

## The Hypothetical Consent Objection to Anti-Natalism<sup>1</sup>

### Abstract:

A very common but untested assumption is that potential children would consent to be exposed to the harms of existence in order to experience its benefits (if it were possible for us to ask and for them to respond). And so, would-be parents might appeal to the following view: Procreation is all-things-considered permissible, as it is morally acceptable for one to knowingly harm an unconsenting patient if one has good reasons for assuming her *hypothetical consent*—and procreators can indeed reasonably rely on some notion of hypothetical consent. I argue that this view is in error. My argument appeals to a consent-based version of anti-natalism advanced by Seana Valentine Shiffrin. Anti-natalism is the view that it is (almost) always wrong to bring people (and perhaps all sentient beings) into existence. While, like Shiffrin, I stop short of advocating a thoroughgoing anti-natalism, I nevertheless argue that procreators cannot appeal to hypothetical consent to justify exposing children to the harms of existence. I end by suggesting a more promising route by which this justification might be achieved.

**Keywords:** anti-natalism; procreative ethics; David Benatar; Seana Shiffrin; hypothetical consent; paternalism; dignity

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## 1. Introduction

Anti-natalism is the view that it is (almost) always wrong to bring people (and perhaps all sentient beings) into existence. This view is most famously championed by David Benatar (1997, 2006). Benatar's anti-natalism has stimulated significant debate, and he has defended (2012, 2013, and 2015) his controversial arguments against a number of critics.<sup>2</sup> In contrast to the attention Benatar's anti-natalism has received in recent years, other routes to an anti-natal conclusion that have recently been put forward have gone relatively under-explored (for example, Belshaw 2012, Harrison & Tanner 2011, Harrison 2012, and Häyry 2004). I am of the view that an older paper that does not explicitly argue against procreation, Seana Valentine Shiffrin's "Wrongful Life, Procreative Responsibility, and the Significance of Harm" (1999), ought to command more attention than the sporadic discussions it has thus far elicited within the natal debate. I focus primarily on her views in this article, chiefly because she offers what can be read as a consent-based argument for anti-natalism.

Though Shiffrin appears unwilling to conclude that procreation is always wrong, I demonstrate how her account of permissible harm offers a route to anti-natalism that is arguably no less persuasive than the arguments defended by Benatar. The key feature of the account of permissible harm Shiffrin advances is that we may only rightfully impose a (serious) harm upon a nonconsenting individual in order to remove her from harm, or to prevent greater harm from befalling her. Procreation, Shiffrin acknowledges, appears to fall outside the scope of this account of permissible harm.<sup>3</sup>

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<sup>2</sup> The list of critics is long, and growing, and includes Bayne (2010), Boonin (2012), Bradley (2010), Brill (2012), Brown (2011), DeGrazia (2010, 2012, & 2015), Harman (2009a), Kaposy (2009), McGregor & Sullivan-Bissitt (2012), Metz (2011), Packer (2011), Smilansky (2008, 2012), Trisel (2012), and Weinberg (2012, 2016). I will not have space to address their criticisms here.

<sup>3</sup> Shiffrin nevertheless attempts to defend procreation as "a special case" of harming (1999:139), perhaps because she fears any perceived anti-natal consequences will result in a *reductio ad absurdum* objection to her overall argument for a wider range of liability in wrongful life suits. But I do not believe that she does enough to save procreation from the anti-natal implications of her account of permissible harm. The arguments I present in the main text will go some way to showing why I think this is the case.

I offer a novel Shiffrin-esque route to anti-natalism, and defend it from a powerful and original objection.<sup>4</sup> This objection asserts that procreation is all-things-considered permissible, as it is morally acceptable for one to knowingly harm an unconsenting patient if one has good reasons for assuming her *hypothetical consent*—and procreators can indeed reasonably rely on some notion of hypothetical consent on the part of the ones created. The intuition behind the objection is that children would consent—if it were possible for us to ask and for them to respond—to the harms of procreation in order to receive its benefits.<sup>5</sup> Despite its *prima facie* appeal, I show how the hypothetical consent objection in fact fails, and why parents need stronger reasons to justify procreation.

I do not look at Benatar’s arguments for anti-natalism; the Shiffrin-esque route to anti-natalism I outline here can be seen as an alternative, consent-based route to anti-natalism. Benatar (2006:49-54) has already compared his (asymmetry) argument to Shiffrin’s, and at length, so I do not add to his analysis. It is worth noting, though, that in appealing to benefits to children, I adopt a significantly different strategy to that of Benatar’s, whose treatment of procreation makes it look like an activity that could only truly benefit parents—a strategy that distinguishes the present paper from other (prominent) discussions of anti-natalism.<sup>6</sup> As I outline it, the hypothetical consent objection takes the view that procreation can be good *for the sake of a child*. Furthermore, though Shiffrin states that procreation usually results in

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<sup>4</sup> David DeGrazia (2012) has independently advanced a “Shiffrin-like” anti-natal argument (2012:150-3); however, he rejects her argument, while I support it. Among other things, DeGrazia argues that the issue of procreative harm ought to be weighed against other moral considerations, not the least of which is respecting the procreative autonomy of parents. I will not have space to consider this other-regarding argument in defence of procreation, but I will note here that the objection I will be raising to Shiffrin’s “anti-natalism” focuses only on (expected) benefits to children, and not on benefits to their parents. David Benatar, too, has also noted that Shiffrin’s argument can be used to defend an anti-natal position (2006:49-54). However, he favours his argument over hers.

