

# Consent or public reason? Legitimacy of norms applied in ASPD and COVID-19 situations

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## CONSENT OR PUBLIC REASON? LEGITIMACY OF NORMS APPLIED IN ASPD AND COVID-19 SITUATIONS

### ABSTRACT

This paper extends Alan John Simmons's conceptual distinction between Lockean (or consent) and Kantian (or justificatory) conceptions of legitimacy that he applied to the question of the legitimacy of states, to the issue of legitimacy of public decisions. I criticise the consent conception of legitimacy defended by Simmons, and I defend the Rawlsian version of the justificatory conception of legitimacy from his objection. The approach of this paper is distinctive because the two conceptions are assessed by investigating, using the method of reflective equilibrium, their respective prescriptions concerning the treatment of antisocial personality disorder (ASPD) and epidemiologic measures.

I argue that the method of reflective equilibrium does not support the consent conception. Considering the issues of treatment of APD and of epidemiologic measures, I argue that the consent conception of legitimacy is not well-equipped for the evaluation of norms that are not strictly self-regarding. This causes a deficit of prescriptions for relevant social responses. Further, by considering the case of responses to epidemics, I argue that such a conception can avoid harmful consequences only by recurring to additional, and independent, premises. This does not cause incoherence but reduces the coherence of a normative system. Finally, the consent conception is not equipped to support social cooperation in an optimal way, which has proved to be necessary in critical conditions, like a pandemic. On the other hand, I argue that the method of reflective equilibrium supports the Rawlsian version of justificatory conception of legitimacy, because of its advantages in handling the indicated issues. In addition, I maintain that this justificatory conception is respectful of freedom and equality of agents as moral self-legislators, and, thus, it is not vulnerable to Simmons's main criticism.

### KEYWORDS

Antisocial personality disorder, COVID-19, justification, legitimacy, public reason, Rawls, reflective equilibrium, Simmons

1. In the present paper, I discuss two conceptions of legitimacy of public decisions. By following Alan John Simmons (1999), I distinguish between a conception that links legitimacy to the consent of persons subject to decisions, and a conception that links legitimacy to the justification of decisions. The

former conception is called the Lockean conception of legitimacy, while the latter is called Kantian. In a sense, one can classify both as consent conceptions of legitimacy. The difference is that what matters for the former is actual consent, while for the latter it is hypothetical consent (Stark 2000). In my view, Simmons's conceptual distinction is well founded. It is true that authors he classifies as Kantians talk about hypothetical consent, but it is important to note that this means that what is relevant is the consent of reasonable persons, when they employ their reasonableness, i.e., they respond to valid reasons. In other words, what matters is their consent when they respond to justification (Horton 2012, 133–134). Thus, we see justification as fundamental for legitimacy. This supports defining the conception as justificatory.

By 'legitimacy' I refer, in an adapted way, to "the complex moral right [...] to be binding [...] on its subjects, to have its subjects comply [...], and to use coercion to enforce the duties" (Simmons 1999: 746). Although I borrow the frame of the debate from Simmons, the focus of this author, as well as of others working in this field, is different from mine, and the results of the discussions are not necessarily equivalent. Simmons, and others, discuss the legitimacy of the state in general. On the other hand, I discuss the legitimacy of public decisions that regard policies and laws.

One could object to my focus on the legitimacy of public decisions by saying that it becomes futile once the legitimacy of the state is established. The legitimacy of the state implies the legitimacy of making public decisions, the objection would say. Thus, Thomas Nagel says that the debate about legitimacy regards the framework where decisions are made, and it is not more extended than this (Nagel 1991: 33). But, in fact, there are reasons for debating public decisions as separate issues to which we need to attribute legitimacy, as I show below.

Together with the more abstract discussion of legitimacy of public decisions, the paper has a more practical focus as well. The discussion is developed through illustrations focused on the treatment of antisocial personality disorder (ASPD), as well as epidemiologic measures, with an emphasis on the COVID-19 pandemic. Such measures range from mild requirements, like wearing masks, to more demanding obligations or restrictions represented by partial limitations of freedom of movement, or limitations on running a business (e.g., temporarily closing nightclubs), and the most rigorous ones like lockdowns.

By relying on these illustrations, I opt for the Kantian conception of legitimacy. My conclusion is that the justificatory conception of legitimacy is better than the rival, at least when decisions that do not regard dimensions of life that are strictly self-regarding are concerned. Basically, the reason is to avoid social interactions that would be harmful, as well as the rule of ignorance. The reason why I opt for the critical comparison of these two conceptions of legitimacy, and I do not analyse others, is that these are the two views of legitimacy implicitly engaged in the public disputes. This is, for example, visible in the opposition to epidemiologic measures. This opposition is frequently based on an argumentative structure that we can associate to the consent conception of

legitimacy. In general, this conception seems to be a firm assumption in health care cases of decision-making, where the principle of informed consent is taken as supreme (Greene 2016: 76).

In discussing the theoretical question of legitimacy and the practical issues, I employ the method of reflective equilibrium. To put it in simple terms, reflective equilibrium is a method of reasoning about morality, proposed by John Rawls (1999: 18–19, 42–45), that consists in the mutual assessment of moral beliefs at various level of generality. Thus, as persons engaged in moral reasoning, we assess moral principles by verifying whether their application is acceptable for our considered judgments. But, on the other hand, we assess considered judgments through general principles. We strongly endorse some of these principles, and when a judgment is in contradiction with them, we have a reason to doubt it. We arrive to a reasonable result when, in the process of mutual adjustment, through revisions and corrections at all levels of generality, we form a set of moral beliefs that sustain each other.

Thus, in the present paper I verify which of the opposed conceptions of legitimacy fits better with our considered moral judgments in healthcare questions, with a focus on ASPD and epidemiologic measures. At the same time, I use the preferred conception of legitimacy to make further order among our considered moral judgments.

