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Civil Interests, The Social Contract, and The Conditions of Political Legitimacy

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A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of Philosophy

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CIVIL INTERESTS, THE SOCIAL CONTRACT, AND THE CONDITIONS OF
POLITICAL LEGITIMACY

(Thesis format: Monograph)

by

Michael S. Borgida

Graduate Program in Philosophy

A thesis submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

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Abstract

This dissertation explores the idea of *civil interests*, and considers how civil interests constrain the legitimate exercise of political authority. John Locke presents the concept of civil interests in *A Letter Concerning Toleration* as the legitimate object of political authority's concern. First, I identify the idea of civil interests and its relationship with the social contract in Locke's *Letter*. I argue for the prominence of Locke's contractarian line of argument in his case for toleration. Second, I trace the idea of civil interests through the historical social contract arguments of Locke's *Second Treatise*, Thomas Hobbes' *Leviathan*, and Immanuel Kant's major political works. I demonstrate the utility of analyzing the social contract in light of the idea of civil interests by clarifying puzzling features of each theory, specifically Hobbes' conflicting remarks on religious liberty, and Kant's elusive notion of possible consent. Third, I abstract the social contract argument for identifying persons' civil interests from its historical expression to argue that persons' civil interests, consist of their lives and liberty. I additionally justify my appeal to the social contract, and specify its details for the purpose of my argument. Finally, I apply the social contract argument centred on the concept of civil interests to argue against legal moralism as theory of criminalization and criminal law. I argue that instrumental legal moralism is conceptually untenable, and non-instrumental legal moralism provides an illegitimate justification for criminalization and the criminal law.

Keywords: civil Interests, social contract, political legitimacy, political society, political authority, political cooperation, toleration, John Locke, Thomas Hobbes, Immanuel Kant, liberalism, legal moralism.

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Introduction

In *A Letter Concerning Toleration* John Locke writes, “The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing of their own civil interests.” Though offered as a foundational claim about the nature of political society by a historically prominent political philosopher, the idea of *civil interests* has garnered surprisingly little philosophical investigation. My dissertation explores the idea of civil interests, and considers how civil interests constrain the legitimate exercise of political authority.

In the *Letter*, Locke presents the category of civil interests as the proper object of political action, the legitimate object of political authority’s concern. I argue that in the *Letter* we can identify a vital connection between the idea of civil interests and the idea of the social contract. That is, we can determine the specific interests that count among persons’ *civil* interests by considering the ends of persons engaging in political cooperation, and setting the terms of their association, from a pre-political circumstance. Locke identifies persons’ civil interests as their lives, liberty, physical integrity, and outward possessions.

In broad terms, I identify the idea of civil interests as it first appears in Locke’s *Letter*, trace it through the history of social contract theory, and explore its implications for contemporary political societies. I aim to establish its prominence in Locke’s work on toleration, its utility in analyzing social contract theories, and its importance for understanding the nature of political cooperation, and the limits of legitimate political action.

This study is worthwhile for two related reasons. First, Locke's *Letter* is a rich source of political philosophical insights. Though written in 1685, in parts, it reads like a modern work of political theory. And though Locke wrote the *Letter* to advocate for policies of religious toleration appropriate for seventeenth century England, in the course of this endeavour, he offers enduring insights into the nature of political association. It is surprising then to realize that the *Letter's* most compelling arguments, that resonate most profoundly in contemporary political contexts, have been dismissed by some of Locke's most prominent historical and contemporary commentators. Locke's *Letter*, specifically his notion of civil interests and its relation to the social contract, is a worthy object of philosophical investigation.

Second, we continue to struggle with setting the boundaries of legitimate political action. We see prominent challenges to the justifications of political action with incredible frequency. In the last two years, in Canada alone, the Quebec government proposed to enact a charter of secular values that would ban ostentatious religious symbols in public space, Muslim women encountered bans on face coverings at citizenship ceremonies, and self-proclaimed Pastafarians fought for the right to appear in their government issued photo identification with spaghetti strainers on their heads. Governments have offered a myriad of justifications for their actions, some reasonable, others confounding. These justifications, and the surrounding public debates reveal not only the inescapable reality that the line between permissible government action and individuals' freedoms is blurry, but also the more interesting idea that we are not quite sure what political society is all

about. That is, we still have much to learn from a clear analysis of the goals of our political cooperation, and the nature of political society and authority.

In Locke's *Letter* we find a social contract argument aimed at defining persons' civil interests that helps us think clearly about the nature of our political cooperation, and the permissible limits of political action. In what follows I engage Locke's argument, and use it as a departure point for exploring the ends of political cooperation, and the extent of legitimate political authority.

In chapter one I argue for the prominence of Locke's contractarian line of argument in his *Letters* on toleration. With an eye to the structure of his case for toleration, I argue that only his contractarian line of argument can establish his claim that civil government ought to concern itself with only persons' civil interests, from which his conclusion in favour of toleration follows.

In chapter two I argue that social contract theories can generally be interpreted in light of the idea of civil interests. Further, I consider the social contract theories of Locke's *Second Treatise*, Hobbes' *Leviathan*, and Kant's major political works, with a focus on the idea of civil interests. This analysis illuminates otherwise puzzling features of each theory, and, in the course of doing so, demonstrates its utility. In Locke we get a fuller account of how parties to the social contract designate certain interests as their *civil interests*. In Hobbes we achieve a better understanding of his conflicting remarks on religious liberty. And, in Kant, we clarify his elusive conception of possible consent.

In chapter three I abstract from the history of social contract theory to justify my appeal to the social contract, specify the details of my account of the social

contract, and present a social contract argument for identifying persons' civil interests. I acknowledge and respond to David Hume's famous criticism that the social contract is a fiction with no political import. I present my account of the parties to the social contract, and the circumstances of their political cooperation, to identify persons' civil interests as their lives and liberty.

In chapter four I apply the argument of the previous chapter to argue against legal moralism as a theory of criminalization and of criminal law. Legal moralism is the view that the immorality of conduct is a salient reason for criminalizing it. I argue that instrumental legal moralism is an untenable version of legal moralism in that, when pressed, it forfeits any meaningful claim to enforcing morality as such. And I argue that non-instrumental legal moralism offers politically illegitimate reasons for criminalization and criminal law because the enforcement of pre-political morality could not be the object of agreement among parties to the social contract.

Above all I aim to articulate the view that the nature of persons' political cooperation constrains the legitimate exercise of political authority. That is, in justifying political action we ought to appeal only to ends and values that emerge from parties entering political society and subjecting themselves to political authority. Civil interests represent the point of agreement among independent persons cooperating politically, and, therefore, constitute the object of legitimate political concern.

1 – Civil Interests and Locke’s Mandate Argument for Toleration

1.1 – Introduction

In this chapter I consider Locke’s main arguments in *A Letter Concerning Toleration*.¹ I argue for the prominence and strength of his contractarian “mandate argument” in establishing the conclusion that civil governments ought to concern themselves with only the protection and promotion of persons’ *civil interests*.²

I begin by looking briefly at the historical and political context in which Locke wrote the *Letter*. I then consider the structure of the *Letter’s* arguments and conclusions. I argue that only the mandate argument provides a framework for establishing the *Letter’s* conclusions. Finally, I look at the substance of the mandate argument as it appears in the *Letter*, and as it evolves over the course of Locke’s later *Letters*. I argue that the mandate argument provides strong support for the *Letter’s* conclusions.

1.2– The Historical Context of *A Letter Concerning Toleration*

As David Wootton notes in his introduction to Locke’s *Political Writings*, the context in which Locke wrote the *Letter* is difficult to pin down. Locke scholars generally agree that the *Letter* was written late in 1685 while Locke was in exile in the Dutch Republic for participating in subversive political activities. At the time, religious

¹ Locke wrote the *Epistola de Tolerantia* in Latin. It was translated to English by William Popple and published in 1689.

² Richard Vernon names Locke’s three main arguments in the *Letter*: “the argument from the mandate of the state”, “the argument from belief”, and “the argument from error” in his Introduction to *Locke on Toleration*, (New York, NY: Cambridge University Press, 2010), xv. I explore each of these arguments below.

toleration was a pressing political issue. In 1685 in England, James II ascended to the throne and soon after would offer a policy of toleration to Catholics and dissenting Protestants. James himself was Catholic and this worried many in England. People commonly associated Catholicism with authoritarianism, and they believed that allowing Catholicism to gain traction in England was contrary to the national interest. In the same year in France, Louis XIV revoked his policy of toleration and exposed French Protestants to violent persecution. Many fled to the Dutch Republic where Locke temporarily resided.

Disagreement persists regarding Locke's immediate motivation for writing the *Letter*. Richard Ashcraft takes Locke to have been advancing the cause of the radical English Dissenters among whom he lived while in exile in the Dutch Republic.³ They, and their Whig associates in England, sought toleration for non-conforming Protestants but not for Catholics. Additionally, they demanded that any policy of toleration receive the assent of parliament; James' toleration was granted on his prerogative alone. Ashcraft suggests that, in the *Letter*, Locke provides arguments tailor made for the Dissenters' purposes. On the contrary, Mark Goldie suggests that Locke was no radical. Despite the perceived religious radicalism of the *Letter*, Locke remained a member of the established Church for his entire life.⁴ Goldie suggests instead that Locke wrote the *Letters*, specifically his later *Letters*, to

³ Ashcraft, Richard, *Revolutionary Politics & Locke's Two Treatises of Government*, (Princeton, NJ: Princeton University Press, 1986), 498.

⁴ Goldie, Mark, "John Locke, Jonas Proast and Religious Toleration 1688-1692," John Walsh (ed.) *The Church of England c. 1688-c. 1833*, (Cambridge: Cambridge University Press, 1993), 144. Wootton, David, Introduction to *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 98.

support the objectives of a Low Church faction within the established church. They sought a liberalization of the Church's structure and many of its practices.⁵

Though political circumstances in England and elsewhere in Europe certainly provided the occasion for Locke to write the *Letter*, and he may have sought to advance a particular cause, it is a mistake to suppose that the strength of Locke's case for toleration rests entirely on the particulars of his context. Richard Vernon suggests that Locke's sought to provide a general theory of toleration, and to demonstrate that one ought to conduct political theory abstracted from one's immediate political circumstances.⁶

So, because we cannot definitively isolate Locke's immediate context in writing the *Letter*, and because of the universality at which Locke's political theory seems to aim, Wootton suggests that readers must work from the *Letter's* text alone. Along similar lines, Jeremy Waldron, in his famous critique of the *Letter*, declares at the outset that he will, "consider the Lockean case as a political argument – that is, as a practical intellectual resource that can be abstracted from the antiquity of its context and deployed in the modern debate about liberal theories of justice and political morality."⁷ In this chapter, I approach Locke's *Letters* as Wootton and Waldron urge. I ultimately argue that a line of argument in Locke's *Letters* is strong and relevant in contemporary political contexts. While I will certainly acknowledge contextual aspects of Locke's work insofar as they are necessary for making sense of

⁵ Goldie, "John Locke, Jonas Proast, and Religious Toleration 1688-1692," 161.

⁶ Vernon, *Locke on Toleration*, xi.

⁷ Waldron, Jeremy, "Locke: Toleration and the Rationality of Persecution," in Susan Mendus (ed.), *Justifying Toleration*, (Cambridge: Cambridge University Press, 1988), 61.

the text,⁸ I, like Waldron, am primarily interested in Locke's arguments as contributions to political philosophy.

It should be noted that Locke's arguments for toleration were not entirely novel. Again, when Locke wrote the *Letter*, the struggle for religious toleration was a live political issue with enormous implications for people's everyday lives.

Accordingly, many politicians and pamphleteers wrote extensively on the topic.

Ashcraft takes a worthwhile look at the writings of Henry Care, Robert Ferguson, and William Penn, and considers their influence on the development of Locke's

views on toleration.⁹ Additionally, as Vernon points out, radical Leveller William Walwyn presented a variation of several of the arguments that Locke would draw

upon in the *Letter*.¹⁰ Suffice it to say that many, perhaps most, of Locke's arguments were in the air at the time. Locke however distinguishes himself from others writing on toleration at the time by approaching the problem with a philosophical rigor

uncharacteristic of most political pamphleteers. Further, Locke develops and refines his case for toleration over the course of several hundred pages in response to Jonas

Proast's criticisms. Proast, an academic and churchman, responded to Locke's *Letter* the year after its publication. Locke subsequently wrote a *Second* and a *Third Letter*

⁸ For example, by acknowledging certain of Locke's religious assumptions, see 1.3, 1.4 below, and for making sense of the limits he places on toleration, see 4.3.2, 120 below.

⁹ Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government*, 480-489.

¹⁰ Vernon, *Locke on Toleration*, xiii, xvi. See Walwyn, William, "Toleration justified and persecution condemned," in Andrew Sharp (ed.), *The English Levellers*, (Cambridge: Cambridge University Press, 1998), 9-30. I count five distinct lines of argument that appear both in Walwyn and in Locke's *Letters*.

in response to Proast. In 1704, fifteen years after the publication of his original *Letter*, Locke died, leaving *A Fourth Letter for Toleration* unfinished.¹¹

1.3 – The *Letter's* Arguments and Conclusions

I turn now to the argumentative structure of the *Letter*. Locke's ultimate conclusion in the *Letter* is that civil government¹² ought to adopt a policy of toleration.

However, he does not deploy the *Letter's* three main arguments in direct support of this final conclusion. Rather, Locke presents them as support for an intermediate conclusion from which his ultimate conclusion follows. I argue that this argumentative structure sheds light on the priority of the *Letter's* arguments.

Vernon helpfully terms the *Letter's* three main arguments “the argument from the mandate of the state”, “the argument from belief”, and “the argument from error”.¹³ Proast and Waldron, two of the Locke's most famous critics, argue that the entire strength of the *Letter* rests on the success of the argument from belief.¹⁴ This, however, cannot be the case. Proast and Waldron fail to appreciate the *Letter's* argumentative structure. Again, Locke does not present his three arguments as direct support for toleration. Rather, the three arguments are explicitly advanced as support for an intermediate conclusion, namely, that the jurisdiction of civil

¹¹ Vernon, Richard, *The Career of Toleration: John Locke, Jonas Proast, and After*, (Montreal: McGill Queen's University Press, 1997), 3.

¹² And, additionally, religious associations and private individuals.

¹³ Vernon, *Locke on Toleration*, xv.

¹⁴ Proast, Jonas, *The Argument of the Letter Concerning Toleration, Briefly Considered and Answered*, in Richard Vernon (ed.) *Locke on Toleration*, (New York: Cambridge University Press, 2010), 60. Waldron, “Locke: Toleration and the Rationality of Persecution,” 65.

government reaches only to persons' *civil interests*. Given the *Letter's* argumentative structure, priority must be given to the argument from the mandate of the state.

Before stating his intermediate conclusion, and laying out his main arguments, Locke introduces the ideas of *a commonwealth* and of *civil interests*. He writes, "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing of their own civil interests."¹⁵ Here I take Locke's mention of persons' "civil interests" to refer to the general category of civil interests, whatever particular interests end up populating the general category. So Locke defines *the commonwealth*, and the general category of persons' *civil interests* in relation to one another. We ought to understand commonwealths as societies constituted for protecting and promoting persons' civil interests, and we should understand the category of persons' civil interests as the things for which commonwealths are constituted to protect and promote. Giving content to the category of civil interests, Locke continues, "Civil interests I call life, liberty health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."¹⁶ So civil interests are the interests that political society aims at protecting and promoting. And, in particular, Locke takes persons' civil interests to consist of their lives, liberty, physical integrity, and certain outward possessions.

Immediately before presenting his three arguments, Locke clearly states the conclusion that he intends to establish. He writes:

¹⁵ Locke, John, A Letter Concerning Toleration, in David Wootton (ed.), *John Locke: Political Writings*, (Indianapolis: Hackett, 2003), 393. Hereafter cited as *Letter*.

¹⁶ Locke, *Letter*, 393.

Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right, and dominion is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.¹⁷

Locke's intermediate conclusion is that civil government may only legitimately concern itself with persons' civil interests. Further, religious concerns, like the salvation of souls, are not among persons' civil interests. It is easy to see that once this claim is established, it follows that civil governments ought to adopt policies of toleration. If the proper jurisdiction of civil government is limited to a concern for persons' civil interests, then it does wrong when it pursues ends other than the promotion and protection of civil interests. And if substantive religious matters like the salvation of souls are not among persons' civil interests, then civil government is obligated to refrain from interfering in religious matters, or in other words, civil government ought to adopt a policy of toleration. Though this last claim is Locke's ultimate conclusion in the *Letter*, it is important to realize that his three main arguments are advanced to establish his intermediate conclusion, what I will call the "civil interest claim".

It is also important to realize that Locke's civil interest claim contains both a positive and a negative assertion. First, Locke claims that civil government *ought* to concern itself with persons' civil interests. Second, he claims that civil government *ought not* to concern itself with anything else, specifically, substantive religious matters. So to fully establish the civil interest claim on which his ultimate conclusion rests, Locke's arguments must establish both its positive and negative

¹⁷ Locke, *Letter*, 394.

aspects. While all three of Locke's main arguments support the negative claim, I argue that only the mandate argument provides a framework for establishing the positive claim. Further, if we read Locke's arguments in the *Letter* as he presents them, not only as a narrow case for toleration, but as a broader account of the proper role and limits of political authority, then we cannot ignore the unique capacity of the mandate argument to support Locke's broader objective. As a result, we ought to regard the mandate argument as primary.

I turn now to the arguments. The first argument that Locke presents to support his civil interest claim is the argument from the mandate of the state, or the mandate argument. Locke argues that, "... the care of souls is not committed to the civil magistrate, any more than to other men."¹⁸ Substantive religious concerns like the "care of souls" are not committed to civil government by God, nor are they committed to civil government by the consent of the people. Locke argues that we have no indication that God has granted the authority to anyone to coerce others to believe in or practice a particular religion, and, more importantly for present purposes, we cannot understand persons to have consented to being compelled to observe a particular religion.¹⁹

Implicit in this argument is the claim that that civil government may not exercise coercive power in ways not "committed" to it. This claim is central to Locke's conception of political legitimacy. Political authority must be conferred upon civil government from without for it to rule rightfully. No authority is natural;

¹⁸ Locke, *Letter*, 394.

¹⁹ I consider and assess the strength of Locke's underlying reasons for *why* persons would not include religious salvation among their civil interests in the next section.

all authority requires justification. In the absence of justification explaining the external source of authority, we ought to regard persons as naturally free from, or independent of, authority over them. Civil government receives its authority to govern from without.

Further, the character of civil government's authority is limited by the content of the commission that grants it authority. Locke considers two sources from which rightful authority can emanate. God could confer the right to govern upon civil government, or the people to be governed could themselves confer the right. Neither Locke's critics nor I take issue with claim that God has not conferred this right on civil government generally or to any government in particular.²⁰ Therefore, in the extensive discussion of the mandate argument that follows, I leave aside the aspects of the argument that focus on a commission from God and concern myself with the aspects of the argument that focus on persons' consent.

The connection between Locke's mandate argument and his civil interest claim is clear. The mandate argument provides provisional support to both the positive and negative civil interest claims. Locke explicitly presents the negative case. Civil government may not concern itself with religious matters because the right to do so has not been conferred upon it. Further, we can infer the positive case. Civil government may, and perhaps should, protect and promote persons' civil interests because it *has* received authorization to do so.

²⁰ Further, a host of difficult issues would arise if one were to claim that God had conferred on civil government the right to compel people to the true religion. Most importantly, who would have the authoritative interpretation of God's word if disagreement existed? It's not at all clear that a supposed commission from God would remove the need for the people's consent.

I consider and assess the strength of the reasons that underlie Locke's mandate argument in the following section. In this section my primary concern is the structure of the arguments in the *Letter*. The important point at this early stage is that we can identify a framework unique to the mandate argument, and that it provides provisional support for both the positive and negative aspects of the civil interest claim. Next I consider whether Locke's two other main arguments in the *Letter* equally provide a framework for establishing his civil interest claim. I argue that they do not and therefore that priority must be given to the mandate argument.

Locke next presents the argument from belief. He argues that the tools characteristic of civil government are unfit for the task of altering religious beliefs, and therefore, that civil government ought not to deploy them for that purpose. The power of civil government, "consists in outward force; but true and saving religion consists in the inward persuasion of the mind..."²¹ Locke argues that the means distinctive of civil government, namely, "confiscation of estate, imprisonment, (and) torments,"²² are inefficacious in altering people's beliefs. For one to achieve religious salvation, Locke assumes that one must fully believe in the true religion. The threat of punishment, however, cannot succeed in changing persons' beliefs. Try as one might, one cannot change his honestly held beliefs in response to threats. Locke therefore concludes that, "the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws."²³

²¹ Locke, *Letter*, 395.

²² Locke, *Letter*, 395.

²³ Locke, *Letter*, 395.

How does the argument from belief stand in relation to the civil interest claim that it purports to support? At first glance, the argument from belief provides a very compelling case for the negative civil interest claim. If the means available to civil government are entirely inefficacious in realizing religious ends, namely the salvation of souls, then it is irrational to deploy them for that purpose. Further, it would be immoral to punish persons for a purpose that cannot be attained with punishment. This would, in effect, amount to punishment to no end. If Locke is right that the threat of punishment cannot alter persons' beliefs, then he has provided a strong argument for why the religious salvation of citizens should not be counted among the proper ends of civil government.²⁴

However, the argument from belief does not similarly provide support to the positive civil interest claim. On the face of it, the argument from belief is entirely negative. It only gives reasons for *not* counting certain things among the rightful ends of civil government. Specifically, ends, like securing citizens' religious salvation, that cannot be attained using civil government's distinctive means, must fall outside of its jurisdiction. The argument from belief offers no support for the positive civil interest claim. In other words, there is no argument here for what we *should* regard as within civil government's jurisdiction. There are no reasons *for* including anything among people's civil interests.

