

# TERRORIST OR REVOLUTIONARY?

AN ENQUIRY INTO THE MORAL AND LEGAL GROUNDS FOR POLITICAL  
VIOLENCE

SENIOR THESIS  
YE JIN LEE

HAVERFORD, PENNSYLVANIA \* SPRING, 2004

“I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.”

**Martin Luther King Jr. (1929 - 1968)**

“Laws are like sausages. It's better not to see them being made.”

**Otto von Bismarck (1815 - 1898)**

\*

## C O N T E N T S:

Introduction: <i>Law, Politics, and the Threat of Violence</i> .....	4
One: <i>The Social Contract: Legitimacy Through Covenant?</i>	
The problem of legitimization.....	9
Hobbes: Authority and the problem of consent.....	12
Locke: Defending the right to resist.....	22
Kant: The moral duty to obey, the moral duty to disobey.....	28
The failure of social contract theory.....	34
Two: <i>Constitutionalism: Legitimacy Through Amendment?</i>	
The quest for legitimacy: From Contract to Constitution.....	37
Derrida & Machiavelli: Founding and preserving.....	40
Transforming dissent: Arendt and the American Constitution.....	46
The problem of the moral revolutionary, pt. 2.....	51
The theoretical exclusion of violence.....	57
Three: <i>Legitimacy Beyond Contract and Constitution?</i>	
The problem with legitimization.....	60
Foucault: The questionable basis of authority.....	61
Derrida & Camus: The violent exclusion of violence.....	63
Law as the new 'Mortal God'.....	68
Arendt & Schmitt: The (re)turn to the political.....	72
Conclusion: <i>Theory, Politics, and the Hazards of Consensus</i> .....	76

References

Acknowledgements

\*

## INTRODUCTION:

### Law, Politics, and the Threat of Violence

\*

#### *1. The right to be 'right'*

The recent eruption of terrorist violence in the world today demonstrates that the question of who has 'legitimate' access to violence is both a significant and timely one. Rather than merely condemning all who use violence to further a political cause, it behooves us to address terrorism, revolution, and rebellion as legitimate objects of theory. All too often in the literature concerning political violence, theorists attempt to divorce 'terrorism' from the 'legitimate' use of violence in certain instances. For example, violence against the liberal state is often considered not only reprehensible in itself (as all violence is), but illegitimate, since democracies provide non-violent means of expressing dissent or even changing the system itself. A right to vote or run for political office, it is implied, forbids one from engaging in violent acts of dissidence. But why is this the case? What assumptions underlie the distinctions we make between those with a legitimate access to violence (such as police officers) and those without (such as rioters)?

In nearly every instance of political violence, the dissident faction has claimed to have right on their side, and has justified their taboo use of force with an appeal to some transcendent law or principle.<sup>1</sup> Likewise, most dissidents tend to believe (or at least engage in discourse that makes it seem as if they believe) that they are privy to a particular and true notion of 'right'.

I define 'right' as that which *is* right, or the sense of 'right' that is enforced. Thus, 'right' is not merely a matter of ethics, but belongs more properly to the realm of politics. Though this may seem like a rather vague definition, we have to keep in mind that the seemingly innocent

---

<sup>1</sup> The reason why the individual use of violence against the state and other citizens is considered to be 'taboo' will be addressed in Chapter III of this paper.

matter of defining terms can embroil us in a never-ending debate over what is included and excluded in the definition, and how and why these inclusions and exclusions occur. In any case, I am not defining 'right' more precisely at this point because the very act of doing so (the ways in which 'right' is defined) shall be the general target of this paper's enquiry.

Thus, my formulation of 'right' precisely addresses the larger subject that I intend to discuss, which is this: during revolutionary periods, how can both dissidents and governments simultaneously claim to have 'right' on their sides? Does the state has a *more* legitimate moral claim to violence than the revolutionary? Are there any circumstances in which the revolutionary can 'rightfully' (in both a juridical and moral sense) use violence?

Before I continue, I should also explain what I mean by 'violence', exactly. Theorists have argued about what violence is, what it means, its limits and so on, for nearly as long as the discipline of political philosophy has existed. I will not take up much space detailing the varying permutations of the word. For the purposes of this paper, I will define 'violence' broadly and simply as a violation of some sort, something one does to another without her consent.<sup>2</sup> Violence is specifically 'political' when it aims to produce some effect upon the functions and purposes of the state, often in the services of furthering an ideological cause.

Political theory generally excludes the use of legitimate political violence in the hands of citizens. The exclusion that is performed within the field itself reflects a larger exclusion that operates at the very heart of liberal democracy. The purpose of my examination and linking together of political violence and the basis of legitimacy in the legal order is an attempt on my

---

<sup>2</sup> As an illustrative point, we can consider the difference between attacking someone in an alleyway and attacking someone in a boxing ring. In the former instance, the person attacked can be legitimately considered a victim, since she was likely not expecting an act of violence to be committed against her at that moment. In the latter instance, the person attacked is not a victim in the strict sense, since by entering the bout, she has agreed to the violence that is a part of a boxing match (which is usually not referred to *as if it were violence*, interestingly enough, but merely a matter of speed, strength, build, strategy, etc.) and the injuries that she may suffer within the ring. Boxing is a 'lawful', controlled exercise of force, while a mugging is a 'pure' act of violence. Thus, the former instance is a crime while the latter is not since the element of consent is missing.

part to identify the potential problems that such a tactic on the part of the normative order might raise. Thus, the question we should ask is how has this separation between legitimate and illegitimate forms of violence come to be. What (or whose) agenda does it serve and what does it reveal about our own assumptions about the law, the legitimacy of the state, and protest?

If the claims of the state to 'right' are questionable, then so too are our theoretical and juridical distinctions between legitimate and illegitimate uses of violence. This is no insignificant matter, since uncertainty about our claims to 'right' may affect our policies on the ground, regarding both domestic and international affairs. The use of the death penalty, the 'war on terror', and our duty to the Third World are some crucial instances in which our understanding of 'right' is literally a matter of life and death. A clearer understanding of the grounds of legitimacy and the normative force of our laws as mediated through the question of legitimate access to political violence will hopefully help us to address these issues.

## *2. Summary of the argument to be presented*

I argue in the following pages that the ability to revise the law of the land is what makes that law viable in democracies, what authorizes it *as* law. Successful revolutions end up institutionalizing their principles in the foundational moment of the state, in either an actual document, or in the structure or meta-rules by which to establish and regulate both constitutional and statutory law. Revolution as it is mediated by constitutional law into a controlled violence is what legitimizes the legal order. This is accomplished by creating mechanisms that relieve the pressures of nascent rebellion, which is the possibility of conflict that always resides in pluralistic societies, without giving way to rebellion. Possible political violence is channeled into means of constitutional reform, and these methods of reform are taken to be the source of the Law's

legitimacy and authority. However, this transformation mandates that the breaking of law necessarily becomes an act of metaphorical violence on the part of the lawbreaker.

This cooption and transformation of political violence into what legitimizes constitutions/the Law results in the silencing of the moral law-breaker/revolutionary. She cannot articulate her demands, for the norms and language of moral discourse, which are determined by the state are denied to her. The revolutionary consequently loses her specifically political and moral character so that any act of violence on her part is *always* deemed an act of terrorism. The morality that animates and informs her actions is reduced to mere criminality. The difference between our conceptions of 'revolutionary' and 'terrorist', and the difficulties theorists have in precisely figuring out why the former seems to have a better claim to legitimacy than the latter, reflect this move by the juridical order to both conceal violence (the violence that is at the heart of law) and exclude it (the possibility of violent resistance by citizens). The latter move is necessitated by the former fact. In order to prevent the ruled from questioning the legitimacy of *the* rule (particularly in democracies), it is necessary to forbid this use of violence, which may undermine the only real claim that the Law has to be authoritative.

In order to frame this discussion, social contract theory will be discussed as the first sustained effort to justify citizen's obligation to obey the Law. A review of Thomas Hobbes, John Locke and Immanuel Kant's views about revolutionary violence and the social contract will draw out the dangers and difficulties that exist in the attempt to theorize and distinguish violent political dissidence from sanctioned violence. Ultimately, we will find that contract theory proves to be inadequate to its stated task of legitimizing *state* violence, due to its failure to accommodate violent dissent. However, the contract tradition does lay the groundwork for constitutionalism, which is the next major trend in legitimizing political authority.

Constitutionalism, as it is conceived by Hannah Arendt, the Founding Fathers, and others, tries to avoid the thorny issues of consent and dissent that proved to be so bothersome to social contract theory. Instead, this particular form of constitutionalism (which itself is a wide field that covers any situation in which people create laws to rule themselves. It thus encompasses the social contract) elides the issue altogether by turning towards foundations, but also taking up Jean-Jacques Rousseau's notion of the general will, while disregarding his requirement that all citizens actively and regularly engage in the business of statecraft. One ends up with a more theoretically sound justification for obedience than the social contract, but true dissent—or dissent that can exist outside the normative-judicial order, dissent against the accepted notions of 'right'—no longer possible in a constitutional democracy. But this is a necessary exclusion, as our readings on Jacques Derrida, Michel Foucault, and others in Chapter III will reveal. Violence in the hands of citizens cannot exist, for it threatens to undermine the legal order.

The first two chapters of this paper thus seek to critically examine the supposed bases of the state's claim to the monopoly of legitimate violence within a territory. The third chapter is a more thorough critique of the project that *actually* underlies the political theorists' attempts to found the state monopoly of violence on covenants and amendments, respectively. I will attempt, in the conclusion, to gesture towards a more appropriate, or honest, theoretical grounding for authority in democracies.

\*



## CHAPTER ONE:

### The Social Contract: Legitimacy through promising?

\*

#### *1. The Problem of Legitimization*

The nature of authority has been a subject that has long occupied political philosophers. A question that continually arises from the study of authority has been that of obedience, or why people obey the state. What is the basis for the authority of the law? One result of the secularization of the state is that we can no longer answer the above question with an unequivocal, "Because God said so!" Even now, hundreds of years after the Enlightenment, we still find ourselves asking: why *is* the law, the law?

Social contract theory arose as a possible solution to the problem of justifying political authority without invoking a deity.<sup>1</sup> Contract theory creates a hypothetical basis for legitimating or justifying the coercive authority of the state.<sup>2</sup> It is thus an agreement to establish rule itself.<sup>3</sup> In general, contractarian inquiry generally seeks to establish the grounds for civil society and government by determining the moral and rational constraints upon individual behavior.

While contract theorists disagree over why people entered the contract originally, they generally do agree that doing so conferred some sort of benefit to the contracting parties. This benefit was usually in the form of protection from the uncertainties or dangers of the state of nature, which is the metaphorical condition of anarchy, in which there is no ultimate authority to

---

<sup>1</sup> This is not to say that contract theorists have *not* attempted to ascribe the authority of the law to some higher power. John Locke is one theorist I will be discussing in relation to the natural law justification of political authority that is derived from religious notions, particularly in regard to one's duty to protect life.

<sup>2</sup> It should be noted at the outset of this discussion that the social contract will be understood as symbolic means of legitimizing government, rather than an actual, historically-grounded document or moment of agreement to abide by the law. For further discussion of the impossibility of a historical social contract, see the essay by David Hume, "Of the Original Contract." (1748).

<sup>3</sup> Murray Forsyth, "Hobbes' Contractarianism: A Comparative Analysis" *The Social Contract From Hobbes to Rawls*. David Boucher and Paul Kelly, eds. (London & New York: Routledge, 1994), 37

adjudicate disputes. Without such a benefit, it becomes extremely difficult to understand why individuals would give up part of their presumed liberty in the state of nature to any authority, particularly if that authority might itself pose a greater threat to one's safety than existing in the state of nature.<sup>4</sup>

Contract theorists of all political stripes seek to secure the basis of the polity. Many of these theorists created social contracts in response to some perceived crises. Thomas Hobbes and John Locke wrote *The Leviathan* and *Two Treatises of Government*, respectively, in response to the events surrounding the English Civil Wars. On the Continent, Immanuel Kant responded to the events of the French Revolution with both great interest and anxiety, while Jean Jacques Rousseau's writings were a critique of what he saw as the increasing decadence of bourgeoisie society. More recently, John Rawls has revived the social contract in order to propose a solution to the glaring economic disparity that exists in the world today.<sup>5</sup> All of these responses are characteristic of the political philosopher's role "as the encompasser of disorder", someone who attempts to impose order upon a disorderly world.<sup>6</sup>

Contract theories are a prime example of the tension between the instinct of the theorist to *order* the polity and the inherently messy, complex nature of politics itself. In seeking to create a stable foundation for politics, the contractarian tendency to limit or deemphasize the role of conflict in politics, often resulted in a "political association...so unified" that it "cease[s] to be

---

<sup>4</sup> This presumes a traditional, western-liberal contractarianism, in which the individual is taken to be an autonomous subject who generally acts in her own best interest. A communitarian, for instance, might justify the social contract in terms of what is good for other people, or a society as a whole. This, of course, presumes the existence of pre-political society.

<sup>5</sup> See John Rawls's *A Theory of Justice*. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971)

<sup>6</sup> Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*. (Boston & Toronto: Little, Brown and Company, 1960), 8

a political association.”<sup>7</sup> Indeed, the state of nature as it is described in pre-Enlightenment social contract theories (Hobbes being the most obvious example) is a site of pure conflict.

One ought to keep the historical context of Hobbesian contract theory in mind, however. Unsanctioned violence among private individuals (dueling, private vendettas, assassination attempts, etc.) was fairly widespread in the 16<sup>th</sup> century, leading to a preoccupation amongst some 17<sup>th</sup> century scholars to work out theories of social contract which prominently featured a means of subduing the individual use of violence. Indeed, the pacification of the populace under the rule of law helped to later establish the idea of governmental accountability to citizens since “[o]nly in the context of a pacified society does the principle of governmental accountability lose its fearsome aspect” to both ruling elites and political philosophers.<sup>8</sup> Violence consequently becomes a wholly *public* matter, meaning it is not only sanctioned by the state, but employed by it. As for theory, it is clear that in the social contract, the emergence of the legal-political order is what ‘saves’ people from the dangers of freedom, which are symbolized by the state of nature.

An opposing theoretical response to crisis can be to affirm individual autonomy in the face of the perceived despotism or injustice of the prevailing regime. Jean-Jacques Rousseau’s deep dissatisfaction with modernity and the ruling class led to his romanticization of the pre-political. John Locke was born in the midst of the English Civil Wars, yet his fear of tyranny in the form of Charles II likely had an influence on his views of individual rights. Thus, political theorists have had a deep concern with both order *and* freedom, a recurring theme in the canon.

In order to better understand the relationship between the social contract tradition, constitutions, and violence, I propose to give a brief overview of those figures that loom large in the tradition. Thomas Hobbes will be discussed with regards to the problems of basing political

---

<sup>7</sup> Sheldon Wolin, 63

<sup>8</sup> Deborah Baumgold. “Pacifying Politics: Resistance, Violence, and Accountability in Seventeenth-Century Contract Theory.” *Political Theory*, Vol. 21, No. 1 (Feb., 1993): 7

authority on the idea of a contract between the state and citizenry. Next, John Locke will be discussed with regards to his thoughts on natural law as a possible basis for one's right to rebel. Then, I wish to take up Kant's contrary position on the social contract and revolutionary violence, vis-à-vis the Lockean and Hobbesian views.<sup>9</sup> Kant, who seemed to have recognized the inherent danger to authority in the social contract, attempted to secure the authority of the state against the incursions of the English contractarians. The final section will discuss general problems in the theory of social contract and why it ultimately proves to be inadequate to the task of justifying political authority.

## *2. Hobbes: Authority and the problem of consent*

Thomas Hobbes thought that people had no choice *but* to enter into political society and obey the sovereign. They do derive a benefit from it, since it is a better alternative than existing in the state of nature, but they are nonetheless *compelled* to obedience. People's fear of violent death then necessitated their entry into political society: "The final cause, end, or design of men...in the introduction of that restraint upon themselves in which we see them live in commonwealths is the foresight of their own preservation..."<sup>10</sup> For Hobbes, the absence of a judge to make final decisions in the case of disputes is the condition that determines the state of nature. Because sheer might is the only 'law in the Hobbesian jungle, it follows that "...every man has a right to everything, even to one another's body."<sup>11</sup> Here, 'right' is divorced from any ethical connotation and merely indicates a means of justification. Thus the Right of Nature is simply the freedom

---

<sup>9</sup> Jean-Jacques Rousseau is another major figure associated with social contract theory, but I will not discuss him directly in this paper. While his ideas concerning general will are intriguing in itself, it does not directly apply to the topic of this paper. As well, the issues surrounding his ideas about consent will be discussed with regard to Locke's discussion of the same subject.

<sup>10</sup> Thomas Hobbes, *Leviathan*. Edwin Curley, ed. (Indianapolis & Cambridge: Hackett Publishing Company, Inc. 1994), Chapter XVII: 1, (106).

