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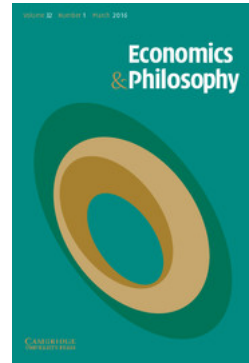
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# CHOICE, CONSENT, AND THE LEGITIMACY OF MARKET TRANSACTIONS

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According to an often repeated definition, economics is the science of individual choices and their consequences. The emphasis on choice is often used – implicitly or explicitly – to mark a contrast between markets and the state: While the price mechanism in well-functioning markets preserves freedom of choice and still efficiently coordinates individual actions, the state has to rely to some degree on coercion to coordinate individual actions. Since coercion should not be used arbitrarily, coordination by the state needs to be legitimized by the consent of its citizens. The emphasis in economic theory on freedom of choice in the market sphere suggests that legitimization in the market sphere is “automatic” and that markets can thus avoid the typical legitimization problem of the state. In this paper, I shall question the alleged dichotomy between legitimization in the market and in the state. I shall argue that it is the result of a conflation of choice and consent in economics and show how an independent concept of consent makes the need for legitimization of market transactions visible.

## 1. INTRODUCTION

Fundamentally, there are only two ways of coordinating the economic activities of millions. One is central direction involving the use of coercion – the technique of the army and of the modern totalitarian state. The other is voluntary cooperation of individuals – the technique of the market place.

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The possibility of coordination through voluntary cooperation rests on the elementary – yet frequently denied – proposition that both parties to an economic transition benefit from it, provided the transaction is *bi-laterally voluntary and informed*. (Friedman 1962: 13)

The price system is, and ought to be, a method of coercion. (Samuelson 1966: 1415)

In the passage from *Capitalism and Freedom* just quoted, Milton Friedman expresses a perspective that is widely shared among economists today. It contrasts freedom of choice in the market sphere with coordination by means of coercion in the state. Paul Samuelson, in an essay written at around the same time, defends a contrary view: The market mechanism, too, relies on coercion. The two quotations mark a watershed in economic thought. The insight expressed by Samuelson was common among marginal-utility theorists. They saw coercion as an inevitable consequence of the price system's purpose to convey the scarcity of resources and to direct them to their most beneficial use.

The puzzle over the conflicting viewpoints expressed by Friedman and Samuelson in the quotations above hinges on the weights attached to the two fundamental categories of rational choice theory. Economic theory explains individual actions as resulting from a choice from a given set of alternatives under the assumption that individuals choose the alternative that maximizes their preferences. If the focus is on individual choice and preferences, one gets Friedman's view. If the price mechanism is represented from the angle of the constraints it sets and the influence it thereby exercises on individual actions, one gets Samuelson's view.

Under the influence of Friedman and George Stigler, freedom of choice has become the "leitmotiv" of economic thinking and the potentially coercive aspects of market relations got neglected.<sup>1</sup> One does not have to go the other extreme and regard all individual action as the result of coercion to see that the picture Friedman paints may be overly cheerful. Take, for example, the much discussed case of people living in poverty, offering their organs for sale. Or consider the outrage provoked by a memo from Larry Summers (then World Bank chief economist) that explored the idea of exporting pollution from rich countries of the North to poor countries in the South (*The Economist*, February 8, 1992: 66). A third example is provided by the choices many women face when trying to combine family work with the demands of the labor market. The three examples

<sup>1</sup> On this development, see Samuels (1997). Samuels, like the early marginal utility theorists, highlights the inevitability of coercion: "Individuals exercise choice (and attempt to maximize utility) within their respective opportunity sets; the substance and scope of each one's opportunity set is a function of coercion" (145). If I speak of contemporary economic theory, I have in mind the Chicago-fed mainstream and do not mean to speak for all of economics. Folbre (1994) offers a framework to analyze what she calls "the social structure of constraints".

give rise to qualms about calling the choices in question entirely free. Note that the problem is not that these cases involve no choice; they are not instances of downright exercise of force. But they draw attention to the fact that instances of significantly constrained volition are common in economic life and prompt the intuition that constraints may matter in the analysis of individual actions.

How economic theory weighs choices and constraints matters for explanatory purposes. It also influences the normative interpretation of what is going on in the market sphere – and it is this latter dimension that I want to discuss in this paper. Quite some mileage can be gained from bracketing the analysis and evaluation of the constraints people face: From the angle of freedom of choice, as is evident in the passage from Friedman (1962) quoted above, markets appear less problem-stricken than the state. While the state has to rely, at least to some degree, on coercion to coordinate individual actions, markets appear to achieve this entirely without force. And while democratic states need the approval of the citizens for using coercion, it seems as if markets could do without the typical problem of legitimization that the state has to face. Seen from this angle, markets appear not only as mechanisms that efficiently allocate resources, but – beyond that – as systems that automatically legitimize themselves.