<sup>5</sup> Note, however, that Benatar (2007) believes contractors in the Rawlsian “original position” would arrive at an anti-natal conclusion.

<sup>6</sup> In attempting to defend procreation via an appeal to benefits to children, my (hypothetical consent) objection to anti-natalism also differs from DeGrazia’s (2012), which appeals to benefits to parents.

children encountering the “burden-riddled mixed *benefit*” (1999:140; my emphasis) of existence, she offers no further defence of this natal-friendly concession *that explicitly appeals to the attempt to bestow this benefit to potential children*. Part of my job here will thus be to assist Shiffrin in working through a possible, though ultimately unsuccessful, method of avoiding the anti-natal implications of her argument.

I start by briefly explaining Shiffrin’s argument, and by illustrating how it can be employed to construct and defend a principle of permissible harm that supports anti-natalism. The key feature of this principle is that it is impermissible for one to impose serious, protracted, and inescapable (without great cost) harm upon an unconsenting individual purely for the sake of granting that individual benefits. I then test this principle against the aforementioned hypothetical consent objection. On behalf of the Shiffrin-esque anti-natalist, I in turn advance two replies to this view. I conclude by suggesting a promising way to challenge the Shiffrin-esque rationale for anti-natalism, and anti-natalism in general.

## **2. The consent-based argument for anti-natalism<sup>7</sup>**

A few brief notes on harm will be useful. Firstly, Shiffrin assumes (as do I, for the sake of argument) that being created can both harm and benefit a person.<sup>8</sup> Secondly, it is important to keep in mind that Shiffrin’s argument relies heavily on the intuition that there is a morally relevant difference between choosing to expose oneself to harm (or the risk of harm), and making such decisions on behalf of third parties.<sup>9</sup> And thirdly, Shiffrin favours a

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<sup>7</sup> This discussion of Shiffrin’s “anti-natalism”, up until the principle of permissible harm on pp. 8-9, partially borrows from Singh (2012b).

<sup>8</sup> For a fairly recent and influential defence of this view, as well as a proposed solution to the non-identity problem (which I do not aim to address here), see Harman (2004).

<sup>9</sup> In Shiffrin’s own words: “Harm is objectively bad in such a way that it is morally problematic to inflict (unsolicited) a significant level of it on another for the sake of conferring a benefit, although a person may reasonably decide to undergo the same level of harm to retain the same level of benefit.” (1999:130)

noncomparative account of harm and benefit.<sup>10</sup> On comparative accounts, a person is harmed if she is made worse off than she would otherwise have been (counterfactual view), or if she has been made worse off than she was before (historical view). Shiffrin’s noncomparative account, on the other hand, identifies harms with “certain absolute, noncomparative conditions (e.g., a list of evils like broken limbs, disabilities, episodes of pain, significant losses, death)” (Shiffrin 1999:123), with benefits similarly differentiated. On Shiffrin’s account, a rescuer who must unavoidably break a person’s arm in the process of saving her from drowning both harms *and* benefits her—an intuitive appraisal, I think—whereas a proponent of the counterfactual view might deny that the rescuer harms the rescuee, perhaps because the rescuer bestows an overall benefit to the rescuee.<sup>11</sup>

Another unique feature of Shiffrin’s noncomparative account is the link it draws between harm and autonomy. Harm “brings about a cleavage between a person’s life and her will”, which can be “partially or perhaps entirely bridged” when a person willingly chooses to suffer harm (Shiffrin 1999:130). On this view, a feature that all harms share is that “they render agents or a significant or close aspect of their lived experience like that of an endurer as opposed to that of an active agent” (Shiffrin 1999:123). I find Shiffrin’s noncomparative account of harm and benefit attractive, but lack the space to defend it here.<sup>12</sup> In any event, my arguments will not require a comprehensive examination of Shiffrin’s noncomparative account of harm and benefit; I focus only on a core principle that it entails.

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<sup>10</sup> This account is developed further in Shiffrin (2012). See also the noncomparative account presented in Harman (2009b).

<sup>11</sup> See Feinberg (1986), as well as Shiffrin (1999:120-127).

<sup>12</sup> For an in-depth critique of noncomparative accounts, and the concept of harm in general, see Bradley (2012). Rabenberg (2015) also offers a critical summary of accounts of harm.

On Shiffrin's account of harm, procreation appears generally impermissible because it imposes a (serious) harm to nonconsenting individuals that is not for a suitably important end—which apparently can only be, for Shiffrin, the prevention of greater harm (1999:128-9). Here she argues that while we consider it morally permissible to harm someone in order to prevent a greater harm befalling this individual—for example, when rescuers or surgeons must injure persons in order to rescue them from greater harms—we do not consider it similarly morally permissible to harm an unconsenting person in order to secure this individual a greater “pure benefit” (Shiffrin 1999:126-7).

These kinds of benefits impart (non-essential) improvements—sensual pleasure, material enrichment, and the like—to our lives, and do not derive their “beneficial” status from the removal or prevention of harm (Shiffrin 1999:124-5). As examples of pure benefits that we would deem it wrong to break an unconsenting patient's arm for, Shiffrin lists “supernormal memory, a useful store of encyclopaedic knowledge, twenty IQ points worth of extra intellectual ability, or the ability to consume immoderate amounts of alcohol or fat without side effects” (1999:127).

