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Edited by

J. Jeremy Wisniewski

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.

1. SOCIAL CONTRACT THEORY, OLD AND NEW

ERIC THOMAS WEBER,
THE UNIVERSITY OF MISSISSIPPI

In *A Theory of Justice*, John Rawls presented a new version of social contract theory (SCT) that he believed could withstand traditional criticisms of it. Rawls explained in *Political Liberalism* that in *Theory* he “wanted to show that [SCT] was not open to the more obvious objections often thought fatal to it.”¹ In this essay, I will argue that Rawls was unsuccessful at addressing a number of the central concerns that critics have raised for SCT, particularly those coming from Hume, Hegel, and Dewey.

In section I, I will offer a general characterization of SCT so that I may contrast Rawls’s version with earlier ones. I will examine two of its commonly held tenets, which are closely related in the various versions of SCT: the notions of consent and authority. Since Rawls did not deal extensively with theories of human nature that have often played a major role in SCT, I will only touch on the way Rawls thinks about human beings in his Kantian fashion. After distinguishing traditional forms of SCT from Rawls’s, I will present the criticisms Hume, Hegel, and Dewey have leveled against SCT in order to reveal several persistent flaws in the social contract tradition.

I. The Social Contract Tradition

Michael Lessnoff’s *Social Contract Theory* credits Manegold of Lautenbach as the first systematic social contract theorist.² Manegold was an Alsatian monk who wrote in the second half of eleventh century. His goal, according to Lessnoff, was to analyze political authority between “‘ruler’ and ‘people’.”³ While Lessnoff explains there to be classical roots to SCT, his book includes excerpts from Johannes Althusius, Thomas Hobbes, Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, and Immanuel Kant. Beyond these key figures, Lessnoff includes writings

from Rawls and other recent authors. In situating Rawls's social contract theory, I will focus especially on Hobbes, Locke, Rousseau, and Kant as dominant theorists.

II. A. Consent

In various ways, social contract theorists employ the notion of consensual agreement, which is continuous with more recent concepts of political legitimacy.⁴ In his essay, "Social Contract: Interpretation and Misinterpretation," Peter McCormick states succinctly the basic argument presented by social contract theorists regarding consent:

- (a) a man can be bound only by his own (freely given) consent
- (b) this man has consented
- (c) therefore, this man is bound (obligated) to obey.⁵

The challenge to this argument, as McCormick explains it, is that

The quasi-historical approach to the logic of the contract, the attempt to isolate a concrete act of consent, leads to the normal and very obvious critiques leveled against contractarianism as such – namely the questions of how and when a [person] could be said to have consented, and what sort of a being it is that consents.⁶

Theorists deal with these challenges in a number of ways. McCormick offers another version of the syllogism which some have used to avoid these challenges:

- (a) a man can be bound only by his own consent
- (b) social form x is such that we know a man is obligated (or, more weakly, "should be obligated")
- (c) therefore, being rational, he must have consented (or, more weakly, "should consent")⁷

On the one hand, the language commonly used regarding pacts, compacts, contracts, and agreements can be thought of historically. This approach is harshly criticized by most defenders of SCT,⁸ although Locke fits this characterization well.⁹ Other theorists propose alternative notions of consent. I will characterize these various positions with four names, *historical* consent, *prudential* consent, *grateful* consent, and *structural* consent. By characterizing four senses of consent, even if these categories are not rigid, we can distinguish the views of competing social contract

theorists. It should be noted that aside from *historical* consent, all other forms can be called hypothetical. To characterize consent only as actual or hypothetical, however, does not sufficiently distinguish its many forms.¹⁰

The *historical* understanding of consent can be understood as stemming from an actual agreement. While there may be other ways of speaking of Locke's notion, certainly there are passages which point toward this interpretation. It is familiar that Locke speaks of people in the state of nature. In Locke's time, there were critics who claimed that there never was a state of nature in which people came to an agreement. Locke responds in this way:

To those that say there were never any men in the state of nature, I will not only oppose the authority of [such a critic] where he says 'The laws which have been hitherto mentioned,' *i.e.*, the laws of nature, 'do bind men absolutely, even as they are men, although they have never any settled fellowship, and never any solemn agreement amongst themselves what to do or not to do; but forasmuch as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our nature doth desire ... we are naturally induced to seek communion and fellowship with others; this was the cause of men's uniting themselves at first in politic societies,' but I moreover affirm that all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society; and I doubt not, in the sequel of this discourse, to make it very clear.¹¹

For Locke, no positing of a prior state of nature is necessary. There are people currently in that state. There *must be*, furthermore, the free giving of consent; otherwise we would have no legitimate governments.

Today, the notion of *historical* consent is primarily discussed as a variant in SCT's development. This is because Locke's approach invites harsh criticisms, such as Jeremy Bentham's. Bentham claimed that "Locke has speculated so deeply, and reasoned so ingeniously, as to have forgot that he was not of age when he came into the world."¹² McCormick summarizes the worry about Locke's *historical* consent:

...the objection is to the liberal myth of the autonomous non-socialized individual who enters the contract as a full moral agent. It is difficult to escape the fact that most members of a society enter that society as infants and are subjected to its influence for an extensive period, including the most formative and influential years of development, before being admitted to full membership.¹³

When defending SCT from traditional critics, then, Rawls was certainly aiming to avoid any *historical* understanding of consent.

Hobbes's version of consent resembles a threat more than a description. It is the sort that warns people against the awful nature of humankind.¹⁴ I call this version *prudential* consent. We consent to political authority, according to Hobbes, insofar as we seek to enjoy stability and security from the terrors of the state of nature. The natural state of humankind, he claims, is one of war. Given this miserable natural condition, he writes, "it is a precept, or general rule of reason, *that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.*"¹⁵ For Hobbes, therefore, we consent in order to achieve peace according to the principles of reason. Given that we abhor the state of war, and that we are rational, we must consent to political authority.

