

Rawls versus the Anarchist: Justice and Legitimacy

Walter E. Schaller
Texas Tech University
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Section 1: The Anarchist's Argument

In a recent article, "Justification and Legitimacy," A. John Simmons argues that Rawls, Nagel, Dworkin, and others are guilty of conflating two separate and distinct problems: justification and legitimacy. According to Simmons, justification consists in showing that the state in general is morally permissible or prudentially desirable, or, as in the case of Rawls et al, that a particular kind of state is just.¹ For a utilitarian, justification requires showing that the state has better consequences than any alternative; for the Kantian, that the state is consistent with the categorical imperative; for the libertarian, that the state does not violate anyone's antecedent rights ("Justification and Legitimacy," p. 124). For Rawls, it requires showing that parties in the original position would choose certain principles of justice. Or, as Simmons says (drawing on Political Liberalism), Rawlsian justification consists in

showing that the state is acceptable to the particular persons forced to live under its authority (i.e., it is consistent with their (possibly quite diverse) moral beliefs ("Justification and Legitimacy," p. 143).

According to Simmons, Rawls, Dworkin, and others tend to suppose that justifying the state in general (or a particular kind of state) also legitimizes the state. He quotes Rawls as saying: "The basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires."² In other words, Rawls seems to think that if the state in general, or a particular conception of justice, is justified, then the state--and its use of coercion--is legitimate.³ But, according to Simmons, justification does not entail legitimacy. On his view,

Political power is morally legitimate, and those subject to it are morally obligated to obey, *only where the subjects have freely consented to the exercise of such power* and

only where that power continues to be exercised within the terms of the consent given.

The legitimacy of particular states thus turns on consent, on the actual history of that state's relations with its subjects ("Justification and Legitimacy," p. 129).⁴

In other words, it is morally impermissible even for a just state to use coercion against the members of that state without their consent (whatever that consists in). The fact that a (particular kind of) state is justified does not entail that its use of coercive political power is legitimate. Whereas justification pertains to the moral qualities of a state, legitimacy depends upon whether it stands in the right kind of relation to individuals, namely, a consensual relation.

Simmons thus argues that, according to Rawls (on whom I shall focus, as a representative political liberal), "legitimacy is now grounded not in what those persons actually accept or do (by consenting or taking benefits, say), but in what it is reasonable to expect them to accept--that is, in their hypothetical endorsement" ("Justification and Legitimacy," p. 144). But that simply collapses the important difference between justification and legitimacy; it is to suppose that the state (and state coercion) is legitimate if the state is just. And that is what Simmons, as a consent theorist, denies: even a just state is not morally permitted to coerce its members unless they have given their actual consent.

Does Simmons have a valid criticism of Rawls? That is, does Rawls illicitly assume the legitimacy of the state (and the use of state coercion) by assuming that justification entails legitimacy? I shall defend Rawls's account by asking whether Rawls has an adequate answer to the philosophical anarchist who insists that even a just state is not morally legitimate--is not morally permitted to use coercion--without his consent.

Section 2: Why Simmons and Rawls Fail to Have a Meeting of the Minds

As a Lockean, Simmons argues that legitimacy requires consent because human beings have a natural right to liberty⁵ which cannot be limited or infringed without their consent:

all persons, whenever and wherever born, begin their moral lives . . . with a substantial body of moral rights and duties, and . . . the rights in question centrally include . . . a

broad right of self-government or independence (both from other persons and groups and from states) (Justification and Legitimacy, p. vii).

Simmons identifies as central theses of Locke's Second Treatise of Government the twin claims that "All persons are naturally free and equal" and "all legitimate political power derives from the consent of those subject to it" (Justification and Legitimacy, p. viii).

In a Lockean state of nature, individuals are both free and equal. The claim of equality is a denial of natural hierarchies; the claim of freedom is the idea of their being in "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, and without asking leave, or depending upon the will of any other man."⁶ It is the possession of these rights and liberties that underlies the argument that the legitimacy of state coercion requires consent. Moreover, because individuals in the state of nature not only have innate rights and natural freedom but are also subject to the laws of nature, it also follows that the *state is morally permitted to require citizens only to do what is consistent with natural law*. Locke thus has an independent criterion for the justification or justice of the state (government). An unjust state is one which transgresses the laws of nature. Simmons writes:

A person's standing as a legitimate subject of some government must then be understood, on this approach, as the result of some special kind of departure from that person's natural condition. The political realm is to be analyzed in terms of permissible transitions from the natural condition to the condition of political membership. The rights and duties of states and governments, the moral limits on the state's employment of coercive political power, and the demands of social justice are all to be explained by delineating the (actual and morally permissible) processes by which persons make the transition from the natural to the political condition (Justification and Legitimacy, pp. vii-viii).⁷

Early in A Theory of Justice Rawls notes similarities between his theory and the the social

contract tradition:

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.

