The Nature of Political Coercion

An Analysis and Justification

Wei Han, Ph.D.

University of Connecticut, 2004

In this work, the author attempts to answer two questions on the issue of coercion: first, what coercion is; and second, whether coercion is justifiable as a means of social control, and, if so, on what ground. The author will provide a descriptive definition to the concept of coercion by establishing the necessary and sufficient conditions under which an act constitutes coercion, and distinguish it from ideas between coercion and which there has not been much clear conceptual distinction. In addition, against the backdrop of the liberal commitment to individual liberty and rights, the author will make an effort at justifying coercion through uncovering an important link between coercion and the law. The author will argue that coercion is an innate function of the law, therefore, the law is necessarily coercive.

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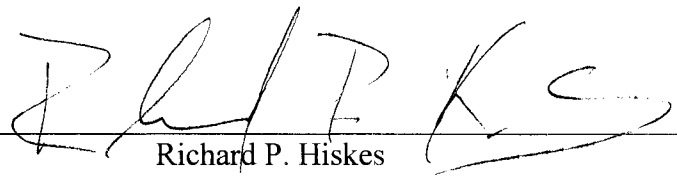
Major Advisor 
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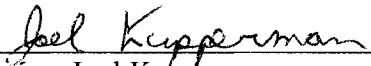
Associate Advisor 
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For Mimi,
My beloved wife.

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Introduction

All politics presumes coercion to some extent, yet, unlike such ideas as autonomy, consent, democracy, liberty, rights, and toleration, the concept of coercion has rarely presented itself as a serious theoretical issue for mainstream political theorists and philosophers. Looking through the most influential works in Western political theory, one is hard pressed to find any discussion on this topic. Even in places where a discussion of coercion is clearly unavoidable, arguments have typically turned to other concepts such as authority and power of the state. Amid such a general lack of attention, there is a group of theorists who have dealt substantially with this idea in their writings, namely, the anarchists. But the anarchists lack authority on this issue, as their understanding of coercion is considered too extreme to deserve much attention.

Hence arises the question why coercion has been overlooked (if it has been unintentional) or ignored (if intentional) by the most prominent figures in the history of political theory. Generally speaking, there are two different explanations as to why theorists have failed to explore this idea. In the case of classical authors such as Plato and Aristotle, coercion would not constitute a contentious issue, if an issue at all, as, albeit for different reasons, neither of them sees a problem in the state's effort to exert coercive influence on individual citizens. Both theorists believe that only in a political community will individual persons be able to live a worthy life. For Plato, this is because a worthy life is a life devoted to the pursuit of virtue and justice. The vast majority of the people, who are incapable of pursuing such a life independently, will nonetheless be able to participate in virtue and justice by living in a well-ordered city, under the rule of the

philosopher king. For Aristotle, life in a political community is the only type of life that is suitable for human beings, who, he believes, are political animals by nature. Maintaining that the relationship between individuals and their community is an organic relationship between the parts and the whole, Aristotle argues that only by living in a political community can human persons fully realize their potential. As a consequence of their views of the state-citizen relationship, both theorists believe that it is legitimate, or even desirable, for the political community to exercise power and influence on individual citizens. Therefore, for these two authors, coercion by the state is an inevitable and welcome result of life in a political community. As such, not much needs to be said about it.

It is a different story in the case of the early modern and modern theorists before the 20th century, who have generally subscribed to the school of thought known as liberalism. To them, coercion is also not an issue to which they want to pay much attention, although for a different reason. The differences among them aside, these theorists generally believe that individual persons can have an existence independent of that of their political community, and as a result, they have focused their efforts mostly on establishing and defending ideas such as autonomy, freedom, and rights, which would conceptually help guarantee individuals such an independent life. For these theorists, the idea of coercion is simply incompatible with all the other notions that they want to embrace and defend, therefore, it has no place in their theory.

However, coercion is not an issue that can be safely ignored. As has been mentioned above, it is a means of social control that has been used extensively in all forms of politics, and consequently it has very frequently been the ground for complaints

against alleged abuse of government power. So the issue of coercion indeed has a far-reaching impact both on political theory and our social-political practice. Because of that, the idea of coercion deserves more systematic efforts of clarification and analysis than it has hitherto received. Besides, being a widely used method of social control, and hence a common social phenomenon, I suspect that there is much more that can be said in favor of coercion than we have realized or been willing to acknowledge. Therefore, this project aims to answer two main questions on the issue of coercion: first, what coercion is; and second, whether it can be justified as a means of social control, and, if so, on what ground.

It has to be admitted that any effort at justifying coercion will have to overcome some great obstacles. Evidently, coercion is an anathema to liberalism, therefore any attempt to justify it will amount to a challenge to the liberal commitment to personal autonomy, and individual liberty and rights that is well established and deeply entrenched in contemporary Western liberal societies. Nevertheless, I believe that this effort is worth undertaking. Even if nothing else is achieved, conceptual clarity on this issue, which I hope will result from this effort, would by itself make an attempt to justify coercion worthwhile.

I will start this work by examining the writings of some of the most important authors in political theory that bear on the subject of coercion, in the hope of finding out what they have to say either directly on this issue, or on some closely related ideas. The objective of these discussions is to provide a historical perspective to the analyses and discussions in later chapters.

In Chapter Two, I will undertake a conceptual analysis of the concept of coercion. I will provide a descriptive definition of coercion through uncovering the necessary and sufficient conditions under which an act constitutes coercion, and distinguish it from some other ideas that are easily confused with it.

The effort of conceptualizing the idea of coercion will not be complete until one more comparison is made. It is important for an analysis of coercion, and also of particular interest to political theory, to compare the concept of coercion with the concept of authority. This is because these two concepts have traditionally been conflated in the literature of political theory, as many theorists have suggested that political authority is essentially coercive, and that coercive measures are an integral part of the exercise of authority by government over its citizens. In Chapter Three, I hope to find out what differences there are between the exercise of authority and coercion by analyzing the idea of authority and comparing it with coercion.

The effort of trying to provide a justification to the practice of coercion starts with Chapter Four. Since coercion has been condemned primarily because of the perception that it violates individual freedom and rights, any attempt to justify it has to clear this hurdle. I will argue in this chapter that, contrary to popular perceptions, coercion can be accommodated by the two notions of freedom and rights, to which the modern society is deeply committed.

However, showing that coercion is not always in violation of individual freedom and rights only provides the practice with a qualified justification. It merely proves that coercion may not be as objectionable as people have thought. Still, it does not in any way justify coercion as a means of social control. I believe that a successful effort at

justifying coercion has to make the case that coercion is not simply *a* means of social control, but *a necessary* means. In the final chapter, I will try to prove that coercion is indeed a necessary means of social control by uncovering what I see as a strong link between coercion and the law. I will argue that coercion is an innate function of the law, therefore, the law is necessarily coercive.

Chapter One: The Concept of Coercion in the History of Political Theory

Coercion has been an all-too-familiar phenomenon in politics throughout the history of human society. Yet, as a concept, it has never occupied a notable place in scholarly discussions. Searching through the most important works of political theory in Western history, one is hard pressed to find much discussion of this idea by the preeminent political theorists of different periods. If one presumes a strong connection between political theory and political practice in any given historical period as I do, he or she will naturally wonder what could account for this seemingly strange collective obliviousness to coercion as both an idea and a political practice.[1] I believe that the best way to solve this puzzle is by looking into the works of some of the most important authors in political theory, to examine their discussions and arguments which, although not about coercion directly, may nonetheless have some bearing on the idea. Through this effort, I hope to find out to the extent that they can avoid using the word "coercion" and discussing the practice, what surrogate concepts and alternative practices these theorists do talk about and advocate. Hopefully, by examining the relevant discussions, I will be able to make some inferences as to how each of the authors I am going to examine may have understood coercion and what may have been their attitude toward it.

No survey of the literature of Western political theory can leave out such names as Plato, Aristotle, Machiavelli, Hobbes, Locke, Rousseau, and J. S. Mill. Therefore not surprisingly, relevant works by these authors will be the focus of my discussion. As has

[1] A significant exception is J. S. Mill, who does deal with the concept of coercion specifically, albeit in a reverse manner, through his discussion of liberty.

been mentioned above, none of these authors, with the exception of Mill, has dealt directly with the concept of coercion. As a result, none of them, including Mill, has provided a precise definition of coercion. Instead, when they do use words in their respective languages to describe practices that are close to coercion, they seem to rely on what is no more than a conventional commonsense understanding of the concept. The reference to this imprecise commonsense understanding by these authors mostly occurs in the context of discussing issues related to ruling and governance in the state and civil society. Although none of them totally rejects the idea of coercion, there are substantial differences in the extent to which they embrace it as a legitimate means of political control. By and large these theorists all agree that there are things that society and the state have a legitimate interest in regulating, and that in doing so coercive measures sometimes are called for. However, they do disagree, as can be expected, on the extent to which society and the state should be allowed to make use of such measures.

The objective of this chapter is twofold: first, as has been mentioned above, to find out to what extent the idea of coercion has been ignored by traditional political theory; and second, with whatever sketch of information I can gather, to try to chart the evolution of political theorists' position on the use of coercion as a tool of ruling and governance in the course of Western history. Given the nature of the discussions in this chapter, I will have to refrain from giving a more precise definition to the concept of coercion in this chapter, and instead will appeal to the same conventional commonsense understanding of coercion which the above-mentioned authors have relied on.[2] However, the shortcomings of this imprecise commonsense understanding of coercion have to be

[2] For the purpose of this study, a more precise definition of the concept of coercion will be provided in the second chapter.

noted before I start. The commonsense understanding of coercion does not clearly delineate the boundary of the idea of coercion. It is incapable of pinpointing coercion as a distinctive practice, and as a result, it cannot tell us where other practices end and coercion starts. Nothing reveals more clearly the problems resulting from the lack of precision in this understanding of coercion than the fact that none of these authors has been able to distinguish between coercion on the one hand, and the legitimate exercise of power and authority by the state on the other, which is a distinction that makes much difference in modern thinking.

This chapter will break down into three sections, with each grouping together two or three authors, who represent either a significant time period in the history of political theory or a major school of thought.

Coercion in a Politics of Virtue and Happiness: Plato and Aristotle

Plato[3]

For Plato, politics serves a definite end, and that end is justice. Justice is the chief virtue, or the virtue of all virtues, whose realization in either a single person or in an entire city depends on the attainment of some other important virtues, namely, wisdom, courage, temperance, and piety, which in Plato's works are always mentioned together with justice. Plato's vision of an ideal politics is the politics of an ideal city, where the different classes composing the city possess different virtues appropriate to each of them, and where there is no disagreement as to who should rule the city.[4]

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[3] My discussion of Plato's works is based on Edith Hamilton and Huntington Cairns eds. *Plato: The Collected Dialogues* (Princeton, NJ: Princeton University Press, 1996). All later references are to this edition.

[4] See the *Republic*, translated by Paul Shorey, in Hamilton and Cairns (1996).

Does a city like that have any use of coercion? To be fair to him, Plato never advocates explicitly the use of coercive measures in ruling the city, and to the contrary, he seems to value discussion and reasoning in resolving disagreements as much as anyone else. However, no reader of his would disagree that the Platonic vision of the ideal city is heavily coercive for two reasons. First, by the modern standard, that vision denies the citizens much more than it provides them with; and second, it presents a single conception of ideal politics as the only correct one, which is distasteful to the modern mind deeply committed to pluralism.

The second objection is fairly straightforward; therefore, I will focus on the first one for the remainder of my discussion of Plato. Three books into the *Republic*, Plato has laid out his vision for his city. His modern reader must be struck by those unpalatable elements in the life of all three classes. For the ordinary citizens, that is, the class of farmers and craftsmen, they are denied what is valued above everything else by moderns, namely, democratic participation. They have to give up any claim to a say in the ruling of the city. And this is justified on no other ground than the shaky claim that they possess no political wisdom that would enable them to participate in governing the city. The life of the ruling elite is no more enviable either. Their life is devoid of all material pleasures, and even worse than that, they are also deprived of the innermost privacy as they are not able to enjoy an exclusive family relationship, nor rear their own children. The loss of privacy may also touch on the life of the ordinary people, when a member of that class has the fortune (or misfortune) to give birth to a child showing great promise. Because of Plato's eugenics, that child will be brought to the care of the guardians. As a

result, the city embodies a severe curtailment of public life for the vast majority of the citizenry, and for the others, the most thorough loss of private life that one can imagine.

Plato certainly understands the distaste of the life in a city like this, and the difficulty to get anyone, even those among the ruling elite, to embrace it. To make people accept his vision, he has in mind two methods, the telling of a noble lie and persuasion. It is in his discussions of these two strategies that we find some redeeming features in his scheme. Contrary to expectation, Plato wants to resort to something other than coercion to make people accept his very coercive political arrangement. His discussion of the noble lie is in the *Republic*, and the discussion of persuasion is found mainly in the *Laws*.

Let us start with the telling of the noble lie. Toward the end of Book III of the *Republic*, Plato reluctantly teases out his noble lie (3.414-415). He believes that to make everyone in the city content with his or her own place, a lie has to be told to them, which tells the tale that the division of labor in the city is based on God's act of mixing different metals into different souls. Thus, those mingled with gold are fit to rule, those with silver are fit to fight, and those with iron and brass are naturally fit to farm and produce. And the city will collapse if it is ruled not by men of gold, but by those of iron and brass. Telling the lie is meant to make it easier for the people to accept the arrangement for their city, however, given the outlandish nature of this tale, it will not be surprising if it turns out to be even harder for them to believe the story than to accept their own fate. As Glaucon, one of Socrates' interlocutors, points out, there is little possibility to get the current citizens to believe the tale, although, he admits, chances are much better with their children (3.415d). And Socrates agrees. But on what would Plato have Glaucon

and Socrates pin their hope with regard to the future citizens? The answer is education, or more precisely, habituation. By exposing the children of the current citizens to this tale since their birth, chances are they will grow up believing it. So evidently, lie-telling as a method to secure obedience cannot guarantee any current effect. It will only have limited success with those who have already cultivated beliefs on the relevant subject, and for these people, it will take more than merely telling the lie to convince them.

Then what would be the more efficient method with respect to these people? Plato believes that rational persuasion provides the answer.[5] Most of the discussions of persuasion are found in the *Laws*.[6] In Book IV, when discussing in what manner laws should be made and pronounced to the public, Plato draws an analogy between doctors treating patients and legislators making laws (4.719e-720). Plato's main character, the Athenian, tells his two interlocutors, Clinias, the Cretan, and Megillus, the Spartan, that there are two kinds of physicians: physicians who are free men themselves and who treat mostly free men, and the slaves of those physicians who only treat other slaves. The two kinds of physicians employ different methods of treatment. The slave physician, in treating other slaves, gives the treatment in the manner of giving orders, without asking his patients for an account of his illness and without giving any explanation himself. On the other hand, the free practitioner, during the treatment, "learns something from the sufferers and at the same time instructs the invalid to the best of his powers. He does not give his prescriptions until he has won the patient's support, and when he has done so, he steadily aims at producing complete restoration to health by persuading the sufferer into

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[5] My discussion of the use of persuasion in Plato draws on Christopher Bobonich's "Persuasion, Compulsion, and Freedom in Plato's Laws", in Gail Fine ed. *Plato 2: Ethics, Politics, Religion, and the Soul* (Oxford University Press, 1999).

[6] Translated by A. E. Taylor, in Hamilton and Cairns (1996).

compliance" (720d-e). After explaining the difference, Plato asks which physician's method is better, and all three agree that the free practitioner's is. Likewise, Plato argues, there are also two ways to make legislation: the one is to legislate with threat of penalty only, and the other way is to legislate with both threat of penalty and exhortation of compliance. Without a question, all agree that the latter is definitely preferable. Therefore, lawgivers should not only give laws and make them known to the people, but also add whatever persuasive force they can muster to those laws as well.

Plato also discusses the need for persuasion in lawgiving in a second set of passages (10.885-888, 890), where he imagines a confrontation between the lawgiving authorities and a young atheist on the existence of gods. The young atheist challenges the lawgivers to make a convincing case if they want to legislate belief in gods:

> ...Some of us, in fact, recognize no gods whatsoever, and others gods such as you describe. So we make the same demand of you that you have yourselves made of the laws. Before you come to the severities of threats, it is for you to try persuasion—to convince us by sufficient proof that there really are gods, and that they are too good to be diverted from the path of justice by the attraction of gifts...we expect you, as legislators who make a profession of humanity rather than severity, to try persuasion on us in the first instance. Your case for the existence of gods may not be much better than that of the other side, but persuade us that it *is* better in the one point of *truth*, and you may perhaps make converts of us. So if you think our challenge a fair one, you must try to answer it. (885c-e)

Plato decides that his lawgivers should take the challenge and make an argument dispassionately and with gentle language. In his response to the young atheist, Plato once again makes the case for the need of persuasion in lawmaking through his spokesman the Athenian:

> Athenian: ...But how would you have the legislator act where such a situation is of long standing? Should he be content to stand up in public and threaten people all round that unless they confess the being of gods, and believe in their hearts that they are such as his law declares—and the case is the same with the laudable, the right, and everything of highest moment, and all that makes for virtue or vice—action must conform in all cases to the convictions prescribed by the text of the legislation—is he to threaten, I say, that those who will not lend a ready ear to the laws shall in some cases suffer death, in others be visited with bonds and whipping, in others with infamy, and in yet others with poverty and banishment, but to have no words of persuasion with which to work on his people, as he dictates their laws, and so, it may be, tame them?
>
> Clinias: Far from it, sir, far from it. If there are indeed persuasives, however weak, in such matters, no legislator who deserves the slightest consideration must ever faint... (890b4-d3)

This passage again shows that Plato believes that legislators should not rely merely on coercive penalties to get people to obey the law; they should, in addition, make an appeal to the people's reason with rational arguments, and convince them of the truth, justice, and other merits of the law.

Although he apparently intends to use both strategies to make people believe and obey, there is ample ground to suspect that Plato is not as serious about the method of lie-telling as about persuasion. His overall theory actually speaks against telling lies. While he discusses lies and falsehood in many places, the tone is always condemnatory. For instance, he argues vehemently against portraying gods as lie-telling (*Republic* 382, *Laws* 941b), and he firmly believes that those who are raised to be philosophers should love knowledge and truth, and hate falsehood (*Rep.* 490b). More fundamentally, Plato describes his city as a place where virtues are cultivated. But for him, all virtues have an epistemic component, and hence are inseparable from knowledge and truth (*Rep.* 441d-443e).[7] Thus, for instance, to possess the virtue of courage is to know what to fear and what not to fear, and to act accordingly. Lie-telling thwarts the very effort of cultivating virtue by misrepresenting falsehood as truth.

If lie-telling is inconsistent with Plato's overall goal, then how should we understand the telling of the noble lie and Plato's apparent endorsement of it? The most plausible explanation is that the noble lie is not really a lie, albeit called so; it should rather be treated as a founding myth, which is essential to achieving justice in the city. We may recall that for Plato a just city is where people are able to do what they are best at without interfering with or being interfered with by others. And more specifically, justice requires that the philosopher king be able to rule the city with the assistance of the guardians, and that the class of the ordinary craftsmen be content with the philosopher

[7] Christopher Bobonich argues that in both the *Republic* and the *Laws*, Plato appears to allow a lower sort of virtue, which does not require the possession of true knowledge but only true belief. See his "Persuasion, Compulsion, and Freedom in Plato's *Laws*". We will not get into the distinction between true knowledge and true belief here, since the more relevant distinction for my purpose is between truth possessed in the form of knowledge and belief on the one hand, and falsehood on the other. In any event, falsehood is not acceptable in Plato's overall scheme.

king's rule. Since Plato believes that the majority of the people are not able to acquire the virtue of justice independently, and therefore have to become part of a larger scheme in order to be just—which is the idea that everyone can be a just citizen, but not everyone can be a just man—spreading the myth of the metals is hence justified if it can help the city achieve the kind of functional justice that Plato believes justice is all about. So the seriousness of the matter and the nobleness of the goal excuse the method employed. And if the telling of the noble lie is to be understood in this way, it would be clear that this is a very unusual case, a case of exception to Plato's general rule against telling lies.

In contrast, persuasion is what Plato clearly intends the rulers of his city to rely on. Plato prefers lawgivers who combine penalty with persuasion in making laws. Lawgiving cannot do away with penalty because laws are intrinsically coercive. If laws are to speak for themselves, they always speak in the voice of threat. For there is no other way through which laws can be enforced. This, however, is unsatisfactory for Plato. While he wants obedience from the people, he wants their obedience to be based on reason, not as a result of the threat of punishment. Although the law can only speak by way of the threat of punishment, lawgivers can certainly do more to make sure that the citizens' obedience is voluntary and rationally based. For this reason, rational persuasion features heavily in Plato's scheme.

We therefore can conclude that Plato is at best ambivalent about coercion. The political arrangement he lays down for his ideal city is arguably the most coercive regime ever. But at the same time, he takes pains to make sure that the city is also a community of the willing. He wants the citizens to see the city as he sees it, to accept the ends the city sets out to accomplish as the most noble ones, and finally to embrace the life in the

city as the life most worth living. Therefore, even though the city is a coercive place, Plato intends it to be realized through non-coercive means.

Aristotle:

If Plato does not say much about coercion directly, Aristotle addresses the issue even less. However, since Aristotle's theory of the state is so clearly laid out, there is little difficulty in drawing the relevant conclusions.

At the start of the *Politics*, Aristotle writes:

> Every state is a community of some kind, and every community is established with a view to some good; for everyone always acts in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good. (I.1.1252a1-6)[8]

Furthermore, the state, or the supreme community, like all prior and smaller communities, such as households and villages, has a natural existence; but different from all of them, it is self-sufficient. And it does not come into existence for the sake of mere life, but for the sake of good life (I.2.1252b28-33). Two paragraphs down, Aristotle goes on to say that "man is more of a political animal than bees or any other gregarious animals" (1253a7-8) because of his possession of the power of speech, since that unique characteristic of man enables him alone to have "any sense of good and evil, of just and unjust, and the like"; and that "the association of living beings who have this sense makes

[8] *The Politics*, translated by Benjamin Jowett, in Stephen Everson ed. *Aristotle: The Politics and the Constitution of Athens* (Cambridge, England: Cambridge University Press, 1996). All later references are to this edition.

a family and a state" (1253a16-18). Immediately after that, Aristotle claims that "the state is by nature clearly prior to ... the individual", for which his proof is that "the whole is of necessity prior to the part", and "if the whole body be destroyed, there will be no foot or hand" (1253a19-21).

This short passage contains almost all the arguments fundamental to Aristotle's political thought. He argues in that passage that the *polis* serves some other, presumably higher, end, that the *polis* is a natural entity, that man is by nature a political animal, and that the *polis* is prior to the individual by nature. David Keyt calls the last three arguments—the *polis* is a natural entity, man is a political animal by nature, and the *polis* is prior to the individual—the "three basic theorems of Aristotle's *Politics*", and argues that they "together ... characterize Aristotle's standpoint in political philosophy and ... distinguish it from rival views such as that of Hobbes".[9]

These arguments of Aristotle's clearly reveal what he thinks of the relationship between the state and its citizens. The state, as the supreme and complete human community, aims at the highest good that human beings can aspire to. But what is this highest good? The answer is not hard to find. An individual person is most concerned with his own *eudaimonia*, or happiness. To him, his own happiness is not merely a good, but the highest good that he can hope to achieve as an individual. In the same fashion, the state, the largest community of individual human beings, is concerned with the *eudaimonia* of all its members, which is *eudaimonia* at the largest scale. Therefore, the highest good the state aims at is nothing other than the happiness of the greatest extent. Not only is an individual person's happiness consistent with the happiness the state

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[9] Keyt, "Three Basic Theorems in Aristotle's *Politics*", in David Keyt and Fred D. Miller, Jr. eds. *A Companion to Aristotle's Politics* (Cambridge, MA: Basil Blackwell, Inc., 1991), p.120.

pursues,[10] but more importantly, his own happiness is only made possible by a life in the *polis*. Aristotle argues that individual human beings can only flourish and attain the good life within the *polis*, where their life is regulated by law and justice. If living outside the *polis*, apart from suffering the inconvenience of not being self-sufficient, they will become the worst kind of animals thanks to their natural and superior capacities (I.2.1253a32-35).

It is not hard to point out elements in Aristotle's thought which one can label as coercive. Scholars have characterized Aristotle's conception of the *polis* and the state-citizen relationship as either "authoritarianism" or "paternalism".[11] R. G. Mulgan argues that Aristotle views the *polis* as the community of supreme power, and as such, "through the law and other institutions of government, [it] should exercise general control over the citizens in order to make them achieve the good life" (1977, p.17). In general agreement with Mulgan, Fred Miller argues that Aristotle sees the founder and lawgiver of a *polis* as a great benefactor, because by administering justice in the *polis*, he provides his fellow citizens with the best environment to perfect themselves by acquiring virtue and practical wisdom.[12]

The above discussion indicates that Aristotle intends to make life in the *polis* a necessity for individual human beings. If they do not want to become the worst kind of animals, and if they want to lead a happy and virtuous life, they will have to continue to

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[10] Although Aristotle argues that the good of the man and the good of the *polis* are the same, the latter type of good is nonetheless a greater and more complete good. See *EN*, Book I 2.1094b7-8, ed. by Terence Irwin (Indianapolis, IN: Hackett Publishing Company, Inc., 1985).

[11] See R. G. Mulgan, *Aristotle's Political Theory* (Oxford University Press, 1977), p.17, and Fred D. Miller, Jr., "The State and the Community in Aristotle's *Politics*", *Reason Papers*, 1 (1974), p.67. Mulgan and Miller's arguments are discussed by David Keyt, "Aristotle's Theory of Distributive Justice", in Keyt and Miller (1991), p.255, where I learned about their arguments.

[12] Fred D. Miller, Jr., *Nature, Justice, and Rights in Aristotle's Politics* (Oxford University Press, 1995), p.67.

be part of the *polis*, ruling and being ruled in return, as is pictured in Aristotle's ideal type of state (I.12.1259b5-8). Inside the *polis*, participation in the political life is expected of anyone holding the title of citizen, even though that is not exactly mandatory, for such participation is good for the individual citizens themselves. Furthermore, both Mulgan and Miller suggest that the *polis*, as the care-taker of the supreme good, is expected to use its political authority to help cultivate a sense of virtue in the mind of its citizens.

So the implications of Aristotle's conception of the state are clear. The state is allowed to play an essential role in the life of individual citizens. They have to live within the state, otherwise they will risk losing their humanity; and they cannot refuse to surrender themselves to the state's scrutiny. However, despite his emphasis on the role of the state, Aristotle is not an advocate of statism. He does not believe that the state has interests separate from those of its citizens. Aristotle sincerely believes that what he thinks the state should do to its citizens is entirely for their own benefits. If the state's actions involve coercion in any form, it clearly is a reasonable price for the citizens to pay in the pursuit of happiness and good life.

There is another component in Aristotle's thought that involves coercion, and that is his argument concerning the so-called natural slavery. Aristotle maintains that a human being, if he "participates in reason enough to apprehend, but not to have, is a slave by nature" (I.5.1254b22-23). The natural slave is intellectually deficient. He has no deliberative capacity (I.13.1260a12), and hence is not capable of a life based on free choice (III.9.1280a33-34). Because of that, he needs someone who is capable of those things to be his master, for the sake of his own good. Thus, even though he is not capable of partaking of reason and virtue by himself, he nonetheless will benefit from reason and

virtue through the rule of his master. However, this master-slave relationship is not supposed to be mutually beneficial. It is the master's interests that such a relationship is supposed to promote, and any benefit to the slave is merely accidental (III.6.1278b32-36).

Nicholas Smith points out that Aristotle draws an analogy between the rule of the natural master over the natural slave and two other models: the rule of reason over emotion, and the rule of the soul over the body or man over beast.[13] But neither model provides Aristotle with adequate ground for the kind of despotic rule that he allows the master over his slaves. Smith argues that on the first model, the rule would be a kingly rule, much like how a father rules his child. Under this type of rule, reasoned admonition is more fitting than mere command, which is a point Aristotle himself advocates (I.13.1260b6-7).[14] Smith thinks that the second model also has problems for Aristotle. The man-beast model applies to the relationship between a man and a human beast only when it is outside slavery. After the beast-like man is enslaved, he will effectively participate in reason and virtue through his master, and as a result he will no longer be beast-like. Therefore, the man-beast model does not justify treating enslaved human beasts in a despotic manner either.[15]

However, incoherent as it is, the theory of natural slavery proves indispensable to Aristotle's larger project. Politics in the *polis* is possible for the most part because of the institution of slavery. By freeing them from domestic concerns and menial labor, thus allowing them leisure time, slavery is the precondition to the free citizens' participation in the political life of the *polis* (II.9.1269a34-36). Yet, what makes something else

[13] Nicholas D. Smith, "Aristotle's Theory of Natural Slavery", in Keyt and Miller (1991), p.142.
[14] Ibid. p.149.
[15] Ibid. p.153.

possible may not be properly a part of that thing. Such is the fate of the slaves in the *polis*. Aristotle believes that the slaves, and for that matter, the non-slave artisans and laborers, are not proper parts of the *polis*. For they lack the essential characteristics that *bona fide* citizens of the *polis* enjoy, such as reason, virtue, wealth, and leisure. Although their contributions to the *polis* are crucial to its well-being, they are not deemed worthy to have a say in its affairs. Therefore, Aristotle's *polis* is arguably a very coercive political arrangement from the perspective of these portions of the population as well.

Coercion in the Thought of Civic Republicanism: Machiavelli and Rousseau

Machiavelli

Before I can proceed with a discussion of coercion in Machiavelli's thought, it has to be established that Machiavelli's thought belongs to the school of civic republicanism. If there is anything that causes doubt about his commitment to republicanism, it is definitely his most read work—*The Prince*.[16] That small book has been viewed by many as a manual for tyranny, as it advises potential as well as current rulers about what they have to do in order to get into power and hold onto it, often in contradiction to classical teachings about ends and virtues in politics. Machiavelli would have been condemned to eternal infamy if not for another book of his—the *Discourses*.[17] In that book, he shows great passion and commitment to the republican cause. Hence is the question which book should be given more weight in determining what Machiavelli's true beliefs are. Or simply put, is Machiavelli a republican theorist or an advocate of tyranny?

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[16] *The Prince*, ed. and trans. by David Wootton (Indianapolis, IN: Hackett Publishing Company, 1995). All references are to this edition.

[17] *Discourses on Livy*, trans. by Harvey C. Mansfield and Nathan Tarcov (Chicago, IL: The University of Chicago Press, 1996). All references are to this edition.

If contemporary Machiavelli scholars have reached something of a consensus, that consensus apparently gives support to Machiavelli's claim to republicanism.[18] Plenty of textual evidence has been cited by commentators that all points to Machiavelli's faith in the republican form of government and in the people living under such a government. For instance, both Quentin Skinner and Maurizio Viroli argue that Machiavelli has inherited most of the themes championed by the humanists before him, such as the rule of law, civil equality, and elective government. Skinner quotes Machiavelli saying in Book II, Chapter 2 of his *Discourses* that "'[i]t is not the pursuit of individual good', ... 'but rather the pursuit of the common good that brings greatness to cities,'" which, according to Skinner, is a unique virtue of republican government.[19] Skinner argues that the Machiavellian brand of republicanism can be summed up in two theses, one negative, one positive. The negative thesis is that "the common good is scarcely ever promoted under princely or monarchical rule," and the positive thesis is that "the only way to ensure the promotion of the common good must therefore be to maintain a republican form of government."[20]

Similarly, Viroli sees in Machiavelli a distinctly republican theme that has been given more emphasis by later civic republican theorists with better credentials, such as Rousseau. He argues, "[f]or Machiavelli, like his republican teachers, politics is not just to do with the formal structure of the constitution; a primary aim of politics is to shape, to

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[18] See among others Gisela Bock, Quentin Skinner, and Maurizio Viroli eds. *Machiavelli and Republicanism* (Cambridge University Press, 1990); Mark Hulliung, *Citizen Machiavelli* (Princeton University Press, 1983); Harvey C. Mansfield, *Machiavelli's Virtue* (The University of Chicago Press, 1996); J. G. A. Pocock, *The Machiavellian Moment* (Princeton University Press, 1975); Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford University Press, 2000); and Maurizio Viroli, *Machiavelli* (Oxford University Press, 1998).

[19] Skinner, "Machiavelli's *Discoursi* and the Pre-Humanist Origins of Republican Ideas", in Gisela Bock, Quentin Skinner, and Maurizio Viroli (1990), p.138.

[20] *Ibid.*, p.139.

educate the passions of the citizens."[21] For Machiavelli, this is also one of the roles the founder of a republic has to play. As Hanna Pitkin explains, Machiavelli's founder must "serve as a model for imitation, must inspire admiration, respect, even love, and embody for his subjects the character they are to acquire by following him—a character not of terrifying cruelty, but of genuine virtue."[22] These characteristics are obviously more fitting to the leader of a free republic than to a tyrannical prince.

But Machiavelli is not a strict follower of his humanist predecessors. For instance, he parts company with them in his acceptance of, or even praise for, civil discord among the various elements of the republic. He believes that for citizens of a republic to develop genuine virtue, they have to be given the opportunities to learn to live with virtue. He asks what opportunities are better than a tumultuous public life in which, through their participation, citizens are able to experiment and eventually find the right virtues suitable to a free republic? As he contends in the *Discourses*, had it not been for the rivalry between the nobles and the plebs, the tribunate, which later proved to be of great benefit to the citizens of the Roman Republic, would not have been instituted (I.4 and 6). In the same spirit, he argues that institutions and practices that have guarded the freedom of a republic and its people so effectively, such as the right to accuse enjoyed by citizens of the Roman Republic, should not be abolished simply because they may lead to civil discord (I.7).

If Machiavelli has talked all the talk of a civic republican theorist, what has kept him apart from the others whose claim to republicanism is not subject to any doubt? Mark Hulliung's answer is that he has given much more emphasis to the pursuit of glory

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[21] Viroli, "Machiavelli and the Republican Idea of Politics", in Gisela Bock, Quentin Skinner, and Maurizio Viroli (1990), p.116.
[22] Hanna Pitkin, *Fortune is a Woman* (University of California Press, 1984), p.77.

and greatness in his thought.[23] Hulliung accuses other Machiavelli scholars of not paying enough attention to the heroic elements in Machiavelli's republicanism. He claims that there would be no inconsistency between the *Prince* and the *Discourses* if Machiavelli's discussions of the glory and greatness of (the founding of) republics are taken more seriously. Hulliung suggests that for Machiavelli the sole end of any political endeavor is greatness, and that his republicanism seems to be more of a byproduct of that aspiration. This is because Machiavelli believes that "the glorious, violent, and aggrandizing deeds" that can bring about such greatness "are better performed by republican citizens than monarchical subjects."[24] If glory and greatness are the only things that Machiavelli aims at achieving, then there would be no tension between what have been seen by many as violent means and humanistic ends in his thought. Everything that would eventually lead to greatness could serve as the means. Interpreting him in this way, Hulliung further contends, "Machiavelli doesn't need to struggle to bring his realism and idealism together since they were never apart."[25] The tension does not exist because both his violent *penchant* and his humanist purposes are combined and reconciled in the pursuit of this higher end of greatness.

Hulliung might be guilty of giving too much emphasis to the theme of glory and greatness, and consequently reading away some very real contradictions in Machiavelli's thought. But I believe that Hulliung is right in seeing Machiavelli as a republican of a different sort. He is a republican with an unusual aspiration for honor, glory, and greatness. This may partly have to do with his frustration at the political conundrum in which he found Italy during his times. As a patriot, he wants to see Italy once again

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[23] Mark Hulliung, *Citizen Machiavelli* (Princeton, NJ: Princeton University Press, 1983).
[24], *Ibid.*, p.220.
[25] *Ibid.*, p.222.

achieve glory and greatness. And as a republican, he believes that such glory and greatness will be best achieved through developing republican virtues, and more importantly, creating a powerful free republic.

Understanding Machiavelli as a republican theorist aspiring to glory and greatness would help explain the two types of coercion found in his writings. The first type of coercion is the coercion conventionally understood, that is, coercion by the ruler against his subjects. The second type is unique to Machiavelli's thought. He argues that coercion is also exercised by *fortuna*, or fortune, against those who struggle to accomplish great deeds, in particular, founders of states. Let's discuss both types of coercion in turn.

Evidence of coercion of the first type is abundant in the *Prince*. In a famous passage, Machiavelli advises rulers and potential ones to learn how not to be good and when to use this knowledge, since not all of those he has to deal with are good, and hence to act as a good man in all circumstances will only bring his own ruin. Therefore, contrary to classical teachings, what a successful ruler should do is to abandon unrealistic moral ideals and get in touch with the political reality. (Chap. 15, p.48) The guide of reality sometimes recommends seemingly violent deeds. For instance, Machiavelli advises rulers to well use, but not to abuse, cruelty. An example of well-used cruelty is to commit all the necessary atrocities at one stroke in order to secure one's power; and an example of abuse of cruelty is to avoid necessary bloodshed, only to find oneself later compelled to repeatedly engage in actions of violence, which will only again and again arouse resentment among the people. To a successful ruler, nothing is off limits, and every effective means (barring the most immoral ones such as parricide and betrayal of

one's own country) should be employed to secure his power. Such a ruler has to have the virtues of both the fox and the lion, combining both resourcefulness and violence in order to achieve his goal.

No wonder that Machiavelli's reader would be struck by these suggestions that seemingly contradict his later demonstrated republican commitment. The question naturally arises whether Machiavelli himself believes in the advice he gives to rulers, or he is simply playing devil's advocate. I think that there is no question that Machiavelli does believe in the merit of his advice, but at the same time he is not concerned with the right and wrong of the actions he recommends. A fact that is often overlooked in the debate of his stands and commitments is that apart from being a political theorist, he is also a political technocrat, whose job requires him to recommend and take actions that would work in real life. I believe that Machiavelli provides rulers with these advice precisely because he believes that they will work in reality, and for no other reasons. He may be an idiosyncratic republican, who is less scrupulous about employing coercive means to achieve republican ends. But that is because Machiavelli has a very complex character—he is a lover of glory and greatness, a believer of republicanism, and a practical political professional. All three parts of his character have almost equal claims on him, and that is why he seems to embody so much contradiction.