<sup>11</sup> Hobbes, Ch. XIV:4 (p. 80)

each has to defend herself by using force, if necessary.<sup>12</sup> A common desire for the security that such a final judge provides is what finally leads to the formation of the state. Necessarily, then, Hobbes requires that the rational individuals who exist in the state of nature prefer peace to conflict, for this preference is the basis of his arguments about the legitimacy of the social contract, and by extension, the state.<sup>13</sup>

In essence, the Hobbesian social contract amounts to an obedience for protection scheme. The government protects people from physical danger by being the sole ‘repository’ of legitimate violence. In return, the people obey the sovereign, which can either be a person (a monarch), a body (parliament or council of some sort), or a principle (the law). The ability to protect subjects is what legitimizes the power of the sovereign for “...every man is supposed to promise obedience to him in whose power it is to save or to destroy him.”<sup>14</sup> While a rational desire for self-preservation is the animating cause behind the formation of civil society, the ability to protect citizens is what actually empowers the state: “The end of obedience is protection...”<sup>15</sup>

Mere survival is not the only thing that the social contract offers people, however. Living in the state of nature tends to preoccupy people with questions of survival. By negating this worry, the political order makes it possible for them to do more, like acquire material goods without the fear of being robbed of them immediately. Arendt expands on this potentiality in *The Human Condition*. According to Arendt, we can only realize our powers through our existing in a collectivity. The promises to obey a common set of laws establish a wider scope for

---

<sup>12</sup> Hobbes, Ch. XIV:1 (79)

<sup>13</sup> Jean Hampton, *Hobbes and the Social Contract Tradition*. (Cambridge: Cambridge University Press, 1986), 150

<sup>14</sup> Hobbes, Ch. XX:5, (130)

<sup>15</sup> Hobbes, Ch. XXI:21, (144)

action, by creating “islands of predictability” in an uncertain future.<sup>16</sup> In a sense, the state provides not only security, but a kind of freedom for its citizens that they would be unable to realize in the state of nature. So one’s fear of the sovereign power does not mean that one is *not* free, for Hobbes sees (bodily) liberty as being compossible with the restraints that law imposes:

“The liberty of a subject lieth...only in those things which, in regulating their actions, the sovereign hath praetermitted (such as is the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life; and institute their children as they themselves see fit.”<sup>17</sup>

The liberty in the state of nature is not equivalent to the civic freedom one experiences within the polity, so there is no ‘loss’ of anything desirable. This is an important condition that was designed to ensure that the rational, Hobbesian individual will *have* to agree to the dictates of the social contract. The physical dangers of the state of nature outweigh any possible harm the sovereign may do.<sup>18</sup>

Because true freedom (which is partly the relief of no longer worrying about one’s physical safety) can only be realized within the confines of the state, Hobbesian individuals only hold rights in relation to their being citizens. Those outside of political society have no rights, as the state of nature is by definition, a lawless realm. A Lockean theory of natural rights does not make sense in the Hobbesian state of nature, since “[t]he notions of right and wrong, justice and injustice, have there no place [in the state of nature]. Where there is no common power, there is no law; where no law, no injustice.”<sup>19</sup>

---

<sup>16</sup> Hannah Arendt, *The Human Condition*, second edition. (Chicago & London: The University of Chicago Press, 1958), 244

<sup>17</sup> Hobbes, Ch. XXI: 6 (138)

<sup>18</sup> Hobbes, Ch. XVIII: 20 (117)

<sup>19</sup> Hobbes. Ch. XIII: 13, (78)

However, a tension exists between Hobbes' attempts to ground sovereign power in reason and his use of the idea of social contract. The problems that arise thereof have mostly to do with the fact that the social contract is based upon the idea of *consent*. Hobbes attempts to dodge this central issue of social contract theory, but as we shall see, is not entirely successful.

Generally, some form of consent is the source for the moral obligation or duty to obey the law in social contract theory. Consent is supposedly what gives the law its authority, since it bridges the gap between legal obligations (which are external and coerced) and moral obligations (which are internally enforced and voluntary)<sup>20</sup> Consent theory tries to resolve individual will and legal coercion by subsuming the former into the latter; following the law is then equivalent with following one's will.<sup>21</sup>

Jean-Jacques Rousseau's conception of the general will is probably the best known example of this particular tactic in contractarianism. For Rousseau, law is identified with the general will, or the force that consents to law that is itself an amalgamation of the individual wills of citizens who will in terms of the interests of society as a whole. Thus, "[t]he primary function of the social contract is to constitute a regime which can express the general will." Individual liberty is thus the source of moral law, rather than being opposed to it.<sup>22</sup> The only way to guarantee one's freedom and autonomy in civil society, according to Rousseau, is to act through the general will, or to act in a way that places the interests of society as a whole over one's own. This theoretical move performs the double act of ensuring that individuals do not act selfishly, and that one's freedom to act as one's own legislator (as Locke might have put it) is

---

<sup>20</sup> Jules Steinberg, *Locke, Rousseau, and the Idea of Consent: An Inquiry into the Liberal-Democratic Theory of Political Obligation*. Contributions in Political Science, No. 6. (Westport, CT & London: Greenwood Press, 1940), 11-12

<sup>21</sup> Steinberg, 15

<sup>22</sup> Allan Bloom, "Jean Jacques Rousseau." *History of Political Philosophy*. Leo Strauss and Joseph Cropsey, eds. (Chicago: Rand McNally, 1963), 523-24

secured. Acting according to the general will is simply a means of fully realizing oneself as a free and moral being.

We could say that Hobbes anticipates Rousseau by completely identifying the will of the individual with that of the sovereign power. The sovereign is then the embodiment of one's own will. Hobbes claims that one cannot rebel against the sovereign, lest one become the author of one's own punishment, and "...it is injustice for a man to do anything for which he may be punished by his own authority..."<sup>23</sup> In fact, the sovereign is not even capable of doing injustice to her subjects, for "...every subject is...author of all the actions and judgments of the sovereign instituted...whatsoever [the sovereign] doth, it can be no injury to any of his subjects..."<sup>24</sup> Thus, Hobbes attempts to undermine a typical argument against the absolute power of his sovereign by connecting individual will with the general will, and then by deeming the sovereign to be the embodiment of the general will.

Hobbes preferred the monarchical form of government to the democratic or aristocratic forms. Placing all power into the hands of the executive is a way for Hobbes to ensure that the sovereign will rule justly. The welfare of the king and the welfare of the nation will supposedly be intimately connected since the monarch who has absolute sovereignty will act in the best interests of all by virtue of his own rational self-interest.<sup>25</sup> This would not necessarily occur in a state with divided sovereignty in which each part would simply quarrel with the other parts in order to gain more power.<sup>26</sup> In any case, the monarch rules due to the social contract, or the covenant men make in the state of nature to consent to the rule of one. It is consent, rather than

---

<sup>23</sup> Hobbes, Ch. XVIII:3, (111)

<sup>24</sup> Hobbes, Ch. XVIII:6, (112)

<sup>25</sup> Frank M. Coleman, *Hobbes and America: Exploring the Constitutional Foundations*. (Toronto & Buffalo: University of Toronto Press, 1977), 116

<sup>26</sup> Coleman sees the Lockean/Madisonian division of sovereignty as derivative of Hobbes, since a system of checks and balances under a tripartite government is merely another version of the idea of using self-interest to promote social good. *Hobbes and America*, 100-120.



mere force that creates the sovereign power: “It is not therefore the victory that giveth the right of dominion over the vanquished, but his own covenant.”<sup>27</sup>

The idea of any kind of consent, however, creates a paradox in the heart of the Hobbesian theory of social contract. Jean Hampton points out that due to Hobbes’ characterization of the state of nature, (in which keeping contracts is virtually impossible unless backed by force), it is not possible for Hobbesian people to agree to constitute a social contract and a sovereign.<sup>28</sup> Hobbes seems to be asking us to believe that the selfish, potentially treacherous people who exist in the state of nature would willingly trust each other to create a polity *and* be able to choose a ruler without too much trouble. Hampton concludes that “...Hobbes’s account of conflict seems to generate sufficient strife to make the institution of the sovereign necessary, but too much strife to make that institution possible.”<sup>29</sup>

Hobbes himself tells us that “...covenants without the sword are but words, and of no strength to secure a man at all.”<sup>30</sup> The sovereign power, *once it has been constituted*, is able to force people to keep their promise to obey the sovereign, but there is no sufficient cause for Hobbesian individuals in the state of nature to agree to constitute an absolute monarch who may end up threatening their well-being or interests. If the ability and inclination to make promises are what guarantee a functioning society and state, and people in the state of nature are naturally unable to keep their word, then they are also fundamentally incapable of constituting a sovereign power. The problem of how to move from the state of nature to civil society proves to be a major difficulty in the Hobbesian account of legitimacy.

---

<sup>27</sup> Hobbes, Ch. XX: 11 (131)

<sup>28</sup> Hampton, 132

<sup>29</sup> Hampton, 136

<sup>30</sup> Hobbes, Ch. XVII:2, (106)

Even more problematically for Hobbes, *any* limitation on the sovereign's power (such as granting individuals the right to self-preservation) leads to potentially limitless checks, and may even support a theory of legitimate rebellion.<sup>31</sup> We should recall at this point that Hobbes believed that individuals in the state of nature considered life to be more important than freedom. Though freedom could only be achieved within the confines of the polity, the state cannot require its citizens to lay down their lives in any situation. The ruler cannot even ask this of her subjects in order to preserve the polity since the individual's object in entering the social contract was to *preserve* her life. Hobbes says quite explicitly:

“A covenant not to defend myself from force by force is always void...no man can transfer or lay down his right to save himself from death, wounds, and imprisonment...this is granted to be true by all men, in that they lead criminals to execution and prison with armed men, notwithstanding that such criminals have consented to the law by which they are condemned.”<sup>32</sup>

Even one's consent to abide by laws is not enough to negate this strong right to self-preservation. Hobbes is thus forced to admit that rebels are justified in continuing to rebel (but not for inciting a rebellion) because they have made an enemy of the state, and will probably be killed unless they continue to resist.<sup>33</sup> The problem becomes readily apparent now. If one takes it far enough, the absolute right to self-preservation can be 'stretched' into a right to resist a tyrannical ruler in certain instances. Hobbes' dilemma is underlined by the critical reception with which the *Leviathan* was greeted. Upon reading the book, Bishop John Bramhall asked, "...should we not change the Name of *Leviathan* into *Rebells catechism*?"<sup>34</sup>

---

<sup>31</sup> Hampton, 191, 198-203

<sup>32</sup> Hobbes, Ch. XIV:29, (87)

<sup>33</sup> Hampton, 195, 199-201

<sup>34</sup> John Bramhall. 1658. *The Catching of the Leviathan or the Great Whale*, appendix to *Castigations of Mr. Hobbes...Concerning Liberty and Universal Necessity*. Printed by E.T. for John Crooke, at the sign of the ship in Paul's churchyard. Quoted in Hampton, 199

Another paradox is that, should a rebellion occur, the mere fact that some people have chosen to use violence against the sovereign is a blow to her power as sovereign. Since her justification for absolute rule is her ability to keep order and protect the subjects, then the very moment a rebellion occurs, she can no longer *be* sovereign.<sup>35</sup> The very existence of a disturbance that cannot be immediately quashed means that she cannot be the sovereign power, which Hobbes determines as an absolute power, denying that the sovereign power is subject to civil laws, (since this leads to an infinite regress in which the true sovereign can never finally be determined).<sup>36</sup> Although rebellion itself is illegitimate, if the sovereign is unable to quash it, she effectively relinquishes her claim to power. Thus, the very use of violence itself is a challenge to state authority.<sup>37</sup> When one recalls the Hobbesian obedience-for-protection scheme, it becomes clear that dissidents who use violence against the state are challenging the authority of that state by denying its exclusive right to violence.

Yet Hobbes denies the possibility that one may return to the state of nature, i.e. the state of pure liberty to act.<sup>38</sup> The social contract, for Hobbes, can be understood as both a vertical contract between the sovereign power and the people (obedience and protection), and as a horizontal contract between individual citizens (a promise to obey the sovereign power constituted therein). Hobbes implies that, in the act of constituting the state, the people permanently alienate their collective power in the person of the sovereign who himself: “...maketh no covenant with his subjects beforehand...”<sup>39</sup> Subjects can expect nothing in return from the sovereign for the social contract is not a traditional, horizontal, two-way contract in the

---

<sup>35</sup> George Shelton, *Morality and Sovereignty in the Philosophy of Hobbes*. (New York: St. Martin's Press, 1992), 259

<sup>36</sup> Hobbes, Ch. XXIX: 9 (213)

<sup>37</sup> This theme will be taken up again in Chapter III: 4 in the discussion of Giorgio Agamben, 62-65

<sup>38</sup> Hobbes, Ch. XVIII:3, (111)

<sup>39</sup> Hobbes, Ch. XVIII:4, (111)

legal sense, but is rather a one-sided, vertical covenant. The way that Hobbes describes the state of nature leaves the rational individual little choice in the matter. She *must* promise to obey an authoritarian ruler, given that she desire physical safety over all else and that the state is the only means of guaranteeing this.

This is where Hobbesian social contract theory runs into the heart of its difficulties, which is, namely, the use of the social contract itself. The very idea that individuals who preexist the state covenant create government suggests that individuals possess liberty and constituent power even before the state exists. This is in opposition to classical ideas about the state being an entity that exists independently of its citizens.<sup>40</sup> Hobbes, however, wants to elide this problem by making the social contract seem absolutely necessary and desirable to rational, pre-social and pre-political men, frequently referring to the endless conflicts that arise within the state of nature throughout the *Leviathan*.

Yet why would Hobbesian people ever alienate all power to an individual if they are indeed as selfish and suspicious as Hobbes makes them out to be? That Hobbes warnings of the terrors of the state of nature seem a bit overwrought should not surprise us, since he needed a way to motivate rational individuals to enter civil society, even if doing so is so manifestly against their interests and natures. This difficulty emphasizes the fact that the idea of a social contract, *any* social contract, entails certain presuppositions, such as an individual's preexistence to the state (*contra* Aristotle, man is not *naturally* political, and the state is recognized as artificial<sup>41</sup>), their rationality, and their ability to keep promises.

It is perhaps not surprising then, that many critics have been able to tease out a nascent theory of rebellion in even a defender of authoritarianism like Hobbes. The logic of contract

---

<sup>40</sup> For an example of this, see Plato's *Crito*, *Phaedo*, and *The Apology*.

<sup>41</sup> Hobbes, Ch. XVII:12, (109)

theory simply make it impossible for the theorist to rule out a right to revolution altogether. Thus, the ideas of contractarianism can often be detected in the discourse of political dissidents as justification for their ‘war’ on the government. The reasoning behind contract theory is carried to its logical (but subversive) conclusion: if a government has breached its duty to its citizens, who consent to being ruled in return for the advantages of being in political society, then the contract is no longer binding upon the citizens, who thus, no longer have to obey that government. The one-sidedness which Hobbes artificially imposes on the social contract is extracted here since it does not accord with our understanding of selfish individuals who preexist the state and who value themselves over the community or the sovereign. According to this sort of reasoning, the consent of the people to be governed is the legitimating factor in government, not the mere historical fact of constitution as Hobbes tries to make it out to be.<sup>42</sup>

In all, the conceptual priority of the individual to the state in Hobbes’ theory of the social contract dooms it from the start. The fact that individuals have to agree to form a state makes social contract theory problematic in terms of Hobbes’ attempts to defend absolute monarchy. The logic of a contract implies that there is a mutuality in agreement, in the sense that two equal parties are consciously and rationally holding each other to certain obligations that will be fulfilled in the future. Contractarianism implicitly evokes an equality of position between the sovereign power and the citizen, and this is where most of the problems with the Hobbesian social contract arise.

If Hobbes had *merely* assumed that the ruler has mastery over her subjects (e.g. a divine right of kings justification for authoritarianism), rather than delving into the origins of that

---

<sup>42</sup> How one defines ‘consent’, particularly with regard to the Rousseauian idea of general will is a whole other issue altogether, and one too complex to address in the space I have here. Needless to say, the very idea of consent to be ruled, implicit or explicit, (which is basically the agreement that underlies the social contract idea altogether) proves to be problematic for Hobbes’ defense of absolute monarchy.

authority, he might have come up with a more sound theory of absolute monarchy. (Hobbes' very attempts to justify sovereign rule might have been a sign that the institution was in trouble).<sup>43</sup> Hobbes' attempt to find a rational, universally true and *non-theistic* source of political legitimacy ends up leading that defender of absolute monarchy down a path towards justifying the individual subject's rights against the sovereign. In the end, contract theory presents too many difficulties in terms of Hobbes intended project, and ends up, paradoxically enough, paving the way for contract theorists like John Locke who held contrary position on the nature of political authority.

### 3. *Locke: Defending the right to resist*

While Hobbes' contractarian theory is based on fear, John Locke's is based on convenience. The dangers of the state of nature were not Locke's overriding concern, nor was the legitimacy of authority itself. Rather, he sought to emphasize the inalienability and 'naturalness' (meaning they did not originate in the state) of individual rights. Locke can be considered the logical 'heir' to the contractarian reasoning Hobbes employed to unsuccessfully defend absolute monarchy. The assumptions of social contract theory, (e.g. that individuals preexist the state; their rationality; their ability to make promises; their self-interest) were used by Locke to more successfully defend the idea of a right to revolution.

Under the Hobbesian contract, men submit to the sovereign in order to protect themselves; they have little choice in the matter, if they wish to survive. Under the Lockean social contract, men submit to the rule of law because it helps them secure their property, which

---

<sup>43</sup> Shelton, 263-64

includes life and liberty as well as material goods.<sup>44</sup> Unlike Hobbes, Locke stressed the aspect of *choice* that exists under a contractarian scheme of justification for authority.

