saving treatment, for surely, *had she been conscious, she would have given her consent*. And perhaps this is enough to render the treatment morally permissible¹.

It is really hard to reconcile liberty and authority. How are we, if we are free, subject to the supposedly legitimate authority of the state? If we are born free, what can possibly make it legitimate that we are everywhere in chains? The natural thought is that consent would do just that. Being subjected to the authority of the state does not seem contrary to our liberty, if we are only subject to it because we’ve consented to being subject to it. Alas, many of us have never given our consent. But perhaps the authority of the state can still be justified, for surely, *had we been rational, we would have given our consent*. And perhaps this is enough to render the state’s authority legitimate².

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

¹ This is a common example. See, for instance, Waldron (1987, 139), Thomson (1990, 187). Below I’ll be discussing several variations of this case.

² See, for instance, Estlund (2008, Chapter 7, and the references there). Though note that Estlund’s own version of a hypothetical consent (the one he calls “normative consent”) is in important respects atypical.

physically restrain you. This is the kind of thing that typically needs consent to be morally permissible. But you don't give your consent. In fact, you actively withhold consent. Still, perhaps my physically restraining you can nonetheless be morally permissible, for surely, *had you realized the state of the bridge*, you would have given your consent, or would have changed your plans to cross it. And perhaps this is enough to render the restraining morally permissible³.

In these examples – and in many more⁴ – talk of hypothetical consent comes very naturally to us. The examples differ in important ways – the relevant hypothetical conditions, for one thing, are importantly different – but they all invoke hypothetical consent. Indeed, at least at first it seems hard to see how we could say all we want to say without resort to hypothetical consent. But – as the literature on hypothetical consent shows clearly – the thought that hypothetical consent can make any normative difference whatsoever is, on reflection, perplexing.

I present the two main problems for the normative significance of hypothetical consent that I find in the literature in the next section: these are, first, that hypothetical consent can never substitute for actual consent, and second, that hypothetical consent is always normatively epiphenomenal, because what does the relevant normative work is that in virtue of which, in the appropriate hypothetical conditions, consent would have been given. But I also insist – on the strength of intuitive examples, mostly – that even under the pressure of those objections, we should not conclude too quickly that hypothetical consent never matters. In order to offer a qualified defense of hypothetical consent, I present (in section 3) some crucial distinctions, and then (in sections 4 and 5) proceed to show how – and when – the objections to hypothetical consent can be met. By the end of section 5, then, we will have some initial framework-setting

³ An example loosely based on one in Mill's *On Liberty* (1869), Chapter 5. Mill does not, as far as I know, invoke thoughts about hypothetical consent here.

⁴ For more examples, see, for instance, Kuflik (2009, 131-3).

conditions – what has to be the case for hypothetical consent to be possibly normatively relevant. But we will not yet have anything by way of a substantive account – a substantive answer to the question when, and why, hypothetical consent matters. I try to make progress on these questions in the following sections: In section 6, drawing on the idea of the depth of the relevant commitment, centrality to the self, and Frankfurtean endorsement, and in section 7 by distinguishing two autonomy-concerns that actual consent sometimes answers to.

2. Two Worries

If we find it so natural – both in every-day and in philosophical contexts – to refer to hypothetical consent (at least when actual consent cannot be secured), why the suspicion that hypothetical consent is not after all morally significant?

I think that two central worries are relevant here.

2.1 No Substitute for the Real Thing

The first objection is straightforward enough⁵. Consent has normative force⁶. It can render impermissible things permissible (like your touching me, or your using my property). Consent – or its close relatives – can create duties (as in contracts). Giving consent is exercising a normative power.

But in these respects, a hypothetical consent just won't do the trick at all. If you complain about my using your property, and I note that you've consented (under the suitable conditions, etc.), then that is the end of the matter – a part of the bundle of rights that your

⁵ Stark (2000) refers to it as “The Standard Indictment”.

⁶ In Heidi Hurd's (1996) memorable phrase, “consent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.”

property rights include are precisely the power, by your consent, to make it the case that it's permissible for me to use it⁷. If you haven't consented, though, you haven't exercised that power of yours. How does it matter, then, that you *would have*, under some hypothetical conditions? It is of the very nature of normative powers – indeed, of powers more generally – that in order to have their standard (normative) effect, they must be *exercised*. As Dworkin (1975, 18) said about Rawls's hypothetical contract a long time ago, "A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all."

Understood in this way, the thought that hypothetical consent can substitute for consent doesn't sound more plausible than the thought that, if you're thirsty and there's no water around, it may be good enough that there *would have been water*, under suitably described hypothetical conditions, or the thought that you should get the medal even though you didn't win, because you *would have won*, under suitably described hypothetical conditions⁸.

2.2 No Real Work: The Grounding Argument

Take the unconscious patient again. True, she would have consented to the blood transfusion, had she been conscious (or so we're assuming; we'll get to relaxing this assumption later on). But we can go deeper. *Why* would she have consented? Presumably, because of things like that she wants to go on living; that she's afraid of death; that she cares intrinsically about some projects, relationships, people – things of value in her life, that she can continue engaging in hopefully constructive, valuable ways if she survives, but not otherwise. But all these things –

⁷ Of course, I'm simplifying here about property rights, the precise content of which – I'm sure – heavily depends on context. Such complications won't matter for our purposes.

⁸ Actually, this last example is not entirely clean. Think about someone who comes in second, and then it's found out that the competitor who came in first was using forbidden drugs. You may want to say that the one who came in second *actually won*. But at least as natural a description would be that he hasn't, but *would have*, if it weren't for the cheating.

aren't *they* reasons enough for you to administer the blood transfusion? The hypothetical consent seems not to do any normative work anymore – rather, 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. The hypothetical consent then becomes not what *makes it the case* that it's permissible to administer the blood transfusion, but a *by-product* of the factors that make it the case that it's permissible to do so.

Or take the political example again. If someone has not given his consent to the authority of the state – indeed, is actively refusing to give his consent – but would have consented, had he been rational, there must be something in virtue of which he would have consented (that there must be such reasons seems to follow from the thought that he would have been *rational* to give his consent). Perhaps, had he been rational, he would have given his consent because the alternative to an authoritative state is a terrible Hobbesian state of nature, or perhaps it's because a democratic state's authority is legitimate as the only public order in which people treat each other as free and equal, or some such. But then, if some such considerations make it the case that the citizen would have consented had he been rational, they seem to justify the authority or legitimacy of the state *directly*. Once again, then, the hypothetical consent drops out of the normative picture. Rather than legitimize the state (or some such), it is merely the normative by-product of that which legitimizes the state.

