

Why Nothing Is Justified by Justificatory Liberalism

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Abstract: According to justificatory liberalism (JL) legal coercion is legitimate only when exercised for reasons that all reasonable persons can accept. That is, laws are legitimate only if they satisfy JL's unanimity condition. This principle entails that if no law meets the unanimity condition, then no law is legitimate. However, given the diversity of persons who meet JL's own twofold criteria of 'reasonable' – commitment to fair cooperation and recognition of reasonable pluralism – no law would be supported by all reasonable persons in JL's thought experiment, let alone in the real world. I illustrate this diversity of qualified views with an objector inspired by Michael Bakunin, whose revolutionary anarchist views take the state to threaten more than protect equality and pluralism. Therefore, JL would prohibit any use of legal coercion. Nothing would be justified by JL. This result clearly conflicts with commonsense, which recognizes many instances of legal coercion as legitimate even amidst disagreement, and calls into question JL's plausibility.

Key words: political legitimacy, justificatory liberalism, public justification, pluralism, unanimity condition, reasonable disagreement.

According to justificatory liberalism (JL)¹, legal coercion is legitimate if based on reasons that any reasonable person can accept. This is the basic idea of public justification, common property to John Rawls, Gerald Gaus, Jonathan Quong, and many others. Working in the social contract tradition, this basic idea is explicated in terms of an idealized procedure that culminates in unanimity. Taken at face value, the view implies that coercion based on reasons that only some accept and others reject is unjustified, and also that no coercion is justified in the absence of reasons that all reasonable persons can accept.

The strong claim that I will presently defend is that JL would make all uses of legal coercion illegitimate. JL theorists have already qualified their theory in an avowed attempt to avoid libertarian conclusions (Lister 2010, 154-55; Gaus 1996; Quong 2005; Schwartzman 2004; Nagel 1987), but, in fact, we should not expect even the night watchman state to pass muster. This implication would obviously conflict with the common belief that many real-world uses of legal coercion are indeed legitimate even amidst disagreement. JL theorists themselves believe this; they are not anarchists. Yet I maintain JL would actually de-legitimize all legal coercion. Why do I make this strong claim? Why would JL lead to this unacceptable consequence?

After a summary of JL, I launch straightaway into the heart of the argument, with the help of an objector inspired by Michael Bakunin. My argument is that the full breadth of political thought includes persons who, according to JL's own criteria of reasonable personhood, qualify as 'reasonable' and yet who would reject the very existence of a

[1] This term originated with Gerald Gaus, though I use it more broadly than he. I follow Christopher Eberle in using it to refer to all theorists who endorse the basic idea of public justification, which I explain here (Gaus 1996; Eberle 2002). The acronym "JL" will variously stand for "justificatory liberalism" or "justificatory liberal" depending on context.

coercive state. I put forward a reconstructed Bakuninist as one such example. There is no use of legal coercion, therefore, that would pass JL's standard of legitimacy, involving as it does a unanimity condition. Having laid out the heart of the argument, I then unpack three factors that conspire to produce this result: first, JL's criteria for reasonable persons; second, the reasonable multi-interpretability of key political concepts, and; third, JL's unanimity condition. The lesson to be learned from my argument is that JL's criterion for legitimate coercion must be wrong, though I do not go so far as suggesting an alternative.

I. AN OVERVIEW OF JL

JL explains legitimate legal coercion in terms of reasons that all reasonable persons can accept. Such coercion is 'publicly justified'. JL distinguishes itself from other liberal political philosophies by its distinctive view concerning the appropriate mode of justifying liberal institutions. Rather than basing legitimate coercion on perfectionist values such as individuality or autonomy – as would the liberal accounts of, say, John Stuart Mill or Joseph Raz – JL bases legitimate coercion on reasons all can accept.

Let us have before us a few representative statements of the basic idea. In perhaps his simplest statement of the idea, Rawls, foremost among JL theorists, writes, "[...] our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification for those actions."² Elsewhere Rawls makes clear that it is to "all" other citizens that our reasons must be reasonably acceptable (2005a, 137). According to Jonathan Quong, a leading JL theorist and close follower of Rawls, the "basic project" of JL is "to show how liberal rights and institutions can be reasonably justified to all citizens in spite of the fact of reasonable pluralism" (2011, 316). Meanwhile Andrew Lister, who bases JL in civic friendship while being critical of other JL theorists³, nonetheless summarizes JL as follows:

The exercise of political power is justified only if it is justifiable *to* all those subject to it, that is, only if it is acceptable to all suitably rational and moral individuals without them having to give up the religious or philosophical doctrine they reasonably espouse. (2010, 151)

This basic idea that legitimate coercion is based on reasons all can accept is common property to JL theorists who otherwise specify the view in differing ways. They differ in what uses of political power must be publicly justified, and in what contexts and to what persons the view applies, among other ways. The most significant of these differences, though, is between "consensus" and "convergence" versions of JL (Vallier and D'Agostino 2012). According to the former, all must support coercion for similar, public reasons – that is, for reasons not unique to a particular religious or comprehensive view. According

²] Rawls as quoted by Lister (2013, 7-8).

