

Phil 290-1: Recent Work on Political Coercion
Rawls, *Political Liberalism*
Cohen, “Democracy and Liberty”

The Liberal Principle of Legitimacy:

It is now something of an orthodoxy among (esp. American) political philosophers to accept the:
Liberal Principle of Legitimacy 1: It is impermissible to use force against someone (the “target”) unless there is some justification of that use of force that is “acceptable” to the target.¹

John Rawls, Joshua Cohen, Samuel Freeman, Thomas Nagel, Judith Thomson, and David Estlund endorse, and rest their arguments on, some form of it.

A justification is “acceptable” to the target, I assume, just when its premises are considerations whose status as reasons the targets could accept, compatibly with (a) their deepest convictions—their “comprehensive doctrine”: e.g., their religious tradition, moral outlook, philosophy of life—insofar as (b) those convictions are “not unreasonable.” Such convictions are “not unreasonable” insofar as they stem neither (i) from errors of reasoning that lie outside “the burdens of judgment,” nor (ii) from an unwillingness to take into account the interests and claims of others (including the claim not to be exposed to force whose justification they cannot accept).

Note that a decision may have an “acceptable” justification without having, all things considered, a sound justification. For example, it might be based on premises of the right kind, but which are nonetheless false. Or, even if the premises are true, the justification may fail to weigh them correctly. Note also that a decision may have an “acceptable” justification even if the target rejects it. The target may not in fact accept the premises or may disagree with how the reasons that they represent are weighed against one another.

Arguably, the Liberal Principle has a further condition. There must be not only an “acceptable” justification, but also one “available” to the target.

Liberal Principle of Legitimacy 2: It is impermissible to use force without a justification acceptable *and available* to the target.

A public justification is “available” to the target just when the target is, or is in a “reasonably” good position to be, informed of it. By “reasonably good” position, I mean that the target’s failure to be informed is due either to his own unwillingness to take further, only moderately costly or difficult steps to inform himself, or to the unfairness of the burdens that others would have to bear in order to improve his position.

One might also want to insist that those using force be *motivated* by such justifications:

Liberal Principle of Legitimacy 3: It is impermissible to use force without (i) having a justification that is acceptable to the target, without (ii) being *motivated* by some such justification, and (iii) without both (i) and (ii) being available to the target.

Amendments 2 and 3 would help to explain what Rawls call the “duty of civility”: that in arguing in favor of certain laws or policies, we are to offer public justifications. In doing so, we help to inform potential targets both (i) of a public justification of the force and (ii) of our motivation by that justification.

A great deal of ink has been spilt exploring how exactly the notions of “acceptable” and “reasonable” in the Liberal Principle are to be understood.

There has also been much discussion of what sorts of individual liberties the Liberal Principle might imply. In “Democracy and Liberty,” Cohen suggests arguments for religious liberties, freedom of expression, and protections against the enforcement of sexual morality. (If we seek to justify the restriction of religious freedom, for example, we have to do so on the basis of reasons that believers could reasonably accept. But believers reasonably take such restrictions to prevent them from fulfilling religious *obligations*, rather than matters of mere preference. And there are rarely reasons that they might reasonably see as *overriding* these obligations.) In other work, esp. “Privacy, Pluralism, and Democracy,” he proposes similar arguments for reproductive rights, including abortion, while finding the case for assisted suicide more equivocal.ⁱⁱ This general project, of deriving individual liberties from the Liberal Principle, seems to me important and suggestive, but it isn’t our focus here.

Our focus is, instead, on the prior questions of what *justifies* the Liberal Principle in the first place. Much less has been said about this. Rawls suggests that it would be chosen in the original position (PL, 225–6). Cohen’s essay ends with the pronouncement that “no other account of reasons is suited to this case.” Both invite the question: Why?

The Liberal Principle and Democracy:

The Liberal Principle is often associated with democracy. This association isn’t entirely transparent, at least not if we understand by “democracy” not simply a commitment to some abstract conception of freedom and equality, or of consensual politics, but a commitment specifically to institutions that reach decisions by processes that give everyone equal opportunity to influence those decisions.

On the most natural understanding, the principal objection to violations of the Liberal Principle comes from the *target* of the use of force. (Of course, others can have objections derived from this objection: that it would put them in an undesirable relation to the target, etc. But those objections are predicated on the target’s having an objection in the first place.) Here the Liberal Principle does not *presuppose*, as far as I can see, democratic ideas in order to be applicable.

However, on another understanding, suggested at times,ⁱⁱⁱ the principal objection to violations of the Liberal Principle comes not from the target, but instead from *other citizens*, whose *equally shared* power we are wielding. This objection *does* presuppose democratic ideas for its application: namely, that that power is co-owned. We may not use what is just as much *their* power, except in ways that *they* could find acceptable.