In the paper, I proceed as follows. First, I show reasons to discuss the legitimacy of public decisions. Second, I describe Simmons's explanation of two models of legitimacy, and his reason for favouring the one based on consent. Third, I consider challenges to Simmons's favourite model of legitimacy through the illustration of public health issues linked to ASPD and pandemic measures. Fourth, I describe further reasons to embrace the rival, justificatory, view of legitimacy. Fifth, I offer some examples of how the rival model of legitimacy can function in practice.

2. I now aim to explain the pertinence of discussing the legitimacy of public decisions. As I show above, this can be problematized. The first reason to discuss the legitimacy of public decisions is a contingent one. Simmons, the principal author that I discuss in the present paper, has John Rawls (2005) as his primary critical target. Rawls, among others, discusses the legitimacy of public decisions. For example, he indicates the question of abortion as a subject of legitimacy (Rawls 2005: 243–244). Secondly, the legitimacy of public decisions is indicated as a relevant question by Amanda Greene, one of the prominent authors in the debate, although she opts for discussing legitimacy of the state (Greene 2016: 72). Thirdly, the legitimacy of public decisions is present in public disputes, apart from questioning the legitimacy of the state. Such are, for example, cases of civil disobedience, where decisions that regard racial segregation are at the focus, not the legitimacy of the state. Even when authors do not put the question in these terms, it appears evident (, at least in my view) that, by defending disobedience of a law, authors deny legitimacy to it. But at the same time, they affirm loyalty to the system as a whole (King

1999; Rawls 1999: 319–323). It appears to me that such a view is supported by John Horton (2012), an author engaged in disputing the legitimacy of states. His thesis is that even unjust states can be legitimate. In his view, however, this does not mean that one needs always to act in accordance with the state's demands (Horton 2012: 135). For example, Horton maintains that the state can act outside its domain of authority. Further, its demands can conflict with opposing and normatively stronger demands. Horton adds that this does not mean that one should respect the demands of the state only when she agrees with them. However, it seems that such cases indicate that there is a separate question of the legitimacy of public decisions. For supporting this claim, it is not needed to deny the general legitimacy of the state; it is sufficient to endorse the view that such legitimacy is “not necessarily a decisive one” (Horton 2012: 135), i.e., a concession that Horton accepts. In fact, he does not extend explicitly his discussion to legitimacy of public decisions, but, in my view, his thesis motivates such an issue.

I do not intend to say that it is appropriate to dispute separately the legitimacy of any single new public decision. It is clearly absurd to say that the legitimacy of all public decisions is under such a constraint. Sometimes legitimate decisions are settled in advance, for example, in virtue of the established legitimacy of the decision-making procedures or the basic structure of society. It is, for example, absurd to say that the decision to punish murderers is under such a constraint, i.e., that it is not legitimate unless accepted by all members of a society in a specific situation. It is clearly absurd to say that the results of an election are not legitimate, simply because they are not accepted by all, after they are settled fairly, in accordance with the procedure established and accepted in advance. The public decisions that I have in mind in the present paper are those that are still unsettled. Such could be decisions that regard possible extensions of already accepted principles, or new balancing of already accepted principles, e.g., because of extraordinary and unexpected events.

Thus, the legitimacy of the state and legitimacy of a law (or public decision) are separate questions, although they influence, or, even, determine, each other.

3. According to the Lockean conception of legitimacy, no person is subject to the authority of a state if she has not consented to it (Simmons 1976: 274). In my extension of Simmons's discussion, the question under consideration is whether consent is the condition of legitimacy of public decisions.

Let us start with Simmons's definition of legitimate political power: “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” (Simmons 1999: 745). The fact, when it is a fact, that a political power is justified, is not sufficient to attribute legitimacy to it.

The Lockean conception, like Simmons explains, wants to separate two questions. On the one hand, there is a question of the quality of public decisions (or, in Simmons's original discussion, of the state). When we have in

mind such considerations, we are focused on the justification of public decisions. However, these qualities and this justification are separate questions from the legitimacy of public decisions. We can represent the difference with an illustration. Think about a shop. It offers high quality products with low prices. This, however, is not sufficient for the shop to have the right to have us as customers (Simmons, 1999: 752). Similarly, public decisions that contribute to the well-being of citizens in an exemplary way are not legitimate in virtue of this. Enforcing them, despite the will of interested people, disrespects voluntariness. In Simmons's words: "To deny this is simply to deny the natural freedom of persons, a basic and plausible Lockean premise" (Simmons, 1999: 752). Respect of natural freedom of persons is achieved only if public decisions receive legitimacy through consent. The basic merit of the consent view of legitimacy is, thus, represented by respecting natural freedom and voluntariness.

The strength of the consent doctrine, in Simmons's view, corresponds to the weakness of the justificatory theory of legitimacy. Like other authors (Greene 2016, 70, 74–76), Simmons sees its main problems in its factual detachment, or, at best, only a partial correspondence to voluntariness (Simmons, 1999: 760–761). Response to what people choose is neglected. Instead, what people ought to choose is favoured, on the basis of the justification of the choices (Simmons, 1999: 761). But by omitting to attribute moral significance to voluntariness "and how we have actually freely lived and chosen, confused and unwise and unreflective though we may have been" (Simmons, 1999: 763), we "deny the natural freedom of persons, a basic and plausible Lockean premise" (Simmons, 1999: 752).

Simmons rebuts a possible ground of legitimacy that could be appealed to by Kantians and that is represented by morally important goals, like "the most efficient provision of [...] security and welfare to which every person has a right" (Simmons, 1999: 767). Namely, in his view, among else, there is no duty to contribute to others' "most efficient provision of [...] security and welfare. [...] On the Lockean view, others have rights against us only that we do our fair shares in contributing to acceptable levels of security and well-being" (Simmons, 1999: 768).