³] See Chapters 2 and 3 (Lister 2013). He argues that JL is based neither on freedom of conscience, democracy, anti-paternalism, equality, nor even on respect for persons, contrary to commonly received views.

to the latter, each citizen must simply have some reason for supporting coercion, even if the reason is religious or unique to his comprehensive view. This distinction parallels what Lister identifies as the difference between two ways of framing JL: consensus accounts frame JL in terms of reasons and convergence accounts in terms of decisions (Lister 2013). The former requires unanimity on reasons, the latter unanimity on decisions. Similarly, the consensus/convergence distinction also parallels the difference between accounts that require coercion to be publicly justified and those that simply require a framework for deliberation to be publicly justified. Despite the quotations above, theorists such as Rawls, Quong, and Lister make clear their accounts only require that coercion be justified by a certain type of general, non-sectarian reason to be publicly justified, even if citizens reasonably disagree over what coercive measures such reasons support (Quong 2011, 262-63).⁴ In other words, they require that coercion be justified from within a deliberative framework that involves only ‘public’ reasons. The consensus/convergence, reasons/decisions, and coercion/framework distinctions are significant. JL theorists remain united, though, in their affirmation of the basic idea that legitimate coercion is based on reasons that all reasonable persons can accept.

For a clearer sense of JL’s core principle and animating spirit, understand that JL is a concerted response to “the traditional liberal demand to justify the social world in a manner acceptable ‘at the tribunal of each person’s understanding.’”⁵ JL essentially attempts to meet this demand by limiting legal coercion to that which is based on reasons all can accept. I will refer to this as JL’s ‘unanimity condition’⁶, that is, the requirement that coercion pass “at the tribunal of *each* person’s understanding” (emphasis mine). This would mean that any social arrangement not justified to each person’s understanding both remains illegitimate and fails to satisfy this traditional liberal aim.

It is helpful to remember that JLs explicate the idea of public justification in terms of a hypothetical procedure (Quong 2011, 143-44, 241). The envisaged procedure is carried out in idealized circumstances that correct for deficits of character, rationality, and political equality such as are faced by real-world persons. Reasonable persons are represented by the parties to the hypothetical procedure. The reasons on which legitimate coercion is based are those which the idealized parties would find acceptable. Legitimate legal coercion is coercion all idealized parties would support as part of a social agreement.

In sum, the basic idea of JL is that legitimate coercion is based on reasons that all reasonable persons can accept, and it represents a contemporary attempt to realize the traditional liberal aim of justifying legal coercion to all affected persons. In what follows, I shall take this basic idea at face value. Although, as I have already noted, some JL theorists emphasize a deliberative framework more than coercion as an object of unanimous

4] According to Lister it is “*principles*” that need be acceptable to all rather than “*laws and policies*” (Lister 2013, 83).

5] Rawls applies this apt phrase from Jeremy Waldron to his own JL account (Rawls 2005, 391 n. 28).

6] I believe I borrow this term from Lister.

agreement, I proceed on the assumption that JL requires that all find reasons for coercion acceptable and not merely that all be offered a certain type of reason. For one, this seems the most natural reading of JL's core principle and its plain meaning. Two, JL theorists such as Lister explicitly affirm that, "The exercise of political power is justified only if it is justifiable *to* all those subject to it..." (Lister 2010, 151). And three, interpreting JL in this way is most consonant with the animating spirit that underlies it, which is concerned with "each person's understanding". Later I return to this third point.

II. THE HEART OF THE ARGUMENT

My claim is that JL actually legitimizes no uses of coercive political power, a result that is clearly at odds with commonsense. My main reason for the claim is this: the real world contains persons who meet JL's own criteria of reasonable persons and yet who would reasonably reject the very existence of coercive states. Given JL's unanimity condition, such persons' reasonable rejection of proposed uses of legal coercion would render all such uses impermissible.

In other words, for even the night watchman state to meet the unanimity condition, no reasonable objections must exist to the effect that a stateless society is preferable to a society governed by a minimal state. But aren't there such objections in the offing? Let us consider one such objection, reconstructed from Michael Bakunin's compelling and influential anarchist writings.⁷

According to Bakunin, recognizing the freedom and equality of all prohibits the existence of a centralized coercive political state and requires instead "a free federation of communes" (Bakunin 1971, xx). In the state, Bakunin saw a grave threat to freedom and equality given that "social life could easily take on an authoritarian character through the concentration of power in a minority of specialists, scientists, officials, and administrators" (1971, 8). His solution was, "A vast network of free associations, federated at every level and preserving the maximum degree of local autonomy..." (1971, 7). Rather than dealing with the fact of reasonable pluralism by means of a centralized state, Bakunin argued that "a free society must be a pluralistic society in which the infinite needs of Man will be reflected in an adequate variety of organizations" (1971, 20). He puts the point with a flourish, "Every command slaps liberty in the face" (1971, 3).