Perhaps we can make this line of thought more precise, in terms of what I will call *The Grounding Argument*⁹. Let *Normative Upshot* designate whatever it is that hypothetical consent may be relevant to – the permissibility of administering the blood transfusion, the legitimacy of the state, or some such. And let *Underlying Reasons* stand for whatever considerations make it

⁹ This line of thought is fairly common in the literature. See, for instance, Thomson (1990, 187), Hill (2001, 326-7), Sreenivasan (2009, 68). The more precise argument that follows is, as far as I know, original.

the case that, in the relevant hypothetical conditions, consent would have been given. Then we get:

- (1) Hypothetical Consent grounds Normative Upshot. (For *reductio*)
- (2) The Underlying Reasons ground Hypothetical Consent.
- (3) The grounding relation is transitive.
- (4) Therefore, the Underlying Reasons ground the Normative Upshot. (From (1), (2), and (3).
- (5) Therefore, Hypothetical Consent is normatively epiphenomenal. (From (4)).
- (6) Therefore, Hypothetical Consent does not ground Normative Upshot. At most, it's a normative by-product. (From (5))

I will return to this argument in section 4 (where the move from (4) to (5) will be questioned).

For now, though, I want to quickly dismiss some initial objections.

Because Underlying Reasons have been stipulatively defined as that which grounds the hypothetical consent, the only way to reject premise (2) seems to be to assert (in a specific case, perhaps) that the relevant hypothetical consent is not grounded at all, that it is *groundless*.

Now, this is a possible move, of course – grounding-chains, like many others, come to an end somewhere. But it seems like an especially implausible place to bring the chain to a stop. After all, we've chosen, among the infinitely many possible hypothetical situations, the one situation consent in which *counts* (for the relevant normative upshot). Why that one, though?

Presumably, because in that hypothetical scenario – when you are conscious, when you are rational, when you are fully-informed – you are more sensitive to the relevant considerations –

that is, it seems, to the ones that ground your hypothetical consent. So something does ground it¹⁰.

The transitivity of the grounding relation (3) may, I guess, be rejected. But this would seem to be a high price to pay – that grounding is transitive is, I take it, one of the few points of consensus in the emerging literature on grounding¹¹.

Of course, even if the argument is sound, its conclusion is consistent with hypothetical consent playing an *epistemic* role. Think, for instance, about using “What would Jesus do?” as a tool in one’s practical thinking. Notice that this amounts to the use of a hypothetical test of sorts. But in order for such use to make sense, one doesn’t have to believe that the fact that Jesus would do so-and-so *makes it the case* that so-and-so is the thing to do. One may think of the fact that Jesus would do so-and-so merely as evidence – perhaps conclusive evidence, but still evidence – that so-and-so is the thing to do. Analogously, then: Even if the Grounding Argument shows that hypothetical consent never grounds the relevant normative upshot, it may serve as evidence for the normative upshot (if, that is, for some reason it’s easier for the relevant agent to know whether there would be hypothetical consent than it is to consider the Underlying Reasons directly; perhaps this is atypical, but surely it’s not impossible). I take it, though, that typically (as in the examples I started with) we seem to want more for the significance of hypothetical consent, more than merely evidence for reasons that are independent of consent.

¹⁰ Hill (2001, 305) makes a closely similar point.

¹¹ Although there are controversies in the vicinity here. Some think – and some deny – that there are *different kinds of* grounding relation. If so, we can ask about the structure of things like the following: What if A metaphysically grounds B, and B normatively grounds C? Does it follow that A grounds C, and if so, what kind of grounding relation is this? Selim Berker argues, on the basis of the transitivity of such structures, that the grounding relation is in fact unitary. For this claim, and many references, see Berker (manuscript).

These rather quick attempts at resisting the Grounding Argument for the epiphenomenal status of hypothetical consent, then, do not work.

2.3 Combining the Two Worries: Will or Reason?

As if these worries about hypothetical consent are not bad enough, when combined they can be more worrying still. For they give rise to a powerful dilemma.

Jeremy Waldron (1987, 140-1) famously distinguishes, in the political context, between consent theories that are will-based, and those that are reason-based. Will based theories use the consent to show that the relevant person's will is engaged in the right kind of way. Reason-based theories use the consent to show that the relevant person has the right kind of reasons. We can use this distinction to offer the following dilemma¹²: Hypothetical consent can be normatively relevant either for will- or for reason-related reasons. If it's supposed to be relevant for will-related reasons, though, the objection in section 2.1 seems especially powerful, for that I would have consented doesn't show that my will engaged in the right kind of way, only that it would have been. If it's supposed to be relevant for reasons-related reasons, the Grounding Argument applies especially powerfully, as then the underlying reasons seem to be doing all the relevant normative work. The challenge to defend some normative significance for hypothetical consent then becomes that of avoiding *both* pitfalls – we must show, roughly, that hypothetical consent is sufficiently about the actual will of the relevant person to avoid the Grounding Argument, but also that it's about his or her will in a way that avoids the problem of consent not being a pale form of consent, but rather no consent at all.

¹² This is not what Waldron uses it for.

3. Another Example, and Two Distinctions

Despite the naturalness of resort to hypothetical consent, then, there are reasons for serious suspicion that perhaps, at the end of the day, hypothetical consent cannot be normatively significant. It cannot do the work of actual consent, because for normative powers to make the difference they are supposed to make, they have to be exercised; and we have some strong initial reasons – captured by the Grounding Argument – to suspect that the hypothetical consent itself is normatively epiphenomenal.

I am not willing to give up on hypothetical consent just yet, though. There are cases in which – despite the worries from the previous section – it's very hard not to assign normative significance to hypothetical consent. To see this, compare the original unconscious patient case to the following variation. In this variation, the unconscious patient arriving in your ER is a Christian Scientist, and is therefore strongly committed, on religious grounds, to not allowing a blood transfusion to be administered to her. In terms of *actual* consent, there is no difference between the two patients – both of them are unconscious. We can also stipulate that it would be good for both to survive, perhaps even to the same degree¹³. The underlying reasons that both have to go on living are equally strong. Still, isn't it clear intuitively that there is a normatively relevant difference between the two cases? Perhaps the difference is not sufficiently potent to make it the case that it's permissible to administer the transfusion in the first case but not in the second. I'm not sure about this. But I am *quite* sure that there is at least *some* normative difference between the two cases. The natural way to capture the difference is by talk of hypothetical consent: The first patient would have consented, had she been

¹³ Thomson (1990, 189) suggests that in such a case, if we should not administer the transfusion to the Christian Scientist, this is because it would be bad for him (say, to survive in virtue of a measure he is strongly opposed to on religious grounds). This seems wrong to me: Surely, we can come up with an example in which all things considered, surviving even by those means would be good for the Christian Scientist. The nature of the religious prohibition is – or at least *can* be, for these are hypothetical examples we're dealing with – deontological rather than good-related.

conscious. The second one would not, because of her Christian Scientist commitments. So it's worth our time to see whether some normative significance for hypothetical consent can be salvaged.