The second type of coercion in Machiavelli's writings speaks of the struggle and eventual triumph of founders of principalities and republics against a coercive fortune. Fortune, like torrential rivers, is a very powerful force, often not shy of demonstrating her destructive power. In Machiavelli's account, fortune is more deterministic than chance, but less so than necessity. Fortune, observes Machiavelli, only determines half of one's

fate, and the other half is left to be determined by one's own virtues. Where fortune reigns free is usually where necessary precaution has not been taken and necessary efforts have not been made to resist her. (Chap. 25, pp.74-5) Given this coercive nature of fortune, Machiavelli maintains that those who aim at great accomplishments cannot simply bet on their good fortune. Their luck will run out, and then they will be dealt with mercilessly by fortune. Therefore people with great ambitions should learn from the great founders of states in the past, such as Cyrus and Moses, who only asked fortune for their first opportunity, and proceeded to succeed entirely with their own virtues. (Chap. 6, p.19)

Machiavelli discusses both types of coercion with a view to their impacts on founders and rulers of states. These people both inflict and suffer coercion. Machiavelli views coercion as both a necessary means and an unavoidable obstacle to greatness, and in neither case, he insists, should one flinch from it. Machiavelli's discussions of coercion should be viewed and understood in light of the kind of complex person he is. He is a republican, a pragmatist, and one who loves glory and greatness. His view of coercion is primarily a result of his pragmatism and his love of glory and greatness. Thus, though he speaks of two types of coercion, they are actually unified under one overriding concern of his, namely, the pursuit of glory and greatness.

J. J. Rousseau

As a republican theorist, Rousseau has a no-less-complex view of coercion. Let me start by quoting three of the most famous passages from three of the most famous chapters of the *Social Contract*:

'The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.' This is the fundamental problem of which the social contract provides the solution.[26]

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free...(Bk. I Chap. 7, p.195)

...Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually the happy moment which took him from it for ever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man.

...What a man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses. (Bk. I Chap. 8, pp.195-6)

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[26] Jean-Jacques Rousseau, *The Social Contract*, ed. by G. D. H. Cole, revised and augmented by J. H. Brumfitt and John C. Hall, and updated by P. D. Jimack (Everyman, 1993), Bk. I Chap. 6, p.191. All later references to *The Social Contract* are to this edition.

These passages clearly state Rousseau's positions on some of the most important issues he addresses in his works, such as the ideas of the general will, natural versus civil freedom, and especially, the idea of "forced to be free". Those ideas are by no means uncontroversial, and as a result one Rousseau scholar has observed that *The Social Contract* can be said to have "either establish[ed] the principles of modern liberal democracy or justifie[d] a totalitarian state."[27] There is no wonder why Rousseau has sparked so much debate among scholars studying him. On the one hand, he portrays himself as the staunchest defender of freedom, but on the other hand, he gives the most forceful argument to the idea of the general will, equipping it with unprecedented power against those in society who refuse to go along with its wish.

My discussion of Rousseau in this section will focus on arguably the most provocative idea of his, the idea of "forced to be free", and try to find out what, if anything, that idea has to show about Rousseau's attitude toward coercion. To pave the way for that discussion, let me first talk briefly about the ideas of the general will and civil liberty.

The general will Rousseau refers to in *The Social Contract*, is the general will of civil society. But that does not mean that society has a monopoly on the idea of general will. According to John Noone, Jr., the will can be either general or particular with respect to both society and individuals. A particular will of an individual is based on considerations of the particular interests of that individual. An individual can also have a general will—a particularized general will—when his will is directed at the public interests rather than his private ones. For a society composed of individuals capable of

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[27] Roger D. Masters, "The Structure of Rousseau's Political Thought", in Maurice Cranston and Richard S. Peters eds. *Hobbes and Rousseau: A Collection of Critical Essays* (Anchor Books, 1972), p.401.

having both particular and general wills, the general will of the society would be nothing but "a summation of the general wills of individuals".[28] But what is the general will based on specifically? Noone is also one of the few scholars who are willing to give an answer to that question. Noone believes that "[m]anners, morals, customs, and public opinion define a people and constitute its abiding common good", and that common good "is the object of a people's general will".[29] In other words, the general will of a people is based on the specific opinions, norms, and traditions of that people, and aims at achieving the common good as defined by those things.

On the issue of Rousseau's substitution of natural freedom with civil freedom, William Bluhm provides the best interpretation.[30] "Each person," argues Bluhm, "in joining civil society, seeks his self-preservation."[31] As the end of self-preservation has to be pursued through community, the individual has to subject his free will which he enjoys in the state of nature to the will of community, the general will. But this is in direct contradiction to our natural tendency, which only abides by what is akin to the rule of the jungle—either I impose my will on society when I am strong enough to do so, or someone else's will is imposed on me when I am the weaker. Bluhm argues that Rousseau sees the solution of this problem in an effort to create a common value system. This common value system would be "a common way of looking at the world", and "a common ideology of vision and aspiration".[32] This, Bluhm argues, can only be done by remaking the natural man, that is, by redefining his freedom in terms of the general will.

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[28] John B. Noone, Jr., *Rousseau's Social Contract: A Conceptual Analysis* (The University of Georgia Press, 1980), pp.73-5.
[29] *Ibid.*, p.77.
[30] William T. Bluhm, "Freedom in *The Social Contract*: Rousseau's 'Legitimate Chains'", *Polity* XVI:3, 1984, p.359-83.
[31] *Ibid.*, p.374.
[32] *Ibid.*, p.375.

That is why, Bluhm points out, Rousseau has emphasized in both *The Social Contract* and the *Discourse on Political Economy* the need to develop "by public authority ... shared patriotic emotions and other common sentiments".[33]

Bluhm's interpretation has the following implication. If natural liberty is replaced by civil liberty which is defined by the general will, then presumably how much and what kind of liberty individual citizens should enjoy is determined by the general will. In that case, private opinions and wills contrary to the general will would be legitimately suppressed in the name of promoting the real liberty. Consequently, the apparent semantic contradiction in the phrase "forced to be free" would thus be explained away. And the only question that remains is how it is achieved that the people opposing the general will are forced to be free.

Bluhm's reading of Rousseau raises the question whether Rousseau is guilty of a conceptual sleight of hand by arbitrarily changing the very meaning of liberty in order to allow his arguments to come through. I do not think that there is any evidence of intellectual dishonesty on Rousseau's part, however, it has to be admitted that he does make some radical change to the idea of liberty by proposing the concept of civil liberty, and that his overall theory does to a great extent depend on this altered idea of liberty. More on Rousseau's view of liberty will be said in Chapter Four, but here let me point out that despite the apparently big difference between natural liberty and civil liberty, one essential feature of liberty remains the same, that is, for Rousseau liberty always means to obey the law that one makes for oneself. Thus, to enjoy civil liberty requires that one willingly embraces the general will, and adopts it as his own will. Having explained why it is the case that citizens, who are forced to will the general will, are forced to be free,

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[33] *Ibid.*, p.376.

the more puzzling question that remains is how citizens are actually forced to embrace the general will, and hence become truly free. Is Rousseau suggesting the use of coercion? If so, how is it carried out?

Steven Affeldt believes that the conventional interpretation by Rousseau scholars endorses the view that those recalcitrant individuals have to be compelled by the legal authorities to comply with what has been rightfully decided by the general will.[34] However, Affeldt contends, this interpretation contradicts what a literal reading of Rousseau's words would indicate. On this account, individuals are only "literally made free through the use of coercive power" as a result, whereas, Rousseau clearly intends with what he says that those individuals should eventually achieve freedom through a process by themselves.[35] In order to come to a correct understanding of what Rousseau has intended himself, let me quote at length a relevant passage in the *Social Contract*, where he talks about the voting procedure:

> ...But it is asked how a man can be both free and forced to conform to wills that are not his own. How are the opponents at once free and subject to laws they have not agreed to?
>
> I retort that the question is wrongly put. The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them. The constant will of all the members of the State is the general will; by virtue of it they are citizens and free. When in the popular assembly a law is proposed, what the people is asked is not exactly

[34] Steven G. Affeldt, "The Force of Freedom: Rousseau on Forcing to Be Free", *Political Theory*, Vol. 27 No. 3, June 1999, pp.299-333.
[35] *Ibid.*, p.324.

> whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day I should have achieved the opposite of what was my will; and it is in that case that I should not have been free. (Bk. IV, Chap. 2, pp.277-8)

This passage, which is the one most pertinent to this subject in the entire book, clearly suggests no coercive measures to be imposed by the government authorities on the citizens who disagree with the majority, which represents the general will. The mistakes of this minority of citizens have to be corrected by no one but themselves. Rousseau expects them to renounce their previous positions once they realize that those positions are inconsistent with the general will. But does that mean that the deliberation\decision-making process is completely free from coercion?

Affeldt does not think that that is the case. Affeldt's interpretation of Rousseau emphasizes an active sense of the word "engagement" which Rousseau uses in the *Geneva Manuscript*. According to the idea of active engagement, Rousseau believes that the social contract demands much more from citizens than mere passive compliance. It requires citizens to actively participate in the continuous constitution of the general will.[36] Affeldt argues that the general will is essentially an act of willing, and as such is

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[36] *Ibid.*, p.313.

always a current will.[37] For citizens to participate in the general will, they will have to engage in a continuous act of willing what is good for the entire society. Failing to do so does not make one a bad citizen, but not a citizen at all. This continuous engagement with the general will means not only that an individual citizen has to see to it that he always wills what is willed by the general will, but also that he has to "tak[e] on the work of constraining others to obey the general will—the work of constraining others to turn against the private will and toward participation in the continuous constitution of a general will."[38] So Affeldt believes that there is indeed coercion involved in forcing the reluctant to be free, but instead of the government authorities doing it, such coercion is being exercised by citizens themselves against each other. But what form would such citizens-enforced constraining\coercion, or as Affeldt puts it, the force of freedom, take? The answer is philosophy—philosophy "understood as transformative education or instruction".[39] Therefore, rather than relying on coercive institutional power, Affeldt sees Rousseau's solution lie in civic education and the force of public opinion of the civic-minded citizens. Only by compelling and transforming their will, will those citizens on the opposite side of the general will attain genuine freedom.

However, Affeldt may have ruled out the institutional forces too quickly, as he may have narrowly understood those forces as governmental institutions only. Arthur Melzer sees a role to be played to achieve the same effect by broader institutional forces that also include "the religious rites and beliefs, the manner of education, the economic

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[37] *Ibid.*, p.306.
[38] *Ibid.*, p.314.
[39] *Ibid.*, p.318.

practices, public festivals, athletic games, and so forth", which transform human nature "by molding institutions that in turn mold the men who grow up within them".[40]

As to what conclusion can be reached regarding Rousseau's attitude to coercion, I agree with Affeldt that Rousseau is not in favor of coercive government measures. Instead, he pins his hope on a combination of social practices, civic education, and a good public philosophy that will improve and transform human nature. The minority of citizens on the opposite side of the general will may feel coerced by their fellow citizens in the course of this transformation, but such coercion is necessary and for the good of those citizens themselves.

Coercion in the Voices of Liberalism: Hobbes, Locke, and Mill

Thomas Hobbes

The political theory of Thomas Hobbes is a subject on which scholars have reached a relative consensus. His is a theory of absolutism. It justifies the possession of nearly absolute power by a sovereign monarch over his subjects, and does not allow much liberty for the subjects *vis-à-vis* the sovereign power.

More specifically, in the very important Chapter 18 of the *Leviathan*,[41] Hobbes enumerates a number of rights and powers the sovereign possesses, to which the subjects have presumably consented[42] when coming into the covenant with each other to form

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[40] Melzer, *The Natural Goodness of Man: On the System of Rousseau's Thought* (The University of Chicago Press, 1990), p.234.

[41] Hobbes, *Leviathan*, ed. by Michael Oakeshott (Touchstone, 1962). All later page references are to this edition.

[42] By using the vaguer phrase "consent to", I hope I can avoid getting involved in a major scholarly debate on Hobbes, notably between David Gauthier and Jean Hampton, on whether what Hobbes refers to as "authorizing" the sovereign amounts to total surrender of liberty and rights by the subjects or merely delegation of liberty and rights to the sovereign. My personal preference is Hampton's position, although hers is not without difficulty either. See David P. Gauthier, *The Logic of Leviathan: The Moral and*

civil society. His discussion of those rights and powers is phrased largely in the form of what the subjects are not allowed to do. As listed among the most important sovereign rights, the subjects cannot change the form of government; the subjects cannot revoke the power of the sovereign; no subject is allowed to dissent against the sovereign's rule; the subjects cannot accuse the sovereign of any wrong doings; the subjects cannot punish the sovereign for his actions; the sovereign is the judge of what is necessary for the peace and defense of the subjects; and the sovereign is the one to make laws, to adjudicate on controversies, to make war and peace, and to determine whom to punish or reward.[43] For Hobbes, such an enormous delegation of power is consistent with the will and purpose of those who originally contracted to create civil society, since the essence of the commonwealth, as he puts it, is "*one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense*".[44] Seeing such a long list of sovereign power makes one wonder what is left for the ordinary people. Well, Hobbes does allow them the right to disobey the sovereign ruler when ordered to hurt or kill others or themselves, for, ultimately, the purpose of creating civil society is self-preservation.[45]

Hobbes is probably the only theorist discussed in this chapter who unequivocally endorses the use of coercion. His political theory certainly allows the maximum use of coercion, and he himself quite often speaks favorably of coercive power in his book. One only has to keep in mind that Hobbes' sovereign has the right and power to do almost

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Political Theory of Thomas Hobbes (Oxford University Press, 1969), Chap. IV; and Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press, 1986), Chap. 5.

[43] *Leviathan*, Chap.18, pp.134-41.

[44] *Ibid.*, Chap. 17, p.132. Italics are Hobbes'.

[45] *Ibid.*, Chap. 21, pp.164-5.

anything and everything, including taking lives when he sees fit.[46] But what is the justification of restricting the ordinary people's liberty by allowing the sovereign this enormous amount of power? The answer is to avoid a greater evil. David Gauthier argues that despite first impressions, Hobbes does believe that liberty is a good, which the sovereign should not deprive his subjects of except for a greater good.[47] But what is the good greater than liberty and the evil greater than the loss of liberty? Gauthier answers that the greater good is security and the greater evil is the lack of it. As he explains,

> It is true that in Hobbes's political system, security comes before liberty. Hobbes would have insisted that liberty depends on security, of course. It is true that his political theory centers on security, rather than liberty, and that in trying to devise guarantees of security, Hobbes must exclude guarantees of liberty.[48]

Hobbes believes that only in the society that he envisions can security be guaranteed. The reason he thinks so is because he has a very dismal view of human nature, and does not trust the law of nature. Hobbes maintains that men, naturally conceited and untrustful, are not capable of any cooperative schemes that would promote peaceful coexistence in the state of nature. As a consequence, that state of human existence represents a hopeless picture of the life of men as wretched savages. There, men are in constant danger of mutual aggression. And because there lacks any institutional means to ensure justice, when aggressions occur, the parties involved have no other resort than their own body and physical force. War is hence a common

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[46] Hobbes does concede that that is one of the few circumstances in which disobedience is justified on the part of the subjects.
[47] Gauthier, *The Logic of Leviathan*, p.143.
[48] *Ibid.*, p.144.

phenomenon. As a result, violent death is quite often what life is ended with. Therefore, the fear of violent death is constant and real in the state of nature.[49] What is added to this already unfortunate situation is the fact that the law of nature is not of much help to men. Jean Hampton argues that Hobbes believes that all rules, including the law of nature, need interpretation. Since two men's interpretations are more than likely to be affected by their respective biases and self-interests, they will inevitably be at odds with each other as to what the law of nature says. If they cannot agree on what the law of nature says on specific matters, the law of nature will definitely not be the resort when conflicts arise.[50] Therefore, Hobbes insists, the war of all against all in the state of nature can only be ended when the wills of all men are subject to the will of one.

Hobbes is ready to argue that the lack of guarantee of, and hence the genuine desire for, peace, security, and self-preservation have made attaining these goods an overwhelming concern of men in the state of nature. This single concern overrides all other concerns in the view of the parties to the social contract, therefore they are willing to give up all the rights and liberty they may possess in the state of nature in return for a life of peace and security guaranteed by the sovereign power in civil society.

Skeptics may still question the wisdom of that single most repulsive element in Hobbes' theory, namely, the creation of an absolute sovereign monarch. Some would like to divide the sovereign power among different branches of government, and others would prefer to substitute the personal sovereign with a constitution or a set of higher laws. Hobbes quickly brushes aside the first suggestion, which, in his opinion, is one of the causes that weaken a commonwealth. He asserts, "For what is it to divide the power

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[49] *Leviathan*, Chap. 13, pp.98-102.
[50] Hampton, *Hobbes and the Social Contract Tradition*, p.103.

of a commonwealth, but to dissolve it; for powers divided mutually destroy each other."[51] There will inevitably be quarrels over jurisdiction on areas and issues, which may incapacitate the government and lead to civil war.[52] He sees no merit in the second suggestion either. To set the law above the sovereign is to set a judge above him as well, for the law always needs interpreters, and whoever is given the authority to interpret the law is himself above the law and thus becomes the true sovereign.[53]

In conclusion, Hobbes' political theory is based on his theory of moral psychology. Because he sees human beings as sub-rational and short-sighted, thus incapable of enjoying rights, liberty, and equality which they naturally possess, without bringing harm and destruction to themselves, he argues that the safest thing for men to do is to entrust their life and well-being to an all-powerful sovereign ruler. In do so, they certainly will experience coercion, as that is a necessary element in the sovereign's rule and thus intended by Hobbes himself.

John Locke

If Locke's *First Treatise of Government* is devoted to the refutation of Sir Robert Filmer's theory of patriarchalism, his much more celebrated *Second Treatise of Government*,[54] in which Locke expounds his own theory of government, is believed by many scholars as at least partly directed against his other and more worthy opponent,

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[51] *Leviathan*, Chap. 29, p.240.
[52] Hampton, *op. cit.*, p.102.
[53] *Leviathan*, Chap. 29, p.240; and Hampton, *op. cit.*, pp.101-2.
[54] Locke, *Second Treatise of Government*, ed. by C. B. Macpherson (Indianapolis, IN: Hackett Publishing Co., Inc., 1980). All later references are to this edition.

Thomas Hobbes.[55] There is plenty of textual evidence in the *Second Treatise* to support that belief. In one passage, attacking those who believe that people should put all their trust in one absolute monarch, Locke says that "[t]his is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by *pole-cats*, or *foxes*; but are content, nay, think it safety, to be devoured by *lions*."[56] The analogy of the lions quickly reminds one of Hobbes' similar choice of metaphor when he refers to the absolute sovereign as a *leviathan*, a biblical term for a sea monster. Locke must have had Hobbes in mind when writing his *Second Treatise*, for many ideas argued by Hobbes serve as the main targets of Locke's attacks. As a matter of fact, some of Locke's most important positive arguments are made by way of refuting what he believes to be false teachings, most of which are of course Hobbes'.

Among all the disagreements between the two theorists, the most essential one is on the sovereign power. Hobbes puts this power in the hands of an absolute monarch for the safekeeping of peace and order. His sovereign receives from the people the broadest authorization, which is also irrevocable, and as a result has powers over virtually all matters in life and death. Furthermore, the sovereign king, as the possessor of the supreme sovereign power, is accountable to no one else. For Hobbes believes that anyone who can hold the king accountable has the power over him, and in that case that person will then be the true sovereign. Locke subscribes to the same belief that the holder of the sovereign power is supreme. However, that belief is precisely the reason that sets Locke against absolute monarchy. Locke argues that the chief cause of all the

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[55] Richard Ashcraft points out that there has been a presupposition among Locke scholars that "Locke was - or should have been - writing against the only philosophically worthy opponent among his contemporaries: Thomas Hobbes." Ashcraft, *Locke's Two Treatise of Government* (London: Allen & Unwin, 1987), p.4.
[56] *Second Treatise*, Chap. VII, Sec. 93, p.50. Italics are Locke's.

inconveniences in the state of nature is the fact of everyone being judge in his own case. Therefore, the very purpose of entering into civil society is to avoid this very evil by setting up a known authority for people to appeal to in case of conflicts. Anyone who has no such an authority to appeal to and therefore remains the judge of his own case is still in the state of nature, and "so is every *absolute prince*, in respect of those who are under his *dominion*".[57] To institute absolute monarchs in civil society not only is a grave injustice, but also amounts to letting all the inconveniences that have plagued the state of nature continue in civil society only at a greater scale. For this reason, Locke believes that absolute monarchy as conceived by Hobbes is not a viable form of government for civil society.

Locke's alternative solution is to create a limited constitutional government, which is also established through consent. If there is a lack of clarity as to what consent means in Hobbes' theory, Locke leaves no room for confusion in his reader's mind. In discussing the beginning of government, Locke writes:

> When any number of men have so *consented to make one community or government*, they are thereby presently incorporated, and make *one body politic*, wherein the *majority* have a right to act and conclude the rest.[58]

Locke argues that the founding members of civil society give their consent to the government thereby established on the condition that everyone who shall become a member give his consent, and agree to be bound by the will of the majority. By so consenting, each member is obligated to his fellow citizens—rather than to one man who is above everyone else—to obey the laws the majority of the people shall agree to. By

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[57] *Second Treatise*, Chap. VII, Sec. 90, p.48. Italics are Locke's.
[58] *Second Treatise*, Chap. VIII, Sec. 95, p.52. Italics are Locke's.

agreeing to be ruled by no one but the majority, each member retains the rights and liberty they have enjoyed in the state of nature. But the actual decisions made by the majority are enforced in the name of the entire people rather than those individual members of the majority.[59] So in the original act of consent, the parties did not give up their rights and liberty in return for protection, instead, they only authorized the government they had founded to use those same rights and liberty in their name.

This disagreement with Hobbes certainly indicates a strong and principled objection to coercion on Locke's part. But at the same time, one has to be careful not to overstate Locke's position, for his objection may not be as categorical as one has been led to believe. Both Willmoore Kendall and Jacqueline Stevens think it necessary to emphasize the majoritarian elements in Locke's theory because of the long-held perception of Locke as *the* champion of individualism.[60] There is ample ground for such a perception. Take the example of the one subject that Locke touches on most often in his book—property rights.[61] Locke considers private property essential to the well-being of an individual person, and as a result, holds the rights to private property to be sacred. The supposed inviolability of those rights is made clear by Locke, for instance, when he argues that none of the legitimate governing powers, e.g. the power of a father, of a king, or of a superior military officer, can reach the private property of someone under those powers even though it is legitimate for those powers to punish his person.

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[59] The majority's will represents the will of the people.

[60] See Kendall, *John Locke and the Doctrine of Majority-Rule* (Urbana, IL: University of Illinois Press, 1959); and Stevens, "The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the *Second Treatise*", *Political Theory*, Vol. 24 No. 3, Aug. 1996, pp.423-63.

[61] Stevens explains that what Locke means by property is "lives, liberties, and estates", but contrary to her argument, Locke clearly has a more restrictive understanding of property in some of the passages where that subject is discussed. See Stevens, *op. cit.*, p.434.

Against this presumption, Kendall cautions that Locke's individual is a community member, with reciprocal rights and duties that are subject to community regulation. The rights enjoyed by Locke's individual are not absolute or inalienable, for he believes that there is "an inherent right in the community to withdraw rights from individuals who do not perform the [reciprocal] duties".[62] If Locke does not insist on inalienable rights for individual persons, then he certainly is not the kind of ultra-individualist that he has been portrayed to be.

Kendall's interpretation of Locke's understanding of individual rights is consistent with Locke's position on the question of the power of government. Locke believes in legitimate government power, which is bound by certain rules in the way it is exercised, but is not restricted as to how far it can reach.[63] More importantly, as both Kendall and Stevens point out, Locke allows the sovereign power to be exercised by the majority of the people, rather than insisting on strict unanimity as the only way of decision-making. Locke believes that it is legitimate to let the majority carry the day even though that means that those in the minority may feel coerced. Finally, Stevens interprets Locke to give only a qualified endorsement at best to the much-trumpeted Lockean idea of resistance against the sovereign. A careful reading of the chapter "Of Tyranny" shows that Locke keeps the option of citizen resistance closed for most of the circumstances in which corruption and unlawful acts by government officials occur. Locke advises the people to seek help from the law first in the case of a magistrate committing unlawful acts or acting outside his authority. Only when such help is not

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[62] Kendall, *op. cit.*, pp.68-74.
[63] On this point, see *Second Treatise*, Chap. XI, "Of the Extent of the Legislative Power".

available, will resistance be justified.[64] Moreover, such resistance has to be balanced against the consideration of the overall good of society. And Locke is also quick to point out that disobeying a magistrate's unlawful acts is categorically different from resisting the government, because by acting outside the boundary of the law, the magistrate's commands are void, just like those given by a private person.[65] Kendall and Stevens's interpretations strongly suggest that Locke is not as uncompromising on matters of individual rights and liberty, and on the use of coercive power as he has been thought traditionally.

However, on the other hand, there is also the danger of seeing Locke as too much against individual citizens. His theory of tacit consent presents such a possibility. Tacit consent is viewed as an indirect way of legitimating the government to its most recent addition of citizens. Since government is created by consent, it has to be maintained by consent as well. For later generations that have missed the only opportunity to give express consent to their government, they nonetheless should have a chance to voice their support to their government, albeit in a less explicit way. Locke's tacit consent relies heavily on uncertain presumptions such as having enjoyed the benefits the country provides, or having not expressed discontent through open rebellion. The difficulty of treating these facts as reliable indications of giving consent has been pointed out again and again.[66] Hence arises the question: if it is almost impossible for the government to safely assume tacit consent on the part of its later generations of citizens, wouldn't proposing this idea as if it is practicable amount to a conceptual deception, only to trick

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[64] Locke wants to emphasize that resistance is justified only in the case of unlawful acts taken by government officials, not acts that one simply disagrees with.
[65] *Second Treatise*, Chap. XVIII, pp.101-7; and Stevens, *op. cit.*, pp.445-7.
[66] See Craig Carr, "Tacit Consent", in *Public Affairs Quarterly*, 4, 1990, pp.335-45.

people into believing that their government continues to enjoy legitimacy and its citizens' support?

The fairest thing to say about Locke on this issue is that he may have never realized those problems about tacit consent raised by modern theorists. Tacit consent, in his view, is not only harmless, but very necessary to his theory of government. First, Locke genuinely sees tacit consent as the only way for a government to continue to possess legitimacy in the eyes of its citizens. And second, Julian Franklin argues that Locke sees in the idea of tacit consent the only way to keep the country from being dismembered after the passing away of the founding generation.[67] For the founding members who have given express consent, the territorial jurisdiction of the government, that is, the government's jurisdiction over the landed estates owned by those founders, automatically arises. The government continues to have jurisdiction over those land even after the original founders pass way and their land is transferred to new owners. To prevent the country from being dismembered, Locke insists that the new owners of the land have to enjoy their newly acquired possessions under the same terms as the original owners. That is, they cannot emigrate and become members of another country while still holding onto their land. They have to choose between quitting their possessions and leaving, and holding onto their land by giving their consent and becoming a true member of the commonwealth. So tacit consent, on Franklin's interpretation, serves a double purpose. It guarantees the territorial integrity of a country by keeping its land only in the hands of its own citizens, and supplies the only legitimate means for the government's jurisdiction to reach its new generations of citizens through its jurisdiction over the land.

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[67] Franklin, "Allegiance and Jurisdiction in Locke's Doctrine of Tacit Consent", in *Political Theory*, Vol. 24 No.3, Aug. 1996, pp.407-22.

Franklin's argument lends much support to the idea of tacit consent. It shows that the requirement of tacit consent is not meant to be a coercive bondage imposed on the future citizens, but a necessary measure for the preservation of society and the state.

In conclusion, Locke ultimately is not a liberal hostile to coercive government power. He has indeed made strong arguments to defend individual rights and liberty, and to restrict the power of government. But his effort should be viewed in the context of the political reality of his own times. His theory is a response to the claims to absolute power made by rulers of the 17th century, particularly, the reactionary attempts by the Stuart monarchs at acquiring such power. Overall, Locke's theory presents a balanced view on individual liberty and rights *vis-à-vis* the power of the state. He allows legitimate government power, even though it may very often be coercive, because he understands that such power is essential to the preservation of the collective enterprise known as civil society.

J. S. Mill

J. S. Mill's *On Liberty*[68] is arguably the best defense of personal liberty and freedom by a classical author. As such, it is also the only book by classical authors that directly addresses the subject of coercion. The principle that Mill lays down in the Introduction of his book, which has been dubbed by scholars as the Principle of Liberty, says:

> ... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully

[68] Ed. by Elizabeth Rapaport (Hackett Publishing Company, Inc., 1978). All later page references are to this edition.

> exercised over any member of a civilized community, against his will, is to prevent harm to others.[69]

A few lines down, as a further explanation Mill adds:

> The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[70]

Here, speaking unequivocally and in absolute terms, Mill delineates a realm of personal freedom, where any attempt of coercion, be it from other individuals, from the government, or from society at large, would be illegitimate. As an advocate and defender of personal freedom, Mill is one crucial step ahead of most of his predecessors and contemporaries,[71] in that he not only argues vehemently against coercive interference with personal freedom by political authorities, but also seriously considers the possibility of harms done on individual persons by the majority of society via public opinion.

Conventional interpretation of Mill sees him as not allowing society much discretion in interfering with a person's private activities. The Principle of Liberty bars any such interference by outside forces when the act in question does not affect anyone else other than the actor. Many of Mill's early critics find fault with the "harm to others" requirement, whereas, more serious questions have been raised by modern commentators with regard to the connection between the Principle of Liberty and the Principle of Utility. Simply put, those commentators ask whether Mill can be both a liberal and a utilitarian at the same time. For Mill the liberal, the problem is that given the fact that

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[69] *On Liberty*, p.9.
[70] *Ibid.*, p.9.
[71] With the notable exception of Alexis de Tocqueville.

liberty is defended by him in absolute terms, how it is going to be reconciled with the claim of utility, which recognizes no other ultimate ends than itself. For Mill the utilitarian, the problem he faces is that although a defense of liberty on utilitarian ground is readily available to him, it is not clear that such a defense would give the concept the vigor and absoluteness he prescribes in *On Liberty*.

Presented with such a dilemma, scholars studying Mill resort to different strategies. Gerald Dworkin argues that there are indeed two strains of argument for liberty and against coercion in Mill: one is a straightforward utilitarian argument, and the other is one that emphasizes the absolute value of free choice itself.[72] Dworkin apparently does not give much credence to the conflict between utility and liberty as an absolute good. John Gray believes that although in his complex view, Mill sees utility, or happiness, as the one most fundamental to human life, he treats choice-making not as merely instrumental to, but as itself partially constitutive of, a happy life.[73] For Alan Ryan, the question goes even beyond which one is more fundamental to Mill's moral theory. Both utility and liberty only deal with what people do. Whereas, an even more fundamental question asks who they are. Ryan argues that "the concept of utility to which Mill appeals is a concept which is parasitic upon his conception of progress."[74] Mill conceives of men as progressive beings, whose permanent interests advise them to leave their future open by preserving their own liberty and freedom.[75] Therefore, it is intrinsic to who or what they are that men should have liberty and freedom, and that they

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[72] Dworkin, "Paternalism", in Dworkin ed. *Mill's on Liberty: Critical Essays* (Rowman & Littlefield Publishers, Inc., 1997), p.73.
[73] Gray, "Mill's Conception of Happiness and the Theory of Individuality", in John Gray and G. W. Smith eds. *J. S. Mill On Liberty in Focus* (Routledge, 1991), p.193.
[74] Ryan, *J. S. Mill* (Routledge & Kegan Paul Ltd., 1974), p.133.
[75] *Ibid.*, p.133.

should be allowed to make choices without outside interference whenever they need to. Liberty and freedom understood thus as an enabling feature of a happy life also serves as a general argument against coercion. Coercion should be *prima facie* ruled out as a way of dealing with individual human beings, because by denying men the right to free choice, coercion denies them the recognition that they are beings capable of progress.

In my opinion, Ryan offers the best solution to the problem by broadening the issue. No argument is more convincing than the one that ties personal liberty and freedom to our aspiration to be the kind of progressive human beings Mill rightly claims we should be. I believe that Ryan is right in his interpretation. Talk of utility and liberty would be meaningless if it is not based on the presumption that human beings are progressive—they are capable of self-improvement, and care about their interests both at present and in the future.

To pick up again the other issue in Mill's theory, as suggested above, the conventional interpretation of the Principle of Liberty may have understood the "harm to others" requirement too narrowly. According to this interpretation, intervention by outside forces is warranted only when an individual's act would have harmful impacts on other people's person and interests. Such a narrow reading does not even accommodate some of the requirements on individuals which Mill himself would allow society to impose, such as serving as a witness in a court of law, participating in the common defense, or saving another person's life when such an act is called for.[76] David Lyons believes that this problem is not the result of an inconsistency in Mill's theory, but traditional commentators' restrictive interpretation of Mill's intent in proposing the

[76] *On Liberty*, pp.10-11.

"harm to others" requirement.[77] To resolve this problem, Lyons reformulates the Principle of Liberty to mean that "[t]he prevention of harm to other persons is a good reason, and the only good reason, for restricting behavior."[78] Lyons calls his reformulation a "general harm-prevention principle", in distinction to the traditional reading which he dubs a "harmful-conduct-prevention principle". On Lyons' understanding, society would be allowed to do more than merely intervening in private conducts that will bear direct and immediate harmful consequences to others and society, as society is interested in preventing harms, not merely harmful actions. Lyons's reading of the Principle of Liberty allows society greater discretion in regulating activities of individual persons, and at the same time, provides justification to a much greater extent to coercive measures that society as a whole considers necessary to protecting the public interests. Yet, Lyons's reading of the principle is not a far-fetched, arbitrary expansion of Mill's meaning, as there is ample textual support for his understanding.[79] I believe that Lyons's interpretation of the Liberty Principle captures Mill's original intent in formulating that principle, which is not adequately reflected in his own words.

However, Lyons' interpretation of the Principle of Liberty does not detract from Mill's image as a staunch defender of personal freedom. To the contrary, it only makes his position more reasonable and more coherent in the eyes of his modern admirers. He will continue to be viewed as someone committed to liberty on principle; but at the same time, he will be seen as also understanding the need of allowing personal liberty and freedom to be curtailed for other, presumably greater, goods.

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[77] Lyons, "Liberty and Harm to Others", in Dworkin ed. *Mill's on Liberty: Critical Essays* (Rowman & Littlefield Publishers, Inc., 1997), pp.115-36.
[78] *Ibid.*, p.120.
[79] See Lyons's article for the textual evidence.

Conclusion

This chapter has provided a historical perspective to the study of coercion, where I have discussed what some of the greatest political theorists have thought of this idea and practice. The discussions in this chapter are important to studying the idea of coercion, as I believe that political theorists' understandings of a concept often determine how the concept evolves in political theory. Although in this case, the traditional theorists have not said much that have contributed toward a clearer conceptual understanding of the concept of coercion, their positions and arguments on society and government's use of coercive measures nonetheless have elucidated some real implications for some crucial issues of governance that involve coercion. For this reason, their views on the idea of coercion are a significant part of the repertoire of knowledge that political theory has gained on this very important concept.

The next chapter will take a different approach to the study of the concept of coercion. I have noted at the beginning of this chapter that those theorists discussed in this chapter have relied on what is no more than an intuitive understanding of coercion. None of them has given the idea a rigorous analysis, delineating its conceptual boundaries, and distinguishing it from related concepts. But such a conceptual analysis is necessary for the purpose of this study. Therefore, in the next chapter, an effort will be made toward coming to a definition of this concept, in the hope of achieving some conceptual clarity on the idea of coercion.

Chapter Two: Disentangling the Concept of Coercion

In the first chapter, I have relied on what I called an intuitive or commonsense understanding of the concept of coercion in discussing how that concept has featured in the thoughts of some of the most prominent political theorists in the course of history. The main reason that I did not equip my discussions there with a more precise definition of the concept was that, since those theorists have mostly touched on coercion only in passing, the commonsense understanding of coercion as reflected in our ordinary speech is probably much closer than any scholarly definition to how they have understood that concept themselves. However, a more precise definition of coercion *is* called for at this point, which is going to be the task of this chapter. Since the concept of coercion has received the most extensive treatment from modern analytical philosophers, I will have to turn mostly to the philosophy literature for the purpose of this chapter.

It is easy to demonstrate the lack of precision in the understanding of the concept of coercion in our ordinary speech. Coercion has been roughly understood in that discourse as an undesirable situation in which one person is forced by another to do things that he otherwise would not do. But this characterization is hardly sufficient to distinguish coercion conceptually from other concepts involving the subjection of one person to another. For instance, on that understanding, no distinction can be drawn between coercion and mere exercise of physical force. Can I be said to be coerced if another person holds my hand and forces me to sign a document to forfeit all my property? And one is equally ill equipped with that understanding to differentiate coercion from inducement. If I have been induced by some positive offer made by

another person, am I not justified in claiming that my action has been made subject to someone else's will? Difficulties and indeterminacies like these show that a more precise definition of coercion is needed.

There have been some efforts made to provide a precise definition of coercion, notably those of Robert Nozick, Michael Bayles, Bernard Gert, Virginia Held, Alan Wertheimer, David Hoekema, Cheyney Ryan, and Craig Carr, among others.[1] The discussion in this chapter will draw extensively on the works of these scholars. However, as is very common, these authors do not agree with each other on many aspects of the idea of coercion, and few of them have been able to come up with a conceptual framework that can adequately address the others' concerns. Therefore, more analyses are justified till an adequate conceptual framework is found. It is the goal of this chapter to contribute toward that effort.

Features of an Act of Coercion

Let's begin with a relatively uncontroversial example of coercion. Suppose you were detained by your work till very late and walk home well after dark. Because it's so late, you take a shortcut through a poorly lit neighborhood, when suddenly a man jumps out with a pistol in hand and shouts, "Your money or your life". You feel compelled to sacrifice whatever amount of money you have in your wallet in order to save your life.

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[1] Nozick, "Coercion", in Morgenbesser, Sidney, Suppes, Patrick, and White, Morton eds. *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969), pp.440-72. Bayles, "A Concept of Coercion"; Gert, "Coercion and Freedom"; Held, "Coercion and Coercive Offers"; and Wertheimer, "Political Coercion and Political Obligation"; in Pennock and Chapman eds. *Coercion* (Chicago, IL: Aldine.Atherton, Inc., 1972). Ryan, "The Normative Concept of Coercion", *Mind*, Vol. 89, Issue 356, Oct., 1980. Hoekema, *Rights and Wrongs: Coercion, Punishment and the State* (Associated University Presses, 1986). Carr, "Coercion and Freedom", *American Philosophical Quarterly*, Vol. 25, No. 1, Jan., 1988.

And after you unwillingly but nonetheless voluntarily hand over your wallet, the man runs out of your sight in no time.

What happens to you constitutes a typical example of coercion. In this case, there are two agents involved, and the one succeeds in compelling the other to perform an act by threatening a harm, which the other person perceives as much worse than that which will result from his performance of the act. The above example points out a number of typical features of an act of coercion. First, when physical force is in the picture, an act of coercion generally involves the threat of physical force rather than the actual use of it. As a result, unlike the Q in the case in which P holds Q's hand and forces Q to pull the trigger of a gun, in an act of coercion the party compelled performs the act out of his own will. Second, P can be said to have coerced Q to perform or refrain from performing an act only if P succeeds in bringing it about that Q performs or refrains from performing the act. In other words, "coerce", like "know", is one of those so-called "success" verbs, the use of which indicates a successful completion of the act in question. Third, the compliance with the request of the compelling party by the party compelled is the result of coercion only when the threatened harm is perceived by the weaker party as substantially worse than the harm that might be caused by the act requested. Let me explain these three features in some details.