The state of nature is not an actual, historical precursor to civil society for Locke. Rather, it is an explanatory device used to draw out certain features of human nature. These features, such as the desire to protect one's life, liberty and rights, are then used to justify the formation and authority of government. In fact, the state of nature is more of a *condition* that arises when men exercise their liberty against the dictates of the putative social contract. That is, if a citizen commits a crime or rebels against the state, then she has stepped out of civil society into the state of nature.<sup>45</sup>

According to Locke, people in the state of nature are naturally equal in their capabilities, and equally free to pursue an ideal life, but he distinguishes this state of nature from mere anarchy since “[t]he state of Nature has a law of Nature to govern it, which obliges every one...” Natural law seems to be Locke's formalization of what he believes are rational rules that all humans live by, by virtue of being rational agents. For example, Lockean people may not harm or kill themselves or others according to natural law, since they are God's 'property' and cannot dispose of themselves as they wish. Interestingly, this principle is extended to include property, or that which includes not only life, but “...the liberty, health, limb, or goods of another.”<sup>46</sup> There is thus absolutely no right within the state of nature to suicide, for the primary duty of the individual is to preserve her own life (Hobbes also states that this will to life or to survive is the primary law of nature, or principle of human nature). The secondary duty according to natural law is to preserve the lives of others. Thus, the use of force against any other person is also outlawed, *unless* it is used to fulfill the first duty of self-preservation. Unlike Hobbesian people

---

<sup>44</sup> John Locke, *The Second Treatise on Civil Government*. (Amherst, NY: Prometheus Books, 1986), 70

<sup>45</sup> Locke, Ch. II: Sections 13 (13)

<sup>46</sup> Locke, Ch. II: Section 6, (9-10)

in the state of nature, who have no specific injunction against using violence against others to achieve power or material goods, etc., Lockean people in the state of nature may only use violence to *defend* life.

Despite the equality and freedom one possesses in the state of nature, its “inconveniencies” make civil society a more desirable alternative, since “...the enjoyment of the property [one] has in this state [of nature] is very unsafe, very insecure.”<sup>47</sup> Locke believed that each individual has the right to judge whether she or another has transgressed a law of nature and to punish accordingly. Though people are naturally equal in the state of nature and governed only by natural law, this does not mean that people therefore live in a state of perfect peace, since not all are “strict observers” of the laws of nature all of the time.

Akin to Hobbes, rational self-interest motivates Lockean individuals to enter into civil society. People submit to government only in order to improve their natural state of freedom and equality. For Locke, the polity is constituted when individuals give up this right to act as a judge and punish transgressors of the laws of nature in order to authorize a legislative power that will settle conflicts. People thus give up their right to use violence in return for the “...many conveniencies from the labour, assistance, and society of others in the [political] community, as well as protection from its whole strength.”<sup>48</sup> Consequently, civil society should be an *improvement* to the natural condition of mankind. Otherwise, there would be no reason to agree to the social contract.

Yet Locke carefully qualified his version of the social contract. The state is only empowered to act in order to secure property “by providing against those...defects...that made

---

<sup>47</sup> Locke, Ch. IX: 123, (69)

<sup>48</sup> Locke, Ch. IX:129-30. (71)



the state of Nature so uneasy.”<sup>49</sup> Government that rules arbitrarily, or not according to laws that protect property and rights, is tyrannous, and may be legitimately resisted according to the dictates of the social contract:

“Wherever law ends, tyranny begins...whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed...”<sup>50</sup>

The radical nature of Lockean contractarianism is encapsulated in the condition that the sovereign herself is under an obligation to obey the Law. The Lockean social contract holds that *both* ruler and subjects must obey the law. Should either party break the law, the original contract can be considered void.<sup>51</sup> If the person in authority exceeds the power granted to her by law, then she no longer has a legitimate claim to authority. Similarly, the citizen who breaks the law is no longer under the protection of the social contract, and can be considered outside human justice. Thus it is permissible to execute murderers.

Locke’s *Treatise* is usually taken as a work that focuses mainly on resisting the state, and unsurprisingly, is often invoked by those who seek to resist state power, or those who seek to undermine the state’s “monopoly of the legitimate use of physical force within a given territory”, to use Max Weber’s terms.<sup>52</sup> Locke’s popularity among revolutionaries and other dissidents can be explained by the elements of contractarian theory that he chooses to emphasize. In the Lockean social contract, the state is constituted to serve the people, who retain the power to decide whether the state is fulfilling its directive adequately. That is, if the government does not

---

<sup>49</sup> Locke, Ch. IX: 131, (72)

<sup>50</sup> Locke, Ch. XVII: 202, (109)

<sup>51</sup> Incidentally, this conditional sovereignty is a step closer to the ideas embodied in constitutionalism, in which Law, rather than man, rules.

<sup>52</sup> Max Weber, *Essays in Sociology*. H.H. Smith and C. Wright Mills, trans. and eds., (New York: Oxford University Press, 1946) 78. Original text is italicized.

serve to protect people's property (the definition of which, we should recall, includes life and liberty), then it is illegitimate, and has lost its authority. Since Lockean subjects are their own judges in the state of nature, when the government reneges on its end of the social contract, i.e. acts unlawfully and seizes people's property, then the social contract is dissolved. The people resume their powers to judge and punish those who attempt to oppress them.<sup>53</sup> Thus, an oppressive state may be overthrown, if it is not fulfilling its legitimate purposes.

Locke's contribution to our understanding of state-subject relations is his unambiguous identification of sovereignty with the People as a constitutive force (a concept to which Hobbes only unwillingly, and perhaps unwittingly, alluded). Sovereignty is located in 'the people' as a whole because it is only the masses' belief in the authority of the legal-political order that keeps it afloat. Power is inherent to the whole, as Arendt argued, since the rule of any individual or group relies upon the obedience of the whole.<sup>54</sup> The sheer number of bodies that authorize any government (no matter how large or powerful) is what really constitutes the 'power' of the people.

Altogether, Locke's contract theory is more internally harmonious than Hobbes' since consent to being governed makes more sense with regard to Lockean individuals who are endowed with natural rights and who ultimately retain sovereign decision-making power. Yet there are flaws in Lockean contractarianism that point to deeper problems in social contract theory.

For example, 'the laws of nature' can be used to theoretically legitimize almost any agenda. The problem with the use of social contract rhetoric in relation to violent resistance is that these groups tend to pick and choose which parts of the theory to focus upon, ignoring the

---

<sup>53</sup> Locke, Ch. II: 13, (13)

<sup>54</sup> Hannah Arendt, *On Violence*. (New York: Harcourt, Brace & World, Inc., 1969), 42-5

rest. Thus, they advocate natural law and the consensual theory of government, yet gloss over or ignore the possible dangers of the state of nature. As well, they often conveniently forget that for Locke, force can only be used to defend life, rather than to advance a cause.

Another problem lies in Locke's use of 'tacit consent'. For Locke, the subject need not have explicitly agreed to obey the law, but her continuing residence within the boundaries of the state, within the reach of law, so to speak, is an indication of an implicit agreement to the conditions of the social contract.<sup>55</sup> In the *Crito*, Socrates refuses his friends' attempts to get him to escape execution by going into exile. One reason he cites for obeying the laws that condemn him is that by continuing to live in Athens, he has *tacitly* agreed to abide by the laws. The problem with Socrates' position and the Lockean right to exit the polity (in which a citizen may simply pack up and go elsewhere if she is dissatisfied with the rules of the state) is that most citizens are not offered a choice of entering the polity, but are born into it. Only perhaps an adult who chooses to apply for citizenship to a country different from the one of her birth can be said to have given consent to being ruled by the laws of her adopted homeland. A right to exit is only theoretically viable, since leaving the nation of one's birth is more than a matter of merely buying a plane ticket and applying for citizenship elsewhere. Economic, linguistic and cultural barriers, as well as the possibility that the expatriate will not be accepted elsewhere, make a right to exit a weaker control on tyranny than the ability to rebel.

Finally, and perhaps most importantly, it is doubtful whether Locke provides strong enough motivations for people in the state of nature to enter into civil society. It is not implausible to assume that some rational individuals may opt to 'take their chances' in the state

---

<sup>55</sup> The idea of tacit consent has generated the most controversy within this particular sub-field of contract theory. It complicates the original story since one's consent to be ruled by the state is recognized when one is born into the political community and, most importantly, continues to dwell within it. I will touch on it briefly further down at the end of this section.

of nature rather than give up their legislative ability to punish.<sup>56</sup> His successful defense of the individual's right to rebel is perhaps *too* successful. As with Hobbes, Locke does not provide an altogether convincing justification for the creation and maintenance of juridical authority. The ostensible purpose of contract theory has been accomplished in the Lockean social contract only in a weak sense.

### 3. *Kant: The moral duty to obey, the moral duty to disobey*

The essential problem of the revolutionary is whether one's duty to be a good *citizen* takes precedence over one's duty to be a good *person*. A good citizen is 'moral' within the confines of a particular community, in that she follows the rules faithfully. A good person is moral in a way that is somehow transcendent of particular cultural norms or historical eras. In sum, the moral agent's duties are as follows: one has a duty to the state; one has a duty to oneself; one has a duty to others. For Kant, these three duties are conflated into one duty, which is to obey the law.

The moral revolutionary is one who questions the soundness of this formulation, and ultimately takes the definition of a good citizen to be that of a good person. In other words, she perceives herself as an essentially *moral* person. She believes her duty to be a moral person may have a higher normative status than her duty to the state. In fact, she may equate her duty to be a good person with her duty to be a good citizen. This self-perception, or to be more exact, the beliefs and worldview that create this self-perception are what justify the use of political violence. Despite her taboo use of violence, her violation of right (for law never authorizes the use of violence by private individuals), for the rebel, "[t]he principle of right is ever-present—in

---

<sup>56</sup> Isolationist paramilitary and religious groups (e.g. Waco, Ruby Ridge) might be considered a modern incarnation of the attempt to 'drop out' of the social contract and retain the right to use violence.

its violation as well as in defense of its holiness...”<sup>57</sup> This is because the principle of ‘right’ she espouses may not necessarily be that which has been sanctioned by the juridical order.

What happens when one’s duty to personal morality conflicts with one’s duty to obey the law? Successful revolutionaries do not have to answer this question. As the winners, they can exonerate themselves and efface the illegal nature of their own acts of founding violence. But the more difficult case is that of the revolutionary who is *about to* commit acts of political violence. It is not possible to gloss over the paradoxical nature of resistance in this case. This is where the problem of the moral revolutionary arises, a question that has long troubled serious political thinkers. The rebel conceives of herself and her mission as essentially moral, she feels compelled to resist, and even takes her act of resistance as being coherent with justice.

In terms of those who choose to break the law, contract theorists have generally adhered to one of two positions. For Locke, she who breaks the contract with the intention of hurting other people simultaneously enters into the state of nature *and* the state of war, so that the laws of nature cannot protect her from punishment. Such a person is truly an outlaw, beyond the reach of any law, and is thus fair game for any who take it upon themselves to punish or even kill her, who incidentally, enter the state of nature in order to do so. Murderers, for example, deserve nothing less than death, for they have violated the social contract *and* declared war on mankind. They are no longer even considered human, but are likened to a “Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security.”<sup>58</sup> One’s existence as a *person*, much less a political subject, is therefore contingent upon one’s relationship to the Law.<sup>59</sup>

---

<sup>57</sup> Wolfgang Schwarz, “The Right of Resistance.” *Ethics*, Vol. 74, No. 2 (Jan. 1964): 126

<sup>58</sup> Locke, Ch. III:16, (15)

<sup>59</sup> One should keep in mind that the Law itself has to be derived from Natural Law in order to be just, i.e. impose a duty to be obeyed.

The ability to void the social contract makes revolution a legitimate option to citizens, but it does not mean that the sovereign power cannot be expected to retaliate in kind. Locke, however, does not specifically acknowledge that the revolutionary must step outside the juridical order in order to act. We will have to turn to the work of Immanuel Kant in order to further explore the problem that the conscientious law-breaker presents for contract theory.

Kant, representing the second view amongst contractarians, believed that the moment of contracting is temporally complete and can never be revisited. Even if one party to the social contract, such as the ruler, breaks it, the other party is *not* freed from her obligation.<sup>60</sup> Living under the social contract (as it is embodied by constitutional law) is not an *option* for Kant, but a *duty*. People as moral agents have a duty to obey the law, no matter how unjust or oppressive that law may be. Thus, the legal-political order applies even to those who wish to reject it, which is why sedition is a punishable crime:

“...there can be no right of *sedition*, and still less a right to *rebellion*, least of all a right to *lay hands on* the person of the monarch, or to take his life on the pretext that he has misused his power...The least attempt to do so...may be punished with nothing less than death.”<sup>61</sup>

Indeed, not only is violent disobedience an injustice committed against the state, and towards other people, it is also a kind of justice towards oneself, for it negates one's own rights, which are only possible within the state. Following the law is a duty of justice, which is coercively enforceable because one's rights and freedom must be compatible with the rights and freedom of all people.<sup>62</sup> One's rights depend on one's ability to coerce others into respecting the limitations

---

<sup>60</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch.” *Political Writings*. H.B. Nisbet, trans. (Cambridge: Cambridge University Press, 1991), 126

<sup>61</sup> Kant, “The Metaphysics of Morals”, *Political Writings*, op cit., 144

<sup>62</sup> Christine Korsgaard, “Taking the Law into Our Own Hands: Kant on the Right to Revolution.” *Reclaiming the History of Ethics: Essays for John Rawls*. Barbara Herman, et al, eds. (Cambridge: Cambridge University Press, 1997), 302-03

of their actions. My right to something is contingent upon your duty to not hinder my right. Thus, in order for me to have any rights, I *must* enter into the juridical condition of the polity. Consent has less to do with this than the necessity of the framework of civil laws for me to enforce any sort of obligation upon another person. Rebelling against the state, i.e. the juridical condition, is nonsensical, since the state is something one requires to assert one's rights against others.

Moreover, it is unjust to rebel against the state, for to do so is to threaten the juridical order that makes the rights of others possible.<sup>63</sup> This is because the categorical imperative disallows using other people as a means to some end (in the case of a revolutionary, this entails violating or threatening the rights of others in order to effect regime change), revolutionary violence cannot be justified using any sort of utilitarian reasoning. By attaching one's duty to uphold the categorical imperative to political obedience, man-made law assumes a transcendent moral position in Kantian political philosophy. Citizenship requires that one obey the laws; to do so is in accordance with justice.<sup>64</sup> Logically speaking, one must follow the laws in order to be a good person, since the moral order seems to be equivalent to the legal order for Kant.<sup>65</sup>

Thus, for Kant, the very strategies and discourse of revolutionaries introduces a contradiction. They attempt to legitimize their cause by claiming to act for the sake of the People, or to be the true representatives of the general will. Yet they cannot do this, since the state is the only legitimate embodiment of general will, which itself was established by the

---

<sup>63</sup> Sarah Williams Holtman, "Revolution, Contradiction, and Kantian citizenship." *Kant's Metaphysics of Morals*. Mark Timmons, ed. (Oxford & New York: Oxford University Press, 2002), 212. Kant and the moral revolutionary will be further discussed in Chapter II of this paper.

<sup>64</sup> According to Kant, a deposed ruler may choose between becoming a private citizen and taking back his throne. This implies that citizenship automatically implies a duty not to rebel. See Peter Nicholson's article, "Kant on the Duty Never to Resist the Sovereign." *Ethics*, Vol. 86, No. 3 (Apr., 1976): 225

<sup>65</sup> Kant, "The Metaphysics of Morals", *Political Writings*, op cit., 137

constitution.<sup>66</sup> This is necessarily the case, otherwise the arbitrary will that grounds law would be revealed, threatening the authority of law that makes the enforcement of rights possible.

Revolutionaries face a paradox when attempting to overthrow what they perceive to be an unjust regime. They dare to speak for the people, to represent the general will, though there has been no authorization for this, even in a purely allegorical sense (as it is expressed in political myths about the social contract). In a democracy, the sovereign is located in the People. It is illogical to declare oneself to be against sovereign power, which is equivalent to the general will, since it represents one's own. Popular or individual rebellion is thus self-defeating; one cannot rebel against one's own will.<sup>67</sup>

In fact, the only legitimate representative of the Will is the government itself, since the Constitution, or the founding, authorized it to be this. Thus, Kant denied that there was a right to revolution. The People as such do not exist until the moment of constitution, when they organize themselves into a political community and agree to submit to the sovereign power (whatever that may be). Since it would be paradoxical for a state to include a clause that allows for people to disobey it, i.e. rebel, then there can be no legal right to revolution.<sup>68</sup> Rebellion is, in fact, a kind of tyranny one exercises over others, since one's revolt against the state is an attempt to dissolve the juridical condition, and to return all to the state of nature.

Clearly then, Kant does not support a theory of revolution. Yet his position seems rather contradictory in certain aspects. He has been accused of being a reactionary since his formulation of the social contract seems to support the maintenance of the status quo, yet he is known to have followed the events of the French Revolution (at least, before The Terror) with keen interest and enthusiasm. We have already noted that an anxiety about a return to the state

---

<sup>66</sup> Beardsworth, 63

<sup>67</sup> Korsgaard, 312

<sup>68</sup> Kant, "The Metaphysics of Morals", *Political Writings*, op cit., 145



of nature animates nearly all discussion about revolution and the social contract, so we should bear this in mind as we continue our analysis of the Kantian prohibition on revolutions. It is possible that the lessons of that particular historical era may have influenced his position. Understandably, the bloody spectacle of the guillotine and the emergence of figures like Maximillien Robespierre did not speak well of revolutions in general. However, Kant's formulation of the social contract as a one-time event gives rise to a paradox in the person of the moral revolutionary, which proves to further undermine social contract theory's attempts to justify state legitimacy and authority.