One important step in this direction, then, is to distinguish among different kinds of normative significance, different ways in which hypothetical consent may (be thought to) make a normative difference. In particular, if hypothetical consent makes a difference, we can ask what kind of difference, and to whom.

3.1 Different Normative Upshots

I already noted that consent and its relatives make *all sorts* of normative differences. My willfully entering the boxing ring with you arguably makes your punching me – usually, a morally impermissible action – into a permissible one. Here the normative upshot is that of permissibility. My promising to meet you for lunch creates for me a duty to be at the cafeteria at noon. Here, the normative upshot of the promise (importantly different from consent, but certainly in the same normative family) is that of obligation, or duty. Perhaps, if I consent to the authority of an arbitrator, she now has the normative power to create duties for me. Perhaps here the normative upshot of my exercising the normative power of consent is that of creating further normative powers (in the arbitrator). And so on.

When asking about the normative significance of hypothetical consent, we should not be working with an overly poor menu of normative upshots¹⁴. Even if, for instance, hypothetical consent – unlike actual consent – never makes an impermissible action permissible, this does

¹⁴ I think, though, that we can rule out the possibility that hypothetical consent matters merely *instrumentally*. The problem is that mattering instrumentally is a causal matter, and hypothetical consent is not actual, and so presumably is causally inert.

not mean that it does not make a normative difference, because it may have *other* normative upshots¹⁵.

In particular, two points are worth stressing here. First, normatively mattering can be a matter of degree. In the boxing example (with actual, though perhaps implicit, consent), for instance, you may think that the wrongness of the entire practice makes it the case that the consent does not in fact make your punching me morally permissible. Even if you do think that, though, I am pretty confident you don't think my consent is normatively inert. You probably think that your punching me, while still wrong, is not *as seriously* wrong as it would have been had I not given my consent. Or perhaps the punching – while still wrong – is wrong in somewhat different ways, or for somewhat different reasons, than it would have been but for the consent. Similarly, then, it's possible that hypothetical consent does not make an impermissible action permissible, but still makes a normative difference (think again about the comparison between the two patient cases above)¹⁶.

Second, even if hypothetical consent can never do the normative job that actual consent does, this does not mean that it doesn't do any normative work at all. There are many ways for things to be normatively significant, and not being significant in the way that actual consent is just does not entail not being normatively significant at all¹⁷.

¹⁵ Kuflik (2009) criticizes Thomson, noting that hypothetical consent may be normatively relevant even if there's no moral status for which it's either a necessary or a sufficient condition.

¹⁶ Perhaps – I am really not sure about this – if something makes *any* normative difference, it just follows that we can describe a possible case in which it makes the difference between permissibility and impermissibility. Perhaps, for instance, if my consent to boxing makes a normative difference, then while it needn't make your punching me morally permissible, it makes some intervention by a third party that would have been impermissible permissible. If this is so, then making a normative difference *anywhere* entails making the difference between impermissibility and permissibility *somewhere*. This would require weakening some of the claims in the text here, but not, I think, in crucial ways: It would still remain true that *in a given context* hypothetical consent could make a normative difference without making – *in that context* – the difference between impermissibility and permissibility.

¹⁷ This is a point that Stark (2000) emphasizes.

3.2 To Whom

Forget talk of permissibility and impermissibility. Let's talk of reasons for action. Consent (and its relatives) can affect *everyone's* reasons for action. By my consent to your touching me, I can make it the case that reasons you had not to touch me are no longer in place. I can make it the case that the weight of other reasons of yours changes. By the exercises of related normative powers I can bring reasons for action into existence¹⁸. I can also affect *my own* reasons for actions. I can, for instance, create duties for myself, and so on.

It may be important to ask, assuming hypothetical consent can make a difference in terms of reasons for actions, *whose* reasons it may affect. The relevant distinction here is, I think, that between my hypothetical consent affecting *my own* reasons for action, and it affecting *others'* reasons for actions. You may think, for instance, that in order to affect others' reasons for action – especially in the way actual consent does, say, by rendering certain impermissible actions permissible – consent has to be actual, but that the fact of hypothetical consent may affect *one's own* reasons for action¹⁹. That is, you may think that the mere hypothetical consent of an agent never makes a difference to the reasons that apply to *others'* treating her, but that it can make a difference to her own reasons. Or you may want to insist that hypothetical consent does make this kind of a difference for others' reasons as well, or perhaps even only for others' reasons²⁰.

¹⁸ For requests, see my "Giving Practical Reasons" (2011). For orders and authority, see my "Authority and Reason-Giving" (2014).

¹⁹ This, I think, is Stark's (2000) view.

²⁰ One way of understanding Stark's (2000) master argument is as starting off agreeing that one's hypothetical consent doesn't directly affect how one is permissibly treated by others; insisting that it nevertheless may have another kind of normative upshot, affecting one's own reasons for action; and then claiming that in the political context, sometimes how one can be permissibly treated is affected by what reasons for action one has oneself.

There are many ways, then, in which hypothetical consent may make a difference: It may make a difference by rendering impermissible actions permissible, but even if it does not, it may have other normative upshots. It may make a difference to the reasons for action of the person whose consent it is, or to others', or both. Still, for the most part in what follows I will be focusing on the narrower questions – whether hypothetical consent can make at least the kind of normative difference actual consent often makes, by affecting other people's reasons for action, and in particular, by rendering otherwise impermissible action permissible. This is the kind of case where hypothetical consent is most often invoked²¹, and the kind of normative significance that was relevant in the three examples with which I started. The distinctions between the different ways in which hypothetical consent can make a normative difference will nevertheless be of importance later on.

4. The Grounding Argument, and Multiple Realizability

Recall the Grounding Argument:

- (1) Hypothetical Consent grounds Normative Upshot. (For *reductio*)
- (2) The Underlying Reasons ground Hypothetical Consent.
- (3) The grounding relation is transitive.
- (4) Therefore, the Underlying Reasons ground the Normative Upshot. (From (1), (2), and (3).
- (5) Therefore, Hypothetical Consent is normatively epiphenomenal. (From (4)).
- (6) Therefore, Hypothetical Consent does not ground Normative Upshot. At most, it's a normative by-product. (From (5))

²¹ Stark (2000) argues that in the political context, at least in Rawlsian views, hypothetical consent should be understood as relevant, but in a very different way, with a different normative upshot. For reasons that are irrelevant here, I am unconvinced.

I want to grant now the argument until (4). Also, I will not be questioning the move from (5) to (6) – this is partly because it seems valid to me, and partly because from the point of view of someone hoping to vindicate some normative significance for hypothetical consent, (5) is bad enough. What I want to question now is the move from (4) to (5).

