

The Morality and Heuristics of Consent: Comment on Andreas Suchanek

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Introduction

In his fairly short but stimulating paper Andreas Suchanek investigates one of the persistent bottlenecks of modern political theory.¹ What, if anything, is the role of individual consent in the constitution of a society? Since the writings of Hobbes, Locke and Rousseau political theorists have seriously contemplated the idea that the consent of individuals has a crucial role to play in the related problems of justifying the state and legitimising state action (cf. Simmons 2001, ch. 7). The bulk of philosophical effort in the writings of Hobbes or Locke, as well as contemporary thinkers such as Rawls, Scanlon, Gauthier or Buchanan, has gone towards explicating the conditions under which consent can be said to *normatively legitimate* a decision or set of rules – especially where these significantly affect the members of a particular political unit.²

Suchanek's contribution advances a radical critique to the enterprise of political justification, maintaining that consent theory should not be concerned with the search for 'compelling reasons for obligations of what should be done' but rather with 'those empirical conditions that are prerequisites for a better realization of social cooperation' (p. 3*) He argues that consent theories cannot play a justificatory role because they commit what he calls the *normativistic fallacy*: consent theories generally advance moral demands that are completely devoid of relevant

¹ Suchanek 2003: page references throughout the text refer to this paper. This commentary was originally written for a conference on *Deliberation and Decision: Discourse Ethics meets Constitutional Economics*, Wittenberg. I would like to thank the organizers for their kind invitation and subsequent support, and Els Compennolle, Hans Kribbe, Cillian McBride and Lindsay Stirton for comments.

² Suchanek rightly suggests "consent becomes the basis for legitimation of collective rules, norms, and decisions" because "those who are affected by a collective decision or who shall adhere to a legal, social, or moral norm should be able to accept it out of their own free will" (p. 2*). I have serious reservations with the inclusion of "norms" in the above quotation since norms cannot be consciously proposed and consented to in the same way that rules or decisions can be.

empirical considerations, fail to be self-enforcing,³ and consequently render themselves impractical and effectively futile. Suchanek proposes that, instead, we regard consent theory chiefly as a heuristic device that provides us with essential insight in the conditions under which individuals consent to a rule as well as the conditions necessary for changing a rule. On this view, taking a heuristic turn would allow us to vindicate the central role of consent in social theory without committing ourselves to an inherently fallacious position.

In this commentary I want to challenge Suchanek's views on two counts. First, I argue that his critique of justificatory role of consent theory is invalid and largely fails to achieve its stated goal of discrediting Justificationism.⁴ I think Suchanek may have a point against those consent theorists that fail to respect the division of labour between ethical reasoning and institutional design (though the merit of the argument obviously need be considered on a case-by-case basis). But I simply do not think his critique extends well to justificatory consent theories *in general*. I argue that he misrepresents both the main insights and purpose of justificatory consent theory; furthermore I suggest that this is in part due to a failure to acknowledge a number of key distinctions within the political theory of consent. Second, I point out some difficulties with the alternative approach of reconstructing consent as a heuristic device. It seems to me that the heuristics of implicit and hypothetical consent – the two cases Suchanek discusses – is a bit of a red herring. In my view neither contributes much to social theory that is not already present in standard rational choice theory and game theory, which of course begs the question what can be gained from introducing yet another conceptual scheme. However, I do think there is some mileage to the heuristic approach in relation to *express consent* – which Suchanek somewhat surprisingly ignores – and in the final section I briefly outline why the 'heuristics of express consent' can play an important role in contemporary democratic theory.

The Morality Of Consent

Suchanek's critique relies heavily on the argument that justificatory consent theories commit what he calls the *normativistic fallacy*. The central idea is a familiar one and indeed embodies an old chestnut in political theory: to be of practical importance rules need not only satisfy a set of desirable properties but also operate

³ Suchanek suggests that the concept of consent has to be self-enforcing in the following way: "its application should help to find consent in society, i.e. consent theory should provide the prerequisites of the venture of social cooperation for mutual advantage" (p. 3*). I have some reservations with the concept of self-enforcement as specified here. For instance, it remains unclear to me whether Suchanek advances the strong claim that consent should *produce* the relevant background conditions for mutually advantageous social cooperation, or whether he instead endorses the weaker claim that they should be merely *compatible with* them.