I shall argue that the apparent automatic legitimization of market transactions is the result of a conflation between choice and consent in economic theory. Consent is a moral notion, related to acting rightly. In interpersonal interactions, the consent of a person affected by an action gives other persons the permission to act in this way.<sup>2</sup> The consent of a patient to a risky medical treatment is an example. In the context of social, political, and economic institutions, on which I shall focus in this paper, the consent of those affected by these institutions establishes their legitimacy.

Consent has legitimizing force only if coercion is absent – if there is coercion, meaningful consent is precarious and dissent should be expected. I shall argue that the possibility of choosing between different alternatives does not, by itself, guarantee absence of coercion in such a way that the choices made could be read as acts of consent. By the same token, a concept of consent that does not collapse into choice accommodates the possibility of choice without consent and opens up space to address the particular problems of legitimization that interactions in the market face. It helps us to see that the fact that people choose to sell their organs does not imply

<sup>2</sup> Plamenatz (1938), an influential (if controversial) British political philosopher gives a helpful definition: “A man’s consent is always to the action or actions of another man or men. It involves on his part the expression of a wish that another or others should perform or abstain from a certain action or actions. . . . We have consent . . . whenever the right of one man to act in a certain way is conditional upon another man’s having expressed the wish that he should act in that way” (3–4). “The giving of consent,” he adds, “is essentially the granting of *permission*” (6–7).

that they have consented to the institutional arrangements that confront them with such alternatives or that a woman who gets married may not have consented to the gender relations on which the institution of marriage is based.

My goal in this paper is to question the alleged dichotomy between, on the one hand, freedom of choice and markets and, on the other, coercion and the state and to show how market transactions do not legitimize themselves. The conclusion I will draw from my argument is that to evaluate the legitimacy of market transactions, the constraints under which people choose will have to be taken into account and the analysis of the choices people make given these constraints will not suffice. If this is correct, it follows that the distinction between choice and consent provides the basis for an alternative theory of social evaluation.

I shall start with a critical analysis of the choice-based view of consent (section 2). The sections that follow explore, in a more constructive fashion, how consent could be conceived of as separate from choice (section 3) and the implications of such a notion of consent for frameworks of social evaluation of alternative institutional arrangements (section 4). Section 5 concludes.

## 2. THE PROBLEM WITH THE CHOICE-BASED VIEW OF CONSENT

Although the importance of consent can be traced back very far in the history of philosophy, it began to play a major role in the contractarian tradition in moral and political philosophy that started with Hobbes, Locke, Rousseau and Kant. Not least because of this tradition's lasting influence on contemporary philosophy, consent is seen as a fundamental principle both of moral action and of political legitimacy. The role of consent in moral philosophy is most evident in Kantian ethics. According to Kant's "end-in-itself" formula, moral conduct should follow maxims that ensure that a person is never treated merely as a means but always also as an end in itself.<sup>3</sup> One violates this requirement whenever one acts without seeking the consent of persons affected by the action, or when one pursues ends the affected person does not share, as is the case when duress is involved or if an action is fraudulent.

The role consent plays for the transfer of political legitimacy – which is the context this paper focuses on – derives from this ethical justification. It can best be illustrated with contemporary political philosophies that derive from Kant. As is well known, John Rawls' theory of justice as fairness (Rawls 1971) demands that society's basic institutions be regulated

<sup>3</sup> The formula goes: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Kant 1964: 96). O'Neill (1985: 105ff.) explores the consequences of this formula for the requirement of consent.

according to those general principles that free and equal citizens can all consent to. Consent is no less important in Jürgen Habermas' ethics of discourse (Habermas 1993), where it is required that everybody affected can consent to a principle of action, given an ideal discourse situation.

In economic arguments, the relation between consent and legitimacy is sometimes explicitly invoked but is more often implicitly present. The notion of consent that comes into play stands in some contrast to the ideal theories developed by Rawls and Habermas, however, as the tendency is to simply read people's choices as acts of consent. A clear expression of such a choice-based notion of consent can be found in Richard Posner's work on law and economics (1981):

The version of consent used here is *ex ante* compensation. It is my contention that a person who buys a lottery ticket and then loses the lottery has 'consented' to the loss so long as there is no question of fraud or duress.<sup>4</sup> (94)

Posner thus assumes that the choice situation fully describes all the features of a proposal that may need justification through consent. The notion that choice expresses consent is symptomatic, however, for any theory that confines all evaluation to a single value function, as it is the case with rational choice theory. Since utility depends on the alternatives that can be obtained, the evaluative exercise is exhausted by a choice from a given set of alternatives. In other words, since there is no basis for any other form of evaluation, a choice that does not involve duress or fraud is thus read as an act of consent.