The crucial point is that the Bakuninist objector should qualify as 'reasonable' according to JL's own criteria of reasonable persons. As I discuss below, these criteria are basically twofold. They are, first, that one is prepared to cooperate with others on fair

7] Neither is this the only such objection that might compromise the night watchman state. For another example, I suspect a reasonable case for anarchism, expressible in 'public' terms, might be based on the ideal of the self-sufficient, pioneering individual present in American political culture. For such a rugged individualist, freedom consists in taking responsibility for one's own well-being, without interference from others who likewise are responsible for themselves and equally free in this sense.

terms of cooperation and, second, prepared to recognize the fact of reasonable pluralism.⁸ Stated generally, the Bakunist meets both these criteria. He recognizes others as free and equal persons with whom he is willing to cooperate; he also takes into consideration others' diverse conceptions of the good.

The real difference between the Bakunist, on the one hand, and the hypothetical contractors of JL, on the other, is not that the former is 'unreasonable' according to JL's own criteria of reasonableness while the latter are not. As I say, both possess the requisite qualifications. Rather the difference is that the Bakunist simply holds conceptions of freedom, equality, and fairness that are strikingly different from what JL theorists believe to be reasonable. The Bakunist and the JL theorist agree on the importance of these general concepts; but they signally disagree on the conditions for experiencing these values and the operative threats to them.

For instance, consider how the Bakunist's conceptions of freedom and equality differ from those typical of JL. For the Bakunist, freedom is

...the absolute right of every adult man and woman to seek no other sanction for their acts than their own conscience and their own reason, being responsible first to themselves and then to the society which they have *voluntarily* accepted. (Bakunin 1971, 76)

At first glance, this conception may appear compatible with JL. In some sense the JL and Bakunist alike affirm individual autonomy; for their part, JLs regard people as free in having the capacity and right to lead their lives by their own lights. But the differences between the Bakunist's and JL's conception of autonomy are actually very significant. For one, the Bakunist gives primacy to one's conscience in a way JLs seem not to. Freedom is primarily a response to one's conscience, living out the dictates of conscience unimpeded by others. By contrast, JL freedom is much more a response to social order. Given that one's life will be lived out in a social context governed by political coercion – a starting premise which the Bakunist seems not to share – individual autonomy is adjusted to the demands of others. As such, JL freedom is reduced to little more than a way of reconciling oneself to the political order under which one lives (Rawls 2005a, 222), as opposed to the Bakunist's more radical freedom which requires following one's conscience whether within society or not. So, for example, in a conflict between a religious community's conscientious beliefs and a social expectation of non-discriminatory hiring practices, the Bakunist is much more likely than the JL to uphold the religious

8] Quong adds the third condition that reasonable citizens give "deliberative priority" to considerations of justice. That is, they prioritize justice-related considerations over other considerations stemming from their full-blown comprehensive views should they conflict (Quong 2011, 233, 291). The problem with the Bakunist, though, is not that that he fails to give deliberative priority to justice, but that he reasonably holds a different conception of justice. Rawls proceeds with only these two criteria for reasonable persons, and so do I.

community's freedom of conscience and prescribe withdrawal from wider social and political structures if conscience requires.⁹

Two, Bakuninist freedom can only be limited by social arrangements to which one actually and voluntarily consents in the real world. The JL simply does not see this as a practicable possibility. The JL assumes the existence of political coercion; the question becomes how to appropriately justify this coercion; and for that purpose counterfactual consent in idealized circumstances suffices.

Three, "*freedom for all*" – which is the aim of the social revolution Bakunin envisages – requires "the radical dissolution of the centralized, aggressive, authoritarian State, including its military, bureaucratic, governmental, administrative, judicial, and legislative institutions" (Bakunin 1971, 96). By contrast, JLs see in a modern, centralized state no threat to their conception of individual autonomy. To put the difference still more starkly, the JL sees the state as enabling citizens to lead their own lives, where doing so is understood to require social goods such as political standing and the "social bases of self-respect"¹⁰ securable by the state. Conversely, the Bakuninist sees the state as threatening autonomy, given how the state's overwhelming power can impede individuals from living according to their own conscience.

As for Bakuninist equality,

This is not the removal of natural individual differences, but *equality in the social rights of every individual from birth*; in particular, equal means of subsistence, support, education, and opportunity for every child, boy or girl, until maturity, and equal resources and facilities in adulthood to create his own well-being by his own labor. (Bakunin 1971, 97)

While here again there is much with which JLs would agree, there are also significant – and reasonable – points of difference. Bakunin's conception of equality clearly requires a rich list of positive rights. The Bakuninist and JL will find common ground on that point, albeit ground not shared by those toward the right end of the political spectrum. But Bakunin's conception of equality also regards these positive rights as oriented towards a particular goal, namely, each individual engaging in labour that is productive and dignifying – dignifying not in the sense of dignity-respecting, but dignity-bestowing. For all their differences, Bakunin shared with Marx Marx's thoroughly secular, materialist perspective in which the dignity of humans consists in their capacity for free, productive, self-expressive labour. It is here the JL and Bakuninist part ways in their respective understandings of equality. For the JL generally views people as equal in the sense that no-one has a natural right to exercise political power over others, while the Bakuninist views them as equal in their right to the conditions for dignifying labour. Now is the Bakuninist unreasonable in holding this more particular view or in relying on it while negotiating social arrangements? I think not. For the Bakuninist's belief that cooperative labour lies at

9] I think this last example is borrowed in part from Cécile Laborde.