Though the argument from belief seems entirely negative, perhaps we can extract support for the positive civil interest claim from it. Above I inferred a

²⁴ The strength of this argument rests on the assumption that political authority deploys religious coercion for the purpose of achieving persons' salvation. I consider the challenge to Locke's arguments religious coercion for other ends presents, see 1.4, 34, and 3.4, 98-99 below.

positive corollary of the mandate argument; perhaps the same can be done with the argument from belief. As it appears in the *Letter*, the argument from belief contends that civil government should not pursue ends that its distinctive means, namely outward force, cannot attain. Perhaps then the positive corollary of this claim would be that civil government may, or perhaps should, pursue any ends that outward force *can* attain. This suggests that civil government is limited only by its means. Civil government has licence to use its coercive power to attain any ends that such power can in fact secure.

The question becomes whether this positive corollary of the argument from belief supports the positive civil interest claim: that the care of citizens' civil interests falls within civil government's jurisdiction. At first glance the positive argument from belief is overly broad. Locke asserts that persons' civil interests include their lives, liberty, physical integrity and possessions.²⁵ The positive corollary of the argument from belief would include many more things as civil interests than Locke seems to have in mind. The only requirement for classifying something as a civil interest would be that outward force could bring it about. On this scheme civil government's jurisdiction would include everything that outward force can bring about. There would be no *prima facie* grounds for accusing civil government of overstepping its rightful bounds so long as it pursued ends that its characteristic means could achieve. For example, political authority would act within its rightful bounds in mandating specific dress codes or hairstyles for trivial reasons like the personal preference of the head of state, or for no reason at all. So

²⁵ I take up the question of whether Locke's list of civil interests is exhaustive in the next two chapters.

long as state coercion could successfully influence persons' choice of clothing and hairstyle, which it certainly can, the political action would be legitimate.

Proast, in his response to the *Letter*, defends a claim very similar to the positive corollary of the argument from belief. He writes, "Doubtless commonwealths are instituted for the attaining of all the benefits which political government can yield."²⁶ Though Proast provides little support for this claim, it provides the occasion for Locke to respond. Locke argues that Proast's claim mistakenly dissolves the distinctness of different types of societies. We differentiate types of societies by the ends for which they are "instituted". If we presume that civil society is instituted for "attaining all the benefits it can any way yield," why should we not presume the same of other types of societies? If we do, we lose any way of differentiating between political societies and religious associations, between families and businesses. All societies, we would have to assume, would be responsible for attaining all of the benefits they could possibly obtain.²⁷

One might respond by arguing that civil society is the association endowed with outward force to pursue its ends. But, on the assumption that all societies are instituted for the same ends, that would be an arbitrary attribution. On this scheme, there is no reason why any particular society should have a monopoly on outward force, unless, of course, it was conferred on that society by the participants. If the right to use outward force were granted to a society by the participants, it would presumably be done for the purpose of securing some specified ends. Because

²⁶ Proast, *The Argument of the Letter Concerning Toleration*, 62.

²⁷ Locke, John, *A Second Letter Concerning Toleration*, in Richard Vernon (ed.), *Locke on Toleration*, (New York: Cambridge University Press, 2010), 103. Hereafter cited as *Second Letter*.

coercion entails the loss of liberty, we will always need compelling reasons for presuming that a society has been authorized to use outward force in this way. This reasoning belongs firmly within the framework of the mandate argument.

This exchange between Locke and Proast illuminates an ambiguity in their language that enables them to, at times, talk past each other. Though both speak of the manner in which civil society is “constituted”, or at times “instituted”, they seem to use these words to make contrary points. Locke argues that civil society is constituted to protect and promote persons’ civil interests only. Proast, on the other hand, argues that civil society is constituted to pursue all of the goods that it can secure. Locke consistently uses the word “constituted” to refer to the process or act of having formed a society. Locke’s usage of the word alludes to the intentions of persons forming political societies. Proast occasionally conforms to this usage; however, at times, he seems to use “constituted” or “instituted” to refer only to the capacities of a society once it is formed, regardless of the intentions of those who formed it.²⁸ On the latter sense of the word, Proast is correct to claim that the civil society is constituted to pursue any and all ends that it can secure. The claim amounts to a tautology. If by “constituted” one simply means fit to do something, it is trivially true that all things are constituted to do whatever they can, in fact, do. Combined with Proast’s claim that outward force, deployed in the right way, *is* efficacious for the purpose of changing people’s beliefs, he is correct to claim that

²⁸ One could, for example, speak of a washboard being *made* (or constituted in the latter sense) for use as a percussion instrument, though it was obviously first built (or constituted in the former sense) for washing clothes. This is just to say that washboards are perfectly suited for, say, playing in a skiffle band regardless of their original intended purpose. Thanks to Seth Zuk for this example.

civil society is constituted (in the latter sense) for the purpose of pursuing citizens' religious salvation. This is just to say that civil government is well equipped to pursue the goal. Though this claim amounts to a positive corollary to the argument from belief, it is open to the criticisms considered above and does not supplant Locke's mandate argument, that civil government's jurisdiction reaches only to the ends for which it is constituted (in the former sense).²⁹

The third and final argument that Locke explicitly advances in support of the civil interest claim is the argument from error. The argument from error claims that even if civil government's characteristic means were efficacious in changing persons' beliefs, endeavouring to do so would lead to absurd consequences.³⁰ Though Locke assumes that there is only one true religion, the political decision makers of the world practice countless disparate religions. It would be unacceptably risky for individual citizens and ultimately counterproductive to the aims of the true religion for political decision makers to coercively enforce the practice of the religion they each take to be true. More people worldwide would be forced to believe in and follow false religions than the true one. Further, an individual's chances of being coerced into the true religion would depend entirely on the place of her birth. Locke suggests that it is absurd to suppose that God would endorse a policy that led to

²⁹ Vernon points to Locke and Proast's divergent uses of the word "power" to make the same point. Locke speaks of civil government's "power" to refer to its authority. Proast speaks of civil government's "power" to refer to its capacity. Vernon stresses that this illuminates one of the main points of contrast between Locke and Proast. Proast conflates the two senses of "power" and assumes that whenever civil government has the capacity to secure a good it is justified in doing so. Locke insists that civil government is constrained by its authority before questions of its capacity arise. Vernon, *Locke on Toleration*, xix-xxi.

³⁰ Locke, *Letter*, 395-396.

these consequences. He concludes that individuals ought therefore to retain the right to choose their religions for themselves.³¹

Like the argument from belief, the argument from error is entirely negative. It speaks only to why religion should *not* fall within civil government's jurisdiction. The argument from error is, at least partially, a consequentialist argument. It suggests that, given the plurality of religious beliefs held by political decision makers, a policy of persecution, if universalized, would lead to bad consequences. Persons would be unlikely to achieve salvation and the true religion would flounder.³² The clear goal of one wishing to place religious concerns within civil government's jurisdiction would be to ensure persons' salvation and to further the ends of the true religion. So we ought not to regard persons' religious salvation as among their civil interests because doing so would be self-defeating. Attempts to coercively promote persons' salvation, and further the ends of the true religion, are bound to do more harm than good. These considerations show how the argument from error supports the negative civil interest claim.

Can we generate a positive corollary to the argument from error to support the positive civil interest claim? I do not believe we can. Though the argument from error instructs that civil government ought not to involve itself in activities that will likely subvert individuals' pursuit of salvation and the aims of the true religion, we cannot simply urge civil government to involve itself in activities that will *promote* these aims. The argument from error shows that civil government's attempts at actively promoting substantive religious ends are self-defeating. Attempting to

³¹ Locke, *Letter*, 396.

³² Vernon, *Locke on Toleration*, xvii.

coercively promote religious ends is precisely what leads to bad and absurd consequences. Generalizing the argument further does not help support the positive civil interest claim. A positive argument that claimed that civil government ought to pursue all ends that are not self-defeating would be overly broad and lead to additional absurdities.

Proast protests that civil government may not enforce its favoured religion, but may enforce the *true* religion.³³ This approach, however, does not remedy the shortcomings of the argument from error. As Locke points out in response to Proast, everyone believes that his religion is the true religion. It would be absurd for one to claim that he believed in a religion yet did not believe that religion to be true. Even if, as Proast maintains, believers in the true religion can know with certainty that their religion is true, one cannot deny that adherents of false religions believe in the truth of their religion just as vigorously as believers of the true religion. Therefore, one could not implement the principle that civil government may only enforce the true religion in any way that would avoid the consequences at which the argument from error points.

The purpose of this section is to establish the primacy of Locke's mandate argument in the *Letter*. Though the *Letter's* ultimate conclusion is that civil government ought to adopt a policy of toleration, Locke aims to establish it by first establishing an intermediate conclusion. The *Letter's* intermediate conclusion is that civil government's jurisdiction reaches only to persons' civil interests, and that religious salvation is not among them. This intermediate conclusion, Locke's civil

³³ Proast, *The Argument of the Letter Concerning Toleration*, 65.

interest claim, contains both a positive and a negative claim. While all three of Locke's arguments provide prima facie support for the negative civil interest claim, only the mandate argument supports the positive claim. Therefore, it is a mistake to suppose, as Proast and Waldron do, that Locke's case for toleration rests entirely on the strength of the argument from belief. Given that Locke aims to show that toleration follows from a proper understanding of the scope of civil government's authority, priority must be given to the mandate argument. In the next section I argue that the mandate argument provides the foundations of a strong political argument for establishing Locke's civil interest claim and his ultimate conclusion in favour of toleration.

1.4 – The Mandate Argument and Civil Interests

In this section I analyze Locke's mandate argument. I first consider its original formulation in the *Letter* and then look at subsequent formulation in Locke's later *Letters*. I argue that the mandate argument provides strong support for Locke's civil interest claim and for toleration.

To review, in its simplest form the mandate argument states that the right to govern must be conferred on civil government from without. Or, in other words, civil government's authority must be granted to it. Further, the extent of this authority is limited by the content of such a grant or conferral. Locke briefly entertains the notion that the authority to govern could be granted by God, but focuses on the idea that the persons who will be subject to civil government's authority must be the ones to confer the right to govern on it. Thus, the mandate

argument introduces a line of contractarian reasoning in the *Letter*. Locke's mandate argument is an argument for religious toleration because it includes the claim that parties to the social contract would not authorize civil government to be responsible for their religious salvation. Or in other words, salvation is not among the civil interests that persons would charge civil government with protecting and promoting.

The reasons that Locke offers for *why* persons would be unwilling to alienate responsibility of their salvation to civil government evolve over the course of his *Letters*. In the original *Letter*, Locke writes:

No man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consists in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true, and the other well pleasing unto God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation.³⁴

Here, Locke offers three related reasons for why persons would not consent to civil government coercively enforcing religious beliefs. Looking at the third reason first, Locke suggests that the nature of religious beliefs requires that they be formed and held in a particular way in order to serve their purpose, namely, in order to be pleasing to God. Locke stresses the importance of inward persuasion in forming, and sincerity in holding religious beliefs. Any attempt to change one's religious beliefs according to external pressure from the state, without being fully convinced that the beliefs are true, would be displeasing to God. Presumably, this would be the

³⁴ Locke, *Letter*, 394.

case even if such practices or professions were only the first steps in eventually coming to accept those beliefs as true. Recognizing that this process would hinder one's chances at salvation, Locke argues that it would be irrational for persons to authorize civil government to attempt to coercively enforce religious belief.

Though I suppose it is possible that Locke's assessment of what is pleasing to God is accurate, it does not provide very strong grounds for the mandate argument. As Vernon and Waldron point out, it relies on the particulars of Locke's conception of true religion.³⁵ It therefore fails to live up to the standard that we have come to expect of Locke of providing a generalizable theory of toleration,³⁶ and fails to serve as a compelling political argument where the veracity and role of religious claims are very much at issue.

Locke's second reason for why persons would not authorize civil government to pursue religious ends echoes the reasoning of his argument from belief. He argues that persons' beliefs, religious or otherwise, cannot be altered by external pressure. Only reasoning and persuasion can affect persons' beliefs. It would therefore be irrational for persons to authorize civil government to attempt to change their religious beliefs by outward force. It would be irrational because it would require persons imposing pressures and punishments on themselves that would be ineffective and likely detrimental to their wellbeing.

It is important to note that, though Locke's reasoning here echoes his reasoning in the argument from belief, it takes on a different character within the

³⁵ Vernon, *Locke on Toleration*, xxiii, Waldron, "Locke: Toleration and the Rationality of Persecution," 63.

³⁶ Vernon, *Locke on Toleration*, xi.

framework of the mandate argument. The question is not, “is it rational for civil government to coercively promote religious beliefs?” but, “is it rational for the parties to a social contract to authorize civil government coercively promoting religious beliefs?” As Wootton and Vernon point out, the argument from belief appeals to the rationality of civil government or its officials. The mandate argument, on the other hand, appeals to the rationality of the persons subject to political authority.³⁷ This requires that we adopt the perspective of an individual seeking to engage in political cooperation, contemplating the powers she should confer upon civil government. Thus, as Vernon points out, the mandate argument additionally adds the prospective perspective of citizens seeking to engage in political cooperation.³⁸

Given that Locke refers back to the reasoning of the argument from belief, it is necessary to consider Proast and Waldron’s criticism that, deployed in the right way, outward force *can* aid in the formation and alteration of beliefs. Though outward force cannot at once alter a person’s beliefs, punishments and incentives can force people to listen to the arguments that will persuade them. If Proast and Waldron are right, as Locke eventually appears to acknowledge,³⁹ we can ask whether it would ever be rational for parties to a social contract to authorize civil government to coercively enforce certain religious beliefs.

³⁷ Wootton, *John Locke: Political Writing*, 99. Vernon, *Locke on Toleration*, xxi.

³⁸ Vernon, *The Career of Toleration*, 23.

³⁹ Vernon notes the significance of Locke’s unwillingness to defend his argument from belief in its original form in his replies to Proast, in *Locke on Toleration*, xix. Locke’s replies to Proast, beginning in the *Second Letter*, consistently grant that this refined use of force could successfully aid in altering persons’ beliefs.

Alex Tuckness argues that in certain circumstances it would be rational for persons to authorize religious coercion.⁴⁰ If state coercion, when deployed in the right way, is in fact efficacious in altering beliefs, and if people have any reason to believe that civil government is more likely to have access to religious truth, say by having access to the best religious scholars and advisors, then it would be rational for persons to consent to a state enforced religion. If successful, the benefits of eventually accepting true religion, or even the increased likelihood of accepting true religion, would far outweigh the injuries of religious persecution. Tuckness concludes that, “even if we grant that the government has only those powers that it would be rational for citizens to grant them in the state of nature, given certain assumptions about probabilities and payoffs, consent to religious coercion might turn out to be perfectly rational.”⁴¹

Proast and Waldron’s conclusions about the efficacy of force for the purpose of changing beliefs certainly invite the sort of reasoning that Tuckness presents. However, I believe that Tuckness’ argument misses a crucial element of the decision facing parties to a social contract. It is not the case that their only two options are to pursue religious truth in complete isolation or to submit to civil government’s religious coercion. In order for religious salvation to be a legitimate end of civil government, the people would have to authorize civil government to coercively enforce religious beliefs. For this to happen, according to Tuckness, all that is required is that the people recognize that civil government has a slightly better

⁴⁰ Tuckness, Alex. “Locke’s Main Argument for Toleration.” *Toleration and its Limits*. Melissa S. Williams and Jeremy Waldron (eds.), (New York, NY: New York University Press, 2008, 114-138), 135.

⁴¹ Tuckness, “Locke’s Main Argument for Toleration,” 135.

chance of accessing religious truth than they do. However, if we suppose that people are capable of recognizing this prior to engaging in political cooperation, why should we suppose that they are incapable of recognizing this after entering political society? If they are equally capable of recognizing the privileged standing of civil government with regard to religious truth, then antecedently agreeing to religious persecution again seems irrational. Why would persons prefer to be coerced into accepting particular religious beliefs when they could simply consult religious experts themselves and consider the experts' arguments as they see fit, free from the injuries of persecution? Again, the mandate argument requires that, for religious coercion to be legitimate, parties to a social contract would first have to sanction it. I am suggesting that there are no features unique to the situation prior to political cooperation that would make it rational for persons to impose religious coercion upon themselves in political society. The concern for religious salvation that, at first glance, might make religious coercion appear attractive, would undermine the need for it in political society. Persons could procure the benefits of religious coercion without actually exposing themselves to the harms of religious coercion.

These considerations relate to Locke's final reason⁴² for why persons would not authorize civil government to pursue religious ends. Locke insinuates that decisions regarding religion are so important that we ought not to blindly leave them to anyone else. We must retain responsibility for our own religious lives. Authorizing religious coercion at the hands of civil government would remove

⁴² Which appears first in the discussion of the mandate argument in the *Letter*.

oneself from a process that one has a prudential, and perhaps religious, responsibility to actively engage in.⁴³

In response, Proast argues that in submitting to religious coercion, persons in fact show a greater concern for their religious lives than if they pursue religious ends on their own.⁴⁴ Persons ought to recognize that their biases and prejudices will prevent them from giving sufficient consideration to other religions. They ought therefore to submit themselves to the religious coercion of civil government to ensure that they will give due consideration to another, and if Tuckness is right, more likely true religion. In authorizing civil government to pursue religious ends, persons express their commitment to their own salvation, in spite of their biases and prejudices.

Here again, Proast fails to justify why people would regard religious *coercion* as necessary. In order for civil government to legitimately pursue religious ends, the people would first need to authorize it to do so. In order to do so for the reasons proposed by Proast, persons would have to overcome their religious biases and prejudices. Proast fails to offer a compelling reason for why persons would not similarly be able to overcome their biases once they were in political society. If persons in political society are equally able to overcome their religious biases and listen to the religious arguments that could aid in their salvation, there is no reason

⁴³ Ashcraft argues for the religious obligation to maintain responsibility for one's own religious interests. Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government*, 499.

⁴⁴ Proast, *The Argument of the Letter Concerning Toleration*, 63.

for them to antecedently impose religious coercion upon themselves. Thus religious coercion is rendered unnecessary.⁴⁵

Locke's mandate argument introduces a promising line of contractarian reasoning to the discussion of toleration; however, as it first appears in the *Letter*, it has its limitations. As noted, some of Locke's reasoning relies on particular assumptions about religious truth and the requirements for religious salvation. Additionally, Locke's support for the mandate argument in the *Letter* invites arguments along the lines of Tuckness' that there *are* compelling reasons for parties to a social contract to consent to religious coercion. Perhaps, for example, persons would authorize religious coercion to hold them to their prior religious commitments. Though I think Locke would have strong grounds for rejecting these arguments, contemporary Locke scholars like Waldron and Tuckness remain unconvinced. Perhaps the most significant shortcoming of the mandate argument as it appears in the *Letter* is that it presupposes that the end of religious persecution is the salvation of persons' souls. This version of Locke's mandate argument is silent on the legitimacy of religious coercion where its stated purpose is other than to instil true religious beliefs in people, but rather, say, to ensure uniformity in religious practice for ends other than the care of persons' souls.

In Locke's later *Letters* on toleration he revisits the framework of the mandate argument. In the later *Letters*, however, he provides new, and I believe

⁴⁵ The possibility persists that parties to the social contract would recognize themselves as weak willed and sanction civil government to coercively hold them to their antecedently established religious commitments. I think the mandate argument as it appears in the second and third *Letters* begins to address this possibility. I address it directly, see 3.4, 103-104 below.

stronger grounds for establishing that persons setting the terms of their political cooperation would not consent to religious coercion at the hands of civil government. In the *Second Letter* Locke writes:

Nothing can 'in reason be reckoned amongst the ends of any society', but what may in reason be supposed to be designed by those who enter into it. Now nobody can in reason suppose that anyone entered into civil society for the procuring, securing, or advancing salvation of his soul, when he, for that end, needed not the force of civil society. 'The procuring, therefore, securing, and advancing the spiritual and eternal interest of men, cannot in reason be reckoned amongst the ends of civil societies'...⁴⁶

Here Locke clearly reintroduces the structure of the mandate argument and draws the connection between it and the civil interest claim. The ends of civil society, and consequently of civil government, are defined by the parties seeking to engage in political cooperation. The reasoning underlying this version of the mandate argument, however, does not simply echo that of the earlier version. Here Locke argues that people outside of political society simply do not need the force of civil government to successfully pursue their religious salvation. Parties to the social contract would have no reason to authorize religious coercion because they have all that is necessary to pursue their salvation independently of political cooperation. Simply put, the inability to pursue religious interests as they see fit is not among the problems that persons would face outside of political society; and, therefore, it is not something that persons would include among their civil interests and look to civil government to remedy.

⁴⁶ Locke, *Second Letter*, 104-105.