Posner recognizes that if somebody is subject to duress – as in the classic example of robbery at gunpoint – choice is not free and can thus not express consent. To use Albert Hirschman's language, this is the case when the exit option is foreclosed.<sup>5</sup> If a proposal is fraudulent, the chooser is misled about the alternatives from which she believes she is making a choice and can thus not express meaningful consent. Absent these two limiting cases, however, all choices are assumed to express consent.

Posner is prepared to go even further by arguing that whenever actual choices cannot be observed, consent should be derived from past choices, as, for example, by calculating surpluses from existing demand and supply functions. He writes:

My analysis may be questioned on the ground that the consent on which I am prepared . . . to justify institutions . . . is fictitious because it is not express. But this objection founders precisely on the unavailability of a practical

<sup>4</sup> Another instance of explicit use of this concept of consent is Buchanan and Tullock's *The Calculus of Consent* (1962). For an original critique of Posner's notion of consent, see West (1985).

<sup>5</sup> According to Hirschman (1970), the "exit option" makes "some customers stop buying the firm's products or some members leave the organization" (4).

method for eliciting express consent, not so much to individual market transactions... as to *institutions*, such as the negligence system or indeed the market itself. If there is no reliable mechanism for eliciting express consent, it follows not that we must abandon the principle of consent but that we should be satisfied with implied (or more precisely, perhaps, hypothetical) consent where it exists. (1981: 96)

For Posner, as can also be inferred from the passage just quoted, a conception that derives consent from choice – whether actual or past – can be applied to legitimize not just individual market transactions, but the institutional constraints under which people choose and in which individual market transactions take place.

For non-Posnerians, this should seem rather odd. Since the preferences on which choice is based are restricted to an evaluation of the alternatives in the feasible set and do not say anything about the goodness or badness of the conditions under which one chooses, it takes quite a leap to derive consent to the institutional features which shape the set of alternatives from a choice between these alternatives.<sup>6</sup>

Tibor Scitovsky draws attention to the gap between these two aspects of evaluation by distinguishing between the freedom to choose among alternatives in a given set and consumer's sovereignty – the chooser's ability to influence what is in the set:

Among the reasons for the economist's refusal to probe into consumers' motivation was his belief that every consumer is his own master, free to follow his personal tastes and inclinations independently of other consumers' tastes and inclinations.... That belief, known as the doctrine of consumer sovereignty, is a gross oversimplification.... People exercise freedom of choice whenever they use money to pay for goods and services and are free to decide what to pay and in what quantities. That freedom must not be confused with consumer sovereignty. The consumer is sovereign insofar as his choices influence the nature and quantity of the goods and services produced. (1976: 7f)

The simplification Scitovsky criticizes has the same origin as the conflation between choice among given alternatives and consent to the institutional features that give rise to a set of feasible alternatives. The fact that one makes a choice between given alternatives does not mean that one has consented to the constraints that shape the set of alternatives, nor, for that matter, that one has had the possibility to express one's consent or dissent in the first place. To read the choices people make as acts of consent is thus wrong, as it fallaciously subsumes the evaluation of the constraints which

<sup>6</sup> On the gap between these two targets of evaluation – (i) the alternatives in the set and (ii) the conditions which frame the set – see also Dan-Cohen (1992). Anderson (1993), in an argument that is related to the one presented in this paper, identifies in Posner's notion of consent an "equivocation between two different notions of acceptance" (201).

shape the set from which a choice is to be made under the evaluation of the alternatives from which one can choose.

How does one get to a notion of consent as equal to choice? The answer, I contend, lies in the weight economic theory assigns to freedom of choice.<sup>7</sup> The importance attributed to freedom of choice can be traced to two different origins, one stressing the instrumental value of freedom of choice and the other its intrinsic value. The first is the utilitarian tradition that exerts a lasting influence on economic theory in the reduced form of welfarism (Sen 1979). If welfarism is combined with a subjective theory of value, it elevates individual choices and preferences to the sole criterion for the evaluation of social states. Freedom of choice is then instrumentally necessary for people to get what they want. The second justification for the importance of freedom of choice in contemporary economic theory springs from libertarianism. Libertarian political philosophy values freedom, understood negatively as the protection from interference by others, above everything else. Friedman's position, for example, is libertarian.<sup>8</sup>

The tendency in economic theory to put the spotlight on people's choices and to leave the analysis of constraints in the dark elevates the freedom to choose between given alternatives to freedom *tout court* and thus elevates choices to consent.