10] The most important of Rawls' primary goods.

the basis of society and is the source of “dignity” and “rights” (Bakunin, 1971, 92) strikes me as at least reasonable, even if not compelling. Moreover, the Bakuninist can hold and articulate this conception of equality even while bracketing his wider and reasonably contestable atheistic, materialistic beliefs.¹¹

Moreover, the Bakuninist also seems to respect the Rawlsian requirement of reciprocity. For Rawls, fair cooperation not only involves respecting others as free and equal, but also reciprocity; this requires “that citizens believe in good faith that the fair terms of social cooperation that they propose and expect all to abide by are *reasonably acceptable to everyone* in their capacity as free and equal citizens, without their being dominated or manipulated, or under pressure because of an inferior social or political position” (Freeman 2007, 375). It is true that the Bakuninist’s anarchist objections would deprive the least well-off of social programs which, as JLs see it, make only the redistributive state “reasonably acceptable to everyone”. However, for the Bakuninist it is not the lack of such redistribution that poses the greatest threat to the least well-off. Rather, it is the state itself that poses the greatest threat, given the state’s potential for centralizing power, resources, and expertise. Thus, given how he sees the operative threats to the sort of freedom he values, the Bakuninist can “in good faith” reject the state while fulfilling Rawls’ reciprocity requirement.

Likewise, the Bakuninist offers a different interpretation of what the fact of reasonable pluralism means for social cooperation. Both the Bakuninist and JL accept it as a fact, and accept that it has implications for social cooperation. But they disagree over what its implications are. JLs believe pluralism implies their idea of public justification. Conversely, the Bakuninist believes it means that society ought be hospitable to diverse grassroots organizations that give expression to the full variety of comprehensive views that exist in a pluralistic society. To reiterate, “a free society must be a pluralistic society in which the infinite needs of Man will be reflected in *an adequate variety of organizations*” (Bakunin 1971, 20 [emphasis mine]). This diversification itself is fostered by rejecting a centralized state that tends toward monopolizing intellectual and material resources. For the JL, reasonable pluralism means that the power of the state must be publicly justified; for the Bakuninist, it instead requires extensive devolution of this power. Reasonable diversity is not expressed in the public justification of state power, but in the “variety of organizations” encouraged by devolving state power.

Whether or not anyone actually advocates these Bakuninist positions in a given time or place is immaterial to the present point. Simply the fact that one could plausibly interpret freedom, equality, fairness, and the implications of reasonable pluralism in these diverse ways should qualify the Bakuninist as ‘reasonable’ under JL’s twofold criteria.

11] This is bracketing required by consensus, though not convergence, approaches. Reasons peculiar to one or another comprehensive view are not reasons that all can recognize as being reasonable grounds for accepting or rejecting a proposal. For their part, JLs would claim that their understanding of equality – no-one naturally being subject to another – is ‘public’ in just this sense, not peculiar to any one comprehensive view.

Of course, if these general criteria are specified in more particular ways, then the Bakuninist may fall beyond the pale of the reasonable. This may happen, for instance, if free-and-equal citizenship is stipulated so as to require the provision of a social minimum, or if it is stipulated (rather than argued) that the fact of reasonable pluralism implicitly requires JL public justification.

But there are at least three strong reasons why JLs cannot, and would not want to, load the deck in such ways.

First, JLs cannot specify reasonable personhood in a more particular way since doing so would beg the question in favour of the substantive conclusions at which JL theorists hope to arrive. A hypothetical procedure only involving persons who already hold the substantive conclusions at which the theorist wants to arrive has no genuine heuristic or constructivist value (Pettit 1993, 297-307). Second, doing so would also render JL a much less apt tool for dealing with the diversity that exists in real-world liberal democracies. No longer would the hypothetical contractors represent anything closely approximating the diversity that exists among real-world persons holding various comprehensive views. Instead, it would represent only a much more narrow range of diversity, tailored to achieve unanimity only on the conclusions that JL theorists prefer. Third, the more procedure-independent content with which JLs fix these concepts, the less can JL plausibly claim to instantiate a higher-order impartiality.¹² JL aspires to be an arbiter between comprehensive views, not an expression of one. Presuming, then, that JL theorists neither want to beg the question nor fail to address real-world pluralism nor become just one comprehensive view among others, their criteria of 'reasonable' persons will have to rest on general concepts of freedom, equality, fairness, and reasonable pluralism as opposed to specific conceptions thereof.

In short, all this means that it seems perfectly possible for a reasonable person to believe that the benefits of living in a stateless society would outweigh the costs – as our reconstructed Bakuninist does. I myself may judge the costs and benefits differently. Yet do I fail to see any plausible grounds for rejecting the night watchman state, and grounds that are perfectly expressible in terms of public reasons? I do not, and the existence of such objections means that even the minimal state fails at the bar of JL's unanimity condition; not all can accept it.