Even if the Liberal Principle does not *presuppose* democratic ideas for its application, it might be said to *imply* democratic institutions. One way is suggested by Estlund: non-democratic institutions would *themselves* violate the Liberal Principle. The basic idea is that for any rival to universal suffrage, the claim that that rival would produce better results could not be accepted compatibly by some reasonable view.

Another way is suggested by talk of “deliberative democracy.” A democracy of a suitably “deliberative” kind would somehow best realize the Liberal Principle. We can agree that, first, having democratic institutions and, second, offering public justifications in the electoral or legislative debates leading up to decisions made by those institutions will be a *means* for, first, testing whether there is in fact an acceptable justification; second, informing people of it; third, fortifying a commitment to be moved by it; and finally, displaying to others that commitment. We can also agree that, if we take democratic institutions for granted, then offering public justifications in democratic fora will be the best available means. (At very least, alternatives would squander excellent opportunities to multi-task.)

Even so, it isn’t clear that non-democratic institutions couldn’t provide similar means. A “consultation hierarchy” of the kind that Rawls imagines might just as well satisfy the Liberal Principle, with the autocrats using those consultations to test whether policies would be acceptable to the subjects consulted, choosing for implementation only among policies that do satisfy it, and then making it clear to subjects, in public pronouncements, how the policies were supported by justifications that could be accepted by, say, Jews, Copts, etc.^{iv}

The Liberal Principle and Consent:

It is often suggested that the Liberal Principle somehow represents a “better” way to accommodate the impulses that otherwise find expression in the Consent Requirement.^v There are two ways of taking this thought. The first is that “acceptability” somehow “better” serves the role that consent is invoked to serve. The second is that while “acceptability” is not as good as consent, it is the “closest” we can come.

There is a case for the acceptability-as-first-best view. It might be said that someone’s deepest values “speak for” him more accurately than his actual consent at any given time.

But there is also a case for the acceptability-as-second-best (or consent-as-first-best) view. If we understand the objection to nonconsensual state force as continuous with the objections to battery, or rape, or nonconsensual medical treatment—that is, as rooted in something like an interest in controlling others’ uses of force against us—then it would seem that only consent fully removes the objection. Such bodily invasions are more plausibly made permissible by consent than by acceptability. Even if acceptability is better than nothing, consent would still be best.

If we take the acceptability-as-second-best view, then the Liberal Principle should probably be further modified.

Liberal Principle of Legitimacy 4: It is impermissible to use force without a justification acceptable etc. to the target, *unless the target consents to it.*

If the second-best can license force, then presumably the first-best can too.

It is not clear that proponents of the Liberal Principle would endorse this. Are we permitted to use force that can’t be publicly justified if, in fact, everyone consents to it? (Note that, for Cohen, a use of force is not publicly justified if it could not be accepted by some possibly, but not actually, held reasonable doctrine (234). This strikes me, though, as untenably restrictive. The District of Columbia’s prohibition on falconry without religious exception seems to me publicly justified, even though there are certainly *possibly, but not actually*, held reasonable

doctrines—e.g., an animism that obligated shamans to commune with birds of prey—that would make it unacceptable.)

In any event, as natural as the second-best view is, it is, on reflection, mysterious. In what sense “can’t” we come closer? Rawls seems to suggest that our refraining from using force without consent simply isn’t an option. I don’t see why, unless this is just a consequence of a stipulative definition. Commitment to the Consent Requirement seems as conceivable as pacifism.

Perhaps the point is not that we *can’t* come closer, but that we *shouldn’t*: that commitment to the Consent Requirement would be unfair. Suppose the target refuses to consent to a use of force over him on which many others depend for certain benefits or escape from certain harms: for the goods that a state might provide. Do we use force or not? On the one hand, there is target’s loss of control over others’ use of force against him, if we use force. On the other hand, there are the losses or deprivations others bear, if we refrain. The question is how these two sets of burdens should be weighed against one another. Think, then, of the Liberal Principle and the Consent Requirement as two competing answers to this question. In broad terms, the argument for the Liberal Principle over the Consent Requirement is that it distributes the burdens between target and others more fairly, whereas the Consent Requirement asks others to bear all the burdens.

“More fairly” in three respects. First, contrast a case in which we “merely” violate the Consent Requirement but not the Liberal Principle—i.e., the target refuses to consent but the justification is “acceptable” to him—with a case in which we violate both—i.e., the target refuses to consent and the justification is not acceptable to him. To use force in the former case denies control only to his choices, whereas to use force in the former case denies control not only to his choices, *but also* to his deepest normative beliefs. Arguably, this is a more significant deprivation of control. So the burdens to the target of a “mere” violation of the Consent Requirement are less than the burdens to the target of violations of the Liberal Principle.