### 3. CONSENT AS DISTINCT FROM CHOICE

Given that the evaluation of the legitimacy of market transactions involves two steps – assuring that there is no coercion and assuring that there is consent – the plausibility of the claim that consent should be treated as separate from choice hinges on the plausibility of theories of freedom, voluntariness and coercion that are more comprehensive than those implied by freedom of choice as emphasized in economic theory. Only if the possibility is granted that being free to choose from a given set of alternatives is compatible with coercion and with violations of other aspects of freedom and of voluntariness is it conceivable that consent is different from choice. In putting forward such accounts, I shall proceed as follows in this section. First, I will discuss different strategies to go beyond the choice-based view of consent that I regard as failed. On the basis of this discussion I shall, secondly, argue for a broadly Rawlsian

<sup>7</sup> To be more precise, the answer lies in the theory of freedom that underlies this emphasis on freedom of choice. Pettit (2001) calls the theory of freedom implied in this account "freedom as rational control." According to this theory, agents are free as long as "they operate properly as intentional subjects: that is, as subjects of intentional states like belief and desires" (35). On freedom as control, see also Sen (1982) and for an analysis of the role of different types of freedom in the evaluation of market arrangements, see Sen (1993).

<sup>8</sup> Nozick (1974) presents perhaps the most comprehensive libertarian framework.



theory of voluntariness and coercion that provides the backdrop against which consent can be distinguished from choice.

A first strategy to escape the narrow choice-based notion of consent could be to demand that choice be extended to the constraints themselves.<sup>9</sup> Consent would then mean that one has – or would have – chosen the constraint one faces. Similarly, coercion has to be expected whenever there is no possibility to choose the constraints. The obvious problem with this solution is that since one can almost always imagine a better deal for oneself, dissent (one did not or would not have chosen the constraints) and coercion (one did not have the possibility to choose the constraints) become vacuous concepts. Consequently, the legitimizing force of consent and the legitimacy-threatening force of dissent get lost. It seems that mere preferences among alternative constraints cannot ground obligations to others. Extending the choice-based notion of consent to include the evaluation of constraints is thus not an attractive solution and it is necessary to develop notions of coercion and of consent and dissent that have more bite.

Let me start with a discussion of coercion. Robert Nozick (1969, 1974) distinguishes between “threats” and “offers,” where threats are coercive and offers are not. According to Nozick, an offer expands the person’s possibilities of action or choice, while threats reduce them. While this distinction is certainly helpful, it needs a well-defined baseline that separates threats from offers in order to be operational.

The vast literature in philosophy of law and political philosophy on coercion is divided into two camps on the question of how to define the baseline between threats and offers. In the first camp are those who defend a *moralized* theory of coercion – the theories are called “moralized” because they define coercion (and its correlate, voluntariness) in terms of moral notions such as rights, freedom, or related concepts. In the second camp are those who argue for *non-moralized* accounts of coercion and voluntariness. The basic idea there is that the claim that one has been coerced or has acted non-voluntarily should be understood on its own terms, not simply because there has been some underlying violation of rights or freedom. Instead of referring to moral concepts, non-moralized theories establish the baseline between threats and offers on the basis of the quality of alternatives.<sup>10</sup>

Nozick’s own theory of coercion, which uses rights as the baseline, is a moralized theory. According to Nozick (1974),

<sup>9</sup> Such a strategy could be deduced from Scitovsky’s notion of consumer sovereignty quoted above. I am not, however, attributing this view to Scitovsky himself.

<sup>10</sup> For good discussions of the literature on coercion, see Wertheimer (1987) and Trebilcock (1993).

whether a person's actions are voluntary depends on what it is that limits his alternatives... Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends on whether these others had the right to act as they did. (262)

In other words, the baseline depends on how the constraints a chooser faces have emerged. As long as these constraints are the result of others exercising their rights, Nozick argues, freedom is not undermined, actions are voluntary, and the constraints are thus non-coercive. We are dealing with offers, which can be accepted or rejected.

A first problem with Nozick's theory of coercion is that it is circular. It follows from his theory of coercion that as long as everybody acts within their respective rights, acceptance of an offer is read as consent and rejection as dissent. But since at the same time Nozick defines legitimate constraints in terms of rights, dissent cannot undermine the legitimacy of a particular rights system. The upshot of Nozick's theory is that what is legitimate is what is right and what is right is what is legitimate (Wertheimer 1987).

In addition, Nozick's account is based on a rather odd interpretation of what voluntariness is about – instead of focusing on the affected person, it looks at the rights of those whose actions affect the person (Wertheimer 1987; Olsaretti 1998). Nozick's rights-based theory of coercion avoids the problem noted earlier with extending freedom of choice to the constraints, but it does so by going to the other extreme. Under the extended choice-based view of freedom, a person has the power to make infinite coercion claims on the grounds that she has not had the possibility to choose the constraints. In Nozick's theory of coercion, based on a conception of freedom as non-interference, she has no such powers. Only the rights of others matter in evaluating coercion claims; the affected person's judgment has no weight in itself.