Shiffrin employs a parable to suggest that creation represents the bestowal of pure benefits (among other things), which appear impermissible to bestow (1999:127). I summarise this parable below:

#### Wealthy/Unlucky Case

*Wealthy* is a very rich individual. One day he decides to share some of his wealth with his neighbours, who live on a nearby island. They are in no need of extra money. *Wealthy* gets into his plane with a hundred cubes of gold bullion. His

intention is to drop these gold cubes from the sky. He goes about doing this, taking care not to hit anyone. He is aware that his actions could maim, or even kill, but he has no other means of distributing his wealth. Most of the recipients of gold cubes are surprised but happy to receive their unexpected gifts. One person, *Unlucky*, does in fact get hit, and the impact breaks his arm.

Wealthy might have delivered an all-things-considered benefit to Unlucky, but in doing so he placed Unlucky at great risk where no such risk previously existed, and indeed inflicted a serious injury upon Unlucky. Similarly, even when parents create persons who come to view their lives to be all-things-considered beneficial, parents impose (the risk of) potentially serious harms upon their offspring.<sup>13</sup>

Even if [Wealthy] took the greatest care, he imposed risk of harm and injury on another without consent and without the justification that it was necessary to avoid a more substantial harm. Everyday procreation may be described in similar terms. (Shiffrin 1999:136)

To my mind, Shiffrin is appealing to the following sort of principle:

The Shiffrin-esque principle of permissible harm

*It is permissible for one to knowingly harm unconsenting patient A to a non-trivial degree if, and only if, the following conditions are met: a) one imposes the harm with the reasonable*

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<sup>13</sup> DeGrazia (2012:153-4) makes an interesting distinction between *imposing* harm upon others, and merely *exposing* them to harm. Procreation, he argues, does not usually impose harms upon children; rather, it merely exposes children to harm, along with the potential for great benefits. Though I think that this impose-expose distinction is an important one deserving further discussion, for now I will simply point out that a lack of hypothetical consent is still a problem when aiming to argue that certain harmful acts are permissible—regardless of whether the harm comes about through imposition or (simply) exposure.

*expectation of thereby alleviating or saving patient A from a pre-existing or anticipated harm; and b) the imposed harm is a lesser harm than the harm one aims to alleviate.*

This principle is meant to capture the most prominent features of Shiffrin’s position regarding permissible harming. On Shiffrin’s view, it is not (ordinarily) permissible to harm a patient in order to bestow a pure benefit upon this patient. Therefore, I have not explicitly included the bestowal of pure benefits in the above principle. Instead, I have included only features necessary and sufficient to justify harming an unconsenting patient, and there aren’t many such features, according to Shiffrin—with an important proviso (more on this below).

Crucially, on the face of it, an anti-natal conclusion seems to follow from the above principle. Creating new persons exposes them to non-trivial harms. While in other cases harming in this non-trivial fashion might be justified if it is in the service of saving persons from even greater harms, procreators cannot appeal to this possibility. Procreation cannot sensibly be viewed as the act of saving non-existing persons from (greater) harm. Rather, on Shiffrin’s account, procreation can be viewed, at best, as the morally problematic exposure to non-trivial harms in order to offer uninvited and non-essential benefits (that is, “pure benefits”) to the person created; at worst, it can be viewed as the morally impermissible imposition of serious, protracted harms upon a patient that are not toward the alleviation of greater harms. Further, and most crucially, children do not have the opportunity to offer their consent to encounter the harms of existence in order to receive the benefits, which entails that it is wrong to procreate.

Importantly, I label this principle “Shiffrin-esque” in no small part because it excludes an additional, pro-natal clause outlining an intention to offer compensation for the harms one



imposes. Let me explain. Shiffrin explicitly distances herself from the view that procreation is all-things-considered impermissible, claiming that it is consistent with her arguments to deem “nonconsensual, burden-imposing actions as morally problematic but not always impermissible”, or, further, to think of procreation as “a special case” (Shiffrin 1999:139). Shiffrin offers no reasons in support of the latter suggestion, so I set it aside. She does however defend the notion of procreation as “morally problematic but not always impermissible”, arguing that

the unconsented-to burdens of life do not make it wrong to procreate per se, but rather wrong to procreate without undertaking a commitment to share or alleviate any burdens the future child endures. (Shiffrin 1999:139)

And so, a revised Shiffrin-esque principle would incorporate an additional, Get Out of Anti-Natal Jail for Free clause—something like the following: “*c) one intends to offer, prior to imposing the burden, adequate compensation to patient A for this harm*”.

But here is why I doubt that this additional clause can do the heavy lifting Shiffrin presumably thinks it can, and why I exclude it from the principle above. It seems to me that while it may often be *good of me* to offer compensation for harms I impose—perhaps it is in fact often morally required—it is doubtful that subsequent compensation could (retroactively?) render my initial act of harming *permissible*. In other words, my subsequent actions, though they might reflect either positively or poorly on my character, do not render my original harmful act permissible or impermissible; they are silent on that issue.<sup>14</sup>

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<sup>14</sup> It is beyond the scope of my current project to examine the merits of appealing to subsequent compensation—a task I take up in far greater detail in Singh (2012a).

The Shiffrin-esque principle implies, then, that it is impermissible for us to harm an unconsenting patient if we act solely to secure her benefits, but what if we believe that we can be reasonably sure that this patient would have consented to our actions? What if, in other words, we believe that we are justified in presuming her hypothetical consent to our actions? This is an important question to consider in context of the natal debate, as it is not unlikely that most prospective parents would assume, if they thought about it at all, that their children would consent to being created, were they able to be asked and to respond.

