

Week 7. Consent

1 Examples

Which of the following are cases of consent? If they are not, how should we classify them? What different types of consent might be involved?

1. “I guess it would be only fair if I paid Rosie more,” Joe says, after his neighbour had accused Joe of underpaying her.
2. When Gary entered the S&M club, he knew that there was a chance he would be chained and gagged; and he was.
3. Celebrities expect to have their private life examined closely, and so they have no complaints against the paparazzi.
4. I know Adam well—he would have no objection if we took his car to pick Mary up from the airport. (Unfortunately we can’t currently reach Adam: he’s hiking in the mountains.)
5. Bernd agrees that Armin kill and eat him. Armin does.
6. You enter a restaurant and get served. When asked for money, you reply that you never agreed to pay.
7. When the bank robbers tell us “your money or your life”, we choose life, giving them all our money.
8. “If you don’t object”, the nurse says to Tom, “I’ll insert the needle now.” Tom keeps silent. The nurse injects the needle.
9. After long deliberation, everyone in the room agrees that poverty should be given higher social priority.
10. Little Johnnie loves his mother’s kisses, even though he pretends he doesn’t.

2 Some Distinctions

Consent vs Affirmation vs Consensus

In cases of *consensus*, you merely agree with someone with regard to some opinion or idea (e.g., case 9). In a case of mental *affirmation*, you like or prefer a way that you’re treated (e.g., case 10). In a genuine case of *consent*, you bind yourself in some way, taking on some burden or responsibility, or allowing others to treat you in some way (e.g., case 6).

Explicit vs Implicit Consent

Consent is *explicit* if you publicly communicate your consent to the relevant person(s), and what you consent to (e.g., case 5). Consent is *implicit*, by contrast, if your behaviour can be clearly interpreted as agreement to certain norms (e.g., case 2, 6, 8).

Conditions of Consent

Consent can be *valid* and *invalid*. Different accounts exist, but consent must at least be (a) voluntary and uncoerced (e.g., not like case 7), (b) not contradict other strong moral norms (e.g., not like case 5), (c) be minimally informed—e.g., the consequences of consent must be known or reasonably foreseeable (e.g., not like case 3).

Actual vs Hypothetical Consent

Actual consent is based on the actual behaviour—explicit or implicit—of individuals (most cases). *Hypothetical* consent, by contrast, is concerned with what people *would* or *could* agree to (e.g., case 4).

3 Huemer, “Traditional Social Contract Theory”

Explicit Social Contract Theory (21)

Noone has explicitly consented to the social contract. So we can set this type of theory aside.

Implicit Social Contract Theory (22)

Huemer distinguishes four possible ways in which implicit contract theory might work,

1. *Passive consent.* Chairman example.
2. *Consent through acceptance of benefits.* Ordering in a restaurant example.
3. *Consent through presence.* Party example.
4. *Consent through participation.* Lottery example.

Conditions for Valid Agreements (25)

A *valid* agreement is morally efficacious: it has its intended effect. Huemer argues that valid consent requires four conditions:

1. Valid consent requires a reasonable way of opting out.
2. Explicit dissent trumps alleged implicit consent.
3. An action can be taken as indicating agreement to some scheme, only if one can be assumed to believe that, if one did not take that action, the scheme would not be imposed on one.
4. Contractual obligation is mutual and conditional.

Questions for Discussion. (i) What might other conditions for informed consent be? (ii) Why could there not be one-sided contractual obligations?

Is The Social Contract Valid? (27)

The Difficulty of Opting Out

Hume’s Objection: leaving one’s state is enormously costly. Huemer: what matters is that it violates our rights.

Failure to Recognise Explicit Dissent (30)

The government continues to impose laws on anarchists.

Unconditional Imposition (30)

Laws are imposed on you no matter what.

The Absence of Mutual Obligation (31)

If the state has any duty in a social contract, then it is to protect us. But the state routinely fails even in this minimal job. Worse, American jurisprudence suggests that the government has no duty to protect its citizens (33–4).

Questions for Discussion. (i) Under what conditions would we have an appropriate opportunity to opt out from the state? (ii) Are there other types of implicit consent that could explain the state’s authority?

4 Huemer, “The Authority of Democracy”

Naive Majoritarianism (59)

The Bar Tab example: some other people democratically deciding that I should pay the bar tab gives them no authority over me, and no duty to comply.

Deliberative Democracy and Legitimacy (60)

Cohen outlines four features of deliberative democracy,

1. Participants are unconstrained by prior norms,
2. Participants offer reasons for their proposals, and those reasons alone determine the fate of their proposals,
3. Participants have an equal voice,
4. Deliberation aims at consensus.

Huemer argues that actual deliberation falls far short of these idealised features. Actual democracy does not even come close to these features. But even if we would be able to implement deliberative democracy, it would fail to provide legitimacy (sec. 4.2.3).

Questions for Discussion. (i) Is Huemer's criticism right? What would deliberative democrats reply? (ii) How might deliberative democracy produce legitimacy?

Equality and Authority (65)

Huemer reconstructs Christiano's argument as follows,

1. Individuals are obligated to treat other members of their society as equals and not to treat them as inferiors.
 2. To treat others as equals and not as inferiors, one must obey democratic laws.
 3. Therefore, individuals are obligated to obey democratic laws.
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Two subarguments for premise (2) can be provided. One argument focusses on the idea that it is wrong to place one's judgment above that of others. The second argument focusses on the idea of publicity, and that democracy is central to the equal advancement of interests.

Huemer offers a series of criticisms of this argument,

- Christiano's underlying theory of justice as equal advancement of interests is absurdly demanding (sec. 4.3.2);
- My disobedience would have no impact on the functioning of the state (sec. 4.3.3);
- It is not unjust, and compatible with equality, to treat others as having inferior political knowledge (sec. 4.3.5);
- If imposing one's judgment is wrong, then most types of democratic coercion are wrong (sec. 4.3.6).

5 Explanations of Legitimacy

Actual Consent. The State is legitimate because people have (explicitly or implicitly) agreed to it.

Hypothetical Consent. The State is legitimate because people would agree to it if they were reasonable and impartial.

Benefits. The State is legitimate because people have benefitted from it, and it continues to be in our self-interest.

Democracy. The State is legitimate because its decisions have been made democratically.

Public Order. The State is legitimate because without it, there would be chaos.

Community. The State is legitimate because it represents the rules of our community.

Outcomes. The State is legitimate because it brings about the morally desirable outcomes.