It has been argued that any moralized theory of coercion misses the particular force of coercion claims. David Zimmerman (1981) and Serena Olsaretti (1998), among others in the second camp in the literature on coercion, argue that if being coerced is nothing but a violation of rights or freedom or some other moral concept, there is no need to talk about coercion; talk about the underlying moral concepts will exhaust the issue, and to Zimmerman and Olsaretti this seems mistaken. The theories they put forward define coercion with regard to the quality of the proposals, the leading question being whether it contains acceptable alternatives or not.<sup>11</sup> Olsaretti (1998: 65–6) argues, against Nozick, that “freedom and voluntariness are not necessarily related” and that non-coercion in the sense of absence of freedom does not automatically guarantee

<sup>11</sup> See MacPherson (1973), Zimmerman (1981), Olsaretti (1998) and the literature cited there.

voluntariness. She thus defends a theory of voluntariness that, according to her, does not rely on a theory of freedom. According to Olsaretti (1998: 71), “a choice is voluntary if and only if *it is not made because there is no acceptable alternative to it.*” If there is not at least one alternative of a sufficient quality, the situation is coercive.

Zimmerman (1981) recommends a thought experiment to determine whether the quality of alternatives is acceptable. He starts from Nozick’s distinction between threats and offers, but adds to this pair a third category – that of “coercive offers.” To separate genuine offers from coercive offers, he suggests a comparison between two situations. One is the actual status quo, i.e. the situation that can be expected without the proposal in question. The second is a counterfactual pre-proposal situation. According to Zimmerman,

an offer is coercive only if [a person] Q would prefer to move from the normally expected pre-proposal situation to the proposal situation, *but he would strongly prefer even more to move from the actual pre-proposal situation to some alternative pre-proposal situation.* (1981: 132)

I agree with Olsaretti and Zimmerman that the quality of the alternatives matters for the evaluation of coercion. The reason is that a theory that attributes legitimizing force to consent cannot bracket the question of whether the nature of the constraints a person faces give her a real possibility to express consent or dissent. Nozick’s libertarian framework fails on this account because it only considers the actions of others, not the evaluation of the situation of the person whose consent is in question. In Nozick’s theory, any situation that does not involve a violation of right is by definition legitimate – there is no coercion and, therefore, the situation could only have come about through consensual interactions. This leaves no room for questioning the legitimacy of social arrangements as long as they have legal backing.

I am not convinced, however, about the non-moral quality of coercion claims. How should one go about the assessment of the quality of alternatives without any reference to moral concepts? The evaluation of the quality of the alternatives has to include the evaluation of the nature of the constraints which bring about the set of alternatives in question. David Zimmerman’s recommendation, in particular, for how to go about the evaluation of the quality of alternatives makes this clear. The counterfactual pre-proposal situation he invokes is nothing but a situation ruled by alternative, counterfactual constraints. As argued above, statements of the kind “I do not like these constraints” are unlikely to convince anybody and, if taken to be the basis of coercion claims, will lead to a vacuous conception of coercion. For this reason, the evaluation of the constraints people face will have to be expressed in terms of arguments that others can potentially endorse. This makes the evaluation of the constraints

dependent on moral concepts. Any politically plausible claim that a proposal includes inadequate alternatives will involve considerations of freedom, rights, equality, or justice at some stage.<sup>12</sup> The contrast between moralized and non-moralized theories of coercion thus seems too stark.

Contrary to what Zimmerman and Olsaretti claim, the failure to take the quality of alternatives into account is peculiar to Nozick's theory, not to moralized theories of coercion or voluntariness in general.<sup>13</sup> How can this problem be solved within a moralized theory of coercion? In my view, it disappears from the angle of the Kantian tradition of contractualism (Rawls 1971, 1993; Scanlon 1988, 1998).<sup>14</sup> This tradition invokes a different theory of freedom than libertarianism and is based on correspondingly different conceptions of voluntariness and coercion than the ones put forward by Nozick. John Rawls recognizes that equal formal liberty is compatible with "the worth – or usefulness – of liberty . . . not [being] the same for everyone" (Rawls 1993: 326) due to inequalities in external or internal resources. Rawls's emphasis on the worth of liberty as the appropriate focal point of a theory of justice attunes the Rawlsian version of contractualism to differences in the quality of alternatives, as the worth to people of their liberty depends on the constraints they are facing.<sup>15</sup>

The theories of coercion and voluntariness that underlie Rawls' theory of justice are moralized theories – they are linked to his conception of justice and thus to equal liberty. True to the social contract tradition, Rawls takes as his starting-point the position that consent to certain institutions establishes their legitimacy. He specifies, however, that consent is valid only if given under certain conditions. This requirement is formulated in his principle of fairness, which states that voluntary acts give rise to

<sup>12</sup> One could, of course, make a psychological – rather than a political – argument about coercion and voluntariness, but that would not be of much help in the attempt of defining a concept of coercion that is applicable to issues of political legitimacy. For a theory of freedom that accommodates both the sense of voluntariness (free will) and of political liberty that is neither Nozickian nor burdened with psychology, see Pettit (2001).