If one reads Kant carefully, one *can* detect a space for rebellion. He is adamantly against the idea of a *legal* right to revolution, but is more circumspect about there being a *moral* 'right'. A legal right to revolt does not make sense because it undermines the authority of the sovereign power (whatever or whoever that may be) by placing another power over it. The right to rebel against the state puts the sovereign power of decision in the hands of anyone who decides to use it. The sovereign power is made to be accountable to something else, and this violates the definition of the sovereign power.

Rebellion may be excusable, if not legitimate, in Kantian ethics. There is no legal right to revolution, but a moral duty may exist. The duties of virtue, which are internally coercive, and required of our morality, are how we achieve freedom of will.<sup>69</sup> If the Law, which is logically supposed to embody justice or 'right', is perverted so that it actually produces injustice, then the Kantian moral agent may have no choice but to break the law in order to obey the dictates of conscience.<sup>70</sup>

---

<sup>69</sup> Korsgaard, 316

<sup>70</sup> Korsgaard, 319

The revolutionary moment is a moment of non-law, which justifies itself with regard to a hoped-for future success. Justification, which is future-oriented, may be possible, but not legitimacy, since the ability to legitimize revolt rests upon the existence of a past right to do so. Since she cannot be guided by the norms that the legal order provides in ordinary times, a moral gap opens up in which the agent must stand alone. The would-be revolutionary must accept the consequences of her decision to act, since she instigates a lawless period of time in which much suffering, death, and injustice will occur, yet this does not mean she cannot act at all.<sup>71</sup> Thus, even Kant was unable to wholly rule out the possibility of true, ethically-inspired disagreement with government.

##### *5. The failure of social contract theory*

The flexibility of social contract theory means it can be ‘stretched’ to accommodate various ideological positions, (though it is perhaps, more amenable to some). Contract theory can *also* be considered a rhetorical/polemical device used by the theorist to press her own understanding of what human nature is like, what constitutes political legitimacy, what is the best form of government, and so on.<sup>72</sup> Thus, theorists including Kant and Hobbes tried to use the theory to defend state authority, while others, including Rousseau and Locke, used similar theoretical concepts to defend individual liberty and rights held *against* the state.

The malleability of social contract in the hands of the theorist, however, proved to be the undoing of contractarian thinking: “...neither Kant nor Hobbes could come up with a reason for creating a state that was also a reason precluding legitimate rebellion under any circumstances...the reason originally justifying that state’s creation can become a reason

---

<sup>71</sup> Korsgaard, 315

<sup>72</sup> Steinberg, 26-7

justifying its destruction and replacement by those subjects.”<sup>73</sup> Basing a theory of state legitimacy upon the consent (implied or otherwise) of its future subjects always opens up the possibility of a justified rebellion, since the temporal priority of the individual to the state suggests that the latter (being an artificial construct of the former) can just as easily *not* exist.

If one agrees with Kenneth Minogue’s claim that “the social contract doctrine is” concerned mostly “...about the relapse of political life into a situation of social breakdown.”<sup>74</sup>, the invocation of contractarian reasoning to support insurrection becomes less coherent (despite Locke), since social contract theory itself cannot be taken as a monolithic tradition. In fact, the emergence of the social contract type of theorizing about legitimacy, Minogue contends, is a sign of fears of social breakdown (as opposed to a mere concern with constitutional revision) which indicates that “men want to rethink their social arrangements in terms of fundamentals.”<sup>75</sup> The political theorist in her role as encompasser-of-disorder supplies contractarian theory in order to meet this demand for fundamentals, but (predictably, perhaps) ends up tailoring the theory in response to particular historical events, social needs and her own political predilections.

An issue which should be addressed at this point is why theorists like Hobbes and Kant were “so afraid of the agency implications of the social contract methodology” that they denied those implications “in a way that made their theories invalid in a fairly obvious way?” Hampton suggests that these theorists feared to admit “...what the social contract methodology pressures any practitioner of it to admit: that in the end, the only ‘political masters’ subjects have are

---

<sup>73</sup> Hampton, 262. Original text is italicized.

<sup>74</sup> Kenneth R. Minogue, “Social Contract and Social Breakdown.” *Democracy, Consensus & Social Contract*. Pierre Birnbaum, Jack Lively, and Geraint Parry, eds. SAGE Modern Politics Series: Volume 2. (London and Beverly Hill: SAGE Publications, 1978), 134

<sup>75</sup> Minogue, 140

themselves.”<sup>76</sup> Admitting this adds an unappealingly arbitrary aspect to politics and political philosophy, which naturally enough, contract theorists were eager to overlook.

Later generations of political theorists were more willing to grapple with the nihilistic implications that the arbitrariness of authority and its justifications raises. The project of the contract theorists was eventually taken up by those who also sought to ground sovereign power in the assent of the governed, but who used the more concrete idea of constitutions to do so. Accordingly, the next section of this paper will discuss constitutionalism, particularly as it is conceived by Hannah Arendt. Arendtian constitutionalism goes a step beyond Rousseau’s general will so that the individual aspect of consenting to be ruled is elided. For Arendt, the mere acting together in mutual promising is what legitimizes the moment in which a new government is constituted while the People’s vested ability to revise the legal order is what maintains that government’s legitimacy *after* the foundational moment. The useful and the problematic aspects of the Arendtian conflation of founding and conserving violence will be discussed in the next chapter.

\*

---

<sup>76</sup> Hampton, 266

## CHAPTER TWO:

### Constitutionalism: Legitimacy through amendment?

\*

#### *1. The quest for legitimacy: From Contract to Constitution*

We have seen from the above discussion on the social contract the difficulty in justifying political authority in purely rational terms. The inability of contractarianism to contain the threat of revolutionary violence means that it was unable to complete its project, i.e. justify *obedience* to the law. Ultimately, social contract theory, even in the hands of an avowed monarchist like Hobbes, proved to be too porous to the possibility of rebellion. As Hobbes and Locke formulated the social contract, it ended up being more a justification of insurgency than of compliance. Meanwhile, Kant offered us a version of social contract that glossed over the crucial aspect of consent, nearly excluding the possibility of resistance altogether.

A modified version of constitutionalism has been put forward, of late, as a solution to the problem of legitimizing state authority while simultaneously containing the threat of revolutionary violence. Written constitutions in the American style are thought to be a more stable or valid form of legitimization than theories of putative social contract and covenant. This is mostly because, rather than eliding the problem of possible rebellions, constitutions grapple with the problem head on, transforming dissent into a means of actually *legitimizing* state coercion.

Some have argued that the revolutionary uses violence to express her moral nature, while the terrorist merely wishes to express their freedom to act, or more specifically, to kill. Violence against the state is not meant to be an instrumental means towards change, but is performative in

nature.<sup>1</sup> Revolution seeks reform, while terror seeks destruction for its own sake.<sup>2</sup> Yet I argue that the distinction itself merely reflects the discourse authorized by the preexisting legal-political order, which excludes the individual's use of violence in any context. The criminalization of dissidents by the state actually depends largely on those factions being unsuccessful in their quest to overthrow the state than in the illegitimacy of their actions or beliefs.

Indeed, the Founding Fathers exist only in the context of successful revolution. The terrorist exists only in the context of failure. It is merely the validating power of *success* that gives us the ability to distinguish between a revolutionary and terrorist.<sup>3</sup> This distinction, divorced from its intensely *political* aspects (which operates in all official discussions of violent insurgency) thus becomes quite arbitrary, a matter of time and luck and perspective, rather than of truth. One's identification of a violent dissident as either a 'freedom fighter' or a 'terrorist' depends entirely upon one's allegiances in the war between rebel and authority, rather than a hard-and-fast set of criteria by which to judge moral claims.

In a revolutionary period, the winner not only gets to write the official history of the events, but also gets to determine the very framework for future ethical discourse and action. Law itself has no normative content beyond its context in a historical epoch and normative order: “[r]ules are empty in themselves, violent and unfinalized; they are made to serve this or that, and can be bent to any purpose. The successes of history belong to those who are capable of seizing

---

<sup>1</sup> Annette C. Baier, “Violent Demonstrations.” *Violence, Terrorism, and Justice*. R.G. Frey and Christopher W. Morris, eds. (Cambridge: Cambridge University Press, 1991), 42-43

<sup>2</sup> Zeev Ivianski, “The Moral Issue: Some Aspects of Individual Terror.” *The Morality of Terrorism: Religious and Secular Justifications*, second edition. Yonah Alexander and David C. Rapoport, eds. (New York: Columbia University Press, 1989), 229

<sup>3</sup> Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’” *Political Writings*, op cit., 82; “The Metaphysics of Morals”, *ibid.*, 147

those rules...in such a way that the dominators find themselves dominated by their own rules.”<sup>4</sup> Had it failed, the American Revolution would now be considered an unlawful act of sedition and the Founding Fathers would be remembered as mere criminals, if at all. But because it was successful, the founders are remembered as such, and the rebellion against certain British policies assumes the nobler guise of revolution.<sup>5</sup> The rules of discourse change according to the way historical events play themselves out.

Before I continue, I ought to make clear what I mean by ‘constitution’ and ‘constitutionalism’. Constitution can refer to a document that sets out the framework of rights, duties, and restrictions in a particular state (as in the American case), or a body of legal rules that perform a similar guiding, meta-jurisprudential function in the creation of statutory law (as in the British case). The term can also refer more broadly to the way in which a polity functions, in both a day-to-day sense (the methods by which policies are actually created, carried out and challenged) and a structural sense (the guidelines for the creation, maintenance and destruction of policies). And finally, constitution can refer to the actual act of founding or constituting a nation.

I am using ‘constitutionalism’ to refer to a particular set of ideas that have been best articulated in *The Federalist Papers* and in the work of Hannah Arendt, and have to do with how a people create rules to govern themselves. ‘Constitutionalism’ is broadly defined as including anything that is concerned with the juridical composition of the state. (This means that theories of social contract, justice, rights, and so on fall under the larger topic of constitutionalism). More specifically, Arendt and the authors of *The Federalist Papers* attempt to contain the threat of

---

<sup>4</sup> Michel Foucault, “Aesthetics, Method and Epistemology.” *The Essential Works of Michel Foucault, 1954-1984*. Paul Rabinow, ed. (New York: New Press, 1998), 3

<sup>5</sup> There are some who argue that the American Revolution was really a conservative, colonial rebellion rather than a true revolution. See, for example, Coleman, *Hobbes and America*, 26-8, 72-4, 123

revolutionary violence that proved to be the undoing of social contract theory. The issues of minority factionalism and rights, and Arendt's concern with providing the American Constitution with irreproachable foundations, betray similar anxieties about 'the political', which itself is a concept that, while particularly concerned with (potential and actual) conflict, actually covers the entire field of human relations. For now, I will say that this version of 'constitutionalism' can be considered the sum of strategies that intend to institutionalize and normalize dissidence.

As a means of placing the above discussion into a context, the writings of Niccolò Machiavelli and Jacques Derrida will be taken up to explore the nature of founding and preserving violence, which are intrinsic to the constitution of the modern state. These two concepts will later be employed with regard to Hannah Arendt's discussion of the American constitutional moment and how this particular act of constitution transformed the threat of insurgent violence into state-preserving, juridical power. Finally, I will attempt to critique Arendt's position, arguing that the containment of founding violence in constitutional means of reform causes the rebel to disappear altogether, and routinely makes violent revolutionaries into terrorists. A more extensive critique of this foundationalist turn in constitutionalism, and its implications for the common understanding of state authority, will be taken up in Chapter III of this paper.

## *2. Derrida and Machiavelli: Founding and preserving*

The sacralization of 'founding violence', as Jacques Derrida refers to it, in constitutional law is, in some sense, the valorization of democratic principles or the idea of democracy itself. Indeed, "...constituent power tends to become identified with the very concept of politics as it...is understood in a democratic society." Yet constituent power, or the founding violence, is



temporally limited, being only “deployed as an extraordinary power” only.<sup>6</sup> Any attempt by the citizens to ‘take the law into their own hands’, in ordinary times, is considered illegitimate rebellion, an insurrection *against* the sovereign power, which itself is identified solely with the state during ordinary times. It is only in extraordinary circumstances, such as during a revolutionary period of upheaval, that constituent power *may* be mobilized. In that case, sovereign power is identified with ‘the People’, in whose name the rebels challenge governmental authority. The sovereign power reverts back to the state, i.e. the revolutionary faction, if the rebellion is successful.

But the moment of insurrection itself is never legitimate. It can only be made so after the fact. Thus, constituent power is future-oriented, while the constitution, in attempting to enshrine (certain) revolutionary values is more past-oriented.<sup>7</sup> The ability to amend the Constitution, which is a remnant of constituent power preserved in constitutional law, keeps the Constitution from being *entirely* backwards-looking.

Jacques Derrida identifies a constative element in constitution-making, in which there is an implicit appeal to a higher authority that cannot itself be questioned, lest the entire enterprise (namely, the state) crumble.<sup>8</sup> This approach could be characterized as a kind of postmodern pragmatism in that it denies the possibility of an absolute truth to base authority upon, but views the theoretical existence of a higher authority as useful to the functioning of the polity. Thus, the idea that law is justice or that law is right, is a kind of Platonic lie that is used to keep the state operational, despite the normative emptiness at the heart of law.

---

<sup>6</sup> Antonio Negri, *Insurgencies: Constituent Power and the Modern State*. Maurizia Boscagli, trans. Theory out of Bounds, vol. 15. (Minneapolis; London: University of Minnesota Press, 1999), 1

<sup>7</sup> Negri, 10.1

<sup>8</sup> Jacques Derrida. “Force of Law: The ‘Mystical Foundation of Authority.’” *Deconstruction and the Possibility of Justice*. David Gray Carlson, et al, eds. (New York; London: Routledge, 1992), 55-6

Steven Smith identifies the tendency to sacralize law (or the turn towards constatives in the constitution) as the “impulse to idolatry”. Smith claims that the innate human desire for the superlative has been frustrated by modern-day secularism, so that Law becomes the super-human entity or force that we have come to rely on as a source of guidance, protection and morality.<sup>9</sup> The Law has come to take on an increasingly divine aspect since “...there is no higher source of good or right, so that purely human goods are all we have, then the difference between moral decisions and calculations of individual or collective self-interest seems to disappear...” The death of God, as Friedrich Nietzsche found, leads to problems when dealing with egoism and the lapse of ethics into mere utilitarianism or relativism.<sup>10</sup> Divine Law thus serves as a kind of placeholder in the moral universe in order to ensure good behavior.

This ‘enabling fiction’ of the republic gives law a divinity that is useful to the on-the-ground operations of the state.<sup>11</sup> Tricky questions about the normative basis for law can be answered simply by the affirmative: law is law. Or to be more specific: the normative basis of law resides in its enforceability. The concept of law contains within itself a command to obey. Without this implicit command, law would not be itself but merely be words, or maybe hopeful suggestions. So we can reformulate our earlier statement thusly: law is not law, unless it is obeyed. Law will not be obeyed unless it seems to be right, for the belief of the masses is the true basis of the power of law. Law must be obeyed to be law. Therefore, law *is* law, or that which is obeyed.

Derrida thus identifies the ‘moral authority’ of the democratic state in its foundations. The act of constituting crystallizes revolutionary moments *and* acts as the basis for the authority

---

<sup>9</sup> Steven D. Smith, “Idolatry in Constitutional Interpretation.” *Against the Law*. Paul F. Campos, Pierre Schlag and Steven D. Smith. (Durham; London: Duke University Press, 1996), 169-70

<sup>10</sup> Smith, 171

<sup>11</sup> Bonnie Honig, “Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic.” *The American Political Science Review*, Vol. 85, No. 1 (March, 1991): 106

of the state. To use Derrida's terms, constitutional law embodies both *founding* and *preserving* violence.<sup>12</sup> Unlawful, or criminal violence founds the state, yet the use of revolutionary violence is absolutely forbidden once it has been established. This prohibition is necessary to maintain the normative meaning and hence, the authority of the law. This is the aporia of constitutional law: it cannot tolerate dissidence, though it is itself born of the same sort of violence it deems illegitimate. The success of violence is what authorizes Authority, not the general will, the constituent power, the sovereign, or other fictions political philosophers have created to replace God. In other words, *events* determine what Law is now, and what it may be in the future.

Founding and preserving violence are not particularly new ideas. Niccolò Machiavelli seemed to reference these ideas in his writings on the state. Civil society was not a static entity for Machiavelli. Rather, it was a never-ending cyclical movement, in which one form of government inevitably degenerates into its corrupt twin (principality-tyranny; aristocracy-oligarchy; democracy-anarchy), leading to revolution and a new form of government, which itself will eventually decay and be replaced.<sup>13</sup> With respect to the topic at hand, Machiavelli believed that the prince should reintroduce the founding violence regularly in order to remind/warn citizens of the chaos (but also mostly the uncertainty) that lurks outside the juridical order.