In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract.⁸

But, granting these similarities, in several critical ways Rawls's theory is not a social contract theory. Most importantly, unlike Locke, Rawls does not suppose that individuals have innate rights⁹ (antecedent to the original position which cannot be limited or infringed without their consent, nor does he suppose (as Locke did) that governments have no powers except those which have been transferred to them by individuals.¹⁰

Although Rawls says that the parties in the original position (and citizens in general, at least those in a modern, democratic society) conceive of themselves as "free and equal," nowhere does Rawls suppose that they have any particular (innate) rights, liberties, or duties.¹¹ The equality of citizens consists in their having the two moral powers to "the requisite minimum degree necessary to be fully cooperating members of society" (PL 19; 79).¹² Citizens are also conceived of as free in three respects: (i) they "conceive of themselves and of one another as having the moral power to have a conception of the good" (PL 30); (ii) they "regard themselves as self-authenticating sources of valid claims" (PL 32); and (iii) they "are viewed as capable of taking responsibility for their ends" (PL 33-34; also PL 185-188). Notice that the freedom and equality of citizens and parties in the original position does not consist in their having any (determinate) rights or duties (prior to or independent of those conferred or imposed by the principles of justice themselves).

_____ Furthermore, in the original position, the parties are motivated strictly by self-interest (they are 'rational'); they do not suppose that they have any rights that they want to protect. Rather, the parties (and moral persons in general) are characterized as having two moral powers (PL 103-104): (i) the

capacity for a sense of justice (the capacity to understand, to apply and to act from the principles of justice; in other words, the capacity to be reasonable), and **(ii)** the capacity to form, revise, and rationally to pursue a conception of the good--the capacity to be rational (PL 302).

These two higher-order powers generate two higher-order interests--interests in realizing and exercising these powers (PL 19, 30). It is these higher-order interests that govern deliberation in the original position; these are the interests the parties seek to advance by their choice of principles.

Furthermore, Rawls argues that, as a political conception, justice as fairness regards persons as free and equal only in terms of their public identity--as citizens they are to be conceived or regarded as free and equal (PL 31; JFR 22). Political liberalism does not make any claims about the innate or inherent moral status of persons (in terms of their nonpublic identity); it does not assert (nor, of course, does it deny) that persons, or rational beings, are inherently equal (moral equality) nor does it assert (or deny) that they have some kind of natural liberty as a birthright. (These are questions on which citizens may differ, depending on their comprehensive doctrine.)

Finally, Rawls argues that the idea of pure procedural justice applies to the selection of principles of justice in the original position.

Pure procedural justice means that in their rational deliberations the parties do not view themselves as required to apply, or as bound by, any antecedently given principles of right or justice. Put another way, they recognize no standpoint external to their own point of view as rational representatives from which they are constrained by prior and independent principles of justice (PL 73).¹³

Since the choice of principles of justice is a case of pure procedural justice, there is no independent criterion for a correct choice (PL 72-73); the procedure itself defines the correct outcome.

Let us now return to the (philosophical) anarchist. In Lockean social contract theory, the anarchist appeals to the natural right to liberty to justify his claim that if the state coerces him without his consent, it violates this right and is therefore illegitimate. But Rawls, unlike Locke, does not start

with the assumption that individuals have rights that cannot be infringed without their consent. Since the choice of the principles of justice is an instance of pure procedural justice in which the parties in the original position are not constrained “by prior and independent principles of justice,” the anarchist has no grounds for arguing that their choice is mistaken or unjust because they fail to acknowledge the existence of antecedent rights. And so Rawls leaves the anarchist without any grounds for arguing that he is treated unjustly.

As we have seen, instead of rights, the parties in the original position have interests which they seek to advance--interests in developing and exercising their two higher-order powers. If the state coerces them in ways that thwart, say, their ability to advance their conception of the good, the only question is whether the principle on which the state acts is just, that is, whether it is the most reasonable grounds for coercion, not whether any of their natural rights are thereby violated.

Since the parties in the original position do not have any antecedent rights (only interests), the anarchist can object to coercion without consent only by appealing to the principles that would be chosen in the original position. If justice as fairness is the theory that would be chosen by the parties in the original position, then the anarchist is treated unjustly only if justice as fairness requires consent. And it does not.¹⁴

Of course, it might turn out that the principles chosen in the original position do not match our considered judgments in reflective equilibrium and we might be motivated to revise the description of the original position (or our considered judgments).¹⁵ But this does not provide any solace for the anarchist, for the appeal to our considered judgments is an appeal to our beliefs about what is just within society--our beliefs about the characteristics of a just society--not our beliefs about justice in the state of nature or outside of political society. So while it is possible in this sense for the original position procedure to yield ‘incorrect’ results, they are incorrect as principles of social justice, not as principles about innate rights.