Locke fills in this picture with the type of considerations that *would* inform the reasoning of the parties to a social contract when he again revisits the mandate argument in his *Third Letter*. He writes:

The end of a commonwealth constituted can be supposed no other than what men in the constitution of, and entering into it, proposed; and that could be nothing but protection from such injuries from other men, which they desiring to avoid, nothing but force could prevent or remedy; all things but this being as well attainable by men living in neighbourhood without the bounds of a commonwealth, they could propose to themselves no other thing but this in quitting their natural liberty, and putting themselves under the umpirage of a civil sovereign, who therefore had the force of all the members of the commonwealth put into his hands, to make his decrees to this end obeyed.⁴⁷

Here Locke argues that the civil interests that persons engage in political cooperation for the purpose of promoting and protecting, and that therefore fall within the jurisdiction of civil government, are those things that would be vulnerable to injury at the hands of others, and that only outward force can protect and promote. These vulnerabilities represent the distinctive problems that persons outside of political society would face. Consequently the prospect of remedying these problems is what would motivate persons to engage in political cooperation and put themselves under the authority of civil government. The interests that persons recognize cannot be secured but by the outward force of civil government are their civil interests.

Here we get a better sense of how Locke generates his list of civil interests, namely, persons' lives, liberty, physical integrity, and their possession of outward things. Outside of political society, the possession of these things is vulnerable to

⁴⁷ Locke, A Third Letter for Toleration, in Richard Vernon (ed.), *Locke on Toleration*, (Indianapolis: Cambridge University Press, 2010), 141. Hereafter cited as *Third Letter*.

injury at the hands of others. Further, there is little persons could do to successfully secure these things short of engaging in political cooperation and submitting the care of these things to the authority of civil government. Any other problems that arise outside of political society can equally well be solved outside of political society, without the force of civil government. Persons would therefore define their civil interests as their lives, liberty, physical integrity, and possession of outward things. As we see later in the same passage, persons would include nothing but these things enumerated by Locke, including their religious interests, among their civil interests.

Locke continues:

Now since no man or society of men can by their opinions in religion, or ways of worship, do any man who differed from them any injury, which he could not avoid or redress, if he desired it, without the help of force; the punishing any opinion in religion, or ways of worship by the force given the magistrate, could not be intended by those who constituted or entered into the commonwealth; and so could be no end of it, but quite the contrary. For force from a stronger hand to bring a man to a religion, which another thinks the true, being an injury which in the state of nature everyone would avoid, protection from such injury is one of the ends of a commonwealth, and so every man has a right to toleration.⁴⁸

Here, Locke explicates the reasoning that underlies the claim that people's religious interests are *not* among their civil interests. Building on the argument of the *Second Letter* Locke here argues that even outside of political society persons' religious interests are secure. Persons are free to pursue religious salvation as they see fit; they may reason through and debate religious claims in any way they choose, in consultation with others as they desire. People simply do not need the outward force of civil government to pursue their religious ends. If civil government's

⁴⁸ Locke, *Third Letter*, 141.

outward force is necessary at all with respect to religion, it is to protect the liberty of individuals to believe in and practice religions of their choosing, free from the threats of others. Far from authorizing religious coercion, parties to a social contract would locate their civil interest in the freedom from religious coercion. This version of the mandate argument demonstrates that substantive religious interests are certainly not among persons' civil interests.

Implicit in this version of the argument is the claim that persons would only subject themselves to the authority of civil government, and thereby forfeit their natural freedom from authority, when it was necessary for realizing benefits that could not be achieved through other means. Putting oneself under civil government involves a *prima facie* loss of liberty. Upon entering political society, persons become subject to laws and threats of punishment, to which they were not previously subject. Making oneself vulnerable to new laws and punishments is perfectly rational where it represents an escape from greater or more pressing vulnerabilities, irrational when it does not. Accordingly, persons *would* forfeit their natural freedom from authority to protect their lives, liberty, physical integrity, and possessions because, despite their best efforts, without universal participation in political society, and the strength of civil government's outward force, persons could not succeed in securing these things. Participation in political society represents persons' only opportunity at secure and lasting enjoyment of these vital interests. The same cannot be said of persons' religious salvation. Outside of political society,

persons' religious beliefs are not vulnerable to injury.⁴⁹ It would therefore be irrational for persons to consent to religious coercion. Doing so would make them vulnerable to injuries that they did not face outside of political society, or, at the very least, perpetuate vulnerabilities that did.

I take the mandate argument as it appears in the *Third Letter* to be Locke's strongest formulation of the mandate argument, and his strongest argument for toleration in his four letters on the subject. It provides strong support for both the positive and negative civil interest claims, and accordingly, for a policy of toleration. As I have argued, it is Locke's only argument that successfully accomplishes this. Further, this version of the mandate argument retains its force regardless of the intended aim of religious persecution. The question of the intent of religious persecution never arises. Civil government only has the powers conferred on it by the persons endeavouring to cooperate politically, and they would not submit their religious interests to the authority of civil government. As Vernon emphasizes, Locke's tolerant conclusions emerge out of circumstances of political cooperation and the nature of legitimate political authority.⁵⁰ Insofar as we are concerned with the legitimacy of political action, Locke's mandate argument for toleration ought to be regarded as compelling. On this basis, I believe that Locke's mandate argument remains relevant in contemporary political contexts.

⁴⁹ Except, as Locke notes, injury at the hands of others who have different religious beliefs.

⁵⁰ Vernon, *Locke on Toleration*, xxix.

1.5 – Conclusion

In this chapter I have identified Locke's idea of civil interests and shown its unique connection to the social contract. Only the contractarian mandate argument provides support for both the positive and negative civil interest claim. And though Locke has gone a long way towards establishing the mandate argument as strong grounds for the civil interest claim, and for toleration, we must ask whether Tuckness' line of argument, that we *can* conceive of compelling reasons for why parties to a social contract would consent to religious coercion, can be pushed even further. To fully answer this question it is necessary to further expound the contractarian premise on which Locke's mandate argument rests. What, for example, justifies framing questions of political legitimacy in terms of a social contract? And, how should we understand claims about political participants' consent? I take up these questions in the next two chapters by considering how Locke's idea of civil interests fits into the broader tradition of social contract theory (Ch. 2), and by formulating a social contract argument of my own centred on the Lockean idea of civil interests (Ch. 3).

2 – Civil Interests and the History of the Social Contract

2.1 – Introduction

In this chapter I aim to demonstrate that social contract theories of political legitimacy can generally be interpreted in light of the idea of civil interests. I consider the well-known social contract theories of Locke, Hobbes, and Kant, and identify an analogue to civil interests in each. Further, I consider how the version of civil interests in each theory defines and limits the exercise of political authority. The utility of this analysis is revealed in its ability to explain otherwise puzzling features of historical social contract theories.

First I look at Locke's fuller account of the social contract in his *Second Treatise*. I endeavour to understand the social contract of the *Second Treatise* in terms of civil interests, and argue that this helps elucidate the contractarian line of argument in the *Letters*. I then impose the structure of the *Letters'* mandate argument on the social contract theories of Hobbes and Kant. Doing so allows us to explain Hobbes' conflicting remarks on the importance of religious uniformity, and provides an interpretation of Kant's notion of possible consent.

2.2 – Locke's *Second Treatise* and Civil Interests

Given that the idea of civil interests is articulated by Locke in his *Letters* on toleration, a logical place to begin a broader investigation of the relationship between civil interests and social contract theory is with Locke's fuller account of the social contract and political legitimacy in his *Two Treatises of Government*.

It has been noted by many of Locke's commentators that, though his *Two Treatises* and his *Letter* were published in the same year, and both address, among other things, the limits of political authority, Locke seems to have presented the two works as entirely distinct from one another. The word "toleration" does not appear in the *Two Treatises*, nor does the phrase "civil interests". Conversely, the word "property" is mentioned only once in the *Letters*, and "state of nature" can be found just twice in the *Third Letter*. Waldron notes the peculiarity of toleration being completely absent from the *Second Treatise*, Locke's major work on the function and limits of government.¹ Vernon suggests that while the two works deal with similar issues, Locke understandably had a different focus in each. The *Second Treatise* is directed primarily at the holders of political power while the *Letter* is directed at competing religious groups.²

Wootton notes a "remarkable difference between the literature on *A Letter Concerning Toleration* and that on the *Second Treatise*."³ That said, Wootton and others have worked to bridge this divide in Locke scholarship. James Tully suggests that reading the *Letter* in conjunction with the *Two Treatises* can illuminate contentious aspects of the latter.⁴ He, for example, uses the *Letter's* remarks about conscientious disobedience to better understand the *Second Treatise's* right of

¹ Waldron, Jeremy, "Locke: Toleration and the Rationality of Persecution," Susan Mendus (ed.), *Justifying Toleration*, (Cambridge: Cambridge University Press, 1988), 73.

² Vernon, Richard, Introduction to *Locke on Toleration*, Richard Vernon (ed.), (New York: Cambridge University Press, 2010), xxxi.

³ Wootton, David, Introduction to *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 94-95. He attributes this, at least in part, to the difficulty in pinning down the precise historical context and occasion of Locke writing the *Letter*.

⁴ Tully, James, *An Approach to Political Philosophy: Locke in Contexts*, (New York, NY: Cambridge University Press, 1993), 3.

revolution.⁵ Wootton and Vernon both consider the relationship between the contractarian arguments in the *Letter* and in the *Second Treatise* and note important similarities between the two.⁶ A. John Simmons considers two possible interpretations of the *Letter* and ultimately argues for the interpretation that aligns best with the Lockean theory of rights he discerns in the *Two Treatises*.⁷

In this section I explore the relationship between the contractarian line of argument in the *Letters* and that of the *Second Treatise* specifically in light of the idea of civil interests. I look to Locke's comprehensive account of the social contract in the *Second Treatise* to fill in the details of, and further our understanding of, the mandate argument.

In the *Second Treatise* Locke describes the state of nature as a state of perfect freedom and equality in which persons are governed only by the law of nature.⁸ The law of nature states that nobody may harm another in his life, health, liberty or possessions. Locke grounds this law of nature on the theological claim that, because all persons belong to God, in a literal sense are God's property, no one may destroy himself or anyone else, or deprive others of their liberty, health, or possessions.⁹ Persons are, therefore, free to live as they please within the bounds of the law of nature, and to punish breaches of it. There are only two ways by which a person

⁵ Tully, *An Approach to Political Philosophy: Locke in Contexts*, 60-62.

⁶ Vernon, *Locke on Toleration*, xvi, xx, xxvii-xxviii. Vernon, *The Career of Toleration: John Locke, Jonas Proast, and After*, (Montreal, QC: McGill Queen's University Press, 1997), 32, 40, 44, 69. Wootton, *John Locke: Political Writings*, 103, 113.

⁷ Simmons, A. John, Simmons, A. John, *On the Edge of Anarchy*, (Princeton, NJ: Princeton University Press, 1993), 128-134. Simmons' two interpretations of the *Letter* closely resemble two interpretations of the *Letter* I consider, note 27 below.

⁸ Locke, *Locke, Second Treatise of Government*, C. B. Macpherson (ed.), (Indianapolis, IN: Hackett Publishing Company, 1980), §4-6. Hereafter cited as *Second Treatise*.

⁹ Locke, *Second Treatise*, §6.

may part, or be parted, with some or all of his natural liberty. First, one involuntarily forfeits his natural liberty by transgressing the law of nature and opening himself to punishment at the hands of others. Second, one may voluntarily consent to give up part of her natural liberty for the purpose of realizing a benefit.

Locke explains that although persons in the state of nature possess their natural freedom, there are features of life outside of political society that make the enjoyment of their lives, liberties, and possessions “very uncertain, and constantly exposed to the invasion of others.”¹⁰ First, there may be persons who transgress the law of nature and purposely inflict harm on others. Second, even the persons who desire to live within the bounds of the law of nature will have difficulty living peaceably because they lack a clear and settled law, an impartial judge to resolve disagreements under the law, and the power to enforce the law.¹¹ These shortcomings of the state of nature motivate persons to unite in political society, as Locke writes, “for the mutual *preservation* of their lives, liberties and estates, which I call by the general name *property*.”¹²

Locke proceeds to state clearly that, “The great and *chief end*, therefore, of men’s uniting into common-wealths, and putting themselves under government, is *the preservation of their property*.”¹³ This closely resembles Locke’s claim in his *Letter* that, “The commonwealth seems... to be a society of men constituted only for

¹⁰ Locke, *Second Treatise*, §123.

¹¹ Locke, *Second Treatise*, §124-126.

¹² Locke, *Second Treatise*, §123.

¹³ Locke, *Second Treatise*, §124. Locke reiterates this claim several times throughout the *Second Treatise*. In sections 94 and 171 he makes the stronger claim that society “has no other end” but the preservation of persons’ lives, liberties, and possessions.

the procuring, preserving, and advancing their own civil interests.”¹⁴ These are foundational statements of the ends of political society, and, importantly, the categories of property in the *Second Treatise*, and of civil interests in the *Letters*, designate almost the exact same things, namely, persons’ lives, liberties, and possessions.¹⁵ Calling these things *property*, however, as Locke does in the *Second Treatise*, imbues them with additional meaning. That something is a person’s property entails that others have a duty to refrain from interfering with it, and that they wrong the owner if they do. Therefore, in calling these things persons’ property, Locke builds in the constraints of the law of nature, that everyone is obligated to refrain from harming others in their lives, liberty, and possessions. Calling these things property makes clear that persons have substantive duties prior to the social contract that unites them in political society. Additionally identifying these things as property alludes to Locke’s underlying rationale for the law of nature. Persons’ lives, liberty, and possessions are really God’s property, and they hold them in trust for God.¹⁶ Persons therefore have a duty to preserve themselves and others.

Conversely, relatively little seems to be built into the notion of civil interests. Though Locke’s mandate argument refers to the social contract, and therefore presupposes persons’ independence from natural authority, it does not rely on the

¹⁴ Locke, John, A Letter Concerning Toleration, in David Wootton (ed.), *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 393. Hereafter cited as *Letter*.

¹⁵ Locke occasionally adds health, or indolency of body to the list. Tully notes the similarity in the categories of civil interests and of property in Locke’s broad sense, *An Approach to Political Philosophy: Locke in Contexts*, 59.

¹⁶ Locke, *Second Treatise*, §6. Simmons argues for this understanding of persons’ relationship with God, *On the Edge of Anarchy*, 116.

existence of substantive obligations prior to the social contract.¹⁷ Instead, the language of civil interests invites us to focus on the unique set of benefits that persons aim to realize by associating in political society.

Locke's contractarian argument in the *Letters* proceeds by showing that, because persons can only be understood to forfeit the responsibility for particular things, namely, their civil interests, to civil government, the responsibility for all other things, in particular their salvation, falls outside of the mandate of civil government. With this structure in mind, we can look to the contractarian argument of the *Second Treatise* with an eye to how the social contract limits legitimate political action.

In the eleventh chapter of the *Second Treatise*, Locke examines the extent of legislative power. Locke identifies four ways in which conceiving of political society as arising out of a social contract limits the legislative exercise of political authority. The grounds that Locke offers for these limits provides further insight into the manner in which the social contract limits the legitimate exercise of political authority. Locke argues that 1) political authority cannot be absolute and arbitrary, 2) civil government must rule by promulgated standing laws and not extemporary decrees, 3) civil government cannot confiscate citizens' property without their consent, and 4) the legislative power cannot be transferred.¹⁸

¹⁷ From this independence that the social contract presupposes we can infer a pre-political obligation not to interfere with persons' independence. I explore the role of persons' independence in social contract arguments, and its implications at 3.4, 94 below.

¹⁸ Locke, *Second Treatise*, §135-141

First, Locke argues that political authority cannot be arbitrary because civil government can have only the power conferred on it by the persons contracting into political society, and persons do not have absolute arbitrary power over themselves. Again, Locke takes persons to hold their lives in trust for God for the purpose of preserving themselves.¹⁹ They do not have the authority to destroy themselves, and, accordingly, cannot confer any such power on civil government in entering political society. From this we can infer the general rule that civil government cannot exercise any powers that parties to a social contract are incapable of granting to it.²⁰

Second, civil government may not rule by ad hoc decrees. Any attempt to rule by ad hoc decrees would fail to remedy the shortcomings of the state of nature that persons enter political society for the purpose of remedying. Locke counts the absence of an established, known law to govern persons' conduct, and settle controversies between them, among the "inconveniences" of the state of nature.²¹ Given that persons enter political society and consent to the authority of civil government for the purpose of preserving their property in the face of the shortcomings of the state of nature, where a government fails to remedy those shortcomings, we cannot infer persons' consent. Therefore civil government may not rule by extemporary decrees, and, in general, must be understood to endeavour to provide a remedy for the shortcomings of the state of nature. It may not reiterate the problems that persons engage in political cooperation to avoid.²²

¹⁹ Locke, *Second Treatise*, §6. Simmons, *On the Edge of Anarchy*, 116.

²⁰ Locke, *Second Treatise*, §135

²¹ Locke, *Second Treatise*, §124

²² Locke, *Second Treatise*, §136

Third, Locke argues that civil government may not take any part of persons' property without their consent. Persons enter into political society and subject themselves to political authority for the purpose of protecting their property. It would be contradictory to the ends for which persons enter into political society for civil government to take some or all of persons' property arbitrarily, and therefore absurd to suppose that civil government could undertake such action legitimately. It will of course be necessary for civil government to collect taxes, and restrict citizens' liberties in order to maintain the functioning of the state; however, when persons enter political society and consent to political authority, they must be understood to consent to the actions that are necessary for the functioning of the state and the promotion of the public good. Here Locke argues against arbitrary intrusions into persons' property, and, in general, against civil government acting in opposition to the ends for which persons enter political society.

Fourth, the legislative power may not transfer its power of making laws. In uniting in political society, Locke takes persons to confer the power to make laws on the legislative authority alone. Accordingly, it may not transfer that power to, in effect, make new lawmakers. Because civil government's legislative authority arises from a "positive voluntary grant and institution" from the people, that authority cannot be anything other than what the people intended, and had the capacity, to do. And, according to Locke, the people could not grant the power to transfer legislative power.

These four limits on the legitimate exercise of political authority show various ways in which the social contract constrains the form and actions of civil

government. From Locke's stated limits we can draw out general principles. First, because civil government may legitimately exercise only the powers conferred on it by the people, it cannot have any powers that they are incapable of granting to it. Second, because persons enter political society to remedy shortcomings of the state of nature, we must be able to regard legitimate political action as a remedy to those shortcomings, and legitimate exercises of political authority may never reiterate the problems that persons face outside in the state of nature and enter political society to overcome. Third, civil government may not act in opposition to the ends for which persons enter political society. Fourth, political authority may not extend farther than the people intend in granting authority to civil government.

In the discussion of the limits on exercises of political authority in the eleventh chapter of the *Second Treatise* Locke does not include the limit that preoccupies him in his *Letters*, namely, that civil government may not legitimately pursue substantive religious ends. The constraints he considers in the *Second Treatise* are largely formal. They are limits on *how* political authority may be exercised rather than limits on what may be the legitimate objects of political action. The latter kind of limit is Locke's concern in the *Letters*. There he argues why only the things he classifies as persons' civil interests are the legitimate objects of political action. However, I believe that we can generalize the arguments that Locke gives for limits on political action in the *Second Treatise* to the more substantive concerns of the *Letters*. In doing so, we get a fuller account of how the social contract limits civil government to a concern for persons' civil interests, and what persons' civil interests consist in.

Of the general principles I draw out of the limits for which Locke argues in the eleventh chapter of the *Second Treatise*, the first two provide complementary support for interpretations of the *Letter's* mandate argument, and, consequently, to the *Letter's* conclusion that the jurisdiction of civil government is restricted to a concern for persons' civil interests.²³ The third general principle above is consonant with the reasoning of the mandate argument; however, it does not provide additional grounds for, or further our understanding of, the mandate argument. Rather, in claiming that civil government may not act in opposition to the ends for which persons enter political society, we just restate the conclusion of the *Letter*. Locke states clearly that the end for which persons enter political society is the protection and promotion of their civil interests (*Letter*), or property (*Second Treatise*). However, the main question of the *Letter* remains: what should count among persons' civil interests, and why?²⁴ Or, in other words, why should we include certain things, namely, persons' lives, liberties, and possessions, within civil government's jurisdiction, and exclude other things, namely, persons' salvation?

Likewise, the fourth general principle drawn out above does not provide additional grounds for, or further our understanding of, the mandate argument. While the mandate argument certainly presupposes that political authority may not

²³ Locke, *Letter*, 394

²⁴ Recall that I interpret Locke's statement about the relationship between the commonwealth and persons' civil interests to mean that it is true by definition that the end of political society is the protection and promotion of persons' civil interests. The question of importance is which of persons' interests we should include among their civil interests in the proper jurisdiction of political authority. See 1.3, 10 above.

extend farther than the persons granting authority to civil government intend, again, the question here is what persons entering political society intend.

Simmons recognizes that Locke puts forward versions of the first two principles as the grounds for his limits as well. In his summary of the limits on legislative power at the end of the eleventh chapter of the *Second Treatise* Locke writes:

These are the *bounds* which the trust, that is put in them by society, and the law of God and nature, have *set to the legislative* power of every common-wealth, in all forms of government.²⁵

So, civil government's legislative power is constrained in principle by 1) the content of the trust that persons grant it, and 2) the law of God and nature. Taking them in reverse order, God's law makes it such that persons have limited rights over themselves, which limits what they may transfer to political authority. This is the first principle I identify above. And, second, the legislative power is constrained by the content of the grant of rights and powers from persons to political authority. Simmons notes that this principle provides the justification for Locke's third limit.²⁶ As I note above, this principle, while integral to Locke's social contract arguments, does not enrich our understanding of them. The second principle I identify above (drawn from Locke's second stated limit), however, that civil government's actions must remedy the shortcomings of the state of nature, takes us a step further in understanding the content of the trust granted to political authority. Therefore, in slight variation to Simmons' interpretation, I will consider the social contract argument of the *Letters* in light of the first two principles I identify above.

