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# Autonomy and Consent

Ethics

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## 2 Today

- I. Autonomy
- II. Paternalism
- III. The Nature of Consent
- IV. Valid Consent

# Autonomy and Its Value

## 4 The Problem

COMMITTEE. “At the age of twenty-two years, you are approached by a committee composed of middle-aged friends and members of your family. They point out to you a number of serious wrong turns you have made in your life so far ..., and tell you that, purely out of love and respect for you, they are prepared to take over the running of your life. In future, you will be protected from the sort of mistakes which you are now regretting. ... On reflection, you realize that the committee will run the remainder of your life better than you, in the sense that there will be fewer wrong turns. The question is: will you surrender control of your life?” (Crisp 1990, 81)

Is there value in deciding for myself? Even if I am bad at making decisions?

# 5 Autonomy

- Auto-nomos: [to give] oneself (auto) law (nomos)
- In Kant: a metaphysical property, giving oneself the moral law
  - Raises difficult questions concerning free will
- We are interested in **personal autonomy**
  - Roughly: do I make choices for themselves? Do I control my own life?
- The opposite of autonomy is **heteronomy** (other-rule)
  - Being governed by others (interpersonal domination)
  - Or: being governed by my own uncontrolled impulses

## 6 What Diminishes Autonomy?

- **Coercion.** If someone threatens me, then I am not in control
- (Social) **Pressure.** If I am under intense pressure to do something, and if there are high costs not doing something, then I am less in control of my own life
- **Manipulation/Brainwashing.** If I do something merely because I have been misled about the nature or consequences of my choices, then I am not in control
- **Lack of Options.** If I have no options to choose from, or if all my options are bad, then my choices are less mine

Each of these options come as a continuum. We can imagine mild versions which we do not think are morally problematic. Similarly, autonomy **comes in degrees**.

## 7 Personal Autonomy

We can distinguish two types of personal autonomy (following David Enoch)

- **Sovereignty**: I make choices unimpeded by others
  - **Non-alienation** (or **authenticity**): the choices I make reflect my own values and commitments
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- We can enjoy sovereignty without non-alienation, or the other way around
  - Enoch: **full autonomy** is non-alienation achieved through sovereignty

# Discussion

1. Can we imagine a sovereign decision which is alienated?
2. Can we imagine a authentic decision which is not sovereign?



# Paternalism

# 10 Paternalism

- **Definition:** interference with someone's autonomous choice, against or without their agreement, on the basis that doing so will be better for them
  - Paternalism must be distinguished from legal interference to prevent harm against third parties
- Various types of paternalism
  - **'Weak' Paternalism** (Mill): we need to make sure everyone has sufficient information to make their own choices
  - **Nudging Paternalism:** we should make bad options less attractive, e.g. through clever design of choice architecture
  - **Coercive Paternalism:** we should prohibit certain bad options outright
- Examples of paternalism
  - Requiring you to attend these lectures
  - Gambling and Sunday prohibitions; 'Sin' taxes (e.g. sugar, alcohol, tobacco)
  - Bans on voluntary euthanasia

# 11 Two Objections against Paternalism

- **The Epistemic Objection.** Each person is the best judge of what's good for them
- **The Abuse Objection.** We cannot trust people to implement fairly what's good for others

## Shortcomings

- Both the epistemic and abuse arguments rely on contingent empirical facts; they cannot exclude all cases of paternalism ('successful paternalism')
- Behavioural economics puts into question the empirical premise underlying the epistemic argument

# Discussion

Given that people are often irrational, should we think that paternalism is less problematic than it might at first seem?