Acts of Coercion and Acts Involving Use of Physical Force

The first distinction commonly drawn by philosophers in conceptualizing coercion is between acts that compel with the threat of harm and acts that compel with the use of physical force. In Michael Bayles' words, the distinction is between "dispositional"

coercion and "occurrent" coercion.[2] A typical case of occurrent coercion is the above-mentioned example of squeezing another person's finger to pull the trigger of a gun. Acts like these preclude any role of the will of the party so forced. Instead, the party thus forced becomes an extension of the physical body of the party doing the forcing. An act of dispositional coercion is more like what coercion is normally understood. It works by means of a threat of a sanction by one person against another, which will materialize if the latter fails to act as requested. Harry Frankfurt makes a similar distinction in differentiating "physical coercion" from all other types of coercion. He points out that "in instances of physical coercion the victim's body is used as an instrument, whose movements are made subject to another person's will," while in other instances of coercion, "it is the victim's will which is subjected to the will of another."[3] The same distinction is also made by David Hoekema, although with different terminology. Hoekema calls what Bayles and Frankfurt refer to as "occurrent" or "physical" coercion "physical compulsion", and reserves the word coercion only for the type of instances in which the will rather than the body is forced.[4]

Given the importance that theorists have attached to this distinction, the only issue in question is whether this is a distinction within a broad concept of coercion or this is the distinction that distinguishes genuine cases of coercion from all other acts of forcing. On this question I agree with Hoekema, who argues that an essential feature of coercion is that it involves the victim's intentional action, that is, in cases of coercion the victim's will plays a role. A coerced act is nonetheless an act the victim chooses to perform,

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[2] Michael D. Bayles, "A Concept of Coercion", in Pennock and Chapman (1972), p.17.
[3] Frankfurt, "Coercion and Moral Responsibility", in Ted Honderich ed. *Essays on Freedom of Action* (Routledge and Kegan Paul, 1973), p.66.
[4] Hoekema, *op. cit.*, pp.19-20.

although in an undesirable situation of restricted choices. Whereas, in cases of using physical force to immediately impact the body, it is entirely impossible for the victim to exercise his or her own will. Therefore coercion is out of the question where a physical act circumvents the victim's will to have an immediate impact on his or her body.

Successful Acts of Coercion and Unsuccessful Attempts at Coercion

A number of theorists including Michael Bayles and David Hoekema argue that for an act to be an act of coercion, it has to be successful. If P intends to coerce Q into doing X, P can only be said to have coerced Q into doing X if Q did do X as a result of P's act. If P fails to secure the result of Q's doing X, P has only made an unsuccessful attempt at coercing Q into doing X, and his act cannot be called one of coercion.[5]

What could make P who attempts to coerce Q fail to do so? Coercion works by way of threat. In most cases of failed attempts at coercion, the threat is not sufficient to coerce. "I will tickle you if you don't slap that man's face" is normally insufficient as a threat, for the possible consequence of slapping a man's face usually outweighs the harm of being tickled. In contrast, "You will be crippled if you don't give that false bomb alarm" may be a sufficient threat to most people because being crippled is a much worse harm to the victim than what he believes a false bomb alarm would cause.

However, one may be left wondering that given the identical form of intention and act on the part of the party making the attempt in the two cases (the form of the intention and the act in both cases being one of "forcing someone to act by way of threat"), why the two acts fall into different categories. The answer is that an act of coercion involves more than one agent, and as a result it is a collaborative act. By a

[5] Bayles, *op. cit.*, p.19. Hoekema, *op. cit.*, p.44.

collaborative act is not meant that two people willingly collaborate with each other, as it is more the opposite in the case of coercion; what it means here is that both agents (in a two-person scenario) contribute to the act to make it what it is. The nature of a collaborative act is thus determined by the actions of both agents rather than by that of the initiator alone. So it is not enough for the initiator to act in a certain way, because to make the act one of coercion, the other party has to respond in a certain way. And that explains why in the case of coercion the success of the coercer's act, which depends largely on the victim, is essential in determining the nature of the act itself.

What makes a threat coercive?

Hoekema argues that the coerciveness of a threat is relative to the person to whom the threat is made, relative to the circumstances under which the threat is made, and relative to the nature of the act demanded by the coercer.[6] Thus the threat of a beating may coerce someone who is unhealthily thin and weak, but may not coerce a heavyweight professional boxer. A threat of taking away a thousand dollars may be sufficiently coercive to a person paying for his son's heart transplant, but may be considered only a minor loss by a recent winner of a jackpot. However, I disagree with Hoekema's third relativity. What makes it different from the other two is that it involves a moral consideration that is illegitimate with respect to the determination of whether one can claim to have been coerced. What Hoekema asserts is that if the victim is forced to commit certain acts that result in grave and serious harm, he or she cannot claim to have been coerced to excuse him or herself. For example, no one can claim to have been

[6] Hoekema, *op. cit.*, p.30.

coerced into committing murder because murder is a serious moral wrong and cannot be excused on any ground.[7]

I believe that Hoekema's requirement confuses considerations appropriate to a descriptive analysis of coercion with considerations that justify the victim's compliance. What is underlying Hoekema's argument is his belief that coercion provides a legitimate excuse to the victim for whatever he or she has done as a result of being coerced. Coercion in a sense justifies the victim's wrongdoing. A consequence of this belief is usually the exoneration of the victim from any legal responsibility or even moral blame. But there are serious wrongdoings that can never be justified, and the agents of which can never be exonerated from legal and moral responsibilities. What worries Hoekema and other theorists making the same argument is that without this requirement those who commit murder and other serious crimes may be able to get away more easily by claiming coercion, and that potential victims of coercion may have less scruple about committing murder and other serious crimes. As I will elaborate in a later section, I do not believe that whether one has been coerced should be determined on any other ground than whether he or she has genuinely felt so. If the only reason that the victim commits the wrongdoing is because of the coercive threat, then regardless the victim's claim of coercion is legitimate. Worries of responsibility and justification are legitimate concerns, but allowing these result-oriented considerations would render our understanding of coercion indefensible.

Besides, Hoekema's requirement is quite problematic in its application as well. First, he fails to specify what kind of harmful acts demanded will render a threat insufficient to coerce. He mentions murder as one example. But what about acts that

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[7] *Ibid.*, p.30.

will result in severe and permanent physical harm, although short of death, such as having someone crippled? What about acts that may result in such harms in an indirect way, for instance, stealing the money someone has barely raised for a life-saving operation? Should non-physical harms such as loss of honor and reputation that may be feared even more by the potential victim be included in the list? Just as people may disagree about what harms are sufficient to coerce, there is hardly any possibility of a broad agreement as to the perpetrator of what harms should be held absolutely accountable.

Second, there are cases in which, no matter how severe the harm of the demanded act may be, the threat is even worse. For instance, someone may be threatened with the killing of his wife and children if he refuses to commit a murder. One is hard pressed to argue that he should not commit the murder no matter what. It does not help much either to suggest that one can always discount what may happen in the future, and therefore the coerced husband and father should not help cause a present harm. Utility calculations in terms of the severity of the harm and the probability of its happening do not fit to be part of the decision-making process under circumstances like this, and to suggest so is to be blind to genuine psychological vulnerabilities normal human beings are subject to.

In light of the various problems Hoekema's requirement suffers from, I argue that instead of ruling out certain type of acts from the list of coercive demands, the requirement should be changed to this: the victim of coercion has to feel the harm of the threat as substantially worse than the harm he or she is going to cause by complying with the coercer's demand. To be sure, this condition does not require the harm of the coercive threat to be substantially worse than the harm of the demanded act by an

objective standard, but I don't believe that this weaker requirement will cause any conceptual problem for our analysis of coercion.

The root of the appeal of Hoekema's argument is the concern that although coercion does not preclude moral responsibility, it does render blame inappropriate for the coerced act.[8] As long as we continue to subscribe to the conventional belief that coerced acts are entitled to excuses, many people would maintain that Hoekema's requirement should be kept as strict as possible. One way of solving this problem is to attach strict liability to coerced acts. Since coerced acts are nonetheless done out of the victim's own free will, the victim of coercion should be held legally as well as morally liable for the harm he or she has done to others and to society. This suggestion would certainly not be without controversy, and therefore I am not seriously recommending it. However, I do want to argue that we should not tamper with our conceptual definition of coercion because of practical concerns that involve moral and legal considerations. Should there be any conflict between the conceptual definition and our social practice, I believe that we ought to amend the latter to suit the former.

A Different Path to Defining Coercion

Scholars who have studied coercion have disagreed on the best strategy to define the concept. They basically fall into two groups: those who consider it adequate a definition based solely on factual descriptions, and those who argue that a definition of coercion has to involve normative judgments. Theorists such as Frank Knight, Cheyney Ryan, and Craig Carr are representatives of the latter group, which even Ryan admits is in the minority. Since I disagree with the second group of theorists, I will first discuss their

[8] *Ibid.*, p.59.

views and the grounds of my disagreements with them before I proceed to develop a descriptive definition of coercion.

Frank Knight, an economist with philosophical interests, writes this in his book *Freedom and Reform*:

> Scrutiny of any typical case of unfree behavior reveals that the coercive quality rests on an ethical condemnation, rather than the ethical condemnation on a factually established unfreedom or perhaps it is more accurate to say that they are merely different names for the same thing...We say that the victim of a highwayman is coerced, not because the character of his choice between the alternatives presented is different from any other choice, but because we think the robber does "wrong" in making the alternatives what they are.[9]
>
> Freedom and coercion are ethical categories.[10]

What Knight is arguing is that as an ethical category, a definition of coercion necessarily involves moral judgments, and that the import of the concept cannot be fully captured by factual descriptions only. What differentiates coercion from other acts is not the description of its factual features, but a moral condemnation which alone determines what the act is.

Knight's argument is vulnerable to several criticisms. First, his argument suggests a total separation between the natural features of an act and the moral judgment on it, which is not a tenable position. For without looking at the factual features of the act, it is not possible to make a moral judgment on it. Furthermore, if, as he apparently

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[9] Knight, *Freedom and Reform* (New York: Harper & Brothers, 1947), p.10. Cited in Gerald Dworkin, "Compulsion and Moral Concepts", *Ethics*, Vol. 78, Issue 3 (Apr., 1968), p.227.
[10] Knight (1947), p.12. Dworkin (1968), p.227.

believes, the coercive quality which constitutes the essential feature of coercion rests only on an ethical condemnation, then coercion is hardly distinguishable from other acts that also deserve to be morally condemned. More importantly, Gerald Dworkin points out that since any act that is labeled coercion presumes a prior judgment about the wrongness of the act, it is impossible on this view to discuss the rightness or wrongness of the use of coercion.[11] As a result, we have to restrict the application of this concept in our political discourse in order to avoid either self-contradiction or putting ourselves in an untenable position of condemning justifiable use of coercion.

Cheyney Ryan criticizes the failure of theorists studying coercion to take account of the normative aspects of coercion in their definitions of the concept. Specifically, they have ignored, according to him, references to the rights and obligations of the parties involved in an act of coercion. It is often counterintuitive or even ridiculous to call an act coercion, not because that act differs from other acts of coercion in form, but because the party presumably coerced from doing something has no right to do it in the first place.[12] Ryan then limits the concept to apply to only those cases where the coercer's "right to prevent does not arise from a threat to individual rights."[13] Thus, according to Ryan, it is not coercion if one pulls out a pistol and scares away a few thugs who attempt a robbery; but it would be considered coercion if the government prevents a company from dumping garbage into a lake, although the government's action is justified on the ground of "some moral or legal principle" other than the protection of individual rights.[14]

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[11] Dworkin, *op. cit.*, p.228.
[12] Ryan, "The Normative Concept of Coercion", pp.482-4.
[13] *Ibid.*, p.490.
[14] *Ibid.*, pp.487-8.

I find Ryan's restriction of the use of coercion very problematic. If, as Ryan believes, intuition is relevant to the analysis of the concept of coercion, then our intuition here clearly argues against his distinction with respect to the ground of coercion. Perhaps it would be more revealing to compare the example of dumping garbage into a lake with another example of rightful but non-coercive prevention Ryan gives. Ryan argues that in the case in which P threatens to foreclose on Q's home if the latter does not stop trespassing on his property, P's act does not constitute coercion.[15] What make the two cases different are that in the foreclosure case what is prevented is the harm to one individual, and in the dumping-garbage case it is an emergent harm to a large number of the public. In these two examples, the strict requirement of violation of individual rights as the only criterion to distinguish coercive from non-coercive acts is not very appealing to intuition or common sense. The additional support Ryan provides, that this distinction reaffirms classical liberalism's insistence that only rights violations are proper object of punitive sanctions, fails to convince skeptics as well. This is because there is no necessary link between the analytical definition of a concept and a political discourse embedded with a particular ideology.

Furthermore, although I have no quarrel with Ryan on his argument that acts of coercion have normative implications, I do disagree with his contention that those normative implications have to be reflected in the definition of the concept. Contrary to the misunderstanding on Ryan's part, not including the moral features of coercion in its definition is not equal to treating it as a neutral concept. To his charge that it is counterintuitive to call some cases coercion, e.g., scaring away a bunch of robbers with a pistol, I argue (and I will come back to this argument again in the next section,) that most

[15] *Ibid.*, pp.489-90.

of the acts in cases like this are not separate acts and hence should not be individuated as such. The person who scares away the robbers is clearly doing this in self-defense, which is part of the interaction of a larger act. To see it as an act of coercion is to disregard other related features, and arbitrarily truncate an act which should be viewed as a whole.

Craig Carr also criticizes definitions of coercion couched in what he calls "forced-action statements".[16] His main objection is that such statements either only "report the outcome of events rather than actions,"[17] or in the case they do report actions, do not speak to features in the background that distinguish coercion from non-coercion.[18] On the latter point, he gives the example of "X was forced to do S," which can be used to describe both genuine acts of coercion and acts such as a football team being forced to punt on fourth down.[19] Carr argues that what is absent in definitions of coercion phrased in forced-action statements is the mention of social conventions which establish under what conditions it is socially permissible or impermissible to "leverage another's choice menu."[20] Under his view, coercion can come in the form of both threats and offers. Coercive threats and coercive offers are both instances of conventionally impermissible leveraging, and the difference is that the one involves avoiding the unpleasant and the other receiving the desirable.[21]

The main objection Carr's argument may be subject to is that by tying the analysis of coercion to social conventions, it allows the possibility that the definition of coercion may vary greatly from one society to another. It is possible to conceive of an extremely

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[16] Carr, "Coercion and Freedom", p.59.
[17] *Ibid.*, p.59.
[18] *Ibid.*, p.60.
[19] *Ibid.*, p.60.
[20] *Ibid.*, p.64.
[21] *Ibid.*, p.65.

permissive and an extremely impermissive society, between which there would not be much in common on how coercion is understood. Apart from the problem of cross-culture differences, even within a single society, agreement on social conventions may not be a sure thing either. What is most likely is that people tend to agree on general principles as to what is permissible and what is not, but may diverge widely when it comes to applying those principles to specific instances.

Therefore, the response to all three theorists is that, given the fact that attempts to incorporate the normative features into the definition of coercion cause even more problems, it is advisable to give up those attempts altogether. This is not to deny those normative features as some of them would argue, but is out of the belief that a descriptive definition of coercion based solely on the common natural features of acts of coercion is very much possible. In the following section, I will make an effort toward arriving at such a definition.

Coercion Defined

I have argued in the last section that coercion can be defined by examining only the natural features of acts of coercion. Operationally, this is to be done by listing a set of necessary and sufficient conditions under which the natural features of an act of coercion would obtain. This strategy has been tried before by philosophers such as John Searle in defining speech acts.[22] The earliest such effort on coercion, and arguably still the most

[22] See for example Searle (1965) "What Is a Speech Act?", in A. P. Martinich ed. *The Philosophy of Language* (New York: Oxford University Press, 1996), pp.130-40; and "How to Derive 'Ought' from 'Is'", in W. D. Hudson ed. *The Is-Ought Question: A Collection of Papers on the Central Problem in Moral Philosophy* (London: The Macmillan Press Ltd., 1969), pp.120-34.

complete and the best thought-out, is the one given by Robert Nozick in a meticulously written article entitled "Coercion".[23] The following is Nozick's definition:

1. **P threatens to bring about or have brought about some consequence if Q does A.**
2. **A with this threatened consequence is rendered substantially less eligible as a course of conduct for Q than A was without the threatened consequence.**
3. **P makes this threat in order to get Q not to do A, intending that Q realize he's been threatened by P.**
4. **Q does not do A.**
5. **Part of Q's reason for not doing A is to avoid (or lessen the likelihood of) the consequence which P has threatened to bring about or have brought about.**
6. **Q knows that P has threatened to do the something mentioned in 1, if he, Q, does A.**

The above conditions constitute an act of P coercing Q to refrain from an action, and with some obvious change, can be turned into an act of P coercing Q into an action.

What should be pointed out is that here quoted as Condition 3 is Nozick's initial version, which he later replaces with a more elaborate one in order not to exclude cases in which P either is bluffing and having no intention to carry out the threat, or has no preference for Q's response one way or another. The new version of Condition 3 is a much more complicated disjunction:

3′. (Part of) P's reason for deciding to bring about the consequence or have it brought about, if Q does A, is that P believes this consequence worsens Q's

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[23] Nozick, "Coercion", in Sidney Morgenbesser, Patrick Suppes, and Morton White, eds. *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969), pp.440-72.

alternative of doing A (i.e. that P believes that this consequence worsens Q's alternative of doing A, or that Q would believe it does). If P has not decided to bring about the consequence, or have it brought about, if Q does A, then (part of) P's reason for saying he will bring about the consequence, or have it brought about, if Q does A is that (P believes) Q will believe this consequence worsens Q's alternative of doing A.

Nozick's definition accounts for all three features of coercion identified in the example at the start of this chapter. Conditions 1 to 3 confirm that in acts of coercion, the coercer exerts pressure on his or her victim's will rather than on his or her body. Condition 4 recognizes that coercion occurs only when the coercer's intended result is secured. However, questions hang over condition 2, namely, whether this condition as it is phrased by Nozick satisfies the third requirement, namely, the harm threatened by the coercer should be perceived by the victim as substantially worse than the harm that might be caused by the act demanded.

As Hoekema correctly points out, Nozick's condition 2 as it currently stands opens the door to the possibility that the threat of any attempt at coercion might be used as an excuse as long as it renders non-compliance with the potential coercer's demand substantially less eligible. In an example Hoekema gives to show the inadequacy of this condition, P threatens Q with the loss of one hundred dollars if Q does not help P with a bank robbery. Since losing a hundred dollars is a serious loss to most people and under most circumstances, not helping with the bank robbery with the loss of a hundred dollars is hence much less eligible than if no such loss is attached. Therefore, under Nozick's second condition Q may legitimately claim that the potential loss of hundred dollars is the

reason for his involvement in the bank robbery.[24] Hoekema wants to prove with this example that if Nozick's second condition goes unmodified, the victim of some *bona fide* acts of coercion by Nozick's criteria may still lack legitimate excuses for his or her compliance. However, I will contend that even though Hoekema's example satisfies Nozick's second condition, it would still be hard to convince many people, probably even Nozick himself, that Q can rightfully claim to have been coerced by P in this case.

Two things normally prevent us from easily succumbing to attempts of coercion. One is our love of our autonomy, and the other is the severity of the harm that may be caused by the demanded action. Brought up under normal circumstances,[25] we do and are expected to attach some significance to our status as autonomous moral agents. Our love of autonomy normally prevents us from falling prey to coercion in trivial cases in which the harm threatened is much less than severe. If P says to Q, "Hop with one foot, or I will slap you in the face," unless Q himself feels like doing so, he is normally expected to stand up to this unreasonable demand and refuse to comply. For a normal moral agent is too proud to give in to another's unreasonable demand because of a threat of such negligible harm.

Even when the harm threatened is not negligible, one does not comply indiscriminately either. Usually, we give in to a coercive threat only when we see the harm threatened as much worse than what the demanded action is likely to cause. The perceived difference between the two harms has to be significant, otherwise the party threatened is expected to withstand the threat for the same reason as that given above. To

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[24] Hoekema, *op. cit.*, p.27.

[25] What is meant by normal circumstances here are those circumstances in which there is a low probability for a child to come into contact with instances considered by most moral communities as manifesting moral defects, such as unusual cruelty, extreme servility, or, perhaps more controversially, perversity.

be clear, by raising this requirement, I am not making presumptions about high benchmarks of selflessness on the part of ordinary moral persons. This requirement does allow individuals to overrate harms to themselves or to people close to them, as frequently happens in real life, and discount harms to others. But people can claim to be coerced only when after the adjustment in their calculation they see a substantial net difference between the greater harm of the threat and the lesser one in the demand. Therefore, Nozick's second condition is inadequate in that it leaves the phrase "substantially less eligible" too vague.

Noting the inadequacy of Nozick's second condition, Hoekema introduces the concept of "intolerable harm" to serve as the criterion by which to judge the coerciveness of a threat. The intolerability is measured in relation to both the severity of the threatened harm itself and to the harm of the demanded action.[26] With respect to the severity of the threatened harm, Hoekema argues for an objective assessment of the subjective severity of the threat. The argument on the one hand recognizes that the assessment of a harm threatened is the victim's to make, which would take account of characteristics unique to the victim's own situation, but on the other hand insists on some outside scrutiny on the victim's own assessment.[27] With the requirement of comparing the harm of the threat with the harm of the demand, Hoekema intends to rule out acts that will result in great harms to innocent third parties. As he argues, "a threat which is genuinely coercive must threaten me with a harm substantially greater than any harm I will inflict by complying with the threat."[28] Thus the threat of a broken leg should not coerce one into breaking another's leg, and no threat of any harm can coerce one into

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[26] Hoekema, *op. cit.*, pp.44-8.
[27] *Ibid.*, p.31.
[28] *Ibid.*, p.47.

committing murder. However, what is not clear in Hoekema's argument is, for instance, whether the threat of death is coercive enough for the victim to break another's leg. The lack of clarity on this question underscores the difficulties in his insistence that there should be objective criteria of coerciveness, and that no one can claim to be coerced into causing certain harms.

When Hoekema says that no one can be coerced into committing murder, I think he is not stating a fact, but making a moral argument that one should withstand any threat of harm so as to avoid committing murder.[29] This is making an appeal to the strength of our moral character, and any individual with a high moral character wants to agree with this argument at least in principle. But the same person may feel torn when faced with the situation in which a loving husband and father, threatened with the lives of his wife and children, is asked to commit murder. However, on this issue moral judgment is not relevant at all, since the question here is not whether the man can be excused if he submits to the threat, but whether, in case he does, he has been coerced into doing so.

What we should realize at this point is that regardless how many restrictions we may wish to impose on the victim's compliance, the decision of whether to comply is ultimately the victim's to make. In the above case, if the man succumbs to his coercer's threat and carries out his request, are we going to deny that he did what he did because he had been coerced? I did acknowledge above that the severity of the harm in the demanded action together with our love of our autonomy normally prevent us from easily falling prey to coercion. The concern about the severity of the potential harm to others,

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[29] I should say he is making two moral arguments, with the other being that serious wrongdoings such as murder are not excusable by claim of coercion. See Section One for this argument.

as Hoekema points out,[30] is ultimately derived from our compassion for our fellow human beings and our respect for them as our equals. But we may want to be careful not to overexploit either feeling. We cherish our status as autonomous moral persons, and we respect our fellow human beings for the same reason. But in the case in which one gives in to a threat and causes harm to a fellow human being, however we may judge him or her morally, we should admit that the person has been coerced.

Therefore, I don't think that either one of Hoekema's objective-criteria test and grave-action test is appropriate for the definition of coercion. They are more normative stipulations than descriptions of natural features of the concept. I argue, instead, that the only relevant factor in determining the coerciveness of a threat is whether the victim himself felt that the threat was too much to withstand, everything considered. This test also better accounts for the variance in individuals' reaction in identical situations than the practically impossible objective assessment. In conclusion, cases of coercion should be decided solely on the basis of the intentions and the reasons of the parties involved, otherwise we would be prescribing instead of describing the concept of coercion.

Given the above argument, I suggest that Nozick's second condition be amended into this:

> **2′. The harm of the threatened consequence is believed by Q to be intolerable as compared with that of complying with P's demand.**

With this revision, I believe that the definition is in a good shape.

Coercive Threats and Non-Coercive Offers

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[30] *Op. cit.*, p.47.

I have made two distinctions above: the first distinction is between forcing the body and forcing the will (instances of which are cases of coercion), and the second is between successful acts of coercion and unsuccessful attempts at coercion. David Hoekema uses the term "compulsion" to refer to those cases involving physically forcing the body, such as the afore-mentioned example of holding the victim's hand and squeezing his finger to pull the trigger of a gun. And he calls an unsuccessful attempt at coercion "duress". In such an attempt, the threat is not sufficient to effectively coerce the victim into compliance, therefore the victim only suffers duress. Hoekema's use of the two concepts of compulsion and duress is novel in itself, as he substantially narrows their scope to only those kinds of instances he designates, and I am not aware of any other theorists who so use these concepts. However, what we both agree on is the validity of these two distinctions.

What is more controversial among theorists studying coercion is what distinguishes coercion from such other concepts as enticement, inducement, and incentive, some instances of which, according to some theorists, do seem to coerce. What coercion and these other concepts have in common is that all of them are ways for one to make a request on another and secure the desired result from the other person without using physical force. But they differ in the manner in which the request is made and the desired result is obtained. Coercion is characterized by the use of threat, while all the others rely on the use of offers. However, if, as some theorists have argued, offers can be equally coercive, then the fact that coercion is based on threats and the other concepts on offers is far from making the distinction as clear-cut as we may think. This is because in that case the commonality of coerciveness between those threats that are

hard to withstand and those offers that are irresistible arguably outweighs the difference in the manner in which the request is made in the two types of acts. Thus the debate on this issue boils down to the question whether offers can be coercive. Theorists such as Robert Nozick, Michael Bayles, Bernard Gert, and Alan Wertheimer argue that offers don't coerce; and Virginia Held and Donald McIntosh argue that they do.[31]

Nozick's reason for saying that offers don't coerce is straightforward. "Offers of inducements, incentives, rewards, bribes, consideration, remuneration, recompense, payment do not normally constitute threats, and the person who accepts them is not normally coerced."[32] For Nozick, the distinction between threat and offer is a matter more of semantics than of conceptual analysis. Only threat by definition is coercive, and since an offer by definition is not a threat, offer is not coercive.

Bayles provides more persuasive argument to support the claim. "To consider benefits as sanctions", he argues, first "obscures the distinction between coercion and bribery."[33] He goes on to give an example of a female student trying to get a higher grade than she deserves from a male instructor. The female student's intended deal with the male instructor can be summarized into the following proposition, "You will have sexual pleasure if you raise my grade, and you will not have such pleasure if you don't". Notwithstanding the similarity in form with coercive threats, the student's offer of sexual favor in case of the instructor's compliance and her withholding it in case of his noncompliance does not constitute a coercive sanction. For it is odd to view it as a

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[31] Nozick, *op. cit.*. Bayles, "A Concept of Coercion"; Gert, "Coercion and Freedom"; Wertheimer, "Political Coercion and Political Obligation"; Held, "Coercion and Coercive Offers"; and McIntosh, "Coercion and International Politics", all in Pennock and Chapman eds. *Coercion* (Chicago, IL: Aldine Antherton, Inc., 1972).
[32] *Op. cit.*, p.447.
[33] "A Concept of Coercion", p.22.

punishment or a harm if the male instructor is denied the pleasure. This is because, I may add, the instructor has no reason to expect such a pleasure in the first place. Second, an important distinction between offer and threat is that an offer of reward is given for compliance with a request, and a threat of punishment and harm is given for noncompliance. "This difference is obscured or neglected if coercive sanctions include both rewards and punishments."[34] And finally, to include rewards in coercive sanctions also violates some linguistic conventions in our ordinary speech, because it is against the conventional use of those phrases when we speak of "promising sanctions" or "threatening to reward".[35]

Gert's argument for the claim that offer is not coercive is relatively simple but nonetheless persuasive. In his argument, he speaks of "unreasonable incentives". "An incentive is unreasonable if it would be unreasonable to expect any rational man in that situation not to act on it."[36] Gert believes that only the avoiding of an evil but not the gaining of a good can be an unreasonable incentive. This is so because there are no benefits that no rational agents can resist, whereas, there are serious harms that it would be unreasonable to expect anyone not to do everything possible to avoid. Therefore, only the threat of harms can coerce, but not the offer of benefits.[37]

Wertheimer identifies several differences between threat and offer. The most obvious among all the differences is that one complies with a threat to avoid being made worse off, while one complies with an offer in order to become better off. Second, coercion through threat implies conflict between the parties involved, whereas

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[34] *Ibid.*, p.22.
[35] *Ibid.*, pp.22-3.
[36] "Coercion and Freedom", p.34.
[37] *Ibid.*, 34-5.

inducement by means of offer suggests a potential commonality of purpose. And finally, coercive threats worsen the choices and opportunities of the party coerced, but inducive offers better the choices and opportunities of the party to whom an offer is made.[38]

For arguments on the other side of the debate, Virginia Held has made the strongest case for coercive offers. She contends that, although the distinction between threat and offer made by Nozick, Gert, and others is an important one, "it is perhaps more significantly a distinction between kinds of coercion than between coercion and noncoercion."[39] More specifically, Held argues, "[t]here are forms of coercion, ... where the person coerced did what he did against his will, but might himself have supplied the deficiency of will, and there are forms of coercion where the person coerced did what he did against his will, but might in no way himself have summoned the courage to resist," and "that offers, when coercive, are more frequently coercive in the first way and that threats, when coercive, in the second."[40] To support her argument, Held gives two examples. In the one example, Social Security benefits are terminated for those recipients who refuse to submit to investigations of their political beliefs.[41] And in the other example, the government passes a law requiring all applicants for federal government jobs to sign a loyalty oath and a pledge for cooperation in rooting out subversion.[42] Held maintains that both cases are examples of an offer, and both offers are coercive because those to whom the offers are made are in no position to refuse them.

I believe that Held's distinction between "supplying the deficiency of will" and "failing to summon the courage to resist" is a valid one. However, her argument that one

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[38] "Political Coercion and Political Obligation", pp.221-3.
[39] "Coercion and Coercive Offers", p.57.
[40] *Ibid.*, pp.58-9.
[41] *Ibid.*, pp.56-7. See pp.27-8 of this chapter for a discussion of these two examples.
[42] *Ibid.*, p.56.

can accept an offer against his or her own will needs more explanation.[43] For all I can see, our intuition is rather against this argument. An example will help here. Suppose P tells Q that he will help Q set up a date with S, to whom Q is irresistibly attracted, if Q, who is a much smarter and better student than P is, admits in public that he has had to ask P for help with his homework several times. To comply with such a request is undesirable for at least two reasons: it would be a lie for one, and it would also hurt Q's pride. However, a date with S is so tempting that he eventually decides to take P's offer and comply with his request. This is a typical scenario in which Held would argue coercion occurs. But why would we want to say that Q is acting against his will in this case? He is certainly averse to P's request, but when the request is made together with the offer of a date with S, it is hard to imagine that Q would accept this request-offer in any way other than willingly, to say the least. If Held goes on to argue that even in the case of his compliance, Q may still have reservations about what he has been requested to do, then I should point out that, as she has correctly observed, Q's objection would be against the request, not the offer. But there is no reason not to view the request and the offer as a whole, and taken together, they are definitely something Q would not mind acting on.

Perhaps one can argue that Q in this case has acted on his immediate first-order desire, but his act as a whole may have been against his second-order volition, to use Harry Frankfurt's terminology.[44] Q has qualms about going along with the deal all the time, possibly even after he decides to comply. But at the time when his want for a date

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[43] That one always acts against one's will in the case of a threat is obvious. The threatened harm and the demanded act both must be unattractive to the party threatened, since if the victim does not object to acting on the demand, the threat would be unnecessary.

[44] See Harry Frankfurt's "Freedom of the Will and the Concept of a Person", *Journal of Philosophy*, Vol. LXVIII, No. I (Jan. 14, 1971), pp.5-20.

with S moves him to take the offer and comply with the request, he does so willingly. His inclination to comply constitutes his first-order desire, which in this case effectively determines his act. The qualms and doubts, and more importantly the eventual regret and disapproval of his decision to comply, constitute a second-order desire, which is the wish that he had not been moved by his immediate desire to take the offer and comply with the request. Since the second-order desire is the result of Q's reflection over the desirability of his first-order desire, and hence about which desire he wants to be his will, it constitutes his second-order volition. In Q's case, his second-order volition is indeed in conflict with his first-order desire.

However, in the case of a conflict between one's post-action second-order desire based on reflection, and her first-order desire which determined how she acted, shall we pronounce the act to be against the person's will? In other words, with which desire should we identify that person's will? To be sure, there is no question what Q wants his will to be after his reflection over his first-order desire, and Frankfurt claims that being capable of second-order volition is a defining characteristic of a person,[45] but I believe that to identify an agent's will with her second-order volitions rather than her immediate wants and desires which have been able to determine her action in particular cases would rule out many acts in which the agent has willingly engaged as involuntary. To require in *all* cases that our voluntary action be based on our reflection and judgment of what we immediately want and desire is to set too high a benchmark for human action, which, in cases where conflicting moral principles can be applied, may simply paralyze our action. Therefore, to answer the question what an agent's will is in a particular case, it is the

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[45] *Ibid.*, p.10.

first-order desire that has effectively caused her to act that should be respected as the will of the agent.

Thus, with the difference she finds between offer and threat with respect to the agent's weakness in the two types of cases, Held succeeds in explaining the difference between failing to resist an offer and failing to resist a threat, but fails to convince her reader that such a difference is between failing to resist two different types of coercion. And the examples she gives to support her argument do not fare any better. I argue that for the two examples she provides, Held mistakes a threat in the disguise of an offer as a genuine offer in the one, and asserts the coerciveness of an offer without much argument in the other. Now let's take a closer look at the two examples. In the one case, recipients of Social Security benefits are informed that only those who will submit to investigations of their political beliefs will continue to receive the benefits, and that for all others the program will terminate as many other programs normally do.[46] Held takes what the government suggests to the recipients as an offer, albeit a coercive one, but that is far from the truth. How can a proposition which essentially says "you will lose your Social Security benefits unless you submit to the investigation of your political beliefs" be an offer? That is clearly a threat.[47] Without sufficient and convincing explanation as to why the program has to terminate for those who refuse the investigation, what happens is clearly that the government attempts to coerce the recipients to report their political beliefs. The government's proposition will remain a threat even if the situation is modified in such a way that the termination of the program happens prior to the

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[46] Held, *op. cit.*, pp.56-7.

[47] I guess that the reason Held considers this an offer may be that she sees Social Security benefits as something the government offers to provide to senior citizens, and therefore in her opinion the government can legitimately attach conditions to it as anyone can do to an offer he makes, without changing it from an offer into something else.

announcement of any change of policy and then the former recipients are informed that benefits will resume only for those who submit to the investigation. This is because there is sufficient ground for one to believe that the prior termination of the program is simply a plot if no other reasons can be given for the resumption of benefits for some but not all of the former recipients.

However, the nature of the government's action will be entirely different if the Social Security program has started with a string attached. If, since its start, Social Security benefits have been given only to those who would submit to an investigation of their political beliefs, though unfair and undesirable, I will still call it an offer. Held's other example is precisely this altered scenario. A law is passed requiring all applicants for a job in the federal government to sign a loyalty oath and a pledge for cooperation in rooting out subversion.[48] There is no question about this being an offer; the question is whether the offer is a coercive one. Held acknowledges that to deny one a job in the federal government in the event she refuses to comply with this requirement is not to deprive her of a basic need or threaten her with an evil. But then why she has to call it coercive? In the course of our life, we may encounter many less-than-desirable offers, or even ones that are outright undesirable, but an offer is always something that we can choose either to take or not to take. To choose not to take an offer does not make us worse off, but to choose to ignore a threat does. That is why threat coerces but offer does not. To tie the idea of coercion to a comparison between the future and the current state of welfare is not biased toward the status quo. This conception does not presume that the current state of welfare is satisfactory. It may well not be. But an offer in general

[48] Held, *op. cit.*, p.56.

improves one's situation, and for this reason, one willingly embraces an offer, rather than being coerced into taking one.

A New Conceptual Distinction Between Offer and Threat

What has been at least partly responsible for the lack of an overall consensus among scholars on whether offer coerces is the absence of a conceptually drawn distinction that can clearly distinguish an offer from a threat. To my knowledge, Nozick is the only theorist studying coercion who has addressed this issue, but the distinction Nozick has come to is not satisfactory on several counts.

Nozick differentiates between offer and threat by comparing the outcome resulting from a proposition with the outcome in the "normal and expected course of events".[49] Whether P is making Q an offer or a threat with the proposition that Q does A depends on how the consequence P says he will bring about as a result of Q's choice changes the consequences of Q's action from what they would have been in the normal and expected course of events. It is an offer if the consequences are made better, and a threat if they are made worse.[50] Nozick illustrates the usefulness of his distinction with the following two examples:

(a) P is Q's usual supplier of drugs, and today when he comes to Q he says that he will not sell them to Q, as he normally does, for $20, but rather will give them to Q if and only if Q beats up a certain person.

(b) P is a stranger who has been observing Q, and knows that Q is a drug addict. Both P and Q know that Q's usual supplier of drugs was arrested this morning and

[49] Nozick, *op. cit.*, p.447.
[50] *Ibid.*, p.447.

that P had nothing to do with his arrest. P approaches Q and says that he will give Q drugs if and only if Q beats up a certain person.[51]

Nozick argues that in the first case Q is confronted with a threat, while in the second case he is made an offer. In the normal and expected course of events, Q in the first case should be able to continue to receive drugs from P for $20. Any change of the arrangement that results in Q's not being able to receive drugs for $20 when he still prefers to do so clearly makes Q worse off, and is rightfully viewed by Q as a threat. Whereas, in the second case, there has been no prior arrangement between P and Q, and hence Q has nothing to expect from P; therefore, whatever P proposes to Q regarding supplying drugs to him would make him better off, since he now at least has an option to continue to receive drugs, and so Q's proposition in this case is an offer.[52] Nozick's distinction seems to work fairly well on these two examples.