So JL faces an even bigger problem than libertarianism. JL would not just make many uses of political power illegitimate that we normally regard as legitimate. Taking into account the full range of political views held by suitably reasonable persons, JL would make all uses of political power illegitimate. If JLs have failed to see this, it is because they

[12] The idea of "higher-order impartiality" is from Nagel 1987, as is the contention that liberalism instantiates it.

have failed to appreciate how wide a diversity of views can be held by persons who qualify as ‘reasonable’ according to their own twofold criteria of reasonableness.

III. FACTORS IN THE ARGUMENT

Let me now break down this argument into three of its constituent elements. These factors conspire together to yield JLs unacceptable consequence of de-legitimizing all legal coercion. The first has already figured quite prominently in my presentation of the argument, but it is worth examining in greater detail as it offers a window into the internal logic of JL reasoning.

1. Reasonable Persons: Who’s In? Who’s Out?

To begin with, one must try and disambiguate who or what JL means to describe with the slippery term ‘reasonable’. The term is used in what I take to be the basic idea of JL: legitimate laws are those based on reasons every ‘reasonable’ person can accept. Here it is persons who are reasonable or not. Sometimes it is an act that is counted reasonable or unreasonable, as when JLs speak of reasons all can ‘reasonably’ accept or of reasons no-one can ‘reasonably’ reject. At times Rawls also characterizes legitimate laws as those justified on grounds that citizens can reasonably expect one another to accept (2005b, 446-47). It is one’s belief concerning the acceptability of a proposal to others that is judged reasonable or unreasonable. Finally, in addition to citizens being (un)reasonable and acts of accepting, rejecting, and expecting being (un)reasonable, JL also predicates (un)reasonableness of reasons.¹³ Eberle has catalogued and critiqued various ways in which JLs have tried to capture the general nature of ‘public’, or ‘reasonable’, reasons (2002, 252-87).¹⁴

These many uses raise the question of the relationship between them. This is not an issue that JLs tend to clarify. While they do not, I think consistency demands that a certain order of priority exist among them with application of ‘unreasonableness’ to citizens being primary. I explain.

Given their proceduralist aspirations¹⁵, JLs are committed to predicating (un)reasonableness of citizens primarily and of substantive reasons or policies only

¹³ See Freeman for a comparable list of the many items of which Rawls predicates ‘reasonableness’ (2007, 296).

¹⁴ For instance, such reasons have been characterized as essentially intersubjective, replicable, or fallible in nature, among other proposals.

¹⁵ I speak of JLs as having “proceduralist aspirations” chiefly because of the internal logic of their constructivism, and only secondarily because of what they explicitly say. And, in fact, JLs sometimes explicitly say they do not intend to be thoroughgoing proceduralists; for instance, see Rawls’ response to Habermas (Habermas 1995; Rawls 2005, 421ff.). However, even if JLs acknowledge that there are certain substantively just outcomes they seek to justify – as Rawls does in his response – their constructivism commits them to representing these outcomes as the result of an unconstrained proceduralism. That is,

secondarily. If social arrangements are to be understood as self-legislated by free citizens, citizens themselves must be understood as the arbiters of what count as reasonable reasons and reasonable social agreements. Reasonableness is primarily predicated of citizens, and the reasonableness of other phenomena downstream is determined by procedures in which qualified citizens participate.

Moreover, in addition to the logic of their constructivism, JL should primarily predicate (un)reasonableness of citizens insofar as they aim to meet the liberal demand that “the social order should in principle be capable of explaining itself at the tribunal of each person’s understanding.”¹⁶ With this quote in mind, I have suggested the animating spirit of JL is the desire to make social arrangements justifiable to each and every citizen subject to them. Hence, this order of priority – predicating (un)reasonableness primarily of persons rather than of reasons or agreements – best reflects the spirit of JL, and also preserves its proceduralist designs.

As already mentioned JL gives basically two criteria for reasonable citizens (Rawls 2005a, 54; Rawls 2005b, 488). First, reasonable persons are willing to cooperate with others on fair terms. Reciprocity requires that we offer others terms that we expect they can reasonably accept, that will not impose unreasonable burdens on them no matter their place in the social order. Second, reasonable persons recognize the burdens of judgment and the fact of reasonable pluralism, and recognize them as having implications for social cooperation. So long as a citizen is willing to cooperate fairly and recognize reasonable pluralism, they qualify as ‘reasonable’. These qualifications may seem sparse, but it is their very sparseness that makes them suitable for a constructivist, proceduralist account.

Who, then, counts as reasonable according to JL itself? It is not a matter of any particular reasons or social arrangements one must accept to qualify as reasonable. Rather, according to JL, reasonable citizens are simply those who meet two basic criteria. If JL stays true to its proceduralist aspirations, we should then look to the views of these reasonable citizens to give content to reasons and acts that are reasonable as well.