Conserving violence has two separate but related tasks. Since people are generally "more taken with the present than the past" and tend to forget things rather easily, a form of revolutionary violence should be reintroduced into the polity regularly in order to remind the citizenry of the turmoil that precedes the constitution of a new regime.<sup>14</sup> The prince thus evokes the fear people have of the chaos and violence of revolutionary times in order to both justify his own rule (since even

---

<sup>12</sup> Derrida, 31

<sup>13</sup> Niccolò Machiavelli, *The Discourses*. Leslie J. Walker, trans. (London: Penguin Books Ltd., 1983), Book I, Chapter 2 (108)

<sup>14</sup> Machiavelli, *The Prince*. Daniel Donno, trans. (New York: Bantam Books, 1998), Ch. XXIV, (83)

an absolutist state is better than anarchy) and as a warning against the consequences that all suffer in the case of insurrection.

Additionally, conserving violence serves to remind the nation's leaders, ministers, bureaucrats, etc., of the founding principles of the nation, lest they become complacent and then corrupt. A mindfulness of the past keeps leaders aware of the future, and the possibilities it contains for violent upheavals. Rome was thus an ideal model of a polity, for it safely channeled the potential violence of class conflict between the plebs and the aristocrats into a controlled conflict based on institutional structures (the two houses of the Senate) that kept political life vital *and* stable. Thus, for Machiavelli, good laws and good citizens arise from "...those very tumults which many so inconsiderately condemn."<sup>15</sup> Violence is *productive* of the normative-judicial order.

Given his cyclical view of history, and his insistence that human nature remains essentially the same, Machiavelli seemed to be suggesting that a controlled revival of violence can act as a conservative, rather than as a destabilizing force in the state.<sup>16</sup> The destructive violence of the revolution is then used as a constructive force to keep society together. In fact, 'revolution' can thus be understood in both its senses: an overturning of the existing legal order *and* a cyclical movement back to the foundational act. Revolution is a re-founding of the republic, or of the *idea* of the republic.<sup>17</sup> The revolutionary wishes to both move forwards while also referencing an idealized origin. (As we will see in the next section on Arendt, a controlled return to the founding violence via institutional means for expressing dissent is thus a legitimate use of violence in the political realm.) Thomas Jefferson seemed to be referring to this sense of re-

---

<sup>15</sup> Machiavelli, (1983), Chapter 1.4, (114)

<sup>16</sup> Presumably, one should be careful in employing conserving violence. People need to be reminded of the originating violence without having the violence at the heart of law exposed.

<sup>17</sup> Arendt, *On Revolution*. (New York: The Viking Press, 1963), 35-38.

founding violence when he famously remarked that there ought to be a revolution every fifteen years.

Now we can better understand why Arendt considered violence to be a “weapon of reform”, at least when used in a limited way in democracies. She seems to be relying on Machiavelli’s idea that corruption increases the further men are removed from the foundational moment. The violence that founded the constitutional order must be renewed periodically in order to keep laws just and government legitimate. Thus, “[d]issent implies consent, and is the hallmark of free government” and the ability to amend the conditions of political allegiance is what truly justifies legal authority in the American case.<sup>18</sup>

For Arendt, a written constitution is a way to keep the republic vital because it “...serves to insure that what flows out of the moment of the founding will be stamped by the spirit, or principle, which was present in the beginning...the principle of its life...the constitution, by shaping all subsequent action, secures continuity”<sup>19</sup> The constitution exists in order to guarantee that the unifying spirit which informed the founding of the state will live on and provide cohesion to subsequent generations or anyone who was not present at the original founding, like excluded minority groups. Since people are more apt to feel more strongly about things that occur in their own lifetimes, it is useful to keep conflict alive (albeit in a controlled form) in order to keep people and leaders mindful of the revolutionary violence that birthed the nation. The controlled violence of constitutional reform is both a warning about the fragility of the legal order, and a means to reaffirm the authority of that legal order, in that it is *able* to introduce violence in this way. However, the possibility for violent dissidence, or conflict that is not

---

<sup>18</sup> Arendt, “Civil Disobedience.” *Crises of the Republic*, op cit., 88

<sup>19</sup> Michael G. Gottsegen, *The Political Thought of Hannah Arendt*. (Albany, New York: State University of New York Press, 1994), 123-4

controlled or mediated by constitutional law or institutional means, is excluded in Arendt's formulation of constitutionalism.

### *3. Transforming dissent: Arendt and the American Constitution*

For Hannah Arendt, constatives were inherently violent because they silenced discussion. An absolute removes the possibility for communication, requiring only that people dumbly acquiesce to its command.<sup>20</sup> The existence of some transcendental truth was not as important as securing a space for communicative action, which itself ensures the coexistence of heterogeneous individuals in society; it constitutes the general will itself.<sup>21</sup> Since constatives are not truly final in a transcendent sense, but merely expressions of personal will, they should not be the basis of politics. Rather, the very contingency of the most concrete expression of the general will (or the constitution) serves as the basis of legitimacy in the American situation.

Contra Derrida, Arendt believed that the foundation, which is the simultaneous formation of a general will and a polity, is a pure, performative act. The constitutional moment derives its legitimacy from the coming-together of a people to constitute themselves under the rule of their own sovereign will. Their acting in concert empowers them to found the nation/general will/civil society/the state/etc. The act of authorizing the sovereign power is equated with the act of foundation. The acting-together to enter into the social contract is what gives force to its dictates: "The force that keeps [the people] together...is the force of mutual promise or contract...sovereignty resides in the resulting, limited independence from the incalculability of the future..."<sup>22</sup> The foundation thus requires no higher authorization than its own nature as a

---

<sup>20</sup> Honig, 106

<sup>21</sup> Arendt, (1958), 198-99

<sup>22</sup> Arendt (1958), 245

moment of pure natality, pure action in concurrent word and deed.<sup>23</sup> This line of reasoning naturally leads one to the conclusion that only republican forms of government are legitimate. Unsurprisingly, Arendt viewed the American constitutional act as the *sine qua non* of enshrining (but not freezing) the political will into legal reason.

Atypically for a political philosopher, Arendt sought to accommodate the contingency and unpredictability of politics (which gains this character from natality, or the contingency and unpredictability inherent to human action) within theory. Under Arendt's version of constitutionalism, the possibility of revolution, or founding violence, is folded into preserving violence. That which threatens the state now becomes its best means of defense against insurgencies since the legitimacy of law arises from the unfinished, ongoing nature of the constitutional project. The authority of the constitution to authorize positive law is founded in the ability to amend it.<sup>24</sup> In this way, law makes itself more contingent, opening itself to the uncertainties of the future and the possibility of reform.

The ability to protest the legal order both legitimizes the Law and is guaranteed by it. The basis of state authority thus shifts from extra-legal appeals to reason, ethics or self-interest (as contract theory attempted to do), to its own conditional nature. Law becomes the subject of its own scrutiny. The issue of consent need no longer trouble us, since all subjects are guaranteed the right to change the legal order. If they do *not* do so, then they have implicitly given their approval of the laws. The subtext of this right to dissent or withhold consent is that one may not make war against the state, or use non-legal (which is to say, non-approved)

---

<sup>23</sup> Honig, 101

<sup>24</sup> Honig, 110

methods of protest. As we have already noted, for Arendt, the ability to dissent implies *consent* to constitutional law.<sup>25</sup>

Arendt's position is informed by a desire to ensure that the origins of the democratic state are irreproachably established, meaning that she had to find a basis for law that was not arbitrary will (which was the foundation for the totalitarian state) but still retained an air of authority.<sup>26</sup> The recurring problem in attempts to legitimize authority is that civil law retains the divine aspect that it derived from religious law, something Arendt noted: "[T]here was no avoiding the problem of the absolute...because it proved to be inherent in the traditional concept of law."<sup>27</sup> With the dawn of the secular age, philosophers were left with a God-shaped hole in law.

Arendt attempted to fill the normative emptiness at the heart of law with politics, but in a way that avoids invoking the general will in the Rousseauian sense. Whereas Rousseau envisioned a virtuous, active, educated populace which was intensely involved in every step of political decision-making, Arendt does not make active citizenship a necessary requirement for legitimate politics. The means of legitimation are entirely institutional, vested in the ability to amend the constitution, rather inherently in the People as such: "...the very authority of the American Constitution resides in its inherent capacity to be amended and augmented."<sup>28</sup>

Arendt's move attends to the problem of social cohesion and civil obedience, while simultaneously avoiding invocation of divine command or a governing 'law of laws' which must inevitably refer back to an absolute. Arendt also manages to avoid the vicious circle that arises when the general will is posited as the basis of law's authority since such a move can be defeated by simply pointing out that the People (and the general will) do not exist before the moment of

---

<sup>25</sup> This is not an unproblematic assumption and will be addressed later in this paper.

<sup>26</sup> Honig, 99-100

<sup>27</sup> Arendt, (1963), 195

<sup>28</sup> Arendt, (1963), 203



constitution. Instead, she *acknowledges* that the constitutional moment involves the double move involved in the constitutional moment in which is created the general will through the performative utterance, “We, the People,” along with the republic itself. The legitimacy of laws is based on the Constitution, but the legitimacy of the Constitution remains undecided.<sup>29</sup> Even the devices that serve to contain revolutionary violence are themselves a repetition of it: “The law can indeed stabilize and legalize change once it has occurred, but the change itself is always the result of extra-legal action.”<sup>30</sup>

By making the very act of foundation the source for the legitimacy of law, Arendt avoids the temptation to enforce legal reasoning upon politics, acknowledging instead the inherently unfinished nature of democratic foundations. The founding is thereby recognized by Arendt as a purely political and existential event. (It cannot be a mere legal act since it temporally preexists the legal order.)

By making politics the center of Law, Arendt defused possible threats to the juridical order so “[t]hat which threatens law, already belongs to it.”<sup>31</sup> Dissent is channeled into legitimate outlets, neutralizing the twin threats of pluralism and individual freedom to the liberal political order. In this way, the spirit of the revolution—the newness of foundation coupled with the terror of founding violence—is repeated in the controlled, conserving, legitimate violence of institutionalized political conflict. Revolutionary terror actually “...repeats its gesture of interruption each time that the Republic legislates, each time that a citizen makes a pronouncement.”<sup>32</sup> Machiavelli’s suggestion finds its full fruition in Arendt’s vision of

---

<sup>29</sup> Seyla Benhabib, “Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida.” *Journal of Political Philosophy*, Vol. 2, No. 1 (1994), 99-100

<sup>30</sup> Arendt, “Civil Disobedience.” *Crises of the Republic*, op cit., 80

<sup>31</sup> Derrida, 35

<sup>32</sup> Jean-Francois Lyotard, “Terror on the Run.” *Terror and Consensus: Vicissitudes of French Thought*. (Stanford, California: Stanford University Press, 1998), 34

American constitutionalism. The irruption of founding, constituent violence is normalized and institutionalized into assuming the form of a conserving or renewing force that keeps the Law authoritative. Law is both a concealed founding violence, and a conserving violence that is derived from the founding violence.

The constitutionally-guaranteed ability to change the Constitution itself, to alter the meta-rule of law, thus replaces the Jeffersonian suggestion of having violent insurrections regularly. Constitutionalism is how democratic governments are able to safely channel dissent into peaceful, controlled and institutionalized means for reforming institutions. Protest is ingeniously turned into something that *strengthens* state power. The norm manages to co-opt and contain the violence of non-law, the other, and transform it into that which guarantees the dominance of the norm. Thus, the ability to protest the legal order both legitimizes the Law and is guaranteed by it.<sup>33</sup>

Yet the paradox of the moral law-breaker, which we first discussed in Chapter II of this paper, presents problems for Arendt's version of constitutionalism. For one thing, Arendt does not concern herself with the moral arbitrariness of the founding, or the fact that *any* group of people can act together to form something new. Nor does she problematize acting-together, which in its essentially existentialist formulation is not necessarily a non-violent moment (particularly if one reads Arendt through/against Carl Schmitt). The moral revolutionary, who presented difficulties for social contract theory, also presents problems for the constitutionalist project.

---

<sup>33</sup> Hannah Arendt, "Civil Disobedience", *Crises of the Republic*, Op cit. 88-89

4. *The problem of the moral revolutionary, pt. 2*

A consequence that arises in Arendt's move to enfold founding violence into preserving violence is that true revolution does not seem to be possible in a democracy. Those who attempt to use political violence against the state are labeled mere terrorists, a threat to the normative order. To some degree, deep disagreement with the system itself (and not merely an aspect of it) becomes pathologized, criminalized. It becomes impossible to break the law and remain a moral person.

If revolution is always wrong in both a legal *and* moral sense, then what happens when a moral person finds herself in a situation in which she *must* rebel? In rebelling, she acts out of a conviction that her actions are just or right in some way, but renounces the one moral standard by which she can judge her own actions. Can political philosophy offer a solution to her quandary?

Elizabeth Wolgast comments that:

“There is a very powerful reason for saying that an unjust condition demands correction....The demand to do *something* seems tied to injustice and to one's being a person of integrity and courage. Thus, when we are faced with injustice, our natural way of thinking is consequentialist. It concerns how to get from the one repugnant situation to a superior, more just and humane one, with the least ill effects in the process.”<sup>34</sup>

Christine Korsgaard discusses Kant's refusal to admit the right to revolution from the perspective of a moral revolutionary who *does* attempt to move from a situation she finds repugnant, even if this entails employing means that are not the ones “with the least ill effects.”

Kant was against the idea of using violence to effect political reform, since to do so would be to replace the rule of law with that of violence, plunging us back into the state of nature.<sup>35</sup> But for Korsgaard, the agent proves her freedom and, more importantly, her commitment to morality by deciding to break the law. She does this, not eagerly like the

---

<sup>34</sup> Elizabeth Wolgast, “Getting Even.” *Justice, Law, and Violence*. James B. Brady and Newton Garver, eds. (Philadelphia, Temple University Press, 1991), 128

<sup>35</sup> Peter Nicholson. “Kant on the Duty Never to Resist the Sovereign.” *Ethics*, Vol. 86, No. 3 (Apr., 1976), 223

terrorist, but reluctantly and with a heavy sense of dread and regret. She realizes her responsibility for her actions, and is prepared to take the consequences of them. It is this claiming of responsibility that distinguishes a moral from an amoral or immoral revolutionary (or a terrorist, for that matter), not the value or legitimacy of her cause, nor the guilt or innocence of her targets.

Korsgaard thus highlights the essential loneliness of the conscientious revolutionary. She is a Kantian moral agent who deliberately steps out of political community, the juridical-normative order, in order to act. Since she has no set of moral rules (in a secular age, the Law is recognized as the new Ten Commandments, etc.) to guide her behavior, she acts from within a moral vacuum, alone. Action in this sense truly requires bravery, for the revolutionary is responsible for all the harm that she may cause if she fails.<sup>36</sup>

In fact, the revolutionary must be *responsible* in order to be moral. She must own her acts and commit them with the full knowledge that she must suffer the consequences of them, for she inflicts them upon others without their express consent. The executioner must also be prepared to be the condemned. This sentiment is similarly expressed in Agamben, who tells us that "...those who should happen to wear the sad redingote of sovereignty know that they may be treated as criminals one day by their colleagues...The sovereigns who willingly agreed to present themselves as cops or executioners...now show in the end their original proximity to the criminal."<sup>37</sup> Thus, the vacuum left by the overthrow of God must be filled by someone who is willing to accept the criminality of the origins her own reign, and the possibility that she will someday be overthrown.<sup>38</sup>

---

<sup>36</sup> Korsgaard, 322-23

<sup>37</sup> Agamben, (2000) 106.7

<sup>38</sup> Camus, 54

Unlike the terrorist who seeks violence for its own sake, the moral revolutionary does not believe that a return to the state of nature is the solution. Rather than cause a descent into anarchy, she seeks to reinstate or restore some vision of an ideal society or government, through the creative act of foundation. Camus described the metaphysical rebel (who eventually evolves into a revolutionary in the same way that I refer to one, that is, a moral revolutionary<sup>39</sup>) as one who seeks to create a new moral order “to justify the fall of God.”<sup>40</sup> Her rebellion is an act of solidarity with mankind, of worldly love. Rebellion aspires after values, order, and justice. The rebel turned revolutionary replaces God (or whatever authority plays the role of God) with man; divine virtue is replaced by mortal justice.<sup>41</sup> The new legal order is founded and is necessarily made to seem as if it were an inevitability. But the violence of the founding does not necessarily make the established regime illegitimate since:

“...those who take the law back into their own hands are not acting according to principles which differ from those groups who are in possession of power and who would be prepared to act illegally were the outcomes of public policy threatening to become substantially different. There is no true distinction between the *manifest* violence of the out-groups who commit infractions of the law and the *latent* violence of the in-groups possessing power.”<sup>42</sup>

What the revolutionary does and what the state once did are equivalent acts, differing only in terms of temporality, since foundings occur only after successful revolutions. All governments are born in bloodshed. Kant admits as much, though insists that we treat all regimes as having legitimate origins. In fact, he seems to prefer that we not question the basis of Law’s authority at all:

“The origin of the supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought not* to

---

<sup>39</sup> Albert Camus, *The Rebel*. Anthony Bower, trans. (New York: Alfred A. Knopf, 1954), 77

<sup>40</sup> Camus, 31

<sup>41</sup> Camus, 53

<sup>42</sup> Coleman, 24

indulge in *speculations* about its origins with a view to acting upon them, as if its right to be obeyed were open to doubt...Whether in fact an actual contract originally preceded their submission to the state's authority, whether the power came first and the law only appeared after it, or whether they ought to have followed this order—these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.”<sup>43</sup>

This could be considered a form of philosophical pragmatism, perhaps. Confronted with the aporia of the origin, Kant pragmatically chose to reaffirm state sovereignty no matter the consequences to individual liberties, for fear of a return to an anarchic state of nature.