<sup>13</sup> In a context related to this essay, Riley (1982) argues that this failure is not specific to Nozick but is characteristic of much of the social contract tradition. He argues that while Hobbes, Locke, Rousseau and Kant all agreed on the importance of consent, only Kant was able to provide a theory that can explain the moral and legitimizing force of consent. The problem with Nozick's account and others in the tradition he draws from is that while freedom is the primary value, the possibility of underdetermined action is not theoretically anchored (Riley 1982: 12).

<sup>14</sup> For an excellent discussion of the implications of Kantian ethics for interpersonal interactions, see O'Neill (1985).

<sup>15</sup> Rawls (1971) writes: "The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty . . . . [T]he basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice" (204–5).

obligations only if the background conditions are just (Rawls 1971: 112).<sup>16</sup> Voluntariness in the context of the justification of institutions, for Rawls, depends on one's ability to act according to principles one endorses.<sup>17</sup> Under unjust conditions, the worth of people's liberty is insufficient, which is bad both in its own right and because it undermines their possibility to effectively express consent or dissent to the institutions under which they live – they will be excluded from the process of public justification of institutional arrangements.

It follows that in a Rawlsian theory of coercion, the baseline between threats and offers that distinguishes between coercion and voluntary acts hinges on the worth of people's freedom and on justice. It is erected on a more comprehensive basis than just negative rights, as in Nozick's theory, because it demands justification of the constraints people face in terms of justice. Coercion that is significant for political legitimacy occurs, therefore, when the constraints are such that one cannot act from principles one can endorse and when there is no justification – substantive or procedural – for these constraints that one can accept. This is the case, for example, if one is pushed into unfavorable working conditions for no reason other than discrimination. There is no coercion, however, if one does not agree with a labor law that is designed to ensure equal opportunities for members from different social groups, but accepts the procedure through which the law has been passed.<sup>18</sup>

The implications of such a Rawlsian theory of voluntariness and coercion for a conception of consent that does not collapse into choice are now obvious. Because it draws attention to the background conditions people face, we may call the resulting notion of consent *background-sensitive*. The choice-based conception adopted in economics distinguishes between threats and offers depending on whether or not "exit" is possible. As long as the exit option is given, every market offer (that is not fraudulent) is seen as adding an alternative to the set from which the person can choose and thus represents a genuine offer in Nozick's sense. I

<sup>16</sup> Rawls (1993) writes: "Suppose we begin with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at and fully honored. Straight away we need an account of when agreements are free and the social circumstances under which they are reached are fair . . . The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place" (265–6). I thank Thomas Pogge for drawing my attention to this passage.

<sup>17</sup> See Rawls (1971: 516).

<sup>18</sup> Wertheimer (1987) defends a similar theory of coercion. He writes: "We can probably do without the explicitly Rawlsian perspective, but the argument will be that one acts voluntarily when one acts (or should act) from certain motives or that one acts when the factors that define one's choice situation stand in a certain relation to the principles that one does (or should) accept" (301).

have criticized this solution for not saying anything about the quality of the exit option and not including an independent evaluation of the constraints people face.<sup>19</sup>

From a Rawlsian perspective, consent transfers legitimacy to social institutions only if certain background conditions are in place that assure that there is no coercion.<sup>20</sup> People's choices among alternatives in a given set reveal nothing of their evaluation of the constraints under which they choose. We do not know, therefore, whether there is consent to or dissent from these constraints from observing people's choices.<sup>21</sup> If there is a possibility of coercion as defined above, rather than inferring consent from the choices a person makes, one should expect (latent) dissent.

There is a further characteristic of a Rawlsian theory of coercion that needs to be emphasized. Nozick's theory is based on a notion of freedom as non-interference by other agents. In the theory of coercion just presented, it is not necessary that there be intentional agency – the state or other persons – that limits one's actions.<sup>22</sup> This is important as in market interactions, it is what Nancy Folbre (1994) calls *the social structures of constraints* that delimit prominently the domain of possible individual actions. Among the factors that determine social structures, Folbre subsumes endowments of material and immaterial resources, rules and social norms that influence these endowments, as well as endogenous preferences. Folbre develops the concept of social structures of constraint to correct for the bias in economic analysis toward choice. Her argument is that because choice is often significantly limited, the focus should shift from the analysis of people's choices to the analysis of the constraints under which people act.<sup>23</sup>

<sup>19</sup> For an argument against the exit condition along these lines, see Fried (2003).