²⁵ Locke, *Second Treatise*, §142.

²⁶ Simmons, *On the Edge of Anarchy*, 62 n.10.

These two general principles provide distinct answers for how we should understand what persons include in civil government's jurisdiction, or, in other words, among their civil interests, and what they retain in their personal jurisdiction, upon entering political society.²⁷ The first principle states that civil government cannot possess any powers that persons are incapable of granting to it. For this principle to provide support for Locke's contractarian case for toleration it must be impossible for individuals to transfer responsibility for their salvation to civil government. In the *Second Treatise*, Locke argues that political authority may not be absolute or arbitrary because persons have no such power over themselves, and, therefore, cannot transfer such power to civil government. Though persons certainly possess the power to pursue their own salvation, it may be the case that this power may not be transferred. If, as Locke seems to believe, the particulars of religion dictate that salvation requires that persons form sincere beliefs through personal reflection, it will be impossible for them to transfer the responsibility of their salvation to civil government to achieve the desired result, namely, their salvation.

This is Richard Ashcraft's interpretation of the *Letter*.²⁸ Ashcraft reads Locke as arguing that the responsibility of persons' salvation is inalienable because they have a duty, to God, to care for their own salvation. To support his claim, Ashcraft cites a passage in the *Letter* in which Locke states that one's salvation depends upon,

²⁷ These map roughly onto Simmons' two possible interpretations of the *Letter*. Simmons, *On the Edge of Anarchy*, 128-134. Simmons favours the interpretation that corresponds to the second general principle I consider here primarily because it aligns with his conception of rights in Locke's *Second Treatise*.

²⁸ Ashcraft, Richard, *Revolutionary Politics & Locke's Two Treatises of Government*, (Princeton, NJ: Princeton University Press, 1986), 498-501

“believing and doing things in this life, which are necessary to obtaining God’s favour, and are prescribed by God to that end.” And therefore, “the observance of these things is the highest obligation that lies upon mankind.”²⁹ Accordingly, persons’ highest moral and religious duty, upon which their salvation depends, is to believe and do the things that they take to be favourable to God. This duty exemplifies the “direct obligatory tie” between the individual and God,³⁰ and, as a result, responsibility for one’s salvation cannot be forfeited to civil government.

While Ashcraft’s interpretation makes strong sense of Locke’s initial presentation of the mandate argument in the *Letter*, and he diligently cites earlier letters and manuscripts of Locke’s to show that this was a prevalent line of his thinking on toleration in the time leading up to his writing of the *Letter*,³¹ I do not believe that it is the strongest interpretation of mandate argument that is available to us. As I note in the previous chapter, in searching for a general and enduring justification for the limits of political authority, we should avoid relying on a particular conception of religious truth or duty.³² Further, when Locke revisits his mandate argument in the later *Letters*, his reliance on the particulars of religious beliefs fades. He focuses instead on the details of the situation facing persons in the state of nature, irrespective of their conceptions of religious truth. This approach is supported by the reasoning of the second general principle identified in the eleventh chapter of the *Second Treatise* above.

²⁹ Locke, *Letter*, 421.

³⁰ Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government*, 500

³¹ Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government*, 493-498

³² See 1.4, 24 above.

The second general principle I identify above states that we must be able to regard political action as a remedy to the shortcomings of the state of nature. Political action may never reiterate the problems that persons face in the state of nature, and that they enter political society to remedy. Taking this as a limiting principle on legitimate political authority, it aligns nicely with Locke's reasoning in what I take to be the strongest statement of his mandate argument, and subsequently, his strongest argument for toleration.³³ There Locke argues that persons entering political society could make civil government responsible only for persons' "protection from such injuries from other men which they desiring to avoid, nothing but force could prevent or remedy; *all things but this being as well attainable by men living in neighbourhood without the bounds of a commonwealth*".³⁴ Political authority is created to remedy the problems that persons face in its absence. Where there is no problem to be remedied, or the problem is readily remedied outside of political society without the help of civil government, political action cannot be justified.

In the case of persons' interest in salvation, Locke writes:

Now since no man or society of men can by their opinions in religion, or ways of worship, do any man who differed from them any injury, which he could not avoid or redress, if he desired it, without the help of force; the punishing an opinion in religion, or ways of worship by the force given the magistrate, could not be intended by those who constituted or entered into the commonwealth.³⁵

³³ Locke, Locke, *A Third Letter for Toleration*, in Richard Vernon (ed.), *Locke on Toleration*, (New York, NY: Cambridge University Press, 2010), 141. Hereafter cited as *Third Letter*.

³⁴ Locke, *Third Letter*, 141. Emphasis added.

³⁵ Locke, *Third Letter*, 141.

Here Locke argues that securing one's own salvation is not a problem that one faces in the state of nature. Nobody can injure any other by believing in or practicing a different religion, and, therefore, persons would have no reason to confer the responsibility of promoting their salvation upon civil government.³⁶

Locke's remarks in chapter nine of the *Second Treatise* help fill in this account of the shortcomings of the state of nature that persons enter into political society for the purpose of remedying. Again, the reason that persons enter political society and subject themselves to the authority of civil government is to solve urgent problems that they face in the state of nature. Specifically, they aim to solve the problems caused by the insecurity of their lives, liberty, and possessions. These things are insecure in the state of nature because the people lack a settled, known law to govern their conduct, an impartial judge to settle disputes, and the power to enforce the law. In the absence of these things persons' lives, liberty, and possessions are "very uncertain, and constantly exposed to the invasion of others".³⁷

So in the ninth chapter of the *Second Treatise* Locke gives a comprehensive account of why life, liberty, and possessions do fall within the jurisdiction of civil government, and in the *Third Letter* we get a complementary account of why *only* those things fall within the jurisdiction of civil government. It is only persons' civil interests that suffer from the shortcomings of the state of nature. Persons have no difficulty identifying and pursuing their favoured path to salvation outside of political society. Persons' pursuit of their salvation requires neither a uniform law, a

³⁶ See 1.4, 32 above.

³⁷ Locke, *Second Treatise*, §123.

common judge, nor an executive power.³⁸ As the second general principle drawn from chapter eleven of the *Second Treatise* makes clear, legitimate political action must represent a remedy to the shortcomings of the state of nature. This helps elucidate Locke's statement of the mandate argument in the *Third Letter*. We cannot understand persons' pursuit of their salvation as a problem in need of solving in the state of nature, and, therefore, we cannot count it among persons' civil interests in the proper jurisdiction of civil government.

Indeed, if persons lack anything in the state of nature with respect to their salvation, it is the liberty and security to believe in and practice the religion that they take to be true. In the *Third Letter* Locke writes,

For force from a stronger hand to bring a man to a religion, which another thinks the true, being an injury which in the state of nature everyone would avoid, protection from such injury is one of the ends of a commonwealth, and so every man has a right to toleration.³⁹

This statement makes clear that any attempt of civil government to enforce a conception of the true religion on a people would reiterate a problem that they do confront in the state of nature, namely, the threat of others attempting to coercively impose their religious beliefs or practices on them. Any attempt by civil government to coercively impose religious beliefs that all persons do not unanimously already believe, would be to reiterate a problem that persons specifically undertake to avoid

³⁸ Here I adopt Locke's assumptions concerning the religious requirements for salvation to interpret his argument in the *Letter*. In the next chapter I present a social contract argument abstracted from Locke's religious assumptions. I think we could find resources in Locke's work to construct an areligious argument. David Wootton agrees in his Introduction to *John Locke: Political Writings*, 108. I draw on these resources in the following chapter, but my primary task at this point is interpretive. See 3.4 below.

³⁹ Locke, *Third Letter*, 141

in entering society. Therefore, all persons could not consent to the imposition of religion, and, accordingly, the imposition of religion falls outside of civil government's jurisdiction.

So, we see that the contractarian reasoning in the *Letters* and the *Second Treatise* is consonant. This is not to say that the two arguments are identical. Importantly, as I note above, the starting point of the *Letter's* contractarian argument carries with it less substantial pre-political commitments.⁴⁰ However, the social contract argument of the *Second Treatise* can be understood in terms of civil interests, and considering it in this light helps elucidate the contractarian line of argument in the *Letters*.

In the following two sections I impose the structure of the *Letters'* mandate argument on the social contract theories of Hobbes and Kant. I identify what each takes persons' civil interests to consist in and explore the implications of interpreting each theory in this light. In both cases, importing the idea of civil interests helps explain puzzling features of the theory and sharpens our understanding of the limits of legitimate political authority.

2.3 – Hobbes and Civil Interests

Hobbes describes the state of persons outside of political society as a state of war. Each individual, having an overarching concern for his safety and security, finds

⁴⁰ See 2.2, 39-41 above, and 4.4.4 below. John Marshall notes the tension in the *Second Treatise* between basing the social contract on persons' duties to God, and on their interest in preserving their rights. Marshall, John, *John Locke: Resistance, Religion, and Responsibility*, (New York, NY: Cambridge University Press, 1994), 292-293. He does not explore the idea that Locke takes the latter approach in the *Letters*.

himself vulnerable to violence, and to being deprived of the necessities of life by those equally concerned with their safety and security.⁴¹ Even when fighting is absent, persons cannot be assured of the security of their lives for any extended period of time.⁴² In addition to lacking personal security, persons in the state of nature have no property, there is no trade or commerce, and there is no culture or arts.⁴³ In sum, Hobbes argues that outside of political society persons lack the security necessary to assure that they will be able to continue to live, and lack the means required to live well.

As all persons find themselves similarly unable to secure themselves from the vulnerabilities they face in the state of nature, reason dictates that they endeavour to create a peaceful circumstance in which their lives will be secure. Hobbes argues that the only way of achieving this is for all individuals to unite to create political society and submit themselves to the authority of a sovereign. Hobbes writes, “The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them”.⁴⁴ So, “The final cause, end or design,” of people creating political society and submitting themselves to the authority of a sovereign is, “the foresight of their own preservation, and of a more contented life thereby”.⁴⁵

So persons enter into political society *for the purpose* of securing their lives against the threat of violence, and for securing the means of living well. Persons

⁴¹ Hobbes, Thomas, *Leviathan*, J. C. A. Gaskin (ed.), (New York, NY: Oxford University Press, 1996), 13:1-8.

⁴² Hobbes, *Leviathan*, 13:8.

⁴³ Hobbes, *Leviathan*, 13:9.

⁴⁴ Hobbes, *Leviathan*, 13:14.

⁴⁵ Hobbes, *Leviathan*, 17:1.

have a strong interest in this security and cannot establish it but by entering political society. We may therefore say that, for Hobbes, persons' civil interests consist of their lives, personal security, and the means of achieving a decent life. These are the vital interests that persons outside of political society have, at best, precarious possession of, and that they unite in political cooperation for the purpose of protecting and promoting. Hobbes further mentions certain things that persons lack in the state of nature, namely, trade and commerce, culture, and arts. We may reasonably infer that these are facets of a decent life that persons hope to attain in entering political society. However, Hobbes continually stresses that persons engage in political cooperation and submit themselves to political authority primarily for the purpose of safety and personal security.⁴⁶

From these considerations, Hobbes argues for an absolute and indivisible sovereign. Only such a political authority can remedy the problems of the state of nature and effectively secure persons' civil interests. Hobbes argues that in entering political society persons must authorize the sovereign to do whatever it thinks necessary for establishing peace and, consequently, every citizen's security.

Acknowledging the sovereign's extensive powers, Hobbes considers two ways in which persons' liberty can arise. First, in every political society there are many aspects of life on which the civil law is silent. Persons are free to act as they please where no law applies to their intended action. This first sense of persons' liberty operates in the space in which the civil law happens to be absent. Hobbes suggests that many, relatively prominent, aspects of persons' daily lives exist in this

⁴⁶ Hobbes, *Leviathan*, 13:14, 17:1.

space, namely, “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 think fit; and the like.”⁴⁷ However, Hobbes makes clear that, though persons can normally expect to act freely in these areas of life, it is not the case that the sovereign’s power is in any way limited with respect to these things. Should the sovereign believe it necessary to impose laws in these areas of life for the safety and security of its subjects, it is entirely within its purview to do so.

The same cannot be said of the second kind of liberty that Hobbes considers, which he calls the “true liberty of a subject”.⁴⁸ Just as Locke’s mandate argument shows how an argument for toleration can be drawn out of contractarian considerations, Hobbes discusses how certain limits to political authority, and conversely “liberties of subjects”, arise out of the creation of political society through the social contract. Hobbes considers what rights persons forfeit in entering political society, and conversely, what rights and liberties they retain even after entering political society. Hobbes suggests that we can derive which rights persons forfeit and which they retain by considering 1) the act of contracting, and 2) in Hobbes’ words, “the end of the institution of sovereignty”.⁴⁹

First, in chapter 14 of *Leviathan*, speaking of contracts generally, Hobbes argues that certain rights cannot be forfeited or transferred in the act of contracting, or, in other words, that certain rights are inalienable. Hobbes argues that whenever one forfeits or transfers a right, one does so for the purpose of realizing a benefit to

⁴⁷ Hobbes, *Leviathan*, 21:6.

⁴⁸ Hobbes, *Leviathan*, 21:10.

⁴⁹ Hobbes, *Leviathan*, 21:10.

oneself. Where it is conceptually impossible for one to realize a benefit in the act of contracting away a particular right, all persons retain that right indefinitely. For example, one can never be understood to forfeit the right to defend her life against an imminent threat.⁵⁰ Laying down the right to self-defence makes one utterly vulnerable to being killed, and a deceased person cannot realize any benefits as a party to a contract. It is therefore incoherent to suppose that one could agree to forfeit her right to self-defence. It is simply impossible to lay down this right and still realize a benefit to oneself. Hobbes argues that rights of this kind are persons' inalienable rights.

So, in the political context, as in any other, we can never suppose that the parties to the social contract forfeit their right to defend their lives and resist imminent violence, even at the hands of the sovereign. On Hobbes' scheme, this is simply not a right that individuals can forfeit or transfer.⁵¹

The second way of discerning which rights persons transfer and which they retain in entering political society is by considering the end of political society. Hobbes argues that the forfeiture of certain rights can never be justified given the ends for which persons engage in political cooperation. The sovereign may not act in opposition to the end for which persons enter political society and submit themselves to the sovereign's authority.⁵² So, given that persons enter political society for "the peace of the subjects within themselves, and their defence against a

⁵⁰ Hobbes, *Leviathan*, 14:8.

⁵¹ In Hobbes, *Leviathan*, 14:30, Hobbes additionally derives the freedom from self-incrimination from these considerations.

⁵² Hobbes, *Leviathan*, 14:8, 21:10.

common enemy,”⁵³ the sovereign may not command a subject to kill or maim himself, to refrain from defending himself against injury, or to abstain from the use of the necessities of life.⁵⁴ Though the sovereign must be the ultimate judge of what actions are conducive to peace and the security of subjects, it can never be presumed that persons conferred on the sovereign the right to command subjects to do anything that immediately and directly undermines the security of their own lives. Killing oneself (or maiming oneself, or refraining from defending oneself, or depriving oneself of the necessities of life) stands in direct opposition to the end for which persons enter political society and submit themselves to the authority of the sovereign. Therefore, it can never be presumed that, in entering political society and submitting to political authority, persons forfeited their right to self-defence, or their ability to pursue the necessities of life.

Susanne Sreedhar stresses the importance of understanding Hobbes’ right to self-defence in the context of the social contract.⁵⁵ She argues against a “standard interpretation” of Hobbes on self-defence that revolves around the extreme evil of death. Sreedhar argues that we should only regard the right of self-defence as inalienable in the social contract. My interpretation of Hobbes’ remarks above echo her “fidelity principle” which states that, “the transfer of a right has to be faithful to the purpose of the covenant, that is, one cannot transfer a right the transfer of which contradicts (or undermines) the purpose for which that right is transferred.”⁵⁶

⁵³ Hobbes, *Leviathan*, 21:10.

⁵⁴ Hobbes, *Leviathan*, 21:12.

⁵⁵ Sreedhar, Susanne, “Defending the Hobbesian Right of Self-Defense,” *Political Theory*, Vol. 36, No. 6 (Dec., 2008), pp. 781-802.

⁵⁶ Sreedhar, “Defending the Hobbesian Right of Self-Defence,” 795.

Importantly, Hobbes argues that political authority may legitimately command persons to perform dangerous tasks that will likely lead to their injury or death so long as the command intends to further the ends of political society. For example, the sovereign may legitimately oblige persons to fight in a war aimed at protecting their territory and, consequently, their society. Though they may likely be maimed or killed in carrying out the sovereign's orders, so long as the orders are given for the sake furthering the ends of political society, namely, the protection of their lives, the sovereign's actions are legitimate. Hobbes writes, "When therefore our refusal to obey, frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse: otherwise there is."⁵⁷

Hobbes calls this second kind of liberty, which cannot be forfeited in contracting into political society, the "true liberty of a subject" because it may be exercised notwithstanding the commands of the sovereign. Here the subject's liberty does not depend on the silence of the civil laws, but exists in spite of them. In other words, the exercise of this liberty falls outside the jurisdiction of the sovereign. Political action that interferes with this liberty is illegitimate and may rightfully be opposed by subjects.

So, the structure of Locke's and Hobbes' contractarian arguments are similar. In both cases persons consent to participate in political society for a particular purpose, namely, the protection and promotion of their civil interests. Persons' civil interests define and limit the mandate of political authority and conversely define the scope of, in Hobbes words, persons' *true* freedoms. The social contract that

⁵⁷ Hobbes, *Leviathan*, 21:15.

Locke envisions in the *Letters* places religious matters beyond the concern of civil government. While Hobbes places certain things, namely the right to self-defence and to pursue the necessities of life, beyond the reach of civil government, he does not similarly draw an argument for toleration out of his contractarian considerations.⁵⁸ Given the similarity in the structure of their arguments that I am suggesting, how can we account for the differences in their conclusions?

One way of explaining the differences between the political societies that Locke and Hobbes envision is to point to their differing accounts of persons' civil interests. Locke argues that persons' civil interests consist of their lives, liberty, personal security, and possessions. Persons enter into political society and submit to the authority of civil government for the purpose of protecting and promoting these things. As we saw in the previous chapter, Locke's case for toleration arises from contractarian considerations in two ways. First, religious *salvation* is not among the things that parties to the social contract entrust political authority to be responsible for. As a result, choosing one's own religion and account of religious truth resembles what Hobbes calls a true liberty. I say these things *resemble* Hobbes' true liberties because, though their underlying reasoning is different, both Hobbes and Locke identify a class of things that fall outside of political authority's jurisdiction owing to the social contract through which persons enter political society. These are the things that Hobbes calls the true liberties. Though Hobbes argues that persons *cannot* forfeit certain things to the sovereign, and the modality

⁵⁸ At least Hobbes does not explicitly draw an argument for toleration out of his contractarian considerations. Below I draw out an argument for limited toleration in Hobbes analogous to Locke's mandate argument.

of Locke's contractarian claims are less obvious,⁵⁹ for both, it is the case that whatever the social contract determines lies outside of political authority's jurisdiction, remains the responsibility of each individual. Locke's first contractarian argument for toleration is that the liberty to choose and cultivate one's own religious beliefs lies outside the mandate of political authority and therefore remains with individuals after entering political society.

The second way in which Locke envisions toleration arising from the social contract can be found in the *Third Letter* where he briefly considers the possibility that religious *freedom* is among the freedoms that persons participate in political society for the purpose of protecting. He writes:

... force from a stronger hand to bring a man to a religion, which another thinks the true, being an injury which in the state of nature everyone would avoid, protection from such injury is one of the ends of a commonwealth, and so everyman has a right to toleration.⁶⁰

Here Locke argues that the freedom from persons who threaten to forcefully interfere in others' religious lives, and consequently the freedom to believe in and practice a religion of one's choosing, are among the freedoms that persons enter into political society to protect. In other words, for Locke, *freedom* of religion ought to be counted among persons' civil interests. Civil government, therefore, has a positive role to play in establishing and protecting persons' religious freedom. Notice that, envisioned in this manner, religious freedom is really just a subspecies of a more general freedom to live the life of one's choosing, free from the unjustified

⁵⁹ Locke variously specifies persons' consent in terms of what they possibly *could* consent to, and what they hypothetically *would* consent to. See 3.3, especially 85, 87-88 below.

⁶⁰ Locke, *Third Letter*, 141.

interference from others. Throughout the *Letters* Locke includes liberty among citizens' civil interests, and in the *Third Letter* he explicitly makes the case for religious liberty. Once one understands the grounds for including liberty as a civil interest, it is easy to see that religious freedom is encompassed in this more general liberty. Persons enter into political society to, inter alia, establish the conditions necessary for living a life of their choosing, free from unjustified interference from others. Surely freedom to make religious decisions for oneself is a subspecies of this freedom.