It will be helpful to start by thinking about analogous structures elsewhere – in particular, about the explanatory force of the special sciences²². Think, then, of the following argument:

- (1) Chemical properties ground biological ones. (For *reductio*)
- (2) Physical properties ground chemical ones.
- (3) The grounding relation is transitive.
- (4) Therefore, physical properties ground biological ones.
- (5) Therefore, chemical properties are (causally? explanatorily?) epiphenomenal.

I take it that the conclusion is clearly false. Grounded, supervening properties can do genuine explanatory work. The most natural way of seeing that is focusing on multiply-realizable, or multiply-groundable grounded properties. Perhaps the chemical property of solubility in water can be realized or grounded in different physical structures – P1, P2, and P3. If so, it's quite possible that the best explanation of some biological fact is that some material is soluble in water, rather than the explanation in terms of it possessing the physical property P2. This is so, if possessing P1 or P3 would have been equally good for explaining the relevant biological fact. In such a case, it seems that what really does do the explanatory work is the supervenient, grounded chemical property, rather than the underlying, subvening, grounding, physical property. Similarly, that moral properties supervene on and are grounded in non-moral ones

²² I heard David Estlund make a comment anticipating this move in response to an objection, in the context of defending his version of hypothetical consent, *normative* consent. I don't think that he's pursued this line in writing.

does not undermine moral properties' explanatory potency. Perhaps, for instance, what explains social instability is the relevant society's being unjust. This can be so, even if the injustice itself is grounded in some non-moral property (say, about the distribution of resources, or of power), so long as there's a range of non-moral phenomena that could make it the case that the society was unjust, and as long as injustice thus-grounded would also have led to instability²³.

Can we say something analogous, then, in order to block the transition from (4) to (5) in the Grounding Argument against the normative significance of hypothetical consent? In order to do so, we would have to show that hypothetical consent can be grounded in different Underlying Reasons, and that thus grounded, hypothetical consent could still ground the relevant normative upshot. What we need, in other words, are intuitively plausible cases where all you need to know in order to know that the normative upshot is there is *that* there is hypothetical consent; you needn't care about *why it is* that there is hypothetical consent. Notice that this is what we would say about the normative significance of *actual* consent: Even if actual consent too is grounded (say, in one's reasons for consent), often the normative upshot of consent is secured by the consent alone, regardless (within some constraints) of the reasons for consent.

So what we need is something like the following: Perhaps there are any number of potential grounds in virtue of which the unconscious patient could have consented, had she been conscious. Perhaps she could have done it out of fear of death, out of blind obedience to medical authority, out of *joie de vivre*, out of a sense of duty to one's loved ones, out of the desire to complete one's philosophy paper, ... If it's plausible to say that in (roughly) all and only cases in which the patient would have consented had she been conscious, it's permissible to

²³ See McCord (1988, section 7), Railton (1998) and Sturgeon (1998).

administer the blood transfusion, regardless of why it is that she would have consented, then the Grounding Argument fails – the move from (4) to (5) is blocked, and hypothetical consent, grounded though it is in other things, still does genuine normative work.

The Grounding Argument, then, does not establish its conclusion. But it may establish a closely related one. Think about the argument regarding chemical properties. We already know that the fact that chemical properties are themselves grounded in physical ones does not necessarily rob them of any explanatory or causal potency. Chemical properties still do explanatory work. But perhaps we can conclude that the explanatory work that chemical properties do is, in some sense, *not ultimate*. What does the ultimate work, we may think, are the physical properties, or whatever properties are the ungrounded grounders. And we may want to say something similar about hypothetical consent. Perhaps something in the vicinity of the grounding argument shows not that hypothetical consent doesn't do any normative work, but rather that whatever work it does do is not ultimate. This may be so, and depending on what you were hoping for coming in, may be partly disappointing. For instance, you may think that here there's a difference between the significance of *actual* consent and merely hypothetical consent – perhaps actual consent does sometimes have ultimate normative significance. I'm not sure that this is so²⁴. But I want to note here that even if this is so – even if the normative significance of hypothetical consent is in this way somewhat more superficial compared to that of actual consent – still for our purposes here (for instance, explaining the examples we started with), showing that hypothetical consent matters is quite enough. Ultimate normative relevance is neither here nor there.

²⁴ In fact, I think that this is not so. In discussing the normative force of making requests and authoritative orders, I claim that there must be something in virtue of which we have these powers. See, my "Authority and Reason-Giving" (2014).

Notice that this response to the Grounding Argument does not amount (yet) to a positive argument for the normative significance of hypothetical consent. It does not even amount to a rejection of the Grounding Argument against such significance. What it does is open the door for such a defense. The defense itself will have to depend on the specific details of the relevant hypothetical consent theory: In particular, the specific hypothetical conditions invoked, and the specific normative upshot the theory is out to secure. Perhaps, for instance, hypothetical conditions that include things like had-she-been-conscious (as in the patient case) or had-he-been-well-informed (as in the bridge case) are ones that satisfy this condition (because we don't care why he would have changed his plans re the bridge had he known about its state, we only care *that* he would do so). But perhaps hypothetical conditions that include had-he-been-rational conditions (as in the political authority case) are in worse shape regarding the challenge posed by the Grounding Argument, because perhaps in asking about what the citizen would have consented to had he been rational, we are *already* asking about the reasons for consent, rather the consent itself²⁵.

The plausibility of this response to the Grounding Argument can thus depend on the specific hypothetical conditions invoked. It can also depend on the relevant normative upshot, and here the distinctions from the previous section may be helpful. You may think that the Underlying Reasons that ground the hypothetical consent and the hypothetical consent itself ground *different* normative upshots. You may think, for instance, that the reasons that make it

²⁵ However: Things here may depend on the specific conception of rationality employed. Under a purely instrumental conception of rationality, the point in the text does not seem to go through. Also, if the case can plausibly be made that what matters for the relevant purposes is not *the reasons for consent*, but rather *that there are* reasons for consent (whatever they are), then the general strategy of resisting the Grounding Argument can again be utilized here as well, even under a substantive conception of rationality (as responsiveness to reasons).

Let me note quickly here, without the further discussion that would be needed to establish this point, that I think Estlund's "normative consent" version of a hypothetical consent theory is especially vulnerable to the point in the text here. Because his hypothetical conditions are normative, the Grounding Argument is especially appealing. See here the discussion between Sreenivasan (2009) and Estlund (2009).

the case that the unconscious patient would have consented to the blood transfusion had she been conscious are reasons *for her*; but that the reason why it's permissible *for you* to administer the transfusion is not her *joie de vivre* (or whatever), but the fact that, for whatever reason, she would have consented had she been conscious. Or perhaps her *joie de vivre counts in favor of you* administering the transfusion, but the only thing that makes it *permissible* for you to do so is that she would have consented.