# 13 Nudging (Sunstein/Thaler)

- Nudging leaves people free to choose, but it designs choices to people in a way that is meant to push them in a direction better for them
- Nudging is a response to results of behavioural economics: if we know that people are ‘predictably irrational’, then we might be able to exploit this fact
- Examples
  - Default Organ Donation: if people need to opt out of organ donation, many do not do so
  - Portion Size Illusion: people eat less if food is provided on smaller plates
- Objections to Nudging Paternalism
  - The empirical efficacy of nudging is often questionable
  - Nudging exploits your irrationality, and this is objectionable even if we continue to have a choice

# The Nature of Consent

# 15 What is Consent? (I)

**Consent** is an **exercise of one's will** to create or change rights and duties

Intuitive case: I lend you my pen

- Agreement in the **epistemic sense**: agree to a proposition
  - Consider something to be true: *I believe that ...*
- Agreement in the **volitional sense**: agree to a norm or course of action
  - Wanting something to be the case: *I want that ...*
- **Consent** is a volitional notion: it is about exercising one's will
  - Warning: the German 'Zustimmung' (and the English 'agree') is ambiguous between the epistemic and volitional sense

# 16 Triggering, Revealing, and Creating Reasons

- Anton drives a car on the road. Beth walks across the road
  - Anton gains a duty to stop because he has a duty not to injure others
  - Beth has **triggered** Anton's duty to stop, but she has **not created** the duty
- Cecil is in love with Dora. Emile tells Cecil that Dora loves movies
  - Cecil **has a reason** to invite Dora to the cinema
  - Emile merely **reveals** to Cecil that he has a reason to invite Dora, he does **not create** the reason
- Matthias is Johan's father. Matthias tells Johan, 'Stop playing in the sand!'
  - Assume Matthias has authority over Johan (who is 2)
  - Johan should stop playing in the sand **merely because** Matthias told him to; Matthias has **created** a reason for Johan
- Harald promises Ines that he will cover her shift on Wednesday
  - Harald now has a duty to Ines to work on Wednesday; he has **created** a reason for himself



# 17 What is Consent? (II)

**Consent** is an exercise of one's will **to create or change rights and duties**.

Consent is a **moral power**: it creates or changes rights and duties

- 'I consent that you use my car'  $\Rightarrow$  it becomes permissible for you to use my car; you no longer have a duty not to use my car
- 'I consent to selling this laptop'  $\Rightarrow$  I no longer have the rights to my laptop; you gain the rights to the laptop

# Discussion

Are the following cases of consent?

1. Celebrities expect to have their private life examined closely, and so they have no complaints when paparazzi take photos of them
2. Klaus takes his brother's car. He doesn't ask his brother, but he knows that his brother is generous and would never say no

# 19 The Nature of Consent

Beyond the claim that consent is a moral power, we encounter competing theories of what consent is:

- **Mental-State Account:** consent is merely a mental act of willing
- **Performative Account:** consent is a public action of affirmation which needs to be perceived (or perceivable) by others
- **Hybrid Account:** consent is a public action of affirmation which expresses a mental act of willing

## 20 The Mental-State Account (I)

**Mental-State Account:** consent is merely a mental act of willing

**OLD COUPLE.** Claudia and Dimitri have been married for forty years. They know each other so well that they can almost mind-read each other. From Dimitri's recent behaviour, Claudia has inferred that Dimitri wants his motorcycle to be sold. Without talking to him, she sells his motorcycle. This was what Dimitri in fact wanted.

- In the mental-state view, the performative act of consenting is **evidence** for the mental state of consenting, but it is not *itself* consent, and not strictly necessary
  - Analogy: someone saying 'I love you' is strong evidence for the person loving you, but it is not sufficient
  - The words 'I love you' are **not identical** with the *emotional state* of love
  - Someone can love you (and you can know it) without them ever saying the words

## 21 The Mental-State Account (II)

Anya loves Bettina, but is too shy to talk to her. She secretly wishes that Bettina would read her diary, so that Bettina would learn that Anya loves Bettina. Bettina, without knowing Anya's wishes, reads Bettina's diary.



- According to the mental-state view, Anya **has** consented to Bettina reading her diary
- According to the performative and hybrid views, Anya **has not** consented to Bettina reading her diary

## 22 Performative Account vs Mental-State Account

**Performative Account:** consent is a public action of affirmation which needs to be perceived (or *perceivable*) by others

**FAKE.** Anya tells Bettina, as part of a dare, that she wishes to have sex with her, although she has no such desire. They have sex.