<sup>20</sup> Compare with Rawls (1971):

obligations arise only if certain background conditions are satisfied. Acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations. It is generally agreed that extorted promises are void *ab initio*. But similarly, unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind. (343)

The passage hinges on a distinction between express consent and morally valid consent that is similar to the distinction made in this paper between choice and consent.

<sup>21</sup> In this spirit, Thomas Scanlon (1988) argues – contra Nozick – that “[t]he background conditions under which choices are made in a laissez-faire system are ‘arbitrary from a moral point of view’ in this sense: they could be almost anything . . . . Consequently, there is no assurance that these conditions will have the moral property of being conditions under which choices confer legitimacy on their outcomes” (186).

<sup>22</sup> Rawls (1993: 266–7) emphasizes that background justice can be undermined even if nobody intentionally acts unfairly.

<sup>23</sup> She writes (Folbre 1994): “Choice . . . is limited. A theory of social structure is key to any conceptualization of the context in which choice takes place. Precisely because we might like to choose a world without sexism or racism but find we cannot, our attention shifts to considerations of the ways in which other people's choices limit our own” (29).

In the next section I shall argue that the Rawlsian account presented here mirrors such a shift of focus: The distinction between choice and consent demands that social evaluation should not be based exclusively on choices but make room for the justification of the constraints under which people choose.

#### 4. SOCIAL EVALUATION BETWEEN CONSENT AND DISSENT

The foregoing analysis has revealed how dissent from social arrangements may be present in ways that cannot be captured by the categories of choice and exit used in economic theory. Since exit is the only form of dissent contemporary economics recognizes, it fails to register cases of latent dissent, thus assuming too readily the legitimacy of market transactions. The remaining piece of the argument is to outline a framework that elucidates the significance of individual consent and dissent for the evaluation of alternative institutional arrangements. I would like to approach this issue indirectly, by exploring first the consequences of the approach presented here for the Pareto criterion – the principal criterion for social evaluation in economics.

Following the Pareto criterion, a social arrangement A is better than an arrangement B if at least one person prefers A to B while everybody else is indifferent between the two. The Pareto principle can be read to suggest unanimous consent that A is better than B. Posner (1981: 88), for example, suggests that “consent... is the operational basis of Pareto superiority.”<sup>24</sup> As such, it appears to be an uncontroversial criterion for social evaluation. If, however, a notion of consent is plausible that does not collapse into choice and which cannot be read off preferences among available alternatives, then the cutting power of the Pareto argument is weakened considerably. A gap opens between individual choices and the legitimization of the social structures of constraint. A notion of consent as separate from choice thus requires supplementing evaluation based on (market) choices, given certain social structures of constraint, with an evaluation of these constraints themselves.

Social evaluation based on a background-sensitive notion of consent overcomes the status quo bias of Pareto evaluation. For, their importance and pervasiveness notwithstanding, social structures of constraint do not have the character of natural laws; they have developed over time and are subject to ongoing transformation. There is thus scope at any particular time to question their appropriateness and to aim at transformation. Dissent to these structures should provide the incentive as well as,

<sup>24</sup> See also Buchanan and Tullock (1962) for an influential argument on the relation between the Pareto principle and unanimity, based on Wicksell (1967).



through collective action organized around such dissent, the engine for such evaluation and transformation.<sup>25</sup>

While “exit” is one way of expressing one’s dissent, the possibility of there being forms of dissent not expressed through exit demands that the standing of “voice” be strengthened in frameworks of social evaluation. Hirschman (1970: 30) defines the voice option as “any attempt at all to change, rather than to escape from, an objectionable state of affairs.” Since the genuine possibility of exit from unacceptable social structures of constraint cannot always be guaranteed – even less simply be assumed – exit is an unreliable indicator of dissent and needs to be supplemented by voice.

The importance of voice for the legitimacy of social structures of constraint privileges democratic deliberation over evaluation as contained in market processes. As argued above, people’s choices should not be expected to express consent whenever the social structures of constraint are such that they hinder people from acting according to principles that they endorse without there being a justification – substantive or procedural – for these constraints that they can accept. In democratic deliberation, the reasons people dissent from social structures of constraint are evaluated and weighted. While it will not be possible to discuss the notion of deliberative democratic evaluation in sufficient detail, let me discuss a few aspects that are pertinent to the topic of this paper.