Perhaps one could argue that it is one of our considered judgments that there is a natural right to

liberty (and/or that coercion without consent is morally impermissible). If so, one could then argue that the description of the original position and the parties themselves should be altered so that the principles of justice honor this considered judgment. The best Rawlsian response to this suggestion is that the belief in a natural right to liberty is too theoretical to qualify as the kind of considered judgment that can serve as a (provisional) fixed point.¹⁶ (Rawls's examples of considered judgments are very specific and very uncontroversial, e.g., the belief that slavery, religious intolerance and racial discrimination are unjust.)

Remember our question: are anarchists treated unfairly if they are coerced without their consent? The Rawlsian answer is that they are not, and that is because they do not have any rights except insofar as those rights are defined by the principles chosen in the original position. If those principles say that it is morally permissible to coerce individuals under certain conditions, regardless of whether they consent to being coerced, then such coercion is justified (and legitimate).

At this point it might be objected that the argument assumes what needs to be shown, namely, that in the state of nature individuals do not have any rights. Rawls is not entitled simply to deny that the anarchist has a natural right to liberty. Drawing on his line of reasoning in Political Liberalism, the most obvious Rawlsian response is that there is reasonable disagreement about the (necessary and sufficient) conditions for political obligation and legitimacy.¹⁷ In light of this fact of reasonable disagreement, it would be unreasonable for the anarchist to insist that his particular theory of political obligation be accepted by others who reasonably disagree. Of course, the anarchist might reject Rawls's account of political legitimacy and thus deny that a conception of justice cannot be grounded in ideas that could not be rejected by reasonable people. He might reject what Rawls calls the liberal principle of legitimacy (LPL) according to which "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason" (PL 137). Rawls and the anarchist would then be at an impasse.

Since our purpose is to determine whether Rawls collapses the distinction between legitimacy

and justification, let's suppose the anarchist does accept Rawls's account of legitimacy and agrees that justice as fairness (or something like it) is the most reasonable conception of justice and therefore determines the rights and responsibilities of citizens. By endorsing justice as fairness, the anarchist agrees that these principles determine his rights, duties, and liberties.¹⁸ From this it follows that it would be unreasonable for him to insist that he retains a different set of rights and liberties, such as Lockean natural liberty. Once he endorses justice as fairness as the most reasonable conception of justice, he is also committed to endorsing the rights, liberties, and duties that constitute that conception of justice; he is committed to agreeing that those are the rights and liberties that he has; they are the rights, duties, and liberties that determine how he is permitted to act.

Conclusion

The anarchist who insists on the necessity of consent is appealing to (something like) a Lockean natural right to liberty which makes it is morally impermissible to coerce people without their consent. But if the anarchist accepts that justice as fairness (or something like it) is the most reasonable principles of justice, then the anarchist is unreasonable if he insists that he is not morally obligated by those principles because he has rights not entailed by those principles. The moral necessity of consent depends upon the truth of something like a Lockean right of natural liberty, but once the anarchist accepts that justice as fairness establishes the liberties he possesses, then he can no longer appeal to the Lockean rights to justify his claim that he is not bound by those principles without his consent.¹⁹

Has Rawls really answered Simmons? Simmons charged Rawls with assuming that the justice of a state was sufficient for its legitimacy. I think that Rawls is not guilty of conflating justice (or justification) and legitimacy;²⁰ rather, what is really at issue here is the appropriateness of Locke's approach to legitimacy (which presupposes the existence of certain innate rights) versus Rawls's approach (which imagines the parties in the original position as having certain fundamental interests but not any rights which would render coercion without consent morally impermissible).

FOOTNOTES

¹ A. John Simmons, “Justification and Legitimacy,” in Justification and Legitimacy: Essays on Rights and Obligations (Cambridge: Cambridge University Press, 2001, p. 125). Originally published in Ethics 109 (1999), pp. 739-771. Simmons writes: “we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives” (125).

² John Rawls, Political Liberalism (New York: Columbia University Press, 1993), p. 224 (hereafter cited as PL); “Justification and Legitimacy,” p. 141).

³ Simmons quotes Thomas Nagel: “the task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it” (Equality and Partiality [New York: Oxford University Press, 1991] p. 33). Ronald Dworkin writes: “the general justification of the exercise of coercive power of the state” is “[t]he classic problem of the legitimacy of coercive power. It rides on the back of another classical problem: that of political obligation” (Law’s Empire [Cambridge: Harvard University Press, 1996], pp. 190-191). Finally, Leslie Green writes: “A state is legitimate only if, all things considered, its rule is morally justified” (The Authority of the State [Oxford: Oxford University Press, 1990], p. 5).

⁴ Simmons adds: “Legitimacy . . . is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively. Legitimacy is thus the logical correlate of the (defeasible) individual obligation to comply with lawfully imposed duties that flow from the legitimate institution’s processes. The proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution (“Justification and Legitimacy,” p. 155).