### **3. The hypothetical consent objection**

I will be looking at arguments for a certain kind of paternalism, as these arguments appear to rely on hypothetical consent in ways that might challenge Shiffrin's strict views on permissible harming, and thus the anti-natal implications of her argument. Indeed, I shall use *paternalist* and *paternalism* when referring to those who believe that certain harmful acts can be justified via appeals to hypothetical consent—such is the strength of the link I see between a defence of paternalism and an appeal to hypothetical consent. On the face of it, some paternalistic acts appear to harm—often via autonomy-limiting interventions—for the sake of securing benefits.<sup>15</sup> If this is so, and if we do indeed find such interventions permissible, it seems as though there is a larger category of permissible harms than Shiffrin believes. The Shiffrin-esque principle of permissible harm is thus false—which, perhaps, leaves room for procreation to be considered permissible. Indeed, procreation can be viewed as a paternalistic act, or at least an act performed with a paternalistic attitude: Parents decide to impose harms upon their children for the sake of securing those children benefits.

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<sup>15</sup> For example, parents often permissibly restrict the autonomy of their teenage children by forcing them to stay in and study. The hope is that this will help give them a better chance at getting into a good college, and thereby secure them the additional benefits that come to gainfully employed adults with college degrees.

Hypothetical consent in the guise of paternalism thus presents an initially promising way of objecting to a Shiffrin-esque route to anti-natalism.

In the following paragraphs, I examine an argument that appeals to hypothetical consent to justify the sort of paternalism I have discussed above. I argue that paternalism need not in fact run afoul of the Shiffrin-esque principle of permissible harm: Shiffrin and the paternalist both appear to share similar intuitions regarding permissible harm. I conclude that this strategy cannot successfully contest Shiffrin's claim that appeals to hypothetical consent, while justified in cases where the aim is to avert greater harm, do not, upon reflection, seem justified where the aim is to bestow pure benefits. Further, I argue that the *degree of harm* imposed is of utmost relevance when ascertaining the permissibility of paternalistic interventions, and it is not obviously the case that we are permitted to impose the *serious* harms of life.

Before commencing upon a *prima facie* powerful critique of the Shiffrin-esque route to anti-natalism using the notion of hypothetical consent, I think it will be necessary to define *consent*, and to show what makes *hypothetical* consent a special sort of consent. I would like to suggest the following definition, which I borrow from A. John Simmons: Consenting is "the according to another by the consenter of a special right to act within areas within which only the consenter is normally free to act" (1979:77). Consent is thus a sort of transactional relationship between two or more agents wherein one agent agrees to relinquish a degree of her autonomy to the other(s). To draw an example from the political arena, elected representatives are entrusted with the task of promoting the best interests of those who elect them.

Note that hypothetical consent is not equivalent to endorsement, nor is it the same as subsequent consent. Consent always entails a sort of tacit agreement or contractual relationship between two or more individuals or institutions. Endorsement is different, in that it is purely internal to the individual: Even if it is about another's actions, it does not essentially involve a relationship with her. An individual can consent to another's actions—think here, for example, of cases where “consent” is given under duress—but whether or not she endorses those actions is another matter.

I now wish to distinguish between three varieties of consent: a) express consent, b) tacit consent, and c) hypothetical consent. *Express consent* is when a consenter gives a “clear sign” of her consent to the one to whom she is consenting (Simmons 1979:64).<sup>16</sup> *Tacit consent* is where a consenter does not give a clear sign of consent to a proposal, but where her consent can nevertheless be reasonably inferred from her *lack of explicit objection* to the proposal (Simmons 1979:80).<sup>17</sup>

*Hypothetical consent* differs from the two varieties of consent discussed above, and requires a more extended discussion. We are on occasion called to act on behalf of a person or persons who, for any number of reasons, are not available for consultation. The opportunity to ask these persons for explicit signs of consent is thus not available to us, nor, by extension, is it plausible to infer their tacit consent. On such occasions, we often must rely on some notion

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<sup>16</sup> For instance, a consenter could explicitly state that she is indeed giving her consent to another by performing some voluntary activity that both parties have agreed would clearly signify consent. Examples of such voluntary activities include the showing of hands and the voicing of “ayes” or “nays”.

<sup>17</sup> To give an example—a modification of the one found in Simmons (1979:79-82)—a university lecturer could ask her students whether there are any objections to her extending her lecture by a few minutes, and, if no student voices an objection or gets up to leave, she could thus infer that all of her students have consented to her proposal.

of hypothetical consent, asking ourselves what the persons we are acting on behalf of would consent to (if we were able to ask them, and they were able to answer us).

Hypothetical consent can be separated into two sorts: Hypothetical consent that relies on *objective* criteria, and hypothetical consent that relies on *subjective* criteria. In the former case, we can adopt a Rawlsian strategy and ask: To what sorts of proposals would contractors in the “original position” (Rawls 1971) be most reasonable to consent?<sup>18</sup> Here we can say that, because they aim at promoting objective values and maximising universal goods, there are certain proposals to which everyone ought to consent. Even if persons do not for some reason (currently or ever) care about these goods or values, we may be justified in asserting that they ought to care, and hence ought to consent to receiving them.

