

**Risk, Consent, and Externalities:
How the Lack of a Global Basic Structure Implies a Right to Migrate**

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The argument presented here builds on the fact that there are significant international and global externalities. The transportation system of one country causes greenhouse gas emissions that affect other countries. One country's appetite for fish drives a market that depletes another's fishing stocks. Nor are externalities solely environmental. The economic decisions made by firms or consumers in one country can cause the export earnings of another to plummet.

I understand these externalities in terms of creating risk for individuals who have not consented to the action. If it is *prima facie* wrong to knowingly cause harm to others, it seems that it is *prima facie* wrong to cause non-negligible¹ risk that others will be harmed. Ideally, the basic structure of a society helps to resolve this problem. The basic structure is able to resolve the ethical problems of externalities and risk by providing an institutional framework that allows us to infer hypothetical consent from those being subjected to the risks. So long as the risks are generated and imposed upon people all under a basic structure which provides sufficient regulatory, compensatory, and representative mechanisms, it is reasonable to infer that they give hypothetical consent to the risk.

For international externalities there is no basic structure that allows us to infer hypothetical consent, and thus there is something more wrong about causing non-negligible risk for people in other countries. Despite this, the lack of a shared basic structure with another person is often thought to lead to fewer and lesser obligations to that person. Michael Blake, for example, offers an argument to show that obligations of distributive justice arise only under a shared basic structure.

Blake argues that there exists no obligation to provide international distributive justice.² Only states have this obligation because states are the entities that apply legal coercion to people. If we think that autonomy is important, then legal coercion needs justification since it appears to be a violation of people's autonomy. We have to appeal to a notion of hypothetical consent in order to justify this coercion. In order to obtain hypothetical consent, however, we must avoid "special pleading." The laws and exemptions to them must be justified to all. Because the enforcement of property rights is a key part of legal coercion, property rights need to be justified to all without special pleading. The Rawlsian difference principle provides a justification for the coercive defense of

the economic system to the least advantaged. Thus the need for distributive justice arises out of the coercive power of the state.

I argue, on the other hand, that in fact obligations may arise when one does not share a basic structure or government with another. There are at least three categories of such obligations. First are constitutive obligations. These are obligations to create a basic structure where none exists. We might think, following Rawls and Locke, that a people have some constitutive obligation, if they are in a state of nature, to create a government. I will assume that no general constitutive obligation exists at the international level. That is, there is no general obligation to create a world basic structure, although such an obligation may be able to be shown to emerge from a set of contingent circumstances.

The second kinds of obligation that a lack of a basic structure can give rise to are humanitarian obligations. Here, the assumption is that there exist some humanitarian duties toward all people, but the basic structure acts to discharge our obligation towards those who share the basic structure with us. If we live in a society with a just and fully functioning basic structure, we may not have any duty to provide private charity. We might be justified in thinking that our support for social services discharged our humanitarian duties towards those in our society.

If humanitarian duties extend outside of one's society, however, then these duties may not be discharged just by paying taxes and supporting the basic structure. In this case some further action, such as private giving, may be required. In this case one does not have greater duties to those outside of one's society, but sharing and supporting a just basic structure fulfills the humanitarian obligations towards those in one's own society but not abroad.

To put the thought another way, if you encounter an individual desperately in need of medical attention, your obligations are quite different if you two share a basic structure that includes institutions like hospitals and ambulance services. In this case your obligations may be limited to merely calling for an ambulance. If these institutions are not in place, then your obligations may be much weightier. You may be required to provide what medical care you can yourself. Thus the presence of shared institutions may in fact diminish the number and seriousness of some duties that agents owe to each other.

Risk

The focus of this paper and the third type of obligations that the lack of a basic structure can give rise to are those obligations to get the consent of people who are placed at non-negligible risk of harm by one's actions. In our quotidian exchanges, we think that we affect the lives of other people only via consensual mechanisms. We purchase goods from a seller who consents to sell. The people with

whom we interact (by and large) consent to interacting with us. Indeed if we had reason to believe that we were putting others at risk without their consent, this would be a *prima facie* source of moral concern.