2. Multi-Interpretable Concepts: Why Disagreement Persists even in the Ideal

JLs evidently believe that the idealizations of the hypothetical contracting situation will substantially decrease the extent of political disagreement that exists among citizens of diverse viewpoints when compared with the real world. I am arguing, however, that even with such idealizations – moral, epistemic, material – we still should not expect the range of disagreement to so narrow that appreciable unanimity could be reached on

the procedure they use to justify the substantive outcomes they prefer must not simply presuppose these outcomes by imposing them on the contractors as procedure-independent criteria of rightness. In short, JLs may have substantive commitments, but they are also committed to justifying these in proceduralist terms. In this way they have proceduralist aspirations.

¹⁶] See n. 5 above.

any political measure, including the very existence of a coercive state. Why shouldn't we expect this?

My presentation of the argument implicitly depended upon and illustrated one reason why, but I should now draw out and set forth this reason more clearly: we cannot expect unanimity because of the reasonable multi-interpretability of general concepts that are centrally important to political debate. Such concepts are crucial to JL's criteria of reasonable persons. As a result, the range of persons who qualify as reasonable is broader than is typically conveyed by JL accounts; so, too, will the range of reasonable grounds for rejecting coercion.

For example, take the concept of freedom. What does it mean for citizens to be free? Does it mean that governments legitimately rule only by consent of the governed? If so, is it only by actual consent or also by tacit consent? And what might constitute tacit consent (Simmons 1979, 57-100)? Perhaps freedom speaks rather to certain basic negative liberties that everyone ought to enjoy.¹⁷ Or does it also include a basic right to certain material goods (Rawls 2005a, 356-63)? Does our freedom consist in the political liberties, as the ancients thought? Or in basic civil liberties, as moderns are more inclined to think (Constant 1988, 307-28)? Are we free in some more abstract sense, maybe the Kantian understanding of ourselves as self-legislators of the ethical and political norms that govern us? Is freedom an essentially relational term, where free persons are those who stand in a relationship of non-domination to others (Pettit 1999)? Nor should we forget the Bakuninist's conception of freedom seen earlier that accords primacy to one's conscience.¹⁸ Moreover, so far as I can see, all of these conceptions of freedom are compatible with the basic concept that JLs start with: individuals are free in that each has a capacity and right to lead their lives by their own lights. It is safe to assume there is some shared meaning between all these conceptions – some basic idea such as self-direction. But a vague concept like this is hardly sufficient for adjudicating any substantive political disputes.

Now consider equality in this same light. At the beginning of *Contemporary Political Philosophy*, Will Kymlicka posits that political theorists of our time have come to occupy in common an "egalitarian plateau" (Kymlicka 2002, 4-5). He then goes on to discuss each of several leading schools of contemporary political philosophy: utilitarianism, liberal equality, libertarianism, Marxism, communitarianism, and feminism. He suggests that each of these can be fruitfully understood as a different interpretation of the political value of equality! (And so, too, can anarchism, the Bakuninist will hasten to add.) For example,

This more basic notion of equality is found in Nozick's libertarianism as much as in Marx's communism. While leftists believe that equality of income or wealth is a precondition for treating people as equals, those on the right believe that equal rights over one's labour and property are a precondition for treating people as equals. (Kymlicka 2002, 4)

17] See Berlin for the distinction between negative and positive liberties (Berlin 1958).

18] For a contemporary exponent of the view that freedom is primarily freedom of conscience, see Kukathas 2003.

It is evident, then, that even citizens who view one another as free and equal will experience great difficulty coming to unanimity given their differing interpretations of what it means to treat people “as equals.”

And just as there are diverse interpretations of equality and freedom, there are also various reasonable interpretations of fairness. Do fair terms of cooperation require rendering to each according to desert, where desert is a function of one’s virtue or vice? For much of Western history, justice and fairness were understood primarily in these terms, though now this understanding has been mostly – though not entirely¹⁹ – abandoned by professional philosophers. Does fairness demand ‘from each according to ability, to each according to need’? This was Marx’s suggestion, and still resonates deeply. Does fairness demand rendering to each according to her actual contribution to society’s economic production? A certain ethic of personal responsibility, held by libertarians and laissez-faire capitalists, would say it does. But this dimension of fairness also finds expression, albeit more modestly, in the writings of Rawls – who views persons “as capable of taking responsibility for their ends” (Rawls 2005a, 33-34) – and luck egalitarians – who aim to “eliminate involuntary disadvantage”, though not voluntary disadvantage (Cohen 1989). Or does fairness demand distribution according to a system of natural rights, equally and inalienably held by all?²⁰ Or perhaps fairness demands distribution according to a hypothetical procedure of some sort, procedures which themselves try to embody one or more of the foregoing ideals of fairness in combination with each other. JL, for instance, incorporates both luck egalitarian elements – trying as it does to nullify characteristics that are “arbitrary from the moral point of view” (Rawls 1999) – and natural rights elements – taking each person as it does to be a “self-authenticating source of valid moral claims” (Rawls 2005a, 32).