Second, the burdens on others of respecting the Liberal Principle (once the “unless...” clause of version 4 is added) *cannot be greater* than the burdens of respecting the Consent Requirement. Indeed, the burdens are typically *much less*. The Consent Requirement grants vetoes to non-consent on *shallow* grounds and to non-consent on *unreasonable* grounds. So it tightly constrains others. Someone can refuse to consent to just about *anything* shallowly or unreasonably. By contrast, the Liberal Principle grants a veto only to non-consent on *deep and reasonable* grounds. Support for such a veto is much harder to come by. So its constraints on others are far more limited.

Third, the Consent Requirement grants a veto to refusal to consent on *unreasonable* grounds, whereas the Liberal Principle does not. Others would seem to have a strong objection to having to bear burdens simply because of this sort of veto. Why should they be left holding the bag, after the target’s unreasonableness, especially when they have made reasonable efforts to offer the target a justification on the basis of which the target could, compatibly with his deepest normative beliefs, consent? Look at the matter more abstractly. Suppose there are two ways that A can enjoy some good. Way X requires much from others, whereas way Y requires little from them. Others have made reasonable efforts to put A in a position to take way Y, but A unreasonably refuses to take it and insists on X. Are others required then to bear the burdens of

providing A with the good in way X? Or is that A's ("substantive") responsibility? In the present case, the good is freedom from nonconsensual force, which one can enjoy by not consenting and having others refrain from using force (way X) or by consenting and allowing others to use force (way Y).

For these reasons, one might conclude that the Liberal Principle represents a fairer answer than the Consent Requirement to the question how the respective burdens should be distributed when there is a potential conflict between the target's interest in control over uses of force against him and others' interest in the benefits, or relief from harm, that such uses of force would bring.

Simmons objects that the acceptability-as-second-best view, left on its own, is disingenuous: "For if the ideal of the fully voluntary political society were in any way regulative for them, Rawls (et al.) would be interested in restructuring political societies so as to make the choice of membership (or nonmembership) as voluntary as circumstances will permit" (146). Put another way, the objection is that, if consent really is the first-best, then the Liberal Principle should read:

It is impermissible to use force *unless all reasonable efforts have been made* to avoid force without the target's free consent and, *if that fails*, with at least a justification acceptable etc. to the target.

The question, though, is what "efforts" to avoid force without the target's free consent would not unreasonably burden others. Giving the target a veto at will over the use of force clearly would. But perhaps other "efforts" would not.

First, efforts might be made to allow targets to avoid (at least *our*) nonconsensual force by *exiting* the political community altogether. *If* such a policy wouldn't unreasonably burden others, then the use of force without consent would not be permissible, even with an acceptable, etc. justification, unless that policy were in place. Permission to use of force would require a right of exit. But this is not equivalent to saying that force is not permissible unless there is an *easy, costless opportunity* to exit (something that may not be in the home state's power even to provide) of the kind that would be required for non-exit to count as consent. And, in any event, most liberal democracies do have a right of exit.

Second, taking as given that the target will not avoid exposure to our force, efforts could be made to win his free consent to it. I suppose that would mean (a) presenting the target with good arguments to consent and (b) ensuring that his refusal to consent did not involve any special cost or difficulty, so that his consent could count as free. (Recall the objection, made famous by Hume, that Locke's apparent suggestion that mere residence might count as tacit consent clearly violates (b), because emigrating was as difficult and costly as casting oneself overboard.) But, as we have said already, these efforts seem built into the Liberal Principle. By making the justification *available* to the target, we are already making efforts to achieve (a). And nothing special needs to be done to ensure (b); we need only ensure that those who refuse to consent aren't held up to scorn, denied public-sector employment, etc. It may be true that, provided a justification acceptable to him is available, force will be used *whether or not* he consents, and that this force will be costly. But that is not the same as making his *refusal* to give consent, *as opposed to his consenting*, costly or difficult.

ⁱ Perhaps the *locus classicus* is Rawls: “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.... To this it adds that all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as possible, by principles and ideal that can be similarly endorsed.”

ⁱⁱ Sketches:

Abortion:

- Restrictions on abortion burden women in uncontroversial ways: that is, in ways that no one could reasonably reject:
 1. Burden on equality, when *women* must carry unwanted pregnancies to term.
 2. Burden on liberty, by preventing women to make choices about the course of their lives. (*This* problem would persist even if men bore comparable burden.)
 3. Burden on judgment, analogous (perhaps) to religious liberty.
- These rights *could be* overridden by an argument that abortion is the taking of innocent human life.
- But any such argument would depend on “a particular outlook about the nature and value of life” that could be reasonably rejected.