A different strategy from the one just outlined is adopted in the case of hypothetical consent that relies on subjective criteria. Here we ask: To what sorts of proposals would it be rational for *agent A* to consent, given *her* unique aims? This second strategy is tailor-made to best reflect the interests and preferences of specific individuals. So, for instance, let us assume that Wealthy somehow knows some of the people from his neighbouring island very well. He is thus so well acquainted with the unique interests and preferences of each of these people that he can say, with a very high degree of certainty, that they would probably consent to him placing them at significant risk in order to secure them the chance of acquiring gold bullion. Were Wealthy to, under these altered circumstances, appeal to some notion of subjective hypothetical consent as (at least partial) justification for his decision to release gold bullion over his neighbouring island, it might reasonably make a difference to our

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<sup>18</sup> Note that though I employ him here to spell out the two types of hypothetical consent, Rawls himself is not a friend of the paternalists. Also, see footnote 5.

assessment of the permissibility of his actions. We might still consider his actions impermissible, though we might be inclined to think differently about the extent of his liability and the sort of compensation, if any, he owes the islanders.

But procreators arguably cannot rely on subjective hypothetical consent when deciding on the permissibility of bringing people into existence. Non-existers cannot be said to have preferences—let alone unique, individual preferences! Shiffrin consistently maintains that the unique features of the individual being created cannot be taken into account by parents. It therefore appears as though she thinks parents consider their unborn children generically—which is to say, as things of the same sort. But the pro-natal paternalist could argue that matters are not this simple. He could say that, insofar as they can, parents often, and always ought to, consider the unique circumstances of the lives into which they will bring their children. This line of reasoning appeals to the view that parents often have a pretty good idea of what kinds of lives their children can expect to enjoy. Prospective parents can construct a relatively reliable picture of sorts from their shared genetic history, their socio-economic situation, etc., and can be reasonably sure regarding what their children would prefer. On this line of reasoning, therefore, it is not quite accurate to say that prospective parents consider their potential offspring generically; rather, they consider their offspring, insofar as they can, as unique products of their (the parents') unique circumstances.

But I am not convinced that this objection holds much weight. Consider the fact that siblings often have very different preferences. Further, also consider that children very often fail to live up to their parents' expectations. Finally, though Shiffrin (so far as I can tell) thinks this is rare, children might *not* have a subjective preference for existence—and it may be begging the question against the anti-natalist to assert that children ought to have this as an objective

preference. (Consider here the problem of suicide.)<sup>19</sup> And so, it does not look as though procreation can be justified via appeals to subjective hypothetical consent.

What about appeals to hypothetical consent emphasising objective criteria, though? On one reading, Shiffrin, the committed individualist, seems to underplay the possibility of determining objective values and universal goods that we all arguably ought to prefer.

However, a closer reading of Shiffrin reveals both that there are indeed some objective goods for her, and that she allows for hypothetical consent to promote these goods (though it is not clear what she thinks these goods are). When considering whether Wealthy was justified in relying on the hypothetical consent of the islanders when he decided to place them in harm's way in order to benefit (some of) them, she is explicit that he was not. This is not simply because Wealthy was not justified in relying on hypothetical consent, but rather because he was not justified in relying on hypothetical consent *as someone acting to promote greater benefits and not avert greater harms*. In Shiffrin's own words:

[T]here seems to be a harm/benefit asymmetry built into our approaches to hypothetical consent where we lack specific information about the individual's will.

We presume (rebuttably) [the presence of hypothetical consent] in cases where greater harm is to be averted; in the cases of harms to bestow greater benefits, the presumption is reversed. (Shiffrin 1999:131)

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<sup>19</sup> In the US in 2016, suicide was the second leading cause of death in age groups 10-14, 15-24, and 25-34, and the fourth leading cause of death in age groups 35-44 and 45-54 (CDC 2016). Of course, I recognise that suicide is a phenomenon with many contributory factors, and I am cautious not to assume that there is a straightforward link between suicide and (thereby) "expressing a subjective preference not to exist". The statistics, though, are sobering, and whilst I am not sure how they should factor into the procreative deliberations of potential parents, I do think it would be unreasonable for parents to dismiss the problem of suicide without some level of existential engagement with it.

Unlike the rescuer, Wealthy acted not to remove patients from harm, but to secure them “pure benefits”. What concerns Shiffrin most is that while a rescuer has good reasons to infer the hypothetical consent of the patient he is rescuing, Wealthy—and, by extension, all persons who place unconsenting patients in harm’s way in order to secure these patients pure benefits—had no good reason to think that he had some way of ascertaining what sorts of harms the islanders would willingly expose themselves to: “I do not think it is clear that Unlucky would give his consent *nor is it clear what test is relevant: that his consent is certain? rationally required? likely?*” (Shiffrin 1999:132; my emphasis). In contrast, with the rescue case Shiffrin concedes that appeals to hypothetical consent might be “appropriate”, as “something of great *objective significance* is at stake” (Shiffrin 1999:132; my emphasis).

It appears to me that a case can be made for the claim that the rescuer is appealing to hypothetical consent to *bestow benefits* as well as avert harms. Though the evaluation of harms and benefits is, Shiffrin consistently maintains, an individual, subjective matter, in the rescue case she can be read as allowing for (in the promotion of some good—which I shall tentatively refer to as *survival*<sup>20</sup>) an appeal to objective criteria. And so, though Shiffrin does indeed consistently place great emphasis on respecting individual liberty—and thus subjective preferences and interests over some notion of objective, universal preferences and interests—she does not appear to be blind to the existence of objective goods we all ought to consent to receive (even if this entails some harm to ourselves). I now wish to test whether there is indeed a longer list of objective goods than she is willing to acknowledge.