⁵ See, for example, his approving reference to “the natural freedom of persons” (“Justification and Legitimacy,” p. 136).

⁶ John Locke, Second Treatise of Government, §24. Also, to possess natural liberty is “to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule” (§ 22; see also §6).

⁷ Simmons writes: “This approach to political philosophy, then, constitutes a straightforward rejection of what we might call ‘political naturalism’--according to which the natural condition of persons born within the territories of political societies is one of membership and political obligation. The political relationship is by contrast, according to the view espoused here, essentially ‘artificial’ (that is, a product of human artifice), however ‘natural’ it may be for us to create and live in political society” (Justification and Legitimacy, pp. vii-viii). Clearly, although he does not appeal to natural rights in his argument, Rawls also rejects political naturalism.

⁸ A Theory of Justice, Revised Edition (Harvard University Press, 1999), pp. 10, 11.

⁹ Simmons distinguishes between human rights and natural rights such that all natural rights are not innate. Natural rights may be either innate or acquired (Justification and Legitimacy, p. 185).

¹⁰ Locke thus argues that governments are not permitted to enslave their citizens (nor can citizens give valid consent to being enslaved): “a man, not having the power of his own life, cannot by compact or his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another, to take away his life when he pleases” (Second Treatise of Government, § 23).

¹¹ In A Theory of Justice, Rawls does discuss natural duties, but they are to be selected by the parties in the original position only after the principles of justice have been chosen. In any case, there is no mention of natural rights. Moreover, whereas Locke argues that governments have only those powers that are transferred to them by citizens, Rawls says that governments only have those powers which would be agreed to in the original position, but that is quite different from Locke’s claim. Rawls never argues that the parties in the original position are limited, by their own innate or natural rights, in the rights they can

transfer to the government.

¹² See also Justice as Fairness: A Restatement, edited by Erin Kelly (Harvard University Press, 2001), §7; see also A Theory of Justice, §77.

¹³ Rawls writes: “one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice” (A Theory of Justice, p. 17; also PL 259, 282).

¹⁴ In Section 51 of A Theory of Justice, Rawls offers reasons, from the point of view of the original position, why political obligation should not presuppose any voluntary act on the part of citizens; instead, he argues, the parties would find it rational to endorse a natural duty of justice (see Section 19).

¹⁵ A Theory of Justice, p. 18.

¹⁶ In Theory Rawls says that considered judgments are those that “we seem unwilling to revise under any foreseeable circumstances” (280). Given how many conflicting theories of political obligation find thoughtful defenders among philosophers, the judgment that coercion without (actual) consent is unjust is a poor candidate for a considered judgment. (For one of the best discussions of the various theories of political obligation, see Simmons, Moral Principles and Political Obligation [Princeton: Princeton University Press, 1979].)

¹⁷ Some people think that consent is required (the voluntarists); others are persuaded by the argument from fairness or fair play; still others by the idea that the duty of gratitude underlies political obligation.

¹⁸ Rawls allows that utilitarians might continue to believe that true justice is utilitarian and justice as fairness is simply a reasonable approximation which must be accepted because it would be unreasonable to expect others to endorse utilitarianism (PL 170). In the same way, the anarchist might grant Rawls’s claim that it would be unreasonable to expect everyone to endorse a consent theory of legitimacy but insist that it is nonetheless the true theory. I discuss problems with this way of thinking in “Political Liberalism: Truth, Justification, and Legitimacy” (unpublished) where I argue that Rawls should argue for the truth and not merely the reasonableness of justice as fairness.

¹⁹ My argument has assumed the legitimacy of Rawls's approach to public justification in Political Liberalism. I have not tried to defend that approach, however. My purpose has been to show why, within the terms of his argument, the anarchist does not have any grounds for maintaining that legitimacy requires consent. To make that argument, he would have to argue that it is reasonable for him to insist upon the existence of rights which are not part of the most reasonable conception of justice.

²⁰ Justice as fairness satisfies the conditions of legitimacy (the liberal principle of legitimacy) because (or if) the theory can be given a freestanding justification, for then it does not presuppose the truth of any particular comprehensive doctrine. And the freestanding character of the theory is represented in the original position by the veil of ignorance. (Since the parties do not know their conception of the good, they cannot choose principles designed to favor their particular conception.) In Political Liberalism Rawls seeks to show how the conception of justice that he had justified in the earlier book can also satisfy the conditions of public justification (by not appealing to the truth of any particular comprehensive doctrine) and thereby satisfy the conditions of legitimacy. By recasting the justification of justice as fairness so that it is a public justification which can be endorsed by reasonable citizens, whatever comprehensive doctrine they affirm, Rawls makes it possible (if his arguments are sound) for his theory to legitimate as well as justify.