It is worth noting that Hobbes and other social contract theorists often employ language that is situational, or historical. The critics who charge SCT of historical absurdity emphasize this language. While Hobbes's version of the social contract is understood as hypothetical,¹⁶ his language admits of the temporality of consent. He writes, "as long as every man holdeth this right, of doing any thing he liketh; so long are all men in the condition of war."¹⁷ Hobbes attributes the state of war to the conditions in which people act. This is not *historical* consent in the sense of there having been a specific time at which consent was given, and after which it remained constantly. Rather, it is a condition that can rise and fall with the stability of ruling power. In this way, Hobbes is not entirely different from Locke on the notion of consent. Hobbes's form of consent, nevertheless, is most aptly understood as one "imputed to the individual," according to McCormick.¹⁸ To be clear regarding Locke, we must note a tension in the claim that individuals consent to their governments, something that either does or does not happen in countless cases, yet legitimate governments are established in which consent is already assumed for subsequent generations. Locke's test for whether a government remains legitimate rests on natural law. If a government fails to respect natural law, then it must be overthrown. Despite tensions in Locke's language regarding kinds of consent, he remains the strongest example of an adherent of *historical* consent.

By contrast to Locke's, Rousseau's is a complex SCT, not as easily characterized. His conception of consent borders on several of my categories. We can distinguish one aspect that is less prominent in the work of other theorists, however. Rousseau presents a lighter picture of

humankind than does Hobbes. One factor of his theory concerns gratitude. *Grateful* consent is the name I give to the sense of consent that is taken to be implicit in one's actions insofar as we gain benefits (beyond security) from political associations. When I go to the bank and withdraw funds to buy lunch, for example, I enjoy not only security (Hobbes's point), but other benefits as well. Laws, institutions, and relationships often benefit me. These factors are taken to imply that through the enjoyment of the fruits of association, I consent to its basis.

Rousseau touches on a *grateful* consent when he writes that

... each man, in giving himself to all, gives himself to nobody; and as there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has.¹⁹

Rousseau appeals to a political ideal with roots in Aristotle's work. Aristotle believed that a thing or a person flourishes inasmuch as it follows its nature. Since he believed humans are the rational animals, and the political ones, political association is necessary for humans to flourish. Of course, Aristotle believed that the state arises by our very nature. In various ways, social contract theorists have agreed and disagreed with this view. When people aim to flourish, when they seek their happiness, social contract theorists impute *grateful* consent. It is consent in part for security, but for more than that.

By contrast to other social contract theorists, Kant most clearly offers a *structural* understanding of consent. There are varying kinds of *structural* consent; I will focus on Rawls's version of *hypothetical* consent, and Kant's – *possible* consent. They are generally claims that because of the kind of rational beings we are, we *would* consent to political authority. *Structural* consent resembles *prudential* consent, except that the former is broader. *Structural* consent differs in its avoidance of depending upon any or at least some desires or passions. According to Kant, one *would* consent to political obligation given the structural requirements of acting freely as a moral agent – at least insofar as the idea of an “original contract” for Kant is an “idea of reason.”²⁰ Kant's and Rawls's understandings of consent diverge. On the one hand, Kant continues talk of consent. On the other, Rawls focuses on legitimacy. Given Rawls's Kantian influence, I will discuss the work of a Kantian critic of Rawls, Onora O'Neill, after a brief exposition of Kant's SCT.

Kant's picture of human nature is closer to Hobbes's than Locke's. Kant writes that “Experience teaches us the maxim that human beings act in a violent and malevolent manner, and that they tend to fight among

themselves until an external coercive legislation supervenes.”²¹ But Kant’s views regarding political legitimacy are closer to Rousseau’s. Kant writes that “only the unanimous and combined will of everyone whereby each decides the same for all and all decide the same for each – in other words, the general united will of the people – can legislate.”²² Kant’s politics, like his ethics, is deeply rooted in universality – and in this way differs from Rousseau. Rather than follow Rousseau’s notion of the general will, therefore, Kant searches for a way to speak of universal acceptance of political consent. Since such an idea sounds out of place in the real world of politics, Kant concerns himself with *possible* consent, consent that *could be* willed universally.²³ The people need not actually have consented, according to Kant, for the contract which he imputes is an idea of reason. He writes,

The act by which the people constitutes a state for itself, or more precisely, the mere idea of such an act (which alone enables us to consider it valid in terms of right), is the *original contract*. By this contract, all members of the people give up their external freedom in order to receive it back at once as members of a commonwealth, i.e. of the people regarded as a state.²⁴

Clearly Kant’s notion of the original contract does not allude to *historical* consent. The idea of an original contract derives consent from reason, which itself is given by our humanity. We consent because we are rational creatures who could only consent to political legitimacy if we understand what follows “necessarily from the general idea of a state.”²⁵ To further understand Kant’s views on the social contract, it will help to contrast them with Rawls, with the help of Onora O’Neill.