Though the discussion of the revolutionary moment reveals the arbitrary basis of political authority within the state, this does not mean that violent revolt is then excusable or acceptable behavior. If state power is arbitrary, then the cause of the rebel is only more so. This is something that the rebel is usually aware of: “...we do not want war; but war can only be abolished through war...in order to get rid of the gun it is necessary to pick up the gun.”<sup>44</sup>

The problem of the moral law-breaker, which we earlier discussed in the context of the social contract, also presents problems for Arendt's version of constitutionalism. For one thing, the morally arbitrary nature of the founding is not directly addressed by Arendt. Indeed, the acting-together in covenanting that Arendt describes is curiously vacant of any moral content. While speech-acts may be enough to guarantee the purity of politics, are they enough to guarantee virtuous politics, as Arendt seems to assume? It is not difficult to imagine instances of mutual promising that Arendt probably would not find to be praiseworthy, such as the formation of the Confederation of Rebel States, or the Palestinian Liberation Organization, or other groups that are formed to advance narrow self-interests (which Arendt criticizes as being more ‘social’ rather than ‘political’). In fact, Arendt criticized the French Revolution as the embodiment of

---

<sup>43</sup> Immanuel Kant. “The Metaphysics of Morals.” (1991), 143

<sup>44</sup> Eldridge Cleaver, *Soul on Ice*. (McGraw Hill, 1968), 37

‘socialized’ politics, embodied in the apparently selfish desire of the *sans culottes* for economic justice. Meanwhile, she deemed the American Revolution to be wholly political, an instance in which great men performed great discursive deeds, who sought to form a nation on the basis of a desire for the right to *be* political, to *act*.<sup>45</sup>

But, we have to question the idea that the acting-together of the foundation is not violent. Contrary to what Arendt asserts, the essentially existential nature of the constituent moment means that it is necessarily violent because it *excludes*. Foucault noted that “...in many of the analyses that have been made by Arendt, or...from her perspective, the relation of domination has been constantly disassociated from the relation of power.”<sup>46</sup> Arendt identified power in the constitutive moments in which people act together or make mutual promises, but does not seem to problematize the possibility of relations of domination and subjugation within those moments of acting-together. The violation of violence (physical, linguistic, or otherwise) is inherent to acting-together, since this mutual promising necessarily excludes. One does not become a Nietzschean creator of new values *without* violence since one cannot shape a new normative order out of the ether. Like human beings, nations are born in blood and suffering.

For instance, in the American constitutional moment that Arendt so valorizes, the people of what would become the United States were not the ones who came together and promised to form a new government. Rather, self-selected elites acted as *representatives* of ‘the People’ and made this promise *for* them. These ‘representatives’ (and I use quote marks because they were not chosen in an entirely democratic fashion), perhaps, were empowered by this moment of acting-together, but one questions whether the totality of the population in the thirteen colonies,

---

<sup>45</sup> Arendt criticized the French Revolution, as it was more a social, rather than a purely political revolution. This critique is a recurring theme in *On Revolution*.

<sup>46</sup> Michel Foucault. “Politics and Ethics: An Interview.” *The Foucault Reader*. Paul Rabinow, ed. (New York: Pantheon Books, 1984) 378

the 'We' that is said to constitute the United States, was similarly empowered. It is abundantly clear, given later history, that the invocation of the constitutive 'We' in the Constitution is a moment of violence in that it forms the nation through an exclusion of the 'other', i.e. African-Americans, women, indigenous Americans and so on. While the 'We' that formed the republic, the constitutive force, was exclusively male, white and upper-class, the 'we' that was constituted therein included even the subaltern groups mentioned above, for they were/are expected to follow the laws that they (as supposedly part of the constitutive 'We'), in a sense, 'created'. The moment of constitution that Arendt found so promising is merely another instance of domination and subjection to Foucault. Indeed, Arendt's "embrace of natality as a paramount political value threatens to consign all latecomers or subsequent political actors to the subaltern sphere of political everydayness or inauthenticity."<sup>47</sup>

Thus, "the invention of the United States must be violent since no previous law nor state can justify it."<sup>48</sup> Despite Arendt's valorization of natality, the creation of something new is necessarily an act of violence, a violation of *someone's* rights, security, ability to protest, and so on. The existential nature of the Arendtian founding moment make it an inherently violent enterprise, despite Arendt's strenuous attempts to extract violence from the constituent moment. The coinage of a new kind of action, the 'speech-act', is an attempt to elide the quandary that the constative 'We' presents.

In the end, it is apparent that the possible conflict between one's moral sense and one's duty towards one's neighbors cannot, ultimately, be resolved in the *legal* sphere. Constitutions cannot include a means for *real*, fundamental disagreement with the juridical order itself. Philosophy, perhaps can offer the moral revolutionary solace in affirming the necessity, if not

---

<sup>47</sup> Richard Wolin, 168

<sup>48</sup> Richard Beardsworth, *Derrida & the Political*. (London; New York: Routledge, 1996), 99



legitimacy, of her actions. But even then, “there is no possible salvation for the soul that truly feels compassion” for she steps into an indefensibly god-like role, risking other people’s rights in her unilateral decision to renew the polity.<sup>49</sup>

### 5. *The theoretical exclusion of violence*

By co-opting the rebel’s project and channeling the possibility of revolutionary violence into a preservative force, the new constitutionalism as championed by Arendt, among others, manages to elide the theoretical quandary of the moral revolutionary. The good citizen *is* a good person. However, by valorizing speech to the point of nearly equating it with action, Arendt makes political protest an impossibility by means *other than those offered by the state*. Ultimately, one *must* be a good citizen, in order to exist as fully human. For instance, Arendt commented upon the youth revolts of the late ‘60s thusly: “This generation discovered what the eighteenth century had called ‘public happiness’, which means that when man takes part in public life he opens up for himself a dimension of human experience that otherwise remains closed to him and that in some way constitutes a part of complete ‘happiness.’”<sup>50</sup>

But what does the moral revolutionary have to do with the anxieties of the political theorist? It seems that for Arendt, Kant and others, the *threat* of political violence is temporal in nature; using violence to achieve political ends is dangerous if those ends are not quickly achieved. It is the moment before the law-breaker acts that is most perilous. Arguments against political violence based on victims’ rights, ethics, etc. simply miss the point. Inserting violence into the public life can radically change the world in unexpected and even dangerous ways.<sup>51</sup>

---

<sup>49</sup> Norman Jacobson, *Pride and Solace: The Functions and Limits of Political Theory*. (Berkeley: University of California Press, 1978), 160

<sup>50</sup> Arendt, “Thoughts on Politics and Revolution.” *Crises of the Republic*, op cit. 202

<sup>51</sup> Arendt (1969), 80

The natality of action makes the moment *of* action, the decision to act, a moment of high drama and risk.

In a sense, Arendt was as fearful of the unpredictability of natality as any other theorist, and ended up joining a tradition that has long sought to conceal the apparent arbitrariness of the authority of the moral-judicial order. As we have seen, "...the reorganization of the relation between violence and law ends up hiding violence by giving it, precisely, a site."<sup>52</sup> The co-option of revolutionary or founding violence by the normative order in the form of written constitutions is precisely this reorganization between violence and law, which does the double task of hiding the violent origins of law and excluding the possibility of violence as a means of protest.

The foundationalist turn in Arendt's constitutional theory was thus an attempt to preserve the revolutionary spirit of a nation's birth. Unlike social contract theory, which tended to emphasize the violence in the state of nature, foundationalism invokes the violence that founded the nation as a legitimizing factor. The revolutionary is part of the logic of the republic. Her role is built into the system of modern democracy. Yet Arendt ultimately denies the full implications of her valorization of revolution, depicting revolution in an oddly bloodless way.

There is no *legal* right to revolution, and the justification for a moral right is shaky, given the possibility of harming innocents. Accordingly, the most compelling reason Kant had against revolutionary action was that it involves treating one's fellow humans as means towards a goal, rather than as ends in themselves.<sup>53</sup> But sometimes, repugnant though it may be, a moral person may find herself doing just that, in order to *save* her fellow man.

---

<sup>52</sup> Beardsworth, 91

<sup>53</sup> Nicholson, 221-22

But if norms are contingent, depending on the successful use of violence in order to *be* norms, then the violent revolutionary might be considered merely a moral-person-in-waiting. Perhaps morality is nothing more than a self-aware, thoughtful, and slightly ironic or skeptical attitude towards one's beliefs, and even more importantly, a willingness to accept responsibility for bad outcomes if one does decide to act. One must act and live with the consequences, good or bad, of one's actions: "...the rebel can never find peace. He knows what is good and despite himself does evil."<sup>54</sup> Sometimes, violence may be a more acceptable course of action than doing nothing at all.<sup>55</sup>

The theorist, however, does an additional exclusionary violence by automatically labeling the cause of every violent dissident 'terrorist' and illegitimate. This move is a repetition or recreation of the fundamental exclusion that forms the nation. The theorist creates a 'we' by defining who moral agents are so as to exclude those who use violence as a means of protest. Constitutionalism, oddly enough, repeats the exclusionary violence of the Constitutional moment by excluding the possibility of just political violence once the republic has been formed. This is not a judgment on the theorist, but rather, it is an acknowledgement that this doubled exclusion exists, and perhaps *must* exist. The implications of the preceding statement will be more fully unpacked in the next chapter.

\*

---

<sup>54</sup> Camus, 252

<sup>55</sup> This is not to say that violence and passivity are the only options available to a moral person, but I am only concerned with the situation in which they *are*. That is why I am not discussing civil disobedience at any great length in this paper.

## CHAPTER THREE:

### Legitimacy beyond contract and constitution?

\*

#### *1. The problem with legitimization*

Though Kant's critique of revolutionary violence cannot be cast aside lightly, his way of framing the discussion places perhaps too much emphasis on the revolutionary as the variable.<sup>1</sup> As I have attempted to demonstrate in the previous chapters, the more relevant issue may be to determine whether the state has a *more* legitimate claim to the use of violence than the dissident. Consequently, the issue of the Law's exclusive right to violence (which social contract theory and constitutionalism attempted, but failed to prove) will be the focus of this chapter.

Kant unreservedly believed that it was better to live in civil society than in the state of nature, no matter how corrupt or oppressive one's government. For him, living according to the laws of the state was a duty, since they provide predictability and protect rights. But I argue that Kant goes too far in his insistence on the inviolability of sovereign power. His insistence on the duty to uphold even tyranny makes one wonder "whether anarchy would not be a better alternative than continued injustice under the guise of law."<sup>2</sup> This question becomes especially compelling if we think about political obedience and dissidence in light of Michel Foucault's work on disciplinary power.

---

<sup>1</sup> The dilemma that the distinction between 'what is right' and 'what is legal' represents is not restricted to revolutionaries. Abraham Lincoln is a famous example of someone caught between personal moral beliefs and perceived duty: "I am naturally anti-slavery...I cannot remember when I did not see, think and feel that it was wrong; and yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment." 'Letter from President Lincoln.' *Liberator*, May 6, 1864, p.73. Cited in Richard J. Ellis, *The Dark Side of the Left: Illiberal Egalitarianism in America*. (Lawrence, Kan.: University Press of Kansas, 1998) 28.

<sup>2</sup> Allen D. Rosen, *Kant's Theory of Justice* (Ithaca & London: Cornell University Press, 1993), 159

## 2. Foucault: *The questionable basis of authority*

According to Coleman, "...prevailing American ideology...is distinctly more comfortable with social rather than institutional forms of coercion."<sup>3</sup> Yet one could argue that social and institutional forms of coercion can be mutually reinforcing, particularly if one believes that the law can be *productive* of the normative order. If this is so, then the power of laws to create and compel moral behavior spells some troubling implications for theories of constitutionalism.

As was discussed Chapter II, constitutional democracy's greatest strength is its ability to co-opt successful strategies of social action and even dissent. It neutralizes opposition by forcing people to express their dissent in the formal language and structures of the system, thus dictating the boundaries of discussion.<sup>4</sup> The formal, institutional rules laid out in the Constitution do coerce, both in the normal, outward sense of legal coercion, and in the normalizing effects that this particular constitution has on dissent. Yet, as we are beginning to understand, this is a silence that cannot be broached, for it is necessary to the task of constitutional law and to maintenance of authority itself.

According to Foucault, modern society produces docile bodies through the implementation of disciplinary technologies which operate through the enforcement of social norms. The means of enforcement have been internalized by successfully disciplined bodies to the extent that most people reproduce the modes of enforcement (by monitoring, disciplining and punishing themselves and others) without being blatantly coerced into doing so.<sup>5</sup> Disciplinary power is decentralized, dispersed over many bodies, institutions and even objects (e.g. a policeman's badge is an object of power) but is itself not something that can be possessed.

---

<sup>3</sup> Coleman, 114

<sup>4</sup> Jean-Francois Lyotard, "Terror on the Run." *Terror and Consensus*. Op cit., 25-6

<sup>5</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison*. Alan Sheridan, trans. Second edition. (New York: Vintage Books, 1995), 26-7

Power is a creative force, in that it creates the social norms/structures/institutions which produce subjectivities, but it is itself not an object. Thus, the subject does not have nor exercise power. Rather, power is exercised *through* the subject.

In fact, the subject is wholly the product of power. There is no 'self' that exists prior to one's constitution by existing social structures. The 'I' is merely the nexus of overlapping power relations, the effect of disciplinary practices. The individual is reduced to being merely a body that occupies a predetermined subject position, and is unable to influence the conditions that determine *her*.<sup>6</sup> Any power she may seem to possess (and power is not an object that *can* be possessed; it is more like a relation, a verb rather than a noun) is actually attached to the subject-position she occupies. A teacher, a judge, a doctor only 'have' power or exercise the power accorded to their professions in certain circumstances, such as the classroom, the courtroom and the hospital. The body who *is* a teacher, judge or doctor does not itself wield any power, since a different situation will change her relationship to those around her. A judge is powerful in the courtroom, but is not powerful as a patient in a doctor's waiting room. In other words, Foucault denies us the possibility of agency.

Furthermore, the institutions which wield disciplinary power are not necessarily natural or right. They are very much grounded in history, and are thus utterly contingent. This applies to people and roles as well. As we have seen, some subject-positions will be regarded as more powerful at a certain historical moment or geographic location while others will be more powerful at another.

Given Foucault's analysis of the operation of power through private (or individual) and social enforcement of norms, one immediately detects a problem in the Arendtian constitutional

---

<sup>6</sup> Colin Gordon. "Afterword." *Power/Knowledge: Selected Interviews & Other Writings*. Michel Foucault. Colin Gordon, ed. (New York: Pantheon Books, 1980), 239

project. The supposed ability to reform the legal order is not an additional right that has been granted to the People against the fear of tyranny.<sup>7</sup> Rather, the constitutional technique of channeling violent protest into reformatory, conservative power can be construed as merely another means by which the system asserts and exercises power. In this regard, constitutionalism is power that *normalizes* dissent. What is outside the normative-juridical order (violence, the other, *le différend*) is captured by it, and used to strengthen its authoritative position, or the its claim to ‘rightness’.

Though the system and its proponents claim that the position of the revolutionary is morally arbitrary and that her justification for her acts lacks authority, authority itself is no less arbitrary in its origins and nature. As we have argued earlier, the main difference between the claims of the revolutionary and those of the sovereign power is that the latter has been more successful at it, i.e. the state is able to use violence against its enemies, something the revolutionary cannot do (yet). The violence and normative emptiness of legal sovereignty is something that our examinations of the social contract tradition and the foundationalist turn in constitutionalism have revealed quite clearly. We have already uncovered the violent exclusion that theory itself performs in the service of legitimate rule. This chapter is therefore concerned with addressing the reasons why this exclusion and concealment occur.

### *3. Derrida & Camus: The violent exclusion of violence*

What any discussion of dissent suggests is that there are cases in which the law can be wrong, or in which it can contradict its own animating spirit. For example, *Radbruch'sche Formel* (Radbruch’s formula) holds that statutory law must be disregarded in favor of some higher form

---

<sup>7</sup> This is to say that the most significant changes introduced into the Constitution in American legal history have nearly all originated in the court system, rather than through popular ballots, initiatives, referenda, or other, more democratic means (though one could claim that majoritarian, representational voting is not so democratic either).

of Law, in cases where statutory law is deemed intolerably unjust.<sup>8</sup> This is manifestly a disguised appeal to a form of Natural Law, upon which human laws are supposedly based. Truth be told, Law has been (and still is) generally conceived of as being grounded in some type of universal moral standard. This standard is no longer explicitly religious, but the effect remains the same. The Law is treated as divine; although individual laws can be wrong, the Law itself is always right. To amend the Constitution is not to admit that it was wrong, but to say that we are returning it to its ‘natural’ state of rightness. We amend not because the Law was wrong, but because *we* were.