4. I now assess the consent conception of legitimacy through illustrations represented by treatment of ASPD and epidemiologic measures. When speaking about questions of healthcare, the consent conception of legitimacy appears to be strongly intuitive, in virtue of the strongly accepted principle of informed consent in relation to them (Greene 2016, 76). But I think that the illustrations that I show do not support this view of legitimacy as decisively as it appears at first sight, and, in fact, in one of the illustrations, we find convincing intuitions to reject it.

I start with a discussion that regards possible biomedical interventions intended to remove moral impairments in the cases of criminal offenders who committed particularly severe criminal offences and who refuse rehabilitation. To circumscribe the discussion to moral problems that concern medical

interventions, I consider only cases of criminal offenders with forms of ASPD that favour severe criminal offences. I present here a possible case.

Imagine a dangerous criminal offender who has committed a ferocious criminal act. If left free, the person would iterate that criminal act. Think, for an illustration, of the Austrian film *Fear*, directed by Gerald Kargl, and based on a real-life character. The person has been released from prison. Immediately after that, he has massacred a family in a cruel way. In that story, the person has been wrongly released, because of having been deemed no longer dangerous. However, imagine a similar character that has been correctly diagnosed as being persistently dangerous, because of severe moral impairments. It is clearly established that the person resists rehabilitation, and she, even, does not want, or is not able, to simulate. The consequence that appears obvious is that the person needs to be kept in prison for far more time. But imagine that we have at our disposal interventions to remove the moral impairments and render the person non-aggressive. In fact, some authors indicate that there are promising prospective means (Chew, Douglas, Faber 2018). Would it be permissible to do so?

There are proposals that justify interventions in such cases (Douglas 2014; Douglas 2018; Baccarini, Malatesti 2017). Douglas's famous line is to argue that there are no significant moral differences between reactions to criminal acts that are usually socially and morally accepted, like imprisonment, and mandatory biomedical treatments for reaching moral improvement. In other words, he argues that incarceration and compulsory biomedical treatment of the kind indicated above are morally equivalent, and, thus, there are no reasons to refuse the latter while we accept the former. Baccarini and Malatesti (2017) offer a justification inspired by Gerald Gaus's (2011) model of public justification.

Other authors reject any kind of such mandatory interventions. The appeal is to the inviolability of the mental integrity. I will show briefly two of such refusals. One of the two authors that I take as an example of such a thesis is Robert Sparrow (2014). In fact, he is engaged in a wider discussion than the one of moral improvement of criminal offenders. He participates in the dispute about mandatory moral enhancement in general, but his arguments are relevant in the narrow context, as well.<sup>1</sup>

Sparrow remarks what he sees as the peculiar wrong of mandatory moral enhancement. Contrary to moral development through education, mandatory moral enhancement does not satisfy the condition that requires "to justify the norms that have shaped [...] the project and its content with reasons that the person being educated should accept" (Sparrow 2014: 26). This is a condition needed to respect the other part as equal, because it allows her the possibility to reply, and, possibly, to change the view of the interlocutor. This possibility is lost through mandatory biomedical enhancement. In such a case, new character traits are instilled on a person by the exclusive will of another person,

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1 I have written about these themes in Baccarini 2014, 2015.



and, thus, the former person is treated like an object. She loses her freedom and the condition of being equal.

In fact, in a society that permits mandatory biotechnological enhancement, no person is free and equal (Sparrow 2014: 26–28). At first sight, we could think the opposite. We could think that because most of us do not have criminal inclinations, our freedom is not threatened. We do not want to have character traits that the indicated case of mandatory biotechnological enhancement modifies, and thus (apparently, in Sparrow's view), our freedom is not menaced. But, in fact, says Sparrow, by embracing the republican view of freedom, when mandatory enhancement is permitted, we are in a condition like that of the slave of a benevolent master. The master leaves to the slave the freedom to do everything that he wants to do, but nonetheless, the freedom that the slave has is only a concession that can be revoked. However, freedom that depends on another's arbitrary will is, in fact, defective freedom. The fully valuable conception of freedom is established through non-domination, a condition when a person is the master of her life.

Sparrow concludes that mandatory interventions for moral enhancement are defeated. One could say that this does not, by itself, indicate that Sparrow is opposed to treatments for improvement of the moral character in the specific case of ASPD. However, it seems plausible to derive such a conclusion, in the cases of persons in condition of ASPD that are, in general, competent to assess their condition. Sparrow's argument, thus, represents a possible support to the affirmation of the principle of informed consent in the present case.

The other author whose proposal I discuss as an example of opposition to the kind of biomedical interventions under scrutiny, in the absence of consent, is Elizabeth Shaw (2018). In fact, she intends to develop a discussion in the domain of criminal law. But, because of the presence of persons with ASPD among criminal offenders resistant to rehabilitation whose rights to resist interventions she defends, it can be interpreted as a debate on medical treatment, as well.

In her view, interfering with one's bodily or mental integrity without the consent of the subject of intervention is a strong expression of disrespect, and of attribution of lesser value than each person deserves. This constitutes the moral ground for rejecting such interventions. In Shaw's view, it is this that is the dominant moral consideration in the present issue, and not a basic appeal to human rights by itself (Shaw 2018: 323). The strong disrespect expressed by such interventions, and, thus, the strong normative ground to oppose them, derive from the fact that moral and physical integrity are constitutive of a person. In addition to the attack on personhood, Shaw adds the normative relevance of the fact that such interventions, when there is no consent of the subject, often harm agency and cause suffering and humiliation (Shaw 2018: 324). In virtue of all this, there is a persistent strong moral case against such interventions, even when some of the attributive moral features are not present.

To be sure, Shaw and Sparrow do not ground their positions on the consent conception of legitimacy. On the contrary, their theses, if eventually justified, would offer reasons in support of this view of legitimacy. This is the reason



why their contributions are relevant for the present discussion. The possible consequence is that there are some values with strong normative weight that deprive of legitimacy those public decisions that are not supported by the consent of the persons involved. Such are those that regard interventions to morally improve criminal offenders with ASPD, who are resistant to rehabilitation in virtue of their evaluations. This appears to give reasons for endorsing the consent conception of legitimacy.