If it is wrong to harm another without her consent, it is also wrong to expose her to non-negligible risk without her consent.³ Given that many or most of our daily behaviors in fact do create non-negligible risks for others, we have to explain either how creating these risks for others are justified, cease causing the risks, or accept that we act in an unjustified way.

The easiest solution to this problem is when actual consent is obtained. I take it that there can be two forms of actual consent. Direct actual consent is given when the person affected explicitly, soberly, and with adequate information gives consent to the action which will put her at risk. There is also indirect actual consent. This occurs when we act in a way that implies we would give our direct consent if asked. This covers most of our daily consensual activities. When I board a city bus I do not give explicit consent to be placed at risk of being involved in a bus accident, but I do give indirect actual consent.

While far more of our daily actions satisfy the condition of indirect actual consent than direct actual consent, there are many other cases where conditions for neither form of actual consent are met. Often, people do not behave in ways that allow us to infer actual consent. In many cases we simply act in ways that impersonally create risk for others. Such cases include the environmental and economic externalities with which I opened. In other cases the person explicitly does not consent. This is often the case for criminal and property law that Blake considers. Such laws are needed precisely because people sometimes do not provide actual consent to important moral principles.

Can a plausible theory of consent cover cases of externalities and of legal coercion? What are the implications if one cannot? I will spend the remainder of this paper discussing if, and how, a theory of hypothetical consent can cover cases of externalities (cases where we impersonally cause non-negligible risk to others without obtaining their actual consent) and what implications this holds.

Hypothetical Consent

Blake uses the notion of hypothetical consent to justify the use of legal coercion. While those coerced by the law do not always give their consent to the coercion, this use of coercion does not unjustly infringe on their autonomy because they would hypothetically consent to it. That is, in ideal circumstances they would rationally prefer a criminal justice system in place that impartially protected them and others from wrongdoing. Even criminals prefer to live in a lawful society rather than a lawless one.

This, I take it is what Blake means by his notion of hypothetical consent requiring no “special pleading.” I cash this first notion of hypothetical consent as:

H₁: An individual hypothetically consents to action X if she rationally prefers a world with the impartial application of X to all relevant subjects to a world without the impartial application of X to all relevant subjects.

Thus the drunk-driver may not give her actual consent to being punished, but if she rationally prefers a world where drunk-drivers who are caught are punished impartially (without special pleading), then by H₁ she gives her hypothetical consent. In the case of drunk-driving it will seem, given that the expected gains of the behavior are far-outweighed by the risks as well as for other reasons, that H₁ will be satisfied.

In the case of some externalities, H₁ seems adequate. The small business owner presumably prefers a world where competition in her industry is allowed to thrive without partiality. This means that the entry of new firms will reduce her profits, and perhaps even drive her out of business. She may not actually consent to the entry of competitors and the reduction of her profit, but it seems that she must hypothetically consent, at least if she accepts the general principles of market economics and prefers a world where they hold impartially. It is possible that she could articulate a critique of market competition. She may think that small, local businesses should be favored over large industries and thus be able to give a principled reason for her opposition to, for example, Wal-Mart competing with her. I will discuss the case of principled opposition to laws and policies below.

Other externalities, however, will not garner the hypothetical consent of those they place at risk. Many people in Bangladesh may rationally prefer a world where wide-spread industrialization and greenhouse gas emission did not occur. For the poor who have not seen the benefits of an industrializing world and who are being placed at great risk by climate change it is implausible that they would rationally and with full information consent to being subjected to these environmental externalities.

Common practices in international relations would arguably also fail to satisfy H₁. Thomas Pogge discusses the several privileges which rich countries confer on the dictators of poor countries to ensure strategic allies and a steady supply of resources for the industrialized economies.⁴ Leif Wenar similarly argues that at least part of the “resource curse” is due to the willingness of rich countries to accept resources stolen from a people.⁵

The first way of responding to this challenge to H_1 is to deny that the people affected by the externalities do not give their hypothetical consent. Such a view was articulated by former President George W. Bush, who claimed that the best thing for the poor of the world was to grow the US economy.⁶ This response is highly implausible.⁷

A second response is to deny that consent must be obtained in these cases. Blake argues that it is specifically legal coercion that poses a problem for autonomy. The mere economic interactions that characterize international relations are not sufficient to create any obligation to ensure consent. To the extent that they are voluntary, they may even be presumed to be consensual.