Derrida reminds us that law is merely “authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged...to be unjust or unjustifiable.”<sup>9</sup> Its very enforceability, the fact that one can be ‘lawfully’ punished for disobeying it, is what makes *a* law *the* Law, for “...there is no such thing as law (*droit*) that doesn’t imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being...applied by force...there is no law without enforceability, and no...enforceability of the law without force.”<sup>10</sup>

Right is not might, exactly, but might with the *appearance* of justice. Law that seems to be immoral or somehow wrong loses its normative power to command. Thus, a law that commands one to commit suicide or some heinous act against an innocent, etc. would be considered unjust because it conflicts with one’s sense of natural ‘rightness’. Hobbes also seemed to have held a similar understanding of law, for he says that civil law is made up of those rules “...which the commonwealth hath commanded [the citizen]...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

---

<sup>8</sup> “Gustav Radbruch.” Wikipedia, Online. (12/19/03) URL [http://en2.wikipedia.org/wiki/Gustav\\_Radbruch](http://en2.wikipedia.org/wiki/Gustav_Radbruch)

<sup>9</sup> Derrida, *Deconstruction and the Possibility of Justice*. op cit., 5

<sup>10</sup> Derrida, 6. Original text is italicized.



rule.”<sup>11</sup> Questions of right and wrong, which once belonged to theology, have thus been transferred to the domain of jurisprudence. The Law creates and encompasses not only the juridical order, but the moral order as well.

But this sense of ‘rightness’ is entirely determined by force, as I have argued elsewhere in this paper. Right *is* might, if one takes ‘might’ to be the *successful* use of political violence. Or to put it in other terms, the one who comes out on top after a period of revolutionary upheaval is the one who determines what ‘right’ will be. Generally, the violence that is at the heart of Law is masked by an appeal to a putative ‘higher’ justification. Predictably, authority has a vested interest in ensuring that citizens are indoctrinated to believe that the individual use of violence is wrong, but to not question why this must be so.

Right, or law, is not authoritative because it is an embodiment or reflection of some transcendent set of moral principles. Rather, the law is right *because* it is law. It justifies itself as right, but its true authority was originally based on violence: “...the very *idea* of sovereignty, is itself a *violent decision* which excludes as much as it promises.”<sup>12</sup> The concepts of rightness, justice, or fairness, are usurped by the Law. The Law takes these concepts into itself and assumes them like masks when the situation calls for it to seem right, just or fair (which are not necessarily equivalent terms). It is not surprising then that we have a tendency to identify the legal with the moral. We are taught that doing what is *right* is the same as doing what is *legal*.

But violence is not recognized to be part of the juridical order at all, for it is “...expelled as a non-civil phenomenon from the social whole...Violence is misrecognized by society by being placed at the limit of the individual’s domain.”<sup>13</sup> Violence is excluded in the sense that the individual cannot and must not be allowed access to violence. The social contract and then

---

<sup>11</sup> Hobbes, Ch. XXVI:3 (173). Original text is italicized.

<sup>12</sup> Beardsworth, 68

<sup>13</sup> Beardsworth, 76

modern constitutions are both based on the idea that violence is excluded in the individual's dealings with the government, that one has given up one's access to violence in exchange for the safety, convenience, etc. of civil society. The general difficulty in defining terrorism and differentiating terrorist acts from sanctioned forms of violence reveals the shaky foundations of the Law's claim to legitimacy, and to the moral foundations upon which we ground any act of violence we consider to be 'right'. In other words, theorists have difficulty distinguishing instances in which illegal activity is not only permissible but perhaps even a requirement of one's duty to justice (but not necessarily to the Law, which is not always just). Abolitionists are generally admired today for opposing laws that they perceived to be unjust. But would we have held similar views had the Civil War turned out differently?

Thus, the other cannot speak, since Law has taken all concepts of morality and ethics into itself. What is not legal is not moral. By challenging the authority of the Law, a moral individual immediately becomes a suspect figure, *even* if she eschews violence. This suspicion is the first injustice that the moral revolutionary suffers. The second injustice is that she is silenced, unable to defend herself from the charges brought against her, except in the prevailing dominant discourse, which constitutes another injustice. The third and, somehow the worst injustice of all, is that this violent exclusion of violence is not even acknowledged as such. Rather, the Law presents things as if they had always been this way, and always will be.

The violence that is at the heart of Law is repeated and epitomized in its relations with the revolutionary. By summarily dismissing the right to use violence for political purposes, the Law itself performs a violent exclusion. The legal/moral order is based upon an exclusionary violence that is at the same time, a silence: "The law has a regulative character and is a 'rule' not because it commands and proscribes, but because it must first of all create the sphere of its own

reference in real life and *make that reference regular.*”<sup>14</sup> The moral revolutionary cannot coherently *speak* within the juridical order, since her voice is violence and violence (except in the employ of the state) has been outlawed as a criminal act.

The logic of liberal constitutionalism is unable to provide a space for the moral revolutionary, who represents a paradox or an aporia, a limit to legal rationality. Thus, she who seeks to use violence is silenced. Her claim to moral authority is unintelligible. Her cause is dismissed. She must defend her actions as if she were a criminal, since there is no other space *within* the legal order from which she can make her claims. For the new mortal God (Law) has claimed ‘the good’ for itself in such a way as to make any rebellion against authority a turn towards evil or injustice.<sup>15</sup>

The moral law-breaker attempts to broach the sacred space surrounding Law in order to challenge and ultimately replace it. For Camus, the moral individual rebels in order to assert her humanity, but must ultimately sacrifice that identity in order to assume the role of a creator and replace the normative order she has destroyed.<sup>16</sup> She not only rebels against divine authority, but seeks to be God’s equal. The real ‘crime’ of a terrorist who takes violence into her own hands is her usurpation of the role of the State as the quasi-divine, ultimate authority.<sup>17</sup> The loss of innocent lives is not as much of an issue as the attempt to wrest undermine the traditional, unquestioned social contract between state and citizen. The breaking of the civic taboo against touching violence, which is what constitutes and preserves Law itself, is the true crime. Consequently, the very structure of the legal order makes the act of transgressing the law

---

<sup>14</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*. Daniel Heller-Roazen, trans. (Stanford, CA: Stanford University Press, 1998), 26

<sup>15</sup> Camus, 43

<sup>16</sup> Camus, 248

<sup>17</sup> One wonders whether we can really assign criminal status to someone, like the terrorist, who altogether rejects the very normative/legal system that labels her as such.

inherently an act of violence. As Locke noted, breaking the promise one supposedly makes to give up one's right to use violence is a step back into the state of nature; one is no longer fully human, but an animal, and an enemy to civilization itself.

#### 4. *Law as the new 'Mortal God'*

In the eyes of the Law, protest itself contains an element of violence, even when it is peaceful. Self-professed non-violent marchers and demonstrators are still monitored by armed policemen, and confined to cordoned-off areas in the public space. If the crowd is large enough, the National Guard may be called in. But we are left wondering why exactly armed soldiers in riot gear are necessary to 'guard' peaceful demonstrations. What exactly is this show of force supposed to accomplish? Why is it necessary?

For Giorgio Agamben "[w]hat is important here is not so much the threat to those who infringe on the [sovereign] right, but rather the display of that sovereign violence."<sup>18</sup> The display of might is a defensive move, a reminder of the inviolable space that surrounds the sovereign power. The 'divine' Law is a new Ark of the Covenant, something that must remain apart from the masses. Only the high priests of the legal religion (i.e. judges and lawyers) are permitted to approach Law, since they pose no threat to it, and in fact, cultivate its mystery. This distance from the average citizen is partially what gives the Law its inexplicable authority.

Annette Baier alludes to this concealed link between violence and protest when she notes that our toleration of non-violent protest means we must accept the possibility of violent protest.<sup>19</sup> Violence shadows the challenging of the law. To confront authority is inherently

---

<sup>18</sup> Giorgio Agamben, *Means Without Ends: Notes on Politics*. Vincenzo Binetti and Cesare Casarino, trans. Theory Out of Bounds, volume 20. (Minneapolis & London: University of Minnesota Press, 2000), 104.5

<sup>19</sup> Annette Baier, "Violent Demonstrations." *Violence, Terrorism, and Justice*. R.G. Frey and Christopher W. Morris, eds. (Cambridge: Cambridge University Press, 1991), 45

violent, because this act challenges the presumptions upon which social order is constructed. The necessary relationship between the modern form of Law and liberal society (property rights, rights in general, etc.) means that a challenge to Law is a challenge to the very conditions of socio-political life. It is no wonder then, that we so fear that one successful act of violence (recall the hoary law-enforcement maxim: ‘we do not negotiate with terrorists’) will lead to others. The foundation of authority must seem so fragile to even those in charge that any questioning of its authority is interpreted as a sacrilegious attack on the nation, the “mortal God” himself.<sup>20</sup>

It is perhaps clearer now why even peaceful demonstrators are guarded by armed policemen and soldiers. Their attempt to approach the Law, to touch and possibly to subvert it makes them an inherent threat to its authority, for they may reveal the smoke and mirrors basis for its right to be Law. Though Arendt identifies the Law’s legitimacy as grounded in its mutability, the Law’s power to compel behavior actually works best when people assume and internalize its divinity, its absolute inviolability.

Given all this, it is not surprising then that the Black Panther Party, the Students for a Democratic Society (SDS), paramilitary separatists, and other radical, dissident groups have been the targets of systematic, government-sponsored harassment and abuse.<sup>21</sup> For instance, although the Panthers were strict observers of the law, their forceful invocation of constitutionally-guaranteed rights (such as in the right to bear arms) was viewed as a threat by the legal status quo.<sup>22</sup> Their attempts to enforce the enforcement of African-Americans’ rights (such as by

---

<sup>20</sup> Hobbes, XVII: 13 (109)

<sup>21</sup> Dhoruba Bin Wahad, “COINTELPRO and the Destruction of Black Leaders and Organizations.” *Imprisoned Intellectuals: America’s Political Prisoners Write on Life, Liberation, and Rebellion*. Joy James, ed. (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2003), 94-103

<sup>22</sup> David Ray Papke, *Heretics in the Temple: Americans Who Reject the Nation’s Legal Faith*. (New York; London: New York University Press, 1998), 123-24

following policemen as they drove around local neighborhoods) were perceived as an attempt to handle the Law directly.

Thus, the Panthers were portrayed as one of the most dangerous groups in America during their heyday, and the target of a systematic attempt to destroy them. All this, despite the fact that the government could never adequately prove that they really were criminals and terrorists. The Panthers' attempts to 'take the law into their own hands', to break through the inviolable space surrounding the holy writ of Law was perceived as a kind of attack on the legal/moral order itself. But why is this so?

The Law requires its divine façade in order to operate as Law. The normative emptiness in the heart of authority must be concealed. Thus, we treat Law as the new mortal deity, and partition it off from the dirty realities of politics. Thus, the 'mystical foundation' of Law must not be identified, lest one expose not only the normative emptiness at its heart but, worse yet, the violent crime that it embodies.<sup>23</sup> Hopefully, by now, the reasons why Law is anxious to conceal the link between constituent power and the right of resistance have become clearer.

At the beginning of this paper, I asked 'What is the basis for the authority of the law?' since the separation of church and state means we cannot base this authority on divine command. The death of God means that we no longer have a standard by which to judge our actions. Without such a universal, we experience a loss of unity and finality in the world. Everything becomes contingent, wholly dependant upon man, who must return to himself as the ultimate source of law and order.<sup>24</sup>

It is not surprising then that social contract theorists were "so afraid of the agency implications of the social contract methodology" that they managed to invalidate their own

---

<sup>23</sup> Derrida, 12

<sup>24</sup> Camus, 58

theories of legitimation. Similarly, the attempts by constitutional theorists to ground legal authority in some notion of democratic will that is embodied in the ability to amend constitutions are characterized by an urgent desire to find *something* to act as a transcendent principle upon which to base ‘right’, to take the place of God in our systems of ethics. In both cases, theory has been eager to deny the deeply political—and seemingly arbitrary and contingent—aspect of sovereign authority.

The issue of legitimacy was only compounded with the rise of the post-modern, post-structural movements, which left us with neither God nor even the subject-as-agent. Power was everywhere, but could not be utilized to advance positive social changes, or rectify injustice. Political philosophers, ethicists and other intellectuals found themselves in a bind: How is it possible to have an ethics or a politics without either God or the subject? Helplessly, we found ourselves asking, “Where, after metanarratives, can legitimacy reside?”<sup>25</sup> Theories of constitution that valorized the foundation and sacralized the Law were another attempt to save politics from pure relativism, and the nihilistic consequences thereof.

Recently, however, political philosophers have begun finding legitimacy in the very stuff of politics itself, and placing the unpredictability and conflict of politics itself at the very heart of theory. Could politics be the answer to our quest for legitimacy? The next section explores the possibilities inherent in the turn to the political, exemplified in the works of Hannah Arendt and Carl Schmitt.

---

<sup>25</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*. Geoff Bennington and Brian Massumi, trans. (Minneapolis, MN: University of Minnesota Press, 1984), xxiv-xxv

5. *Arendt & Schmitt: The (re)turn to the political*

One notes a striking shift in political theory over the past century or so. For much of history, consensus and peace were our dearest goals. While theory has attempted to contain and neutralize conflict in the past, theorists of late have been increasingly concerned with *preserving* the discord and contingency of the political. Some theorists have identified the consensual society with a disaggregative effect, an atomization of the collectivity and a homogenization of difference. The ‘depoliticisation’ of American society has “led to a notion of consensus through apathy that differed radically from the classical theory of ‘consent’: henceforward dependent more on mechanisms of social control, consensus takes on a strong ideological colouring which strengthens the status quo and forestalls questioning.”<sup>26</sup>

Hannah Arendt valued the political as a practice by which we existentially affirm ourselves. Politics “...possesses a quintessential ontological function: it is the supreme act of human self-revelation or self-disclosure.. it is the fundamental way in which we express our distinctiveness as human beings.”<sup>27</sup>

Like Arendt, Carl Schmitt was concerned with restoring ‘the political’ to public life. More specifically, Schmitt wanted to ‘return’ the limit situation of emergency/decision to the heart of civil life. For Schmitt, then, “*dictatorship alone* could save the world from the godless era of secular humanism.”<sup>28</sup> The empty heart of secular law would be filled by the sovereign power, what would ostensibly be a Rousseauian-type general will, but concentrated into one man. At the same time, the missing urgency of politics, or the depoliticization of civil affairs would be filled in with the existential decisionism that the sovereign power employs. For

---

<sup>26</sup> Pierre Birnbaum, “Consensus and Depoliticisation in Contemporary Political Theory.” *Democracy, Consensus & Social Contract*. Op cit, 173

<sup>27</sup> Richard Wolin, *Labyrinths Explorations in the Critical History of Ideas*. (Amherst, MA: University of Massachusetts Press, 1995), 167.

<sup>28</sup> Richard Wolin, 115



Schmitt, public life could not be vital without the existence of this extreme decision to exclude the existentially different, the other who is an inherent threat. And the political looms the ever-present threat of warfare. One cannot engage in ‘great politics’ unless one’s very identity is at stake.

Schmitt thus takes Hobbesian theory to its limits by suggesting that the state of exception (or war) is somehow the norm, while the norm (the state of peace) is the exception.<sup>29</sup> The state of nature and the state of war are conditions into which an otherwise civilized person can step. Schmitt sought to ‘fix’ the problem of the open space for rebellion in the Hobbesian contractual scheme by turning the formation and empowerment of the sovereign into a life-or-death, existential moment: “Schmitt goes back against liberalism to its originator, Hobbes, in order to strike at the root of liberalism in Hobbes’ explicit negation of the state of nature.”<sup>30</sup> The sovereign power thus operates within the exceptional moment, when the political order is threatened. She is the figure who both ends the state of nature and is its very embodiment. Violence is thus unequivocally recognized by Schmitt to be the basis of politics and the hidden heart of Law.

Whether one agrees with Arendt or Schmitt’s conception of the political and its place in political theory, we have to realize that “political community is only possible through struggle and exclusion and that in this sense it is always to be made and unmade.”<sup>31</sup> Violence is part of politics, but politics cannot be reduced to mere violence, despite Schmitt. Politics is also about how people live together. By insisting that that the political boils down to merely a decision to exclude (or conflict itself), Schmitt leaves out the everyday aspect of politics, which is about our

---

<sup>29</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*. George Schwab, trans. (Cambridge, MA: The MIT Press, 1985), 15

<sup>30</sup> Leo Strauss, “Comments on Carl Schmitt’s *Der Begriff des Politischen*,” in Schmitt, *The Concept of the Political*. George Schwab, trans. (New Brunswick, NJ: Rutgers University Press, 1976), 90.

<sup>31</sup> Beardsworth, 92

attempts to overcome struggle, and to reach compromise and agreement. One doubts whether the culturally homogenous society that Schmitt envisioned as a place for practicing this kind of existential politics would be free enough of internal conflict in order to make the decision to exclude.

Similarly, Arendt's fascination with limit situations, the 'great politics' that are possible in revolutionary moments, betrays a "devaluation of normal politics or political normalcy." Normal politics, which include on-the-ground compromising, back-scratching, deliberating, and so on, "are relegated to the status of a second-order political good."<sup>32</sup> Indeed, the acting-together that Arendt valorizes seems almost like a call for consensus politics, which would be to take a position on the other side of Schmitt. In order to preserve the possibility for dissent, a fine balance has to be maintained between order (embodied in the structural, procedural and institutional elements of political society, such as laws), which holds the community together, and the political (contingency, or conflict itself), which naturally seems to arise when individuals live together in communities.<sup>33</sup> A space somewhere between Arendt and Schmitt may be the most conscionable position we can take.