Reflect upon this fact. The contemporary political philosophical world is characterized by diverse theorists who knowledgably and sympathetically articulate utilitarian, libertarian, Marxist, communitarian, and feminist views, as well as theories such as justice-as-fairness, justice-as-luck-egalitarian-equality, justice-as-rights, justice-as-entitlement, justice-as-desert, justice-as-impartiality, and so on. What makes possible their disagreement? In large part, their disagreement turns on the multi-interpretability of the key concepts under discussion. They agree that people are free and equal and should be treated fairly; they just disagree on the meaning and implications of these general ideas.

Their disagreement reinforces my argument in this essay. In light of the extant disagreement among political philosophers with which we are familiar, is it reasonable to expect that contractors – burdened by the same multi-interpretable concepts – will fare any better in reaching unanimity? As Waldron emphasizes with respect to Rawls’ *Political Liberalism*, political disagreement exists “all the way down” (Waldron 1999, 295)²¹, and we

19] For an extensive recent discussion of desert, see Kagan 2012.

20] Think Locke here.

21] Chiding Rawls for wrongly supposing that diverse persons will unanimously support public

should not expect the situation to be significantly different even if we transpose real-world persons to the hypothetical conditions of JL.

3. JL's Unanimity Condition: Why Nothing Gets Justified

The reasonable multi-interpretability of key political concepts contributes to an explanation of why JL de-legitimizes all uses of legal coercion. The vagueness of these concepts, though, is something with which all political philosophers must reckon. More specifically, why is it that, in the context of JL, these vague concepts lead to the unacceptable consequence of de-legitimizing all legal coercion?

The culprit is the unanimity condition that is part of the JL thesis. JL requires that laws be based on reasons that all can accept; correlatively, it requires justifications that none can reasonably reject. Unanimity might seem possible given certain understandings of freedom and equality that are widely shared among contemporary liberal democratic citizens. However, JLs fail to appreciate the full breadth of viewpoints that qualify as reasonable by their own twofold criteria, a failure that I suspect is due to certain understandings being so hegemonic at present that they have become virtually transparent to us. This bias leads to marginalizing views such as the Bakuninist's, despite the fact that it is actually consistent with the general premises of fair cooperation between equals and reasonable pluralism. But it is the surprisingly wide range of persons that qualify that problematizes the JL standard, since any proposal must be non-rejectable by all of them.

To solve this problem, the unanimity condition cannot simply be removed from JL. It cannot since it is an essential part of JL given the problem to which JL is a response. The problem is how to vindicate the freedom and equality of real world democratic citizens who, on the basis of political views they do not share, are often coerced against their will. How can a person be free who is coerced by their fellows, having had his vote outweighed by the majority view? This was the essential problem Rousseau sought to redress with his notion of the general will. Notice this problem is only generated if we believe that every citizen is free and equal. If every citizen is not, then it seems unproblematic that certain citizens be coerced by others or their views dismissed by the majority; for it would make sense that those who have less status or freedom should be subject to coercion by those who have more status or freedom. But that is obviously not the premise from which JL begins nor the situation to which JL addresses itself. JL assumes that everyone is free and equal, and so long as even a single person stands to be coerced against her will Rousseau's conundrum remains as problematic as ever. The larger moral framework presumed by JL is certainly individualistic and Kantian, not aggregative and utilitarian. To remove the unanimity condition from JL, therefore, would be to gut JL of a key advantage over aggregative approaches as well as render it only a partial solution to the problem it is meant to solve.

reason as a framework for resolving political disputes, Waldron elsewhere comments, "[w]e also have to deal with justice-pluralism and disagreement about rights" (Waldron 1999, 159).

Let me explain JL's unanimity condition in yet one more way, defending my construal of it against the charge that I've misinterpreted JL. It may seem I have misinterpreted JL as follows. I have presented JL's unanimity condition as requiring that reasons for coercion be accepted by all reasonable persons. What it actually requires, though, is simply that reasons for coercion be acceptable to all. It requires only that reasons are such that they could be accepted, not that they necessarily are accepted. In other words, the purpose of JL is not to resolve disagreements. Rather, it is simply to provide a framework for handling disagreements that is appropriate to free and equal citizens. It serves this latter purpose by the framework itself being accepted by all, even if the reasons given for particular measures within the framework are not accepted by all. JLs such as Rawls and Quong clearly want to allow for the legitimacy of coercive legislation amidst disagreement. They require only that legislation be justified by reasons that are related to the shared values of freedom, equality, and fairness and by reasons that are otherwise non-sectarian.

In light of this exegetically being the case, why do I characterize the unanimity condition as I do – as requiring that all reasonable persons find reasons for coercion acceptable, and not merely as requiring that they be offered a certain type of reason? And why do I insist that the unanimity condition, so characterized, is essential to JL?