Consider the following principle, which, to my mind, encapsulates the paternalist’s ethical stance regarding the permissibility of harmful intervention:

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<sup>20</sup> Or perhaps a larger set of objective goods, as survival usually encompasses other goods.



### The paternalistic principle of permissible harm

*It is permissible for one to knowingly harm unconsenting patient A to a non-trivial degree if one has good reasons for assuming her objective hypothetical consent to one's action.*

It seems to me that though we can agree with Shiffrin that harming for the sake of bestowing pure benefits is morally problematic, this need not be the end of the story. We could for instance deny that our lack of any “specific information about the individual’s will” (Shiffrin 1999:131) is fatal to the permissibility of our interference(s) on behalf of the individual concerned. We could claim that there is indeed a longer list of *objective* goods we can refer to in order to help us decide whether our interventions are permissible. Hence, while we might not have enough information about a given individual to rely on subjective criteria when assessing the permissibility of hypothetical consent—or we might be Rawlsians, asserting that subjective criteria are not morally significant, even when available—we may still have sufficient justification to interfere on her behalf according to certain *objective* criteria, such as the promotion of goods like health, compulsory education for children, and, indeed, liberty. I am interested as to whether procreation can be justified via an appeal to objective hypothetical consent.

In order to further challenge Shiffrin here, I suggest that we consider some arguments for paternalism that appeal to hypothetical consent. Friends of paternalism hold that it is often permissible to harm individuals—by limiting their autonomy, for instance—in order to advance one or more of their interests. To be clear, the paternalist could agree with Shiffrin that every individual’s capacity for autonomous decision-making, as it relates to their own lives, ought to be respected. But the paternalist could also point out that individuals are often not in the best position to recognise what is in their best interests. Indeed, individuals often

have conflicting interests. For instance, I might have a very firm desire to live a long, healthy life. I might also have an unhealthy desire to smoke, which, despite various attempts, I cannot quite break away from. This latter interest is in conflict with my former, deeper, more consistent desire for longevity. To restate the preceding from the perspective of a paternalist appealing to some notion of *subjective* hypothetical consent: my subjective preference, overall, is to stop smoking. Another person assisting me in expressing this preference to stop smoking will be working to bestow a benefit upon me.

But, to alter the example so as to apply it to the alternative principle of permissible harming—which appeals to objective hypothetical consent—what if I do not ever desire to stop smoking? In other words, what if I have conflicting preferences, and/or, despite the serious health risks, what if giving up smoking is in fact *not* one of my preferences (subjective or otherwise)? Perhaps, through wishful thinking, I have convinced myself that smoking’s well-documented adverse effects will not affect *me*, and that I will not impede my goal of living a long and healthy life if I continue to smoke indefinitely. And perhaps no amount of information to the contrary will get me to change my mind. Another person interfering in my wish to continue smoking is *not* assisting me in expressing my deeper preference, as *I* see it. It is instructive to look at my situation here from the perspective of someone appealing to some notion of *objective* hypothetical consent. From such a perspective, it could be said that an activity such as smoking hinders one’s capacity for autonomous decision-making to the point that one falls under its spell, *becoming a slave to it* (Goodin 1989).

I would like to highlight a couple of conclusions that I think follow from this analogy to enslavement. First, as no one can be said to rationally give oneself into slavery, it can be

assumed that no one would rationally decide to fall under the spell of a severely autonomy-limiting state such as addiction (Goodin 1989:586; Mill 1974:173). Thus, secondly, the preferences of one currently under its spell to remain there ought not to be respected. To clarify, a paternalistic perspective appealing to some notion of objective hypothetical consent might assert that certain activities are, objectively speaking, irrational to adopt: We are justified in assuming, says the paternalist, that no self-interested rational agents would deem it reasonable to promote such activities.

This is especially true, as mentioned, for autonomy-diminishing activities from which one cannot escape. With such activities, the paternalist wishing to appeal to some notion of objective hypothetical consent might assert that because *not* engaging in such activities ought to be everyone's firm preference, there ought to be little objection to paternalistic measures being adopted that ensure such activities become more difficult to start or continue to engage in. To put this another way, there are apparently certain benefits all persons ought to want to receive: The smoker, for example, ought to desire the good of health, and we are justified in promoting this good (that is, "benefiting" him) even if it involves curtailing his freedom (that is, "harming" him) by restricting his access to cigarettes.

#### **4. Replies to the initial hypothetical consent objection**

To summarise, it appears as though there are indeed cases where it is fairly uncontroversial to harm unconsenting persons in order to benefit them, cases where we are justified in assuming the hypothetical consent of these persons. Does this mean that the Shiffrin-esque principle of permissible harm is false—a principle which, recall, permits (non-trivial) harm only in order to prevent harm, but not to promote pure benefits? Perhaps not. Consider the following replies.

I first point out (in 4.1.) that in the most prominent instances of where hypothetical consent is permissibly presumed—namely, the most tenable cases of paternalistic intervention—the aim is to prevent *serious* harms. Procreation is not toward this end. Second, I proffer (in 4.2.) a plausible counter on behalf of the paternalist. I then argue that this counter fails to challenge my response on behalf of Shiffrin, in that it would only look plausible if *trivial* harms were imposed. Procreation, I argue, is significantly removed from this case (as well as from paternalism), and therefore does not appear a plausible candidate for justification via an appeal to hypothetical consent.