However, there are authors who resist this appearance. They remark socio-economic reasons that support such interventions, despite possible reasons that oppose it (McMahan 2018). For example, resistance to rehabilitation causes longer imprisonment, which is very expensive and interventions for the improvement of moral dispositions could reduce such costs. Financial resources could be, thus, redirected to socially valuable goals, like improving public health services, protecting persons' health, improving public schools, etc. The question, thus, is problematic, because it does not regard only personal domains, but also the allocation of resources for competing valuable goals.

I do not intend to presently adjudicate this debate. It is, for me, sufficient to show that we are in front of an allocative question that requires public deliberation. The public deliberation needs to be adjudicated through the best reasons that can be appealed in the dispute. In other words, public decisions must be established through justification. Such justification attributes legitimacy to them. At the end, it can be proven that Shaw's and Sparrow's arguments are decisive, and that the consent of persons is required for the legitimacy of interventions. But consent is not the foundation of legitimacy. The normative strength of consent, in the present case, is sustained by justification, which represents the foundation of legitimacy. Eventually, we could conclude that interventions are legitimate only when consent is present. But the rule holds not in virtue of the consent conception of legitimacy. Instead, the rule holds because it is justified. In other words, there is not a foundational role for consent. Its victorious normative status is ascertained through sound justification that establishes its supremacy over competing normative standards, on the basis of valid reasons, in specific circumstances.

5. I comment, now, the consent view of legitimacy through the examples of rejections of epidemiologic measures (BBC 2020; Bruemmer 2020). When I do not specify differently, I generally denote them as anti-mask, but protests against coercive epidemiologic measures are not limited to the refusal of masks. Recently, anti-vax and anti-mask protests have come together in public expressions of opposition (Bogel-Burroughs 2020). Like Rupali Limaye says, anti-vax and anti-mask opponents employ a similar rhetoric. A basic concept that they employ is that of 'individual self-management'. The idea is that each individual should be in control of making decisions (Bogel-Burroughs 2020). This could be an instance of the consent conception of legitimacy.

There are more articulated libertarian expressions on epidemiologic measures that correspond more clearly to the consent conception of legitimacy.

Contrary to the protests mentioned above, Jason Kuznicki thinks that people should wear masks and practice social distancing in a pandemic. By adopting Simmons's conceptual scheme, he would say that wearing masks is justified, but also that this cannot be legitimately mandated (Kuznicki 2020). In conformity with the consent conception of legitimacy, such behaviours need to be the result of free choices. Thus, there appears to be here a distinction between legitimacy and justification. He compares wearing a mask to brushing teeth. Both are norms of personal hygiene that we should follow, but it is not the business of public authorities to enforce them by coercion. This is true, even though wearing a mask is more important, because of its relevance for protecting from incomparably stronger harms. Kuznicki supports his claim by appealing to an expectation that, if true, would avoid dilemma in social choices. In his view, people have diffused inclinations to follow hygienic norms, and this gives us a reason to think that they would also be ready to wear masks. Their opposition to masks derives from the obligation to wear them, despite this inclination. This is an optimistic view. The problem is, however, that in fact there is no clear evidence for it, to say the least. Some researchers even show connections between misbehaviour in the pandemic and anti-social character traits (Miguel et al. 2020; Nowak 2020). Thus, although I do not exclude the possibility of diffused voluntary acceptance of wearing masks (perhaps, in some cultural contexts more than in others), the presence of people who refuse to do this must be taken in consideration.<sup>2</sup> For this reason, we need to think about policies addressed to people who persist in their refusal to wear masks. All evidence indicates that Kuznicki does not attribute legitimacy to mandatory wearing of masks, and, thus, we can take his view as a clear illustration of the thesis that justification does not imply legitimacy. I think, however, that under examination, we can reasonably judge that his view needs to be rejected, and that, in this way, we find support for affirming the connection of justification and legitimacy.

The view that a public health decision that concerns measures to contain the spreading of a virus is legitimate only if it is sustained by consent of people involved, is opposed even by libertarian views that affirm the need to be concerned with the rights of all people involved.

Jessica Flanigan (2020) is hesitant towards accepting legitimacy of coercive measures of states that restrict personal freedoms, against the opposition of persons, but, at the end, she accepts them, under conditions. First, Flanigan accepts that the duty of wearing masks is justified. Despite the very strong concern that libertarians attribute to freedom, when there is a scientific health justification for public decisions (containing the spread of the virus, and the serious danger of COVID-19), and interferences with human rights are rather limited, there is a moral justification for measures that limit liberty, but intend to avoid potentially harmful behaviour. In brief, people should wear masks, or even stay home, if this is a justified measure. The reason is that infecting

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2 Thanks to a reviewer for this point.

a person with a harmful virus violates the fundamental right to bodily integrity of this person. The risk to contribute to such damage puts an obligation on each of us.

However, there is a different question from whether persons should respect such measures. This is whether governments should have the moral authority to enforce wearing masks and lockdowns, or other coercive measures. This is the question of legitimacy. Here the answer is under stronger conditions. Governments might enforce wearing masks or other coercive measures and enforce lockdown (by which they impede some people to run their business) only if there are no alternative measures sufficiently efficacious, and only if doing this provides benefits that are superior to the costs. Thus, a condition for attributing legitimacy to restrictive epidemiologic measures is that governments first try to mitigate the spreading of the virus by less coercive means.

We see that Flanigan is more concessive, from the standpoint of the legitimacy of public decisions, than Kuznicki. At the end, epidemiologic coercive measures to mitigate the pandemic can be legitimate, because of being justified, although high burdens of proof need to be met.

Andy Craig expresses a similar view (2020). He says, for example, that social distance must be kept on a voluntary basis, as far as it is possible, and his view about this is rather optimistic. He favours voluntariness, but accepts the legitimacy of coercion, when this is justified (again, although the burden of proof is high).