O’Neill distinguishes between kinds of consent (though her focus is on Kant’s ethics).²⁶ After discussing three problems regarding the notion of what she calls *actual* consent (not strictly referring to SCT), she gives reasons for defending *hypothetical* consent. Defense of *hypothetical* consent, she claims, generally involves the view that

... at least sometimes actual consent is not morally decisive, even if well informed. Hence it allows for our strong intuitions that even a consensus may be iniquitous or irrelevant (perhaps it reflects false consciousness), and that not everything done between consenting adults treats the other as a person.²⁷

Given O’Neill’s aim of defending her interpretation of Kantian ethics, the return to the ideal of treating others as persons is central. In order to defend her approach to Kant, she discusses challenges to *hypothetical*

consent. She writes, “If treating others as persons requires only hypothetical rational consent, we may, as Berlin long ago pointed out, find ourselves overriding the actual dissent of others, coercing them in the name of higher and more rational selves who would consent to what is proposed.”²⁸ The concern that O’Neill raises here is well founded. In *Theory*, for example, Rawls makes the uncomfortable claim that

The consistent application of the principle of fair opportunity requires us to view persons independently from the influences of their social position. But how far should this tendency be carried? It seems that even when fair opportunity (as it has been defined) is satisfied, the family will lead to unequal chances between individuals (§46). Is the family to be abolished then? Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction. But within the context of the theory of justice as a whole, there is much less urgency to take this course.²⁹

What if one were to disagree with Rawls’s statement? Justice, then, would be sought in a way that would inspire great dissent. Defenders of hypothetical consent, however, believe that actual people’s consent or dissent may be irrelevant. What is of greatest importance, according to the kind of consent O’Neill characterizes as *hypothetical*, is “whether the fully rational would consent.”³⁰ Rawls addresses some of these concerns. His response is that when we consider the original position, we must imagine real *people* in deliberation. If it is not imaginable, therefore, that they would choose to abolish the family, then he can avoid this problem.

O’Neill offers this criticism of *hypothetical* consent (such as Rawls’s) in order to distinguish it from what she calls *possible* consent.³¹ While there may be cases in which there appears to be consent, *possible* consent must be free of coercive features. In Kantian fashion, it must avoid dependence upon passions and desires. O’Neill’s interpretation of Kant suggests that the desires of individuals must not be a basis for legitimacy. She writes,

When we see morally required actions as those to which others either actually or hypothetically consent, we implicitly view morality as partly contingent on desires. Another’s actual consent will usually reflect his or her wants or preferences ... Yet it seems implausible that treating others as persons can be of *prime* moral importance if it amounts only to avoiding what they do not want or would not rationally want.³²

In this passage we see an important way in which Kant and Rawls differ. Diverging from pure Kantianism, Rawls’s approach to SCT offers a middle ground between utilitarians and deontologists.³³ Rawls first takes up a Kantian theme. According to John Christman,

In Kant ... the legitimating force of the idea of a social contract is now no longer grounded in the actual consent or participation of the citizens. Rather, political power is justified if (and only if) it conforms to the universal standards of morality – that is, if it is just.³⁴

Rawls's move is to focus on legitimacy, grounded in justice. But rather than remain only in the Kantian tradition, Rawls attempts to account for varying motivations. He incorporates into his version of SCT, therefore, both utilitarian and deontological concerns.

Although Rawls incorporates more than Kantian ethics in his theory, he nevertheless is firmly rooted in Kant's work. In *Theory*, he writes, "To act from the principles of justice is to act from categorical imperatives in the sense that they apply to us whatever in particular our aims are. This simply reflects the fact that no such contingencies appear as premises in their derivation."³⁵ Despite this strongly Kantian move, Rawls wants to take into account a variety of motivations people have for judging between moral principles. He does so, however, from a standpoint that is hypothetical, insofar as it is based on a thought-experiment. And he aims to allow some kinds of personal motivations to enter into consideration, and not others.

Whereas Kant occasionally focuses on consent, Rawls shifts his attention to the subject of legitimacy.³⁶ Kant refers to a *possible* "original contract by means of which a civil and thus completely lawful constitution and commonwealth can alone be established." He summarizes his views regarding political legitimacy as follows: The "original contract" is an "idea of reason." He claims that it is the

... test of the rightfulness of every public law. For if the law is such that a whole people could not *possibly* agree to it (for example, if it stated that a certain class of *subjects* must be privileged as a hereditary *ruling class*), it is unjust; but if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.³⁷

Although Kant does not employ the word "consent" widely, it features prominently, nonetheless, in his theory.

By contrast, Rawls's rarely uses the term "consent," shifting to focus instead on political legitimacy. Christman summarizes Rawls's shift as follows:

Rawls's view picks up on the Kantian claim that justice is a matter of what rational individuals would choose for themselves when not swayed by factors that would bias their choices, such as their own narrow self-

interest; justice amounts to those principles chosen in this manner for a well-ordered society in which these choosers would be citizens.³⁸

In this way Rawls's SCT avoids the problematic concern of "demanding that citizens actually express their acceptance of the political authority under which they live."³⁹ Rawls, therefore, offers a *structural* notion of consent.

Rawls's version of consent differs from Kant's by being stronger. He does not ask only what people could *possibly* agree to as fully rational beings. He asks *what they would* agree to in circumstances of deliberation that are fair.⁴⁰ We see, therefore, that the outcome of Rawls's positing of the "original position," the name for his thought experiment aiming at fair deliberation, is more specific than that of Kant's "original contract." For, there could be a range of "original contracts" for Kant, in terms of what could *possibly* be agreed upon on his account. In recognition of this fact, Rawls comes to see his theory of justice as particularly liberal, in contrast with non-liberal ones. He addresses this concern most explicitly in *The Law of Peoples*.⁴¹ Over the course of his writings, Rawls's shift is clearly from the claim that what he finds are the principles of justice, to the view that they are *liberal* principles. Nevertheless, he maintains the goal of offering a universal standard for any principle of justice, with which he classifies "decent" and "indecent" societies.⁴²

II. B. God and Other Traditional Sources of Authority

There are most generally three categories of authority found in the social contract tradition. The first is God and natural law. The second is Rousseau's vague "general will." The third is reason, or rationality.