This religious freedom, however, is not unlimited for Locke. That is, we can justify interference with persons' religious liberty in some cases. The protection of persons' religious liberty, and all other liberties, must be balanced against the protection and promotion of persons' other civil interests. Locke makes clear that in some circumstances persons' interest in maintaining a secure society outweighs certain persons' religious freedom. For example, where one's religion makes him loyal to a foreign government, as Locke supposed of Muslims (and, it is commonly assumed, Catholics on similar grounds),⁶¹ persons' interest in the protection of society will undoubtedly outweigh certain individuals' freedom to practice religions that pose the threat. To say that something is a civil interest is to say that civil government may legitimately act for the sake of protecting or promoting that thing. If persons have multiple civil interests, as Locke supposed they do, concern for these interests will inevitably have to be balanced against one another. This balancing will

⁶¹ Locke, *Letter*, 426. Wootton, *John Locke: Political Writings*, 35.

have different results in different contexts. We can understand this balancing as the practice of politics.

In contrast, for Hobbes, persons' civil interests consist almost entirely in the protection of their lives and their personal security. He continually states that the end of political cooperation is to establish a peaceful condition in which persons' lives and persons are secure.⁶² As a result, it seems natural to infer that whatever policy on religion is most conducive to securing peace between citizens is the one that Hobbes would prefer. If a policy of religious uniformity is most likely to secure peace, it ought to be implemented. If a policy of toleration is most likely to secure peace, it ought to be preferred. If persons' interest in political participation consists entirely in their personal security, civil government is justified in implementing whatever policy will establish the conditions of peace.

This naturally inferred view paints Hobbes as largely indifferent to toleration as matter of political concern in itself. Further, it is the view of Hobbes on toleration that most commentators assume to be the default understanding of his position. Alan Ryan suggests that the "obvious interpretation" of Hobbes is as a "simple enemy to toleration".⁶³ In arguing for a view of Hobbes as a tentative defender of toleration, he suggests that Hobbes' position on toleration is "less ignominious than we tend to think."⁶⁴ J Judd Owen calls the interpretation of Hobbes as indifferent, or

⁶² Hobbes, *Leviathan*, 17:1, 18:8, 21:10.

⁶³ Ryan, Alan, "A More Tolerant Hobbes?" Susan Mendus (ed.), *Justifying Toleration: Conceptual and Historical Perspectives*, (Cambridge: Cambridge University Press, 1988, 37-60), 43.

⁶⁴ Ryan, Alan, "A More Tolerant Hobbes?" 39. Emphasis added.

even hostile to toleration the “typical view”.⁶⁵ Edwin Curley, in adjudicating between different interpretations of toleration in *Leviathan* suggests that Hobbes is “more favourable to toleration *than it might appear*”.⁶⁶ Though commentators typically argue that Hobbes’ views on toleration are more nuanced than we commonly suppose, whether they take Hobbes to ultimately be a friend or foe of toleration, they seem agree that we commonly suppose him to be indifferent to toleration on its own terms, and pragmatic about it in practice.

This reading of Hobbes on toleration is bolstered by the seemingly contradictory claims in *Leviathan* about religious belief and practice. Hobbes seems to praise, and at the very least acknowledges the success of, the tolerant policies of the Romans whereby all religions were tolerated unless they contained elements that put them at odds with civil society and political authority. Hobbes writes that only Jews were not tolerated because they “thought it unlawful to acknowledge subjection to any mortal king or state whatsoever.”⁶⁷ Though not universally tolerant, Hobbes’ remarks here are very similar in tone and spirit to Locke’s limits on toleration in the case of Catholics and Muslims.⁶⁸ Toleration ought to be implemented except where doing so is subversive to the political order as such.

In opposition to his sympathetic remarks about historical policies of toleration, Hobbes affirms that the Sovereign possesses the authority to determine

⁶⁵ Owen, J Judd, “The Tolerant Leviathan: Hobbes and the Paradox of Liberalism,” *Polity*, Vol. 37, No. 1, (January 2005), 130-148, 130.

⁶⁶ Curley, Edwin, “Hobbes and the Cause of Religious Toleration,” Patricia Springborg (ed.), *The Cambridge Companion to Hobbes’ Leviathan*, (New York: Cambridge University Press, 2007), 325. Emphasis added.

⁶⁷ Hobbes, *Leviathan*, 12:21.

⁶⁸ Locke, *Letter*, 426.

whether opinions and doctrines are averse to civil peace.⁶⁹ In doing so, he appears to rule out the possibility of a strong, principled claim to religious freedom. Further, Hobbes explicitly advocates for uniformity of public worship. He argues that to understand the commonwealth as a single unified entity it must worship God publicly with a single voice.⁷⁰ As a result, Hobbes takes uniformity of public worship to be necessary for, at the very least, public cohesion and civil peace. Hobbes' remarks additionally suggest that uniformity of public worship might be necessary for conceiving of a people as united in political society at all.

These and other conflicting remarks by Hobbes' on toleration and liberty of conscience invite conflicting accounts of Hobbes' account of toleration and its limits. Alan Ryan, for one, takes Hobbes to be a tentative defender of toleration. He argues that Hobbes' requirement of uniformity in public worship is merely a "police matter".⁷¹ Uniformity in outward religious practice ought to be favoured only so far as it is necessary for maintaining peace and security. He argues that religious belief is a private matter that ought to be left to each individual so long as they obey the law.⁷² Johan Traleau argues against Ryan's account of Hobbes attempting to show that by "conscience," Hobbes ambiguously meant both a private individual thing immune from the outward force of the sovereign, and a public social phenomenon subject to the law.⁷³ Traleau explains away the notion of conscience as a private

⁶⁹ Hobbes, *Leviathan*, 18:9.

⁷⁰ Hobbes, *Leviathan*, 31:37.

⁷¹ Ryan, "A More Tolerant Hobbes?" 57.

⁷² Ryan, "A More Tolerant Hobbes?" 45, 50. Curley, "Hobbes and the Cause of Religious Toleration," 310-311.

⁷³ Traleau, Johan, "Hobbes Contra Liberty of Conscience," *Political Theory*, Vol. 39, No. 1 (February 2011), 75.

personal endeavour, and, therefore, argues that Hobbes does not advocate for the freedom of conscience that commentators like Ryan suppose.

I believe that we can make the best sense of Hobbes' varied claims on toleration in *Leviathan* by considering his main political argument in light of the idea of civil interests. By focusing on civil interests in Hobbes' account of political association, we clarify the extent to which political authority may interfere in the religious lives of persons. Like Locke, Hobbes does *not* take religious salvation as an end of political cooperation, and therefore would not include it among persons' civil interests. Therefore, we may infer a limited case for toleration in Hobbes contractarian argument that is analogous to the first of Locke's. If religious salvation is not among persons' civil interests, civil government may not enforce a particular account of religious truth, or demand conformity of religious *belief*. It would be illegitimate for the Sovereign to act for the sake of persons' salvation because salvation is not among their civil interests. This amounts to toleration of privately held religious beliefs. If the sovereign may not act for the sake of citizens' salvation, each citizen is left to pursue her conception of religious truth alone, or in concert with others of her choosing.

What then should we make of Hobbes' intolerant remarks? Despite this similarity in what they exclude from among persons' civil interests, Hobbes and Locke disagree about what things we should *include* among persons' civil interests. Hobbes, unlike Locke, does not recognize religious freedom, or freedom of any kind, as a civil interest. Again, for Hobbes, persons' civil interests are their lives and personal security. As a result, Hobbes' sovereign has no positive role to play in

securing the religious freedom of citizens. Here Hobbes' ultimate concern for peace and security take over. If uniformity of public worship is necessary for the cohesion of political society, as Hobbes supposed it was, it ought to be implemented.

Providing that such a policy was enacted for the purpose of peace and personal security, and was necessary for that end, it falls within the scope of persons' civil interests and, therefore, ought to be regarded as a legitimate undertaking of the sovereign. For Hobbes, there are no countervailing considerations of citizens' freedoms, religious or otherwise, as there are for Locke.

This reading of Hobbes on toleration aligns best with Ryan's account of Hobbes as more tolerant than is commonly assumed, though only cautiously so.⁷⁴ However, Ryan concludes that, for Hobbes, "Toleration is not argued for on principle, but as a utilitarian measure; if toleration is unsafe, it must be dropped – public order trumps any notion of a right to free speech."⁷⁵ While for Hobbes it is certainly true that toleration ought to be limited by the requirements of public safety, I do not believe it makes his toleration unprincipled. My analysis of Hobbes' social contract in light of the idea of civil interests gives rise to a Hobbesian account of toleration principled in a surprisingly similar way to Locke's. For both, the pursuit of religious truth falls outside of the jurisdiction of civil government, and for both, religious expression can only be limited for prudential reasons in the pursuit of civil government's proper end of protecting and promoting persons' civil interests. Their accounts of toleration diverge where their accounts of civil interests diverge. Having an overarching concern with peace and security, Hobbes allows for great

⁷⁴ Ryan, "A More Tolerant Hobbes?"

⁷⁵ Ryan, "A More Tolerant Hobbes?" 58.

intrusions into other aspects of persons' lives for the sake of securing that end.

Locke additionally includes persons' liberty among their civil interests and, therefore, requires that civil government take a more balanced approach in pursuing its proper ends.

2.4 – Kant and Civil Interests

For Hobbes, as with Locke in his *Letters*, identifying persons' civil interests is relatively straightforward. Identify the end of political cooperation by considering the factors that motivate persons to enter political society and you will have identified persons' civil interests. The process is not as straightforward when considering Kant's social contract theory. Kant does not contemplate the factors that would motivate persons to create political society and submit to political authority. Rather, he endeavours to explicate the conditions on which political society may be regarded as a "rightful condition", regardless of whether persons would ever feel motivated to enter it.

That said, Kant's political theory is not immune to analysis in terms of civil interests. Kant relies on the idea of the social contract to limit the legitimate exercise of political authority, and in doing so implicitly acknowledges a domain of civil interests.

Though Kant's project is importantly different than earlier social contract theories, his language occasionally obscures that fact. At several points in Kant's major political works, he writes of persons' interest in entering political society in terms similar to Hobbes and Locke. In *On the Common Saying* Kant describes the

civil condition as a distinctive kind of social contract, all of which can be regarded as “The union of many for some (common) end (that all of them *have*)...”⁷⁶ In the *Doctrine of Right* he writes, “Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth*.”⁷⁷ In these passages, Kant, in the same vein as Hobbes and Locke, seems to acknowledge that we can regard persons as having an interest in entering political society, and that the end of political society is furthering those interests that persons share. Specifically, Kant insinuates that persons have an interest in being in a rightful condition, or, in other words, having their rights secured.⁷⁸

However, Kant goes on to explain that the civil condition is unique among social contracts owing to the “principle of its institution”. For Kant, the civil condition does not aim at securing some contingent end that persons happen to share. Rather, entering it is “the unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another...”⁷⁹ For Kant, every person has an innate right to freedom from the imposition of others’ wills. Further, it is only in the civil condition that persons can interact with one another in a way that respects their freedom. So, persons have a *duty* to enter the civil

⁷⁶ Kant, Immanuel, *On the Common Saying: That may be correct in theory, but it is of no use in practice*, in Mary J. Gregor (ed.), *Immanuel Kant: Practical Philosophy*, (New York, NY: Cambridge University Press, 1996), 8:289. Hereafter cited as *On the Common Saying*.

⁷⁷ Kant, Immanuel, *The Metaphysics of Morals*, in Mary J. Gregor (ed.), *Immanuel Kant: Practical Philosophy*, (New York, NY: Cambridge University Press, 1996), 6:311.

⁷⁸ I return to Kant’s reliance on the language of interests at the conclusion of this section.

⁷⁹ Kant, *On the Common Saying*, 8:289.

condition because it is the only way for them to interact with others in a way that respects everyone's innate freedom to be independent of other's wills.⁸⁰

So, we cannot identify civil interests in Kant's system by indentifying persons' motivations for entering political society. However, the reasoning that underlies the uniqueness of Kant's theory illuminates the way in which the civil interest analysis can be applied to it. Moving past the supposed fact of persons' motivation to enter political society, we can consider the grounds of that motivation in the social contract theories we have considered so far. I, following Locke, suggested that we can identify persons' civil interests by identifying those interests that require protection outside of political society, and that only political authority can secure for them. Here we find an analogue in Kant's political philosophy.

For Kant, persons have a duty to enter the civil condition because it is the only condition in which persons are able to interact with each other on terms of equal freedom. That is, Kant maintains that persons are obligated to uphold their own freedom, and not interfere with the freedom of others, and that this is only possible when acting by way of political institutions in the civil condition. So persons are obligated to protect and promote their innate freedom to be independent of others' choices, but they cannot do so outside of political society. Only in the civil condition can persons' freedom be secure. We may therefore identify persons' civil interest as their freedom.

To draw out the idea of the civil condition as a system of equal freedom Kant appeals to "the idea of the original contract".⁸¹ For persons to interact with one

⁸⁰ Kant, *On the Common Saying*, 8:289.

another in such a way that they all remain free from each other's wills, we must be able to understand the conditions governing their interactions as authorized by them all with a united will. Insofar as the conditions of political cooperation are authorized by the united will of all, persons can understand themselves as subject to others' wills only on reciprocal terms, and, therefore, equally free.⁸² Further, each person can be understood to authorize political authority in that each person's own will is united with all others in its rightful exercise. It is in this way that Kant understands the rightful condition through the idea of the social contract.

Kant makes it clear that the idea of the original contract is "*only an idea of reason*".⁸³ That is, he explicitly rejects the idea that anything resembling a historical social contract ever existed, or that a historical social contract could carry any significance for existing political societies. Instead, Kant envisions the original contract only as an idea, but one with real implications for the exercise of political authority. The idea of the original contract serves to limit political authority to the conditions of its rightful exercise. Kant writes, "Properly speaking, the original contract is only the idea of [the act by which a people forms itself into a state], in terms of which alone we can think of the legitimacy of a state."⁸⁴ For the exercise of political authority to conform to the principles of right, we must be able to regard it as emanating from the united will of all. Or, in other words, for political action to be legitimate it must be possible to regard it as the object of consent for the people engaging in political cooperation. Therefore, for Kant, the idea of the original

⁸¹ Kant, *On the Common Saying*, 8:297, Kant, *The Metaphysics of Morals*, 6:315-316.

⁸² Kant, *The Metaphysics of Morals*, 6:315-316.

⁸³ Kant, Immanuel, *On the Common Saying*, 8:297.

⁸⁴ Kant, Immanuel, *The Metaphysics of Morals*, 6:316.

contract is a limiting idea. It does not create obligations for persons subject to political authority the way we often suppose social contracts do; rather, it serves as a test by which we can identify legitimate political action. If it is possible to regard a political action as emanating from the united will of all, we ought to regard it as legitimate. If we cannot regard it as emanating from the people's united will, we ought to regard it as illegitimate.

Though Kant makes clear the importance of the idea of the original contract, his application of the idea of possible consent as a limiting condition on political action is obscure. Kant gives three examples of particular political actions that the idea of the original contract rules out; however, he does not make clear what, in general, makes it *impossible* for a people to consent to a given action. The idea of civil interests can help us draw the connection between the idea of the original contract and the application of the idea of possible consent as a test for legitimacy.

I contend that we should understand the test for whether all persons could consent to a political action as whether that action conflicts with or undermines their civil interests.⁸⁵ The protection and promotion of civil interests are the ends for which persons organize in political society.⁸⁶ If we are to understand the civil condition as emanating from an original contract in which persons' wills are united, it must be the case that persons will the protection and promotion of their civil interests. To suppose that a people could consent to the subversion of their civil

⁸⁵ Kant, of course, does not use the language of "civil interests".

⁸⁶ Again, Kant does not conceive of political cooperation as means to some contingent end. But he writes of the "... end for which the civil constitution is established..." in *On the Common Saying*, 8:298.

interests is to suppose a contradiction in their united will.⁸⁷ Therefore, it is impossible for all persons to consent to any political action that subverts or undermines the protection or promotion of their civil interests. In Kant's political system, this means that it is impossible for persons to consent to the subversion of their freedom understood as their mutual independence from each other's wills.

Of course, Kant did not write using the language of civil interests. However, I believe that this interpretation of Kant's notion of possible consent is implicit in his remarks on the topic. In *On the Common Saying* Kant argues that legislation directed at promoting persons' happiness "is not done as the end for which a civil constitution is established but merely as means for *securing a rightful condition*..."⁸⁸ It can be a matter of debate whether such legislation is enacted prudently; however, Kant argues that one can infallibly discern whether a law conforms to the principles of right by appealing to the idea of the original contract. Kant writes, "For, provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right."⁸⁹ My analysis of Kant's notion of possible consent in terms of civil interests illuminates wherein the contradiction lies. Because the civil condition is established for the end of protecting persons' freedom, or, in other words, their civil interest consists in their freedom, they must be understood to will the protection of their freedom.⁹⁰ To suppose they will the subversion of their freedom would be to suppose a contradiction in the

⁸⁷ This makes sense of Kant's claim that where it is impossible for a people to consent to a political action, it is self-contradictory, *On the Common Saying*, 8:299.

⁸⁸ Kant, Immanuel, *On the Common Saying*, 8:298.

⁸⁹ Kant, Immanuel, *On the Common Saying*, 8:299.

⁹⁰ Ripstein, Arthur, *Force and Freedom: Kant's Legal and Political Philosophy*, (Cambridge, MA: Harvard University Press, 2009), 26.

people's united will. If ever we discover that enacting a law supposes a contradiction in the people's united will, specifically, that they do and do not will the protection of their freedom, the law does not conform to the principles of right.⁹¹

Of Kant's examples of things to which a people could not consent, the best illustration of understanding possible consent in terms of civil interests comes where Kant considers the possibility of a class of hereditary nobility. Kant says that an entire people could not consent to such a permanent class system because it would be tantamount to them throwing away their freedom.⁹² By this Kant means that, in a hereditary class system, in which persons of a lower class could not attain a higher rank though any action of their own, persons of lower classes would be perpetually subject to the wills of higher-class individuals in that their capacity to improve their lot in life would be arbitrarily restricted by higher-class persons who would not be reciprocally constrained. It is in this sense that they would be unfree.⁹³ I am suggesting that we can further explain the impossibility of persons consenting to throwing away their freedom by realizing that the establishment and protection of persons' freedom is the end of political association. In other words, For Kant, persons' civil interests consist in the establishment and protection of their freedom. For persons to throw their freedom away is to act in contradiction to the end for which they associate in political society. Therefore, it is impossible for a people to consent to throwing away their freedom, and, accordingly, it is impossible for a people to consent to a system of hereditary nobility.

⁹¹ This echoes Sreedhar's "fidelity principle" in Hobbes' social contract, "Defending the Hobbesian Right of Self-Defense," 795. See 2.3, 57 above.

⁹² Kant, Immanuel, *The Metaphysics of Morals*, 6:329.

⁹³ Kant, Immanuel, *On The Common Saying*, 8:293.

Along similar lines, Kant considers the imposition of a tax on a people to fund a war. He raises this example in the course of explaining the standard of possible consent as the application of the idea of the original contract. Kant argues that if the tax is applied consistently to all persons, regardless of whether the war is unpopular, and, consequently, the people *would not* consent to the tax if consulted, the law implementing the tax is legitimate because the people *could* consent to it. Conversely, if the tax were applied inconsistently to persons of the same rank, that is, imposed on some and not others, “it is easily seen that a whole people could not agree to a law of this kind...”⁹⁴ This is all Kant says about the war tax. Accordingly, despite Kant’s reassurance, very little is “easily seen” in this example. However, as in the previous case of the hereditary class system, the idea of civil interests helps make sense of Kant’s claims about the possibility of a people’s consent. If the war tax is applied uniformly, though the war may be unpopular, it does not undermine any person’s freedom. If, however, the tax is applied inconsistently, the persons who fund the war are bound to support the actions of the commonwealth in a way that is not reciprocated by those exempt from the tax. The taxpayers find themselves subject to the will of those on behalf of whom political action is taken, and cannot understand themselves as part of that class because they do not have the power to similarly bind those exempt from paying the tax. It is in this sense that the freedom of the payers of an inconsistently applied tax find their freedom subverted. Again, because persons’ civil interests consist of their freedom, it is impossible for all

⁹⁴ Kant, Immanuel, *On the Common Saying*, 8:298, footnote.

persons to consent to the subversion of their freedom; accordingly, a whole people could not consent to an inconsistently applied tax.

Kant's third example of a political action to which a people could not possibly consent is that of coerced religious conformity.⁹⁵ Jonathan Peterson carefully considers Kant's formulation of the "binding religious creed" example as he presents it in the short essay *An Answer to the Question: What is Enlightenment*.⁹⁶ Peterson's analysis of Kant's claims regarding possible consent in the case of binding religious creed aligns with my interpretation of Kant on possible consent in light of the idea of civil interests. Peterson argues that it is impossible for a people to consent to the institution of a religious association that is permanent, unalterable, and not to be doubted publicly because it stands in contradiction to the end for which persons unite politically. Peterson, in effect, builds the idea of civil interests into Kant's conception of a people. He writes, "The content of the Kantian concept of a people comes, in my view, from the idea that a rightful political society is oriented to the purpose of securing the independence of all its members."⁹⁷ He then explains the impossibility of a people consenting to a binding religious creed by showing that it contradicts the idea of a people so conceived. He argues that for a people united for the purpose of securing the independence of all its members to conceive of the ruler as carrying out their commission, they must will what Kant calls the freedom of

⁹⁵ Interestingly, Kant talks about toleration in similar terms to Locke in, *The Metaphysics of Morals*, (6:368).

⁹⁶ Kant also briefly considers the possibility of a binding religious association at the end of *On the Common Saying* (8:304-8:305), and in *The Metaphysics of Morals* (6:327).