I have shown two libertarian views that oppose the consent conception of legitimacy as implicitly applied by Kuznicki, and as implicitly present in part of the motivations of anti-mask protests. The libertarian elements in such views are represented by the high burdens of proof for the justification of coercion. However, coercion can nonetheless be legitimate in specific cases when it is justified. The question, now, is how reliable are the intuitions that support such views. On one hand, they are contrasted by intuitions endorsed by Kuznicki, who implicitly endorses the consent conception of legitimacy. On the other hand, these intuitions respond to the duty not to represent a threat of harm to others, as is the case of people not wearing masks during a pandemic. Thus, this view is also coherent with a widely shared principle.

In fact, obligations imposed by the harm principle are strong and we cannot imagine a plausible normative system that contradicts it. It seems to me that Simmons wants to offer a theory respectful of this duty, when he says that “On the Lockean view, others have rights against us only that we do our fair shares in contributing to acceptable levels of security and well-being” (Simmons 1999: 768). Thus, it appears to be legitimate to enforce restrictions of liberties, from the obligation to wear a mask, to more rigorous requirements, when these are needed to control the spread of a virus that threatens security and well-being.

What we have at this point is that views that implicitly correspond to the consent conception of legitimacy, and oppose coercive epidemiologic measures, are defeated by the method of reflective equilibrium, because of strong and shared commitment to not harming others.

The question remains whether only the views that we have seen as opposed to epidemiologic measures are defeated, or, more generally, the consent conception of legitimacy as such is defeated. Could we imagine a more sophisticated version of the consent conception of legitimacy that avoids the critique addressed to Kuznicki's thesis? The question is legitimate because, as we have seen, Simmons introduces a qualification that intends to save his theory from consequences that would be deleterious, if it would not be able to avoid them.

In order to answer, we need to investigate whether Simmons's theses are well-ordered in reflective equilibrium. In my view at least, they do not offer the best expression of reflective equilibrium.

Namely, by relying on Simmons's judgment about duties that we have toward others, it seems that the range of application of the consent view of legitimacy, at least, needs to be qualified. The question is, how? One could say that the consent conception of legitimacy is part of a coherent view with other principles and norms. In such a view, consent is not the foundation of all norms in society and the consent conception of legitimacy is only one of the normative consequences of the natural principle of liberty. But there are other principles as well, that need to be coherent with the natural principle of liberty and with the consent conception of legitimacy. One of these principles is represented, for example, by the one stated by Simmons, that says that "others have rights against us [...] that we do our fair shares in contributing to acceptable levels of security and well-being" (Simmons 1999: 768).

However, there is a fundamental problem for this strategy. It is represented by the question of where these principles, inclusive of the principle of natural liberty, come from. This is a legitimate challenge, and it is necessary to provide reasons to defeat it, as well as to offer reasons to endorse the principles supported by Simmons. Further, it is needed to provide reasons for the proper balancing between all these principles. We see now that consent cannot represent the foundation of the legitimacy of public decisions. Neither the principle of natural liberty nor consent can be foundational – we need to support their role with appropriate reasons. However, this means that, at the end, justification of these principles is needed, inclusive of the principle of natural liberty, and of the consent conception of legitimacy derived from it. Therefore, it becomes clear that consent is not foundational of legitimacy. It could be true that consent is needed for the legitimacy of a public decision but whether this is so is established through justification. Justification is thus foundational of legitimacy.

This discussion shows reasons in support of the thesis that the consent conception of legitimacy does not fit well with the entirety of our normative commitments and thus that it is not justified in reflective equilibrium.

6. I describe now the specific justificatory theory of legitimacy that I embrace, which is Rawls's doctrine (Rawls 2005). In this view, public decisions are properly justified, and thus legitimate, when they are sustained through the model of public reason. This model requires public justification addressed to each

person as reasonable. The conception of reasonableness that Rawls assumes is specific.

Reasonableness includes a political part, as well as an epistemic part. The political part is constituted by the endorsement of the organizing idea of society as a fair system of cooperation among free and equal persons, as well as related principles and ideals (Rawls 2005: 9). Thus, among valid justificatory reasons there are certain basic rights and liberties, as well as the organizing idea of reciprocity (Rawls 2005). The epistemic part is constituted by reasons like “methods and conclusions of science when these are not controversial” (Rawls 2005: 224).

Therefore, justification must be grounded on reasons for which we can reasonably expect endorsement by all persons as free, equal, and epistemically responsible (Rawls 2005: 224). A public decision is legitimate when it is justified through such reasons, as Rawls expresses in his liberal principle of legitimacy (Rawls 2005: 137).

Like Simmons says, the Kantian / Rawlsian conception of legitimacy is a middle way between the consent view of legitimacy, and a more impersonal conception (Simmons 1999: 762), such as, for example, the correctness conception of legitimacy. While for the Rawlsian / Kantian what matters is justification acceptable to each reasonable person when they reason as reasonable persons, according to the correctness conception, a public decision is legitimate when it is justified through the *de facto* best reasons, even when they are not accessible to all. This view is well represented by Richard Arneson: “Suppose the pope really does have a pipeline to God, hence warranted true beliefs of the utmost importance for all of us. Suppose that each human person can attain eternal salvation but only if she lives according to the dictates of the Roman Catholic Church. In this case the pope is surely entitled, and probably morally required, to coerce the rest of us for our own good, if he happens to have sufficient military force at his disposal. Too much would be at stake. What blocks the pope’s entitlements is that, in fact, there is no reason to believe he has such a pipeline or in other words warranted true beliefs to the effect that outside the Church there is no salvation” (Arneson 2016: 159).

The distinction between the Rawlsian and the correctness conception of legitimacy relevant here is that, although Rawls does not leave public decisions as hostages of individuals’ consent, it is not part of his view of legitimacy to impose evaluative standards, independently of the fact that some reasonable persons do not have reasons to endorse them. The specificity of Rawls’s theory is that it is respectful of the pluralism characteristic of liberal democracies, and thus justification is not based on doctrines and reasons that are controversial among reasonable persons.