Much remains, then, for the substantive, detail-specific discussion of specific suggestions as to the way in which hypothetical consent matters. This, it seems to me, is as it should be. Still, this section establishes two important results. First, it shows that the Grounding Argument against the normative significance of hypothetical consent is by no means conclusive. And second, it helps to establish a desideratum for hypothetical consent theories – if you want to put forward such a theory, you had better be able to make the multiple-realizability kind of point²⁶, with the details of your specific theory plugged in, in a substantively plausible way.

5. When Is Idealization in General Acceptable?

Recall the thought that hypothetical consent is not a pale form of consent; rather, it is no consent at all. There is a natural sense in which this is obviously right. But we should resist too quick and broad a generalization. Sometimes, after all, going hypothetical, or idealizing, is an acceptable move. And I think it will be helpful to have a more general look here, and spend some time on the more general question – when doing theory, *any* kind of a theory, when is idealizing or going hypothetical acceptable?²⁷

²⁶ I haven't established – nor can I – that *the only* way of resisting the Grounding Argument is by employing the line in the text. If there are others, the point in the text here should be qualified accordingly. (I can't think of others, though).

²⁷ In what follows I draw, in general, on my "Why Idealize?" (2005), and also on some paragraphs in my "Against Public Reason" (forthcoming).

A theory is offered, one that ties some phenomenon to our relevant responses. Perhaps, for instance, a theory is offered about the relations between (phenomenal) color and our color appearances, so that to be red is just to appear red. Or perhaps a theory of values is offered that ties them very closely to what we value, so that to be of value just is to be valued. But counterexamples immediately come up: Sometime something appears red to me even though it isn't, and sometimes it doesn't even though it is. Sometimes people (even I) value things that aren't of value, and fail to value things that are. A natural move then is to idealize: Perhaps to be red is not to appear red, but rather to appear red *to normal observers, in good lighting conditions*. Or perhaps to be of value isn't to be valued, but to be valued *by the right people, in the right conditions*. And of course, any such idealization can be thought of as hypotheticalization – perhaps being red is tied to how things *would have looked to you*, had you been a normal observer, in good lighting conditions. Perhaps being of value is tied to what you *would have valued*, had you been in the appropriate conditions.

We already noted that there's something perplexing about such moves – here too, we can say, hypothetical responses are not some pale form of responses. They are not responses at all. Still, sometimes, idealizing is respectable, I think. Whether it is depends on what the underlying motivation was for going for the relevant view in the first place. Think again about the water example. Presumably, your reason for looking for water is that it would quench your thirst. Hypothetical water won't do that – it won't even go a part of the way towards doing that. So in the absence of water, going for hypothetical water amounts to cheating – it is disconnected from the underlying motivations of looking for water, and therefore offers no satisfaction, not even partially.

What about colors? Is idealizing here a way of cheating, avoiding counterexamples in an ad hoc way? Or are ideal, hypothetical responses enough here? The answer depends on the

philosophical motivations underlying the relevant account of colors. If they are all about actual observers and their actual responses, then going hypothetical (because of the pressure from counterexamples) is cheating. What counterexamples show us, in such a case, is not that we should settle for observations in hypothetical conditions, but that we should resist the attempt to tie colors and our appearances of colors as closely together as all that. But if the underlying motivations of such an account are consistent with settling for hypothetical conditions, then all is well, and the idealized response-dependence account may still be a good idea.

Similarly for values and what we value. If the underlying motivations for offering a response-dependence view of values is tied to actual people and their responses, then what we should do in the face of the obvious counterexamples is not idealize (in an ad hoc way), but rather reject response-dependence altogether. But if the idealization can be motivated in a way that's consistent with going response-dependence and with the philosophical motivations for so going, then all may still be well.

And so, we have a test for when idealization is a legitimate philosophical move. It is, when it is motivated, and furthermore, when the offered motivation is consistent with the motivations for going for the initial, non-idealized view (the one that was devastated by obvious counterexamples). This is why hypothetical water is out, why (perhaps) some idealized response-dependence views of colors may be in, and why (as I argue elsewhere) idealized response-dependence views of normative concepts are out²⁸.

End of detour about idealization in general. Now we can note how this test applies to the case of hypothetical consent, and in particular, to the question when it can do the normative work that in more simple cases actual consent does. The thing to do is to ask why it is that *actual* consent matters, when in fact it does. And then we need to ask whether the concerns to

²⁸ Again see my *Why Idealize* (2005). But see also Sobel (2009) and my (manuscript). Also see Dorsey (manuscript).

which actual consent answers are also answerable by hypothetical consent (and if so, which hypothetical consent, in which hypothetical conditions).

So we need to think about actual consent. But already before doing that we can note how surprising it will be if we get a *general, context-insensitive* answer to this question. It seems much more plausible to suppose that actual consent matters in different ways in different contexts, for different purposes. So perhaps the way to progress is to acknowledge such complexity, to see how actual consent matters in different contexts, and then to apply the test from above to see whether (and what kind of) hypothetical consent can matter in similar ways. I do just that (in a somewhat preliminary way) in section 7. Before that, though, we need more examples, and we need to think about depth of commitments, centrality to the self, and endorsement,

6. Depth

Bear with me. I want you to consider now five patient cases. We've already described two of them. But we need all five now.

The first two patients are conscious, and they actively refuse to consent to being given a blood transfusion. But they do so for different reasons. *The Conscious Christian Scientist* does this because of her religious commitments. *The Conscious Anxious* does this because of his anxiety of needles. The next two patients are the unconscious counterparts of these two: *The Unconscious Christian Scientist* and *The Unconscious Anxious* – both do not give consent, because they are unconscious; nor would either of them give consent had he or she been conscious (but for different reasons, as above). And compare these, for control, to the person I'll just call *The Unconscious Patient* – who is unconscious, but is neither a Christian Scientist, nor

anxious of needles, and would have happily consented to the transfusion, had she been conscious.

On entirely intuitive grounds, I submit that it's morally permissible (perhaps even required) to administer the transfusion in the case of the unconscious patient, and also in the case of the unconscious anxious. I am not sure about the other cases. But I'm quite sure that there's a morally relevant difference between the unconscious Christian Scientist and the other unconscious patients, and also between the Conscious Christian Scientist and the Conscious Anxious. It may be permissible to administer the transfusion in the case of the Conscious Anxious but not in the case of the Conscious Christian Scientist – but I'm not sure. Even if it's impermissible in both – or even permissible in both – there's still an important difference. It's at least more morally problematic to administer the transfusion to the Conscious Christian Scientist than to the Conscious Anxious. And I would say something similar about the Unconscious Christian Scientist – it's at least more problematic to administer the transfusion to her than it is to the Unconscious Anxious.

What explanations – hopefully, vindicating explanations – can we offer of these distinction?