⁹⁷ Peterson, Jonathan, "Enlightenment and Freedom" *Journal for the History of Philosophy*, Vol. 46, No. 2, April 2008, pp. 223-244. 239

public reason.⁹⁸ By this he means the freedom to reason in one's own name, or, in other words, to reason such that one is not subject to the authority of another.⁹⁹ The freedom of public reason stands in direct opposition to the prospect of a binding religious creed; therefore, it is impossible for a people to consent to a binding religious creed.

Here we see that, though the case of the binding religious creed requires the additional idea of the freedom of public reason (on Peterson's analysis at least), as with the case of a class of hereditary nobility, and the unevenly applied war tax, the impossibility of a people's consent is established by establishing a contradiction between the proposed political action and the people's civil interest in establishing the conditions of their freedom.

Here Kant, like Locke, and to a lesser extent Hobbes, draws an argument for religious toleration out of contractarian considerations. In all of the social contract theories considered thus far, coercively enforcing a religion on a people runs afoul of the social contract which establishes the conditions of political association and from which civil government receives its authority. Though the underlying reasoning of each social contract theorist varies, when we consider the social contract in terms of civil interests, the feature that the coercive enforcement of religion will be rendered illegitimate is common to them all.

So Kant's social contract theory, like Hobbes' and Locke's, can be interpreted in light of the idea of civil interests. Further, applying the idea of civil interests to Kant's political theory provides an interpretation of a key feature of his system that

⁹⁸ Peterson, "Enlightenment and Freedom," 243.

⁹⁹ Peterson, "Enlightenment and Freedom," 228.

is bound to strike readers as mysterious. Kant stresses that the idea of the original contract is, “the touchstone of any public law’s conformity with right.”¹⁰⁰ From the idea of the original contract he argues that for political action to be legitimate, it must be a possible object of a people’s consent. Further, Kant provides examples of political actions that fail the test of possible consent. However, the underlying grounds for discerning whether some political action could be the object of a people’s consent remains mysterious in Kant’s text. I have suggested that we can understand Kant’s notion of possible consent in terms of civil interests. Because persons in the civil condition must be understood to will the protection and promotion of their civil interests, it is impossible for them to will the subversion of their civil interests at the same time. On Kant’s political system we can understand persons’ civil interests to consist in their freedom or independence from others. We can therefore infer as a general rule that it is impossible for all persons to consent to anything that undermines their freedom.

Despite the similarities noted above, I will add a final word on the way in which Locke and Kant differ that I touched on at the outset of this section. When Locke writes of persons’ interests, he invites us to think of interests that persons actually have and that they want to protect. It is for the sake of protecting these interests, which they all share, that Locke envisions persons entering political society. Kant, on the other hand, argues that these kinds of interests, or, “the end that all [persons] naturally have (their aim of happiness),” cannot play a role in

¹⁰⁰ Kant, *On the Common Saying*, 8:297.

justifying the establishment of the civil condition.¹⁰¹ It is important to note that Kant defines happiness broadly as “any empirical ends”.¹⁰² Kant would therefore take issue with Locke’s attempt to justify political society by appealing to a set of persons’ contingent interests. I, however, am not convinced that Kant’s argument reaches as far as he intends.

Kant’s reason for excluding consideration of empirical ends from the justification of the civil condition is that, “since people differ in their thinking about happiness and how each would have it constituted, their wills with respect to it cannot be brought under any common principle and so under any external law harmonizing with everyone’s freedom.”¹⁰³ The problem with Kant’s claim here is that it excludes only the narrower, more common sense of “happiness” from the determining grounds of the civil condition. I do not see why no empirical ends can be brought under a common principle and serve as justification for establishing the civil condition. In fact, we can regard this possibility as one of Locke’s main claims in his exchange with Proast. Some interests are held in common and can be the object of common principles; among these are persons’ civil interests. Other interests cannot, for example, persons’ salvation, or, as Kant suggests, their happiness narrowly construed. I therefore do not take Kant’s argument against appealing to empirical ends in the determining grounds of the civil condition to be devastating to Locke’s account of civil interests in justifying political society.

¹⁰¹ Kant, *On the Common Saying*, 8:289-290.

¹⁰² Kant, *On the Common Saying*, 8:290.

¹⁰³ Kant, *On the Common Saying*, 8:290.

As I note above, Kant occasionally writes in terms of interests. Perhaps this is because he was trying to situate his system in the social contract tradition but did not yet have the vocabulary to express his theory's new and distinctive features.¹⁰⁴ I, however, am tempted to believe it is because talking in terms of interests, as Locke does, is unavoidable. In thinking about the justification of actual political societies, we cannot help but think about the interests that political societies actually serve.

2.5 – Conclusion

In this chapter I have endeavoured to show that historical social contract theories can be interpreted in light of the idea of civil interests, and, further, that this analysis elucidates how the social contract limits the legitimate exercise of political authority.

This discussion introduces a host of questions about how we ought to understand the social contract. In the following chapter I justify my appeal to the social contract, and explain what I take to be its relevant aspects for my argument. Additionally, I argue directly for the importance of the idea of civil interests in social contract theory, and present a contemporary account of civil interests.

¹⁰⁴ Ernest Weinrib suggested this reading when asked during a seminar on Kant's legal philosophy in the Faculty of Law, University of Western Ontario, March 2013.

3 – The Social Contract and Civil Interests

3.1 – Introduction

Having identified the idea of civil interests in Locke's *Letters*, and argued for its significance in historical social contract theories, I now turn to address several issues regarding civil interests and social contract theory head on. Any argument that appeals to the idea of the social contract to draw political conclusions must justify such an appeal, specify how the social contract is to be understood, and explain its relevance to actual political circumstances. In the first half of this chapter (3.2-3.3) I argue for the significance of social contract theory, and explain what I take to be its relevant aspects for my argument. In the latter half (3.4), I present my account of the social contract for the purpose identifying the legitimate object of political action – persons' civil interests.

3.2 – Hume's Criticism

I begin by considering David Hume's powerful criticism of social contract theory that the social contract is a fiction and therefore cannot be the source of compelling political conclusions. I confront Hume's criticism, as all social contract theories must, and consider the responses that we can offer on behalf of Hobbes, Locke, and Kant. In the next section, I use Hume's criticism as a departure point for understanding the various ways of specifying the details of the social contract, and for specifying the details of the social contract on which I rely for articulating my conception of persons' civil interests.

In his essay “On the Original Contract,” Hume argues that the social contract is a fiction.¹ He argues that persons who find themselves in political society, and subject to the authority of civil government, were not parties to a historical social contract. Further, if an actual social contract existed at some point in the past, we should not regard persons as bound by the agreements of their ancestors. If this is the case, and some extant civil governments are legitimate, then the legitimacy of those governments, and persons’ political obligations, cannot be grounded in their consent. Therefore, the criticism runs, we should not appeal to an obviously fictional social contract to draw political conclusions.

Hobbes, Locke, and Kant all respond to these challenges in the course of articulating their versions of the social contract. Hobbes responds directly to the concern that persons never found themselves in a pre-political state of nature like the one he describes. He argues that we can imagine what life *would* be like outside of political society and free from political authority.² If the state of nature that Hobbes envisions, and upon which his account of political authority is based, is hypothetical in this way, we may infer that his social contract is hypothetical as well. This approach answers the criticism that the social contract is a fiction by arguing that persons need not *actually* be parties to a social contract to establish their political obligations and the conditions of political authority’s legitimacy so long as we can know what things *would* be like in a state of nature and what *would* motivate persons to enter political society. From these considerations we can deduce the

¹ Hume, David, *Of the Original Contract*, in Henry D. Aiken (ed.), *Hume’s Moral and Political Philosophy*, (New York, NY: Hafner Press, 1948).

² Hobbes, Thomas, *Leviathan*, J. C. A. Gaskin (ed.), (New York, NY: Oxford University Press, 1996), 13:11.

need for political authority, and the form that it ought to take, without requiring that persons suffer through the miseries of actually living in a pre-political state of nature.

Locke, in the *Second Treatise*, appears less willing to accept the initial premise of the criticism that the social contract is a fiction.³ Locke tells the story of persons moving from a familial association to a political society and reaffirms that only their own consent could legitimize their political ruler's authority and bind them to obey it.⁴ Not only does Locke claim that persons routinely express their consent to enter political society, but he argues that only a person's express consent can make her a full member of a political society.⁵ Locke explains the obligations that all persons possess to obey the law, even in case they have not expressly consented to the authority of civil government, by appealing to the notion of tacit consent. For as long as they reside within a given territory, and benefit, however little, from the existence of political society, we may suppose that they implicitly consent to obey its laws.⁶ However, to enjoy the full privileges of political society, for example voting in elections, and have the full duties of a citizen, for example to defend the territory from outside force, Locke requires express consent. This response undercuts Hume's criticisms by challenging the premise that the consent upon which social contract theories rely is fictional. However, as A. John Simmons argues, requiring

³ Locke, *Second Treatise of Government*, C. B. Macpherson (ed.), (Indianapolis, IN: Hackett Publishing Company, 1980, Chapter 8. Hereafter cited as *Second Treatise*.

⁴ Locke, *Second Treatise*, §106.

⁵ Locke, *Second Treatise*, §117-§119. Locke claims that persons typically fail to notice others' expressions of consent to enter political society as full members. Accordingly, it is unclear what act suffices to express one's consent.

⁶ Locke, *Second Treatise*, §119.

express consent leads to the conclusion that “societies that refuse to permit or fail to facilitate free choice of political allegiance are simply illegitimate, however many such societies might actually exist.”⁷

Kant, on the other hand, fully concedes that no historical social contract need exist, nor must persons actually consent to civil government’s authority to legitimize it. However, Kant maintains that the social contract plays a vital role in discussions of political legitimacy nonetheless. He refers to the “original contract” as “*an idea of reason,*” but an idea with “undoubted practical reality”.⁸ So though Kant envisions the social contract as purely notional, he takes it to impose real restrictions on the permissible actions of government. As noted in the previous chapter, the idea of the original contract limits the exercise of political authority such that its actions must be a *possible* object of all persons’ consent.⁹

3.3 – Rawls’ Classification of Social Contract Theories

John Rawls, in his *Lectures on the History of Political Philosophy*, presents a series of distinctions that help us understand and contrast the various ways social contract theorists respond to Hume’s criticism, and define the specifics of the social contract. In this section I use Rawls’ categories to run through the specifications of Hobbes’, Locke’s, and Kant’s social contracts as a prelude to defining the specifics of the social

⁷ Simmons, A. John, *On the Edge of Anarchy*, (Princeton, NJ: Princeton University Press, 1993), 79.

⁸ Kant, Immanuel, On the Common Saying: That may be correct in theory, but it is of no use in practice, in Mary J. Gregor (ed.), *Immanuel Kant: Practical Philosophy*, (New York, NY: Cambridge University Press, 1996), 8:297. Hereafter cited as *On the Common Saying*.

⁹ See 2.4, 71-73 above.

contract on which I rely to define persons' civil interests in the next section.

Exploring historical social contracts in light of Rawls' categories helps us think clearly about what the social contract is, and how it functions to generate political conclusions.

Rawls presents four sets of distinctions according to which any specification of the social contract is classifiable. First, we can understand the social contract as either actual, or non-historical. Second, the content of the social contract can be determined either by an actual expression of consent, by analysis of the situation facing the parties, or by some combination of the two. Third, of social contracts determined by analysis, that analysis can appeal either to hypothetical consent (what persons *would/would not* consent to), or possible consent (what they *could/could not* consent to). Fourth, and finally, we can understand the social contract as establishing either persons' political obligations (their duties to obey the law), or the conditions of civil government's legitimacy (the conditions of a government's rightful authority), or both.¹⁰

So, we can, for example, understand Hobbes' social contract as 1) non-historical,¹¹ 2) in which the content is determined by analysis, (informed by his understanding of persons' natural freedom and equality, the right of nature, and the miserable state of things that would follow), 3) determined specifically by what persons *would* consent to (namely, any sovereign authority that establishes peace

¹⁰ Rawls, John, *Lectures on the History of Political Philosophy*, Samuel Freeman (ed.), (Cambridge, MA: Harvard University Press, 2007), 14-15.

¹¹ Hobbes, *Leviathan*, 13:11.

and the security of persons' lives),¹² and 4) as establishing both persons' political obligations, and the sovereign's legitimacy.¹³

We can understand Locke's social contract, as envisioned in the *Second Treatise*, as 1) actual, 2) in which the content is determined largely by analysis (though, in light of the requirement of actual consent, whether express or tacit, also determined to some extent by the act of consenting). 3) To the extent that the content of the social contract is determined by analysis, Locke writes both of what persons could/could not consent to (as in the case of absolute arbitrary power),¹⁴ and what they would/would not consent to (as in the case of extemporary decrees).¹⁵ And, 4) Locke takes the social contract to establish both persons' political obligations, and civil government's legitimacy.¹⁶

Here we see a tension between actual consent and the task of determining the content of the social contract by analysis. If to establish political authority's legitimacy, or persons' political obligations, we require their express consent, then the obligations and conditions of legitimacy that flow from that consent, must be determined by the content of their actual expression of consent. However, there remains a place for determining the content of persons' consent by analysis. Actual expressions of consent are limited by the idea of possible consent. The notion of possibility that pertains to persons' consent is different than the most common notion of possibility in regular discourse. When we say that one *cannot* consent to

¹² Hobbes, *Leviathan*, 13:11, 18:13. Also, see 3.2, 81-82 above.

¹³ Hobbes, *Leviathan*, 18:3, 18:6, 18:7, 29:23.

¹⁴ Locke, *Second Treatise*, §135.

¹⁵ Locke, *Second Treatise*, §137.

¹⁶ Locke, *Second Treatise*, §119.

something, we do not mean “cannot” in the same way as when we say a human cannot fly unaided. When considering persons’ consent, we are not concerned with some physical possibility that would prevent them from uttering the words that would normally signal their consent. Rather, we are concerned with what persons *can* or *cannot* consent to in light of some abstract feature of themselves, or the object of their consent, that would limit the normative force of the words that would otherwise signal their consent. For example, in Locke’s case, persons, understood as God’s property, cannot consent to absolute and arbitrary rule over their lives because they do not possess the normative power to alienate their lives in this way.¹⁷ And for Kant, as I argue in the previous chapter, persons engaged in political cooperation to secure the conditions of their freedom cannot consent to subversions of that freedom.¹⁸ Here we see a place for analysis in determining the content of consent, even where actual consent is required. Analysis can determine the circumstances in which attempts at actual consent are defective. That is, analysis of the parties to the social contract and their circumstances can reveal instances in which actual expressions of consent fail to be the legitimizing force we normally expect.

Finally, we can understand Kant’s social contract as 1) non-historical, 2) determined entirely by analysis, 3) determined specifically by what a people *could/could not* consent to, and 4) to establish conditions of political authority’s legitimacy.¹⁹ Regarding the fourth category, it is noteworthy that Kant’s social

¹⁷ Locke, *Second Treatise*, §135. Also, see 2.2, 42 above.

¹⁸ See 2.4, 71-72 above.

¹⁹ Kant, *On the Common Saying*, 8:297.

contract has a narrower focus than Hobbes' or Locke's. Every time Kant speaks of the "original contract," he directs its implications to civil government alone. He writes that the idea of the social contract, "involves an obligation on the part of the constituting authority..."²⁰ that its purpose is to "bind every legislator..."²¹ and that it is the idea "in terms of which alone we can think of the legitimacy of a state."²²

Kant's more limited construal of the social contract follows as least partially from his specification of the social contract in the other three categories. A non-historical social contract focused on the *possibility* of persons' consent, while suitable for defining the limits of political authority's rightful exercise, seems insufficient for establishing strong obligations on the part of persons subject to political authority. That independent persons *could not* consent to something is a strong reason against imposing it on them. However, that they merely *could* consent to something provides weak support for obliging them to do it. For Kant, that all persons' could consent to some action provides a test for legitimacy by showing that it is consistent with their freedom.

Now, what of the social contract to which Locke appeals in the *Letters*? And how should we understand the *Lockean* social contract, centred on the idea of civil interests, from which I wish to draw conclusions regarding the legitimate jurisdiction of civil government in contemporary political societies?

Locke, not surprisingly, says much less about the specifics of the social

²⁰ Kant, Kant, Immanuel, *The Metaphysics of Morals*, in Mary J. Gregor (ed.), *Immanuel Kant: Practical Philosophy*, (New York, NY: Cambridge University Press, 1996), 6:340.

²¹ Kant, *On the Common Saying*, 8:297.

²² Kant, *The Metaphysics of Morals*, 6:315.

contract relied upon by his mandate argument in the *Letters* than he does of the social contract of the *Second Treatise*. However, we can infer specifics of the social contract he envisions from his various statements of the mandate argument in the *Letters*. In the first *Letter* Locke writes that the “care of souls” *cannot* be conferred on the magistrate.²³ In the second and third *Letters* Locke writes of what we “*can* in reason suppose” persons to consent to.²⁴ And, also in the third *Letter*, he writes both that punishing minority religious opinions “*could* not be intended by those who constituted or entered into the commonwealth,” and that persons moving from the state of nature to political society *would* avoid certain injuries.²⁵

Here we see that in the *Letters*, as in the *Second Treatise*, Locke variously specifies persons’ consent in terms of what they hypothetically would or would not consent to, and of what they possibly could or could not consent to. The main difference between the conception of consent argued for in the *Second Treatise*, and that inferred from Locke’s remarks in the *Letters* is that, in the *Letters*, he does not make a case for the importance of actual express consent. This allows us to understand the social contract of the *Letters* as non-historical, the content of which is determined entirely by analysis. That analysis consists of examining the relevant features of the parties to the social contract and their pre-political circumstance to

²³ Locke, John, A Letter Concerning Toleration, in David Wootton (ed.), *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 394. Hereafter cited as *Letter*.

²⁴ Locke, John, A Second Letter Concerning Toleration, in Richard Vernon (ed.), *Locke on Toleration*, (New York, NY: Cambridge University Press, 2010), 104-105. Hereafter cited as *Second Letter*. Emphasis added.

²⁵ Locke, John, A Third Letter for Toleration, in Richard Vernon (ed.), *Locke on Toleration*, (New York, NY: Cambridge University Press, 2010), 141. Hereafter cited as *Third Letter*. Emphasis added.

determine what they would, and could consent to upon entering political society and subjecting themselves to the authority of civil government.²⁶

The most salient feature of persons' pre-political circumstance, implicit in the premise of social contract theory, we may call persons' independence. By independence I mean that no person is naturally subject to the authority of another.²⁷ No authority is self-evident, and all authority requires justification. I take this to be the conceptual starting point of liberal political theory. Locke and Kant each provide a clear statement of this idea. Locke writes that persons in the state of nature are in, "a *state of perfect freedom* to order their actions... without asking leave, or depending upon the will of any other man."²⁸ Kant writes that, "*Freedom* (independence from being constrained by another's choice), insofar as it coexists with the freedom of every other in accordance with a universal law, is the only

²⁶ I specify what I take these features to be below. I employ the notions of both hypothetical, and possible consent.

²⁷ Independence can alternatively be understood as a sort of natural freedom. Specifically the freedom from any unjustified authority. As I proceed, I will employ what I take to be the less loaded term: independence. Also, the core case here is adults with full capacities. The relationship between parents, children, and the state is a complicated one that I cannot adequately deal with here. As a brief aside, I will say that I agree in large part with Locke's account of parents' responsibility for children in the *Second Treatise*, Chapter VI. Locke writes that, "*every man's children* [are] by nature as *free* as himself" (§73). Parents' de facto authority over children must be directed toward the children's safety, health, and development, and should last only until children are able to care for themselves. This authority includes responsibility for helping children develop life plans and values. I do not suppose this responsibility emanates from a right belonging to parents to pass on their values, but from nobody other than parents being better suited or positioned to aid children in this aspect of their development. Educators will also play an important role in this. So we should not understand parent's responsibility for their children as a kind of natural authority that conflicts with persons' independence. Where biological parents do not exercise their responsibility in the service of children's safety, health, and development, they ought to lose their opportunity to care for children to these ends.

²⁸ Locke, *Second Treatise*, §4.

original right belonging to every man by virtue of his humanity.”²⁹ The appeal of social contract theory is that it explains how political authority is consistent with persons’ independence. The only justifiable way for one person to become subject to the authority of another, is by her own consent. Accordingly, the only way for persons to justifiably be subject to the authority of civil government is by their own consent. In other words, persons’ consent legitimizes political authority.

Social contract theory can begin to bridge the gap between persons’ independence and legitimate political authority even in the absence of actual consent. Independently of whether persons actually consent to some existing political authority, we can ask what political authority must be like to be worthy of, or capable of receiving persons’ consent in light of their independence, and various other aspects of their pre-political circumstance. So in the absence of actual consent we can still appeal to the idea of the social contract to generate significant conclusions about the permissible extent of political authority. If, in order to be *legitimate*, political authority must conform to the conditions that emerge from analyzing the parties to the social contract and the object of their agreement, certain forms of political authority will be ruled out, and the actions of civil government will be limited in particular ways.

In specifying the details of the social contract on which I rely as I proceed, I draw on the historical social contract theories I have discussed. I draw most heavily on Locke’s social contract argument in his *Letters* in that I too employ the social contract to identify the civil interests that persons enter political society to protect

²⁹ Kant, *The Metaphysics of Morals*, 6:237.

and promote, and that therefore form the proper object of political authority's concern. I additionally draw on Kant's understanding of the social contract as an idea with practical implications on the extent of political authority's legitimate exercise. So, with this in mind, the social contract on which I rely as I proceed is on Rawls' categories, 1) non-historical, 2) determined by analysis, 3) specifically determined by what individuals *would* propose, and all persons *could* agree to, in light of their independence and pre-political circumstances, and 4) to establish some necessary conditions of political authority's legitimacy. I further explain these details and present my social contract argument for defining persons' civil interests in the following section.