Nevertheless, this is not a definitive distinction for all cases. Nozick suspects that the reason that Q is not made an offer in the first case may be that the proposed change of the arrangement is not good enough. So he wonders whether the threat would be turned into an offer if P instead proposes to Q something like this, "'I will not give you drugs if you just pay me money, but I will give you a better grade of drugs, without monetary payment, if you beat up this person.'"[53] If this is still not good enough for Q, the proposition can always be modified till the new arrangement is made sufficiently more attractive than the old one so that Q will willingly give his consent to the new arrangement. Thus a threat can be turned into an offer if the original proposition is sufficiently sweetened, and that means that there is no unbridgeable difference between

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[51] *Ibid.*, p.447.
[52] *Ibid.*, pp.447-8.
[53] *Ibid.*, p.448.

the two. However, by allowing this move, Nozick finds his distinction much less clear-cut than it has been thought. For, because of the potential variance in the attitude of different Qs toward the proposed change, instead of dealing with unmistakable cases of threat or offer, Nozick now has to distinguish between situations in which the change of arrangement predominantly involves an offer, and situations in which the change made predominantly involves a threat.[54]

I believe that the move of turning a threat into an offer is untenable. That move recognizes the different degrees of desirability of the proposed changes, but ignores the important fact that P's intention remains the same,[55] and because of that the nature of the proposition is not changed. If denying Q drugs even if he offers to pay the original amount of money is a threat, then it remains a threat no matter what change is brought to the original arrangement.[56] A genuine offer should provide a genuine choice. For instance, Q should at least have the choice between making the $20 payment and beating up the person as requested. Short of that, Q has every reason to believe that he is under a threat. Furthermore, the move also makes the judgment of offer or threat in particular cases mostly depend on the particular Qs involved. Different Qs would inevitably come to different conclusions as to which new arrangement is preferable to the old one. The result would be that we cannot state definitively what change constitutes an offer and what change constitutes a threat. This indeterminacy is different in nature from the

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[54] *Ibid.*, pp.448-9.

[55] One may argue that P's willingness to negotiate the new terms constitutes a second intention, and that second intention might be able to bridge the gap between an offer and a threat. I grant the second intention, but contend that given that the primary intention of denying Q drugs on the original terms remains unchanged, the second intention is hardly able to bridge the gap. And the second intention will disappear when we talk about different propositions made by different Ps, which is what really interests us, instead of one P proposing different changes.

[56] I take the sweetened terms, "I will give you a better grade of drugs," to be the same thing as denying Q drugs on the original terms, even when the reference to the original terms, "I will not give you drugs if you just pay me the money," is dropped.

above-mentioned indeterminacy of the coerciveness of individual threats. Which threats coerce and which do not can be determined in no other way than by individual cases where specific victims are involved. But the indeterminacy in what constitutes an offer and what constitutes a threat is something that we should do everything to avoid, because not being able to resolve this issue itself constitutes a very serious conceptual muddle, not to mention that the answering of many other questions depends on our ability to make this distinction.

Another problem in Nozick's approach has to do with the idea of "normal and expected course of events". As Nozick notes shortly after he introduces the idea, "people will disagree about whether something is a threat or an offer because they disagree about what the normal and expected course of events is."[57] Consider the following example Nozick gives in his article. Q is drowning in the water, and P passes by in a boat, which is the only boat in sight. P says to Q, "'I will take you in my boat and bring you to shore if and only if you first promise to pay me $10,000 within three days of reaching shore with my aid.'"[58] Nozick points out that whether P's proposition is a threat or an offer depends on what people think the normal and expected course of events is. If one sees the normal and expected course of events as one in which Q drowns if not rescued, then P, in asking for a sum of monetary reward in order to save Q, is making Q an offer. On the other hand, if one sees the normal and expected course of events as one in which a drowning Q is to be rescued by another person passing by in a boat, then P, in demanding monetary reward for saving Q, is making a threat against Q. This relatively simple situation can be further complicated by releasing more information about P and Q, as

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[57] *Op. cit.*, p.449.
[58] *Ibid.*, p.449.

Nozick has done, thus making it even more difficult to determine what the normal and expected course of events is.[59]

To avoid all the pitfalls besetting Nozick's approach, I suggest that threat and offer be distinguished in the following way: for a proposition made by P to Q, if Q's situation is made worse than before in the event that he turns down the proposition, the proposition is a threat; if Q's situation is not made worse than before (that is, remains the same or is made better) in the event that he turns down the proposition, the proposition is an offer.[60]

As I have argued above, an essential difference between a threat and an offer is this: when a person does something because of a threat, his will is subject to the will of another; but when he does something because of an offer, he acts on his own will. When one is made a proposition, there is no better indication that the person retains the control of his own will and action than the fact that he can turn down the proposition without suffering any harm. This is because being able to refuse an offer, turn down a request, or not to comply with a demand is of much more importance and greater moral significance to an individual moral agent than being able to simply concur or voice his support. In situations that are characterized by strong disagreement or clash of wills, our ability to withstand pressure and survive such disagreements and clashes unbowed thus best testifies to our status as autonomous moral agents. Therefore, I think that my approach

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[59] *Ibid.*, pp.449-50.

[60] The criterion of being made better or worse may be a question for debate. For instance, in the example mentioned above, Q, the drug addict will be denied drugs if he doesn't comply with his supplier's new demand. As a result, he will save $20 and will not be able to take drugs. Is his situation made better or worse? One may be tempted to argue that since the denial saves him money and may force him to quit drugs, he is made better off. However, saving $20 and quitting drugs are not Q's objective, but getting drugs with $20 is. Clearly in his opinion, these benefits are far outweighed by the sufferings he will have. Therefore, the criterion I propose will be one based on common sense.

captures the most essential of all differences between threat and offer, and that as such it should fare better than Nozick's.

Let's see how well it deals with Nozick's examples. First consider the example in which P, Q's usual supplier of drugs, instead of charging Q $20 as he usually does, demands Q to beat up a certain person as the payment for the drugs. What if Q refuses? As is made clear by P, if Q doesn't beat up that person, he will not receive the drugs as he usually does from P. In this case, Q is clearly made worse off, since the immediate suffering caused by not being able to take drugs outweighs all possible immediate benefits combined for a drug addict. Therefore, P's proposition to Q in this case is clearly a threat. In the other example, P, a stranger who happens to know that Q's usual supplier of drugs has been arrested, makes the same proposition to Q. If Q turns down P's proposition, he will not get the drugs. However, since Q's usual supplier has been arrested and therefore he will not be able to get the drugs anyway, his situation is not made worse by rejecting P's proposition, therefore, P's proposition to Q in this case is an offer. So far my approach comes to the same conclusions as Nozick's.

What about those more complex scenarios, in which Q actually welcomes the change P, his usual supplier, proposes to their original arrangement? As I have indicated above, Q's attitude toward the proposed change is not what distinguishes a threat from an offer. Complex propositions often have very enticing components, which may more than make up for the less desirable elements in the eyes of those to whom the propositions are made. But one should not be blinded by those desirable elements from seeing the truth. The truth of the matter is that if P denies Q drugs in the event that Q refuses to comply with P's new demand, Q is made worse off, and therefore P's proposition is a threat. The

advantage of my approach in cases like this is that the observer will not be distracted by irrelevant elements, and that a simple estimate of benefits and harms will reveal the true nature of any proposition in a given situation.

The superiority of my approach over Nozick's is again demonstrated in cases in which the failure of Nozick's approach to identify the normal and expected course of events makes the determination of offer or threat impossible. In the above-mentioned drowning person case, if Q who is about to drown refuses P's demand of monetary reward and is then left unrescued, his situation is not made worse than before P made his proposition. So, despite possible reservations, the right conclusion we should come to is that P has made Q an offer. My approach makes unnecessary all the complicating considerations that Nozick feels bound to take into account. Thus, the comparison between the two approaches shows that simplicity in this case is more than an added value.

And finally, given the uniqueness of the above example, it may be necessary to revisit a previously discussed issue for a brief moment. There could be much confusion, as Nozick shows, on whether one is making an offer or a threat to a drowning person, requesting reward in exchange for rescue. The confusion indicates that as an example of offer, this may be the closest one to showing that an offer can be coercive. However, the demonstration that shows that the proposition is not a threat itself speaks to the argument that offers do not coerce. Therefore, a point that I have made earlier is worth repeating here: not all offers are desirable, and some offers are much less than desirable; but offers as a kind are not coercive.

Conclusion

In this chapter, I have argued for a descriptive approach to conceptualizing coercion. My position is that the concept of coercion can be adequately analyzed and defined by examining only the natural features of acts of coercion, without involving any normative judgment. Then using as a first approximation the definition of coercion proposed by Nozick, which is based on a description of the necessary and sufficient conditions under which coercion occurs, I have made what I consider necessary revisions to Nozick's definition in order to resolve some conceptual issues that Nozick himself failed to take into account. And finally, taking a side in the debate on whether offers can be coercive, I have argued that offers do not coerce, and suggested a new approach with which to distinguish between a threat and an offer. After doing all these, I believe that I have been able to delineate the conceptual boundaries of the idea of coercion, and distinguish it from most of the other concepts that might be confused with it.

However, the task of conceptualizing coercion would not be complete until another distinction is drawn. That distinction is between coercion and the exercise of authority. This distinction is particularly important for political theory, because such important authors in political theory as Machiavelli and Hobbes have long argued that political authority is coercive. I will take on this issue in the next chapter, where I will discuss whether political authority is based on coercion, and if not, in what political authority is grounded. In addition, I will also discuss the differences in various aspects between an authority relationship and a relationship based on coercion.

Chapter Three: Authority and Coercion

In Chapter Two, I have discussed what I believe to be the essential conceptual issues of coercion, which are crucial to the effort of defining this idea and distinguishing it from other concepts that are easily confused with it. But as I said at the end of the last chapter, the effort of conceptualizing the idea of coercion will not be complete until one more comparison is made. It is important for an analysis of coercion, and also of particular interest to political theory, to compare the concept of coercion with the concept of authority. This is because in the literature of political theory, where authority is one of the central notions, these two concepts have traditionally been conflated. As has been mentioned in the first chapter, although political theorists in ancient and early modern times were not particularly interested in delineating the concept of political coercion, none of them could avoid discussing political authority, since authority is one of the most important concepts to the study of politics, and hence a crucial building block to political theory. Notwithstanding their strong interest in the one and lack of it in the other, those theorists seem to suggest that these two concepts have essentially the same meaning. Explicit in the works of most of them, political authority is viewed as essentially coercive, and coercive measures are considered an integral part of the exercise of authority by the government over its subjects.

But is authority coercive? Are the two practices of authority and coercion of the same nature? These questions will be discussed and answered in this chapter. But for now, let me point out that there is at least one obvious reason against conflating the two

concepts. The exercise of authority has always been viewed as legitimate,[1] whereas, the practice of coercion very often illegitimate. This perception of *prima facie* legitimacy distinguishes authority from coercion in both scholarly discourse and ordinary speech. However, this perception clearly presents a direct contradiction to the traditional belief in political theory that authority is more or less coercive. How can the exercise of authority be considered a legitimate practice, while coercion is not, if both are characterized by the same characteristic of coerciveness? To my knowledge, this issue has not been adequately dealt with by political theorists studying either concept. Part of the reason for this failure, in my opinion, is the persistent and troubling lack of clarity in political theory's understanding of authority, particularly on the issue of what grounds political authority and provides it with the ultimate justification.

Conceptual clarity in our understanding of the idea of authority is the first thing that we have to achieve before we can take on the other issues. Therefore, the first part of this chapter will be devoted to clarifying the concept of authority, where I will discuss how the idea of authority has been understood historically, how it is conceived of by contemporary theorists, what problems beset contemporary theories of authority, and finally I will propose what I believe to be a satisfactory understanding of the idea of authority, which can adequately address the problems identified in the existing theories. After that, I will compare the two practices of authority and coercion, and examine the relationship established between the two agents involved in each of the two practices, in the hope of not only answering the question whether authority is coercive, but also

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[1] Richard Friedman argues that it has been the dominant approach to authority in contemporary social science to construe it in terms of the notion of "legitimacy". See Friedman, "On the Concept of Authority in Political Philosophy", in Richard Flathman ed. *Concepts in Social & Political Philosophy* (New York, NY: Macmillan Publishing Co., Inc., 1973), pp.121-46, p.125.

identifying crucial differences between the two that have contributed to the very different perceptions of the two practices.

The Concept of Authority

The Historical Backdrop

Although the notion of authority was not available to the ancient Greeks,[2] Plato did try to introduce something akin to political authority in the person of the philosopher king. The philosopher king is an enlightened ruler; he is the only one among all the people of the city who has "seen the reality of the beautiful, the just and the good."[3] Therefore, it is incumbent upon him to make sure that the entire community will have the benefit of living by the true and the good, even though not everyone in the city is capable of obtaining knowledge of the true and the good on his or her own. Plato's philosopher king thus is someone who should and does have moral and political authority in the city, and that means that all the other members of the city are obligated to obey him. However, the unsavory fact that more often than not the ordinary people are not able to see, to understand, and hence to live by the truth and the good makes coercion unavoidable.[4] Coercion by the political authority is justified because, as Plato puts it, the city is not

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[2] "The word and the concept (of authority) are Roman in origin. Neither the Greek language nor the varied political experiences of Greek history shows any knowledge of authority and the kind of rule it implies." Hannah Arendt, "What is authority?", in *Between Past and Present: Six Exercises in Political Thought* (New York, NY: The Viking Press, Inc., 1961), p.104.

[3] *Republic*, VII520c, trans. by Paul Shorey, in Edith Hamilton and Huntington Cairns eds. *The Collected Dialogues of Plato* (Princeton University Press, 1961), pp.575-844, p.752.

[4] Apart from direct coercive measures, coercion also features in the background in Plato's ideal city, for instance, the rigid, almost puritanical, regimen and life style allowed to citizens of the city, which emphasizes simplicity in all aspects of life and devotion to one's work. However, it has to be noted that Plato does not explicitly advocate the practice of coercion, even though he allows it as something necessary to ruling an unenlightened crowd; his preferred method is education through the development of good dispositions and habits.

created in order to "allow each to take what course pleases him,"[5] but for the purpose of pursuing the good of justice. The city will achieve justice only when all the citizens participate in a just order, and the just order will be possible only when the philosopher king is able to effectively rule the city. Therefore, in Plato's view, coercion is compatible with the practice of political authority, even though he also believes that the exercise of political authority should not be overly coercive.

Though disagreeing with Plato on what political authority is to fulfill, Machiavelli, like Plato, does not rule out coercion as an appropriate way for rulers of states to exercise their authority. As a matter of fact, Machiavelli goes much further than the classical authors in his view about the symbiotic relationship between authority and coercion. Arguably, Machiavelli's notion of political authority can be reduced to the idea of political power, which he understands as the power of political leaders to accomplish political ends. He believes that as long as the ends are accomplished, political figures do not have to be too scrupulous about the means. But the ends to be accomplished are the personal ends of powerful political figures; politics, or as Machiavelli prefers to call it, statecraft, has no pre-determined higher purposes. In other words, unlike Plato, Machiavelli does not believe that there is any specific noble goal for those in authority to achieve. In addition, while for Plato, political authority has to be legitimated by the superior knowledge of those holding political office and the benefits that they are able to bring to the political community, Machiavelli sees political authority as self-legitimating, that is, in need of no other justification than the successful exercise of it.[6] When political

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[5] *Republic*, VII520a, p.752.

[6] For that argument, see Richard Hiskes, *Democracy, Risk, and Community: Technological Hazards and the Evolution of Liberalism* (New York, NY: Oxford University Press, 1998), Chap. Three: Risk and the Authority of Ends, pp.64-5.

authority is understood as having no purpose and no restraint, those who hold it will thus have much latitude in choosing what the authority is exercised to accomplish and in what manner it is exercised. And it would not be surprising if the theorist who endorses this view of authority sees coercion as an efficient and hence a preferred way to exercise political authority.

In the thought of Thomas Hobbes, political authority is once again equipped with a purpose, namely, preserving peace for mankind in the political community. That is a function entrusted to the ruler of the state by the subjects through an intentional act of authorization. Hobbes thus understands authority:

> "Of persons artificial, some have their words and actions *owned* by those whom they represent. And then the person is the *actor*; and he that owneth his words and actions, is the AUTHOR: in which case the actor acteth by authority...And as the right of possession, is called dominion; so the right of doing any action, is called AUTHORITY. So that by authority, is always understood a right of doing any act; and *done by authority*, done by commission, or licence from him whose right it is."[7]

For Hobbes, authority is the right to take an action; and the authority by virtue of which one takes an action is derived from an act of authorization by another person who has a prior claim to undertaking this action. Understood in this way, political authority is not self-originating, and hence not self-legitimating. Rather, it is granted to the ruler by his subjects with clear understandings as to what the authority is to be used to accomplish. Since this authority-right is transferred from the subjects to the ruler with conditions attached, arguably it is not supposed to be an absolute power. But Hobbes thinks

[7] *Leviathan*, ed. by Michael Oakeshott (Touchstone, 1962), p.125. Italics are Hobbes'.

otherwise. Hobbes contends that for political authority to be effective, the authorization by the subjects has to be thorough and complete. Hobbes' pessimistic view of human nature inclines him to believe that only by allowing the sovereign ruler unrestricted power and authority will there be hope that horrendous crimes will not be committed by men to each other, and that people in civil society will be spared the harms and sufferings that they could never avoid in the state of nature.

Therefore, for the purpose of preserving peace in civil society, Hobbes argues, political authority is granted to the ruler of the state by the subjects; and precisely for the same reason, Hobbes insists, coercive measures have to be available to the sovereign ruler so that he can use his authority effectively in maintaining the political community. This is because men are sub-rational; they do not respect reason or persuasion, and therefore only a coercive superior power can hold them back.

Liberal political theorists after Hobbes have in various ways attempted to restrict political authority. What is common in their various efforts is to separate the person of the holder of political authority from his office, and vest the authority exclusively in the office. As a result, holders of political authority have a claim to authority only by virtue of holding an office of authority.[8] That move obviously puts the exercise of political authority under greater restraint, and presumably has some effect in guarding against the abuse of authority by its holders. However, what it fails to do is to eliminate coercion completely from the exercise of political authority. This is because coercion does not

[8] This is a claim shared by contractarian and libertarian theorists, but not by anarchists or communitarians. The anarchist position on political authority can be safely discounted, as it rejects the idea completely. Communitarians take a different approach to authority from that of liberal theorists. Unlike liberals, communitarians put much emphasis on the idea of authoritative beliefs. For them, as long as authoritative directives reflect the authoritative beliefs of the community, they do not particularly care whether those commands are given by the individuals holding authority or by their office.

occur only when authority is abused for pursuing personal gains; coercive measures are as often taken by political authority to achieve legitimate political goals.

At present, the concept of authority remains suspect among Western political theorists. They reject authority entirely in the realm of morality, because the idea of moral authority directly contradicts liberalism's conception of individual persons as autonomous moral agents, capable of pursuing personal ends defined all by themselves. Nonetheless, political theorists have to live with authority in the realm of politics; but there they have worked out an elaborate system of legal-political mechanisms by means of which political authority is created, monitored, and controlled, thus completing the long process started by Locke in which political authority is transformed from being personal authority to being an institution.[9] Arguably the reason that such great care has been taken to limit the exercise of political authority within certain boundaries is that political theorists still see authority in the same light as coercion. Political authority is to be contained primarily because its exercise tends to coerce.

But is coercion one of the core elements of authority? Does the exercise of authority have to be coercive? I believe that contemporary analyses of authority have answered this question definitively. The consensus that contemporary theorists have reached on this question is that for authority to be what it is, the exercise of authority cannot rely on coercion. In the next section, we will find out why it is so.

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[9] In Richard Friedman's words and terminology, "in authority" has increasingly replaced "an authority" as the dominant sense of the idea of authority in contemporary society. For a discussion of "in" and "an" authority, see Friedman, "On the Concept of Authority in Political Philosophy".

What Is Authority?

Before I discuss what authority is, let me first make clear what authority is not. Authority is not mere power, and consequently an exercise of authority is not the same thing as an exercise of power. Power is a more stripped-down concept. It is the ability to bring about the desired outcomes. How much power one has with respect to a specific matter is measured by the extent to which she is close to bringing about her desired outcome. What is of the most concern to power holders is the outcome; that how or in what manner the outcome is brought about is only of secondary importance. Therefore, even though it is common to speak of power relationship as an interpersonal relationship—e.g., we often hear people say A has power over B—it is more fruitful to view the exercise of power as directed to specific desired outcomes. This is so because rational power holders never exercise power for the sake of exercising it. They always have specific purposes and goals in mind.

If this view of power is correct, then power does not have to be exercised over someone else against her objection in order to prove its existence. Therefore I believe that Robert Dahl's definition of power, which says, "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do,"[10] is not a correct one. My discussion in the second chapter shows that Dahl's definition of power is very close to a definition of coercion. I believe that as there is as much difference between power and coercion as between power and authority, a definition resembling that of coercion cannot serve as the definition of power. The problem with Dahl's definition is that the exercise of power is defined in relation to an opposing will over which power is exercised. Our

[10] Robert A. Dahl, "The Concept of Power", in Bell, Edwards, and Wagner eds. *Political Power: A Reader in Theory and Research* (New York, NY: The Free Press, 1969), pp.79-93, p.80.

intuition seems to tell us that power truly exists only when it manages to make an impact by overcoming resistance to it. But the truth of the matter is that it does not have to be so. If A, a power holder, exercises her power through B,[11] then A certainly has successfully exercised her power if, notwithstanding B's objection, the outcome that A wants is obtained.[12] But B's preference with respect to the outcome is irrelevant to A's exercise of power. In the case in which B has no preference one way or another, if the same result is achieved, A still has successfully exercised her power. Even in the event that B agrees with A on the desirability of the outcome A wants to bring about, the very fact that A is in a position to initiate an action that will result in the outcome she wants still testifies to the power A has. Therefore, the defining feature of power is the power holder's ability to achieve her desired outcome by any means possible.

In distinction to the exercise of power, an authority holder has to be concerned about the manner in which her authority is exercised. Furthermore, she also has to care about how her exercise of authority is viewed by those subject to her authority. On the point that authority has to be exercised in an acceptable manner, an early effort by Hanna Arendt is very illuminating. Arendt argues that the exercise of authority precludes both coercion and persuasion based on rational arguments. Where either coercion or argument is enlisted as a means of influencing the action of someone subject to authority, the authority has failed.[13]

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[11] B could be either an individual or an institution, and is in a position to carry out the power holder's command so as to bring about the desired outcome.

[12] Of course, serendipity has to be precluded here. That means that we have to rule out the possibility that the desired outcome is obtained not as a result of the efforts of the agents involved, but through chance, good luck, or some other cause.

[13] Arendt, "What is Authority?", in her *Between Past and Future: Six Exercises in Political Thought* (New York, NY: The Viking Press, 1961), p.93.

One reason that authority fails in the presence of coercion or persuasion, I will argue later in this chapter, is that authority presumes a relationship of inequality between the two agents involved, whereas, both persuasion and coercion are based on a recognition of equal status between the agents.[14] So when an authority holder resorts to coercion or persuasion in order to influence her subjects, her action will have the effect of leveling the ground between them, and thus turning their relationship into a different one. In addition, Arendt's claim also reveals something more significant about the idea of authority, which in turn explains why there should be no place for coercion or persuasion in the practice of authority. What she argues—and most authors writing about authority agree with her[15]—goes to the heart of the conception of authority, which is about the important issue of what exactly is involved in the exercise of authority.

Theorists studying authority generally agree that when there is a claim to authority, there is also a consequent claim to the obedience of those subject to the authority. Thus, if A has authority over B, then B is expected to obey A. However, theorists cannot tell on what grounds the second claim, the claim to the subjects' obedience, is established; some of them seem to simply believe that that claim does not have to be established independently, but instead, arises as a logical result of the first claim, the claim to authority. I believe that to argue that the claim to the subjects' obedience is the same claim as the claim to authority, or part of that claim, though

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[14] The claim that the two agents involved in an act of coercion have equal status should not present any problem. The very fact that the coercer has to resort to threat in order to influence the victim's action indicates that the coercer has no other leverage over the victim that will put them on unequal ground. For more of this argument, see the second part of this chapter, where a comparison is made between the practice of authority and that of coercion.

[15] E.g., R. S. Peters says, "the term 'authority' is necessary for describing those situations where conformity is brought about *without* recourse to force, bribes, incentives or propaganda and *without* a lot of argument and discussion." See his "Authority", Symposium by R. S. Peters and Peter Winch, *Proceedings of the Aristotelian Society*, Supp. Vol. 32, 1958, pp.207-40. Quoted from Anthony Quinton ed. *Political Philosophy* (Oxford University Press, 1967), p.92.

plausible, does not answer the question at all. All it does is pushing the question one step back to the claim to authority, requiring that claim to be established with adequate explanation at the same time as to why the subjects have to obey authority. To suggest alternatively that the claim to the subjects' obedience is entailed by the claim to authority does not get us very far either. What is suggested is that the logic of the practice of authority determines that the subjects be obligated to obey authority, as the logic of the practice of promising-making dictates that one who has made a promise be obligated to make good on that promise. The analogy is premised on the belief that there is no point to create and recognize authority if it is not to be obeyed, as it is meaningless to make promises if they are not to be kept. However, the analogy with promise-keeping may not give the claim the force needed. For, first of all, the obligation to fulfill one's promise is far from being a settled issue, as it is still considered by moral philosophers a legitimate conceptual question to ask on what grounds promises should be kept.[16]

Apart from that, there is also too much difference between the promiser's obligation to fulfill a promise and the subjects' obligation to obey authority to make the one a useful model for the other. The promiser's obligation to fulfill his promise is a self-assumed obligation; it is derived from a prior voluntary act of his, namely, making a promise. But the subjects' obligation to obey authority is not necessarily a self-assumed obligation, since the subjects may not have much to do with the creation of the authority.[17] As it often happens in history, rulers come to acquire political authority by successfully imposing their rule on their subjects. However, one may wonder whether

[16] As a proof, I attended a job talk in the Philosophy Department of the University of Connecticut in 1999, where the speaker presented a paper which was entirely devoted to this issue, and the presentation was followed by a quite vigorous Q&A session between the speaker and the participating faculty members.
[17] Social contract theories certainly believe they do, but they are only one school of theories of authority, albeit a dominant one.

the subjects would assume the obligation to obey an authority by virtue of recognizing the authority. Thus, even though they have nothing to do with its creation, they are still obligated to obey it. But this move does not resolve the problem. The subjects cannot simply recognize an authority; there have to be adequate grounds for them to do so. So now the question is only changed from being about the grounds for the obligation to obey authority to being about the grounds for recognizing authority. All the difficulty remains. Furthermore, the obligation to obey authority is a much more general and much greater obligation than that of keeping promise, and for that reason more justification of it is called for than simply saying that the logic of the practice of authority requires it.

Therefore, even though I agree with the conventional view that it is a legitimate expectation that the subjects obey authority, I would contend that the subjects' obligation to do so has to be adequately justified for it to be used to explain the exercise of authority. So the question about this obligation is more a question of justification than explanation. Theorists studying authority have reached an impasse on this issue largely because they have treated it as something to be explained, and hence looked mostly to the mechanics of the practice of authority for an answer. But since the subjects' obligation cannot be further broken down and reduced to something else, theorists are therefore forced to claim that this obligation is entailed by the claim to authority, thus explaining away the problem. The right approach to this issue, as I have argued above, is justification. But the subjects' obligation does not need to be justified separately. It can be part of the justification of the larger issue of authority. As such, the issue of the subjects' obligation to obey authority cannot be resolved here, for it would be more fruitful to come to a clear understanding of the practice of authority, specifically the

mechanics of the practice, before issues of justification are taken on. So the discussion now will turn to a more detailed analysis of the concept of authority, through deconstructing the authority relationship, and examining the interaction between the agents involved.

Drawing on the distinction that Arendt sees between authority on the one hand and coercion or persuasion on the other, a number of theorists have taken a further step in clarifying the uniqueness of the exercise of authority. Richard Friedman identifies the most crucial component to an authority relationship as the "surrender of private judgment" by those over whom authority is exercised. Elaborating on the idea conveyed in that notion, Friedman explains that what is involved in an authority relationship is that "in obeying ... a command simply because it comes from someone accorded the right to rule, the subject does not make his obedience *conditional* on his own personal examination and evaluation of the thing he is being asked to do."[18] The very nature of an authoritative pronouncement, namely, it is a judgment or a directive issued by someone in a position of authority, according to Friedman, should be a sufficient ground for the subjects to accept and obey it; they should not base their acceptance of the authority's pronouncement on their own judgment of its wisdom. It is in that fashion that the authority of a superior military officer is exercised over and accepted by his troops.

However, the phrase "surrender of private judgment", Joseph Raz argues, is a mischaracterization of what happens in the subject's mind. He contends that the notion focuses on the subject's action rather than his deliberation, and as a result, it can only explain practical authority but not theoretical authority. For in the exercise of theoretical authority, which is meant to impact on the subject's belief, it is not reasonable to insist

[18] Friedman, "On the Concept of Authority in Political Philosophy", pp.128-9.

that the subject refrain from making his own judgment, but instead believe whatever the authority pronounces as good, right, or true, regardless whether it is really so. What actually happens in the exercise of both theoretical and practical authority, Raz maintains, is that instead of being withheld, the subject's personal judgment is preempted by the judgment of the authority conveyed to the subject through his pronouncement.[19] The authority's pronouncement is meant to replace the reasons on which both the subject's private judgment and the authority's own may have been based, and become the sole reason for the subject to form a belief or take an action. Raz calls the kind of reason that an authoritative pronouncement constitutes in the mind of the subject "a preemptive reason", which does not work as one additional reason for the subject, but as a reason that replaces all the other reasons.[20]

Despite their other differences, both Friedman and Raz agree that a successful exercise of authority requires that those subject to the authority take its pronouncement itself as a sufficient reason for compliance, and perform what is requested by the authority for no other reasons than that the authority wills it. Correctly as this analysis describes what goes into an authority relationship, it nonetheless fails to explain what the analysis has revealed as the most crucial element in the exercise of authority. The Friedman-Raz analysis, which has become the standard analysis of the authority relationship, fails to account for the nearly blind faith and total trust the subjects have in the authority, which the analysis correctly identifies as crucial to a successful exercise of authority. The analysis points out that in any genuine authority relationship there is a strong deference to the authority on the part of the subjects, which makes them heed the

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[19] Raz, "Authority and Justification", *Philosophy and Public Affairs*, Vol. 14, Issue 1 (Winter, 1985), pp.7-10.
[20] *Ibid.*, p.10.

authority's call without questioning; but what has caused, and continues to sustain, such a deference remains a mystery.

It should be realized that to ask for an explanation of the subjects' deference to authority is the same thing as asking for a justification of authority to the subjects. And it should be recalled that to resolve the unfinished business of explaining the presumed obligation of the subjects to obey authority also depends on the authority being justified to the subjects. Besides this, what the deference and the obligation on the part of the subjects also have in common is that they both are used to explain the authority relationship, but in quite different ways. It seems that in explaining the authority relationship, the "is" and the "ought" questions come together. The explanation in terms of the subjects' deference says that in any genuine authority relationship, the subjects *do* obey the authority; and the explanation in terms of the subjects' obligation claims that in any genuine authority relationship, the subjects *should* obey the authority. But neither explanation will be complete before the question of what justifies authority is answered. That an analysis of authority leads directly to the question of authority's justification indicates that the two questions of explanation and justification in the case of authority are inseparable from each other. Without looking at the first question, the second question cannot be answered; but at the same time, without going into the second question, the first question cannot be dealt with satisfactorily. Therefore, unlike most cases where the two issues of explanation and justification can be approached separately, to achieve a complete understanding of the concept of authority requires that the two questions be dealt with at the same time. For this reason, let me now turn to the question of justification.

The Justification of Authority

But before I discuss how authority is justified, it has to be noted that justifying authority as a social institution is different from justifying a particular authority to a particular group of subjects. To justify authority as a social institution is to justify it to some neutral rational observers, and the justification is expected to be based on rational grounds that appeal to the reason of those ideal observers. Whereas, in the case of particular authority relationships, various factors, both rational and irrational, may have made a group of people susceptible to the commands of a particular authoritative figure, therefore different authority relationships may call for different justifications. In light of this difference, which approach should I take in my effort of justifying authority? Does it have to be the case-specific approach, as any authority ultimately aims at convincing its own subjects?

Obviously case-specific justifications cannot serve the general purpose of justifying a social institution. There may be more reasons than one can think of that may convince a particular group of people to enshrine a particular authority figure. And many reasons that may be sufficient to cause a particular group of subjects to obey a particular authority cannot be considered adequate or even acceptable justificatory grounds, because, quite frankly, many authority relationships may not be rational relationships, and the subjects in those authority relationships may be sub-rational persons. Therefore, I don't feel guilty for choosing to focus only on what are generally considered rational grounds, and ignore the other possibilities, because rational arguments serve a broader

and better justificatory purpose, and apart from that, they are what ultimately make authority and the authority relationship a meaningful subject for political theory.

In this section, I will examine a number of candidates that have been suggested by theorists as grounds for justifying authority, and argue that none of them can provide the authority relationship with the rigor and strength that the standard analysis of authority has ascribed to it in Raz's phrase of "preemption of private judgment".

The first theory to be discussed has to be Hobbes', as he was the first political theorist to make an effort to justify political authority. Hobbes believes that the fact that there is no common authority figure to enforce the law of nature, and adjudicate on disputes between individuals who are by nature short-sighted, untrustful, and aggressive, makes the state of nature a very precarious state of human existence. As a result, human beings in the state of nature are in constant danger, and hence constant fear, of violent death. The yearning for peace and security make people take steps to form civil society, in which a common political authority is instituted, who is then given absolute power by the people and authorized to take whatever measure necessary to preserve peace and security in civil society.

Political authority, for Hobbes more than for any other theorist, is a necessity. Its creation is the result of there being no other choice for individual human beings who want to live their life in peace. And the driving force behind Hobbes' idea of absolute authority is fear, especially the fear for violent death. Hobbes' idea of absolute political authority is almost identical to what contemporary theorists describe as genuine authority. The subjects under the authority are expected to obey its commands without questioning, and for no other reason than that they are the authority's commands. Hobbes apparently

believes that political authority is justified primarily on account of its exclusive ability to ensure peace and security. But this argument is hardly convincing, because the validity of two important claims of Hobbes' on which his theory of political authority is premised is very much in question. The first claim is that human beings by nature are such that without a common authority to restrain them, instead of coexisting in peace, they will inevitably come into conflict with each other, and as a result, suffer violent death as their most probable fate. The second claim is that absolute political authority in the form of a sovereign monarch with unconditional power is the only solution to this human predicament.

These two claims are empirical claims, therefore, they can be either proved or refuted by looking at the reality. Our experiences tell us that both claims are wrong. First, Hobbes' view of human nature is simply too pessimistic. Human beings are not such short-sighted, untrustful, and aggressive creatures. Instead, they are, as Locke later describes, rationally self-interested. That means that even though human beings are primarily concerned with their own interests, they are not selfish or spiteful, and they are indeed capable of benevolence toward others. Second, the upshot of Locke's revised view of human nature is that human beings do not need an absolute and supreme sovereign power to restrain their behaviors in order to prevent them from killing each other; as has been proved by history, they are capable of creating and maintaining large-scale cooperative enterprises such as civil society, in which they retain most of their freedoms and rights. So absolute sovereign monarchy is not the *only* solution to what Hobbes sees as a grave problem. As a matter of fact, what Hobbes suggests is not a solution at all. The kind of arbitrary power, which Hobbes allows the sovereign

monarch, to dispose of human life and personal property, is hardly what individuals would have bargained for when searching for a way to guarantee themselves a life of peace and security. And history has shown that absolute monarchs are capable of committing more and greater harms to their subjects than individuals to each other. Therefore, if Hobbes has intended to justify political authority on the ground that installing an absolute sovereign power is the only way to guarantee peace and security in human society, his effort obviously has failed.

Moreover, I would argue, Hobbes' approach would never have any hope of success, even if both of his empirical claims were true. His approach is to justify political authority instrumentally. But an instrumental justification is a conditional justification. A conditional justification can never give authority the kind of vigor and strength that the standard analysis has correctly identified as essential to the exercise of authority. In Hobbes' case, if the subjects of the sovereign power are rational enough, they will realize that the sole purpose of the sovereign power's existence is for their own benefits. That thought will inevitably cross their mind whenever they are directed by the sovereign to take an action. It may also be inevitable that they will compare the sovereign power's directives with their personal judgments of what are in their interests and what are for their benefits. Thus, there is a strong possibility that the sovereign authority's directives will not be carried out; and even in the case that the sovereign authority's directives are eventually carried out, they may not have been carried out in the manner that a successful exercise of authority would require. Therefore, I conclude that Hobbes' approach to justify authority will not truly justify it.

The second rational ground I will now discuss is consent. While it is a component of Hobbes' theory of authority, consent does not seem to be what Hobbes has wanted to ground his notion of political authority. It has been the social contrast theorists after Hobbes that have allowed consent to perform that function. Indeed, consent has been billed by political theorists since Locke as the most legitimate basis of political obligation, and consequently, the most reasonable ground for the exercise of political authority. For instance, Carole Pateman argues that in liberal societies political obligations are self-assumed by individuals through consent. That means that the obligation of individual citizens to obey political authority in the liberal state is derived from their own agreement to be governed.[21]

But grounding political authority in consent is not without problems. Many theorists now question the relevance of consent, and the validity of consent arguments, on the ground that even citizens in liberal democratic societies have few genuine opportunities to exercise their right to consent. Instead, their consent, especially their consent to the government and its laws and institutions, is often assumed to have been given, as a result, in the case that they decide to withhold their consent, there are no venues for them to do that.[22] Joseph Raz raises a second objection to consent theories. It turns on the fact that consent is an open-ended, life-binding, and widely-affecting promise. To surrender oneself to political authority in this way is obviously inconsistent with liberalism's long-held presumption that individual persons are competent, and hence ought to be allowed, to make decisions that would significantly affect themselves. Because of both these problems, Raz proposes that consent be more narrowly restricted

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[21] Pateman, *The Problem of Political Obligation* (New York: Wiley, 1979).
[22] For this argument, also see Craig Carr, "Tacit Consent", *Public Affairs Quarterly*, Vol. 4, No. 4, Oct., 1990; and Richard Hiskes, *Democracy, Risk, and Community*, Chap. Two, pp.33-56.

as a means of justifying political authority. Specifically, he limits the use of consent as a non-instrumental ground for justifying political obligation and political authority to only those given in a reasonably just society.[23]

The promise of consent to ground the claim of political authority is not hurt only by the problems identified above; more importantly, like Hobbes' argument, it is defeated by the fact that consent-based authority is a qualified authority, which is conditioned on a prior agreement by the subjects to obey the authority. As such, the authority can hope to exercise its influence power over its subjects' and expect them to obey only as long as the subjects are willing to be bound by their prior agreement to obey. In the event that the subjects choose to renege on their agreement and release themselves from the obligation to obey the authority, the authority will then cease to exist. It is inconceivable that a genuine authority relationship can be terminated so abruptly. In addition, the subjects do not give their consent for no reasons. So whatever they may be that the subjects have traded for with their consent to the authority, will remain in the background when they carry out the authority's commands. And those concerns that have moved the subjects to consent to the authority will inevitably affect how they react to the authority's directives. Therefore, it is more than likely that the subjects in an authority relationship grounded in consent will not have the appropriate attitude toward authoritative pronouncements as expected, and to the extent that that happens, consent-based authority is not genuine authority.