#### **4.1. Hypothetical consent works only when significant harm is at stake**

According to the preceding formulation of paternalism, interfering with a patient’s autonomy is sometimes permissible if it furthers some objective good, such as her health. To be clear, the paternalist would justify this intervention *by appealing to objective hypothetical consent*: He would say that harming in order to secure a patient certain objective goods—health, education, liberty, etc.—is (often) permissible, because the patient being acted upon *would* consent to such harmful actions were she of course available to give her consent, and were she considering matters in light of objective reasons.

But all the paternalistic interventions I have mentioned so far, though they aim to confer benefits, do so by removing or preventing harm; in other words, they are not in aid of conferring *pure* benefits. “Pure benefits”, remember, do not involve the removal or prevention of harm. However—and this is crucial—in every example of clearly permissible paternalistic intervention I have mentioned (and can think of), an appeal to objective hypothetical consent looks justified because the removal or prevention of harm is involved. Paternalistic interventions promote the objective good of education, and neglecting one’s

education can be immeasurably harmful (especially to one born into significant socio-economic disadvantages); anti-smoking measures promote the objective good of health, and sickness is the opposite of health; and so on. Paternalistic interventions making it harder for smokers to procure cigarettes (through the imposition of so-called “sin taxes”) or consume them (by making explicit the effects of smoking via labels on cigarette cartons) gain their justification due to the fulfilment of conditions (a) and (b) in the Shiffrin-esque principle. Paternalistic interventions of the sort most plausibly justified by objective hypothetical consent thus do not appear to run afoul of this principle.

And so, whether the paternalist is arguing for intervention toward the end of health, education or liberty, “something of great objective significance is at stake” (Shiffrin 1999:132)—namely the removal or prevention of greater harm—and people, all things being equal, ought to consent to such interventions. I therefore do not see why Shiffrin would need to object to paternalism as such; she can concede much to the paternalist and still be consistent with the principle of permissible harm I have attributed to her. However, in my view, Shiffrin has much to say regarding *when* paternalistic interventions are permissible, or—to be more precise—when *appeals to hypothetical consent* are justified. To summarise, what I might claim at this point, on behalf of Shiffrin, is that hypothetical consent appears to justify harm only to alleviate or prevent greater harm.

In assessing Shiffrin’s argument, Rivka Weinberg (2016) argues that paternalism is justified in the case of procreation, because children do not have consent rights (Weinberg 2016:137). I think Weinberg underemphasises a vital component of Shiffrin’s argument, namely the claim that when we impose *serious* harms upon a patient, we need *adequate justification* to do so. In other words, notwithstanding the consent status of the patient, the degree of harm

we impose upon them (or expose them to) matters, as does the justification for its imposition. In the next section, I further explore these thoughts.

#### **4.2. The degree of imposed harm matters**

It is possible for the paternalist to counter my response in the following manner. It is possible for him to claim that certain goods exert such a powerful appeal that only the most unreasonable persons would object to receiving them, regardless of the degree of harm involved. But I will demonstrate how this claim, too, can be defeated.

Consider the following example of a pure benefit, one which is arguably an objective good, and which could perhaps be viewed as a good we all ought to want to receive—even if we need to be harmed in order to receive it. The good I have in mind is an utterly wonderful aesthetic experience. I will use the example of a gorgeous, unforgettable sunset. Imagine the following scenario, in which a paternalistic act is performed exclusively toward the promotion of a good, and not toward the prevention of a harm:

##### Sunset

*You are part of a tourist group on a train travelling through a rainforest. As with everyone else in your tour group, you have fallen into a deep, dreamless sleep. The tour leader is awake, however, and, looking out the train windows, he sees a most beautiful scene. [Long, poetic description of the sun setting through treetops.] Now, this is quite a large tour group, and the sun is just about to disappear beneath the horizon; your tour leader does not have enough time to race through the train to wake everyone up. It just so happens that every seat and bunk in this train is electrified:*

*with the push of a button, a mild electric current will be sent through every seated and lying passenger on the train, waking anyone who happens to be asleep. Your tour leader has this button on his remote keychain; he presses it. You and everyone else in your tour group are awoken with a start. You are all greeted by the last few moments of a most memorable picture as the train's carriages are lit by the soft orange glow of a glorious sunset.*

In the above case, the tour leader harmfully intervenes in order to procure others a pure benefit. Do his actions look justified? There is nothing inherently harmful to *not* seeing a sunset. *Missing out* on such an experience, especially if one alone has missed out, can make one feel very disappointed. And one is arguably wronged when another seeks to disappoint one by denying one a nonessential but desirable experience or good. But that sunset is breathtaking! It could be held that the tour group members would surely be acting unreasonably—ungrateful, even—if they (after soaking up the scene, perhaps) confronted their tour leader over his (they might allege) ill-treatment of them.

But note that the Sunset case states that a “*mild* electric current” will be sent through every passenger. Suppose that mild electric shocks count as trivial harms, all things considered. What difference would it make, morally, if the voltage were increased to a level where it was a matter of reasonable dispute whether electric shocks of such an intensity counted as trivial or not? Further, what difference would it make to one’s evaluation of the tour leader’s actions if his interventions were such that they imposed lasting, ongoing effects? For example, if he risked burning and scarring some or all of the passengers, I doubt that his actions would meet with universal approval from the tour group. I doubt, in other words, whether the tour leader could reasonably assume the objective hypothetical consent of all

those he acted on behalf of. Procreators, to my mind, take a similar gamble when they opt to “awaken” individuals to the (pure) benefits of life.