Talk of whether the unconscious patients would have consented, had they been conscious, may explain the difference between Unconscious Patient and the two other unconscious ones (the Anxious and the Christian Scientist), but not between those two – both of them would not have consented had they been conscious. So this won't help. Nor will talk of what they could consent to *had they been rational*, for we can stipulate that the (conscious or unconscious) person who is anxious of needles would not have been so anxious had he been rational, and also that the (conscious or unconscious) Christian Scientist would not have been a Christian Scientist, had she been rational. Even under these assumptions, an intuitive difference

between them remains. So idealizing on rationality won't do the work needed here. Nor will it help to talk about how the different patients will feel about things retroactively: This is a tempting line of thought, because we can imagine an Unconscious Anxious who – when he regains consciousness – is happy to find out that he received the transfusion while unconscious (we can even easily imagine a Conscious Anxious who is retroactively happy about having received the transfusion against his will at the time); and we can easily imagine an Unconscious Christian Scientist who – when she discovers that she received the blood transfusion when unconscious – is deeply troubled by this. But we shouldn't let this mislead us. Even if the religious commitments of the Christian Scientist are such that she can be (and indeed is) perfectly happy retroactively with the transfusion²⁹, the intuitive difference between the two Christian Scientist patients and the two anxious patients survives³⁰. So we need another explanation.

A natural suggestion is that there is an important difference between the role that the commitment to Christian Science plays in the life of the Christian Scientist, and the role that the needle-anxiety plays in the life of those anxious of needles. The needle anxious may think of his anxiety as something external to his self; as something he finds himself with, rather than something he does, or something he is; he may feel alienated from it; he may think of it as something to overcome. The Christian Scientist – or anyway, the one we're talking about now (there'll be others shortly) – is not like this. She is *committed* to Christian Science; she identifies with it, she endorses this commitment; this commitment is a part of her self-conception, it's a

²⁹ Perhaps Christian Science only offers a kind of deontological constraint against receiving the transfusion, one that doesn't say that state of affairs of having received one is at all bad.

³⁰ If you're not convinced, consider the following: Suppose our Unconscious Anxious will be terribly disturbed even to find out retroactively that he was given the transfusion. Still, there's an important difference between him and the Christian Scientist (who would also be retroactively upset), and one way of seeing this is thinking about *deceiving* the two about the treatment they received. I think it's much less morally problematic to hide the fact of the transfusion from the Anxious than from the Christian Scientist. What explains *this* difference? I think that here too the point about depth that I am about to get to in the text does the work.

part of who she is, of how she thinks of herself. The Christian Scientist's commitment to Christian Science lies very close to the core of her self, whereas the needle-anxiety is much more peripheral for the other patient.

One way of making such metaphors more precise is by employing higher-order desires and attitudes³¹. The Christian Scientist wants not to receive the blood transfusion. She also has, we can safely assume, higher-order desires that endorse this desire – she wants to continue having that desire, she wants that desire to bring her to action, and so on. The typical person who is anxious of needles will be very different in these respects – he will want not to receive the transfusion alright, but he may also want to rid himself of this first-order desire, he may want that desire not to bring him to action (he may want, say, his *joie de vivre* to outweigh his anxiety), and so on. Thus, while both desire – perhaps equally and maximally intensely – not to receive the blood transfusion, this desire is superficial in the case of the needle-anxious patient, and deep and central to the self-conception of the Christian Scientist.

This means that administering the blood transfusion in the case of the (conscious or unconscious) Christian Scientist amounts to a kind of an assault on the self in a way that a similar action in the case of the needle-anxious does not. In both cases, administering the transfusion amounts to a frustration of an expressed desire (in the cases of the conscious patients) or a hypothetical one (in the case of the unconscious ones). In both cases, if you administer the transfusion you will be treating the patients in a way that usually requires consent, without their consent (and perhaps in the face of a withholding of consent). This is already problematic. But in the case of the Christian Scientist you will also be launching an assault on her very self. It is no surprise that this seems more seriously problematic, then.

³¹ Thinking about higher-order desires as a way of making sense of thoughts of endorsement, and indeed the self, is, of course, central to the work of Harry Frankfurt. See, for instance, his (1988).

This also nicely explains why the patient's being unconscious seems to solve the problem entirely in the case of the Anxious, but not in the case of the Christian Scientist. With the Anxious, the problem is a superficial one, and superficial solutions suffice to deal with it. And his being unconscious is a step in the right direction – it doesn't do away with his desire (not to receive the transfusion), but it removes the immediate objection, and the need to, well, hold him down. With the Christian Scientist, the problem is deep, and so superficial solutions are just not good enough. Even when she's unconscious, treating her in a way that goes against her deep commitment, in ways she would reject had she been conscious, still amounts to an assault on her self. To put it a little dramatically: If the Conscious Anxious suddenly becomes unconscious, the main problem in administering the transfusion (thereby saving his life) has just been solved. If the Conscious Christian Scientist becomes unconscious, at least one main problem is still very much in place.

I've been adding all sorts of assumptions about our characters – that the Christian Scientist is deeply committed to her religion, that the person who is anxious of needles thinks of this anxiety as something external to the self, and so on. But we can think of other, perhaps less typical, cases. What about, for instance, the Willing Anxious³² - a person who is anxious of needles, but also endorses this anxiety, identifies with it, does not want to rid himself of it, and so on? Well, in this case it seems to me that the intuitive difference between the Conscious Anxious and the Conscious Christian Scientist, as well as the intuitive difference between the Unconscious Anxious and the Unconscious Christian Scientist, become less clear. And this is precisely as the explanation above predicts. As we imagine (less and less realistically, perhaps) the anxiety to be deeper and more central to the Anxious's self, the normative need to respect it

³² Loosely modeled after Frankfurt's (1988) willing addict.

seems weightier. And in the other direction, I think we see a similar phenomenon if we try to imagine the Christian Scientist less and less seriously committed to her religion³³.

Now, this explanation – in terms of depth, alienation, centrality to the self, higher-order desires – goes a long way towards the vindicating explanation we were looking for of the intuitive judgments we started with. Still, let me concede its limitations. First, it does not cover all cases. Think, for instance, of the normative relevance of consent to sex. This seems to be the paradigmatic case where we require (*at least*) actual consent. No hypothetical consent will ever do – there is no way of completing the sentence “True, she didn’t consent, but she would have consented, had ...” in a way that renders sex permissible³⁴. This is so even if her refusal to sex on the specific occasion was based on unendorsed desires, or some such. I return to this example in the next section. Second, I have not ruled out all possible competing explanations of even just the five patient cases I’ve been discussing. I’ve ruled out some, and I’ve done what I can to make the one in terms of depth plausible. But I should note that other explanations are possible, and that if one is put forward, it should be evaluated on its (comparative) merits.

Even with these restrictions in mind, then, some progress has been made. For we seem to have made a plausible case for the following claims: At least sometimes, hypothetical consent does matter, because treating people according to the way they want or would want to be treated is important, at least when their so wanting to be (or not to be) treated is an endorsed a desire, one they identify with. And in those cases, it’s important to treat them in such a way because treating them differently can amount to an assault on their self.