⁴ 'Justificationism' is Suchanek's term for approaches that attempt to legitimate political arrangements by appeal to the normative force of consent.

within certain feasibility constraints.⁵ Because justificatory consent theory implies a dualism between moral demands and empirical conditions, preventing ‘consent theory from contributing to the improvement of the conditions of social cooperation’, *mere* consent cannot fully justify a particular set of rules or decisions (p. *). I want to challenge this radical conclusion by pointing out three key distinctions that Suchanek fails to take into account in his analysis.

First, consider the problem of social order which, Suchanek maintains, constitutes the basic problem of consent theory. The problem of social order arises when collective action gives rise to coordination problems and social antagonism. Social order has both a production and a distribution component that need to be resolved together to avoid persistent social conflict (cf. Knight 1992). Avoiding social conflict is considered a social good that allows us to efficiently organize social cooperation and, in principle, to distribute the gains from social cooperation such that all have a rationale to cooperate. This is where the ‘mutual advantage clause’ in Suchanek’s conception of social order carries the bulk of the argument.

One crucial aspect of the problem of social order as presently defined concerns what James Buchanan has termed the *natural distribution*. On this view the starting point of resolving social conflict must be the existing distribution of power and opportunities and their associated costs and benefits.⁶ In recent years many political theorists have argued that this starting point cannot constitute a just or *moral* order. For a social order also to constitute a moral order we need to ensure some sort of fair baseline underlying subsequent Pareto-superior moves. Rawls, for instance, famously proposed that the natural distribution of talents and the social distribution of opportunities is morally arbitrary and therefore cannot be allowed to play a role in the constitution of a just cooperative venture.⁷ (cf. Brian Barry 1989; 1995) has taken Rawls’s arguments a step further and has even challenged Rawls’s idea of justice as reciprocity for giving in too much to the bargaining position of those who hold a disproportionate share of natural or social talents. Naturally, the problem of moral order partially overlaps with the problem of social order. Social order is often a precondition for achieving a socially optimal moral order; norms of fairness in turn often contribute significantly to a stable social order.⁸ But both

⁵ Compare Griffin (1996) for an interesting philosophical critique of the “ought implies can” doctrine which underlies the distinction between ‘desirability’ and ‘feasibility’.

⁶ James Buchanan (1975, pp. 54-58) defines the natural distribution in terms of the combined outcome – an independently adjusted equilibrium – resulting from each person’s preference and production functions under conditions of a genuinely anarchic order. The same background condition roughly underlies David Gauthier’s social contract theory (Gauthier 1986).

⁷ “The natural distribution is neither just or unjust; nor is it unjust that persons are born into society at some particular position. These are simple natural facts. What is just or unjust is the way that institutions deal with those facts” (Rawls 1991, p. 87). Rawls suggests we regard distribution of native endowments, but *not* the endowments themselves, as a common asset (Rawls 2001, pp. 74-77). For discussion see Thomas Pogge (1989, pp. 73-81).

⁸ In recent years experimental studies have shown that norms of fairness significantly contribute to stable outcomes in a variety of social domains. The importance of fairness is most

goals in fact *may* – and often *do* – conflict, at which point the constitution of a moral order poses more stringent demands than the constitution of a social order. Contrary to what Suchanek seems to suggest, then, I believe justificatory consent theories are best appreciated as attempts at regulating the moral order, not simply as an approach to resolving social conflict. Of course, traditionally avoidance of social conflict has been an important motive for setting up a strong state. This was most clearly the rationale behind Hobbes’s social contract theory (cf. Hobbes 1991), and its motivational force remains very much unchallenged to date.⁹ But other social contract and consent theorists have broadened their moral scope to include other types of reasons, taking into account more stringent normative limitations.¹⁰

The key concern in the philosophical debate surrounding the role of consent in the constitution of society has been to examine the extent to which contingent conditions can be said to validate or invalidate the legitimising force of individual consent. Locke’s proposed move from express to implicit consent, for instance, has rightly been subjected to fierce criticism on the grounds that it renders individual consent hostage to individual circumstances. Here is David Hume’s characteristically lucid view:

‘Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her’ (Hume 1987, p. 475)

Rousseau (1973), and in particular Immanuel Kant (1993), went a significant step farther by suggesting that moral agreement arises from an independent source – human reason – thus rendering consent a hypothetical notion.¹¹ There exists a spectrum of consent theories, ranging from the strong (Hobbesian) interpretation of consent – which maintains that an individual’s consent is the sole source of moral and political obligation – to the weak (Kantian) notion that consent may contribute some additional legitimacy to a particular decision provided it accords with the dictates of Reason. But despite their differences and disagreements, the adherents

evidently illustrated by the Ultimatum Game, in which individuals are regularly willing to incur costs to counteract being treated unfairly. See Thaler 1992, ch. 3.