Hobbes and Locke both give God a central role in their understandings of SCT. According to Hobbes, "the multitude so united in one person" generates a "Leviathan or rather ... [a] *Mortal God*, to which we owe under the *Immortal God*, our peace and defence."⁴³ The sovereign is not characterized by justice or injustice. Rather, he or she is the source of both. Without the rule of a sovereign, for Hobbes, there is no law, no right or wrong. Hobbes writes,

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues.⁴⁴

By contrast to Hobbes, Locke is an optimistic natural law theorist. He believes that the laws of nature are God-given. Authority, then for Locke, is determined through the accordance of practices with natural law. He writes that "God hath certainly appointed government to restrain the partiality and violence of men."⁴⁵ The source of authority for Locke, then, is really God and His natural law.

It is worth noting that Rawls admits of influence from H. L. A. Hart, who himself defends natural law theory. Natural law has long been a standard conceptual basis for theories of political authority and legitimacy. Hart's essay, "Are There Any Natural Rights?" serves as a clear example.⁴⁶ Rawls associates his moral ideal of "justice as fairness" with the natural rights tradition. He writes, "The moral ideal of justice as fairness is more deeply embedded in the first principles of the ethical theory [than utilitarianism]. This is characteristic of natural rights views (the contractarian tradition) in comparison with the theory of utility."⁴⁷ It would not be accurate to set Rawls's basis for legitimate political authority too firmly in the tradition of natural rights, except insofar as he does delineate justice in terms of the kinds of beings we are.

Rousseau's understanding of the social contract is more naturalistic than Hobbes's and Locke's. He focuses on human beings' animal nature, and on the ways that we come to associate with one another. While there are many individual wills in the state of nature, the source of true political legitimacy is the general will, he claims. According to Rousseau, "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."⁴⁸ The general will is not simply an average of all the independent wills. Rather, it is a new will. It is a whole made up of the wills of the many, willing on its own, independently of any particular will. Rousseau elaborates,

At once, in place of the individual personality of each contracting party, this act of association creates a corporate and collective body, composed of as many members as the assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will. This public person ... is called by its members *State* when passive, *Sovereign* when active, and *Power* when compared with others like itself.⁴⁹

Rousseau's notion of the general will is distinct from previous and later notions of authority. He still depends upon God, however. He writes, "That which is good, and in conformity with order, is such by the nature of things, independently of human convention. All justice comes from God; he alone is its source."⁵⁰ Authority for Rousseau, therefore, is

not simply given by the demands of reason. His locus of authority is more mysterious.

Finally, Rawls and Kant rest their SCT's on the authority of reason. As I said above, SCT generally attempts to justify political authority. The claim that reason is a source of authority, then, must be distinguished from the notion that we have *reason* to believe it justified. Kant claims that SCT is an "idea of reason."⁵¹ He depends upon *a priori* principles of reason to show political legitimacy and the demands of justice. He writes,

The legislator may indeed err in judging whether or not the measures he adopts are *prudent*, but not in deciding whether or not the law harmonises with the principle of right. For he has ready to hand as an infallible *a priori* standard the idea of an original contract, and he need not wait for experience to show whether the means are suitable, as would be necessary if they were based on the principle of happiness.⁵²

The *a priori* standard Kant proclaims here is not without cousins. We might say that nowhere in the world is there a perfect circle. Yet the *idea* of a perfect circle is clear, and allows us to act in ways that are directed by this idea. With the idea of a perfect circle, I can work to avoid drawing ovals. Similarly, Kant believes that we can posit *a priori* ideas that can then be used to guide our deliberations about justice.

As early as his essay, "Outline of a Decision Procedure for Ethics," Rawls offers a methodological approach to ethics, which is his way of working on the problem of legitimacy. For, if we can discern the proper decision procedure for ethics, the procedure will provide the authority needed for political justification. He writes,

The question with which we shall be concerned can be stated as follows: Does there exist a reasonable decision procedure which is sufficiently strong, at least in some cases, to determine the manner in which competing interests should be adjudicated, and, in instances of conflict, one interest given preference over another; and, further, can the existence of this procedure, as well as its reasonableness, be established by rational methods of inquiry?⁵³

On its surface, Rawls's question appears pragmatic and scientific. Rawls's basis in reason is similar to Kant's, yet sympathetic to Dewey's emphasis on inquiry here. The difference between Rawls and Dewey on this score is that for the latter, inquiry is social, and empirical. Rawls speaks of rational methods of inquiry and of social contexts, but both of these are notions that an individual can consider in the comfort of his or her armchair. Recall that for Rawls, "The principles of justice are ... analogous to categorical imperatives. For by a categorical imperative

Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being.”⁵⁴ In this way, Rawls offers up his contribution to concern about what kind of being enters into the contract. Rawls does not address the matter of human nature generally. He believes that narrow portions of human subjectivity in strictly ethical concerns can be isolated for the purpose of deciding matters of justice. In this way, he does not need to weigh in on matters of the selfish or cooperative nature of mankind.

III. Traditional Criticisms of SCT: Hume, Hegel and Dewey

In what follows I will focus on three traditional critics of SCT. The goal of this section is to outline the challenges they present in order to show the ways in which Rawls does and does not address them. First I will begin with a discussion of Hume and Hegel. Then I will clarify Dewey’s criticisms of SCT.