3.4 – Civil Interests and the Social Contract

Taking the fourth point first, Locke's argument in the *Letters*, and my argument here, aim to show that the social contract can determine what things political authority may legitimately concern itself with, or, in other words, which of persons' interests fall within the jurisdiction of political authority. Whatever else the social contract can be used to show, I, following Locke's mandate argument in the *Letters*, invoke it to determine the legitimate objects of political action – persons' civil interests. This represents one dimension of political legitimacy. To be legitimate, I presume that civil government must additionally, say, adopt democratic institutions, and fulfil several other requirements. These considerations, however, fall outside the scope of my argument here. Therefore, conforming to the conditions identified by my

contractarian argument is necessary, though not sufficient, for establishing the legitimacy of political authority.

I envision the social contract as non-historical, the content of which can be determined by analysis. Though express historical consent may be necessary for, say, fully establishing persons' political obligations, and morally obligating persons to obey all laws emanating from a political authority, or participate in the political process, I leave aside the question of whether any historical social contract sufficient for this purpose actually exists. However, by analyzing various aspects of the social contract and the parties, we can determine some limits on the legitimate exercise of political authority that would make it worthy of persons' consent, or capable of being the object of persons' agreement.

I propose to understand persons' pre-political circumstances as a variation of the "circumstances of politics" as described by Jeremy Waldron in *Law and Disagreement*. Waldron, drawing on Rawls who draws on Hume, explains the circumstances of politics as the circumstances that render political action both necessary and possible.³⁰ Broadening the notion to consider, not some particular political act, but, rather, political action in general, we can understand the circumstances of politics as a non-historical, pre-political situation in response to

³⁰ Waldron's discussion focuses specifically on the political act of protecting individual and minority rights. He enumerates the circumstances of politics as "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be..." Waldron, Jeremy, *Law and Disagreement*, (New York, NY: Oxford University Press, 1999), 102 (Rawls, John, *A Theory of Justice: revised edition*, (Cambridge, MA: Harvard University Press, 2003), 109-112, draws on Hume, David, *A Treatise of Human Nature*, in Henry D. Aiken (ed.), *Hume's Moral and Political Philosophy*, (New York, NY: Hafner Press, 1948), bk. III, pt. II, sec. ii, to identify the "circumstances of justice").

which parties to the social contract establish the conditions of political society and political authority. Political action, and subsequently political society and authority, is *necessary* where persons face problems that they cannot remedy outside of political society. And political action is *possible* when it respects the independence of the persons subject to it by being a possible object of agreement among them. That is, political society and political authority would not be necessary if persons would not face problems outside of political society, or would be able to remedy the problems they faced without the help of political authority. And political society would not be possible, in light of persons' independence, if persons could not all agree on a common framework to remedy those problems. By regarding an exposition of persons' civil interests as a response to the circumstances of politics, we get an account of civil government's jurisdiction that arises as a response to the unique problems that political society and political authority aim to remedy.

In response to the circumstances of politics, we can determine persons' civil interests through a two-stage process. The first stage responds to the *necessity* of political cooperation in light of the problems persons would face outside of political society. The second stage accounts for the *possibility* of political cooperation in light of persons' independence. In the first stage, we identify the interests that persons in a pre-political circumstance *would propose* to include in political authority's jurisdiction. In the second stage we identify, of the interests that persons would propose to include, the interests that all persons *could agree* to include in political authority's jurisdiction. So (in the second stage), the possibility of all persons'

agreement functions to narrow down the array of interests that persons (in the first stage) would have reason to seek to advance through political cooperation.

In the remainder of this section I run through the two-stage process to identify persons' civil interests. I argue that persons *would propose* to include in political authority's jurisdiction the interests that are insecure outside of political society, and that they could not secure without the coercive force of political authority. The first stage reveals that persons would propose to include in political authority's jurisdiction responsibility for their lives, liberty, and, potentially, substantive aspects of their life plans and values. And, of those, all persons *could agree* upon including anything that does not obligate some persons to subordinate their aims and interests to those of others as a condition of political cooperation. The second stage identifies persons' lives and liberty as their civil interests.

First Stage: To arrive at a set of interests that persons *would propose* to include in civil government's jurisdiction, we must consider the nature of the parties to the social contract and their pre-political circumstances. I conceive of the parties to the social contract 1) as independent, and 2) as possessing a desired life plan, or set of life values according to which they wish to live. First, persons' independence consists in the absence of any natural authority over them. Persons have no obligations to live according to the dictates of another prior to agreeing to, say, by entering political society and subjecting themselves to political authority. Second, I suppose that persons have a life plan or set of values according to which they desire to live. Persons may formulate their life plan and values from religious or moral teachings, from a comprehensive conception of the good, from examples they

observe, or from anywhere else. I do not suppose persons' life plans and values to necessarily be comprehensive, or fully developed or realizable outside of society, or in isolation. I merely suppose parties to the social contract to have some desired life plan, or, at least, anticipate that persons in political society will desire to live a life of their choosing.

I contend that parties to the social contract would propose to include in civil government's jurisdiction interests that 1) require security, but 2) would be insecure outside of political society, and 3) which the coercive force of political authority can best or most effectively secure.³¹ This characterization of the parties' motivations rests on the assumption that persons would only abridge their independence from authority to better their circumstances, and, accordingly, that they would not subject themselves to political authority, and open themselves to its coercive power, for the purpose of remedying any problem that could be remedied without making them vulnerable in this, or some similar way.

On this analysis, persons would propose including their lives and liberty, among their civil interests. Additionally, some persons would be motivated to include the substance of a life plan or life values. I explain the inclusion of each of these things in turn.

³¹ One could make the anarchic argument that persons would not face significant threats to their vital interests outside of political society, or at least not threats that they could not remedy without the help of political authority. My argument does not aim to pre-empt such an argument, or, accordingly, to legitimize any extant political authorities, or political authority in general. Rather, as I note above, I aim to articulate necessary conditions of political authority's legitimate exercise such that *if* we are to regard it as legitimate, we must understand it as the best response to particular problems that persons would face in its absence.

Persons' lives, and their continued interest in staying alive, are supremely important to them, and require protection. And, as Hobbes and Locke explain, persons' lives would be insecure outside of political society.³² By insecure, neither Hobbes nor Locke necessarily means that persons would constantly face imminent, life threatening dangers outside of political society. Rather, persons' lives would be insecure in that they would lack assurance that others would not take their life if others thought it necessary or advantageous in the pursuit of their ends. Further, the coercive power of civil government can secure persons' lives from the vulnerability they would face outside of political society. It does this by providing a sufficient disincentive to taking others' lives, through law enforcement and punishment, to provide persons with reasonable assurance that others will not try to kill them. Finally, outside of political society, persons lack the means to secure their lives. Short of establishing political society, persons would not be able to establish a broad plan for security, nor would they possess the force necessary to secure their lives.

The same is true of persons' liberty. By liberty I mean persons' freedom to live according to their desired life plans, and free from unjustified interference by others. I suppose that all persons' have a strong interest in freely pursuing a life plan of their choosing, and not living according to a life plan imposed on them by others.³³ Further, this interest would be insecure outside of political society. As with their lives, persons would have no assurance that others would refrain from

³² Hobbes, *Leviathan*, 13:8. Locke, *Second Treatise*, §123.

³³ Of course, "pursuing a life plan of one's choosing" does not require that persons pursue their life plans in isolation. Rather, the liberty to live as one wills creates the space to cooperate with others freely.

interfering with their liberty whenever it proved advantageous. Persons' concern for the persistent vulnerability of their lives and liberty would further subvert their liberty as they would be forced to devote an inordinate amount of their time and resources to attempting to secure these vital interests. Finally, the coercive force of civil government can secure persons' liberty. By establishing and enforcing acceptable standards of conduct, civil government can secure persons' liberty to live as they choose to the greatest extent possible.

We can consider the claim that persons would propose to include their lives and liberty as civil interests in civil government's jurisdiction in the language of Locke's *Second Treatise*. In the previous chapter I suggested that we can understand the insecurity of certain of persons' interests, and civil government's capacity to secure them, in terms of what Locke calls the "inconveniences" of the state of nature.³⁴ Again, Locke argues that the shortcomings of the state of nature, that motivate persons to enter political society, consist in the lack of a settled, known law, an impartial judge to settle disputes under the law, and the power to execute the law. I suggested that we can understand the classification of certain interests as civil interests by considering which interests would suffer because of these shortcomings, and could subsequently be secured by civil government by remedying the shortcomings.³⁵ Persons' lives and liberty are two such interests. They suffer from the lack a settled law by which they can be secured. Even if persons in a state

³⁴ Locke, *Second Treatise*, §127. Also, see 2.2, 50 above. Locke also refers to these "inconveniences" as "things wanting" (§124) in the state of nature. He writes that, though persons have rights in the state of nature, the enjoyment of those rights is "very unsafe, very unsecure" (§123).

³⁵ See 2.2, 50 above.

of nature take themselves to possess obligations to refrain from interfering with others' lives and liberty, as Locke supposes they do in the *Second Treatise*, and execute their life plans in good faith, without clearly articulated standards of conduct, they should expect their actions to negatively affect each other, and leave their lives and liberty vulnerable. It seems inevitable that persons would make conflicting claims on common space, on common things, and on each other. Additionally, persons' lives and liberty would suffer from the insecurity of not having a method by which to settle disputes with respect to laws governing acceptable conduct. And, finally, persons' lives and liberty would be insecure without an executive power to enforce the law. The power to enforce the laws provides a disincentive for breaking the law, and, accordingly, provides the requisite assurance that others will abide by the law. By recognizing these shortcomings, and the potential for political cooperation and civil government to remedy them, persons would be motivated to propose their lives and liberty for inclusion among their civil interests.

In addition to lives and liberty, some persons may propose to include substantive aspects of their life plans or values in civil government's jurisdiction. By this I mean that some persons would be motivated to include their interest in living a particular way in civil government's jurisdiction in the hopes of sanctioning civil government to coerce persons to live in that way. They would be motivated to do so in two possible circumstances. First, persons may propose to include substantive aspects of their life plans if they were convinced of its truth or value, and either it required the cooperation of others who would not otherwise willingly cooperate, or

they desired others' conformity for paternalistic reasons. Perhaps my conception of moral or religious enlightenment is best achieved acting in concert with my entire community though others in my community disagree. Or, perhaps I genuinely believe that others' lives would be better if they conformed to my set of life values. Second, persons may propose to include substantive aspects of some unknown life plan or values if they were convinced that a true or valuable set of life values exists, but were either ignorant of them, or unmotivated to adhere to them left to their own devices, and that civil government would have privileged access to them.³⁶ In both of these circumstances persons would have a strong interest in establishing and/or pursuing particular life plans in that they take it to be true or valuable. Further, that interest would be insecure, or at least unfulfilled, outside of political society. Persons in the first case would lack the authority, and likely the force, to compel others to conform, and persons in the second case would lack the knowledge or motivation necessary to conform themselves. Finally, civil government could secure this interest by compelling all persons to conform to the life plan that is perceived as true or valuable. This could involve coercing behaviour, and, as Proast and Waldron point out, promoting the preferred ideas and values, and suppressing others.³⁷

³⁶ A third possibility exists, that persons would propose to include substantive aspects of a life plan or life values in civil government's jurisdiction if they believe it necessary for the mere existence of society that persons share parts of a life plan or life values. I consider this possibility in the following chapter when I argue against the political legitimacy of legal moralism.

³⁷ Proast, Jonas, *The Argument of the Letter Concerning Toleration*, Briefly Considered and Answered, in Richard Vernon (ed.), *Locke on Toleration*, (New York: Cambridge University Press, 2010), 56. Waldron, Jeremy, "Locke: Toleration and the Rationality of Persecution," Susan Mendus (ed.), *Justifying Toleration*, (Cambridge: Cambridge University Press, 1988), 81.

What is ruled out for inclusion among persons' civil interest by this first stage of analysis? Persons would not propose to include interests that are secure even outside of political society, or interests that, though they may be insecure, the coercive force of civil government could not secure for them. Locke rules out persons' salvation for reasons included in this stage of the analysis. In the third *Letter*, Locke argues that persons do not injure each other by professing opposing religious beliefs or undertaking different religious practices. At the very least, persons can easily remedy any perceived injury from others' beliefs by simply ignoring them or reaffirming their own.³⁸ While we may rule out persons' salvation and their private religious belief at this stage as Locke does,³⁹ we cannot rule out including substantive aspects of religion in civil government's jurisdiction, thereby sanctioning the enforcement of religious conformity, altogether. Understanding religion as a component of persons' life plans and values, there are circumstances in which persons could have a strong interest in uniformity that cannot be remedied outside of political society. As I note above, persons may require uncooperative others to play a part in their life plans, or perhaps may wish to have a life plan imposed on them from without.

³⁸ Locke's argument here relies on the assumptions that salvation requires only holding the correct beliefs, and that one cannot alter others' inward beliefs by force alone. Further, this argument relies on the assumption that the motivation for including religious interests in civil government's jurisdiction is to promote religious truth and persons' salvation. If the motivation is other than a genuine concern for persons' salvation, then religious interests will not be ruled out at this stage of the analysis. Rather, they ought to be regarded on par with how I envision life plans and values. I rule out their inclusion among persons' civil interests in the next stage of the analysis.

³⁹ In the previous chapter I argue that Hobbes does this too. See 2.3, 65 above.

So, relating back to the circumstances of politics, at this first stage of analysis we can conclude that persons' civil interests will not include any interests for which political society and authority are not necessary to protect or promote. Given the assumption that persons would only circumscribe their independence to realize a benefit, it is unreasonable to suppose that persons would open themselves to coercion and punishment if it was not necessary for their purposes, or if it would be ineffective in achieving their ends.

Second Stage: The second stage of determining persons' civil interests requires that we determine which, of the interests that persons would propose to include in civil government's jurisdiction, all persons *could agree* upon including. This stage of the analysis bridges the gap between persons' independence and legitimate political authority. Insofar as all persons can agree or consent to some aspect of political authority, in this case the interests that fall within its jurisdiction, we can understand that authority as consistent with persons' independence, and therefore legitimate. I contend that, of the interests that persons would propose to include in civil government's jurisdiction, all persons could agree to include only their lives and liberty. These are the only interests that all persons share, and that all persons could agree to include in civil government's jurisdiction such that no persons would be obligated to subordinate her interests and ends to those of others as a condition of political participation. All persons have an interest in living, and living in a manner of their choosing. And, including life and liberty in civil government's jurisdiction can secure these interests in a way that does not make

subordinating anyone's interests to others a condition of political participation by establishing a system of equal protection.

What is ruled out by the requirement that all persons agree upon the interests that they will include in civil government's jurisdiction? Persons could not agree to include interests in civil government's jurisdiction where such agreement would either be oppressive, in that it would subvert some persons' independence by making it a condition of their participation in political society that they subordinate their aims and interests to those of others, or superfluous, in that the unanimity required to render its inclusion legitimate, would undermine the reason for proposing to include it in the first place.⁴⁰

Therefore, we can rule out the inclusion of substantive life plans and values among persons' civil interests. If those proposing to include substantive aspects of life plans or values in civil government's jurisdiction do so for the sake of coercing acquiescence in unwilling persons, agreement would require subordinating the ends of those unwilling participants to others, and is therefore ruled out. Any political action that supposes agreement to include the substance of life plans or values on these grounds would be oppressive in that it undermines some persons' independence. Alternatively, if everyone agrees to include the substance of a life plan in civil government's jurisdiction, the perceived necessity of including it in the first place is eliminated. The unanimity that would be required to make the inclusion of a life plan among persons' civil interests legitimate would render the

⁴⁰ The language of "oppressive" and "superfluous" comes from Wootton's interpretation of Locke's mandate argument in Wootton, David, Introduction to *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 100.

agreement superfluous. If everyone agreed on the particulars of a life plan, nobody would propose to commission civil government to enforce uniformity of their life plan on others who would not willingly conform. A lack of conformity would not be a shortcoming of persons' pre-political circumstances.

One might respond by arguing that it is still possible for parties to the social contract to agree to include substantive life values that they are ignorant of, or unmotivated by, and have reason to believe civil government has superior knowledge of. While it is certainly possible to imagine such a scenario, relying on it to justify the legitimacy of political action aimed at promoting substantive life values requires adopting multiple unacceptable assumptions. First it supposes that we can identify a feature of political authority that makes it better suited to identify good life plans for persons than persons themselves. I am not sure what feature this could be, and, accordingly, it seems unreasonable to suppose that parties to the social contract generally recognize one. Second, this sketch of persons' motivations in participating in political society ignores the fact of diversity of persons' life plans and values that we commonly observe in pluralistic societies. If we can observe a diversity of life plans and values, it would be unreasonable to suppose uniformity among parties to the social contract, and an agreement to coercively enforce its substance. I take these assumptions to fall into Locke's category of things that "nobody can in reason suppose" of the parties to the social contract.⁴¹

Further, supposing unanimity in persons agreeing to precommit themselves to adhere to life plans and values that, left alone, they would be unmotivated to

⁴¹ Locke, *Second Letter*, 105

adhere to, rests on a problematic understanding of the social contract. It supposes that the social contract is a temporal event at which persons can commit themselves to something, and then step back and have it enforced. Instead, insofar as we are interested in identifying necessary conditions of political legitimacy, we ought to understand the social contract as reason-revealing⁴² for us, theorizing about the limits of political authority, right now and always. The social contract, therefore, cannot be regarded as a *precommitment* of any kind. Agreement on the ends of political cooperation cannot be supposed at some prior time. They must be the possible objects of persons' agreement always. Here the superfluity of an agreement to enforce a life plan or life values becomes apparent. The unanimity necessary to enforce substantive life plans and values in a non-oppressive way cannot always be supposed to have happened at an earlier time. There was no earlier time, and there was no actual social contract. We must be able to affirm the reasons revealed to us by the social contract at all times.

So, civil interests are the things that fall within civil government's jurisdiction and, therefore, are the legitimate objects of political action. Persons' civil interests consist of only the interests that parties to a social contract would propose, and that they could all agree to include given the circumstances of politics. This means that only certain justifications of law or other political action are legitimate, namely, those that protect and promote persons' civil interests – their lives and liberty.

⁴² "reason-revealing" language comes from, Lessnoff, Michael, *Social Contract*, (London: Macmillan, 1986), cited in D'Agostino, Fred, Gaus, Gerald and Thrasher, John, "Contemporary Approaches to the Social Contract," Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, (Spring 2014 Edition), accessed at plato.stanford.edu

One may object that this analysis of civil interests, and, subsequently, of legitimate political action, gives rise to a minimal, austere conception of political society. If this is the only acceptable justification for political action, it might seem as though a lot, too much, will be ruled out. After all, Locke additionally included persons' health, physical integrity, and outward possessions among their civil interests. The *prima facie* austerity of my analysis is mitigated when we recognize that to argue that political authority may only legitimately act to protect and promote persons' civil interests, is just to say that, to be legitimate, political action must be deployed in the service of these interests, even if indirectly. To effectively secure persons' lives and liberty, civil government is additionally justified in acting to establish and maintain the means for protecting and promoting persons' civil interests.

The means for protecting and promoting persons' civil interests fall into two categories.⁴³ First, we can identify the means *necessary* for protecting persons' civil interests.⁴⁴ Second, we can identify means that, though not necessary, can reasonably be justified in promoting persons' civil interests. In the first category we can include public institutions without which we cannot conceive of a political

⁴³ The boundaries of these categories will be imprecise, and we should expect them to be the source of genuine political disagreement.

⁴⁴ Kant acknowledges this category in *On The Common Saying*, 8:298. He argues that achieving a certain level of material prosperity is a "means for *securing a rightful condition*," and is required "to make it exist as a commonwealth." Additionally, Hobbes argues in chapter 18 of *Leviathan* that the rights he enumerates make up "the essence of sovereignty," without which we cannot conceptualize a political society constituted for the sake of securing persons' lives. Without, for example, a well maintained militia to enforce the sovereign's commands, there cannot exist a sovereign qua maintainer of "peace and justice, the end for which all commonwealths are instituted." *Leviathan*, 18:16, 14:21.

society aimed at protecting and promoting persons' lives and liberty. Here, for example, we can include a legislative body, and a system of law enforcement. Without a legislative body making laws aimed at protecting persons' lives and liberty, and a system for enforcing those laws, a political society aimed at protecting and promoting persons' lives and liberty cannot exist. Therefore, we ought to regard political action aimed at maintaining these institutions as legitimate. Though not directly aimed at protecting and promoting persons' civil interests, such political action indirectly serves the protection and promotion of persons' civil interests by maintaining the institutions necessary for that end.⁴⁵

In the second category we can include things that, though not necessary for securing persons civil interests, we can reasonably justify as means for promoting persons' civil interests. For example, political action may legitimately support the arts, sports and recreation, or cultural and religious events if the purpose of that support is to enhance persons' liberty to live lives of their choosing by partaking in these endeavours. However, political action supporting these things is not legitimate if they are envisioned as necessary parts of valuable life plans. To ensure that political action supporting any of these things is undertaken in the service of persons' civil interests, it should not favour any particular life plan over others, but, rather, support them equally, or at least offer fair access for support to all persons' endeavours. If, for example, public funds are used to build community sports

⁴⁵ Several additional institutions fall into this category, for example, a defence force, a property regime, and, perhaps, a health care system. Enumerating the means of protecting and promoting persons' civil interests is a substantial task on its own, and a worthy topic for future study. Here I offer these examples by way of explaining the category.

facilities, comparable funds should be available for community arts projects, and other endeavours that similarly aim to foster persons' liberty to live as they desire.