⁹ In a recent article, Adam Przeworski argues along similar lines that the primary function of a democratic state is to regulate the non-violent transition of rulers (Przeworski 1999).

¹⁰ Most famously, John Locke (1960) thought that an individual’s action, and by implication also her consent, must abide by the Laws of Nature, laid out by God and even operative in the State of Nature. The distinction between the Hobbesian and Lockean conception of the State of Nature is essential to understanding the *political* versus *moral* nature of their respective theories of consent (Simmons 1993).

¹¹ Some scholars may object to my depiction of Rousseau’s consent as a hypothetical device. But once taking into account his celebration of the General Will and its implications for individual freedom and consent, I fail to see how we can grant it anything but a hypothetical status.

of these consent theories all seem to share a common goal: to *justify* or *legitimate* the establishment of rules or decisions that affect personal action. To ignore this is to misrepresent the nature and purpose of consent theory in both its traditional and contemporary form.

Part of the problem lies in Suchanek's failure to appreciate that the *acceptance*¹² of rules or decisions is distinct from the *compliance* with such a set. To comply with a decision is to exhibit the sort of behaviour that is merely compatible with it. To accept a decision implies that one further entertains a voluntary commitment to endorse and perhaps even promote it. Consider Brad Hooker's analysis:

'Acceptance of rules also involves the disposition to encourage others to comply with them, dispositions to form favourable attitudes towards others who comply with them, dispositions to feel guilt or shame when one breaks them and to condemn and resent others' breaking them, *all of which dispositions and attitudes being supported by a belief that they are justified*' (Hooker 2000, p. 76, italics added).

The problem of social order is very much a problem of ensuring that a sufficient number of individuals *comply* with a particular decision in order to avoid social conflict. But does this necessarily demand that they *accept* the decision in any morally relevant sense? I think not.

As Suchanek himself points out, social and political rules often alter individuals' behaviour; sometimes by effectively ruling out certain behavioural options, other times by significantly altering the opportunity costs associated with a particular action. This means that there are means of ensuring compliance with a decision that are independent of full acceptance of it. This is not to say that acceptance of a decision might not have a positive impact on the compliance with a particular rule: in many cases people accepting a rule does constitute the most efficient route to ensuring compliance. But scholars also have pointed out instances where people seem to accept a particular rule or decision as appropriate, yet fail to comply with it – whether because of inherent weakness-of-will or a free-rider problem rooted in the structure within which individuals operate (cf. Elster 1985). The solution to ensuring compliance in cases of weakness-of-will, or to otherwise deter free riding, is generally to install a mechanism for detecting and sanctioning such undesirable behaviour. It is important to realize that, even if one expects widespread acceptance of a particular decision or rule, this often does not lessen the need for such a detection and sanctioning device. In addition, it is in fact often in a person's rational interest to endorse such a device even if this also prevents her from shirking on a particular rule.

I think the distinction between acceptance and compliance is important to fully appreciate how justificatory consent theories operate. Justificationism is mainly concerned with the reasons we advance to *accept* certain rules or decisions. A strong Hobbesian interpretation would argue that individual consent is the only moral ground for instituting a particular rule, whereas weaker interpretations, by

¹² I use acceptance in a broad sense, including both strict 'acceptance' and weaker 'non-refusal.'

contrast, tend to put bounds on the weight we grant consent as opposed to other moral reasons. But the crucial point is that there is little reason why a justificatory consent theory, except maybe in its most stringent form, cannot be made compatible with different regulatory procedures or mechanisms, thus taking into account the particular empirical conditions.

This brings us to my final point. I believe Suchanek ignores a crucial distinction between *principles of consent* and *consent mechanisms*. Principles of consent are normative statements or moral guidelines that express the moral reasons underlying the justification of rules or decisions. They are often expressed in universal and general terms, and essentially reflect the moral status individuals embody and the normative relationship between moral persons with potentially competing interests. Principles of consent often endorse an ideal of equality: famous examples include the Kantian maxim that no person should be treated as a mere means to an end or the Dworkinian idea that one should treat all persons with equal concern and respect (cf. Kant 1993; also O'Neill 1989, ch. 7; Dworkin 1977, pp. 180-183; 272-278). It is by virtue of these ideals that principles of consent claim to be universally valid.