³³ But this case is hard: This is so, partly, because the thought that someone may refuse life-saving treatment because of religious doctrines to which he or she are not seriously committed seems barely intelligible. But also, in the case of religion there may be other, indirect reasons not to ask about the depth of the commitment of each specific believer (or “believer”). Such indirect reasons are extremely importantly politically, of course, but we can safely ignore them for our purposes here. On this point, see also footnote 31 below.

³⁴ Estlund (2008, 216).

We can say a little more now. Respecting people's desires and commitments is sometimes a way of responding appropriately to the value of their autonomy – to the fact that at least often, being the author of one's own life story is an aspect of living a good life, and perhaps also that people have a *right* to be – to an extent – the authors of their life story³⁵. The reason we have to not administer the blood transfusion to Conscious Christian Scientist is precisely the reason we have to respect her autonomy. (We also have reasons to save her life. It's not obvious to me which is the more weightier reason, and it may vary with context. What *is* clear, though, is that we have *some* reason not to administer the transfusion, and that that reason has to do with the patient's autonomy). The value of autonomy is not indifferent to the distinction between the Christian Scientist and the Anxious patient: When you administer the transfusion to the Conscious Anxious against his expressed desire, you are most certainly treating him in a way that he doesn't consent to. But because he is alienated from his anxiety, because he doesn't identify with it, because it is not central to his self, you are not harming his ability to write his own life-story in anything like the way you do this if you give the Conscious Christian Scientist the transfusion. And the value of autonomy also explains why hypothetical consent sometimes matters. For sometimes, the way in which you respect someone's self-authorship is by treating them in ways they would consent to, under some hypothetical conditions – that is, under hypothetical conditions that will bring out and emphasize the desires and attitudes with which they identify, and that will perhaps filter out, to an extent, those forms which they are alienated³⁶.

³⁵ It is hard to explain the value of autonomy in non-metaphorical ways. For this metaphor, see Raz (1986, Chapter 14).

³⁶ I want to emphasize that we are not doing politics here – not yet, that is. So *of course* there are serious political problems in trying to institutionalize the points in the text – perhaps, for instance, we do not want the state to be in the business of diagnosing citizens' deep commitments, or of distinguishing between central and peripheral parts of its citizens' selves. But the seriousness of such concerns does not challenge the points made in the text – at a much more abstract stage of the discussion, as it were.

You may still be worried about epiphenomenalism, though, thinking perhaps that what does the normative work in such cases is not whether or not the relevant person would have consented, but rather what their deeper commitments entail. But this is not so. First, treating people in accordance with their deeper commitments is *very* close to treating them in the ways they would consent to, under suitably characterized hypothetical conditions. So it's much more natural to understand the deep-commitment story not as a competitor of the hypothetical consent story but rather as an explanation thereof. Second, notice that the value of autonomy works precisely in the way described above, in section 4, as the way of avoiding the objection posed by the Grounding Argument: autonomy dictates that the patient's deep commitments – *whatever their precise details* – be respected. This means that we have a kind of multiple groundability going on. What does the normative work is not the patient's specific commitment to Christian Science, as other deep commitments that would lead her to refuse treatment (being a Jehovah Witness, say) would work just the same. The only thing that is in common to all the different commitments by the patient that would have a similar normative effect is precisely that they are her deep commitments, that they are what she would act on (in the suitably characterized hypothetical conditions). Furthermore, the grounding chain is broken also by another point noted in section 4: Namely, the reasons underlying the hypothetical consent (or lack thereof) are reasons *for the patient*, whereas it's the value of autonomy and the hypothetical consent that are the reasons *for others* – the reason for which the doctor may avoid administering the blood transfusion is not Christian Science doctrine, of course. (Presumably, the doctor doesn't take that to be a reason at all, and rightly so.) Rather, it's that the patient would not have consented, had she been conscious, and that respecting this hypothetical refusal is a way of respecting the patient's autonomy³⁷.

³⁷ For this reason we can also see that the normative relevance of hypothetical consent (or lack thereof)

7. Autonomy and Actual Consent: Sovereignty and Non-Alienation

A picture begins to emerge, then. Because of the value of autonomy, hypothetical consent sometimes matters. Sometimes, treating someone in a way he doesn't consent to but that he would consent to under hypothetical conditions that filter out his superficial desires and emphasize his deep commitments does not amount to an attack on his self or to an affront to his ability to be the author of his life story – anyway, not *as much* so as similar treatment of someone who wouldn't even consent under those conditions.

Recall now the general point about idealization from section 5. To show that hypothetical consent ever has the kind of normative significance that actual consent has, we need to see why actual consent matters, and then to see whether hypothetical consent can also satisfy these considerations. And partly, this is what we've been doing in the previous section. For surely, at least one reason for which actual consent sometimes matters is because of the value of autonomy. And it is the upshot of the previous section that sometimes, the value of autonomy grounds the significance of hypothetical consent just as it does that of actual consent.

So far, though, I've been focusing on only one way in which autonomy may matter. According to this way, I've been insisting, a violation of your autonomy amounts to a kind of alienation – you are not allowed to write your own life story according to your deep commitments. But autonomy may matter in another way as well³⁸.

here is, in Waldron's terms from section 2, not just a matter of reason – it's also about will. But it's about will, in a way that leaves room for the relevance of hypothetical consent.

³⁸ Of course, nothing depends on the word "autonomy". It doesn't matter whether my distinction here is between two ways in which autonomy matters, or between autonomy and another, closely related value. Kuflik (2009, 147 and on) also stresses the relation between hypothetical consent and autonomy. But he doesn't distinguish between the two values I am about to distinguish between, and perhaps as a result doesn't even address the obvious difficulty: Seeing that no actual decision has been made by the relevant agent, how does respecting a decision she *should have* made amount to respecting her authority?

Suppose that my daughter, out of concern for my health, will sometimes hold on to the salt at the dinner table, and refuse to pass it along, even when I ask her. I appreciate the gesture and the sincere concern, of course. But sometimes, I insist. I can explain that I understand the health issues, but that it's my body, and my life, and that I want the salt, please. I can, it is natural to say, *assert my autonomy*. At least in some such cases, if I so insist, and my daughter still refuses to let me have the salt, she is offending against my autonomy. But notice, of course, that nothing like alienation is at all involved. My deep commitments are in no way threatened by my daughter's refusal to pass the salt, nor is my ability to write my life story in accordance with them. The way in which my autonomy is violated is different: At least after having asserted my autonomy, the salt in my dinner is something over which I should have the last say, it's within my area of sovereignty, so to speak. This too is a way in which autonomy is sometimes important, and this too is a way in which it should sometimes be respected.