I propose that, despite its status as an objective good, the degree of harm required to secure this benefit (in *Sunset*) is indeed, as Shiffrin believes, of utmost moral relevance. There ought to be, in other words, limits to the degree of harm we are willing to impose for the sake of conferring such goods. The *Sunset* case works only if the imposed harm remains trivial, and is thus, as I will motivate, relevantly unlike procreation. For I am doubtful as to how analogous this and other pure benefits are with the “real thing”—procreation.

The decision whether or not to procreate is far more complicated than weighing up, on the one hand, the imposition of harms as trivial and transitory as pinpricks or mild electric shocks against, on the other, objective goods (whatever they may be). The harms procreation imposes are serious, protracted and inescapable (without great cost). New existers are greeted by all kinds of distressing stimuli, are immediately set upon by a mass of infectious organisms, and would quickly perish without close and attentive care. If they survive infancy, there are still all manner of hazards they must navigate with the help of caregivers. In the US in 2016, unintentional injury was the leading cause of death in age groups 1-4 through 35-44 (CDC 2016).<sup>21</sup> Illnesses—from minor infections to terminal cancers—leave no one untouched. Natural disasters, too, can have devastating impacts, as can heartbreak. And finally, by “inescapable (without great cost)” above, I mean that there is no way to escape the harms of life without succumbing to, or imposing upon oneself via suicide, the harm of death.<sup>22</sup>

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<sup>21</sup> This statistic covers the following age groups: 1-4, 5-9, 10-14, 15-24, 25-34, and 35-44.

<sup>22</sup> Not everyone would agree that death should appear in this list; Epicureans would deny that death is bad for the one who dies. For a recent (and forceful) argument against the Epicurean view, see Benatar (2017:92-141).



For the tour leader's actions to be *more like* those of procreators', he would have to recreate each passenger's life anew. For being born is not like awaking from a deep sleep to continue on a pre-existing journey; being created is starting experience from scratch. And thus, for his actions to be more analogous with those of procreators, the tour leader would have to reset, as it were, the psychological narratives of his passengers. Further, he would have to run the risk of permanently maiming or imposing disabilities of varying degrees upon his passengers.

To be fair to the paternalist (and to myself!), I acknowledge that conceiving suitable analogies to procreation is very difficult, as procreation is *weird*: It is an activity that involves the creation of a brand new moral agent seemingly out of the ether. Arguably, no other human activity comes anywhere close to replicating the strange, wondrous magic that is bringing-into-being. Thus, I do not claim to have captured all the morally relevant features of procreation (for this would be a nearly impossible task), only those that I think are most relevant to assessing the claim that harming in order to offer the pure benefits of existence can be justified by appealing to objective hypothetical consent.<sup>23</sup>

And so, though the paternalist may well appeal to the objective attractiveness of certain goods, he cannot reasonably deny the moral relevance of the degree of harm required to bestow these benefits. The moral issue of procreating to "benefit" children really is more complex than this, and we thus ought to reject the argument from hypothetical consent.<sup>24</sup>

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<sup>23</sup> To be clear, I think that certain pure benefits (Sunset is meant to describe a pure benefit) *can* be justified even if the condition outlined in 4.1 (significant harm must be at stake) is not satisfied, as long as the harms imposed are not too serious (that is, as long as 4.2 obtains). In fact, I believe that if the harms of a typical life were sufficiently trivial, then, arguably, even many anti-natalists would agree that procreation would be permissible. But, of course, no lives are so blessed as to contain only trivial harms.

<sup>24</sup> Note that a loss of some degree of autonomy is usually the extent to which patients are injured by paternalistic interventions. Procreation is different, in that though autonomy is *bestowed*, the injuries are far more extensive.

## 5. Conclusion

In defending a Shiffrin-esque route to anti-natalism, I have argued that appeals to hypothetical consent only appear to be justified in cases where the aim is to avert serious harm—namely in *some* acts of paternalism. Procreation is not such a case. Further, I have argued against the notion that there are certain objective goods everyone would (hypothetically) consent to receiving even if they needed to be non-trivially harmed in order to receive these goods. Here, I defended the claim that the degree of harm required to grant individuals (access to) these (alleged) objective goods is of utmost moral relevance. The paternalist—and the defender of procreation in general—has some work to do in order to justify the imposition of harms as serious as those experienced in a typical life. But though I think that the arguments advanced by Benatar and Shiffrin help illustrate that procreation is indeed deeply morally problematic, and that more sophisticated defences of procreation are required than mere appeals to hypothetical consent, I am also of the view that the debate is far from settled in favour of anti-natalism.

My arguments here have remained within the welfarist moral framework favoured by anti-natalists and a large majority of moral philosophers in the analytic tradition. According to this framework, considerations of welfare ought to be the primary focus of our moral judgements.<sup>25</sup> But an ethics focussed on a non-welfarist good, such as dignity, might be more favourable to procreation. This potential route to a pro-natal conclusion has been suggested in the literature—to some degree by David Spurrett (2011:203) and, more explicitly, by Thaddeus Metz (2012:8-9)—but has yet to be thoroughly explored. I propose

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<sup>25</sup> Though Shiffrin does focus on consent, what ultimately weighs against procreation is the fact that non-trivial harms are also involved.

that going beyond welfarism in this manner might also illuminate discussions outside of anti-natalism, and is thus a route worth exploring in future work in moral philosophy.

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