I explain my endorsement of Rawls’s justificatory conception of legitimacy by showing how it is supported by reflective equilibrium. First, I answer to Simmons’s challenge that objects to Kantians insufficient care for voluntariness. The challenge is relevant for the possibility of a theory to be supported in reflective equilibrium, because voluntariness is a widely shared value. I

agree with Simmons's thesis that, although Rawls's conception does not link legitimacy to justification that is not accessible to some reasonable persons, it loses a full adherence to voluntariness. But, I share Nagel's view that the kind of Kantian conception endorsed by Rawls is reasonably close to voluntariness (Nagel 1991: 36).

Rawls achieves reasonable approximation to voluntariness, because he affirms the person's authority as a source of morality. Such authority is not given up, because justification is addressed to the reasons that people endorse, when they manifest reasonableness, and this is an expression of respect to them as free, equal, and epistemically responsible. Thus, Rawls's justificatory conception of legitimacy answers to our considered judgments that attribute a strong moral status to persons' moral autonomy and authority.

We can support this thesis through the illustration represented by Mill in the famous bridge example (Mill 1859/1977: 294). Think about a person, Alf, who wants to walk across a bridge. The bridge is defective and walking over it is dangerous. Alf is coercively stopped by Betty, who knows that walking over the bridge is dangerous. In one sense, Betty is disrespectful toward Alf's voluntariness, but, on the other hand, she is respectful of his deep voluntariness, because Alf's will is to arrive safely to a place in the quick way, not to pass exactly over this bridge. Had he the knowledge that walking over the bridge is dangerous, he would not want to do this. Like Gaus says, Alf "has an accessible reason not to cross the bridge, and that is why stopping him for crossing is compatible with respecting him as a free person (Gaus 2011: 33).

We arrive to the analogy with wearing masks, and respecting decisions based on the state of the art of epidemiology insights. I presume that ordinary people deeply want the pandemic to be contained, health to be protected, and economic activities reasonably preserved. They do not want the collapse of the public health system and a humanitarian catastrophe. If they oppose decisions based on the state of the art of an expert field (i.e. epidemiology in this example), they act incoherently with their deep will. On the contrary, coercing them is respectful of their deep voluntariness. This helps to answer to an intuitive sense of disturbance caused by the fact that "an individual is treated as though her actual non-consent does not matter for legitimacy, as long as her hypothetical consent is obtained" (Greene 2016: 77). The reply to the worry is based on the endorsement of a specific way of affirming the moral authority of persons, based on respecting the reasons they have, and not their flaws (Gaus 2011: 232–258).

There is also a more impersonal reason to give up voluntariness, in some cases, and this is that the will of persons can be silly and unreasonable. Linking legitimacy to the consent of persons, when we do not speak about strictly self-regarding actions, in order to save voluntariness, exposes public decisions to epistemic flaws and consequently to unreasonable policies, as well as antisocial or anti-cooperative attitudes, inclusive of disrespect of Mill's harm to others principle. Such a principle, or a principle close to it, is strongly endorsed. Disrespecting it most likely amounts to being defeated through the application of the method of reflective equilibrium.



On the other hand, Rawls's conception of legitimacy is able to protect from epistemic flaws, since it can be careful about the epistemic quality of reasons we can employ in justifying public decisions, at least when questions of basic justice, rights and liberties are concerned. Such are paradigmatically "methods and conclusions of science when these are not controversial" (Rawls 2005: 224).

Rawls's conception of justification of public decisions, and the correlate conception of legitimacy, warrant fair cooperation because all public decisions that concern basic justice, rights and liberties must be justified through reasons that each of us can accept as free and equal. This is a further way to indicate that these conceptions are protective of persons' freedom and equality, as well as that they are sustained in reflective equilibrium.

Before concluding, I comment on a challenge to the possibility of justifying the Kantian conception of legitimacy through reflective equilibrium. Greene objects to this conception by appealing to intuitions that, in fact, it seems plausible to interpret as shared. She invites us to think about two regimes. R1 is supported by 30% of its subjects. R2 is supported by 80% of its subjects. The strong intuition, says Greene, is that R2 has stronger legitimacy than R1. The explanation of this intuition, in her view, is represented by our persuasion that popular acceptance matters, and that justification is not sufficient for legitimacy (Greene 2016: 75–76).

I agree with Greene's intuition, but I think that it is possible to accept it, and justify the Kantian conception of legitimacy, at the same time. First, it is important to note that popular acceptance in the present illustration is not equivalent neither to the consent about which Simmons speaks in his description and defence of the Lockean conception of legitimacy, nor to informed consent in medicine, that is appealed to by Greene in another illustration. In those cases, consent is a kind of right to veto. On the other hand, when speaking about popular acceptance, consent is something like the right to an equal say in public decision-making.

At this point, we can present a defence of the justificatory conception of legitimacy inspired by Thomas Christiano's theory of procedural democracy (2008). Christiano indicates the normative importance of democratic decision-making, because its procedures operationalize the status of equals of citizens. However, equality is not manifested only through the status of equals in procedures of public decision-making; it is also affirmed by recognition of certain liberties, such as: freedom of conscience, freedom of association, etc. Expressions of such freedoms can be beyond the range of democratic authority. In conclusion, other things being equal, a public decision that is sustained through a democratic procedure respectful of equality has stronger legitimacy than a public decision that is not sustained in this way, but sometimes protection of other rights has priority and legitimacy in opposition to democratic decisions, and democratic decisions are not legitimate.