Contemporary theorists studying authority have made some more suggestions. Peter Winch claims that "there is an intimate conceptual connexion between the notion of authority on the one hand and, on the other hand, the notion of there being a right and

[23] Raz, *The Morality of Freedom* (Oxford University Press, 1986), Chap. 4, pp.88-94.

wrong way of doing things."[24] According to him, the force of authority is derived from the fact that any rule-governed activity, which is a category including all human activities, presupposes an established right way of conducting the activity, and that the appropriate authority acts in agreement with this established right way of conducting the activity in its practice and pronouncements.[25] In a similar vein, Hannah Arendt and Alasdair MacIntyre both suggest that authority depends for its effect on some shared values, beliefs, practices, which themselves are authoritative. As proof of that, they add that the reason that the idea of authority has almost been lost in modern society is exactly because of the loss of common values and beliefs.[26]

Believing that political authority can be justified on several grounds, Joseph Raz offers three separate arguments for consideration. Apart from consent,[27] which I have discussed above, they also include authority's ability to solve coordination problems through establishing social conventions,[28] and what he calls the "normal justification thesis".[29] What the "normal justification thesis" says is that an authority is justified if, when they accept the authority's directives, the alleged subjects under the authority are more likely to comply with reasons that independently apply to them.[30]

Apparently, all these reasons suggested are valid and plausible arguments. However, sound as they all seem to be, none of them can provide the idea of authority

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[24] Winch, "Authority", Symposium by R. S. Peters and Peter Winch, in Anthony Quinton ed. *Political Philosophy* (Oxford University Press, 1967), p.100.
[25] *Ibid.*, p.100.
[26] See Arendt, *op. cit.*, and Alasdair MacIntyre, "Secularization and Moral Change", in Flathman (1973), pp.163-7.
[27] *The Morality of Freedom*, Chap. 4, pp.80-99.
[28] "Authority and Consent", *Virginia Law Review* 67 (1981), p.109.
[29] "Authority and Justification", pp.18-9; and *The Morality of Freedom*, Chap. 4, pp.70-80.
[30] "Authority and Justification", pp.18-9.

with the kind of absolute force that the standard analysis believes an authority would need to be truly authoritative. Let's take a closer look at each of these arguments.

If, as Winch argues, there is a right way of doing things in every rule-governed activity, and if this right way is discoverable by the average participant of the activity, then it seems that authority itself will be displaced by this discoverable truth. Unless the alleged authority is the only one capable of discovering the truth of the activity in question—which might be true for the early religious and other esoteric activities in primitive times, but is definitely not the case for the vast majority of human activities now—we can simply do away with authority and turn directly to the discoverable truth. To be fair to Winch, there indeed are still areas where most people are not capable of finding the truths on their own, e.g., in the various fields of science, and authority is thus needed to act as the intermediary between the ordinary people and the inaccessible truths. But even in the fields of science, the force of scientific authority, I believe, ultimately lies in those scientific truths themselves. There is no reason to accept a scientific authority's judgment on a matter of science if one is convinced that it is not correct.

I am aware that in making an argument about discoverable objective truth, I seem to put myself at odds with Thomas Kuhn, who has claimed that there are no objective scientific truths that are separable from scientists' interpretation.[31] However, I don't think that my argument here needs to contradict Kuhn's. I agree with Kuhn that there may not be a reliable means in practice to separate what is objectively true from what is the scientist's own observation and interpretation. But even Kuhn would have to admit that the reason that a scientist believes a theory to be a scientific truth is that she believes that it captures and truly describes a scientific phenomenon in the objective world. And

[31] Kuhn, *The Structure of Scientific Revolutions* (Chicago, IL: The University of Chicago Press, 1962).

similarly, a layman accepts a scientist's claim on a matter of science on the ground that (the scientist tells her that) the claim is true, not merely because the scientist claims it to be true. So, even though there is no practical way to distinguish between what is objective truth and what is the scientist's interpretation, as we rely entirely on scientists for knowledge about the physical world, there is a conceptual distinction in that regard, and it is this conceptual distinction that enables us to say that the authority on matters of science ultimately lies in scientific truths, not scientists.[32]

The same thing can be said about the argument of common values. Under this argument, there would only be authoritative beliefs and practices, but no authority figures, or personal authorities, in the community. For the authority figure would lose any claim to his subjects' obedience in the event that his judgments and commands deviate from those authoritative beliefs and practices of the community. On the other hand, if his judgments and commands are heeded only when they are in agreement with the shared beliefs and practices, his claim to authority is again displaced by the claim of those authoritative beliefs and practices.

Raz's suggestions do not fare better. To justify authority on the basis of its ability to solve coordination problems is to base it on a weaker claim, since the force of authority is now grounded entirely in its ability to bring about tangible benefits. The implication of that is that authority will lose its appeal when it fails to deliver. But more damaging to Raz's argument, Leslie Green claims that authority is neither necessary nor sufficient to solving coordination problems. It is not necessary because in many

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[32] In making this argument, I obviously subscribe to a version of scientific realism, and the correspondence theory of truth. I believe that science is ultimately a matter of discovery. The politics of science might require, as Kuhn suggests, efforts to build consensus among the scientific community in order to establish the truth of a scientific theory, but it is in the nature of science that the truth of a claim on a matter of science be grounded in nothing else but the fact that it is indeed true.

circumstances, the coordination problem is not solved by an authoritative directive, but through the presence of cues that make one of the alternatives salient. Authority is also not sufficient, because authoritative directives may not be reasonable or permissible all the time. As environmental conditions change, conventional solutions to particular problems may need to change accordingly. Therefore we have to guard against over-commitment to particular authoritative conventions.[33]

What is to be considered finally is Raz's "normal justification thesis", which justifies the claim of authority on the ground that the subjects are more likely to take the right course of action if they follow authority than if they each deliberate about what to do by themselves. Unfortunately, the "normal justification thesis" also suffers some serious conceptual problems, and hence is unable to do the work. Philip Soper has discussed the problems that beset Raz's thesis at length in his article "Legal Theory and the Claim of Authority".[34] Soper first points out that the thesis virtually eliminates the traditional distinction between theoretical and practical authority. Theoretical authority may be justified by the expert-authority's superior knowledge and judgment, which preempts those of the non-experts; but practical authority claims complete content-independence, which precludes justification on such grounds. But more fundamentally, Soper argues, the normal justification thesis is not up to the job of justifying the concept of authority in a way that is consistent with the requirements of preemption and content-independence. Soper contends that these two requirements that Raz has correctly identified in his analysis of authority defend authority in much more vigorous terms than

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[33] Green, "Authority and Convention", *Philosophical Quarterly*, Vol. 35, Issue 141, Special Issue: Philosophy and the Law (Oct., 1985), pp.337-42.
[34] Soper, "Legal Theory and the Claim of Authority", *Philosophy and Public Affairs*, Vol. 18, Issue 3 (Summer, 1989).

the normal justification thesis allows. Therefore, like all the other grounds for the justification of authority that have been discussed, the normal justification thesis is also unable to sustain authority's claim to the absolute obedience of the subjects.[35]

Does the fact that all the above-discussed arguments are inadequate in justifying authority mean that the effort of justification is bound to fail? The answer, I believe, is yes and no. If we remember, I have made the distinction between justifying authority as a social institution, and justifying a particular authority at the start of this section. I have explained that justifying authority as a social institution is to justify it to some neutral rational observers, whereas, justifying a particular authority is to justify it primarily to a particular group of subjects. What we can conclude at this point is that justification of the first type will never succeed, but justification of the second type is possible.

Given the nature of its claim, it is inconceivable that any rational person *qua* potential subject would accept the kind of authority that is described by the standard analysis. A rational person thinks in terms of long-term cost and benefit, and he will be likely to conclude that the cost of completely surrendering his freedom of choice in any regard will ultimately outweigh the benefit in the long run. Therefore, he will never choose to enter a genuine authority relationship, and consequently, nothing will be able to justify the kind of authority in his mind. But more fundamentally, the claim of authority is not subject to the kind of rational utility calculation at all. Any such calculation will take the kind of absolute force away from authority, and hence change the authority relationship into something else. Therefore, in conclusion, the deep contradiction between the claim of authority and instrumental rationality makes it impossible for a rational person to enter a genuine authority relationship, and thus explains the failure of

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[35] *Ibid.*, pp.224-6.

arguments, including, to a great extent, the consent argument, which attempt an instrumental justification of authority.

Perhaps we can also conclude that the very effort of explanation and justification itself defeats the practice of authority. While contemporary theorists have done quite a job at demystifying it, we should realize ultimately that authority cannot properly function in a context in which the subjects possess nearly perfect understanding about what authority is. This is because deference and obedience, which are essential elements of the authority relationship, will be very hard to secure from those for whom there is no mystery in the authority. Thus, authority is likely to fail when it is subjected to the reason-giving type of explanation and justification. These questions may never cross the mind of the subjects involved in a genuine authority relationship, because, if they do, they will likely spell the end of the authority. For, as Arendt has made clear, authority is not compatible with persuasion.

So, in light of the above argument, how is a particular authority justified to its subjects? I believe that a particular authority can be justified only for the same reason as it is accepted by the subjects. No more robust justification is possible. As a matter of fact, authority is probably one of the few social institutions whose very existence, as Marx once said, is their own justification. In the next section, I will discuss how an authority usually gets accepted by its subjects, and hence justified in their mind.

Personal Authority and Authoritative Beliefs

Though authority is resistant to rational justification, there is not much mystery as to how an authority comes to assume its force. In her study of authority, Arendt examines

authority relationships before the modern age, and reaches the conclusion, which is also in general shared by Winch and MacIntyre, that (personal) authority ultimately has to fall back on some broadly understood authoritative beliefs for its claims.[36] In societies of more primitive times, the values, beliefs, and practices shared by all the members of a community constitute the authoritative beliefs for this particular community. Authority in such a community is exercised on the basis of the force of those authoritative beliefs, and at the same time it is exercised at least partly for the purpose of reaffirming and promoting those common beliefs. Anyone who claims authority in a community with authoritative beliefs, claims it on the ground of his faithful adherence to the communal beliefs, and best service to the community as a result of that. And the community members have faith and trust in the authority figure as a result of their faith and trust in those communal beliefs.

But this picture does not square very well with the contemporary conception of authority proposed by the standard analysis, as that conception ascribes to personal authority an absolute force for its claims that seems to be absent in the early understanding of authority based on authoritative shared beliefs. However, this should not be a problem to the kind of justification I propose here, because the fact that there is no adequate argument to ground the authority's absolute claim does not necessarily prevent the authority's claims from carrying absolute force *vis-à-vis* its subjects in reality. As a matter of fact, instead of detracting from the absoluteness of its claims, the authoritative beliefs on which this type of authority is based are actually the source of the authority's strength.

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[36] Arendt, *op. cit.*; MacIntyre, *op. cit.*; Winch, *op. cit.*.

In the Arendt-MacIntyre conception of authority, the influence of a personal authority depends on something much larger than the authority figure himself, and the personal authority remains authoritative provided that, barring drastic changes in the external environment, his pronouncements continue to fall within the confines of the authoritative beliefs. This understanding of authority, which puts authoritative beliefs prior to and above personal authorities, characterizes the authority relationship in all full-fledged early cultural communities having passed the threshold of civilization. This certainly has been the case in the ancient Chinese, Greek and Roman societies, if we remember that Confucius' teachings are largely based on what he views to be the early sage-rulers' practices, and that Socrates very often invokes beliefs and arguments embedded in the ancient Greek culture to establish his more idiosyncratic claims in debates. To say that personal authority depends for its force on some authoritative beliefs is not to deny that it may have absolute claims over its subjects. The authority can have very strong claims, especially, as it often happened in the early societies, when the entire community heavily depends on it for interpreting and carrying out some important traditional practices, or when obeying authority itself becomes a strong communal belief.

The advocates of this understanding of authority believe that it not only correctly describes how the institution of authority has actually come into existence, but also helps explain why there is so much difficulty with the idea of authority in the modern society. Both Arendt and MacIntyre argue that the difficulty in explaining, justifying, and practicing authority is attributable to the fact that there are no longer that many shared authoritative beliefs in the modern society. As people share less and less in common in their beliefs, with the result that one can no longer point to some core beliefs that unite

the whole community,[37] Arendt claims, the idea of authority and genuine authority relationships are lost in modern society. I believe that Arendt and MacIntyre are right in their claim. As a proof for that, we can point to the two characteristically modern distinctions in the idea of authority, namely, those between "an" and "in" authority, and between theoretical and practical authority.[38]

The difference between "an" and "in" authority is that the former type of authority's claim to authority is derived from some personal characteristics of the authority figure, whereas, the latter type of authority has to point to the office he holds to justify his claim to the subjects' obedience. And what differentiates between theoretical and practical authority is that the former commands beliefs, while the latter commands actions. However, both distinctions would collapse in a community in which the members' moral universe is defined by a particular set of common beliefs and an authority figure's interpretation of them. For in such a community, the authority is obeyed both as an institution of the community (in authority) and because of who he is (an authority); and he commands both the members' beliefs (theoretical authority) and their actions (practical authority). The members of the community view the authority in such a way that his office is not considered separable from his person. And for them, the authority's pronouncements are regarded as both theoretical truths to be believed, and practical directives to be acted on.

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[37] One may argue that in contemporary societies, people do have many common beliefs, such as beliefs in democracy, freedom, rights, toleration, diversity, etc.. But these are higher-order neutral beliefs, which, unlike our ordinary substantive beliefs, do not exclude other beliefs. These beliefs are not able to serve the same purpose of uniting the community as the traditional shared beliefs do, since, instead of directing the entire community to specific common goals, they are very likely to spark disagreements and contentions among the members.

[38] See Friedman, *op. cit.*, pp.139-46, for a discussion of the differences between "an" and "in" authority, and Soper, *op. cit.*, pp.224-6, for a discussion of those between theoretical and practical authority.

The fact that authority and the authority relationship in the contemporary society diverge greatly from this communal understanding of authority, I believe, only leads to the conclusion that the contemporary models of authority are not forms of genuine authority. They are at best quasi-authority, that is, authority subject to various restrictions. Being merely a quasi-authority, the contemporary authority figure's judgments may be subject to disbelief, and his commands may be readily questioned. Therefore, to understand contemporary authorities as quasi-authority explains the tension between the standard analysis' ascription of strong claims to authority, and theorists' inability to justify such claims in light of contemporary models of authority. Admittedly, Arendt was speaking the truth when she lamented that the idea of authority had been corrupted or even lost in the modern world.

The Practice of Authority and The Practice of Coercion—A Comparison

In the previous sections, I have exposed what I see as the inadequacy of contemporary efforts at both explaining and, especially, justifying political authority in light of models of authority existing in the modern society. I have made the argument that contemporary models of authority, unlike the previous ones in the pre-modern society, are not genuine authority, given the fact that in the modern society any claim to authority has been made limited and conditional. In addition, theorists studying authority have contended that "in authority", which is a type of personal authority relying completely on institutional sanctions, has increasingly replaced "an authority" as the prevalent form of authority in the modern society, thus further depriving the authority relationship of the characteristics of a human relationship that have helped sustain it in traditional models of authority.

Therefore, contemporary models of authority are best viewed as the result of a compromise between society's need for such a social institution and various limiting factors, which range from people's natural suspicion of those vested with great social functions, to the erosion of common values and beliefs, and to liberalism's inherent antagonism to the very concept of authority.

In light of this development in the practice of authority, perhaps it is tempting to conclude that it is the successful effort to institutionalize authority, and the consequent imposition of the various limitations on the practice of authority in the modern society that have contributed to the different perceptions of the practices of authority and coercion in terms of legitimacy. But as I will show in the next few sections, there are significant intrinsic differences between the authority relationship and the coercion relationship that make the former much preferable to the latter.

Rule-Governing and Predictability

A number of theorists, such as Winch, MacIntyre, and Flathman,[39] have pointed out that the exercise of authority, like most rational (read purposive) human activities, is, to use Winch's terminology, a rule-governed activity. A rule-governed activity, as the name reveals, is an activity subject to the regulation of some rules. But before we go any further, let me make it clear exactly what function Winch has in mind for the rules in rule-governed activities.

One example Winch gives is English-speaking, which is obviously an activity regulated by rules—in this case, the grammatical rules of the English language. Winch

[39] Winch, *op. cit.*; MacIntyre, *op. cit.*; and Flathman, *Concepts in Social & Political Philosophy* (New York, NY: Macmillan Publishing Co., Inc., 1973), Introduction, and *The Practice of Political Authority: Authority and the Authoritative* (Chicago, IL: University of Chicago Press, 1980).

then adds that all educated Englishmen are authorities on the activity of speaking English.[40] Evidently, Winch believes that the rules of a particular rule-governed activity are what ultimately decide on questions concerning that activity, and that personal authorities of the activity are merely surrogates of the rules, since their claim to authority is derived from their knowledge of the rules. Winch's contentions, revealed through this example, may all be correct, but the appropriateness of the example itself may be in question. The example does not demonstrate, as Winch intends, that the exercise of authority is a rule-governed activity, but rather that English-speaking is. A native speaker of English correcting a non-native speaker's English is an exercise of authority, but that exercise is apparently regulated by the rules of English-speaking, rather than by a different set of rules that specifically govern the exercise of authority; unless Winch would argue that there are no separate rules governing the exercise of authority, instead it is governed by the same rules that regulate the activity on which the authority is exercised. That certainly is a possibility. Intuitively, an educated Englishman needs to rely on no other rules than those of the English grammar in correcting a non-native speaker's English. However, I would argue that this example suffers from its simplicity; in the more complex cases, there are indeed separate rules that regulate the exercise of authority in the relevant activities.

Drawing on a distinction originally made by John Rawls,[41] John Searle distinguishes between two sorts of rules, which he terms constitutive rules and regulative

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[40] *Op. cit.*, p.100.
[41] Rawls, "Two Concepts of Rules", *The Philosophical Review*, Vol. 64, Issues 1 (Jan., 1955), pp.3-32.

rules.[42] Searle thus defines the two types of rules: "Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules," and "[r]egulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the existence of the rules."[43] For instance, the rules of baseball game are of the first type, since baseball-playing would be impossible without following those rules. On the other hand, dinner-table manners are regulative rules, because, although behaviors at dinner table are regulated by those rules, they are logically independent of the regulation of any such rules.

The exercise of authority is a rule-governed activity in both senses of rule. There have to be constitutive rules in the exercise of authority, because the practice of authority is not a natural activity as eating is, and its existence is entirely dependent on social conventions. A conventional activity cannot be without constitutive rules; without such rules, the activity can neither be carried out nor identified as a distinct activity.[44] More importantly, the exercise of authority is a rule-governed activity in the sense of being regulated by rules external to the activity. In other words, it is also an activity governed by regulative rules. As Winch correctly points out, for any rule-governed activity, there always is a conventionally established correct way of conducting the activity, which is laid out by the relevant rules of that activity. Evidently, it is the function of the regulative

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[42] Searle, "What Is a Speech Act?", in Max Black ed. *Philosophy in America* (Ithaca, NY: Cornell University Press, 1965), pp221-39, cited from A. P. Martinich ed. *The Philosophy of Language*, 3rd edition (Oxford University Press, 1996), pp.130-40, p.131.

[43] *Ibid.*, p.131.

[44] For brevity's sake, I will not try to specify what those rules are, but it is certainly not impossible to identify them. Similar to those of an act of coercion, there also exist a set of necessary and sufficient conditions that constitute an act of exercising authority, and those conditions are the constitutive rules for the activity of exercising authority.

rules of an activity to specify what constitutes correctly conducting the activity.[45] Thus, for an activity to be a proper exercise of authority, the agents involved have to observe certain rules when engaging in the activity. In an era in which "in" authority is increasingly replacing "an" authority, thus leaving authority almost completely institutionalized, the rules regulating the proper conduct of authority have become much more elaborate and complex. For instance, in the modern society, there are rules regulating virtually every aspect of the exercise of authority, from specifying the exact responsibilities of the person in authority, to stipulating the proper channels and procedures through which the authoritative directives are to be carried out.

In contrast, an act of coercion is not regulated by any rules. To be sure, coercion is not an entirely ruleless activity. It has non-trivial constitutive rules, as logically any non-natural activity has to have. The necessary and sufficient conditions identified in the second chapter are in fact the constitutive rules of an act of coercion. Those rules serve the function of identifying acts of coercion and differentiating them from all other types of activities. But unlike in the exercise of authority, there are no rules independently established to regulate acts of coercion. As a matter of fact, the question as to what constitutes the correct way of coercing people does not even arise. The only right question to ask about coercion is whether an act *is* one of coercion. Without being governed by regulative rules that impose restrictions on the activity in question, coercion is a fair game for those who are able to force their will on others. Thus, as a further

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[45] Searle makes it clear that constitutive rules also regulate, but in my opinion, their regulative function is subsidiary to and derivative from their constitutive function. That type of rules regulates an activity in the sense of stipulating what constitutes the *activity* in question (not what constitutes *correctly conducting* the activity in question), and hence differentiating it from all others. For instance, the two features Arendt identifies in the authority relationship, namely, an authority does not resort to either coercion or persuasion in dealing with the subjects, are two constitutive rules for the exercise of authority.

difference from the exercise of authority, an act of coercion depends on its successful completion to be what it is intended to be, while in an exercise of authority, the nature of the relationship itself predetermines its success.[46]

Because of their difference with respect to regulative rules, an exercise of authority is a more predictable activity than an act of coercion. Being governed by regulative rules indicates that the activity in question is both sufficiently recurrent and serves a useful purpose. And at the same time, the regulative rules of an activity guarantee that the activity will for the most part follow the same identifiable patterns, thus making it fairly predictable. As a further factor affecting the predictability of the two practices, authority can only be exercised by a known authority figure, whereas, coercion can be practiced by anyone as long as he can successfully impose his own will on others. Therefore, I believe that partly because of their difference in terms of rule-governing and predictability, the exercise of authority is considered a reliable means of political governance, while coercion is not.

Unequal v. Equal Status

A second difference between authority and coercion is with respect to the status of the agents involved in the two relationships. The authority relationship, as Arendt correctly argues, is a hierarchical relationship, a relationship based on inequality.[47] In an authority relationship, the agents involved—the authority figure and the subjects—do not have

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[46] An exercise of authority, like an act of coercion, has to be successful to be what it is. But the difference is that for an act of coercion, the identity of the act depends on its success, whereas, success only proves, but does not determine, that an act is an exercise of authority. This is because to call someone authority entails that that person is guaranteed the deference and obedience due to an authority figure, and hence the successful exercise of the authority itself.

[47] See Arendt, *op. cit.*, p.93.

equal status. And this inequality is acknowledged by both the person in authority and, more importantly, those subject to the authority. This acknowledged inequality in formal status between the authority and the subjects is inherent in the very notion of authority relationship; it makes it possible for the subjects to form the will to obey authority, which is arguably the most crucial component of the authority relationship.

A relationship based on coercion is not characterized by a similar recognition of inequality by the agents involved. The victim believes that the coercer has no better reason to coerce him than *vice versa*. On the part of the coercer, the very fact that he resorts to coercion in order to influence the victim's behavior indicates his awareness that there are no other venues open to him for his purpose. The lack of such recognition of inequality and entitlement is the result of the fact that there is no inequality in status between the agents in a relationship based on coercion. However, the two agents involved in an act of coercion are not exactly equals either. The coercer is obviously the stronger party, as he is in a position to hold the victim hostage on account of some weakness the latter presumably has. But this inequality in reality does not translate into a formal acknowledgement, nor does it produce a sense of entitlement in the mind of the two parties. Instead, the coercer's decision to exploit this inequality only causes a sense of injustice in both the victim and the neutral observers.

The Will of the Party Influenced

The exercise of authority and the practice of coercion are both ways of influencing people, but they have different impacts on the will of the parties influenced in the two relationships. In the authority relationship, the people subject to the authority not only

willingly accept the exercise of authority over them, but also have a positive attitude toward their willingness to obey the authority. That is to say, the subjects in the authority relationship not only want to obey the authority, but also approve of their desire to obey the authority. In other words, there is no conflict between their first-order and second-order desires in the case of obeying authority.[48] Therefore, in the authority relationship, the will of party influenced is genuinely free. This agreement between the first-order and second-order desires of the subjects reveals another feature of the authority relationship, which is that for those who participate in such a relationship, there is a perfect match between the perceived normative requirement and their voluntary action. This is because the subjects are willing to do what they believe they ought to do, namely, obeying authority.

The situation is different in a relationship based on coercion. Although he voluntarily surrenders himself to the coercer's demand, the victim of coercion may nonetheless harbor some strong feeling of resentment toward his decision to comply. There is no question that the victim of coercion chooses to comply with the coercer's demand out of his own will, but what makes this other than a genuine case of free willing is the fact that he does not approve of and hence nor does he feel identified with the choice he makes. To use Frankfurt's terminology again, there is a conflict between his first-order and second-order desires. As his immediate desire, he may want to act as the coercer demands for no other reason than to avoid some unbearable harm; but upon reflection, he will come to resent the fact that he is forced to make such an undesirable choice under those circumstances. Because he believes that he has been forced to choose

[48] For a discussion of first-order and second-order desires, see Harry Frankfurt, "Freedom of the Will and the Concept of a Person", *The Journal of Philosophy*, Vol. LXVIII, No. 1, Jan. 14, 1971.

between two evils, the victim of coercion will neither approve of nor feel identified with his own choice. Therefore, we have to say that in coercion, while his choice to comply with the coercer's demand is voluntary, the victim's will is not really free in making that choice. To genuinely enjoy the freedom of will, one not only has to be able to act on his want, but more importantly, as Frankfurt argues, he should be able to want what he wants to want, that is, he has to be free with respect to wanting.[49] In the case of coercion, since the victim is not free with respect to wanting, his decision to comply is not the product of a genuinely free will.

The Choice Situation

Finally, the choice situations in the two relationships are different. To be sure, in neither relationship does the party subject to another person's influence have a genuine choice. In the authority relationship, the subject is completely denied a choice. To choose to participate in an authority relationship means to forfeit the right to make a choice based on one's own judgment. Consequently, refusing to accept the authority's choice or questioning its wisdom amounts to withdrawing from the authority relationship. In a relationship based on coercion, while the victim apparently is free to choose what is contrary to the coercer's demand, in doing so he will only suffer the serious consequences for noncompliance. Since, to be genuinely free in making a choice, one should be able to choose either option without being punished for his choice, the victim of coercion is not free, in Gerald Dworkin's words, with respect to complying with the

[49] *Ibid.*, p.15.

coercer's demand.[50] Therefore, the victim of coercion has no genuine freedom of choice either.

However, even though the subject in the authority relationship has no freedom of choice, given his faith and trust in the authority, the one option available to him is viewed by him as a welcome one. It is not the case for the victim of coercion. The victim of coercion suffers a double injustice. In addition to not being given a genuine choice, the only course of action available to him is also normally not a desirable one—it is merely less undesirable compared with the option of noncompliance.

Conclusion

I have said at the beginning of this chapter that the conceptualization of coercion will only be complete till a comparison is made and a distinction is drawn between coercion and authority. To make this effort possible, I have first examined the understandings of authority by both past and contemporary theorists. I have pointed out what I see as a serious inadequacy of the Friedman-Raz analysis of authority, which has been accepted by contemporary theorists as the standard analysis. The problem lies in the failure of theorists to explain and justify authority's claim to the subjects' absolute obedience, which the standard analysis has identified as the most crucial component to the authority relationship. The conclusion I have come to on this issue is that theorists can find no rational argument to ground authority's absolute claim, because authority is not subject to the kind of reason-giving rational justification. I have further contended that as the only secure ground for authority is lost in the modern society, namely, shared authoritative beliefs, contemporary models of authority have degenerated into quasi-authority. After

[50] "Acting Freely", *Nous*, Vol. 4, Issue 4 (Nov., 1970), pp.367-83, p.380.

the analysis of authority, I have compared the authority relationship with the relationship based on coercion, in the hope of finding whether there are significant differences between them that would warrant the very different perceptions of the two practices. I have been able to identify four such differences, which clearly separate the practice of authority from coercion, and make it a much preferable means of control and ruling.

In the next chapter, my objective will be to bridge the gap between our theory and practice with respect to our attitude to coercion. While coercion is often condemned by theorists as violating individual freedom and rights, it is extensively used in the political practice in the contemporary society. I will examine the charge that coercion violates individual freedom and rights, and find out whether the practice of coercion is really in conflict with pursuing personal freedom and protecting individual rights.

Chapter Four: Freedom, Rights, and Coercion

Freedom and rights are two of the core concepts of liberal theory. Intuitively, these two concepts are in direct contradiction to the idea of coercion. This intuition is reinforced by scholars' conceptions of the two ideas, as in most theories freedom and rights are defined as occurring in contexts absent of coercion. For its part, coercion has been condemned primarily because of its perceived conflict with freedom and rights, and consequently, its supposed violation of them. However, the perception of coercion as violating individual freedom and rights does not seem to have prevented it from occurring and being practiced in contemporary liberal democratic societies. So there seems to be a big gap between coercion's places in liberal theory and in liberal political practice. Obviously, it is not a desirable outcome to have a widely affecting social institution condemned in theory but left untouched in practice.

I suspect that for a social-political practice to be widely adopted, there has to be some reason behind it that can somehow serve as its justification. Therefore, it would be the task of this and the next chapters to find out whether there is any such justificatory argument for coercion. Evidently, any attempt to justify coercion has to be made within liberal theory, as it is the dominant social philosophy in the contemporary liberal society. And since the supposed evil of coercion is traced back mostly to its perceived conflict with and violation of the liberal ideas of freedom and rights, the success of any attempt to justify coercion within the framework of liberal theory will depend to a large extent on the possibility that, despite the apparent contradiction, the idea of coercion can somehow

be accommodated conceptually by the two concepts of freedom and rights. This issue will be dealt with lastly in this chapter.

There are also some other important questions this chapter attempts to resolve besides and before this central issue. First, I have to decide on which conception of freedom to form the basis of my discussion. There has been a long-going debate between two camps of theorists who endorse respectively a negative and a positive conception of freedom. The negative\positive division on the concept of freedom touches on more than the conceptual issues directly involved in the idea. It cuts into many other questions of interest to political theorists, questions such as whether freedom should be measured at least in part by result, or whether the community plays a role in an individual's pursuit of freedom. Therefore I believe that a successful effort toward resolving that debate will provide answers to some very important questions concerning the idea of freedom.

Second, although the two concepts of freedom and rights are often juxtaposed and mentioned together in a single stroke, not much attention has been paid to the connection between the two. Most theorists simply ignore that question, and discuss the two concepts in isolation from each other. What is of particular interest to me on the issue of the connection between the two concepts is the question which one of the two is the more basic concept, or to put it in different terms, which concept is logically prior to which. H. L. A. Hart has made a fairly convincing argument for the existence of an equal natural right for all to be free, on which all of our other moral rights depend.[1] If Hart is right, as I believe he is, freedom is presumably the more basic concept between the two. Hart's argument not only helps resolve this issue, but also sheds light on the question "what are

[1] Hart, "Are There Any Natural Rights?", *The Philosophical Review*, Vol. 64, No. 2 (Apr., 1955), pp.175-91.

rights?" as well. Drawing on Hart and Thomas Perry's theories,[2] I will argue that rights are institutionalized freedoms, that is, freedoms are institutionally recognized and protected through rights. Such institutional recognition and protection of freedom has come from the law of nature as with natural rights, from moral rules as with moral rights, and from the legal-political system as with legal and political rights.

The Ideas of Positive and Negative Freedom

The idea of freedom can be approached from a variety of aspects. For instance, a subcategory of the concept of freedom is the idea of freedom of will, which has a host of issues specific to it that primarily interest analytical philosophers. There is also general interest among theorists of freedom in the question whether freedom is realized by stages, and if so, what the specific marks of each stage are.[3] That question can then branch out to generate such other questions as whether human freedom should be conceived of in view of human beings' rational capacities as well as the values that people commonly agree should govern their life. These and other potential questions have made the idea of freedom one of the most complex issues political theory has ever had to tackle.

Berlin and the Two Senses of Freedom

Although the question of what freedom is can be approached in different ways and from different angles, I believe that the still ongoing positive\negative liberty debate captures most of the fundamental issues with respect to freedom. Following Isaiah Berlin and

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[2] Perry, "Two Domains of Rights", *Philosophy and Phenomenological Research*, Vol. 45, Issue 4 (Jun., 1985), pp.567-80.

[3] See Richard Flathman, *The Philosophy and Politics of Freedom* (Chicago, IL: The University of Chicago Press, 1987), Chap. 1, and Stanley I. Benn, *A Theory of Freedom* (New York, NY: Cambridge University Press, 1988), Chaps. 8-12.

many other theorists of freedom, I will use the two words of freedom and liberty interchangeably. The positive\negative liberty distinction was first broached by Berlin in his seminal essay "Two Concepts of Liberty".[4] Berlin argues that there are both a negative and a positive sense of liberty. The negative sense "is involved in the answer to the question 'What is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference by other persons?'"[5] The positive sense of liberty has to do with the question "'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'"[6]

The idea of negative freedom is closely related to another distinction—the distinction between the public and private realms, which is essential to theories in the liberal tradition. The idea of negative freedom requires that a private realm of personal freedom be allowed to every individual person, which is beyond the scrutiny of public authority or society at large, and in which he or she exercises complete control. Since liberty in this negative sense emphasizes non-interference on the part of public authority or any other person, it is aptly captured by the phrase "freedom from". Therefore, to be free in the negative sense of liberty is to be free from outside interference on matters concerning one's private life, on which one is better left to make his own decisions. Allowing individual human beings a realm of personal freedom is absolutely necessary, because, according to liberals such as Mill and Berlin, such a realm provides individual

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[4] Inaugural Lecture delivered at the University of Oxford, Oct. 31, 1958. Cited from Berlin, *Four Essays on Liberty* (New York, NY: Oxford University Press, 1970), pp.118-72.
[5] *Ibid.*, pp.121-2.
[6] *Ibid.*, p.122.

moral persons a minimum breathing space, which then enables them to develop critical faculties that are essential to their well-being.[7]

The idea of positive freedom, as Berlin argues, "derives from the wish on the part of the individual to be his own master."[8] The individual moral person enjoys and exercises positive freedom as a thinking, willing, and ends-pursuing rational being. His claim to positive freedom is a claim to living his life in a particularly satisfying manner. His aspiration to liberty in this positive sense is more than a desire to be left alone in his tiny little world of self-existence, which, for theorists of positive freedom, speaks of nothing more than a sense of resignation on his part; his longing for positive freedom indicates his readiness for and commitment to a life of action, a life that will bear fruit, as he, upon self-reflection, decides on and pursues ends that he sets for himself. An individual moral person exercising positive freedom is, as Berlin calls him, a subject rather than an object. He is not someone who is pushed around by external forces, but someone who is self-directing, and who is moved by reasons and purposes of his own. An individual pursuing positive freedom is rational in two senses: he is rational not only because he is capable of acting on the appropriate means to reach his ends, whatever they turn out to be, but more importantly, because he has a vision for his life, which is a life of meaningful ends with which he wholeheartedly identifies himself. If liberty in the negative sense makes demands on the external world by requiring non-interference, then the demands of liberty in the positive sense are directed to the individual himself, namely,

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[7] *Ibid.*, pp.122-31.
[8] *Ibid.*, p.131.

to live his life in a particularly rich and fruitful fashion. For that reason, Berlin dubs positive freedom "freedom to".[9]

Berlin himself comes down heavily in favor of negative freedom. Anticipating Rawls's argument in *A Theory of Justice*, and attempting to refute those who argue that freedom in the negative sense is useless to an individual who has no use of it—those who have in mind the scenarios in which the need for material comfort outweighs the need for personal freedom—Berlin argues, "liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience."[10] The point he is making is that if liberty is compromised for the sake of something else, even if such a sacrifice is justified, it still constitutes a net loss of liberty. Berlin believes that liberty in the negative sense should be *prima facie* guaranteed to everyone. To be sure, he does allow occasional infringements on individual liberty for the sake of something else, but such infringements have to be justified on a case-by-case basis. In other words, he does not believe that there should be a general principle that stipulates that personal freedom can be justifiably infringed upon under certain circumstances, for instance, in exchange for more justice or greater equality.

Berlin's adamant refusal to sacrifice liberty in the name of, or for the sake of, something else is also behind his attack on what he sees as the frequent misuse of the idea of positive freedom by theorists who espouse that notion.[11] At the center of the notion of positive freedom is the idea of the "true self", which is rational and self-directing, and with which the individual should identify himself. The idea of the true self, according to Berlin, is exactly where theorists of positive freedom have gone wrong. In their

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[9] *Ibid.*, pp.131-4.
[10] *Ibid.*, p.125.
[11] Those theorists include among others Rousseau, Hegel, Marx, and contemporary communitarians.

interpretations, we are told, those theorists have subjected the rational true self of the individual to the purposes and wills of collective entities such as cultural or ethnic group, community, class, church, or even the state. Theorists of freedom of this persuasion have too often been guilty of exploiting the individual's yearning for an identity within a group to which he wishes to belong, and forcing the collective ends and aspirations of the group onto him through forceful arguments of various sorts with which we have become only too familiar. In a remarkable piece of intellectual sleight of hand, those theorists succeed in substituting a collective, organic single will for the will of the individual, and in doing so, they are also able to convince the individual that he has hence achieved the higher freedom.[12] Because of his forceful defense of negative freedom, and his equally vehement attack of the various theories of positive freedom, Berlin leaves his readers with the impression that he seems to hold that freedom in the negative sense is genuine freedom, whereas, freedom in the positive sense is not.[13]

Berlin's condemnation of theories of positive freedom comes as no surprise, considering what the world has witnessed in the early half of the 20th century. Defenders of liberty in the narrower negative sense are quick to point out the totalitarian tendency of some of the theories embodying a version of positive freedom, most notably among which are Nazism and Communism,[14] and the harm they have caused to human freedom

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[12] *Ibid.*, pp.135-66.

[13] Berlin later acknowledged in the Introduction to *Four Essays on Liberty* that the way he argues his position in "Two Concepts of Liberty" has led to interpretations he had never intended. But nonetheless, he stands by all of his main arguments in "Two Concepts of Liberty", and reaffirms his preference for negative freedom.