III. A. Hume and Hegel

In his essay, “From Hume to Hegel: The Case of the Social Contract,” Christopher Berry analyses Hume’s and Hegel’s critiques of SCT. He explains that although “both Hume and Hegel reject contractarianism, there is a profound gulf between their arguments.”⁵⁵ In their own ways, Hume and Hegel accept elements that were taken up in the social contract tradition. Berry explains,

Hume, while rejecting the idea of an original social contract, nevertheless says originally, submission must be understood as a form of contract or voluntary consent and that when it occurs it is the ‘best’ foundation. When Hegel mentions the origins of a state he locates it in ‘imperious lordship on the one hand, instinctive submission on the other. But even obedience ... in itself implies some degree of voluntary consent.’ Though these two positions seem similar, to Hegel, this argument only shows that since the State must be seen as a totality, as an organic whole, it cannot be understood by abstracting a part and considering it in isolation. Hence, in obedience it is not the isolated individual wills that prevail, but the ‘general will’ the concrete cultural complex.⁵⁶

For reasons that arise in the analysis of Hume here, some authors have categorized him as a social contract theorist.⁵⁷ For my purposes, however, I will focus on the sense in which Hume was a critic of SCT.

Hume's critique of SCT was focused primarily on the *historical* understanding of consent, although not only. According to Berry, Hume's argument

... is two-pronged: historical and philosophical. Historically, he rejects the idea of the social contract as the source of government because it just does not bear up under scrutiny – 'first rudiments of government ... arise from quarrels' – and the history of all societies testifies to the role of force and usurpation.⁵⁸

While Hume's critique begins with a historical emphasis, a deeper philosophical concern is worth noting. Hume recognizes the importance of conflict, of problems, at the origin of intelligent social action. This point foreshadows Deweyan concerns regarding SCT. It is simple to dismiss Humean critiques that are based on *historical* consent, insofar as there are social contract theorists who have abandoned the approach. The challenge regarding the instituting of government, however, still carries weight. I will return to this concern in laying out Dewey's critique of SCT. Dewey's critique is less focused on the historical elements of SCT. Hume's analysis, even if it can be interpreted otherwise, is steeped in historical interpretation. Berry explains Hume's view that "given the facility inherent in human nature to contract habits, even the rule of usurpers acquires the attributes of authority."⁵⁹

Properly understood, Hume's historical critique is not without merit. A historical critique of SCT need not only focus on *historical* consent. It can challenge instead the relevance of a hypothesized consent to real, historical circumstances. If one were to say that the conflict in the Middle East can be averted if we simply conceive of society there as it would be agreed upon *if there had been* a social contract, we encounter a difficulties. Whether or not one agrees to the beauty of the thought-experiment, how that affects the lives of people who have been in conflict for a long time is still unclear. Are people simply to forget their fallen brothers and sisters because of what an outsider suggests would be decided upon by people in ideal circumstances? Hume's point about the origins of society is not simply as a challenge to the idea that a social contract occurred. We can interpret his challenge as especially strong if we demand of SCT an account of the relevance of *hypothetical* consent to real-life situations. On this count, Rawls misses this challenge in *Theory*, but makes strides to address something like it in *Political Liberalism*.⁶⁰

A further Humean criticism of SCT involves human nature. Hume holds to a static view of human nature. Berry writes that Hume's attack on SCT exhibited the "general eighteenth-century characteristic of removing

human nature from mutability and understanding historical phenomena through the universal constancy of human traits.”⁶¹ It is due to claims such as this that theorists have categorized Hume as in the social contract tradition. For some approach SCT with the strategy of deriving principles of *prudential*, *grateful*, or *structural* consent from static conceptions of human nature. In his own way, Rawls does this without the language of human nature. He focuses instead on the immutable features of human subjects who aim to be fair and moral (or later political). The trouble with focusing on Hume’s views of human nature is that they offer ample room for opposing interpretations. One theorist, Frederick Whelan, explains Hume’s views as “less thoroughly individualistic (and voluntaristic),”⁶² yet Whelan further claims that “Less familiarly, but equally important, [Hume’s views are] also less statist than [others].”⁶³ Clearly, there is room for a variety of interpretations of Hume on people’s relation to their government. Nevertheless, we may summarize central Humean critiques of social contract theory with the help of Whelan. He writes,

Hume regarded the theory of the original contract as both philosophically inadequate as a theory of legitimate government and practically dangerous in its excessive and one-sided emphasis on the right of resistance. Hume endorses resistance to government in certain situations (such as “grievous tyranny”) and rejects the opposing ideology of “passive obedience.” Nevertheless, he holds that an acceptable political theory must not only justify obedience as well as resistance in terms of the same ethical principle (utility), but must also demonstrate the usual desirability of authority and allegiance in most situations, thereby making the permissibility of resistance an exception.⁶⁴

In his own way, then, Hume was concerned with the matter of political stability. He thought it important to discern tyrannical governments from those that were more equitable, yet we must beware of political theory that might lend itself to continual suppression and revolutionary attempts (as we might find in a Hobbesian picture).

Rawls is sympathetic to Hume’s point here. In *Theory*, he clearly sets limits to civil disobedience that are complex and consistent with the effort to promote political stability. According to Rawls, (legitimate) civil disobedience is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”⁶⁵ For Rawls, therefore, civil disobedience does not aim at government overthrow, so much as reform.

Hegel’s concerns regarding the social contract are more worrisome for Rawls. Berry summarizes a central challenge which Hegel offers. Berry writes, “Hegel believes that this concept [the social contract] has cogency

only if it separates the individual from the State thus making membership of the State optional, a matter of voluntary choice.”⁶⁶ It is not at all clear that those who would not wish to participate in Rawls’s deliberation in the original position have that option. Kant was right that there are those who are unwilling to let reasoned deliberation decide their political institutions, or who believe that law should be enforced on others, but not on themselves. He writes that

The problem of organizing a state, however hard it may seem, can be solved even for a race of devils, if only they are intelligent. The problem is this: ‘Given a multitude of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions.’⁶⁷

Hegel’s challenge is strengthened by Kant’s point. Do people have the option *not* to accept the State? If they do not, then it appears they are not entirely free to contract with one another. Their hands are forced. Whereas, if the opposite case is made, we must explain in what sense persons are not obliged to partake in the society which reared them. Hegel’s further claim arises correspondingly, then, that “it is only as one of [the State’s] members that the individual himself [or herself] has objectivity, genuine individuality and an ethical life.”⁶⁸ There are two aspects of Hegel’s critique here that must be distinguished.