We have now the resources to reply to Greene's challenge. Popular acceptance matters for legitimacy, because this is a form of endorsement of the equal normative status of each person. Sometimes, it is sufficient in order to



attribute legitimacy, and sometimes absence of popular acceptance is sufficient to deny legitimacy. However, it does not represent the only important normative standard. For example, some basic rights and liberties matter. Thus, a political order (and a public decision) that is supported by 80% of the population, but strongly discriminates the rest of the population is not legitimate. Conversely, a political order (and a public decision) that is refused by 80% of the population, but it guarantees equal rights and liberties to each citizen, is legitimate in virtue of the normative standards that it protects, and the unreasonableness of a refusal. Such equal rights and liberties represent valid public reasons, and they justify the societal order (or public decision). We can still, however, acknowledge that popular acceptance matters, and its presence increases legitimacy, as well as its absence reduces it. Thus, the intuitions presented by Greene are saved, but it is only one among valid reasons that we consider when attributing legitimacy. What finally matters, and constitutes the basis of legitimacy, is a reasonable balance among all valid reasons or, in other words, justification.

7. What are the consequences of the endorsement of the Rawlsian conception of legitimacy for potential policies related to the COVID-19 pandemic? Some of them are pretty obvious, others are more complex.

The first obvious consequence is that behaviours and policies based on anti-social and anti-cooperative attitudes are not permissible. One cannot take the stance “I don’t care whether I am harmful to others”. This obviously does not represent an attitude compatible with offering to others reasons that they can accept as free and equal, which is a condition for justifying public decisions and policies. The Rawlsian justificatory conception of legitimacy favours reciprocity in virtue of the requirement to address justification to others and excludes self-centred behaviours.

The second obvious consequence is that public decisions grounded in pseudoscience, fake news and conspiracy theories are not legitimate. Refusals of public decisions based on such reasons are legitimately dismissed. Such reasons are ruled out by the classification of “methods and conclusions of science when these are not controversial” (Rawls 2005: 224) as valid public reasons.

However, the Rawlsian conception of legitimacy still leaves some questions open and leaves their resolution to fair democratic public decision-making. This is because the justificatory process frequently leads to a set of eligible decisions, and not to a uniquely justified and victorious decision. There are various instances of such cases. For example, we can expect this in epidemiologic measures, because required public policies must be sensitive to various rights and diverse legitimate interests, and different policies can favour or damage them. Restrictive measures could be more effective in saving lives and health, but they could be harmful for wealth and economic benefits, which, at the end, can have particularly bad effects for those who are, in advance, worse off (Winsberg et al. 2020). Epidemiologic measures are a matter of good balance of reasons. The Rawlsian conception of legitimacy cannot, and need not, offer

uniquely justified answers to such dilemmas – they instead result from fair political deliberation. This does not mean that the Rawlsian theory of legitimacy is not of any help. On the contrary, it helps to select valid public reasons among which we need to balance, as well as public decisions justified through them and excludes reasons and public decisions that are invalid (like “I don’t care if I am a threat to others”). One could object that these questions, that require a high level of expertise, could not be left to public deliberation. Instead, they must be postponed, until experts find a solution on which they can agree.<sup>3</sup> However, in opposition to this objection, we need to be aware of conditions when decisions are urgent, and it is not reasonable to postpone them while waiting for the optimal context when we will have consensus among experts. Besides, dissent among experts could be based on them endorsing opposed values (Winsberg et al. 2020), and this delays the moment when they will agree on a unique decision. This is why a decision reached through democratic process, among proposals that are qualified through the justification of valid public reasons, is the best resource in some situations. In support of this idea, we can mention some reasons to attribute the possibility of a certain competence to the general population, to deal with scientific reasons. This attribution regards at least the possibility that the general population can recognize experts that are the sources of information that we can use as valid public reasons, if not the ability to directly recognize valid scientific reasons (Anderson 2011).

8. In this section, I indicate a further merit of the Rawlsian justificatory conception of legitimacy, one that we can highlight through the example of COVID-19 epidemiologic measures. Cooperative spirit appears to be dramatically needed in the light of challenges in critical situations. Part of the problem for efficacious policies consists in the absence of this social stance and solidarity. In too many cases, defects of solidarity and of social attitudes, in the pandemic crisis, call to mind the description that Alexis de Tocqueville offered for some other contexts: “I see an innumerable host of men, all alike and equal, endlessly hastening after petty and vulgar pleasures with which they fill their souls. Each of them, withdrawn into himself, is virtually a stranger to the fate of all the others. For him, his children and personal friends comprise the entire human race. As for the remainder of his fellow citizens, he lives alongside them but does not see them. He touches them but does not feel them. He exists only in himself and for himself, and if he still has a family, he no longer has a country” (de Tocqueville 1835/1840/2004: 818).

A first illustration of such a condition revealed in the actual COVID-19 crisis is represented by opposition to an act of care toward others, like wearing a mask. A second illustration is represented by acts of solidarity toward those who are under the epidemiologic measures that are particularly critical for the spreading of the virus, but that also require them to interrupt their businesses. People engaged in such activities are economically and socially harmed. Social

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3 Thanks to a reviewer for this point.

solidarity in terms of economic support is needed to compensate them for this sacrifice oriented to the common good.

The Lockean understanding of legitimacy shapes a too sharply individualistic conception, that by itself is unable to support a cooperative spirit. On the other hand, the Rawlsian view is respectful of individual differences, because its core values are fairness, equality and liberty, but it also sustains social cooperation as a value.

One could reply to these comments by saying that there is nothing in the consent conception of legitimacy that impedes nurturing and affirming civic sense and solidarity – this is just a different matter than legitimacy. We can see something like this view in Kuznicki's discussion. He distinguishes what one should do, from obligations that the state can enforce. Nurturing civic sense and solidarity could find space in the former domain.