[14] I never feel comfortable about the juxtaposition of Nazism and Communism. I believe that those who do lump them together and condemn both in one breath fail to truly understand the intent and logic of Communism as a social theory, but rather allow themselves to be deceived by the appearances of some very imperfect attempts to apply the theory to practice. Here I'm simply stating what is a common perception among those who subscribe to the belief that freedom should be defined exclusively in terms of its negative sense.

in the name of liberty itself. Although the guilty ones are not limited to the two important political ideologies of the 20th century, one has reason to believe that it is their impacts on the life of individual persons that have galvanized the effort against theories of positive freedom. However, as Charles Taylor warns, it is very tempting in the course of partisan polemic amid the debate on freedom to "fix on the extreme, almost caricatural variants" of the theories of each side.[15]

It is not clear that Nazism best illustrates the dangers of theories of positive freedom, because it may not even be true that Nazism qualifies as a theory of positive freedom. One of the misperceptions of theories of positive freedom is their supposed emphasis on collective control to the near exclusion of all other elements of human freedom. That's probably why Nazism, which pushes to the extreme the Hegelian notion of collective reason as manifested in the nation state, is implicitly if not explicitly lumped together with theories of positive freedom. But as I have suggested, that is the result of a misperception. Communism has been subject to more mischaracterization. Here again, critics almost focus exclusively on the issue of the extent of collective control—exaggeration has often been made even in there—while disregarding the intent and logic of that theory. In a later section, I will make an argument in favor of positive freedom, presenting what I see as a balanced view of the various theories of positive freedom. I will argue that negative freedom is inadequate as a conception of freedom. And I will also show that some of the theorists who are famous for defending freedom in the negative sense, actually have lent support to arguments of positive freedom in their theories. But before I can do that, I need to first examine some of the most famous

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[15] Charles Taylor, "What's Wrong with Negative Liberty", in Alan Ryan ed. *The Idea of Freedom: Essays in Honor of Isaiah Berlin* (Oxford University Press, 1979), p.175.

theories of negative freedom in order to chronicle the evolution of that idea and to find out where it is inadequate.

The Evolution of the Idea of Negative Freedom

The idea of negative freedom has undergone significant transformation since Thomas Hobbes first proposed a theory of negative freedom. Hobbes' theory of freedom is a very crude form of negative freedom theory, in which he equates freedom with the absence of physical impediments from without. As he argues in Chapter 14 of *Leviathan*:

> By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him.[16]

In a later chapter entitled "Of the Liberty of Subjects", he speaks on the same subject:

> LIBERTY, or FREEDOM, signifieth, properly, the absence of opposition; by opposition, I mean external impediments of motion; and may be applied no less to irrational, and inanimate creatures, than to rational.[17]

Two points need to be noted in Hobbes' understanding of freedom. First, Hobbes believes that all impediments to freedom are from sources external to the subject of freedom. Nothing within an agent's own body can hamper her freedom. Therefore, the agent's physical weaknesses, weakness of will, uncontrollable desires, or even addictions to destructive habits, all do not constitute impediments to the agent's freedom. And

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[16] Hobbes, *Leviathan*, ed. by Michael Oakshott (New York, NY: Simon & Schuster, Inc., 1962), p.103. All later page references are to this edition.
[17] *Ibid.*, p.159.

second, what Hobbes says about freedom also suggests that he considers external impediments to freedom to be only physical in nature. As he states himself, external impediments to freedom are impediments to motion, and anything that is capable of motion is capable of freedom. Since Hobbes makes no distinction between the freedom of human beings, and that of non-human creatures and inanimate objects, infringement of freedom can only take the form that equally applies to all three kinds of subjects of freedom. As a result, Hobbes automatically rules out coercion as a type of infringement of freedom, as animals and inanimate objects are not capable of being coerced.

The shortcomings of Hobbes' theory of freedom are obvious. Hoekema points out that Hobbes' definition of freedom is both too inclusive and too stringent. By defining impediments to freedom as external obstacles to motion, Hobbes unduly extends the sources of human beings' unfreedom to such things as environmental conditions, which it may not be proper to speak of as depriving us of our freedom, although they may affect our freedom in some way.[18] By excluding non-physical and non-external elements from his list of impediments to freedom, Hobbes ignores causes that genuinely diminish our freedom.[19] Coercion is such a non-physical cause of unfreedom, and the above-mentioned weaknesses an agent may have, such as physical weaknesses and harmful addictions, are examples of non-external causes of unfreedom that are excluded by

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[18] Hoekema gives the example of a mountain range, which, according to him, may prevent a person from traveling from one valley to another, but does not deprive the person of the freedom to do so. Hoekema, *op. cit.*, p.67. I would go even further than Hoekema on this point. I believe that it is more appropriate to say that environmental conditions are not something that we should speak of as affecting (in terms of either enhancing or diminishing) our freedom. They are simply the parameters within which human freedom is to be meaningfully discussed. Just as we do not complain about our physical inability to fly as depriving us of the freedom to do so, natural environmental conditions should also be taken as givens in discussions of freedom, unless, of course, such conditions result from human action, as, for instance, during ancient warfare the battlefield environment is often altered as part of military tactics.

[19] Hoekema, *op. cit.*, p.67.

Hobbes. Given its inadequacies, Hobbes' theory of freedom has never found much sympathy in later theorists.

One of the reasons that Hobbes' theory has never gained much currency is that later theorists, starting with John Locke, realized that for human beings who are capable of thinking and willing, in addition to mere movement, their freedom has to be different from that of animals, and that it should have at least something to do with their will. Locke argues:

> So far a man has a power to think, or not to think; to move, or not to move, according to the preference or direction of his own mind, so far is a man *free*...So that the *idea* of *liberty*, is the *idea* of a power in any agent to do or forbear any particular action, according to the determination or thought of the mind, whereby either of them is preferred to the other; where either of them is not in the power of the agent to be produced by him according to his *volition*, there he is not at *liberty*...[20]

In a later passage, he again writes:

> That so far as anyone can, by the direction or choice of his mind, preferring the existence of any action, to the non-existence of that action, and *vice versa*, make it to exist, or not exist, so far he is *free*...For such a preferring of action to its absence, is the *willing* of it; and we can scarce tell how to imagine any *being* freer, than to be able to do what he *wills*...[21]

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[20] Locke, *An Essay Concerning Human Understanding*, abridged and edited by Kenneth Winkler (Indianapolis, IN: Hackett Publishing Company, Inc., 1996), Bk. II, Chap. 21, paragraph 8, p.95. Italics are Locke's.

[21] *Ibid.*, II.21.21, p.98. Italics are Locke's.

For Locke, freedom lies in the agreement of an agent's present statement of mind with her current condition. So regardless of how a state of affairs may have been brought about, or what impact it may have on the agent's action, as long as she finds it agreeable, or in other words, she wills it, Locke would declare her free. Thus, for a person who is carried into a room while asleep and then locked up in that room, if she turns out to enjoy her stay in the locked room, Locke would consider it a compelling case of freedom.[22]

There are two problems with this theory of freedom. First, by basing the judgment whether an agent is free with respect to a given action or state of affairs on whether the result of the action or the state of affairs is in accord with the agent's present will, the Lockean agent to a great extent concedes the control of her own life to serendipity. Quite often we find ourselves comfortable in situations that are not the results of our choice and action. If what we mean by freedom is nothing but feeling good about the state of existence we happen to be in at any particular time, then freedom becomes a very trivial concept. In his understanding of freedom, Locke denies what Hobbes and all later theorists of freedom have affirmed, that is, freedom has to involve some sort of voluntary action on the part of the agent. Furthermore, Locke fails to draw a distinction between willing the result of an action and willing a choice. Both Gerald Dworkin and David Hoekema argue that there is an important difference between acting freely and being free with respect to an action.[23] One acts freely when one takes an action voluntarily, regardless of the choice situation. So one pays his taxes freely if he willingly does so. Whereas, one is free with respect to an action only if one is given a

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[22] *Ibid.*, II.21.10, p.96.

[23] Dworkin, "Acting Freely", *Nous*, Vol. 4, Issue 4 (Nov., 1970), pp.379-80; Hoekema, *op. cit.*, p.65. The distinctions Dworkin and Hoekema have drawn are similar but not identical, and in the discussion here, I am following Dworkin's arguments, as I believe that his formulations of the two concepts are better.

genuine choice of either performing or not performing the action. In the above example, one is not free with respect to paying his taxes, since he is not free not to pay his taxes. Therefore, as long as an individual's act of willing is directed only at results and actions, but not choices, as Locke believes should be the case, the individual's freedom is incomplete.

Nevertheless, Locke's theory of freedom is not beyond salvaging. One way to salvage Locke's theory is to interpret it to mean that freedom is the ability to do what one wills.[24] According to this interpretation, one is free if one is able to do what one wants. But this reformulation is not without its own problems. For one thing, as Hoekema points out, people's wants and desires often conflict with each other, and deeply conflicting desires may render actions impossible in certain situations. In addition, this interpretation may result in confusing a lack of freedom with the inability to take certain actions. In the case in which one desires what is humanly impossible, for instance, flying with no flying aids, are we prepared to say that he is unfree with respect to what he desires?[25] Berlin adds a third reason against this interpretation. In the Introduction to *Four Essays on Liberty*, Berlin retracts a position that he has taken in "Two Concepts of Liberty", where he speaks of liberty as "the absence of obstacles to the fulfillment of a man's desires."[26] Berlin's reason is that "if to be free—negatively—is simply not to be prevented by other persons from doing whatever one wishes, then one of the ways of attaining such freedom is by extinguishing one's wishes."[27] Berlin believes that tying

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[24] Hoekema makes that argument in his *op. cit.*, pp.65-6.
[25] *Ibid.*, pp.65-6.
[26] P.xxxviii.
[27] *Ibid.*.

freedom to one's ability to satisfy his wants has the absurd implication that the less desires one has—hence the less unsatisfied desires—the freer he is.

In the more recent and much more defensible theories of negative freedom, as represented by those of Berlin and F. A. Hayek, negative freedom is defined as non-interference by others.[28] Berlin argues that there has to be a realm of personal freedom in which an individual's freedom should on no account be violated.[29] And similarly, Hayek believes that freedom is "the state in which a man is not subject to coercion by the arbitrary will of another or others."[30] Contemporary theorists of positive freedom generally have no quarrel with the argument that an individual human person should in principle be left alone on matters that concern only herself. What theorists of this persuasion do contend is that although an inseparable component of the idea of freedom, the notion of allowing a minimum space of personal freedom does not form an adequate conception of freedom.

Their criticisms of theories of negative freedom by and large do turn on the idea of the true self, which Berlin has spoken of disapprovingly. The general argument is that every individual person has a primary personal identity, which is the identity an individual assumes by virtue of her association with a group with which she primarily identifies herself. It is meaningful to talk about the freedom of the true self of an individual only in terms of this primary identity, which is inseparable from the group with respect to which the identity is formed. There is no such a thing as human freedom pure and simple, but only freedom of individual human persons qua identity bearers.

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[28] Berlin, "Two Concepts of Liberty"; Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 1960).
[29] Berlin, "Two Concepts of Liberty", p.124.
[30] Hayek, *The Constitution of Liberty*, p.11.

Therefore, the aspirations, ends, values, and sanctions of an individual's primary identity group do have a place in the matter of her personal freedom. Pointing out directly what they see as an indication of the inadequacy of negative freedom theories, theorists of positive freedom argue that consequent on their insistence that there should be no external interference with an individual's private affairs, negative freedom theorists provide no safeguards against the possibility that the unchecked base desires and self-destructive personal habits may devastate the life of an individual, while at the same time, ironically, she is still called free.[31] More on this subject will be discussed next, but for now let me turn to the latest development of the idea of negative freedom.

A problem that has troubled all theorists of freedom is the question of freedom's measurement. Although Berlin was able to proclaim rightfully in 1958 (the year in which he delivered the lecture "Two Concepts of Liberty") that the average subject of the King of Sweden was a good deal freer than the average citizen of Spain or Albania, that statement was nonetheless marred by the fact that no precise measurement was available to him.[32] In that regard, Ian Carter has made a valuable contribution to the enterprise of negative freedom. After meticulously resolving such small but nonetheless significant problems as act-description, act-individuation, and act-causation, Carter comes up with a scheme of measurement, in which freedom is measured in terms of the sets of compossible actions.[33] According to Carter, "a person's freedom is a function not simply of the number of actions she is constrained and unconstrained from performing, but rather, of the number and size of the *sets of compossible actions* she is constrained and unconstrained from performing;" and by compossible actions he means actions that may

[31] See, for instance, Charles Taylor, "What's Wrong with Negative Liberty".
[32] "Two Concepts of Liberty", p.130f.
[33] Carter, *A Measure of Freedom* (New York, NY: Oxford University Press, 1999), Chap. 7, pp.169-218.

exist in combination.[34] Thus, *ceteris paribus*, a person in a country which allows free speech is freer than a person in a country in which speech on some subjects will lead to jail time, because the first person's freedom sets include sets of combinations of free speech and a host of other actions, which may not be available to the second due to the fact that the second person's practice of free speech may preclude her from enjoying many other freedoms.

Although an ingenious and well-thought-out approach to the problem of measuring freedom, Carter's theory still fails in one respect as theories of negative freedom in general do. That is the qualitative aspect of the idea of freedom. Critics of negative freedom have long asked and given a negative answer to the question whether freedom can be entirely captured by the idea of being free from external interference. In other words, freedom is not merely a matter of counting the number of actions one is and is not constrained from performing, no matter how precise and well-conceived the counting method is. One can simply ask himself this question: aren't there certain freedoms that I would give up a host of others for? That most people would agree with this claim proves that a purely empirical, quantitative account of freedom is inadequate. Having charted out the evolutionary course of the idea of negative freedom, I am now ready to turn to its rival idea—positive freedom.

Two Theories of Positive Freedom

As has been mentioned above, what has motivated the attack of positive freedom theories by those who subscribe to the idea of negative freedom, is the perceived nexus between personal freedom and the notion of a collective will, which theorists of positive freedom

[34] *Ibid.*, p.181. Italics are Carter's.

have found essential to the understanding of the idea of freedom. However, it should be pointed out at this juncture that although many theorists of positive freedom have in mind such a nexus, there are notable exceptions. These exceptions prove both that a theory of positive freedom neither has to endorse nor has to depend on a specific collectivist theory, and that the conception of negative freedom is inadequate.

Two of the theorists from this group are Kant and J. S. Mill. The reason that these two theorists should be counted in the positive freedom persuasion is that both of their theories go beyond the mere emphasis on non-interference by external forces, which is the basic tenet of the conception of negative freedom, and that each of the two theorists endorses a conception of personal freedom that makes a strong demand on the agent qua subject of freedom. Taking a common stand that marks the positive freedom persuasion, both theorists insist that the individual moral agent should live his life in a way that is informed by a conception of good life.

Kant equates freedom with autonomy. A free agent is an autonomous person, a person with a will that is capable of both self-legislating and law-observing.[35] Stanley Benn explains that what sets the autonomous person apart from other types of agents is that the idea of a *nomos*, or a law, is added to the characterization of the autonomous decision maker.[36] The law, or as Kant calls it, the moral law, confers consistency and coherence on the life of the autonomous person. An individual's life will lack such consistency and coherence should there be no such a law governing his life, and as a result, he will become *anomic*.[37] The moral law, which consists of universalizable moral

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[35] Kant, *Foundations of the Metaphysics of Morals*, second edition, trans. by Lewis White Beck (New York, NY: Macmillan Publishing Company, 1990).
[36] Benn, *A Theory of Freedom* (Cambridge University Press, 1988), p.176.
[37] *Ibid.*, p.176.

maxims, is discoverable by any mind that is capable of reason, and once it is adopted and observed by an individual moral agent, the moral law will then elevate him to the state of autonomy. The moral agent thus becomes free because he is now subject to no other laws but the law he has made for himself.

If, as Berlin apparently believes, a benchmark of theories of positive freedom is the idea of a true self, then Kant's conception of freedom is certainly one of positive freedom. Kant's conception of the true self of a moral agent is an autonomous higher self, capable of finding and observing the moral law. For such a self, freedom is not merely about being unshackled and unconstrained. To be free, the Kantian agent has to successfully identify himself with his true self, and that means that he has to achieve autonomy.

Although he is best known as a great defender of freedom in the negative sense, J. S. Mill's understanding of freedom is by and large closer to a conception of freedom in the positive sense. Apart from making the best case for negative freedom, Mill in *On Liberty* also stresses an idea which modern theorists have called self-realization. Mill makes it clear that the reason that individual human persons should be allowed a private realm of personal freedom is that the exercise of such a freedom will enable them to develop themselves to their fullest potentials. So in Mill there is an inherent requirement in the idea of freedom in terms of what freedom is for. Individuals should not make claims to freedom merely as a defensive strategy, that is, to fend off unwanted interference from others. Rather, they should exercise their freedom for the worthiest goal, which is to develop themselves into the kind of worthy human persons which they have the potential of becoming.

Critics of this interpretation may argue that, granted there is a connection between personal freedom and self-realization, but this relationship is not one within the confines of the notion of freedom, but rather one between two very distinct ideas. Self-realization may be a worthy goal for the enjoyment of freedom, but it is by no means a component of the idea of freedom. I do not believe that the potential critics' argument captures Mill's position on this issue. Mill is not one of the natural law theorists who believe that an individual's possession of freedom is entailed by his personhood. For Mill, the only argument available for allowing personal freedom is in terms of what freedom would enable individual human beings to do and become. There is not a big gap between enjoying one's freedom and realizing one's potential. There is even less distance, if at all, between the two's ontological status. Contemporary theorists studying possible contradictions between Mill's utilitarianism and his defense of liberty have pointed out that Mill would not be able to guarantee liberty the kind of near-absolute and secure status which he apparently believes it should have, unless he accords the same intrinsic value to liberty as he does happiness.[38] Mill's defense of liberty would commit him to the belief that liberty, like self-realization, should be an indispensable component of our conception of happiness, which is the ultimate goal of any human life. The implication of that belief is that liberty and self-realization are thus united in the broader notion of

[38] See, for example, Alan Ryan, *J. S. Mill* (Routledge & Kegan Paul Ltd., 1974). However, professor Joel Kupperman of the Philosophy Department of the University of Connecticut, a member of my thesis committee, has pointed out to me in his comment on this chapter that there could be two ways to assign an intrinsic value to liberty. A strong assignment would make the claim that liberty should never be suspended or violated, in any imaginable state of society; a less strong but more defensible claim would be that the value of liberty must be included, in our assessment of the consequences of actions and policies, as part of the value of happiness. Since Mill is clearly making the second claim only—as his defense of imperial Britain's denial of liberty to the people of India shows—and hence he does not seem to believe that liberty should be an absolute good, there may not be a strong case for those critics of Mill who find fault with what they see as a utilitarian approach to liberty. I agree with professor Kupperman that Mill's critics might have to qualify their claim, but my argument here does not necessarily depend on the success of a non-utilitarian defense of liberty. The weaker assignment of intrinsic value to liberty is both consistent with and sufficient for my argument about the close connection between liberty and happiness.

happiness. Therefore, it is incumbent on any pursuer of happiness to try to achieve both freedom and self-realization. I believe that this association of freedom and self-realization in Mill does qualify him as a member of the positive freedom camp.

The Case for Positive Freedom

Positive freedom theorists' main complaint about the conception of negative freedom is that a purely empirical and quantitative approach to freedom is inadequate. One of the key points contended by theorists of positive freedom is that desire, or motivation, should have a place in the conception of freedom. Theorists of negative freedom disagree. In an attempt to demonstrate the implausibility of this position, Berlin argues that if the fulfillment of one's desires is a measure of freedom, freedom can then be increased by eliminating desires.[39] I believe that Berlin's argument is specious. By Berlin's logic, one approach to attaining perfect freedom is by extinguishing all desires. A human being who is stripped of all desires can hardly survive. And even if we concede that such a human being can survive, we would not feel comfortable calling him a human person. Human life and human actions are based on desires. Without desires, human life would be without purposes. Whatever a desireless person does would be unexplainable, because he simply does whatever he happens to do aimlessly and randomly. A life that is purposeless and unexplainable is not meaningful. Therefore, even if we count such a life in as a human life, it certainly is not a life befitting a rational human person.[40] If that is so, Berlin's agent then achieves perfect freedom by becoming someone other than a

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[39] Berlin, Introduction to *Four Essays on Liberty*, p.xxxviii. Perhaps a more reasonable formulation of this argument is, rather than eliminating as many desires as possible, to eliminate only those desires that may stand no chance or very little chance of being satisfied.

[40] This line of argument finds its strongest support in David Hume. See his *An Enquiry Concerning the Principles of Morals*, ed. by J. B. Schneewind (Indianapolis, IN: Hackett Publishing Company, 1983).

rational human person. If we can agree that freedom in any case has to be enjoyed by rational human persons, then the scenario Berlin has conceived of is definitely not a state of human freedom.

Is there a more charitable reading of Berlin's argument? I guess one can interpret it to mean elimination not of all desires but only those desires that are hard to satisfy. That revision, however, does not make the argument fare much better. As it often turns out, desires that are harder to satisfy are desires of what Mill calls higher faculties.[41] Although to satisfy those desires often requires more commitment and exertion on the part of the agent, much greater pleasure and pleasure of higher forms will be generated when they are satisfied. Unless Berlin disputes Mill's claim that "it is better to be Socrates dissatisfied than a fool satisfied,"[42] these are precisely the kind of desires that a rational human person should cultivate in himself and try to satisfy.

But what exactly is the connection between desire and freedom? Positive freedom theorists argue that a conception of freedom has to take into account the desires that normally motivate an agent into action. The mistake of negative freedom theorists, they argue, is that they believe that obstacles to freedom can only come from sources external to the agent himself, therefore they do not want to admit that desires can enslave people as well.[43] But we can hardly call an alcoholic free, if his addiction to alcohol often incapacitates him, and as a result constantly frustrates his effort to implement his life plan, even though he is not hindered by any outside force. The same thing is true in the cases of all those whose indulgence in certain type of desires has prevented them

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[41] Mill, *Utilitarianism*, p.9.
[42] *Ibid.*, p.10.
[43] In his recent account of the negative freedom theory, Ian Carter does acknowledge that there are both external and internal obstacles to freedom. But that issue is largely circumvented in his book with his construction of a purely empirical measure of freedom. See his *A Measure of Freedom*.

from fulfilling the most significant goals of their life.[44] Such people are not only unfree, but also irrational.

A rational person with a free will has to be different from a rational wanton in that he is not only able to act on his desires but also concerned with the desirability of his desires.[45] A rational wanton acts impulsively on whatever desire he happens to be moved by at a particular moment. Whereas, a rational person is capable of choosing among all his desires the one that he wants to be his will. In Frankfurt's words, a rational person is someone who is capable of second-order volitions, which lift him above the level of being dictated by his immediate first-order desires. The conception of negative freedom, because it ignores the issue of second-order desires, thus fails to set the bar high enough for the idea of human freedom, and in the end fails as a theory of human freedom. For the kind of freedom conceived of by negative freedom theorists may be no more than the freedom of a bunch of aimless wantons.

For positive freedom theorists, desires, or more precisely, right desires, form the link between personal freedom of individual agents and the collective will of their identity groups. They believe that to be free, it is necessary for the individual agent to act on the right desires and resist the wrong desires. The criteria for judging the right and wrong desires are set by the agent's identity group. This idea is illustrated in such theories as Rousseau's social freedom theory, Marx's class theory, communitarianism, and contemporary theories of participatory democracy. All these theories tie individual freedom to the collective group life in which individual persons participate.

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[44] Indulgence in desires is certainly not the only internal obstacle to freedom, such things as fear and weakness of will also hinder the achievement of freedom in the positive sense.
[45] Harry Frankfurt, "Freedom of the Will and the Concept of a Person", p.11.

In Rousseau's thought, the general will represents the purposes and aspirations of the democratic community, and it can never be wrong. An individual member of the community is urged to identity himself with the general will of the community, because only by doing so will he become free, that is, free from falsehoods and illusions. Should the individual member refuse to comply with the general will, he will be forced to do so; and in being so forced, Rousseau famously claims, he is being forced to be free. This is because for Rousseau, liberty in civil society assumes a new meaning. He contends that in civil society civil liberty replaces natural liberty, and becomes the only form of liberty individual members should aspire to. As he writes,

> ...Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually the happy moment which took him from it for ever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man.
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> ...What a man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses.[46]

Clearly, Rousseau believes that civil liberty is a higher form of liberty than natural liberty. Apart from the fact that civil liberty is necessary and hence contributes to the

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[46] Jean-Jacques Rousseau, *The Social Contract*, ed. by G. D. H. Cole, revised and augmented by J. H. Brumfitt and John C. Hall, and updated by P. D. Jimack (Everyman, 1993), Bk. I, Chap. 8, pp.195-6. All later references to *The Social Contract* are to this edition.

preservation of human society, which is a great good for individual human beings, it has the added benefit of elevating individual human persons to a higher level of existence and achievement that they can never hope for through natural liberty.

In his interpretation of Rousseau, William Bluhm argues that the substitution of civil liberty for natural liberty is the inevitable result of the contradiction between people's natural tendency and the requirements of life in community.[47] The communal life does not go by the rule of the jungle—either I impose my will on society when I am strong enough to do so, or someone else's will is imposed on me when I am the weaker, which, however, is the only rule people in their natural existence know of. Rousseau sees the solution of this problem in an effort to create a common value system. This common value system would be "a common way of looking at the world", and "a common ideology of vision and aspiration".[48] And that, according to Bluhm, can only be done by remaking the natural man—by redefining his freedom in terms of the general will, and consequently, by substituting the type of liberty the natural man is used to with a type of liberty that is more supportive of the communal life.

However, despite the apparently big difference between natural liberty and civil liberty, one essential feature of liberty remains the same. For Rousseau, liberty always means to obey the law that one makes for oneself. Even the social contract and the creation of civil society do not change that fact, because the ultimate goal of those efforts is, in Rousseau's own words, "to find a form of association...in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."[49]

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[47] William T. Bluhm, "Freedom in *The Social Contract*: Rousseau's 'Legitimate Chains'", *Polity* XVI:3, 1984, p.359-83.
[48] *Ibid.*, p.375.
[49] Rousseau, *The Social Contract*, Bk. I, Chap. 6, p.191.

Nevertheless, it has to be admitted that by replacing natural liberty with civil liberty, Rousseau does demand more on individual members of society, since to enjoy civil liberty, and to obey only laws of his own making, the individual member will have to willingly embrace the general will, and adopt it as his own will. That is no small transformation of what hitherto has been the natural man, which would take a miracle to accomplish, notwithstanding the helping hand Rousseau sees in civic education.

Because of what is demanded on the average member of society, Rousseau's idea of civil liberty and his theory of freedom based on the general will have proved to be a hard sell. Despite his eloquence, Rousseau has not been able to convince many people that the interests of the average member of society coincide with the interests of the entire society, which are represented by the general will. For his version of positive freedom to succeed, he needs to find a more plausible connection between individual freedom and the collective will of the community. The idea of civil liberty would not be adequate for that effort, for that idea seems to stipulate what, in the eyes of most people, needs to be proved.

Marx's class theory fares much better in drawing this connection. A class is a group of people sharing the same economic interests. Marx argues that for individual members of the working class to cast away the shackles of economic exploitation and political oppression, they have to be united and undertake a collective struggle against the bourgeoisie. Each individual member of the class will be free only when the entire class becomes free. In their common effort to achieve freedom, members of the working class have to be united in both their goals and actions. It is therefore logical to say that the freedom of an individual member of the working class is inseparable from the collective

effort of the entire class. The validity of Marx's argument thus turns on an empirical question, which is whether individual members of the working class can only achieve freedom through group efforts.

Marx's theory is not without shortcomings. Though very compelling in the 19th century, Marx's theory is under the risk of becoming less relevant as it is gradually losing one of its main premises in the context of the modern society: the deep-rooted antagonism resulting from the irreconcilable conflict of interests between the working class and the capitalist class. In addition, his theory of the proletarian freedom places too much emphasis on economic welfare, which, though an important component, is certainly not all that human freedom is about. Furthermore, Marx's theory only has limited applicability, as he himself originally intended. It is a theory of freedom primarily for the proletarian working class. Although the working class is still a significant group in most contemporary societies, a theory that is aimed only at people falling into certain category fails to be a general theory of freedom for all of humanity.[50]

Communitarianism's claim of the inseparability of an individual person's identity from his primary social group forms the basis of its version of positive freedom. Communitarian theorists such as Alastaire MacIntyre, Michael Sandel, and Charles Taylor argue against the liberal conception of a culturally and otherwise unencumbered rational person. They claim that the severing of the individual person from his communal ties is absolutely impossible. The community, with all its purposes, values, and judgments, serves as the context of the individual's life. If taken out of the context, his

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[50] I understand that Marx would ridicule the idea of a theory for all of humanity. He probably would never accept the possibility of such a theory. I believe, however, that there is enough in common among individual human beings for there to be general theories that are broadly applicable, and the point I am making here is that Marx's theory cannot be such a general theory of freedom, because of its limited applicability which he has intended himself.

life would be inexplicable and hence meaningless. The individual in turn looks to his community for directions, as a traveler on an unfamiliar terrain looks to a map. Not only does he form his life plans according to the values and aspirations of his community, but more deeply, he is not able to function except as a member of his community. There is simply no escape from his communal identity. No wonder, for a person like this, his freedom is very much tied to the blessing of his community.[51]

I believe that the communitarian argument of individual freedom is a plausible one. Although they may be guilty of overstating their case sometimes, the communitarian theorists nonetheless point out an undeniable fact—often overlooked by liberal theorists—which is that individual human persons' need for community is more deeply rooted than has been acknowledged in traditional liberal theory.

The recent development in democratic theory seems to have followed the communitarian path. Carol Gould makes the argument in her book *Rethinking Democracy* that individual human beings are best viewed as "individuals-in-relations".[52] These individuals-in-relations form the entities in her proposed new ontology for democratic theory. What Gould means by this idea is that "individuals are such that their characteristic mode of being, that is, their activity, is relational or essentially involves their relations with others."[53] For such entities, relations are no longer merely properties individuals acquire and dissolve at will. They have now become essential aspects of their being. Individuals become who they are and what they are fundamentally through the

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[51] See MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1984), *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988); Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982); Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989).
[52] Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (New York, NY: Cambridge University Press, 1990), p.105.
[53] *Ibid.*, p.105.

relations they have constructed. Their identity is dependent on those relations, and consequently, they are defined by those relations. Gould calls such individuals social individuals.

In a similar vein, Richard Hiskes speaks of "emergent citizens".[54] Emergent citizens are civic persons who discover their identities through their relations with others. This type of citizens are defined not by private characteristics, as in traditional liberal theory, but by the civic relations they construct through engaging their fellow citizens, and participating in public discourse to deal with collective issues that pose emergent risks to the public. This idea of emergent citizenship is particularly useful in redefining individual responsibility in an age of collective vulnerabilities. The idea requires the recognition that in the modern society, citizens must bear individual responsibilities for collective risks and vulnerabilities that no one alone has caused.[55]

Gould's idea of social individuals and Hiskes' conception of emergent citizens clearly support the notion of positive freedom. In both theories, social relations are elevated to such a higher status that they now form the context of the individual's life, and define his identity. Such an understanding of the connection between the individual and his social relations commits both theorists to the view that freedom is no longer something that the individual can achieve all by himself. He has to act within his relations with other individuals, and react to the actions taken by those others. The kind of freedom that the individual can aspire to in this web of relations is the freedom achieved through self-development, that is, the improvement of oneself as someone situated in relations. Thus one tries to be a good husband, a good father, a good

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[54] Hiskes, *Democracy, Risk, and Community: Technological Hazards and the Evolution of Liberalism* (New York, NY: Oxford University Press, 1998), p.147.
[55] *Ibid.*, p.147.

neighbor, a good teacher, etc.. In this view of freedom, the web of relations the individual has woven himself will cease to be constraints and shackles of his freedom, but instead, become the environment in which his freedom is realized.

The Idea of Rights

Freedom and rights are two key concepts in liberal discourse; they are often juxtaposed in various contexts. People seem to be comfortable talking about freedom and rights in a single stroke. This close association of freedom and rights makes one wonder about the exact nature of the connection between these two ideas. More specifically, one wonders which one of the two concepts is the more basic one, or, in the case in which the connection is conceptual in nature, which is conceptually and logically prior to which. I think that H. L. A. Hart has given so far the best discussion of this connection in his article "Are There Any Natural Rights?".[56]

Hart starts with a fairly unpretentious claim: "if there are any moral rights at all, it follows that there has to be at least one natural right, which is the equal right of all men to be free."[57] This right is more fundamental than moral rights. The possession of this right is presumed of all human persons who are capable of choice, and it is not contingent on any voluntary action they have to take.[58] Hart's analysis of the idea of rights in his article shows that freedom and our ordinary moral and legal rights are connected through this equal natural right of all men to be free.

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[56] *The Philosophical Review*, Vol. 64, No. 2 (Apr., 1955), pp.175-91.
[57] *Ibid.*, p.175.
[58] *Ibid.*.

To assert a right, Hart argues, is to claim "a moral justification for limiting the freedom of another person and for determining how he should act."[59] Here limiting another person's freedom, as I understand it, is with respect to the actions that person may take which will adversely affect the right being claimed. In other words, for a moral agent to assert a right is to demand others to respect what the agent asserts as a right, and not to do anything that will result in infringing on that right.

According to Hart, there are two types of rights that individual human persons enjoy, namely, general rights and special rights. A general right is a right asserted defensively in the case of unjustified interference, for instance, the assertion of one's right to speak out one's mind when one is not allowed to do so. A special right is a right arising from special transactions between individuals, such as the right someone who has been made a promise has to hold the promising party to his words. Rights claims are general statements concerning action types. Therefore the assertion of neither a general right nor a special right depends on the content of the specific right being asserted. For instance, the right to free speech is not contingent on the content of the speech for which one asserts that right, nor does the right one has to what one is promised depend on the content of the promise. The main difference, on the other hand, between general rights and special rights is that while a person has general rights by virtue of her status as a free-willing and free-choosing human being, one assumes special rights only as a result of one's voluntary actions. Thus Hart argues that that people have general rights is a direct result of the fact that they all equally have the right to be free. As to special rights, although there is not such a direct link between them and the equal natural right to freedom, Hart contends that the reason that people can create and claim special rights for

[59] *Ibid.*, p.183.

themselves is exactly because they equally enjoy the natural right to be free. Therefore, Hart concludes, when a general right is asserted, the principle of equal right to freedom is invoked directly, and when a special right is asserted, the principle is invoked indirectly.[60]

Building on Hart's freedom-based theory of rights, Thomas Perry argues in his article "Two Domains of Rights"[61] that Hart's theory is based on the positive sense of freedom, and that his theory can be supplemented with a theory of rights based on the negative sense of freedom.[62] Hart's argument, Perry shows, is mainly concerned with the claim that individuals have rights to take voluntary actions as long as they do not coerce, restrain, or injure others. It says nothing about such other rights as those arising from negative freedom, which an individual person absolutely possesses. These rights, according to Perry, are "exemplifications of the natural equal right of all people to be free from harmful or painful conduct on the part of others, and from conduct that invades one's personal integrity in some direct and serious way."[63] Rights in this category include such general rights as the rights to others' abstention from threats, abstention from assault, abstention from rape, and such special rights as the right to self-defense, and the right to make a believable threat in order to fend off an aggressor.[64] These rights are derived from all human persons' equal natural right to freedom in the negative sense. For, different from those rights argued for by Hart, which provide an answer to the question what human beings are entitled to do, rights in Perry's category address the issue of what harms human beings can legitimately expect not to suffer.

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[60] *Ibid.*, pp.183-91.
[61] *Philosophy and Phenomenological Research*, Vol. 45, Issue 4 (June, 1985), pp.567-80.
[62] *Ibid.*, p.568.
[63] *Ibid.*, p.572.
[64] *Ibid.*, pp.572-3.

I believe that Hart and Perry have successfully uncovered the connection between the ideas of freedom and rights. As both theories have been able to show, freedom is the more basic concept between the two, and that the idea of rights is based on the idea of freedom. However, I believe that we can make the connection even more precise than is revealed in Hart and Perry's works.

The history of the development of the two ideas has shown that rights have always served the purpose of providing greater guarantee to the most essential freedoms that human beings enjoy. In their essence, rights are those freedoms that have been institutionalized for their safeguarding. Various institutions have recognized the most essential human freedoms and created freedom-protecting rights throughout the course of human history. They range from the law of nature in the case of natural rights, to moral principles in the case of moral rights, to positive laws in the case of legal and political rights. Different freedoms come to the forefront of human society in different periods of time, and as a result, various rights are created to recognize the significance of those emerging freedoms. Yet not every freedom human beings enjoy has a right to safeguard it. This is because the general presumption with respect to the human condition is one of freedom instead of unfreedom. Not every human freedom is in danger of being violated; hence not every one of them needs to be specially safeguarded. Furthermore, freedoms do not all have the same significance to our life. Some freedoms are essential, and we cannot do without them. Others are not. If there is a right to protect every freedom we enjoy, including the most miniscule ones, the idea of rights would then be trivialized. So rights are institutionalized freedoms concerning our most fundamental interests as human beings. This also explains why there is considerable overlap between the rights created

under different social institutions, for instance, rights that protect the general well-being of human persons, such as the right to life, the right to bodily integrity, etc., appear in the repertoire of all three types of rights—natural, moral, and legal rights.

Freedom, Rights, and Coercion

There is no question that the concepts of freedom and rights are largely defined in contradistinction to coercion. Thus, to be free is first of all to be free from coercive interferences of others, and to claim rights is to preempt or prevent attempts of coercive interferences of others. So it seems that coercion is in direct conflict with the ideas of freedom and rights, and that acts of coercion are in direct violation of the freedom and rights a human person enjoys.

In the contemporary liberal society as well as in modern liberal theory, there is a general presumption in favor of individual freedom and rights, and against coercion. Freedom and rights are considered goods, and have been given various names to indicate their status as such.[65] Moreover, freedom and rights are not only goods, but also goods in themselves. It has been argued by staunch defenders of freedom and rights that people should be allowed to enjoy and exercise their freedom and rights, even if for no other reason than simply enjoying and exercising them. To those theorists, the exercise of freedom and rights by individual persons generally does not depend on the character or content of the acts for which they claim freedom and rights. If people have the freedom and the right to speak their mind, they should be able to exercise that freedom and right regardless of what specific things they have to say, provided that what they have to say

[65] For instance, John Rawls calls basic liberties and rights primary goods, and Ronald Dworkin calls rights trumps. See Rawls's *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), and Dworkin's *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

would not cause immediate harm to others. It is generally agreed that freedom and rights are guaranteed to individual human beings for who they are, not because of what they use them for.

Coercion has a different story. There is a general presumption against the use of coercion in both liberal theory and social practices in liberal societies. Coercion is generally not justified unless it is used to produce some particular beneficial results. Coercion can never be justified as a general practice, but only as individual actions taken under special circumstances. Furthermore, not all sorts of beneficial results can justify coercive actions. Whatever benefits may come out of coercion have to be measured against the specific freedoms lost and rights violated, and coercive measures have to work toward ensuring greater freedom and rights in the future. However, strong supporters of individual freedom and rights, such as Ronald Dworkin, do not even agree with these qualified claims. Dworkin argues that rights are trumps. As such they are inviolable, and they should not be violated even if it is in the general interest to do so.[66] Thus, to theorists like Dworkin, there is absolutely no justification available for coercive measures that violate individual freedom and rights.

Discussion of the justifiability of coercion will thus reach an impasse when met with such rights talk. If freedom and rights are taken as absolutes, then it will be pointless to discuss the right and wrong of actions that infringe on freedom and rights. Any such action will be outright wrong from the point of view of our most fundamental moral beliefs. In that case, the tasks of moral philosophy and political theory will be vastly simplified. However, this position on freedom and rights, needless to say, is not tenable. Freedom and rights cannot be the absolute goods, because of the simple fact that

[66] See his *op. cit.*.

they are not the only goods for human beings. Equality, justice, economic welfare, peace and stability are also goods that bring benefits to human beings and they hence desire. It is fairly obvious, though still worth pointing out, that freedom and rights often come into conflict with the other goods in our social practice.[67] This fact of our social and political reality, I believe, has left open the option of the use of coercion on the part of society and the state.