On the one hand, Hegel criticizes those historical elements of SCT that seek to explain agreement or contract in terms of isolated individuals. On the other, he is pointing out the trouble with attempting to split elements of personhood in political theory. With respect to the first challenge, Rawls is prepared to answer with his *structural* consent. But with respect to the second, Rawls must answer. Even though he moves from a strongly ahistorical project in *Theory* to one that recognizes the contingencies and realities of “reasonable pluralism” in *Political Liberalism*, Rawls maintains what Hegel would see as a great difficulty. In the latter work, Rawls seeks to split off from consideration in political matters those elements of reason which pertain to ethical comprehensive doctrines personally held, to those which he claims to be reasonably acceptable for public use.

Rawls explains the ideal of public reason as demanding that

... citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of

justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably to endorse.⁶⁹

The process that Rawls describes, despite what might be claimed to be a distancing from SCT, nevertheless is explicitly applied to his discussion of the original position. Rawls writes, “in justice as fairness ... the parties in the original position, in adopting principles of justice for the basic structure, must also adopt guidelines and criteria of public reasons for applying those norms.”⁷⁰ Hegel would be deeply concerned with the hard divisions Rawls draws between elements of personhood that are to be relevant in political matters. For these elements of personal or private reason are not arrived at in isolation. They are developed in a thoroughly social and organic way.

Berry summarizes Hegel’s criticisms of traditional SCT as follows:

... for Hegel, the contractarians operate with an abstract notion of man, who is comprehended outside his cultural complex and who, in addition, presumes to judge it. The social contract theory manifests an ahistorical abstract individualism ... Hegel’s rejection [of SCT] is closely connected with his espousal of the theory of man as a historical creation.⁷¹

Rawls answers a portion of this challenge, but not its entirety. In Rawls’s discussion of the original position (the setting he clarifies as a thought-experiment in which parties are said to be behind a veil of ignorance about who they are in society), he posits deliberation as among real people in an ideal circumstance. At the same time, therefore, Rawls aims to overcome the ahistorical nature of SCT by claiming that real people from society are to be considered as entering into the original position, yet he specifies their conditions in a way that divorces important historical considerations of who they are, and idealizes them in this strange condition. Who would a religious fundamentalist (or a fervent representative of other comprehensive doctrines) be if he or she could not raise for political consideration his or her most firmly held values?

The central concerns that we find in Hume and Hegel about the social contract have to do with relevance of this ideal theory to real historically contextualized situations, and with theories of human nature. Hume and Hegel are opposed in the latter. Whereas Hume believes human nature to be at least partly static, Hegel views humans as “a historical creation.”⁷² Humans, for Hegel, are historical creations, contextual, changing, and organically whole. They are not isolable from the State in which they developed. They *are* their culture.⁷³ The criticisms which Dewey raised for SCT that I will discuss next bear some overlap with Hegel’s, especially concerning variation in human nature.

III. B. Dewey

There is a gap in the literature of SCT regarding the critiques which Dewey offered. The contributions of Larry Hickman and Hilary Putnam to the subject are among the most substantial to be found. In *Ethics without Ontology*, Putnam offers an overview of Dewey's general response to SCT. Hickman's discussion of the matter is more specific. Both authors make plain Dewey's general claim that SCT is misguided and misleading. There are four principal problems that Dewey sees with SCT.

Laying out Dewey's general criticisms of SCT, Putnam notes that "Certainly, Dewey (or James, or Mead, or any other of the classical pragmatists) would not wish to challenge the idea that a legitimate state must have the consent of those whom it governs."⁷⁴ The first great mistake of SCT, however, is that "it derived sociability as well as morality from an idealized image of the law of contracts, from *property law*. And Dewey, like Hegel, thinks that this is ridiculous."⁷⁵ One might be inclined to say that Rawls is concerned with rights, not property, by contrast to Hobbes, Locke, and Rousseau. But Rawls focuses a great deal of his attention on property. The very idea of the least advantaged and most favored in society is founded on the notion of wealth and poverty, thus fundamentally connected with the notion of property. While these are very important political concerns, Dewey would challenge the notion that people's consent can be derived from notions of property as a starting point. Property is a social phenomenon developed through interaction in the first place.

The notion of property as a starting point for SCT is troubling for Dewey, since he argued extensively for focusing philosophy, as Hickman explains, "where human beings find themselves – *in media res*."⁷⁶ We cannot assume that political problems are simply "out there" for the picking. They are the products of inquiry. If not, they are only ideology or misleading assumptions. This trouble, of starting political theorizing from abstraction is the second main problem Dewey saw in SCT. Hickman summarizes Dewey's challenge:

Dewey rejected the social-contract theory in all its numerous manifestations. It was his view that social-contract theories neither provide what they have historically claimed to, that is, causal explanations, nor do they do any useful work when regarded, as they now most often are, as a hypothetical "limit." Observation led him to conclude that the search for "state-forming forces" uniformly leads to myths that are at best unhelpful and at worst misleading.⁷⁷

Where Hickman speaks of “state-forming forces,” he refers to those who were Dewey’s target for critique. When we apply this challenge to a more contemporary SCT, such as Rawls’s, we can read Dewey’s critique as concerning “state-legitimizing forces.” Hickman explains, “The highly abstract reconstruction of the social-contract theory advanced by John Rawls, for example, reveals the same fault lines that Dewey thought weakened the social-contract theories of Locke and Rousseau.”⁷⁸ Among these are the third and fourth problems of SCT that we can see as Dewey’s challenges.