Blake is able to arrive at this conclusion because he is concerned with the problem of political justice. Consent, however, is also something that matters at the level of individual behavior. Even if individuals do not subject each other to legal coercion, they still create risks for each other and cause harms for each other. These risks and harms pose an ethical problem, infringe upon autonomy, and need to be justified even at the individual level. Given any plausible theory of autonomy, we will all violate each other's autonomy unless we can develop a theory of consent that justifies causing the many externalities that we cause.

Might we think that externalities require consent but that, since international treaties and economic arrangements are "voluntarily" entered into by countries that the international system is actually, albeit indirectly, consensual? International agreements are consensual on one level, since there is no world government to compel compliance in quite the same way that the state can compel the compliance of its citizens. This means, however, that attempts to regulate externalities are unlikely to be agreed to. Thus the "voluntary" nature of international relations actually means that in many cases we end up with no agreements, and this state of affairs is not one those who are subject to the externalities can be said to have agreed to.

In situations where changes to the status quo need unanimous approval, each involved party can veto the wishes of all others. In such cases the status quo cannot plausibly be said to be consented to. A failure to change the status quo does not imply endorsement of the status quo.

There are also two reasons for doubting that international relations are in fact consensual even in the above superficial sense. First, many of the agreements involve governments who cannot be said to represent their citizens. These governments often get their support from foreign patrons and so are able to rule despite the will of their peoples. If such governments sign agreements that their foreign patrons desire, it can hardly be said to signal the support of their people for the agreement.

Second, even if governments do represent their people, they may be subject to arms-twisting behind the scene, threats of economic punishment, or other such tactics by countries rich or powerful enough to have sufficient leverage. The "actual" consent here is only illusory.

There are global externalities that will create serious risk for other people, risk that they certainly have not actually consented to and risk that they would not give H_1 consent to. There is also the case of principled opposition which I mentioned above but did not respond to. Unlike the person who violated the law and, for selfish reasons, does not want to be punished, the person who has a principled opposition to the law (and thus avoids special pleading) does seem to be able to withhold her hypothetical consent, which would make punishing her problematic.

Both of these problems suggest that H_1 cannot be a sufficient principle of hypothetical consent. To it I add:

H_2 : An individual hypothetically consents to action X if she rationally prefers a world with the impartial application of X to all relevant subjects and with sufficient regulatory, compensatory, and representative mechanisms to a world without the impartial application of X to all relevant subjects and without these mechanisms.

I include “sufficient regulatory, compensatory, and representative mechanisms” because coercion may be just even in the case of principled objectors. Obviously if a law is unjust, it should be changed. That being said, not every principled objection to the law, not even every well-articulated principled objection to the law will be justified. On H_1 people who make these objections would be coerced without their hypothetical consent. On H_2 people who make these objections are hypothetically consenting, provided that the basic structure of which they are members has adequate regulatory, compensatory, and representative mechanisms.

These mechanisms are important features of the basic structure that enable it to plausibly lay claim to hypothetical consent even in cases where there are principled objections to some policies. First, a just basic structure should adequately and fairly regulate the interactions of its subjects, so that if principled opposition arises we have reason to nonetheless think that the regulatory framework adequately protects the rights of the people it covers.

Second, it should provide compensation where necessary. When the regulative mechanisms allow for people to create risks for one another, they ought to also establish compensatory mechanisms. Thus the business owner should feel justified in undercutting her competitors (despite the harm this is likely to cause them) not just because she does not enjoy unfair legal advantages (per the regulatory condition) but also because the losers of the competition will not be forced into life-threatening destitution. Instead they will be eligible for a social safety net (per the compensatory

condition). Thus provided that the institutions of her society are just, the risks that she creates for others through market competition are not unjust. She can presume even those who are actually harmed hypothetically consent.

Third, there must be sufficient means of representation. If citizens are adequately represented, coercing them (within the bounds of the regulatory mechanism) is on more secure justificatory footing. Representation provides a means for ensuring that the views of people affected by actions can influence the debate about those actions. Being able to have input into a decision is often an important part of giving one's consent to the decision. When there is not adequate representation of the people affected, there are serious doubts (see the discussion of dictators in resource-rich countries above) that the resulting decisions have the consent of the people affected.