It is true that universal validity comes at a price: universalism is only possible by restricting the analysis to a certain level of formality. Hegel (1967) famously criticized Kant for refraining to move beyond 'abstract right'. Suchanek seems to take Hegel's lead, challenging Justificationism for 'isolating deliberative reasoning as the foundation of moral behaviour from contingent empirical conditions' (p. 4*). But this claim is false. Consent theory does *not* isolate deliberative reasoning from empirical contingencies; that the contrary is true can be easily ascertained by looking at some of the recent literature on deliberative democracy (cf. Nino 1996; Dryzek 2001). Justificationism does not demand that all rules or decisions are universally valid in the sense that they can be agreed upon by all persons.¹³ What consent theory demands is that the moral grounds that determine whether a particular rule is morally acceptable or not are universally valid in the sense of according with the moral status of persons and the moral relationship between them.¹⁴

In order to combine universally valid moral reasons with stable and practical rules, society needs procedures or mechanisms to mediate between competing interests. Contemporary political practice gives us plenty of examples of how to institutionalise different consent mechanisms: modern polities regularly employ various forms of representation, co-determination, voting and deliberation at different

¹³ I think Suchanek is also seriously mistaken by insisting that "consent theory has the function to encourage unanimous agreement" (p. 1*).

¹⁴ I also think Suchanek is wrong in assuming that because "the norm of consent implies that every reasonable person should only act according to those interests which can claim to be universally valid", this means every person must actually assent to it (p. 4*). This seems a clear misunderstanding of the rationale behind Kantian universalism. Roger Scruton, for instance, has shown that Kant in fact holds the contrasting view that a law must be framed such that it is merely *possible* for all the people to give their consent, even if they at present would be inclined to refuse to do so (Scruton 1992, pp. 213ff; compare also Korsgaard 1995, ch. 2).

levels of decision-making to arrive at a legitimate set of rules. What is important from a justificatory point of view is that these mechanisms are supported by universally valid moral reasons. Of course, from an institutional design point of view they must simultaneously satisfy properties such as incentive-compatibility. But it is the *mechanisms* and not the underlying *values* or *principles* that need to be made compatible with existing circumstances. Suchanek's failure to distinguish between principles and mechanisms, in my view, betrays a misunderstanding of the appropriate division of labour between ethical reasoning and institutional design.¹⁵

The Heuristics Of Consent

In the previous discussion I wanted to point out that the problem of social order is distinctive from the problem of the moral order, that complying with a rule and accepting a rule are two different things, and that mechanisms and principles remain substantially different in nature even when both form an essential component of a general consent theory. I believe Suchanek invalidly collapses these distinctions together and that this has serious implications for his case against Justificationism: while his arguments are genuinely informative along many dimensions, they fail to invalidate Justificationism in general.

In the second part of his essay Suchanek proposes that we adopt a constitutional political economy approach and investigate the extent to which consent theory may serve as a heuristic for resolving the problem of social order. The idea underlying the heuristics of consent is that we can obtain valid information by analysing the circumstances under which individuals consent to a given rule. However, I believe his restrictive use of consent as compliance also poses serious problems for the heuristics of consent. In this section I elaborate briefly on this point.

Suchanek develops his alternative approach along two lines. First, he argues that a heuristic approach to implicit consent allows us to 'learn something about [people's] preferences as the basis for their actual behaviour' (p. 9*) This is then meant to serve as a diagnosis of the constraints individuals face when agreeing to a rule, which under Suchanek's restricted view boils down to deciding whether or not to comply with a particular rule. Second, Suchanek also maintains that an analysis of the structure of the situation within which individuals operate is a necessary condition for improving conditions of cooperation. This is captured by the notion of hypothetical consent.

Unfortunately, I fail to see how an analysis of revealed preferences (implicit consent) or the background structure of individuals' rational choices (hypothetical consent) tells us anything more about the nature of *consent*. By restricting the notion of consent to compliance with a set of rules or decisions, Suchanek renders his theory vulnerable to the objection that the heuristics of consent in either its implicit or hypothetical form contributes little to social theory that is not already covered

¹⁵ It remains a matter of some controversy what exactly constitutes the proper division of labour between political philosophers and institutional designers or policy analysts. For an interesting account see the Postscript in Shue 1996.

by mainstream rational choice and game theory. If the heuristics of consent generates equivalent insights to contemporary rational choice theory, what explanatory value has Suchanek's proposal to offer? For the heuristics of consent to have theoretical bite it must be the case that the act of consenting itself generates valuable information; information which, in turn, supports a stable system of mutually advantageous social cooperation. I believe *express consent* might satisfy this requirement. Let me demonstrate the argument by drawing a rough parallel between rules and consent.