- According to the mental-state view, Anya **has not** consented to sex with Bettina
  - It seems that the mental state view requires us to be mind-readers
  - It also seems that the mental state view puts us into constant jeopardy: we can never be certain whether our actions are morally permissible
- According to the performative view, Anya **has** consented to sex with Bettina



## 23 Performative Account vs Hybrid Account

Cecil will undergo a complex operation as part of which his tonsils will be removed. His doctor explains the operation to him in depth, but Cecil does not pay attention. He signs a contract saying that his tonsils will be removed. At no point does Cecil form the intention to have his tonsils removed.



- According to the performative view, Cecil **has** consented
- According to the hybrid (and mental-state) view, Cecil **has not** consented

# Discussion

What speaks in favour or against the different views of consent?



# Valid Consent

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## 26 Success Conditions

To have its morally transformative effect, consent needs to fulfil **success conditions**

- Internal conditions ('validity' conditions):
  - **Competence**: the person consenting needs to be mentally competent (e.g., a child or a heavily drunk person cannot consent to buy a house)
  - **Information**: the person consenting needs to know what they are consenting to (e.g., if I consent to buy a car that doesn't drive, and I do not know it, my consent is not valid)
  - **Absence of coercion**: the person consenting cannot be coerced into consenting (e.g., if a robber demands 'money or life', I do not validly consent to hand over my money)
- External conditions
  - **Authority**: I need to have justified (ownership) rights over the object of the interaction (e.g., I cannot consent to sell *your* pen)
  - **Alienability**: I need to have a right to alienate the object of the interaction (e.g., perhaps I do not have a right to sell my kidney, or my arm, or my freedom)

## 27 Internal Conditions: Deceit

**CELEBRITY.** Svenja is at a party and mistakes Roderick for the celebrity A. Famous. Roderick does not clear up the mistake. Svenja has sex with Roderick because she finds the idea of having sex with a celebrity exciting.

- This case depends on what we take the **object of agreement** to be
  - Option 1: Svenja has consented to have sex with the person she sees in front of her
  - Option 2: Svenja has consented to have sex with A. Famous
- If we take option 1, then she has consented, and the sex would be morally permissible
- If we take option 2, then she has not consented, and the sex would be morally impermissible

## 28 Internal Conditions: Coercion

**BOAT.** While asleep, you are taken onto a ship, which sails to the wide ocean. When you are awake, you are told that you must obey the captain and the ship's rules. If you do not accept, you must leave the boat. You consent to obey.

- Your consent in **BOAT** is coerced; at the very least, you lack good alternatives
- Hume: our relationship to the state is analogous as the relationship as your relationship to the ship's captain in **BOAT** is
  - Problem 1: you have not consent to obey the state
  - Problem 2: you have not consented to be born into the state, and be subject to its rules
  - Problem 3: even if you did consent to obey the state, you would lack alternatives, because leaving the state is economically and socially expensive, and not feasible for most people
- Hume: the duty to obey the law cannot be explained on the basis of consent

## 29 One Response: Implicit Consent

- **Example.** Stirner enters a restaurant and gets served. When asked for money, Stirner replies that he never agreed to pay.
  - Stirner **has** consented—not explicitly (through words or signing a written document) but implicitly, **through his behaviour**
- **Structure of Implicit Consent:** in some situation S, there is a social convention that behaviour B counts as consent to some interaction A
- **Analogy.** Perhaps we have not explicitly consented to the state, but behaved in a way that counts as implicit consent

# Discussion

Are any of these behaviours sufficient to count as implicit consent to obey the law?

1. residing/remaining in the state
2. taking part in elections
3. receiving benefits

## 31 Next Week & Tutorials

- **No lectures** next week (Whit Tuesday)
- In two weeks: Moral Status (animals, future generations, AI)
- Tutorials this week: chapter from Wertheimer, *Consent to Sexual Relations* (note change in reading!)
- Background reading: Beauchamp/Childress from *Principles of Biomedical Ethics*
- Tutorials next week (Wednesday): study skills / exam preparation