In the contemporary liberal society, the measures implemented to reconcile the conflict between freedom and rights, and any of the other social goods most often are not in the form of outright coercion, since statutory laws, ordinances, and judicial injunctions can do the job better. However, as I will argue in the final chapter, the law of the state is by nature coercive. Laws are a subtle and legitimate form of coercion. But that statement does not mean that there are no significant differences between laws and coercion. The point I am making here is simply that measures that are potentially coercive are often indispensable to our social practice.

Finally we come to the question whether the ideas of freedom and rights can somehow accommodate the idea of coercion. I believe they do. Since the idea of rights in my conception is dependent on the idea of freedom, I will focus my discussion here only on freedom. I argue that coercion may contribute to freedom in both the positive and the negative sense.

Let me start with the idea of negative freedom. Theorists of negative freedom do acknowledge now that obstacles to an individual's freedom in the negative sense come

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[67] This has been shown in many libertarian theorists' works, such as Robert Nozick's *Anarchy, State, and Utopia* (New York, NY: Basic Books, 1974), in which Nozick condemns the just social arrangements proposed by John Rawls as violating individual persons' autonomy rights in general and property rights in particular.

from both without and within. Unchecked passions and rampant desires, not to mention cravings and addictions over which one has practically no control, can enslave an individual as much as external forces. The question to negative freedom theorists is: in the case in which an individual succumbs to his uncontrollable self-destructive passions and desires, is external intervention warranted? Our social practice has given an affirmative answer to that question. Compulsory treatment programs have been set up for addicts of various sorts, and what such programs effectively deny those affected individuals is their freedom to make certain bad choices. Berlin once remarked that Mill deeply believes that men's capacity for choice—choice for both good and evil—and their right to err are what make them human.[68] Once a basic tenet of negative freedom, this belief has become an anachronism in the face of facts showing how much self-destruction the supposedly rational human persons are capable of. Therefore, I believe that even by its own logic, the idea of negative freedom can accommodate coercive measures taken against individual persons under special circumstances.

In positive freedom theories, an individual's freedom is not merely a matter of making his own decisions or acting on his own choices. To attain freedom in this positive sense, an individual has to live up to certain standards set by a collective will. Depending on particular theories, the collective will determining individual freedom can come in such forms as a general will, class consciousness, or purposes and aspirations of cultural, ethnic, religious, or other identity communities. Because of the connection between individual freedom and the collective will, it is consistent with the idea of positive freedom for the entity embodying the collective will to hold individual members

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[68] Berlin, "John Stuart Mill and the Ends of Life", in his *Four Essays on Liberty*, p.192.

up to its expectations. To do so is to force the reluctant members to be free. These last words are Rousseau's, but the spirit is shared by all positive freedom theorists.

Conclusion

In this chapter, I have discussed two different conceptions of freedom—the conceptions of negative and positive freedom. I have argued that the idea of negative freedom is inadequate as a theory of human freedom, and that it needs to be supplemented by elements of the conception of positive freedom. I have also proposed an understanding of rights as institutionalized freedoms. I have argued that rights have been created under different social institutions to protect the essential human freedoms, which are freedoms regarding our most fundamental interests as human beings. And to finally resolve the central issue of this chapter, I have argued that freedom and rights cannot be considered absolute goods, because of the competing claims of other social goods, such as equality, justice, and social welfare, which often come into conflict with these two. Because of the potential conflict due to the competing demands of these various social goods, I have argued that coercion should not be ruled out automatically as a means of governance. Furthermore, I have been able to show that, when freedom and rights are not considered absolute, not to be violated under any circumstances, there may not be an irreconcilable contradiction between them and coercion.

But such a defense of coercion is only the first step toward the justification of coercion. In the next and final chapter, I will show that the need for coercion in the collective enterprise of civil society is deeper than we may have realized. I will argue that the preeminent social institution of civil society, namely, the law of the state, is

intrinsically coercive. That argument may have the implication that, as long as human beings continue to need civil society and law, like it or not, coercion may be something that they will have to live with for the long run.

Chapter Five: Coercion, the Law, and the State

In the last chapter, I have demonstrated that coercion can be accommodated within the liberal ideas of freedom and rights. However, even if that effort is successful, it only shows that coercion is not as objectionable as people have thought. Still, it does not in any way justify coercion as a means of social control. I believe that a successful effort at justifying coercion, which tempers the liberal commitment to freedom and rights, has to make the case that coercion is not simply *a* means of social control, but *a necessary* means. In this chapter, I will try to prove that there is indeed a strong connection between coercion on the one hand, and the law and the state on the other. I will argue that the law is intrinsically coercive, in terms of the descriptive definition of coercion adopted in this work. Furthermore, I will also address the issue of the proper scope and boundary of the law, which, in most cases, has been the real ground for complaints about the coerciveness of the law and the state.

Does the law coerce?

Max Weber has defined the state as the political entity that "claims the *monopoly of the legitimate use of physical force* within a given territory."[1] This Weberian definition of the state has since become the most accepted definition, and political scientists and political philosophers have generally subscribed to the view that what sets the state apart from all other political and social organizations is its possession of a coercive power over individual citizens and groups that live within its boundary. Evidence of that is the fact

[1] Weber, "Politics as a Vocation", in *From Max Weber: Essays in Sociology*, trans. and ed. by H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958), p.78. Italics are Weber's.

that contemporary theorists who are concerned with the justification of the state have paid their attention mainly to the issue of justifying one unique function that the state performs, which is its use of physical force (or violence) for the purpose of punishment.[2] However, I would contend that punishment is only one manifestation of the state's exercise of its coercive power. Another one (it's probably more correct to say, *the* other one), I would argue, is coercion.

That the state uses its power to both coerce (in the sense of deterring individuals from taking actions that the state disapproves of) and punish should be clear to all. The state makes laws, and laws prescribe correct behaviors. Individuals who fail to abide by the law and behave accordingly will be punished as a result. Now the question is what happens to the potential offenders before they take the legally prohibited actions. My answer is that the law's coercive power is brought to bear on them at that stage. Those potential offenders for whom the law is insufficiently coercive become actual offenders as they take the final step to violate the law. And those who are sufficiently deterred by the punitive power of the law do themselves a favor by sparing themselves a taste of the law's punishment.

The law will always have this coercive effect on potential offenders as long as it is generally known to the people. The only scenario in which the law may not effectively possess this coercive power is when promulgated positive laws are replaced by arbitrary decrees, which, because they are inherently unpredictable and liable to constant change,

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[2] See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York, NY: Basic Books, Inc., 1974), Part I; Daniel M. Farrell, "Punishment without the State", *Nous*, Vol. 22, Issue 3 (Sep., 1988), pp.437-53; David Schmidtz, "Justifying the State", *Ethics*, Vol. 101, Issue 1 (Oct., 1990), pp.89-102; A. John Simmons, "Locke and the Right to Punish", *Philosophy and Public Affairs*, Vol. 20, Issue 4 (Autumn, 1991), pp.311-49; Richard Dagger, "Playing Fair with Punishment", *Ethics*, Vol. 103, Issue 3 (Apr., 1993), pp.473-88.

may not be generally known to the people. However, that scenario is unlikely in the modern society, because, apart from all the wrongs of governing by decrees that have been well understood, the one inevitable consequence of that practice, namely, people not knowing what the law is, simply defeats the very purpose of having laws. The primary objective of the law is to provide and maintain a social environment of peace and order, in which human life and human activities may flourish. That purpose is better served through citizens' self-regulation of their own behaviors according to the law than the exercise of the state's punitive power. Therefore, the law has to be known to the people, and consequently, it possesses the power to coerce.

I understand that my argument, which ascribes to the law two main functions of coercion and punishment, smacks much of legal positivism, and hence may be considered difficult to accept by those who subscribe to different theories of the law. But this first impression is deceptive. As I will show later on, this argument should be acceptable to everyone, regardless whether she agrees with legal positivism. Suffice it to say here that legal positivism and other theories of law supply answers to the question what the law is, and in distinction, my argument is about what the law does. I believe that theorists who disagree on the first question may very well agree on the second. Although the two are separate and distinct questions, I do believe that one needs to delve a little bit into the first before he can hope to resolve the second. So in the following section, I will turn to the question what the law is, with my focus on the conceptions of law of several variants of legal positivism, as I believe that on this question the general position taken by that school of legal theory is the correct one.

What is Law?

The question what the law is is the first question that a jurisprudential theory has to deal with. In legal theory, two great legal traditions, namely, the natural law school and legal positivism,[3] have provided very different answers to that question. Theorists of the natural law school argue that civil laws, or the laws of civil society, should reflect the law of nature, which is understood as a set of basic moral imperatives that naturally govern human relationships. That school of thought has its origin in the Christian religious thinkers of St. Augustine and Thomas Aquinas, both of whom argue that positive laws have to be consistent with natural laws in order to have legal authority. Any law that violates the moral principles embodied in the law of nature and hence is morally unjust, cannot be a valid law at all.[4] The natural law school enjoyed its dominance in legal theory for several hundred years after Aquinas, but began to fade away after Thomas Hobbes proposed his command theory of law. Although having lost ground to legal positivism, natural law theory is not completely gone. The contemporary natural law school still counts among its followers such influential theorists as Lon Fuller and Ronald Dworkin.[5] Attempting to resuscitate the natural law theory, the contemporary natural law theorists insist that morality has to serve as a check and constraint on positive law,

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[3] A third legal tradition is legal realism. But legal realists have not generally involved themselves on the issue of the connection (or the lack of it) between morality and law, which has divided the natural law school and legal positivism.

[4] Andrew Altman, *Arguing About Law: An Introduction to Legal Philosophy* (Belmont, CA: Wadsworth Publishing Company, 1996), pp.33-8.

[5] See Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", *Harvard Law Review*, 71 (1958), pp.630-72, and *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1964); and Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), *A Matter of Principle* (Harvard University Press, 1985), and *Law's Empire* (Harvard University Press, 1986).

otherwise a system of law would be indistinguishable from a system of terror, such as the Nazi regime.[6]

On the other hand, theorists of the school of legal positivism deny that the validity of positive law depends on its moral content. The positivist school of thought in law has evolved over the years. Hobbes has been credited for starting the tradition of legal positivism. Hobbes believes that the law is nothing but the commands of the sovereign ruler. As he writes in *Leviathan*, "CIVIL LAW, *is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right, and wrong; that is to say, of what is contrary, and what is not contrary to the rule.*"[7] He makes clear subsequently in the same chapter that the sovereign is the legislator for the commonwealth, who is the only one that has the authority to make laws and interpret laws, and that no rules will become law until they are blessed with the sovereign's consent. However, while making laws that are binding for everyone else in the commonwealth, the sovereign himself is not subject to the law he makes. This is because as he has the power to makes laws, he also has the power to repeal laws. Should existing laws come into conflict with his own actions, he can always change the law to suit his purposes, therefore, Hobbes does not believe it plausible to claim that the sovereign should obey his own laws.[8]

If, as Hobbes believes, laws are the sovereign's commands, then where does the law of nature fit in, which Hobbes himself frequently invokes and discusses in his works? Hobbes argues that the laws of nature, properly speaking, are not laws, but "qualities that

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[6] Fuller, "Positivism and Fidelity to Law", cited from Joel Feinberg and Hyman Gross eds. *Philosophy of Law*, sec. ed. (Belmont, CA: Wadsworth Publishing Company, 1980), pp.68-88.
[7] Hobbes, *Leviathan*, ed. by Michael Oakeshott, selec. and intro. By Richard S. Peters (New York, NY: Touchstone, 1962), Chap. 26, p. 198. Italics are Hobbes'.
[8] *Ibid.*, p.199.

dispose men to peace and obedience."[9] They are the only type of laws in the state of nature, but when a commonwealth is established, men are obligated to obey them only after the sovereign declares them as law and commands people to obey them. But Hobbes also denies that there would be any conflict between the law of nature and the law of civil society. He insists that as the sovereign tends to make natural laws civil laws as well, the two types of laws contain each other, and are therefore in perfect harmony.[10]

What is worth noting in Hobbes' conception of the law is that by defining laws as the sovereign's commands, Hobbes fundamentally rejected the idea of the rule of law that had been preached by the natural law theorists and humanists before him. Andrew Altman points out that for Hobbes, the idea of the rule of law is a conceptual impossibility.[11] The law is what the sovereign himself declares to be law, therefore, the idea of the rule of law would require that the sovereign bind himself with his own commands and rules. The rule of law obviously will not be effective with respect to the sovereign, if he is the one who enforces the law on himself. If, however, the sovereign's commands are enforced on himself by another person, that is, by setting a judge above the sovereign who is vested with the authority to punish him, Hobbes contends that the sovereign in that case will cease to be sovereign, and that the real sovereign will be the judge above him.[12]

Hobbes' legal theory is inseparable from his moral philosophy and political theory. If we recall my discussion of him in the first chapter, Hobbes believes that the greatest good for humanity, which can only be guaranteed in civil society, is peace and

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[9] *Ibid.*, p.200.
[10] *Ibid.*, pp.199-200.
[11] Altman, *op. cit.*, p.13.
[12] Hobbes, *Leviathan*, Chap. 29, p.240.

security. And he believes that peace and security are ultimately guaranteed by men with swords to punish, not law, and that is why he endorses the rule of man rather than the rule of law. As he writes in response to the contention that not men but law should govern:

> And therefore this is another error of Aristotle's politics, that in a well-ordered commonwealth, not men should govern, but the laws. What man, that has his natural senses, though he can neither write nor read, does not find himself governed by them he fears, and believes can kill or hurt him when he obeyeth not? Or that believes the law can hurt him; that is, words and paper, without the hands and swords of men?[13]

What the above passage reveals is that Hobbes, deeply pessimistic about the nature of men and their inclinations and capacities for benevolence to their fellow citizens, strongly believes that coercion has to be a crucial component to governing civil society. To him, the law can only be effective when it is backed by the sovereign ruler's violent force. And for reason, human society would be well served to abandon any pretension to the rule of law, since ultimately, the law has to be executed by men, and the claims of the law will be heeded only when they are supported by the power to punish disobedience, which is held by those who are trusted to enforce the law.

Although there has been a near consensus among Hobbes scholars and legal theorists on the positivist identity of the Hobbesian legal theory, there have been some recent attempts to challenge that view. Mark C. Murphy is one of the theorists who question whether Hobbes can be properly viewed as a legal positivist. According to Murphy, "Hobbes' theory of civil law is historically situated in a jurisprudential no-

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[13] *Ibid.*, Chap. 46, pp.490-1.

man's-land."[14] While the era of the dominance of the natural law school had passed, legal positivism was yet to receive widespread support. As a theorist born into such a time, Murphy argues that, despite some apparent departures from the natural law thought, Hobbes' theory of law not only is not severed from the natural law tradition, but is actually closer to the thought of the natural law school than to legal positivism.

A benchmark of natural law theories of civil law is their insistence that civil laws be consistent with natural laws for them to have the status of law, and that in cases in which there is a conflict between a civil law and a natural law, the legality of the civil law is put into question. Notwithstanding his conception of the civil law as the sovereign's commands, Murphy argues that Hobbes does not fundamentally depart from the natural law school's position with respect to the relationship between the natural and the civil law.

To support his argument, Murphy points to the fact that Hobbes divides the sovereign's commands into two groups: those that the subjects are obligated to obey, and those that they are not. Those commands that the subjects are not obligated to obey include such things as "to kill, wound, or maim himself," "not to resist those that assault him," "to abstain from the use of food, air, medicine, or any other thing, without which he cannot live," to make confessions "concerning a crime done by himself," and to undertake warfare as a soldier.[15] These all are presumably commands that a sovereign may issue, which, however, violate the law of nature. Yet, Murphy contends, those sovereign commands that the subjects are not obligated to obey are not, strictly speaking,

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[14] Murphy, "Was Hobbes a Legal Positivist?", *Ethics*, Vol. 105, No. 4 (Jul., 1995), pp.846-73, p.846.
[15] Hobbes, *Leviathan*, Chap. 21, pp.164-5.

civil laws.[16] Therefore, while civil laws are the commands of the sovereign, not every sovereign command, strictly speaking, is a civil law.

But what commands are the subjects obligated to obey and hence are genuine civil laws? Murphy points to what scholars have called Hobbes' "mutual containment thesis" for a clue:[17]

> The law of nature, and the civil law, contain each other, and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature...are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey them. For in the differences of private men, to declare, what is equity, what is justice, and what is moral virtue, and to make them binding, there is need of the ordinances of sovereign power, and punishments to be ordained for such as shall break them; which ordinances are therefore part of the civil law. The law of nature therefore is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature.[18]

Thus, Hobbes believes that civil laws of civil society are natural laws transformed through the sovereign's commands. Since the sovereign would adopt laws of nature and turn them into positive laws for civil society, Hobbes insists that there will never be a

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[16] Murphy, *op. cit.*, p.849.
[17] *Ibid.*, p.854.
[18] Hobbes, *Leviathan*, Chap. 26, pp.199-200.

conflict between the natural and the civil law. As the laws of nature are already obligatory for men, the subjects are therefore obligated to obey those laws made by the sovereign that reflect the laws of nature. So, unlike the theories of later legal positivists, in Hobbes' legal theory, the law of nature plays a very important role in serving as a constraint of the civil law.

Despite Murphy's contention, it is still difficult to say definitively to which camp Hobbes actually belongs. With respect to the distinction between obligatory and non-obligatory commands in Hobbes' theory, which Murphy evokes as a support for his argument, it is hard to understand its rationale. If some commands are non-obligatory, why does the sovereign bother to issue them? Is Hobbes really prepared to say that they are not really laws at all, or is his position rather that they are indeed laws, but the subjects have good reasons not to obey them? I suspect that Hobbes would take the latter position, which is different from Murphy's interpretation. But does it really matter in Hobbes' mind whether individuals have reasons to disobey the law? It seems not, for Hobbes believes that the law has to be backed by the sovereign's power to punish disobedience. In the eyes of the sovereign and the civil law, any violation of the law is a violation, and needs to be punished, regardless whether the offender has good reasons or not. That makes one doubt that Hobbes truly intends to attach much significance to the distinction between obligatory and non-obligatory commands, as Murphy argues. I think that this distinction is best viewed as an unintended, but nonetheless logical, consequence of his primary concern, which is to preserve by any means one's own life. Although he is prepared to declare the sovereign's commands laws, Hobbes is not willing to deprive the individual of his right to preserve himself even in civil society. Nonetheless, in any

event, it is clear that Hobbes' theory of law is not an unqualified version of legal positivism as that of a later legal positivist, John Austin, to whose theory I turn now.

If there may still be some reservation in Hobbes' mind as to whether all of the sovereign's commands are law, Austin allows no ambiguity in where he stands on this issue. For him, the question of what the law is is conceptually distinct from the question of what the law ought to be. What the law is is the subject of jurisprudence, whereas, the question of what the law ought to be can only be answered by the science of legislation. For Austin, there is no question as to what the law is in civil society. As he writes:

> Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or the law of *nature*...the aggregate of the rules, established by political superiors, is frequently styled *positive* law, or law existing *by position.*[19]

Austin goes on to point out that in human society there are also rules that are "frequently but *improperly* termed *laws*," as those rules are "set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to

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[19] Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Unveranderter Neudruck der Ausgabe London, 1885), Part I, "The Province of Jurisprudence Determined", Lecture I, pp.86-7. Italics are Austin's.

human conduct."[20] In distinction to positive law, Austin designates such rules with the term "positive morality".

Laws are a species of commands, namely, commands that "oblig[e] *generally* to acts or forbearances of a *class*."[21] That is, laws are commands that enjoin or forbid general action types. Commands that enjoin or forbid specific acts are not laws. Since commands are issued by superiors to inferiors, laws, as a particular type of commands, can only be made by superiors for the purpose of binding the actions of inferiors.[22] And in the case of civil law, it is made by the holder of the sovereign power for the purpose of regulating the actions of the subjects. The sovereign is distinguished from other superiors by two marks: first, "The *bulk* of the given society are in a *habit* of obedience or submission" to him, and second, he "is *not* in a habit of obedience to a determinate human superior."[23] Austin goes on to say in the same passage that the sovereign's conduct may be permanently affected by those (improperly called) laws that are imposed and sanctioned by opinion—which he has referred to as positive morality—but to no other determinate person, or aggregate of persons is the sovereign rendered habitually obedient.[24]

So for Austin, positive law, which is the only type of law that is binding in civil society, consists of general commands issued by the sovereign of an independent political society. Whether a rule is a law for a particular civil society depends entirely on whether it is a command of the sovereign of that society. The fact that a rule is a law for a particular society says nothing about its moral content, as its validity as law does not

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[20] *Ibid.*, p.87. Italics are Austin's.
[21] *Ibid.*, p.92. Italics are Austin's.
[22] *Ibid.*, p.96.
[23] *Ibid.*, Lecture VI, p.220. Italics are Austin's.
[24] *Ibid.*, pp.220-1.

depend on whether it is morally obligatory. Austin thus distinguishes between legal and moral obligation. Subjects have a legal obligation, but not a moral obligation to obey the law. Unlike moral obligation, legal obligation speaks in terms of the evil of the sovereign's punishment. Since people are generally averse to such an evil, Austin advises them to accept the legal obligation to obey the sovereign's law. Not fearing to show his contempt for the natural law school's thought, Austin ridicules its view that positive laws that conflict with natural laws are not binding and therefore should not be obeyed as "stark nonsense", and an "abuse of language", not only "puerile", but also "mischievous".[25] He points out that even "[t]he most pernicious laws...have been and are continually enforced as laws by judicial tribunals," and that if someone who has violated the most innocuous law objects to his sentence, "the Court of Justice will demonstrate the inconclusiveness of [his] reasoning" with the infliction of punishment.[26]

Contemporary legal positivism, through the hands of such legal philosophers as H. L. A. Hart and Joseph Raz, becomes much more refined.[27] While defending the general project of legal positivism, both theorists criticize the Hobbesian-Austinian conception of law that understands the law as the sovereign's commands backed by a threat of punitive sanctions. Hart agrees with "the sources thesis" embodied in the Hobbesian-Austinian command theory of law, which says that the legality of a norm is determined by its source, that is, whether it has been sanctioned by an appropriate source of legal authority, rather than by its content. However, he finds fault with a number of aspects of the command theory.

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[25] *Ibid.*, Lecture V, p.215n.
[26] *Ibid.*, p.215n.
[27] See Hart, *The Concept of Law* (Oxford, England: Oxford University Press, 1961), and *Essays on Jurisprudence and Philosophy* (Oxford, England: Oxford University Press, 1983); and Raz, *The Authority of Law: Essays on Law and Morality* (New York, NY: Oxford University Press, 1979).

First, Hart suggests that both Hobbes and Austin have misunderstood the nature of commands. In viewing the sovereign's commands as backed by nothing but punitive sanctions, the Hobbesian-Austinian command theory renders the claims of the law conceptually indistinguishable from the coercive demands of a gunman, and is therefore unable to explain the law's authority. As he writes, "To command is characteristically to exercise authority over men, not power to inflict harm," therefore "a command is primarily an appeal not to fear but to respect for authority."[28]

To be fair to Austin, he does maintain that for the law and the legal system to be viable, there has to be a habit of obedience to the law on the part of the subjects. But Hart contends that the idea of habit only indicates the convergence of behaviors of a group of people, while the law as social rules requires more than mere convergence of behaviors. He argues that there is an "internal aspect" to social rules, which requires that not only do people's behaviors converge, but also they have a "reflective critical attitude to this pattern of behavior", that is, the convergence of their behaviors is consciously driven by their deference for the rules.[29] This aspect of social rules can be illustrated by chess-playing. Chess players do not simply happen to move the Queen in the same way; the players' moves are the result of their conscious following of the rules of the game. In any event, the command theory of law fails to provide an explanation and justification of the authority of law, and the ground on which the subjects develop such a reflective critical attitude to the law.[30] As two other commentators agree, the command theory's reliance on punitive sanctions is actually an admission of the law's failure in that regard. "Rather than explaining the obligations law imposes, sanctions are a sign that the law has

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[28] Hart, *The Concept of Law*, p.20.
[29] *Ibid.*, p.55.
[30] *Ibid.*, pp.54-6.

failed fully to motivate compliance on its own terms. In order to understand the authority of law, we need to understand how law might motivate compliance in the absence of sanctions."[31]

Second, the conception of laws as a sovereign's commands fails to account for the continuity of the law, since the general habit of obedience to one sovereign does not by itself guarantee that there will be the same habitual obedience paid to his successor.[32] Third, the command theory of law that puts the sovereign above the law does not square with the practice of constitutional government, which has increasingly become the norm among all political regimes, and in which the sovereign's legislative power is restricted and the sovereign itself is subject to the same laws as the subjects.[33] And finally, the command theory of law does not fully capture the scope of law. There are laws that cannot be properly characterized as commands, that is, to serve to enjoin or forbid. For instance, legal rules that regulate contracts, wills, or marriages, do not require people to act in certain way; instead, they confer legal powers upon individuals to allow them to realize their wishes.[34]

Having critiqued the previous positivist theories for their failures, Hart goes on to provide a new version of legal positivism. For Hart, law consists of two types of rules: primary rules and secondary rules. Primary rules directly impact individual liberty by restricting or enabling behaviors. Secondary rules break down into three kinds, those that create the power to legislate, those that create the power to adjudicate, and finally a rule

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[31] Jules L. Coleman and Brian Leiter, "Legal Positivism", in Dennis Patterson ed. *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers Ltd., 1996), p.245.
[32] Hart, *op. cit.*, pp.51-4.
[33] *Ibid.*, pp.70-76.
[34] *Ibid.*, p.27.

of recognition.[35] The rule of recognition serves to identify the law for members of society. Once it is accepted, it provides both private persons and officials with "authoritative criteria for identifying primary rules of obligation."[36] Hart believes that in any legal system, there have to be primary rules that impose obligations, and a rule of recognition that specifies the conditions under which a rule that imposes obligations becomes a legal rule. In other words, the rule of recognition confers legality on the primary rules of a legal system. In contrast to Hobbes and Austin's view that the source of the law's authority is in the sovereign's ability to impose sanctions, Hart believes that the primary rules' status as law and their authority are derived from their validity under the rule of recognition, and that the authority of the rule of recognition depends on its being accepted from the internal point of view as a social rule.[37]

However, there is some reservation among commentators about Hart's interpretation of the law's authority. Jules Coleman and Brian Leiter question whether the authority of the rule of recognition can be properly derived from its internal aspect as a social rule. I have mentioned above that for Hart, the internal aspect of a social rule requires people's reflective acceptance of the rule, and that they treat it as a reason for taking the relevant action. But to ground the authority of the rule of recognition in the internal point of view of a social rule amounts to claiming that "what makes a norm reason giving is the fact that the majority of individuals treat it as such."[38] Coleman and Leiter therefore maintain that the acceptance of the rule of recognition from the internal point of view is likely to be a reliable indicator of its normativity, but definitely not the

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[35] Coleman and Leiter, *op. cit.*, p.245.
[36] Hart, *op. cit.*, p.97.
[37] Coleman and Leiter, *op. cit.*, pp.245-7.
[38] *Ibid.*, p.247.

source of its authority.[39] Instead, they propose as a candidate for the source of the rule's authority an idea that Hart has ruled out. That is the idea of the convergence of behaviors. That idea is traced back to the Austinian notion of habitual obedience, and Hart rejects it as a sufficient ground for the law's claim to authority. But Coleman and Leiter contend that the eligibility of the fact of convergent behavior lies in two functions it serves: first, it provides a solution to the coordination problem of social practices, and second, by showing the dominant behavior patterns, it enables one to more likely do what is the right thing to do. Thus, the fact of convergent behavior provides both a prudential and an instrumental reason for treating the law as authoritative. Therefore, they believe that an account in terms of convergent behavior provides the best explanation for the law's authority.[40]

However, to ground the law's authority in the fact of convergent behavior is hardly without a problem. Similar to Coleman and Leiter's criticism of Hart, one can argue that their suggestion is tantamount to saying that what makes a practice authoritative is the fact that the majority of the people in a community actually follow it. Their move is also guilty of confusing the "is" with the "ought", as, they suggest, Hart does. Besides, the idea of convergent behavior is not fundamentally different from Hart's idea of the internal aspect of a rule. The only difference is, rather, Hart goes even further and requires that, in addition to a convergent behavior, people also have a convergent attitude to the rule that regulates the relevant behavior.

Joseph Raz's contribution to the development of legal positivism lies primarily in his succinct summary of the several common themes shared by different versions of legal

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[39] *Ibid.*, p.247.
[40] *Ibid.*, pp.247-8.

positivism. According to Raz, legal positivism has a social thesis, a moral thesis, and a semantic thesis. In the most general terms, the social thesis claims that what is law and what is not is a matter of social fact. The moral thesis says that the moral value of law is contingent on the content of the law and the circumstances of the society in which the law applies. And finally, the semantic thesis argues that terms such as "rights", "duty", and "obligation" have different meanings in legal and moral contexts.[41] Among the three theses, Raz tells us that the social thesis is what fundamentally distinguishes legal positivism from rival schools of thought, such as natural law theory.

However, as Raz shows, the social thesis not only differentiates legal positivism from rival theories, but also sees a significant amount of contention among legal positivists. While agreeing in general terms that the identification of the law is a matter of social fact, legal positivists have subscribed to two different versions of the social thesis. The version that Raz defends is what he terms the strong social thesis, which prescribes that the identification of the law and its content depend entirely on facts of human behavior that can be described in value-neutral terms, without the need for moral argument.[42] Since, according to the strong social thesis, what is law and what is not ultimately boils down to the question about the law's sources, Raz renames the strong social thesis "the sources thesis".

The sources thesis claims that "the law on a question is settled when legally binding sources provide its solution," and the application of the law involves only technical skills in legal reasoning, but not moral acumen.[43] When a legal question cannot be answered by applying the relevant standards derived from legal sources, the question

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[41] Raz, *The Authority of Law*, pp.37-8.
[42] *Ibid.*, pp.39-40.
[43] *Ibid.*, p.49.

then lacks a legal answer. In deciding cases involving such questions, courts will have to break new legal ground, and their decisions will have the effect of developing the law.[44] Although courts may very well act on moral and other extra-legal considerations in deciding such cases, their action does not violate the fundamental principle of legal positivism embodied in the social thesis, for their action would constitute the creation of new laws, which, Austin has long pointed out, is a separate activity from the identification and application of the law, only to which the social thesis applies.

While two of Raz's theses are generally accepted by legal theorists, there has been some disagreement with his formulation of the moral thesis. Brian Leiter argues that the moral thesis is not formulated in such a way that it straightforwardly reflects legal positivism's difference with other theories on the issue of the connection between law and morality. He proposes, instead, what he calls a "separability thesis", which states clearly that what the law is and what the law ought to be are separate questions. He believes that his separability thesis best captures the positivist school's belief on this issue.[45]

As I have mentioned above, I support the positivist position on the issue of what the law is. In agreement with Austin, I believe that what the law is and what the law ought to be are two separate questions that should be dealt with in two different realms of activities. What the law ought to be is a question faced by those vested with the power to make laws, and that question is fit to be considered at the stage of law-making. At that stage, moral and other extra-legal considerations are very appropriate, and should carry much weight in deciding what shape the law should eventually take. But once the law is

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[44] *Ibid.*, pp.49-50.
[45] Brian Leiter, "Legal Realism and Legal Positivism Reconsidered", *Ethics*, Vol. 111, No.2 (Jan., 2001), pp.278-301, p.286.

made, the question of what the law ought to be becomes a settled issue. The only remaining question then is how to identify the law, which involves approaches, methods, skills, and activities that are entirely legalistic in nature, and belong to the realm of law's application. To conflate these two questions by invoking such sensational and highly unusual cases as the Nazi regime is a mistake, because, excluding the very few extreme cases, the move to declare invalid laws that violate moral norms would leave the people in some reasonably just legal systems in a legal limbo, and thus deprive them of the benefit of certainty they would otherwise enjoy through knowing the law.

There are two more lines of defense of the separation of law and morality. If moral norms are to be considered by private citizens and public officials alike and allowed to be used to (in)validate laws, and more specifically, the claim of moral harm is to be a lawful ground for disregarding a law, the result will be legal anarchy. The law will have a hard time being enforced, as everyone can invoke his or her moral beliefs to justify disobeying laws. Furthermore, if causing a moral harm can be a legitimate reason for disregarding a law, wouldn't then, in the same token, the lack of any moral harm be used for the same purpose? For instance, on what ground are we going to say that one cannot run through a red light in the middle of the night when there is no other traffic? Because of these difficulties, I believe that a legal system would be best served to follow the positivist principles of law.

The Functions of the Law

I have argued at the beginning of this chapter that the law performs the two functions of coercion and punishment in order to serve its purpose, namely, to maintain peace,

security, and order in civil society. And I have also anticipated that my ascription of a coercive and a punitive function to the law may make my argument difficult to accept for those who do not agree with legal positivism, which, in our impression, tends to emphasize these aspects of the law. However, as I have also made it clear, my claim that the law functions to coerce and punish should be accepted by people subscribing to any jurisprudential theory. This is because my claim does not involve the more contentious issue of what the law is, but only deals with the more obvious question of what the law does. It cannot be denied even by the harshest critic of legal positivism that the law indeed serves these functions. No matter what the law's content is, or how noble it is, the application and enforcement of the law will inevitably involve coercion and punishment. To anyone who refuses to admit this, I would ask what miraculous force he thinks prevents many of those with criminal inclinations from actually committing a crime? The answer seems clear. There is no other force than the fear of punishment that criminal law causes in the mind of those people, and that fear is exactly the result of the law's coercive effect.

Critics may still object and point out that attributing a coercive influence to the law amounts to presuming a general tendency on the part of citizens to violate the law. That doesn't have to be the case at all with respect to all the individual citizens, or all the choices and actions of a single citizen. For most of the people and in most of their choices and actions, there is no conflict with the law, and therefore it is not the case that people are constantly torn between following their own inclinations and obeying the relevant legal provisions. They experience the coercive pressure of the law only when their potential actions do contradict the law, but that, I would assume, happens only very

rarely in the case of the vast majority of the people. Professional criminals probably are the only ones who constantly feel the coercion of the law, and that is precisely because in them there is indeed such a general tendency to violate the law. Therefore, to suggest that assigning a coercive influence to the law has the implication that people abide by the law merely because they are coerced into doing so insults the majority of the people, who either have no occasions to violate the law or obey the law conscientiously.[46]

Finally, critics may claim that the law's influence on people is based on its authority, not its coerciveness. Joseph Raz represents this view. Raz argues that the law has a claim to legitimate authority. That means that, in addition to *de facto* authority, it has authority also in the *de jure* sense. His argument is supported by the fact that what is commonly true about the law in a society is that not only is the law generally obeyed by the people subject to it, but there usually is also a general agreement among the same people that the law should be obeyed. Like anything else that claims legitimate authority, the claim of the law, Raz tells us, is not that the law's pronouncements provide one additional reason for people to take the relevant actions; rather, it is the claim that they should serve as "exclusionary reasons", that is, they should be the only reasons for people to obey the law.[47] If we recall the discussion of Raz's view of authority in general in Chapter Three, an exclusionary reason for complying with an authoritative pronouncement is the reason that preempts all the other reasons either for or against such

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[46] What distinguishes between the two types of people is the following: those who have no occasions to violate the law are the ones who either agree wholeheartedly with the law in both thought and action, or whose actions always happen to conform to the law; and those who conscientiously obey the law are the ones who choose to obey the law simply because it is the law, regardless of their own judgment of the law, in other words, they accept the law's claim to authority over them (see my discussion of authority in Chapter Three and next in this chapter). I don't know which type is more common.

[47] Raz, *The Authority of Law*, p.30.

compliance.[48] That the law's pronouncements serve as exclusionary reasons for citizens to obey the law is a logical consequence of two important features that Raz identifies in authority's claim, namely, content-independence and preemption. A genuine authority has to be able to command its subjects' obedience regardless of the content of its directive, and regardless whether there are other reasons for obedience. By asserting that the law claims legitimate authority in the sense that the law itself serves as an exclusionary reason for citizens' obedience, Raz is making the argument that having the status of law should itself be sufficient for legal rules to receive citizens' compliance.

I am quite sympathetic to Raz's argument that ascribes legitimate authority to the law. I believe that if there is anything that can make a plausible claim to the kind of authority conceived of by contemporary theorists—the conception of authority that I have referred to as the Friedman-Raz analysis in Chapter Three—the law is arguably the most eligible candidate. Indeed, the law may well be the only thing that people obey unconditionally out of their respect for its authority. It is hard to imagine that any human authority figure commands the same unquestioned obedience.

Having said that, we have to acknowledge that the law is indeed often broken by people, and that not all the law-breakers are those who reject completely the authority of the law. I would assume that the vast majority of those violators, when probed closely, would acknowledge the legitimacy and the authority of the law, and concede that by breaking it, they have done something wrong. If this assumption is true, what is then put into question is the *de facto* authority of the law.[49] But we should note here that the law's

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[48] See Chapter Three, p.9, and Raz, "Authority and Justification", *Philosophy and Public Affairs*, Vol. 14, Issue 1 (Winter, 1985), pp.7-10.

[49] Raz apparently takes the law's *de facto* authority for granted, as he believes that it is the law's *de jure* authority that needs to be argued for. This is understandable because the law's very existence and

claim to *de facto* authority is based on its general acceptance by those subject to the law. It does not require complete acceptance and full compliance by the entire citizenry. In any society and any legal system, there are bound to be people who put themselves at odds with the law. But as long as violations of the law by that minority of people do not threaten the legal system by calling into question the general efficacy of the law, the law remains in *de facto* authority.

However, acknowledging the law's *de facto* and *de jure* authority does not necessarily mean that coercion by the law is automatically ruled out. It is a matter of fact that in any society there are people whose relationship with the law cannot be properly characterized as an authority relationship. Those people I am referring to are obviously the relatively small group of actual and potential violators who do not treat the law with the same respect as the other members of society. How shall we characterize their relationship with the law? If the conception of coercion I have proposed in Chapter Two is correct, then whether coercion actually occurs is an empirical question, and is determined by whether the party subject to someone else's influence actually feels coerced. In the case of a potential violator of the law, although he forms the will and the intention to take an action that violates the law, he does not actually carry it out. And what prevents his will and intention from materializing into action is precisely the coercive impact the law has over him by virtue of its ability to punish. In the case of an actual violator of the law, I believe that the law exercises the same kind of coercive influence over him—it is just insufficient to prevent him from committing the violation—unless he is one of the die-hard criminals who have no fear of punishment and therefore

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functioning as law depends on its being generally accepted by those subject to it. See Raz, *Authority of Law*, p.28.

no qualms about violating the law. But that is an unlikely scenario for the majority of the actual violators.