Social theorists generally accept that, from the perspective of the individual, rules play two important roles. First, a rule provides important information about the sort of behaviour that is expected from an individual. Second, because of its association with a sanctioning device, rules also provide important information about the overall likelihood that certain behaviour will occur. This is often regarded as an extremely valuable property of rules, not only for institutional design at the societal level but also for individuals themselves.¹⁶ It seems there are two ways in which we can secure a baseline of expected desirable behaviour. The first is by attaching sufficiently effective monitoring and sanctioning devices that make it so costly for individuals to exhibit unwanted behaviour. The problem with this solution, familiar to economists and policy-makers, is that monitoring and sanctioning may be extremely costly in their own right – up to the point that it may be more efficient to allow a certain level of misconduct instead of introducing overall heavy monitoring and rule-enforcement (cf. Milgrom and Roberts 1992).

But there exists a second solution that builds on two assumptions. First, on-balance individuals who fully accept a given rule are more likely to comply with it than individuals who do not accept it. Second, under certain conditions the overall level of acceptance of a rule gives a good indication of the expected level of compliance with that rule. This in turn generates valuable information about the practicality of instituting a particular rule. The information entailed by the *signalling* of general acceptance with a rule, then, does not only provide institutional designers with an indication of the level of sanctioning that is required to ensure that non-accepting individuals comply with a rule. It also forms a central piece of information for individuals who often decide to accept a certain rule based on information on how likely it is that other people accept it.¹⁷

Clearly, the 'heuristics of express consent' has important implications for the design of consent mechanisms. To begin with, it is clear that the relevant information must be *attainable to all relevant parties* – individuals as well as decision-makers. Some scholars have gone so far as to demand that votes should be made publicly accountable (cf. Brennan and Pettit 1990). At the very least it means adequate dissemination of information throughout all layers of the polity is essential. In addition, the background conditions under which individuals express their consent

¹⁶ Jeremy Bentham, for instance, suggested that the expectation of behaviour is an important source of utility for the individual, thus providing a utilitarian justification for instituting a system of law. For an extensive analysis of this argument, see Kelly (1990a; 1990b).

¹⁷ This is the "reciprocal nature" of consent Suchanek rightly draws our attention to at pp. 6-7. Many decisions take the form of an Assurance Game (Taylor 1987).

must be designed such that their acceptance of a rule has the highest *expressive value* – that is, it can be regarded by all relevant parties as expressing a free and genuine choice (cf. Brennan and Lomasky 1993; Schuessler 2000).¹⁸ If I have a reason to believe that your consent does not in fact properly reflect your acceptance of a decision, its signalling value becomes worthless. It goes without saying that combining these two features imposes serious demands on the types of procedures and mechanisms decision-makers can employ. Given the complexity of the matter it seems plausible that we need to think in terms of a set of mechanisms to jointly ensure as best as possible that people can freely express their consent with rules and decisions.¹⁹ Needless to say it goes beyond the scope of this commentary to further specify the heuristics of express consent. I would like to stress, however, that the present argument appears to genuinely validate a heuristic in addition to, and fully integrated with, a justificatory approach to the meaning of consent.

Conclusion

In this commentary I challenged Suchanek's essay on two grounds. First I argued that his critique of the justificatory role of consent theory largely misses its target. Once we acknowledge the central role of distinctions such as moral vs. social order, acceptance of vs. compliance with rules, and principles vs. mechanisms, it seems Suchanek's concerns are at best orthogonal to the issues that justificatory consent theories traditionally address. I concluded that Suchanek might have a ground for complaints against those justificatory consent theorists who venture into practical issues without considering empirical constraints. But I have also argued that this in no way invalidates justificatory consent theory *in general*.

In addition I listed some sceptical thought about the heuristic approach championed by Suchanek. The heuristics of implicit and hypothetical consent seem to me to simply repeat insights already obtained from rational choice theory and game theory. I have suggested, however, that one might vindicate the heuristic approach by focussing on express consent. Express consent serves an important signalling function under conditions of imperfect information and moral pluralism, and contemporary democratic theory would do well to integrate this function in its analysis of consent.

¹⁸ The present use of 'expressive value' is instrumental and accords more with Schuessler's than Brennan and Lomasky's approach to democratic politics.

¹⁹ In practice a functional democracy is likely to contain a voting system in addition to other forms of representation, participation and deliberation. Political philosophers often fail to appreciate the contingencies associated with the choice of mechanisms, and normatively analyse one single mechanism. This probably constitutes one of the best examples of failing to appreciate the division of labour between political philosophers and institutional designers.

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