Provided that the society's environmental laws are just, for example, the citizen need not worry that the car she drives (which meets the just environmental standards) causes some air pollution which does some harm to her compatriots. She can assume that the regulations in place are adequate to protect her compatriots from serious risk, that mechanisms are in place to compensate those who are harmed, and that all are sufficiently represented in the policy-making process.

Having sufficient regulatory, compensatory, and representative mechanisms in place enable a just society to plausibly claim that even when it has not gotten actual consent for a policy, it plausibly has hypothetical consent and so is justified in coercing even principled opponents of the policy.

At the individual level, a citizen following the legitimate and just laws of government can presume that her compatriots hypothetically consent to her legal actions, even those that harm them and even if some of her compatriots have principled objections to her actions (and the laws that make those actions legal).

Another example is that of taxation. If a legitimate government were to tax a foreign citizen residing in a foreign country, this would be unjust in part because this person cannot be presumed to have consented to be taxed.⁸ If H_2 is right, just governments with adequate regulatory, compensatory, and representative mechanisms ought to have more leeway to restrict the actions of their own citizens than of non-resident foreigners because the former have given hypothetical consent to the arrangement in a way that the latter have not. This holds true even if the citizens are principled opponents of tax.

Provided it is not abused, the H_2 notion of hypothetical consent can justify the government doing things to its own citizens that it could not do to non-resident foreigners, such as taxing, requiring compulsory community service, regulating, and (in some circumstances) drafting.

If H_2 is correct, we can place burdens on those with whom we share a just social structure that we cannot place on those with whom we do not. In terms of externalities, we are justified in

creating risk for those with whom we share a just basic structure, when creating similar levels of risk for those outside the basic structure would be non-consensual and hence unjust.

This implies that the lack of a (just) basic structure creates stricter obligations to avoid creating risk for those outside the basic structure (provided, that is, that these externalities do not meet the conditions for either form of actual consent).

Implications

To sum up so far, then, both our individual actions and the policies of states face a serious moral challenge: these policies seem to regularly infringe on the autonomy of people by creating a non-negligible risk of harming them. For many actions either direct or indirect actual consent from the person put at risk is given and is sufficient to justify the action. Many other actions and policies, such as those involved in market competition and criminal law, will not get the actual consent of the people they put at risk. To justify criminal law and harmful externalities, I drew on Michael Blake's work on hypothetical consent. This I formulated as H_1 . But I argued H_1 was insufficient to deal with principled objectors to the law or to deal with cases where those affected by the externalities could rationally prefer a world where those externalities did not exist.

Either H_1 is too restrictive or, among other things, legal systems are not justified in coercing principled objectors. If it is still justified in infringing on the autonomy of principled opponents of laws, then a different formulation of hypothetical consent must be found. I argued that when the violations of autonomy (either through coercion or externalities) occur entirely within the context of a basic structure that has adequate regulatory, compensatory, and representative mechanisms, then we might plausibly think that the conditions for inferring hypothetical consent have been satisfied. In the case of principled opponents of laws or of externalities that occur within an adequately regulated basic structure with sufficient compensatory and representative features, I argued these conditions will be met.

Obviously cases of international externalities do not occur within a framework governed by regulatory, compensatory, and representative mechanisms. The Bangladeshi might not actually consent to the environmental externalities she will suffer from. She may also not hypothetically consent (H_1) if she would not rationally and with adequate information consent to being subject to the risks caused by an economic system which does not benefit her. Nor would she hypothetically consent (H_2) if these externalities occur in the absence of regulatory, compensatory, and representative frameworks.

H₂ is a rather permissive notion of hypothetical consent since it implies that a lack of special pleading is insufficient to establish hypothetical consent. It is more permissive than the one that Michael Blake uses in his defense of legal coercion, but it still fails to justify many of the economic and externalities that characterize international affairs.

So long as we share a just basic structure with others which regulates our interactions with them, provides compensation for harms that emerge from the system, and enables those affected to get representation in the decision-making process, we can be reasonably sure that our (legal) interactions with them are just. This is a defeasible assumption, to be sure. It does, however, offer a prima facie case for thinking that so long as they are in accordance with the laws and rules of the just society, our actions that affect our compatriots are themselves just, even if these actions risk causing them harm.