Therefore, there is no contradiction in claiming both that the law has legitimate authority and that it exercises coercive influence. For the vast majority of law-abiding citizens, their relationship with the law is properly characterized as an authority relationship, as they treat the law with the same kind of respect that theorists have identified in any genuine authority relationship, and regard the law's pronouncement itself as the reason for them to comply with it. On the other hand, the law's relationship with the potential and actual offenders is one based on coercion, in which the law's coercive power is sufficient to deter the former but not the latter. Thus, the claim that the law exercises coercive influence is a factual statement, but it does not detract from the law's legitimacy or authority, as some would argue, nor does it in any way insult the vast majority of citizens who willingly abide by the law.

The Justification of Coercion and Punishment

It should now be evident that the state uses its law to both coerce and punish for the same purpose of maintaining peace and order in civil society. It therefore follows that if the state and the law possess a legitimate right to do the one, they will have an equally legitimate right to do the other. But do the state and the law possess such legitimate rights to coerce and punish? Although there has not been much effort toward justifying coercion, there is ample literature on the justification of punishment by the state. Since, as I believe, proving the state having the right to punish also establishes its right to coerce, the literature on the justification of punishment should shed much light on the

justification of coercion. Therefore, let's first take a look of theorists' efforts at justifying the institution of punishment.

The Justification of Punishment in the State of Nature

With Locke, state-of-nature and social contract theorists generally believe that whatever rights people have in civil society were carried over from the state of nature. The social contract does not create any new rights. Therefore, any justification of the right to punish in civil society has to be found in the state of nature. Locke declares that in the state of nature, human beings have a general right of "punishing the crime for restraint", and a special right of "taking reparation".[50] The general right belongs to everyone, and the special right is the victim's. The general right of punishing crime does not entitle every person in the state of nature to punish violators of the law of nature according to his passion and will, but to do so as his reason and conscience dictate.[51] As to the question what justifies this general right of all to punish, Locke's answer is that this right is grounded in an even more fundamental right and duty of men, which is "doing all reasonable things" to ensure "the peace and preservation of all mankind".[52]

This account of the general right of punishment is not without criticisms. Nozick calls Locke's arrangement "a system of open punishment".[53] He points out that such an arrangement will be beset by a number of difficulties. For instance, there is the question whether this system of open punishment allows the first actor to preempt similar actions of all other potential punishers; and there is also a possibility that sadists may compete

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[50] Locke, *Second Treatise of Government*, p.11.
[51] *Ibid.*, p.10.
[52] *Ibid.*, p.11, p.9.
[53] Nozick, *Anarchy, State, and Utopia*, p.138.

with each other to be the first to put their hands on the offender, therefore magnifying the problem of keeping the punishment within reasonable bounds.[54] The same worry of overpunishment is also shared by David Lyons, who suggests that in the Lockean system, an offender may be punished again and again for the same crime, since everyone has the equal right to punish the offender for any particular crime.[55] That worry prompts Daniel Farrell to suggest that to make Locke's theory of punishment plausible, "the alleged right must be thought of not as the right of everyone to punish anyone who does wrong, *simpliciter*, but, rather, as the right of everyone to punish anyone who does wrong *until that wrongdoer has been punished up to a certain point.*"[56] Although details of that part of the arrangement that ensure the commensurability between the crime and the punishment are yet to be worked out, the potential problems surrounding the manner in which the punishment is carried out in the Lockean system are not irresolvable.

A potentially more troubling problem of the Lockean theory of punishment lies in two inseparable questions: what purpose punishment serves, and what justifies punishment. Although he does not phrase his discussion of punishment in clear retributive or deterrent terms, Locke does not believe that an offender should be punished for the reason that he has done something wrong. In other words, he does not subscribe to the retributive theory of punishment. Locke's theory of punishment looks more like a deterrent theory, as he clearly states that the general right to punish is grounded in men's right and duty to preserve all mankind.[57] More specifically, when talking about the severity of punishment, Locke writes, "each transgression may be *punished* to that

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[54] *Ibid.*, p.138.
[55] Lyons, "Rights against Humanity", *The Philosophical Review*, Vol. LXXXV, Issue 2 (April, 1976), p. 210. Cited from Daniel M. Farrell, "Punishment without the State", p.439.
[56] Farrell, "Punishment without the State", p.439.
[57] Locke, *op. cit.*, p.11.

degree, and with so much *severity*, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."[58] So it can be properly inferred that Locke thinks that punishment should serve the purpose of deterring other criminals and preventing similar crimes from happening again in the future. That presumably is also what, in Locke's mind, justifies the institution of punishment. But the problem with his account is whether the reason Locke adduces for practicing punishment is sufficient to justify the infliction of punishment on straying human beings.

The debate on the purpose and justification of punishment, which started after Locke, has been quite contentious. Historically, there have been two rival camps on this issue, namely, retributivism and utilitarianism. On the utilitarian view, punishment is justified entirely by its beneficial consequences. As Jeremy Bentham declares in discussing the purposes of law and punishment:

> The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness: in other words, to exclude mischief.
>
> But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.[59]

In a footnote to the above passage, Bentham goes on to say:

> The immediate principle end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it

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[58] *Ibid.*, p.12. Italics are Locke's.

[59] Bentham, *An Introduction to the Principles of Morals and Legislation*, eds. By J. H. Burns and H. L. A. Hart, and new intro. By F. Rosen (Oxford University Press, 1996), p.158.

> controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power, in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*.[60]

So for Bentham, punishment brings about two long-term beneficial consequences, namely, the rehabilitation of the offender and the deterrence of other potential offenders, both of which would contribute toward augmenting the total happiness of the community through maintaining peace and order in the community. Later utilitarian defenders of punishment have tended to emphasize more the deterrent function of punishment, as that obviously does more to maximize social utility than the mere rehabilitation of the offenders.

The retributive theory, on the other hand, "justifies the suffering inflicted by punishment [with] the moral culpability of the behavior that is punished."[61] However, while all retributivists believe that crimes should be punished for no other reason than that they are crimes, unlike the utilitarian theory, in which there is a general agreement among its believers on what precise purpose punishment serves, retributivism includes a variety of views as to what punishment does to the offenders and their offences. In his survey article of retributive theories, John Cottingham finds nine different versions of retributivism, with each providing a different explanation to the question what purpose

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[60] *Ibid.*, p.158a.
[61] Michael Lessnoff, "Two Justifications of Punishment", *The Philosophical Quarterly*, Vol. 21, No. 83 (Apr., 1971), pp.141-8, p.141.

punishment serves.[62] They range from the repayment theory, which encapsulates the basic sense of retribution, to the penalty theory, as espoused by Kant and John Mabbott, to the satisfaction theory, which claims that the rightfulness of punishment lies in the satisfaction it brings to others, to the placation theory, which is inspired by the Old Testament notions of sacrifice and placation, and which is also traced to Kant, to Hegel's annulment theory, which claims that punishment annuls the crime, and finally, to the denunciation theory, according to which punishment is the emphatic denunciation by the community of a crime.

The utilitarian and the retributive theories have been divided by each side's strong criticisms of the other side's view. Retributivists have long contended that reform and deterrence are external to the issue of punishment. They ask, if punishment can achieve neither result, would that prove punishment of crimes unjust? More damagingly, they point out that utilitarianism's sole concern with consequences would commit it to the position that punishing an innocent person is permissible in certain circumstances.[63] For their part, utilitarian theorists of punishment fault retributivism for its vindictiveness in its insistence that criminal desert is a good and sufficient reason—and very often the only reason—for imposing punishment. They could also argue that, by the logic of the retributive theory, punishment would be rendered inapplicable to instances in which violations of the law cause no harms and hence deserve no moral condemnation, e.g., running through a red light on an empty street in the middle of the night.

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[62] Cottingham, "Varieties of Retribution", *The Philosophical Quarterly*, Vol. 29, No. 116 (Jul., 1979), pp.238-46.

[63] J. D. Mabbott, "Punishment", *Mind*, 48 (1939), pp.150-67, cited from Gertrude Ezorsky ed. *Philosophical Perspectives on Punishment* (Albany, NY: State University of New York Press, 1972), pp.165-81, pp.166-7.

However, despite the division between the two theories, some legal theorists have made successful attempts at reconciling the retributive and the utilitarian defense of punishment. Hart was the first one to make such an effort.[64] Acknowledging that no single value or aim is sufficient for the purpose of justifying punishment, Hart proposes a two-pronged approach to deal with that question. He argues that the justification of punishment involves two issues, with the one being the issue of the "general justifying aim" of the practice of punishment, and the other the issue of "distribution". The general justifying aim refers to the general justification for having an institution of punishment, while distribution refers to the distribution of punishments to particular individuals.[65] Hart believes that, with the question of justification divided into these two issues, it becomes evident that the claims of the retributive and the utilitarian theories are not necessarily in contradiction to each other. "It is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence."[66] In other words, the utilitarian reasons are to be used to justify punishment as a social institution and general practice, while the retributive considerations are to be applied to meting out punishment in individual cases.

Equipped with this new insight, a commentator even finds room for compromise within what has previously been considered a thoroughgoing retributive theory. Don

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[64] Hart, "Prolegomenon to the Principles of Punishment", Inaugural Address to the Aristotelian Society, pub. in *Proceedings of the Aristotelian Society*, 60 (1959-60), collected in his *Punishment and Responsibility* (Oxford University Press, 1968), pp.1-13, cited from Ezorsky ed. *Philosophical Perspectives on Punishment*, pp.153-64.
[65] Don E. Scheid, "Kant's Retributivism", *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp.262-82, p.263.
[66] Hart, "Prolegomenon to the Principles of Punishment", p.161.

Scheid finds that there is enough textual evidence to show that, contrary to the conventional understanding, Kant does give considerations to factors other than moral desert in his justification of punishment. That his theory can accommodate those basically utilitarian considerations is precisely because he also distinguishes between punishment as a social institution and punishment in particular cases.[67] As Scheid argues, "the institution of punishment, which is part of the legal system, is justified for Kant on the ground that it provides an external incentive for citizens to refrain from infringing on each other's freedom."[68] So in Hart's terminology, Kant also believes that the general justifying aim of punishment admits of different justificatory reasons from particular punishments. Failing to appreciate that distinction, Scheid believes, is at least part of the reason for the mistaken perception that Kant is an unequivocal retributivist.

More recently, David Dolinko challenged Hart's distinction between justifying punishment as an institution and justifying it in individual cases.[69] As Dolinko contends, "to speak of a 'justifying aim' risks conflating the issue of *why* we punish ... with that of what *entitles* us to punish," and it is preposterous to suggest "that we can decide what punishment is and why we engage in it without knowing who is supposed to receive punishment."[70] Instead, Dolinko proposes a distinction between what he calls the "rational justification" of the practice of punishment and the "moral justification" of punishment. The rational justification is in answer to the question for what reason or reasons wrongdoers are punished, and the moral justification explains why it is morally

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[67] Scheid, *op. cit.*.
[68] *Ibid.*, p.270.
[69] Dolinko, "Some Thoughts about Retributivism", *Ethics*, Vol. 101, No. 3 (Apr., 1991), pp.537-59.
[70] *Ibid.*, p.541.

permissible to engage in this particular practice.[71] So Dolinko's strategy is, rather than differentiating between the justification of punishment at two different levels, making a distinction within the notion of justification itself. Despite their difference, I believe that, like Hart's distinction, Dolinko's two types of justification are also grounded respectively in the utilitarian and the retributive considerations. It would be a reasonable position for the rational justification of punishment to invoke the beneficial consequence of deterrence, and for the moral justification to appeal to the moral desert of the criminals.[72]

I agree with Hart, Scheid, and Dolinko that the debate between the retributive and the utilitarian theories of punishment does not have to end with the total victory of one side. I believe that there is merit in both sides' views, and that a sufficient justification of punishment would have to take a combination of both theories.

A recent effort at justifying punishment, however, goes beyond the confines of the traditional retributive and utilitarian theories. In his article "Punishment without the State", Daniel Farrell asks what will happen to the general public if someone who knowingly violates the law and brings harm to another person goes unpunished. The answer is an increased probability of another member of the public being harmed in the future. That thus forces on the public a choice between letting an innocent person (who might be anyone of them) be harmed in the future and harming the one who, through his own wrongful conduct, knowingly brings about such an undesirable choice to the public. Since the harm of not punishing the offender is quite real, (not withstanding the objection

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[71] *Ibid.*, p.539.

[72] Dolinko apparently is critical even of what he calls the modest version of retributivism, which invokes desert only for the purpose of the moral justification. But, as I interpret him, he is not arguing that desert is not fit to be used for the moral justification, rather, he is criticizing the modest version for failing to provide a reasonable rational justification for punishment. See *ibid.*, pp.542-4.

that there is still only a probability, not absolute certainty, of such a harm,)[73] and since the harm can come to anyone, the principle of fairness thus gives rise to "a quite plausible principle of distributive justice"[74] (which is a principle for the distribution of harms), which dictates the choice of harming the offender rather than an innocent person.[75]

Although Farrell calls his principle a principle of distributive justice, it may very well be viewed as a simpler principle of collective self-defense. Just like a potential victim of a violent crime is justified to inflict sufferings on his attacker in order to avoid suffering himself in his attacker's hands, society as a whole should have the right to inflict sufferings on current offenders so as to spare some unspecified individual members probable sufferings in the hands of future offenders. What is involved in justifying such collective self-defense is the same principle of fairness Farrell invokes for his principle of distributive justice. On the choice between the option of defending itself against probable future sufferings by punishing current offenders, and the option of not punishing current offenders and as a result exposing itself almost surely to future harms, society should be allowed to choose to defend itself. It is a matter of fairness that those who cause harms should be the ones that are made to suffer, not some innocent others.

Farrell's argument also bestows upon the institution of punishment a sense of necessity, as society can rightfully declare, in Farrell's words, "we *know* of no way to avoid harm to the innocent except through harm to the aggressor."[76] Therefore, if anyone

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[73] This view is actually not correct. There may not be an absolute link between not punishing a particular crime and someone suffering a subsequent crime in the future. But if every crime goes unpunished, or more radically, the institution of punishment is entirely dealt away with, there is absolute certainty that future crimes will occur as a result of the absence of institutional punishment.
[74] Farrell, "Punishment without the State", p.443.
[75] *Ibid.*, pp.443-50. And the two formulations of this principle of distributive justice are on p.443.
[76] *Ibid.*, p.448.

is to blame for society's acting to harm the offenders, it is the offenders themselves, who are responsible for forcing society to make a choice as to whom to harm.

The Justification of Punishment by the State

So far we have established the moral permissibility of the practice of punishment before the state is factored in. Now the question we face is whether the creation of the state and the concentration of the right to punish in its government apparatus would in any way affect the justification of the institution of punishment. In Locke's theory, the creation of the state and the consequent transfer of the right to punish are achieved by a common agreement to a social contract through mutual consent by the people of the state of nature, whereby the general right of all to punish is carried into the state and vested in the hands of the government thereby established. The transfer of this general right is achieved, more specifically, through the voluntary surrender by each individual person of his or her right to punish to the government of the state. So in Locke's view, consent provides one additional piece of justification to punishment in the state that is needed, namely, the justification of the state's monopoly of punishment.

However, it is well known that contemporary theorists have not felt very comfortable with Locke's consent theory. Carole Pateman argues that liberal theorists have regarded consent as the fundamental ground for political obligation. However, as she quotes Richard Flathman as saying, that position seems to lead to the unsavory conclusion that very few people have political obligations, as very few people have had the opportunity to give their consent.[77] To overcome that problem, consent theorists have

[77] Pateman, *The Problem of Political Obligation: A Critical Analysis of Liberal Theory* (John Wiley & Sons, Ltd., 1979), p.81.

adopted two strategies, one of which is to deny the importance or even relevance of consent, but the second and by far the more popular one of which is to equate consent with democratic voting. According to theorists who support this second strategy, "[a]ll those who take part in an election directly consent to the government which takes office, because they voluntarily took part in knowledge of the consequences of an election," and "[t]hose who abstain from voting give tacit consent to the political system as a whole," as they have in their vote an opportunity for legal opposition, but they choose not to avail themselves of that opportunity.[78]

But as Pateman points out, the assumptions underlying the above position can withstand neither theoretical challenge nor empirical proof. Most of the issues that citizens are asked to vote on neither are put in nor can be changed by the voters. The voters are simply asked to voice their support or opposition on issues of other's choice, and either result on those issues would be acceptable to the political system. In Peter Bachrach and Morton Baratz's argument, the ordinary citizens are powerless in the more important aspect of power, namely, the agenda-setting power, which is the power to decide on what to decide about.[79] Furthermore, political scientists studying voting behavior have long raised questions on such important issues as whether voters have sufficient information on the issues, whether they adequately understand the consequences of their choices, and whether their electoral decisions are based on relevant and legitimate considerations. If the electoral decisions made by voters are not well-informed and well-thought-out decisions, then one can hardly claim that the voters give their consent to the government in a meaningful way through their vote. So far, most of

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[78] *Ibid.*, p.84.

[79] Bachrach and Baratz, "Two Faces of Power", *American Political Science Review*, Vol. 56, 1962, pp.947-52.

the empirical findings have seemed to work against that claim. And finally, to the argument that those who abstain from voting in doing so actually indicate their contentment with the current state of affairs, Pateman responds that surveys have shown that citizens do not turn out to vote mostly because they are disillusioned at the electoral process due to the fact that there are no significant differences between the candidates. Therefore, it is hardly plausible to say that the abstainers give their consent as well.[80] With all these factors considered, Pateman argues that, rather than identifying a significant sense for the idea of consent, the argument of consent via voting only "empties it of most or all of its genuine content."[81]

Another big problem contemporary theorists have identified in the idea of consent is with respect to the distinction between express and tacit consent. Theorists have argued that, as there are few genuine opportunities for citizens to give their express consent in contemporary society, the idea of tacit consent is heavily relied on to justify political institutions and citizens' obligation to accept them.[82] The claim of tacit consent is subject to many restrictions. Craig Carr argues that, for actions to signal consent, they have to be "embedded in a social context that identifies them as actions associated with participation in some rule-governed activity or association."[83] Consequently, the giving of tacit consent is subject to the limitation of a "cognitive condition" and a "volitional condition". The cognitive condition requires that the party giving tacit consent understand that his action would constitute an expression of willingness to participate in a

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[80] Pateman, *op. cit.*, pp.83-91.
[81] *Ibid.*, p.81.
[82] See, for example, Richard Hiskes, *Democracy, Risk, and Community: Technological Hazards and the Evolution of Liberalism* (New York, NY: Oxford University Press, 1998), Chap. Two "Risk, Consent, and Communal Identity".
[83] Carr, "Tacit Consent", *Public Affairs Quarterly*, Vol. 4, No. 4, Oct., 1990, pp.335-45, p.337.

given activity or association. The volitional condition stipulates that the tacit consenter truly intend to participate in a given activity or association, with the consequence of entering into some normative relations with others.[84]

Despite his insistence that tacit consent is subject to the above conditions, Carr writes his article with the intention to support the practice of tacit consent. He cautions that, while it is right to be vigilant against attempts to impose commitments and obligations in the name of tacit consent that has not been given, we should also beware of the danger that tacit consent may be attacked for the purpose of producing conceptual arguments against commitments and obligations that truly exist. Carr believes that there are indeed quite many occasions in social life where tacit consent is safe and reliable in starting normative relationships, and consequently, generating moral obligations.[85]

While agreeing with Carr that it can generate moral obligations, Richard Hiskes denies that tacit consent can ever be taken as the basis of political obligations. He attempts to prove that with an example, in which a female college student has come regularly to a concert gathering in a public park, where those who attend take turns to provide food and drink for the rest of the group. After enjoying the music and the free food that others have provided for a few times, the girl is caught in a dilemma when she is told that it will be her turn to do the same.[86] In this example, it is reasonable to claim that the girl, by having knowingly enjoyed the same benefits, has tacitly consented to the practice.[87] Hiskes admits that the girl does have a moral obligation to provide food and

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[84] *Ibid.*, p.339.
[85] *Ibid.*, pp.343-4.
[86] Hiskes, *op. cit.*, pp.47-8.
[87] There may be some doubt as to whether Carr's two conditions are satisfied here. I believe they are. With respect to the cognitive condition, since it would be difficult to ascertain the tacit consenter's knowledge and understanding in most cases of tacit consent, the condition therefore should cover cases in which such knowledge and understanding can be assumed, when it is reasonable to make such an

drink to the group, as others in the group have done. However, he does not believe that the establishment of the moral obligation would then give the group the right to coerce her into fulfilling her obligation, since "[l]egitimate coercion arises from an obligation of a different, political sort," which "it is simply too risky to presume" in cases like this, where the presumed consenter may not have fully grasped the meaning and implications of consent, and has done nothing out of the ordinary.[88] In agreement with Hiskes, I also believe that the argument of tacit consent is not strong enough to serve as the ground for justifying social and political institutions and imposing political obligations. If it is safe to say it proves anything, it only proves a minimum acceptability of the institutions and obligations in question.

Realizing the inadequacy of both express and tacit consent, contractarian theorists have constructed theories of hypothetical consent to strengthen their case. The most notable one of such theories is John Rawls' account of consent given in "the original position", with which he attempts to rescue the idea of consent by assuring its critics that a truly just arrangement arising from mutual consent would be one that everyone would have agreed to if they had had the chance to cast their votes.[89] But the problem with all the hypothetical consent arguments is that hypothetical consent pulls away from

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assumption. In this case, with her level of intelligence, the girl should have realized the implications of accepting the food and drink others have provided. With respect to the volitional condition, the girl clearly intended to participate in the activity and the group, even though she may not have intended to assume the obligation arising from the membership. However, there may be a different take of the situation, which renders Carr's conditions inapplicable. One may claim that a moral obligation for the girl is established at the time she is unmistakably informed of the practice and her responsibility according to the practice, regardless of her prior knowledge and intention. The obligation would then be entirely based on the argument that those who have enjoyed the benefits should share the burden as well. I don't believe this would be a plausible interpretation, because the ground of the obligation would then be changed from tacit consent to a principle of fairness, which is clearly not what the author has intended.

[88] Hiskes, *op. cit.*, p.49.

[89] Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

underneath consent arguments the very ground on which consent serves to justify social and political institutions.

As Pateman has pointed out, consent is often billed by theorists as the firmest ground for justifying institutions of the state. No wonder there is that belief, since how else can an arrangement be better justified than those subject to the arrangement actually agreeing to it? The force of the justification by means of actual consent is therefore derived from the very nature of consent. In David Schmidtz's terminology, justification by consent is an emergent justification.[90] Schmidtz argues, "[t]he emergent approach takes justification to be an emergent property of the process by which institutions arise."[91] In contrast with the emergent approach to justification is the teleological approach, which "seeks to justify institutions in terms of what they accomplish."[92] Unlike teleological justification, which posits goals, emergent justification posits constraints on the process through which institutions come into existence.[93] Thus, in the case of actual consent, the emergent constraint on the process is consent itself. That means that the emergent justification of an institutional arrangement by consent requires nothing else but that those, to whom the institution in question is to be justified, actually consented to it. But hypothetical consent does not meet this requirement of consent being actually and explicitly given. Therefore, justification by hypothetical consent differs from justification by actual consent in the most essential property of the process, and consequently it cannot be an emergent justification.

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[90] Schmidtz, "Justifying the State", *Ethics*, Vol. 101, Issue 1 (Oct., 1990), pp.89-102.
[91] *Ibid.*, p.90.
[92] *Ibid.*, p.90.
[93] *Ibid.*, p.91.

In my view, justification by hypothetical consent is a teleological approach of justification in disguise. The teleological approach justifies an institution in terms of its goals and outcomes, and considerations of goals and outcomes are precisely those on the basis of which people in hypothetical consent situations would give their consent. Since the teleological approach is not as forceful an approach of justification as the emergent approach, hypothetical consent hence cannot muster the kind of justificatory force actual consent commands. As a result, instead of bringing a ready solution to the problem of justifying social and political institutions, hypothetical consent theories only take us on a ride and bring us back to exactly the one option we have had all along, namely, justifying institutions on the basis of their merit.

Finally, a difficulty with both actual and hypothetical consent theories lies in the contractarian model which most theorists agree describes what really happens in the process of deliberation and consent. According to the contractarian model, parties to the social contract collectively bargain about the intended outcomes. The underlying presumption of this model is that what the parties bargain for and eventually agree to would be what results from the process.[94] The problem with this account is that, not equipped with the necessary knowledge and foresight, the parties could not have intended precisely everything that would happen in civil society, and in addition, the likelihood of producing a mutual agreement on a comprehensive institutional arrangement among a large group of bargainers is minimal, to say the least. Because of these difficulties in the contractarian model, Robert Nozick believes that an alternative account, which he calls the "invisible-hand explanation",[95] is more plausible. According to the invisible hand

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[94] See Schmidtz, *op. cit.*, p.99.
[95] Nozick, *Anarchy, State, and Utopia*, pp.118-9.

model, bargaining occurs among shifting and relatively small subsets of the original parties on issues of concern to each of them, and the larger scheme of civil society "evolves through a series of relatively small-scale exchanges and is an unintended result of such exchanges."[96] If Nozick is right about what actually happened in the bargaining process, and if what come out as a result of the deliberations are not what the parties intended and gave their consent to, then wouldn't consent's justificatory force be weakened even in the eyes of the deliberants, who have given their consent to what they presumably did not fully agree with?

So all considered, consent does not seem to be a viable ground for justifying social and political institutions. There are normally not many genuine opportunities for citizens to give express consent, tacit consent cannot be safely relied on in establishing political obligations, and hypothetical consent neither can count as consent nor is really needed to do the work it is supposed to do. Given all these serious difficulties in theories of consent, one may wonder whether political theory has no choice but trust consent to play a central role in justifying social and political institutions.

Pateman mentioned that some theorists had downplayed the importance of consent to deal with the embarrassing implication of consent theories of obligation, namely, very few people have political obligations.[97] But certainly not all theorists who argue the irrelevance of consent do it for that purpose. In his article "Are Their Any Natural Rights?", Hart touches on the issue of consent, and lambastes the contractarian view of political obligation. Hart believes that social contract theorists are right in identifying the source of the general obligation to obey the law in the mutual relationship

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[96] Schmidtz, *op. cit.*, p.99.
[97] Pateman, *op. cit.*, p.81.

that members of a particular political society form with each other. But their mistake, he argues, is to suppose that this obligation is the result of "the paradigm case of promising".[98] It is obvious what he is referring to by "the paradigm case of promising". What Hart rejects is contractarian theorists' attempt to ground the justification of the law in the notion of consent. His argument is that, in a rule-governed collective enterprise involving and benefiting a large group of people, the general obligation of all members to submit to the rules is not contingent on a prior agreement by all the membership to the rules, which presumably establishes the legitimacy of the rules themselves. This general obligation is more straightforward, and does not even have to involve the issue of establishing the legitimacy of the rules. It is simply a matter of fairness that all have to share the burden of supporting the collective enterprise by abiding by its rules in order for all to benefit from it.[99]

In line with this view, Hart proposes the idea of "mutuality of restrictions" to account for the general obligation to obey the law. According to that idea, "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."[100] Hart is not alone in subscribing to this view of political obligation. By Richard Dagger's account, this view has later become fully developed through John Rawls and some other theorists, and acquired a new name—the principle of fairness.[101]

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[98] Hart, "Are There Any Natural Rights?", p.186.
[99] *Ibid.*, p.185.
[100] *Ibid.*, p.185.
[101] Dagger, "Playing Fair with Punishment", p.473.

Hart's claim that we don't really need consent to justify political obligation looks even more convincing after the numerous difficulties in consent theories are exposed. Moreover, his account of political obligation on the basis of fairness is more firmly grounded in reality than that of consent theories. Notice that social contract theorists have long admitted that their accounts of consent in the original state are theoretical abstractions rather than genuine descriptions of the historical facts, and that as such, they serve no more than a heuristic purpose. If that is so, then the idea of consent offers no real justification for the arrangement of civil society and the state. Instead, consent theories only provide an account of one way, which may not be very realistic and practicable, in which social and political institutions can justifiably arise. Since the kind of solid and secure emergent justification we have looked for in consent is not actually available to us, it seems to make more sense to claim that it is simply a brute fact that in order to make such a collective enterprise as civil society work, individual members have to agree to a mutual restriction of their actions according to some rules. Such a mutual restriction is required as a necessity for the survival of civil society, and the necessity of this requirement to the survival of civil society is itself sufficient to justify the general obligation to the law.

Critics may argue that this view seems to beg the question that any civil society is preferable to anarchy. My response would be, first of all, I believe that it is true that any civil society is preferable to anarchy, even one ruled by Hobbes' leviathan. The relative sense of security in the Hobbesian state as a result of the knowledge that there is someone enforcing rules and punishing aggressions does incline people to prefer it over the anarchy in the state of nature, where mutual suspicion and the lack of assurances are

mentally and psychologically wearing. Second and more importantly, consent does not provide better assurance that a civil society would be fair and just. This is because, as we have seen, consent theorists have a hard time with express consent, and instead rely heavily on tacit consent and hypothetical consent. But claims based on tacit and hypothetical consent are suspect, as they provide no solid evidence that people would indeed consider the institutions or arrangements in question fair and just. What makes express consent different from tacit and, especially, hypothetical consent is that justificatory efforts based on express consent count on a legitimating act, while those relying on the other two types of consent have to use legitimating arguments, which carry much less persuasive force. Finally, the critics' argument is misdirected ultimately because it is not incumbent on the fairness principle to ensure the substantive justice of the social and political institutions of a civil society. The fairness principle only makes the modest claim that there is a ground for accepting the institutions of society and obeying its law, but does not prescribe the substantive arrangements of those institutions or the content of the law. Those issues are left for the members of society to decide. The fairness principle only insists that, once those substantive issues are settled, members of society thereby assume the obligation to accept those particular institutions and obey those particular laws society has adopted.

So to go back to the question raised at the beginning of this section whether consent provides an additional needed piece of justification to the institution of punishment, and particularly to the state's monopoly of punishment, the answer is no. Should such additional justification be needed, consent is neither necessary nor sufficient to do the work. If the utilitarian and retributive arguments laid out in last section need to

be supplemented by anything, I believe that the argument of the fairness principle would be a more suitable candidate.

The Justification of Coercion and Punishment

As I have argued earlier in this chapter, coercion and punishment are two symbiotic functions of the law. Therefore, if the institution of law is justified, and one of the two functions is justified, so should be the other function. I believe that I have been able to prove that is precisely the case. Let me recap the general argument here. For civil society—or any collective effort—to succeed, there have to be conventions, norms, and rules that regulate members' behaviors. Those conventions, norms, and rules primarily take the form of law in civil society. The general compliance with the law by individual members of society confers on this particular collective enterprise regularity and predictability, which in turn give individuals a sense of security. It is evident that maintaining the regularity, predictability, and the sense of security is essential to the preservation of civil society, and that serves as the fundamental argument to justify the institution of law.

However, as there often are free-riders in any large-scale collective effort, there are bound to be people in civil society, who, while enjoying the benefits the law provides as a result of other people's compliance with it, choose to take actions that violate the law when doing so is to their advantage. The harm may be negligible when violation of the law is limited to a small number of cases. But when it becomes a generalized practice among members of society, that is, when a substantial minority of people accept the benefits of the law but refuse to share the burden of helping maintain the law's authority,

the immediate result will be the loss of the law's general efficacy, which will then lead to the erosion of the common perception of order, regularity, predictability, and security, and, eventually, the collapse of civil society, when the hitherto law-abiding members of society refuse to continue to be suckers. From the utilitarian point of view, the offenders' actions have caused an overall reduction of social utility and happiness. From the retributive perspective, their unlawful actions constitute substantive moral wrongs. For both schools, the offenders should be punished for their violations of the law. At the same time, when the threat of punishment is over their head, the law inevitably exercises coercion on those would-be offenders. So when the law and its punitive function are justified, no separate justification is needed for its coercive function. Thus, coercion is a legitimate means of social control, and as such should not be forbidden to the state.

Coercion and punishment work in tandem for the same ultimate purpose of preserving civil society. Through coercion, that is, the threat of punishment, the law works to prevent unlawful and hence unfair[102] actions from taking place; and through punishment, the law aims primarily to deter similar unlawful actions in the future. The coercive function of the law is no less important than the punitive function, as the maintaining of social order depends to an even greater extent on citizens' self-regulation, both voluntary and coerced. Society can certainly survive and thrive without having to mete out punishment, as long as the threat of doing so is kept real.

Coercion and the Permissiveness of the Law

[102] Richard Dagger concludes that every crime is also a crime of unfairness. See his "Playing Fair with Punishment", p.476.

There might be critics who object to my argument that explains coercion as an innate function of the law. They may argue that such an interpretation misunderstands the issue of coercion, and furthermore, trivializes it. What is at issue here is not the innate qualities and functions of the law, but rather the deliberate use of the law by the state for the purpose of forcing ordinary citizens into complying with its will. The state often makes laws to enforce specific policies that would have a tremendous impact on people's lives, but on which those so affected are not given a genuine choice. As a result, people feel coerced by such laws and policies of the state. Therefore, the issue of political coercion, from this perspective, is really about the proper extent to which the law should be allowed to interfere with individual citizens' life.

So the opponents of coercion so understood are making a libertarian argument, and I believe that they have a legitimate complaint. We have witnessed an increasing encroachment upon the personal private realm by both civil society and the state, and this has happened to such an extent that the division between the public and the private realms has been reduced to no more than a theoretical distinction. The law has now touched on almost every aspect of our life, including even such intimate issues as sexual orientation and reproduction. Does the law have the right to interfere so much with our life?

Several points can be made in defense of this presumed over-regulation of the law. First, the law does not interfere with people's life for nothing. As a singular feature of our modern age, when the law takes a stand on an issue, it is very unlikely that there has been little public awareness in the form of (very often, strong) support or opposition. The law very often operates amidst contentions, controversies, and debates. In the face

of opposing positions and conflicting interests, whichever side's argument the law chooses to endorse, the other side will always be somehow discontented. But should the law avoid getting involved in issues on which there is a strong disagreement? Definitely not. It is the function of the law to bring heatedly debated public issues that have a significant impact on people's lives to a resolution, even though it may only be a temporary one in some cases. The law cannot evade this very important responsibility. If it does, so as to avoid being entangled in controversies or causing resentment, it will be, in Jane Mansbridge's words, "overly privileging the status quo."[103] There is no basis to presume that keeping the status quo is always preferable to making a change. Therefore, Mansbridge urges the state, especially a democratic one, not to be afraid to initiate changes that will be overall beneficial to society.

Second, that the law does not take explicit actions to endorse an issue position does not necessarily mean that the law is not taking a stand. It is in the nature of the law that not specifically forbidding something is the same as allowing it. A practice is legal as long as the law does not rule it otherwise. For instance, on the abortion issue, if the law does not rule on the legality of the practice, doctors will continue to perform abortions, if that is what they have chosen to do. As a result, the law will be as a practical matter supporting the pro-abortion side of the debate. In the case of the very controversial family planning policy of China, if the law does not impose the one-child (in some special cases, two-child) limit on every married couple, they will continue to produce as many children as they please. Since the inclination of most Chinese young couples today is still to have more than one child, consequently, the law will then be

[103] Mansbridge, "Using Power/Fighting Power: The Polity", in Seyla Benhabib ed. *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996), p.47.

endorsing the argument that no family planning is necessary for the country. This is why the state is often rightly faulted for not taking actions, especially when the excuse is to remain neutral.

And finally, for those who have a complaint against the law on specific policy issues, they are not without a venue to fight against the supposedly overly coercive power of the law. In democratic politics, the political process is always the first and the most effective resort to redress the alleged wrongs done by specific result-oriented policies. Although democracy cannot fundamentally change the coercive nature of the law, it can nonetheless temper the impact of coercion felt by the people.

We can safely assume that a democratic government committed to the ideas of democracy and representation would be able to guarantee that all opinions, including dissenting opinions, will be heard and duly considered. Thus, even though not everyone of those who disagree with the law can have his or her way, they will at least be more disposed toward accepting the particular laws they dispute, knowing that the majority of the people have spoken and overruled their objections. While it may not be very realistic to expect, as Rousseau does, those who have lost the debate to acknowledge that they were wrong and renounce their previous position, the majority of the people do have the right to require that they accept the majority's decision and respect those laws with which they disagree, as democracy also needs action, and deliberation and debate cannot take its place. This view is also not inconsistent with the argument of recent theorists of participatory democracy that democratic deliberation and dialogue should be a continuing

process at multiple levels in the public realm.[104] Discussions of policy issues can always go on in various public forums, including the national legislature, but the existing laws, which (with a few exceptions that are leftovers from previous eras) do represent the will of the majority of the people of the current political community, should be obeyed in practice.

There is a final issue about coercion of the law in non-democratic politics, where the law does not enjoy the benefits of democratic deliberation and majority decision. Theorists, following Rawls, generally agree that the law should be obligatory when the legal-political system is reasonably just.[105] There are bound to be contentions as to how to define "reasonably just". Rawls does not spell out his criteria with which to judge whether a system is reasonably just, and to my knowledge no other theorist who uses this notion does that either. But it's safe to say that whether a system meets that requirement is not entirely a personal judgment. I think that observers of a given legal-political system can relatively easily come to an agreement on that issue. With this problem removed, I believe that, for a legal-political system that is considered reasonably just, its law is obligatory and political coercion by means of the law should not be forbidden to the state.[106]

Conclusion

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[104] See for example, Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), esp. Chap. 4; and Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York, NY: Routledge, 1997), esp. Chap. 3.

[105] See Rawls, *A Theory of Justice*, pp.350-5.

[106] It has to be acknowledged that in such a system there are better grounds for civil disobedience, but at the same time, the law and the actions of the state are not completely immune from the impact of non-government forces in society. Depending on the extent to which the system tolerates and accommodates dissent, the reasonably just legal-political system may eventually approximate to a truly just system, and then its law will have better claim on its people.

I have started this work by raising the question why coercion, a familiar phenomenon and an often-used means of social control, has not been paid much attention in traditional political theory. I have then proceeded to examine what the traditional political theory literature has to say about coercion, and what position authors in different periods of time take on this issue. Realizing that there is not sufficient clarity in political theory's understanding of coercion, I have next undertaken a meticulous conceptual analysis of the concept, disentangling it from concepts that are easily confused with it, as well as from the idea of authority, from which political theory has not traditionally distinguished coercion. In addition to achieving clarity in understanding the concept of coercion, the other objective of this work is to find out whether coercion is ever justifiable. Since coercion has long been perceived as in contradiction to, and hence in violation of, individual freedom and rights, any attempt to justify it thus has to show that the idea of coercion can be accommodated by freedom and rights, as I have done. But showing that provides only a qualified justification. Therefore, my goal in the final chapter is to provide a more solid justification by proving that coercion is a necessary means of social control. I believe that I have been able to prove that by showing a clear link between coercion and the law. I have argued that coercion, like punishment, is an innate function of the law. My argument thus leads up to the final claim of this work, which is that coercion as a means of social control is legitimate and therefore should not be forbidden to the state.

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