While it is an interesting intellectual exercise to study abstract concepts of constitutionalism and social contract, what this kind of purely academic thinking (and what the abstractions of the two kinds of legitimation 'tactics' that I have discussed in Chapters I and II) tends to miss is the real world, the actual, messy business of politics itself. The shift I identify among political and ethical philosophers over the past century (or at least since the end of WWII) is towards a more attentive engagement with the political. I believe this to be a positive

---

<sup>32</sup> Richard Wolin, 168

<sup>33</sup> I am thus departing from Rousseau, who conceived of pre-political society. The political aspect of society is inherent, but social relations are not necessarily relations of dominance. Rather 'the political' refers to the ways in which people determine how to live together and can thus entail cooperation as well as conflict.

development, though perhaps less intellectually satisfying, given the complexity of the problems we face, and the near guaranteed lack of certainty about even how to go about addressing these problems.

\*

## CONCLUSION:

### Theory, Politics, and the Hazards of Consensus

\*

In some respect, both social contract theory and constitutionalism were attempts by theorists to address political crises. The original intent of the social contract was to protect bodies from death and physical injury (the focus on property rights can be interpreted as an extension on one's right to life). The intent of constitutionalism was to preserve and channel revolutionary violence in the democratic institutions of the republic. Constitutional law is a systematic violence which derives its perceived legitimacy from social contract type notions; at heart, one's physical vulnerability and desire for physical integrity is the basis for law.

We have found that while the claims of the revolutionary might be morally compelling, they are not more so than those of the government she agitates against. Both and neither side has a just claim to 'right', and the legitimate use of violence. This aporia of constitutional law, which is a matter of temporality and chance, is most apparent in the case of the moral revolutionary. Indeed, our distinction between one person's legitimate use violence to further a cause (radical abolitionists, perhaps) and another's illegitimate use of violence (fundamentalist terrorists) needs reexamination, if we are to make pronouncements of guilt and innocence with any sort of moral authority at all.

Despite the varied attempts on the part of political philosophers to come up with a sound theory of legitimacy that supports state violence but negates individual violence, the reason why most people tend to follow the laws is because it never occurs to them to break it. Most people are socialized to unquestioningly accept the authority of the law. It is generally very difficult to incite widespread action (violent or not) against the state, which explains why truly popular

uprisings tend to be infrequent in history. This slowness of the masses to act was recognized by Locke, who assured those who were nervous about frequent popular unrest in a democracy that “...the people...are more disposed to suffer than right themselves by resistance, are not apt to stir.”<sup>1</sup>

Machiavelli also recognized this peculiar quality of the masses, who “...incompetent to draw up a constitution”, yet are the best means of preserving it.<sup>2</sup> The “immense negative unity” of majoritarian apathy makes even incendiary texts like the Communist Manifesto, and Locke’s Treatise seem like mere wishful thinking.<sup>3</sup> Perhaps, as the work of recent theorists like Hannah Arendt has made clear, what we should fear is not the violence, unexpectedness, irrational or emotional aspect of politics, but what happens when it disappears from public life.

Philosophers themselves are not immune to political apathy. Foucault points out the strange, and ultimately troubling, detachment of moral and ethical philosophers from the rise of European fascism. Only Cavailles, “a historian of mathematics” participated in the French Resistance against the Nazis during WWII; “None of the philosophers of *engagement*—Sartre, Simone de Beauvoir, Merleau-Ponty—none of them did a thing.” They were thinkers who did not act. Passivity in the face of crisis is the other extreme we have to avoid.

This is not to say that we should valorize revolutionary violence instead. The temptation to impose one’s own vision of the good upon the world is great, and situations of rebellion must be approached cautiously. There is, doubtless, a need to contain constituent power, which has a tendency to expand excessively without limits, to the point that the ‘revolution eats its own children’.

---

<sup>1</sup> Locke, Ch. XIX: 230, (123)

<sup>2</sup> Machiavelli, *The Discourses*. Ch. 1.9 (132)

<sup>3</sup> Arendt, (1969) 46

In any case, we ought to be wary of the temptations of the totalizing ‘we’ that consensus, constitutions, contracts and covenants of all kinds (including those that do not pertain to the state) purport to—and sometimes may actually—represent. A more Foucaultian view of the idea of ‘consensus’ makes it apparent that agreement is a way to silence dissent, and may be a reproduction of arbitrary constellations of dominance and suppression. The ‘we’ contains both a space for possible action, as Arendt identified in her work on constitutions, and the possibility for repression, which is always a danger in consensual politics. The problem of the moral revolutionary is not limited to times of crisis, but in *any* instance in which the majority ‘we’ stands opposed to the disagreeing ‘I’.

We could perhaps take a more Nietzschean route in our search for legitimacy and freedom. Lyotard, for example, updates Nietzsche with his advocacy of ‘pagan politics’ in which multiple discourses about justice exist independently, because each discourse has relevance and applicability only to a particular context: “Legitimacy then is relative to the pragmatic context of localized narratives and as narratives are multiple, so too are criteria of legitimation.”<sup>4</sup> A multiculturalist approach to ethics may be one way of solving the dilemma of legitimacy without constraining freedom overmuch and may, indeed, be an approach that we should apply to all kinds of theory: “Lyotard’s ideal of justice as multiplicity calls to our attention the political nature of any theory which assumes unity and stability. Such theories may be terrorist, they have an urge to repress otherness.”<sup>5</sup>

Or we could merely attempt to cultivate an attitude of thoughtfulness towards our beliefs: “...a demanding, prudent, ‘experimental’ attitude is necessary; at every moment, step by step,

---

<sup>4</sup> Haber, 27

<sup>5</sup> Haber, 30

one must confront what one is thinking and saying with what one is doing, with what one is.”<sup>6</sup> Acting would always be shadowed by a thoughtful reflection upon one’s actions. The goal of political philosophy would not be to discover the ‘real’ basis of state legitimacy or the instances in which one may use violence to promote cherished ends. Rather, it is to “promote an ethos of independent thought and action, one that is sufficiently impersonal to be both morally serious and publicly oriented.”<sup>7</sup>

Ultimately, there is no satisfying conclusion to this debate. We may have to simply act after reflection, when we are moved to, such as the moral revolutionary. We will never be sure whether our course of action is sound, but that cannot preclude action for all time. Perhaps the only honest *and* moral prescription a political theorist can give is this: When an unconscionable situation arises, we must *act* after careful thought, if only to remain true to our personal moral convictions, and accept the consequences of our actions, both good *and* bad.

Ideally, the philosopher’s role is to exhort her fellow men to greater heights in order to improve the world: “Courage is indispensable because in politics not life but the world is at stake.”<sup>8</sup> But in this act of fellow-feeling, the philosopher herself must take a leap into the moral void, since she knows not whether she “is in danger of providing the alibi for a criminal” and “that...is a terrible responsibility.”<sup>9</sup>

\*

---

<sup>6</sup> Michel Foucault, “Politics and Ethics: An Interview.” *The Foucault Reader*. Paul Rabinow, ed. (New York: Pantheon Books, 1984), 374

<sup>7</sup> Dana R. Villa, *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt*. (Princeton, NJ: Princeton University Press, 1999), 109

<sup>8</sup> Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought*. (New York: The Viking Press, 1968), 156

<sup>9</sup> Jacobson, 146

## REFERENCES:

- Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Daniel Heller-Roazen, trans. (Stanford, CA: Stanford University Press, 1998).  
—*Means Without Ends: Notes on Politics*. Vincenzo Binetti and Cesare Casarino, trans. *Theory Out of Bounds*, volume 20. (Minneapolis; London: University of Minnesota Press, 2000).
- Alexander, Yonah and David C. Rapoport, eds. *The Morality of Terrorism: Religious and Secular Justifications*, second edition. (New York: Columbia University Press, 1989).
- Arendt, Hannah. *Between Past and Future: Six Exercises in Political Thought*. (New York: The Viking Press, 1968).  
—*Crises of the Republic*. (New York: Harcourt Brace Jovanovich, Inc. 1972).  
—*The Human Condition*, second edition. (Chicago; London: The University of Chicago Press, 1958).  
—*On Revolution*. Second edition. (New York: The Viking Press, 1963).  
— *On Violence*. (New York: Harcourt, Brace & World, Inc., 1969).
- Bankowski, Zenon and Geoff Mungham. *Images of Law*. (London; Boston: Routledge & Kegan Paul, 1976).
- Baumgold, Deborah. “Pacifying Politics: Resistance, Violence, and Accountability in Seventeenth-Century Contract Theory.” *Political Theory*, Vol. 21, No. 1 (Feb., 1993): 6-27.
- Beardsworth, Richard. *Derrida & the Political*. (London; New York: Routledge, 1996).
- Benhabib, Seyla. “Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida.” *Journal of Political Philosophy*, Vol. 2, No. 1 (1994): 1-23.
- Birnbaum, Pierre, Jack Lively, and Geraint Parry, eds. *Democracy, Consensus & Social Contract*. SAGE Modern Politics Series: Volume 2. (London; Beverly Hill: SAGE Publications, 1978).
- Boucher, David and Paul Kelly, eds. *The Social Contract From Hobbes to Rawls*. (London; New York: Routledge, 1994).
- Brady, James B. and Newton Garver, eds. *Justice, Law, and Violence*. (Philadelphia: Temple University Press, 1991).
- Campos, Paul F., Pierre Schlag and Steven D. Smith. *Against the Law*. (Durham; London: Duke University Press, 1996).



- Camus, Albert. *The Rebel*. Anthony Bower, trans. (New York: Alfred A. Knopf, 1954).
- Carlson, David Gray, Drucilla Cornell and Michel Rosenfeld, eds. *Deconstruction and the Possibility of Justice*. (New York; London: Routledge, 1992).
- Cleaver, Eldridge. *Soul on Ice*. (McGraw Hill, 1968).
- Coleman, Frank M. *Hobbes and America: Exploring the Constitutional Foundations*. (Toronto; Buffalo: University of Toronto Press, 1977).
- Crenshaw, Martha, ed. *Terrorism, Legitimacy, and Power: The Consequences of Political Violence*. (Middletown, CT: Wesleyan University Press, 1983).
- Cropsey, Joseph and Leo Strauss, eds. *History of Political Philosophy*. (Chicago: Rand McNally, 1963).
- Davies, James Chowning. *When Men Revolt and Why: A Reader in Political Violence and Revolution*. (New York: The Free Press, 1971).
- Derrida, Jacques. *Negotiations: Interventions and Interviews, 1971-2001*. Elizabeth Rottenberg, ed. and trans. (Stanford, CA: Stanford University Press, 2002).
- Ellis, Richard J. *The Dark Side of the Left: Illiberal Egalitarianism in America*. (Lawrence, Kan., University Press of Kansas, 1998).
- Foucault, Michel. *Discipline & Punish: The Birth of the Prison*. Alan Sheridan, trans. Second edition. (New York: Vintage Books, 1995).  
—*The Essential Works of Michel Foucault, 1954-1984*. "Aesthetics, Method and Epistemology." Paul Rabinow, ed. (New York: New Press, 1997-2000).  
—*The Foucault Reader* Paul Rabinow, ed. (New York: Pantheon Books, 1984).  
—*Madness and Civilization: A History of Insanity in the Age of Reason*. Richard Howard, trans. (New York: Vintage Books, 1988).  
—*Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*. Colin Gordon, ed., Colin Gordon, Leo Marshall, et al, trans. (New York: Pantheon Books, 1980).
- Frey, R.G. and Christopher W. Morris, eds. *Violence, Terrorism, and Justice*. (Cambridge: Cambridge University Press, 1991).
- Gottsegen, Michael G. *The Political Thought of Hannah Arendt*. (Albany, NY: State University of New York Press, 1994).
- Goux, Jean-Joseph and Philip R. Wood. *Terror and Consensus: Vicissitudes of French Thought*. (Stanford, CA: Stanford University Press, 1998).

- Haber, Honi Fern. *Beyond Postmodern Politics: Lyotard, Rorty, Foucault*. (New York; London: Routledge, 1994).
- Hampton, Jean. *Hobbes and the Social Contract Tradition*. (Cambridge: Cambridge University Press, 1986).
- Hobbes, Thomas. *Leviathan*. Edwin Curley, ed. (Indianapolis; Cambridge: Hackett Publishing Company, Inc. 1994).
- Honig, Bonnie. "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic." *The American Political Science Review*, Vol. 85, No. 1 (March, 1991): 97-113
- Hume, David. *Political Essays*. Knud Haakonssen, ed. (Cambridge; New York: Cambridge University Press, 1994).
- Ingram, David ed. *The Political*. Blackwell Readings in Continental Philosophy. (Oxford: Blackwell Publishers Ltd., 2002).
- Jacobson, Norman. *Pride and Solace: The Functions and Limits of Political Theory*. (Berkeley: University of California Press, 1978).
- James, Joy, ed. *Imprisoned Intellectuals: America's Political Prisoners Write on Life, Liberation, and Rebellion*. (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2003).
- Jones, Peter. *Rights*. (Basingstoke, UK: MacMillan, 1994) .
- Kant, Immanuel. *Political Writings*. H.B. Nisbet, trans. (Cambridge: Cambridge University Press, 1991).
- Kouvelakis, Stathis. *Philosophy and Revolution: From Kant to Marx*. G.M. Goshgarian trans. (London & New York: Verso, 2003).
- Lewy, Guenter. "Resistance to Tyranny: Treason, Right or Duty?" *The Western Political Quarterly*, Vol. 13, No. 3 (Sep., 1960): 581-96.
- Locke, John. *The Second Treatise on Civil Government*. (Amherst, NY: Prometheus Books, 1986).
- Lyotard, Jean-Francois. *Political Writings*. Bill Readings and Kevin Paul Geiman, trans. (Minneapolis: University of Minnesota Press, 1993).  
—*The Postmodern Condition: A Report on Knowledge*. Geoff Bennington & Brian Massumi, trans., *Theory and History of Literature*, Vol. 10 (Minneapolis, MN: University of Minnesota Press, 1984).

- Machiavelli, Niccolò. *The Discourses*. Leslie J. Walker, trans. (London: Penguin Books Ltd., 1983).  
—*The Prince*. Daniel Donno, trans. (New York: Bantam Books, 1998).
- McCarthy, Timothy Patrick and John McMillian, eds. *The Radical Reader: A Documentary History of the American Radical Tradition*. (New York; London: The New Press, 2003).
- McCormick, John P. *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*. (Cambridge: Cambridge University Press, 1997).
- Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. Maurizia Boscagli, trans. *Theory Out of Bounds*, vol. 15. (Minneapolis; London: University of Minnesota Press, 1999).
- Nicholson, Peter. "Kant on the Duty Never to Resist the Sovereign." *Ethics*, Vol. 86, No. 3 (April, 1976): 214-230.
- Papke, David Ray. *Heretics in the Temple: Americans who reject the nation's legal faith*. (New York; London: New York University Press, 1998).
- Rosen, Allen D. *Kant's Theory of Justice* (Ithaca; London: Cornell University Press, 1993).
- Rousseau, Jean-Jacques. *The Social Contract*. Maurice Cranston, trans. (London: Penguin Books, 1968).  
—*The First and Second Discourses*. Roger D. Masters, ed., Roger D. and Judith D. Masters, trans. (Boston; New York: St. Martin's Press, 1964).
- Schmitt, Carl. *The Concept of the Political*. George Schwab, trans. (New Brunswick, NJ: Rutgers University Press, 1976).  
—*Political Theology: Four Chapters on the Concept of Sovereignty*. George Schwab, trans. (Cambridge, MA: The MIT Press, 1985).
- Schwarz, Wolfgang. "The Right of Resistance." *Ethics*, Vol. 74, No. 2 (Jan. 1964): 126-134.
- Shelton, George. *Morality and Sovereignty in the Philosophy of Hobbes*. (New York: St. Martin's Press, 1992).
- Steinberg, Jules. *Locke, Rousseau, and the Idea of Consent: An Inquiry into the Liberal-Democratic Theory of Political Obligation*. *Contributions in Political Science*, No. 6. (Westport, CT; London: Greenwood Press, 1940).
- Timmons, Mark, ed. *Kant's Metaphysics of Morals*. (Oxford; New York: Oxford University Press, 2002).

- Villa, Dana R. *Politics, Philosophy, Terror: Essays on the thought of Hannah Arendt*. (Princeton, NJ: Princeton University Press, 1999).
- Weber, Max. *From Max Weber: Essays in Sociology*. H.H. Gerth and C. Wright Mills, eds. (New York: Oxford University Press, 1946).
- Wilkinson, Paul. *Terrorism and the Liberal State*. (New York: John Wiley & Sons, 1977).
- Wolin, Richard. *Labyrinths: Explorations in the Critical History of Ideas*. (Amherst, MA: University of Massachusetts Press, 1995).
- Wolin, Sheldon S. *Politics and Vision: Continuity and Innovation in Western Political Thought*. (Boston; Toronto: Little, Brown and Company, 1960).
- The Weather Underground: A Documentary*. Sam Green & Bill Siegel. Videodisc. Shadow Distribution in association with Upstate Films, 2003.

\*Note: This list includes both works cited in this paper and those that were consulted, but not directly cited.

## **ACKNOWLEDGMENTS:**

I'd like to thank my advisor, Christina Beltran, for the guidance and support she has provided during the course of this project. This paper also owes a great debt to Emilios Christodoulidis' class on politics and law at the University of Edinburgh and Paul Jefferson's class on constitutional law at Haverford College. I would also like to express my gratitude to the political science and philosophy departments at Haverford College and Bryn Mawr College, all the library staff of the Tri-co, the person who invented coffee, and mom and dad for everything else.

\*