I'm going to distinguish, then, between autonomy reflecting a concern for *non-alienation*, and autonomy reflecting a concern for *sovereignty*. Though the two are closely related, they are still distinct. I hope to say more about the relation between these two in future work: Perhaps, for instance, one of the two is more basic, and the other derivative? Perhaps, for instance, non-alienation is the fundamental thing that is of value here, and sovereignty is significant only because usually, in general, perhaps in a specific cultural setting, it goes hand in hand with non-alienation. Or perhaps the two are both, independently, important. These are interesting questions. But for our purposes here we don't need to answer them. For our purposes here it's sufficient to note that however non-alienation and sovereignty are related, they are distinct; that autonomy is associated with both; and that, therefore, actual consent matters sometimes because of non-alienation, sometimes because of sovereignty, and presumably, sometimes because of both.

Notice also that these two kinds of concern – non-alienation and sovereignty – are very closely related to Waldron’s distinction between will- and reason-considerations. But non-alienation need not go hand in hand with reason. Even if reason rejects Christian Science without reservation, still there is reason to respect the Christian Scientist’s autonomy, at least within certain restrictions.

We can now return to hypothetical consent. If there are two distinct reasons why actual consent matters when it does – non-alienation and sovereignty – we can now ask whether hypothetical consent can answer to these two concerns as well as actual consent presumably can (at least sometimes). And here, the distinction between the two ways is important. For the answer seems to me to be yes in one, no in the other.

When it comes to non-alienation, as we’ve seen in the previous section, sometimes hypothetical consent can do the work. So when actual consent is sought because of concern with alienation, hypothetical consent may be a non-pale substitute³⁹.

When it comes to sovereignty, though, this is not so. If I insist on the salt-decision being mine to make, there’s nothing by way of hypothetical consent that can respond to this. If the decision is mine to make, and I’ve actually decided one way, the fact that I would have decided it differently under different conditions is just neither here nor there. If my daughter should respect my salt-decision, she should respect the decision I actually make. When it comes to sovereignty, then, hypothetical consent is not even a pale form of consent. It really is no consent at all.

Let’s revisit our examples. With regard to the autonomy of conscious patients, we seem to be concerned both with non-alienation and about sovereignty. So the reason it’s more problematic to administer the transfusion to Conscious Anxious than to a conscious patient who

³⁹ Or perhaps we shouldn’t think of it as *substituting* for actual consent at all. For this claim, but in a very Kantian context, see Hill (2001, 320-2).

fully consents seems to have to do with the concern for sovereignty. And the reason it's even more problematic to administer the transfusion to Conscious Christian Scientist is that in her case we're not just concerned with sovereignty, but also with non-alienation. As we shift to the unconscious patients, talk of sovereignty seems no longer relevant. So there's no serious problem with Unconscious Patient, and also, interestingly, with Unconscious Anxious. The non-alienation element remains, however, in the case of Unconscious Christian Scientist, and so in her case, the situation is still morally problematic (and what we should do all-things-considered may depend on the specifics of the case).

How about the example of consent to sex, where it seems like a fairly robust intuition that no merely hypothetical consent can ever make sex morally permissible? In that case, it seems that the interest we have in sovereignty is of tremendous importance. When it comes to sex, it's important that each person has the final say on her or his participation in sexual practices. Though we may also care about non-alienation when it comes to sex – perhaps this is one of the reasons we often think that superficial actual consent is also not enough – we care mostly, and very strongly, about sovereignty⁴⁰. And when this is what consent is supposed to do, we already know that hypothetical consent is no substitute at all. This example too, then, confirms the account above.

Finally, consider the political case. When we care about liberty and autonomy in the political sphere – the kind of thing we care about when we worry about the tension between

⁴⁰ You may think that we care about sovereignty whenever bodily integrity is involved, not just when it comes to sex. And this may blur the difference between the sex case and the blood transfusion cases (where bodily integrity is also at issue). But there are many differences. First, not all cases of bodily integrity are equally important in terms of sovereignty. Sex cases seem special in this regard. Second, the reason to administer the transfusion is powerful and benevolent – for the good of the person whose bodily integrity is in question. This is not the case in consent-less sex cases. Third, with blood transfusion, consent seems all we want. Perhaps we are even okay with mere absence of objection (in suitable conditions). When it comes to sex, we may require more – like a positive attitude, and not merely the absence of a negative one, or the expression of a neutral one. This is why with some transfusion cases, unconsciousness seems to make things easier, not harder. Not so with sex, of course.

authority and liberty, or about people treating each other as free and equal, or about non-subordination – do we care about non-alienation, or about sovereignty, or about both? Well, it seems to me we care about both. But I am especially confident we care about sovereignty. At least partly, this is about who gets to decide (for instance, over me). 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 ludicrous⁴¹. Perhaps it’s not *quite* as ludicrous as the thought that hypothetical consent suffices for the permissibility of sex, but it’s close⁴². If this is so – if the autonomy relevant to political authority is centrally about sovereignty – and if the discussion above gets it right, then what follows is that hypothetical consent accounts of legitimate political authority are hopeless⁴³. I think of this result as an advantage of my account of when hypothetical consent matters.

8. So: When Does Hypothetical Consent Matter?

Without pretending to say something conclusive, or complete, or very general, I think we can conclude with the following lessons: First, even if hypothetical consent doesn’t often do the work actual consent does, still it can be normatively significant on other ways. Second, and even

⁴¹ This is a point I make much of in “The Disorder of Public Reason” (2013) and “Against Public Reason” (forthcoming).

⁴² I deliberately chose a non-political example (the salt case) in order to show that sovereignty-autonomy is relevant not just in politics. The point in the text is that though it’s not relevant *only* in politics, it most certainly is relevant in politics.

⁴³ Dworkin’s influential quote is not about consent exactly, but about contractual obligation. Still, it may be interesting to point out that in contracts too, the relevant value of autonomy seems to be much more about sovereignty than about non-alienation. Perhaps this is why Dworkin’s dismissal of hypothetical contracts is so plausible.

restricting ourselves just to substituting for actual consent, a conclusive argument against the normative significance of hypothetical consent remains to be made. The two arguments most common in the literature raise important challenges, but are far from being conclusive. The way out of the Grounding Argument is the multiple realizability line, and the way out of the thought that hypothetical consent is no substitute for actual consent is to note that whether or not it is depends on why it is that actual consent matters, when it does. Third, actual consent sometimes matters because of non-alienation, and sometimes because of sovereignty. Hypothetical consent can (sometimes) suffice for non-alienation, but not for sovereignty. And fourth, one natural way of understanding non-alienation is in terms of Frankfurtian endorsement, itself understood in terms of higher-order attitudes.

This is not quite a recipe for determining when hypothetical matters and how. But it's a good start, I think. For we now know – if only roughly – what you must show in order to show that in a specific case hypothetical consent can be normatively significant. And this too, it seems to me, may be significant progress.

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