Assisted suicide:

Here the case is different, because the regulation could be defended by appeal...

- “not to a conception of when life ends or what makes a whole life (or parts of it) worth living,” which some might reasonably reject...
- “but to concerns about when we have a conclusive showing of a person’s willing decision to end her own life, and worries about pressures to make that decision as a way to reduce burdens on family and friends,” which are considerations of a kind whose force all might reasonably accept.

ⁱⁱⁱ “it proposes to use the public’s political power—a *power in which citizens have an equal share*—to enforce a view...about which... reasonable persons are bound to differ” (Rawls, 138). “And that... is a failure of democracy. We have denied full membership by failing to provide a justification for the exercise of collective power by reference to considerations that *all who are members of the sovereign body that authorizes the exercise of power* and who are subject to that power, ... can accept. There are many ways to exclude individuals and groups from The People, and this surely is one” (246). “the requirement of shared reasons for the exercise of political power—a requirement absent from the aggregative view—*itself expresses the full and equal membership of all in the sovereign body responsible for authorizing the exercise of that power...* When I say that it expresses ‘full membership,’ not simply equal membership, I mean *membership in the collective sovereign that authorizing the exercise of power*, and not simply membership as a subject of that power” (265).

^{iv} It might be argued that open democratic debate is likely to be a *better* means than consultation. “First, it is not enough just to ask the subjects what is acceptable to them, as if the content of their comprehensive views could simply be read off of some internal script. They need to work through *their* own comprehensive views to *know*. Moreover, they need to work through their own comprehensive views *in dialogue with* the comprehensive views of others. It is not clear that what is acceptable within one’s reasonable comprehensive view can be answered in abstraction from the demands placed on others by their *reasonable* comprehensive views.

“Second, even if there was assurance that the autocrats were committed to public justification, it is not clear that there would be similar assurance of *other subjects’* commitment. And yet those subjects will play a role in actually implementing those policies; they will be using force against their fellow subjects. Again, this is also something served, perhaps uniquely, by public debate. Why would I attempt to convince you that a certain action had a justification of a certain type, unless I thought that it was important that it had a justification of that type? And how could I think that it was important that it had a justification of that type unless I took care to ensure that my views were sound? And how could I take care to ensure that my views were sound unless I listened, and took seriously, others’ views?”

Suppose, then, there is public debate of the following kind. Each person expresses and tries to convince every other person of their views about what decision is best justified by public reasons. Moreover, each person seeks to ensure that his views are sound. A large part of that is listening to, and taking seriously, others’ views.

Still, the connection between the outcome of public debate and decision-making might still be indirect. An autocrat might ensure that the policy enacted does not violate the Liberal Principle, in light of what is revealed by public debate. Public debate would be an indirect mechanism of consultation and a forum for the mutual display of certain genuine political virtues.

Another difficulty is that this seems, in the first instance, an argument not for *equal opportunity* to participate in such a debate, but instead for maximizing the extent and intensity of actual participation in public debate. If *unequal* opportunity for participation in public debate could increase its *absolute* extent and intensity, then it would be justified. For example, greater opportunity for participation might be used as an incentive to induce the contribution of resources that might be redistributed to increase the absolute opportunity to participate of those with less. Moreover, redistributive schemes are even necessary. Suppose the choice is between having a ceiling for campaign expenditures and not having such a ceiling. If those with additional resources wish to devote *more* of their personal resources toward convincing and being convinced by others of their commitment to the Liberal Principle, then why isn’t that something unreservedly to welcome?

It might be objected, first, that such public debate followed by autocratic selection from the surviving candidates would not count as *deliberation*, because it would not *itself* culminate in a decision. But why care whether it counts as “deliberation” *as such*? Moreover, offhand, there is a case to be made that *reflective, deliberate* autocratic selection following public debate is a more “deliberative” process than the mechanical aggregation of votes following public debate.

^v Cohen: “by requiring justification on terms acceptable to others, deliberative democracy provides for political autonomy. Without denying the coercive aspects of common political life, it requires that all who are governed by collective decisions, who are expected to govern their own conduct by those decisions, must find the *bases* of those decisions—the political values that support them—acceptable, even when they disagree with the details of the decision” (265). See also Cohen, “Procedure and Substance in Deliberative Democracy,” 163; and Nagel, *Equality and Partiality*, 36–7. Beitz, *Political Equality*, 103–4, views Scanlon’s contractualism (which is more idealized than the Liberal Principle) as applied to justifying political arrangements as a “second-best” substitute for unanimous consent to those arrangements.