Above all, it is the impossibility of making one’s dissent heard – when neither exit nor voice is available – that threatens the legitimacy of social arrangements, including arrangements of economic life.<sup>26</sup> Social evaluation thus needs to shift emphasis from the choices people make to the question of whether there is any possibility at all of expressing their dissent. For, quite obviously, not just the possibilities of exit but also the possibilities of using voice effectively are distributed highly unequally in society. Ensuring the possibilities of expressing dissent points to the

<sup>25</sup> I am not suggesting that social structures of constraint are always easy to change. Quite the opposite is probably true; these structures often appear self-evident and are thus not questioned. Bourdieu (1977) calls this phenomenon “doxa.” “When there is a quasi-perfect correspondence between the objective order and the subjective principles of organization . . . the natural and social world appears as self-evident. This experience we shall call *doxa*, so as to distinguish it from orthodox or heterodox belief implying awareness and recognition of the possibility of different or antagonistic beliefs” (164). Agarwal (1997), extending the bargaining model of the family to include bargaining over social norms, identifies the questioning of self-evident norms as a key target of women’s movements. On dissent as an engine for institutional change, see also Levi (1990).

<sup>26</sup> This is compatible with Cavell’s reading of consent (Cavell 1990: ch. 3). Cavell criticizes Rawls for neglecting the distinction between withdrawal of consent of those already “in the conversation” – recognized members of the collective in question – and those who are left out, like Ibsen’s Nora. On the relevance of Cavell’s argument for issues of political voice, see Owen (1999).



importance of justice in social evaluation. The possibility of using voice, to which the account presented here assigns priority, is covered by Rawls' first principle of justice. Among a variety of rights and liberties, it demands inclusion in processes of democratic decision-making.<sup>27</sup> When both exit and voice come into play, social evaluation will be a combination of Pareto comparisons based on choice and exit and voice-based democratic deliberation.

There is, however, a difficulty that accompanies a shift in emphasis from choice to consent and from exit to voice. Part of the attractiveness of a choice-based notion of consent and its counterpart – exit as the only acceptable form of dissent – is that it tolerates conflicting evaluations. If two persons get a job offer, they can each either accept or reject it. With a broader notion of consent and a correspondingly greater emphasis on voice, the question needs to be addressed what will happen if what would attract the consent of some invites dissent from others. What will happen if one person thinks that the social structures of constraint that shape a given job offer are unfair, while the other person has no objections?

In addressing this problem, it needs to be emphasized, first, that making such conflicts visible is part of the purpose of a conception that separates choice and consent. It unmask the apparent legitimization through choice. In the above example, it draws attention to the fact that even if both accept the job offer, this need not mean that they accept the social structures of constraint that underlie the job offer. If separating choice and consent makes the legitimization of social structures of constraint more precarious, this need not be seen as a shortcoming of such a conception of consent, but as a strength.

The question remains whether shifting emphasis from exit to voice implies shifting from Pareto unanimity to unanimity in the realm of voice and democratic decision-making. Certainly, as long as there is dissent and no acceptable justification for the factors that constrain people's choices in democratic forums is available, the legitimacy of social arrangements is jeopardized – this speaks for unanimity. What speaks against it is, very simply, that it will hardly be available. But if unanimity in this full sense, i.e. unanimity about the principles that should rule the social structures of constraint is not available, unanimity in the narrower sense, i.e. the unanimity suggested by Pareto evaluations, is fictitious too. This only highlights the importance of a sustained possibility to express dissent and thus leads back to the importance of consent in the broad sense advocated here for the legitimacy of social arrangements.

<sup>27</sup> In Peter (2001) I have tried to work out the relation between Rawlsian justice and deliberative democracy.

## 5. CONCLUDING REMARKS

In this paper, I have argued against a tendency in contemporary economic theory to conflate people's choices with their consent to the social structures of constraints that shape the set of feasible alternatives. To avoid misunderstandings, let me clarify what I have not been arguing. I have not been arguing that individual choices should not matter at all in the evaluation of economic transactions and social arrangements, only that they should not be taken at face value as legitimizing these transactions and arrangements, independently of an evaluation of the constraints imposed on people. Nor has it been my point that we have to view all market choices as coercive in a morally significant way. The argument made in this paper only implies that the market mechanism may have coercive effects that will need justification. Finally, I have not been arguing that the Pareto criterion cannot be used for purposes of efficiency evaluation but that the efficiency of economic and social arrangements will have to be weighed against other considerations as they arise when people voice dissent with prevailing arrangements.

Keeping choice and consent separate forms the basis for developing a theory of social evaluation that differs significantly from the standard approach in contemporary economics. Because of its emphasis on democratic participation, the approach presented also parts ways with approaches based on objective needs that are sometimes put forward as alternatives to the economic approach.<sup>28</sup> If the distinction between choice and consent is accepted, approaches to the evaluation of social arrangements will have to open up to a variety of forums in which people voice their dissent with prevailing social structures of constraint in ways other than through exit. Dissent forms the motor of social evaluation through democratic processes. The institutions of economic life are as much subject to this process of evaluation as any other institutions.

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<sup>28</sup> For a recent attempt, see Nussbaum (2000). Admittedly, because Nussbaum's proposal is based on the capabilities approach, she avoids many of the standard objections against the evaluation of social arrangements in terms of objective frameworks of people's needs.

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