The third problem has to do with will. On the one hand, Hickman explains that “Dewey’s critique ... sought to avoid the absolutism present in many versions of Marxism, as well as the atomism present in most political theories in the West.”⁷⁹ Rawls walks a thin line between the two of these alternatives, one that is far more formalistic than what Dewey sought. On the one hand, Rawls avoids Rousseau’s absolute “general will,” for Rawls refers political legitimacy to the decisions of citizens in idealized deliberation. On the other hand, Rawls attempts to avoid atomism of wills by the very same move. The deciding factor for Rawls’s theorizing about justice and the limits of political legitimacy, however, are delineated through an analysis of what persons would have to agree to as the reasonable principles to be selected in the original position. Jean Hampton, a commentator on Rawls, claims that “there is not theoretical reason to posit more than one party in the original position.”⁸⁰ Samuel Freeman contests this interpretation of Rawls.⁸¹ The fact that this view is contested is testimony of the difficulty Rawls faced in addressing this challenge to SCT. He was struggling between absolutism and atomism. For, even if we agree with commentators like Freeman, who claim that Rawls’s notion of agreement in the original position is of great importance, Rawls nevertheless conceives of persons as isolated individuals in rational deliberation, who are not allowed to know their places in society when they deliberate. In effect, Rawls tries to preserve a social element in the original position while undercutting its very possibility, trying to dice persons into parts when they are organic, related wholes.

Dewey’s concern about absolutism and atomism is closely related to the fourth challenge I wish to mention. Individualism has long been a cornerstone of liberalism. Dewey believed it to be a problematic notion, however, in its common use. At the close of *Individualism, Old and New*, Dewey summarizes his worry about abstractions of individualism. He writes,

The future is always unpredictable. Ideals, including that of a new and effective individuality, must themselves be framed out of the possibilities of existing conditions, even if these be the conditions that constitute a corporate and industrial age ... We may, in order to have continuity of direction, plan a program of action in anticipation of occasions as they emerge. But a program of ends and ideals if kept apart from sensitive and flexible method becomes an encumbrance. For its hard and rigid character assumes a fixed world and a static individual; and neither of these things exists. It implies that we can prophesy the future – an attempt which terminates, as someone has said, in prophesying the past or in its reduplication.⁸²

Dewey admonishes excessive faith in static individualism. This is a large part of his criticism of deontological ethical philosophies, such as the one Rawls offers. Even in *Political Liberalism*, when Rawls deals with the experienced fact of “reasonable pluralism,” he aims again to split up personhood into parts. He puts aside ethical and religious considerations (at least those which are comprehensive), in order to derive the principles of a legitimate society from only political matters. The problem we face so often, however, is just how to resolve conflicts between people who hold firmly to such comprehensive doctrines. To separate these features out from the realm of the political, therefore, is absurd. Hickman clarifies Dewey’s concern:

An individual may be divided within him- or herself in terms of conflicting memberships, roles, and obligations. But to take these facts as grounds for hypostatizing “the individual” and “the social” as fundamentally opposed entities is to create what Dewey calls an unreal problem.⁸³

When we view Dewey’s critiques as a whole, we see the program he advances, and the difficulties that have not yet been taken seriously. Rawls does indeed aim to address a number of the challenges to earlier forms of SCT, but the concerns mentioned here are only addressed in ways that are themselves troubling.

In 1990, Hickman pointed out that “Dewey’s program has still not been widely accepted as a critique of either his predecessors or his (or our) contemporaries.”⁸⁴ This is still true of Dewey’s critique of SCT today. To recognize Dewey’s challenges to SCT is to note a shift in focus for political philosophy. Putnam makes this clear:

For Dewey, the problem is not to justify the existence of communities, or to show that people ought to make the interests of others their own; the problem is to justify the claim that morally decent communities should be

democratically organized. This Dewey does by appealing to the need to deal intelligently rather than unintelligently with the ethical and practical problems that we confront.⁸⁵

Rawls sought to reinvigorate the field of political philosophy in the second half of the twentieth century, claiming that traditional approaches were not as flawed as had been thought. It seems, however, that Rawls failed to address a number of criticisms leveled against SCT. These pages have aimed to outline those criticisms that have been raised in an effort to better understand Rawls and the tradition from which his project has grown.

Notes

¹ John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1996), p xvii. Referred to hereafter as *PL*.

² See p. 5 of Michael Lessnoff, ed., *Social Contract Theory*, ed. William Connolly and Steven Lukes, *Readings in Social and Political Theory* (New York: New York University Press, 1990).

³ Ibid.

⁴ See John Christman, *Social and Political Philosophy: A Contemporary Introduction*, ed. Paul K. Moser, *Routledge Contemporary Introductions to Philosophy* (New York: Routledge, 2002), pp. 26-28.

⁵ Peter McCormick, "Social Contract: Interpretation and Misinterpretation," *Canadian Journal of Political Science* 9, no. 1 (1976): 63-76. See p. 63.

⁶ Ibid., p. 63-64.

⁷ Ibid., p. 66.

⁸ Ibid., p. 63.

⁹ Ibid., p. 65.

¹⁰ See Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (New York: Cambridge University Press, 1989), pp 106-117.

¹¹ From Locke's *Second Treatise of Government*, excerpted in Lessnoff (1990), p. 87.

¹² See p. 112 of John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969). I am indebted to McCormick (1976), p. 64, for pointing out this passage.

¹³ McCormick, p. 64.

¹⁴ See Thomas Hobbes, *Leviathan*, J. C. A. Gaskin ed. (Oxford: Oxford University Press, (1651) 1996), pages 82-86.

¹⁵ From Hobbes's *Leviathan*, as found in Lessnoff, p. 56.