However, there is still a substantial advantage on the side of the justificatory conception of democracy. In the consent conception of democracy, civic sense and solidarity, on one side, and legitimacy on the other, come apart. They are not, in principle, in contradiction, but there is no mutual support either. On the other hand, the Rawlsian justificatory conception of legitimacy favours persons to look at each other as being engaged in a common project. This is the project, among else, of founding each other's status as free and equal. Namely, the distinctive aspect of it is that persons are mutually the sources of the political status of free and equal of each of them. Outside the justificatory process, no person has any moral or political status recognized in the details of a structured conception of justice. Thus, in the view endorsed by Rawls, before the public justificatory process of principles of justice, persons enjoy only the generally recognized status as free and equals. However, this idea needs elaboration in the public justificatory process. There are no alleged literal natural liberties that one can bring separately by herself, in order to claim specific rights and liberties in the political process and social life. This fundamental component of the justificatory conception of legitimacy is a major point of divergence from the consent conception. For example, the latter could claim that without the recognition of natural rights and liberties, individuals cannot be protected from majoritarian power.<sup>4</sup> But, this is wrong because the justificatory conception of legitimacy, in Rawls's form, is not based on majoritarian decisions when it comes to determination of basic rights and liberties. Instead, it shapes a process of justification, in the frame of a heuristic device, where all persons are situated symmetrically. This renders impossible bargaining advantages and majoritarian abuses. Further protection of individuals is offered through the more detailed specification of basic rights and liberties achieved with the employment of Rawls's public reason, that requires that each person justifies her claims to each other person, as free and equal, by having reciprocity in mind (Rawls 2005). Thus, the specific Rawls's justificatory conception of legitimacy does not leave citizens unprotected from majoritarian abuses.

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4 Thanks to a reviewer for this point.

Instead, it incorporates the protection of basic rights and liberties in the structure of public justification, through the model of public reason. In synthesis, there is no advantage of the consent conception of legitimacy over the justificatory conception of legitimacy in relation to the protection of individuals' basic rights and liberties from majoritarian power.<sup>5</sup> On the other hand, there are other advantages of the justificatory proposal. I remark here one of them; the justificatory conception of legitimacy supports awareness of being part of a common enterprise, where each person realizes her moral affirmation and mutual dependence. Again, reflective equilibrium supports the justificatory conception of legitimacy. This is because this conception better supports socially responsible stance and civic sense, that become vividly needed, at least, in conditions of crisis and emergency, like a pandemic.

9. I have shown that the consent conception of legitimacy is not sustainable, because its coherent application is not able without qualifications to support people's protection from harms, to favour social cooperation, and to adjudicate conflicts. It could function only if backed up by other principles. But, because of this, the problem of justifying these other principles, and how to interpret them, appears.

I have shown the flaws of the consent conception of legitimacy, by showing its deficiencies in treatment of ASPD, and for measures in the COVID-19 pandemic. After having established that the alternative justificatory conception of legitimacy, in Rawls's shape, is preferable, I have used it to further specify justified and legitimate norms in epidemiologic measures, through reflective equilibrium. In this way, I have shown that the justificatory conception of legitimacy can be part of a coherent and reasonable set of public norms.<sup>6</sup>

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5 A further problem for the justificatory view could be represented by the exclusion, from the attribution of rights, of persons that are not part of a political society. Such are, for example, immigrants. The objection could say that, without the protection offered by a natural view of basic rights and liberties, they are left to the arbitrary decisions of people who constitute the political society. Unfortunately, I have not here the place to discuss this point. Instead, I only sketch possible answers. Namely, the justificatory conception does not need to be limited to people who actually constitute a political society, i.e. the body of persons to whom justification is due as free and equals, in the light of reciprocity. Further, a supporter of the justificatory conception of legitimacy could say that persons who justify basic rights and liberties must universalize their conclusions and thus also embrace persons who are not part of the constituency. Thanks to a reviewer for this point.

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## Elvio Bakarini

### Saglasnost ili javni razlog? Legitimnost normi koje se primenjuju u situacijama ASPD-a i Covid-19

#### Apstrakt

Ovaj rad proširuje konceptualnu distinkciju Alana Džona Simonsa između lokovske koncepcije legitimnosti (koja se zasniva na pristanku) i kantovske koncepcije legitimnosti (koja se zasniva na opravdanju) koju je primenio na pitanje legitimnosti država, odnosno na pitanje legitimnosti javnih odluka. U radu kritikujem koncepciju legitimnosti zasnovanu na pristanku koju Simons zastupa, te branim rolsovsku verziju koncepcije legitimnosti zasnovane na opravdanju od prigovora. Ovaj rad je karakterističan po tome što se ove dve koncepcije legitimnosti procenjuju kroz istraživanje, primenom metode refleksivne ravnoteže, njihovih odgovarajućih propisa koji se tiču lečenja antisocijalnog poremećaja ličnosti (ASPD) i epidemioloških mera. Tvrdim da metod refleksivne ravnoteže ne podržava koncepciju legitimnosti zasnovanu na pristanku. Izumajući u obzir problem lečenja ASPD-a i problem epidemioloških mera, tvrdim da koncepcija zasnovana na pristanku nije dobro opremljena za procenu normi koje se ne tiču striktno govoreći nas samih. Ovo prouzrokuje nedovoljan odgovor za relevantne društvene probleme. Dalje, razmatrajući slučaj odgovora na epidemije, pokazujem da ova koncepcija legitimnosti može da izbegne štetne posledice samo pozivanjem na dodatne i nezavisne premise. Iako neuzrokuje nekoherentnost, ovo umanjuje koherentnost normativnog sistema. Konačno, koncepcija legitimnosti zasnovana na pristanku nije dobro opremljena da podrži društvenu saradnju na optimalan način, što se pokazalo neophodnim u kritičnim uslovima poput pandemije. S druge strane, tvrdim da metod refleksivne ravnoteže podržava Rolsovu verziju koncepcije legitimnosti zasnovane na opravdanju zbog svojih prednosti u rešavanju navedenih problema. Pored toga, pokazujem da koncepcija legitimnosti zasnovana na opravdanju poštuje slobodu i jednakost delatnika kao moralnih samozakonodavaca, te da nije podložna Simonsovim glavnim kritikama.

**Cljučne reči:** Antisocijalni poremećaj ličnosti, COVID-19, opravdanje, legitimnost, javni um, Rols, refleksivna ravnoteža, Simons