I have already pointed out that mine is the more natural reading of JL's basic idea and that JLs can periodically be found explicitly saying that it is coercion and institutions that must be universally accepted (Quong 2011, 316); additionally, there is substantive philosophical reason to regard the unanimity condition so understood as essential to JL. As I say, JL distinguishes itself in part by being individualistic rather than aggregative and addresses itself to the same question addressed by Rousseau. My construal of JL's unanimity condition, as opposed to construing JL as merely requiring agreement on a framework for reasoning, is more consistent with these considerations. Similarly, by requiring only a framework for reasoning, JLs fail at the essential task of justifying coercion to all affected persons. Persons who are merely offered a certain type of reason rather than reasons they accept have hardly been offered reasons that are acceptable to them. Doing so hardly solves Rousseau's problematic. Hence, given JL's core principle, JL's unanimity condition is best interpreted as requiring unanimity on reasons for coercion as opposed to simply unanimity on a framework for reasoning.

Now the JL theorist might grant that JL cannot be gutted of its unanimity condition and that my characterization of the condition is appropriate. But, he will insist, JLs are not proposing to give every real-world person a veto. They are simply giving every person a veto insofar as their cognitive, economic, and moral deficiencies are corrected for. And then he may put to me the following question: among that idealized group of people, don't I think there would be many uses of legal coercion that no-one would veto?

To reiterate, no I do not. Certainly there are reasons offered in the real-world for rejecting a given policy that would not be offered by persons construed in this way. For instance, no person would object to climate change legislation on the basis of disreputable environmental science. Our contractors also would not have the lapses in moral judgment

that sometimes afflict otherwise egalitarian real-world citizens. Nor would anyone leverage their wealth for political advantage. So the cognitive, moral, and economic idealizations would, I expect, have the effect of narrowing the range of reasons that are offered for or against a proposal.

However, I also expect that these idealizations would not narrow the range of laws that satisfy JL's unanimity condition. That is because there are still several ways in which reasonable citizens, offering public and not comprehensive reasons, may conscientiously disagree with one another.²² To name three sources of such disagreement: they may disagree on the interpretation of general concepts, as I have emphasized. As well, they may disagree on how various public reasons and values ought to be weighted.²³ They may also disagree on the correct analysis of empirical data – such as certain disagreements that attend climate change science (Budd 2015).²⁴

Even if JL's idealizations narrow the range of reasons being offered, there are many reasonable, public objections that reasonable citizens can raise against coercive measures. Climate change legislation may not be rejected on the basis of bad science, but it may be rejected on the moral grounds that some other state priority is of greater urgency; or on the philosophical grounds that we cannot have obligations to future generations; or based on the belief that imminent technological advancements will be able to address future environmental challenges.²⁵ Group-differentiated legislation may not be supported on the basis of irrational prejudice, but may be defended in the name of rectifying historic or systemically entrenched injustices. Egalitarian schemes of property rights may be reasonably rejected on efficiency grounds; or in the name of certain inalienable rights which people plausibly possess – rights to their own bodies, labour, and fruits of their labour.²⁶

In short, people would enter cooperative schemes with diverse views of public reasons and values even when they do their best to leave aside their comprehensive views and even when their moral, epistemic, and material shortcomings are corrected for in the hypothetical scenario envisaged by JL. There is no reason to suppose that widely differing political views and temperaments would not come into play in the making of the hypothetical agreement. We should expect that these differing views would deeply affect even idealized persons as they evaluate proposals. As a result, although certain kinds of particularly divisive reasons may be out of bounds, there are no uses of coercive political

22] In the comments to follow, I take my cue from Lister (2010, 154).

23] Cf. Eberle's comments on abortion (2002, 219).

24] For instance, despite widespread agreement on the basic fact of rising global temperatures caused by human activity, climate scientists disagree over why average global temperatures "barely rose" between 1998 and 2012.

25] I borrow the suggestion that future technologies might solve environmental challenges from a talk given by Jan Narveson at at the Canadian Political Science Association meeting in May 2011, at the University of Waterloo in Waterloo, Ontario, Canada.

26] I follow Nozick in distinguishing and isolating these rights.

power that we should expect all reasonable persons would agree with. Thus, applying JL's unanimity condition de-legitimizes all uses of legal coercion, even in JL's idealized circumstances. JLs have insufficiently explained why we should expect otherwise.²⁷

IV. CONCLUSION

In sum, according to the basic idea of JL legal coercion is legitimate only when exercised for reasons that all reasonable persons can accept. That is, laws are legitimate only if they satisfy JL's unanimity condition. This entails that if no law can meet the unanimity condition, then no law is legitimate. Given the diversity of persons who meet JL's twofold criteria of 'reasonableness' – a diversity that encompasses such marginal views as the Bakuninist's – no law would be supported by all reasonable persons in JL's thought experiment, let alone in the real world. Therefore, JL would prohibit any use of legal coercion.

Nothing would be justified by JL. This result clearly conflicts with commonsense, which recognizes many instances of legal coercion as legitimate even amidst disagreement, and calls into question JL's plausibility.

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^{27]} For reasons such as those summarized in this paragraph we should also expect disagreement over frameworks for deliberation and not just over coercive measures. If so, the foregoing analysis remains relevant even if we interpret JL as only requiring unanimity concerning frameworks.

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