¹⁶ See McCormick, p. 66.

¹⁷ Hobbes, *Leviathan*, from Lessnoff, p. 57.

¹⁸ McCormick, p. 66.

¹⁹ Rousseau, *The Social Contract*, chapter 6, from Lessnoff, p. 111-12.

²⁰ See p. 79 of H. S. Reiss, ed., *Kant: Political Writings*, Second (enlarged) ed., *Cambridge Texts in the History of Political Thought* (New York: Cambridge University Press, (1970) 1991). Kant's essay referred to here is "On the Common Saying: 'This May Be True in Theory, But It Does Not Apply to Practice'." Referred to hereafter as Kant, "On the Common Saying."

²¹ Kant, *The Metaphysics of Morals*, from "The Theory of Right, Part II," as found in Reiss, ed., *Kant: Political Writings*, p. 137 (§ 44).

²² *Ibid.*, p. 139 (§ 46).

²³ See Onora O'Neill *Constructions of Reason*, p. 112.

²⁴ Kant, *Metaphysics of Morals*, from Reiss, p. 140 (§ 47). Emphasis is in the original.

²⁵ *Ibid.*

²⁶ See O'Neill (1989), chapter 6, "Between Consenting Adults," p. 105-25. First published in *Philosophy and Public Affairs*, 14, No. 3, (Summer 1985): 252-77.

²⁷ *Ibid.*, p. 109.

²⁸ *Ibid.*

²⁹ Rawls, *Theory*, p. 448.

³⁰ O'Neill (1989), p. 109.

³¹ *Ibid.*, p. 112.

³² *Ibid.*

³³ Consider Rawls's "Two Concepts of Rules," in Freeman, Samuel, ed. *John Rawls: Collected Papers*. Cambridge, MA: Harvard University Press, (1999) 2001, p. 20 – 46.

³⁴ See Christman, *Social and Political Philosophy*, pp. 48-56. This passage is from p. 51.

³⁵ Rawls, *Theory*, p. 223.

³⁶ See Kant's "On the Common Saying," and his *Foundations of the Metaphysics of Morals and What Is Enlightenment?*, trans. Lewis White Beck, Revised Second ed., *The Library of Liberal Arts* (Upper Saddle River, New Jersey: Prentice-Hall, Inc., 1997), p. 46 (429), and O'Neill, p. 112.

³⁷ Kant, "On the Common Saying," p. 79.

³⁸ Christman, *Social and Political Philosophy*, p. 52.

³⁹ *Ibid.*

⁴⁰ Rawls, *Theory*, pp. 10-19.

⁴¹ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, (1999) 2000). Referred to hereafter as *LP*.

⁴² Rawls, *LP*, p. 59-60.

⁴³ Hobbes, *Leviathan*, p. 87.

⁴⁴ *Ibid.*, p. 86.

⁴⁵ See p. 12 of John Locke, *Second Treatise of Government* (Indianapolis, IA: Hackett Publishing Company, Inc, (1690) 1997).

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- ⁴⁶ H. L. A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64, no. 2 (1955): 175-91.
- ⁴⁷ Rawls, *Theory*, p. 28.
- ⁴⁸ Rousseau, *The Social Contract*, 193.
- ⁴⁹ Ibid.
- ⁵⁰ Rousseau, *The Social Contract*, 73.
- ⁵¹ Kant, "On the Common Saying," p. 79.
- ⁵² Ibid., p.
- ⁵³ From p. 1 of "Outline of a Decision Procedure for Ethics," as found in Samuel Freeman, ed., *John Rawls: Collected Papers* (Cambridge, MA: Harvard University Press, (1999) 2001), 1-19.
- ⁵⁴ Rawls, *Theory*, p. 222.
- ⁵⁵ See p. 696 of Christopher J. Berry, "From Hume to Hegel: The Case of the Social Contract," *Journal of the History of Ideas* 38, no. 4 (1977): 691-703. Referred to hereafter as Berry, "From Hume to Hegel."
- ⁵⁶ Ibid.
- ⁵⁷ See Frederick G. Whelan, "Hume and Contractarianism," *Polity* 27, no. 2 (1994): 201-24, p. 201. See also David Gauthier, "David Hume, Contractarian," *The Philosophical Review* 88, no. 1 (1979): 3-38, p. 3.
- ⁵⁸ Berry, "From Hume to Hegel," p. 692.
- ⁵⁹ Ibid.
- ⁶⁰ See *PL*, p. xx.
- ⁶¹ Ibid, p. 695.
- ⁶² Whelan, "Hume and Contractarianism," p. 202.
- ⁶³ Ibid.
- ⁶⁴ Ibid, p. 207.
- ⁶⁵ See Rawls, *Theory*, p. 320-23.
- ⁶⁶ Berry, "From Hume to Hegel," p. 691.
- ⁶⁷ Kant, *Perpetual Peace*, p. 30.
- ⁶⁸ G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: 1952), p. 242.
- ⁶⁹ Rawls, *PL*, p. 1 – lxii, especially p. 1.
- ⁷⁰ Ibid., p. 225.
- ⁷¹ Berry, "From Hume to Hegel," p. 701 and 703.
- ⁷² Ibid., p. 703.
- ⁷³ Ibid., p. 700.
- ⁷⁴ Putnam, *Ethics without Ontology*, p. 102.
- ⁷⁵ Ibid., emphasis is in the original text.
- ⁷⁶ Larry A. Hickman, *John Dewey's Pragmatic Technology* (Indianapolis, IA: Indiana University Press, 1992), p. 168. Referred to hereafter as Hickman, *Pragmatic Technology*.
- ⁷⁷ Ibid.
- ⁷⁸ Ibid.
- ⁷⁹ Ibid.