In any complex case where interactions go beyond personal relationships, this will be a necessary assumption. When we have numerous distant and complex effects on the lives and life prospects of others, we either must check each one to ensure that it is just, disregard justice entirely, or find a reason to assume that the conditions for just interactions are met.

If we are to justify features of our world in terms of consent, what must we do? If we generated no international externalities that foreseeably created non-negligible risk the issue would be moot. In the world that we inhabit, though, this is not the case. While the regulative, compensatory, and representative mechanisms are parts of the state structure that dominates the world, there are many affects and interactions which are international, not intranational. International agreements, unlike intranational agreements, must get actual, not merely hypothetical, consent to be binding.⁹

A number of our actions will not be able to meet any plausible standards for presuming hypothetical consent. It is implausible, for example, that foreign support for dictators in resource-rich countries plausibly garners the hypothetical support of the people they oppress.¹⁰ It is also implausible that many of the actions by industrialized countries that result in the emission of greenhouse gases into the global atmosphere gets the hypothetical consent of people in non-industrialized countries.¹¹

What can be done when such interactions occur between people who do not share a common basic structure? An obvious response is to cease the actions that fail to garner hypothetical consent. If this is unlikely to occur, then what? A second possibility is to invite the people who were put at risk into a shared basic structure. This will bring risk-generating interactions under sufficient regulative, compensatory, and representative systems.

Being invited into a shared basic structure might be accomplished one of two ways. The first is to create a global democratic basic structure that meets the conditions for being able to infer hypothetical consent.

The second is to allow those put at risk to join the basic structure of those who are causing the profound and foreseeable effects by allowing free migration. Thus, in virtue of emitting greenhouse gases that will profoundly affect the lives of Bangladeshis, the government of Australia would have an obligation to accept Bangladeshi immigrants. In virtue of supporting and have supported President Obiang of Equatorial Guinea, the government of the US would have an obligation to take immigrants (not associated with the human rights violations of the Obiang regime) from Equatorial Guinea.

If you are putting another at risk, you must either cease doing so or must be able to obtain either actual or hypothetical consent from the other. By not ceasing the risk-generating activities and (presumably) failing to obtain either actual or H_1 consent from those in other countries, the remaining route for those who cause international externalities is to either establish international mechanisms sufficient to regulate, compensate, and represent the people affected or to allow the people affected to migrate into the basic structures of those who cause the risk. Since rich countries and the people in them generate far more risk for the people in poor countries than vice versa, this will have the strongest implications for South-North migration. The problem of garnering hypothetical consent for risk-generating activities implies that we may have much stronger obligations to those with whom we do not share a basic structure than with those we do. In a world of risk-generating externalities and no international basic structure, we may have a duty to permit widespread South-North migration.

Notes

¹ There may be several ways of cashing out “non-negligible.” I think that any plausible such way will support the argument I make here.

² Michael Blake, “Distributive Justice, State Coercion, and Autonomy,” *Philosophy and Public Affairs* 30.3 (2001).

³ For similar formulation in terms of exposure to risk on the financial markets, see Klaus Steigleder, “Ethics and Global Finance,” in *The Morality and Global Justice Reader*, edited by Michael Boylan (Boulder, CO: Westview Press, 2011).

⁴ Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002).

⁵ Lief Wenar, “Property Rights and the Resource Curse,” *Philosophy and Public Affairs* 36.1 (2008).

⁶ Stephen Gardiner, “The Ethics of Climate Change,” *Ethics* 114.4 (2004): 587-588.

⁷ Gardiner deals adequately with it.

⁸ That resident non-citizens get taxed but often cannot vote is arguably a problem of justice, but, since they have migrated to the country that is taxing them, they have arguably given hypothetical or indirect actual consent to being thus taxed.

⁹ This is a feature of the international system which makes meaningful action on climate change difficult.

¹⁰ See Lief Wenar, “Property Rights and the Resource Curse,” *Philosophy and Public Affairs* 36.1 (2008): 2-32.

¹¹ See Stephen Gardiner, “The Ethics of Climate Change,” *Ethics* 114.3 (2004): 555-600.

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