3.5 – Conclusion

My positive argument in this chapter consists of two claims. First, I have argued that persons' civil interests consist of their lives and liberty. These are the vital interests that, in light of the circumstances of politics, persons would propose to include, and could all agree to include in civil government's jurisdiction. Legitimate political action may be justified only in the service of these ends.

The second claim is broader and concerns the approach of this entire work. I contend that political authority may only justify its actions by appealing to the ends that arise out of the particular kind of enterprise that political cooperation is. In other words, the idea of civil interests, as the interests that persons enter political society and submit to the authority of civil government to protect and promote, constrains the legitimacy of political action, however one specifies persons' civil interests. Whatever one takes to be the salient features of persons and their pre-political circumstances, and, subsequently, however one specifies the civil interests that result, political authority may only legitimately appeal to values that arise from the idea of political cooperation among independent persons, and the particular problems, whatever one takes them to be, that political cooperation aims to remedy.

4 – Against Legal Moralism

4.1 – Introduction

In this chapter I argue against the criminal law theory known as legal moralism. Legal moralism holds that the immorality of some conduct is a salient, often sufficient, reason for criminalizing it. H.L.A. Hart famously identified two versions of legal moralism, what I call instrumental legal moralism and non-instrumental legal moralism,¹ and argued against both. I adopt Hart's classification but argue against each along a different dimension. In the first half of the chapter (4.3), I argue that instrumental legal moralism is conceptually untenable. That is, there is no space for a coherent account of instrumental legal moralism between a liberal political account of political action, and the non-instrumental legal moralist account of criminalization. In the second half of the chapter (4.4), I draw on the contractarian argument of the previous chapter to argue that non-instrumental legal moralism provides a politically illegitimate justification for criminalization and criminal law in general.

4.2 – Instrumental and Non-Instrumental Legal Moralism

In its most basic and weakest form, legal moralism is the thesis that the immorality of some conduct is a salient reason for criminalizing it. Legal moralists may disagree about what immorality consists in, how strong a reason in favour of criminalization

¹ Hart terms the two versions of legal moralism: moderate and extreme legal moralism in Hart, H.L.A. *Law, Liberty, and Morality*, (Stanford, CA: Stanford University Press, 1963), 48. I use the terms instrumental and non-instrumental legal moralism respectively to reflect the fact that the versions of non-instrumental legal moralism that I consider are not extreme. Rather, they are plausible and widely embraced by criminal law theorists.

immorality counts for, and whether there are countervailing reasons that ought to constrain the legal enforcement of morality, but all agree that immorality provides a good, often sufficient, reason in favour of criminalization.

In *Law, Liberty, and Morality*, Hart identifies what I call an instrumental and a non-instrumental version of legal moralism.² The instrumental thesis casts a shared morality as the cement that holds society together.³ Without a shared morality, society would disintegrate, and, therefore, societies are justified in legally enforcing their morals for the purpose of preserving their integrity and their continued existence. Just as governments may legitimately protect their societies from internal and external enemies that seek to destroy them through violence, so may they protect their societies from the acts that subvert and erode the shared morality that is necessary for the continued existence of their societies.

In arguing against instrumental legal moralism, my primary target is Lord Patrick Devlin.⁴ Devlin developed the instrumental thesis in response to the 1957 publication of the Wolfenden Report on the legal status of prostitution and homosexuality in England.⁵ The Report recommended that homosexuality be legalized, and that, while the public nuisance that prostitution occasions ought to be suppressed, the practice itself should be legalized as well. The guiding principle of the report, at which Devlin took direct aim in developing his instrumental legal

² Hart, *Law, Liberty, and Morality*, 48.

³ Hart, *Law, Liberty, and Morality*, 48.

⁴ Though, as I consider in the following section, Devlin's legal moralism is ambiguous between the two variations.

⁵ Report of the Committee on Homosexual Offences and Prostitution (Cmnd247), 1957, paragraph 61. Hereafter cited as Wolfenden Report. Devlin, Patrick, *The Enforcement of Morals*, (New York, NY: Oxford University Press, 1975), 3.

moralism, states that, "... there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."⁶ The Report takes the function of the criminal law to consist in the preservation of public order and decency, and to protect citizens from injury and offence.⁷ It argues that the law should not interfere with persons' private lives any further than is necessary to fulfil its purpose.⁸

It should be noted that the morality that instrumental legal moralists seek to enforce is the morality of the community, or, perhaps, what is more appropriately called the community's morals.⁹ Presumably, for morality to play a vital role in maintaining the integrity of a society, it must be the actual morals of the society that do the work of keeping society intact. The instrumental thesis would seem mysterious and entirely implausible if the morals to be enforced were some metaphysically true standards of morality that the members of the society did not actually believe to be true.

The non-instrumental thesis contends that the enforcement of morality is justified on grounds other than that it preserves the shared moral code that preserves society. Non-instrumental legal moralists often contend that the enforcement of morality is intrinsically valuable, or that it plays an essential role in the administration of criminal justice. As we will see, all non-instrumental legal moralists take moral wrongdoing to be the proper object of criminal sanctions

⁶ Devlin, Patrick, *The Enforcement of Morals*, 3.

⁷ Wolfenden Report, paragraph 13.

⁸ Wolfenden Report, paragraph 14.

⁹ Nathan Brett pointed this out in a commentary of a paper that informs this chapter at the annual meeting of the Canadian Philosophical Association at the University of New Brunswick, Fredericton, May 2011. Hart and Devlin use both terms.

owing to some feature of the criminal justice system, though they disagree about what feature that is.

Hart traces non-instrumental legal moralism as far back as Plato's and Aristotle's respective arguments for including the promotion of moral virtue in the role of the state.¹⁰ Additionally, he argues against James Fitzjames Stephen's non-instrumental legal moralism at various points throughout *Law, Liberty, and Morality*.¹¹ After falling out of favour for several years, owing in large part to Hart's forceful criticisms, a new school of legal moralism has emerged. Michael Moore and Antony Duff place moral wrongdoing at the centre of their conceptions of the criminal law. Further, both take moral wrongdoing to be the proper object of criminal sanctions without any appeal to the role morality plays in preserving the integrity of society. Because of their prominence in contemporary criminal law theory, Moore and Duff's new legal moralism will serve as my exemplars of the non-instrumental thesis.¹²

Proponents of the non-instrumental thesis are less committed to a particular understanding of morality than instrumental legal moralists. Particular non-instrumental legal moralists may, like their instrumental counterparts, hold that the relevant sense of morality for their theory consists in the community's morals, whatever they happen to be. A commitment to enforcing community morals as

¹⁰ Hart, H.L.A. "Social Solidarity and the Enforcement of Morality" *The University of Chicago Law Review*. Vol. 35, No. 1 (Autumn 1967), 1-13.

¹¹ Hart, *Law, Liberty, and Morality*.

¹² Malcolm Thorburn calls Moore and Duff's legal moralism "the new orthodoxy in English-language criminal law theory." Thorburn, Malcolm, "Constitutionalism and the Limits of the Criminal Law," R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, and Victor Tadros (eds.), *The Structures of Criminal Law*, (New York, NY: Oxford University Press, 2011), 86.

such¹³ would turn non-instrumental legal moralism into a stringent moral conservatism that takes the preservation of the particular character of a society to be intrinsically good.¹⁴ Neither Moore nor Duff fall into this camp. Rather, non-instrumental legal moralists generally argue for legally enforcing what we may call ‘true morality’. In other words, legal moralists like Moore and Duff count the immorality of conduct as a strong reason in favour of criminalizing it only if it is actually immoral, independent of whether the community, or anyone, recognizes it as such. Plausible versions of the non-instrumental thesis acknowledge the difficulty in discerning what true morality consists in and, accordingly, proceed with epistemic humility and the caution that entails.¹⁵

4.3 – Instrumental Legal Moralism is Untenable

4.3.1 – Devlin’s Ambiguous Legal Moralism

Devlin appears to advance the quintessential account of instrumental legal moralism. However, as Hart argues, Devlin makes several vague and unsubstantiated claims about the relationship between community morals and the integrity of society that render his position ambiguous between instrumental and

¹³ The Wolfenden Report introduces the language of enforcing morality *as such* in paragraph 257. Devlin acknowledges this language, *The Enforcement of Morals*, 3, and Hart uses it throughout *Law, Liberty, and Morality*. I understand enforcing morality *as such* to mean enforcing morals *as* morals, and enforcing morality *for the sake of* enforcing morality, as opposed to enforcing morality incidentally in the course of doing something else, say, establishing public safety. So we do not enforce morality *as such* when the morality/immorality of the conduct plays no role in justifying its enforcement.

¹⁴ I return to this version of the non-instrumental thesis when I consider how Devlin’s supposed instrumental legal moralism may collapse into a version of the non-instrumental thesis.

¹⁵ Moore, Michael S. “A Tale of Two Theories,” *Criminal Justice Ethics*, 28:1, 32.

non-instrumental versions of legal moralism. Ultimately I argue that however we understand Devlin's legal moralism, it is fatally flawed. In this section, I explore a portion of the Hart-Devlin debate to identify the two possible interpretations of Devlin's ambiguous legal moralism.

First, Devlin is widely recognized as the primary proponent of instrumental legal moralism. He maintains that a society may enforce its morals through the criminal law because the preservation of society's shared morals is essential for society's continued existence. Devlin bluntly states that, "Society cannot live without morals."¹⁶ He asserts that the bonds of common moral thought hold societies together, and that without those bonds, societies would disintegrate. If societies are entitled to act to preserve themselves from disintegration, they may act to preserve the morals that are necessary for that purpose.

Devlin draws an analogy between immoral action and treason. He suggests that a shared moral code is as necessary to the integrity of society as an established government. If societies are justified in prohibiting treason and other politically subversive activities that seek to destroy the system of government that is essential for society's existence, so may they prohibit action that deteriorates the shared morals that are equally necessary for preserving society.¹⁷

In his most decisively instrumental moment Devlin asserts that, "... before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society."¹⁸ This amounts to the claim that

¹⁶ Devlin, *The Enforcement of Morals*, 24.

¹⁷ Devlin, *The Enforcement of Morals*, 13.

¹⁸ Devlin, *The Enforcement of Morals*, 17.

each criminal prohibition of supposedly immoral conduct requires justification that points to some detriment to society that it endeavours to avoid. The instrumentality of the enforcement of morals for the preservation of society must be apparent in every instance. More generally, Devlin claims that, “There must be toleration of the maximum individual freedom that is consistent with the integrity of society.”¹⁹ That is, governments should only ever consider enforcing morals with criminal sanctions, in effect limiting individuals’ liberty, where the integrity of society is evidently at stake.

These claims constitute a legal moralism that is definitively instrumental. The legal enforcement of morals is justified exclusively for the purpose of preserving society. Each instance of legally enforced morals must have in view identifiable damage to society.

In other moments, however, Devlin’s remarks colour his legal moralism as a version of the non-instrumental thesis. As Hart observes, “... it is not at all clear that for [Devlin] the statement that immorality jeopardizes or weakens society is a statement of empirical fact.”²⁰ Rather, at times, Devlin advances the claim that a shared morality is essential for the preservation of society as an a priori assumption, or a necessary truth.²¹ He writes, “What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals.”²² Devlin explicitly presents this as an a priori claim. Instead of offering empirical support, he suggests

¹⁹ Devlin, *The Enforcement of Morals*, 16.

²⁰ Hart, *Law, Liberty, and Morality*, 50.

²¹ Hart, *Law, Liberty, and Morality*, 50.

²² Devlin, *The Enforcement of Morals*, 9.

that shared morals are constitutive of society. If the moral ideas wither, regardless of whether any specific damage to society can be observed, he supposes society to be at risk of disintegration.²³

Here, Devlin's conception of the relationship between community morals and society makes it immune from empirical falsification. Though he vaguely alludes to historical examples of "the loosening of moral bonds" leading to the disintegration of society,²⁴ his understanding of community morals as constitutive of society renders empirical evidence of the link between morals and the preservation of society redundant. Having stipulated that the preservation of a shared morality is necessary for a society's continued existence, Devlin is able to leave considerations of specific societal harms aside and focus solely on the enforcement of morality. Insofar as Devlin's position is unresponsive to empirical evidence showing a connection between conduct that contravenes community moral standards and harm to society, it begins resembling a non-instrumental version of legal moralism in that it aims to uphold morals for their own sake.

Hart goes so far as to accuse Devlin of mistakenly identifying society with its morals at each moment in its history. Hart argues that such a notion of society is absurd because it entails that a community's morals cannot evolve or change

²³ I further explore Devlin's conception of society, see 4.3.1, 116. Insofar as we regard society as political society aimed at protecting and promoting persons' civil interests, damage to society consists in anything that hinders society's ability to function to that end. The point here is that, on Devlin's view of the relationship between society and its morals, damage to society's morals, and damage to society itself are indistinguishable.

²⁴ Devlin, *The Enforcement of Morals*, 13. Hart, *Law, Liberty, and Morality*, 50.

without one society disintegrating and another taking its place.²⁵ In light of Devlin's assertions that "What *makes* a society of any sort is community of ideas..."²⁶ and that "...society *means* a community of ideas..."²⁷ Hart's suspicion is justified. Devlin however denies that he is guilty of this mistake. He argues that while not every deviation from community morals will damage society, any deviation from community morals *may*. While society is not identical to its morals, he again stresses that they are essential to its existence.²⁸

In light of Devlin's remarks, it is not entirely clear how we should understand his conception of society. Perhaps we can understand society in Devlin's scheme as a political society of the kind I argue for in the previous chapter. There I argue for a Lockean conception of society as a system of political cooperation among independent persons for the purpose of protecting and promoting their civil interests.²⁹ On this conception, society is not merely shared ideas, but, rather, shared ends and the institutions necessary for realizing those ends. A strong case can be made that some moral ideas must *in fact* be shared among a sufficiently large number of members of a political society to ensure its stability. The Wolfenden Report states, "We clearly recognize that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced."³⁰ And Hart writes, "It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and

²⁵ Hart, *Law, Liberty, and Morality*, 51-52.

²⁶ Devlin, *The Enforcement of Morals*, 9. Emphasis added.

²⁷ Devlin, *The Enforcement of Morals*, 10. Emphasis added.

²⁸ Devlin, *The Enforcement of Morals*, 13-14, note: 1.

²⁹ See 3.4 above.

³⁰ Wolfenden Report, paragraph 12.

supplemented the law's proscriptions of conduct injurious to others."³¹ That is to say, a society's political institutions would be unstable, continuously susceptible to collapse, if the members of that society did not in fact believe that they were the appropriate institutions; however, this does not make it the case that society's laws *should* reflect the community's morals, whatever they happen to be. This is merely the descriptive claim that if members of a society do not support their political institutions, those institutions likely will not last.

Further, this conception of society is consonant with the conception of society sketched by the Wolfenden Report, which defines the function of the criminal law exclusively as, "the preservation of order and decency and the protection of the lives and property of citizens."³² Devlin rejects this limited account of the function of the law, and additionally rejects the Report's specific recommendations on decriminalizing homosexuality and prostitution. In arguing that private acts that transgress community moral standards threaten the integrity of society, and concluding that, "...there can be no theoretical limits to legislation against immorality,"³³ Devlin appears to reject the conception of society as a system of political cooperation.

As a result, there seems to be very little space between the conception of society as a community of ideas identical to its morals and of society as political cooperation for the purpose of protecting and promoting persons' civil interests. In any case, my purpose in this section is to identify the character, or, rather, the

³¹ Hart, *Law, Liberty, and Morality*, 51.

³² Devlin, *The Enforcement of Morals*, 2.

³³ Devlin, *The Enforcement of Morals*, 14.

characters of Devlin's ambiguous legal moralism. If we can understand Devlin's society as something akin to political society, supported by persons' moral ideas wherever society proves viable, then we ought to understand his legal moralism as a version of the instrumental thesis. Conversely, if, as Hart supposes, Devlin's society is identical to its morals, or if Devlin advances the claim that shared morals are necessary for the preservation of society as an a priori assumption or necessary truth, then we ought to understand Devlin's legal moralism as a version of the non-instrumental thesis.

In the two sections that follow, I argue that on either interpretation of Devlin's legal moralism, it is fatally flawed. His instrumental thesis is untenable as a version of legal moralism because, if we take seriously its commitment to preserving society, it loses its claim to the enforcement of morals as such; and, his non-instrumental thesis presents a politically illegitimate justification for political action.

4.3.2 – Devlin's Instrumental Legal Moralism

To resist the pull of the non-instrumental thesis, Devlin's instrumental legal moralism must maintain that the end of the legal enforcement of morals is the preservation of society or some other pressing societal objective that is essential in maintaining society's integrity. Again, Devlin writes, "... before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society."³⁴ If, as the instrumental thesis holds, political authority is justified in legally enforcing community morals *for the purpose of*

³⁴ Devlin, *The Enforcement of Morals*, 17.

protecting society from disintegration, before actually making putatively immoral conduct illegal, we must have evidence to suggest that it really is detrimental to society. But where the preservation of society is the ultimate goal, we can ask what role the enforcement of morals as such really plays in justifying criminal prohibitions. In the previous chapter I argued that protecting and promoting the means of securing persons' civil interests falls within civil government's jurisdiction and is a legitimate object of political action. Therefore, protecting society and its institutions, the very thing that enables any cooperative action for protecting and promoting persons' civil interests, is a legitimate end of the law. So, Devlin's liberal opponents should readily concede that the coercive force of political authority may legitimately be used for the purpose of preserving society insofar as society is understood as a political arrangement established for the purpose of protecting and promoting persons' civil interests. However, in doing so, they leave aside considerations of community moral standards entirely.

We can reconcile the distinctively instrumental aspects of Devlin's view with liberal statements of the legitimate exercise of political authority. This shows that insofar as we are actively concerned with the preservation of society or other pressing societal goals, we do not concern ourselves with enforcing a community's morals as such. That is, insofar as Devlin's view retains the features that make it a distinctively *instrumental* form of legal moralism, it loses the essential feature that makes it legal moralism, namely, the enforcement of morality as such.³⁵

³⁵ See note 13 above for my understanding of enforcing morality *as such*.

We find a close parallel to the distinctively instrumental aspects of Devlin's view in Locke's *Letter*. Both stress the importance of political action that preserves the integrity of society. In a passage that strongly resembles Devlin's words, Locke writes, "No Opinions contrary to human Society, or to those moral Rules which are necessary to the preservation of Civil Society, are to be tolerated by the Magistrate."³⁶ However, Locke ultimately argues for toleration of unpopular beliefs and practices,³⁷ while, on very similar premises, Devlin aims to justify intolerant conclusions. Locke's argument and examples show that insofar as we concern ourselves with pressing societal objectives, there is no sense in which we enforce morality as such.

For example, Locke infamously argued that Muslims ought not to be tolerated.³⁸ However, we must note that he argues against the toleration of Muslims for political rather than religious or moral reasons. Muslims, claimed Locke, necessarily find themselves loyal to a foreign political authority. He writes:

That church can have no right to be tolerated by the magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby *ipso facto* deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country, and suffer his own people to be listed, as it were, for soldiers against his own government.³⁹

³⁶ Locke, John, A Letter Concerning Toleration, in David Wootton (ed.), *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 424. Hereafter cited as *Letter*.

³⁷ The toleration for which Locke argues is not absolute. As I examine below, Locke acknowledges limits to his toleration. Here I mean only that he argues for toleration of unpopular beliefs and practices in that their unpopularity is never a salient reason for suppressing them.

³⁸ Catholics, though Locke does not name them here, are supposed to fall outside Locke's toleration for similar reasons. Locke, *Letter*, 426.

³⁹ Locke, *Letter*, 426.

Political authority is justified in acting to preserve political society, and expressions of loyalty to foreign powers threaten the integrity of society. Therefore, political authority is justified in prohibiting the outward expression of religious beliefs by Muslims and other groups that fall into this category.

But it is imperative to note that Locke argues that Muslims ought not to be tolerated, not because the community regards their religious beliefs as sinful, but because he supposed their religious commitments to conflict with and supersede their political commitments making them unfit to participate in civil society. This becomes clear when, shortly after this argument for limiting toleration, he writes, "...neither Pagan, nor Mahometan, nor Jew, ought to be excluded from the civil rights of the commonwealth, because of his religion."⁴⁰ This is because, "...the commonwealth, which embraces indifferently all men that are honest, peaceable, and industrious, requires it not."⁴¹ So no individuals or groups, Muslims, Catholics, or any others, ought to be denied toleration simply because their beliefs are popularly regarded as false or offensive. As Locke writes, "...the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person."⁴²

So, though Locke advocates for toleration, he sets out clear limits for its practice. Further, he defines these limits exclusively in terms of the need to preserve political society and secure political society's ends. Community morals play no role in justifying the limits of toleration.

⁴⁰ Locke, *Letter*, 431.

⁴¹ Locke, *Letter*, 431.

⁴² Locke, *Letter*, 420.

Devlin considers the example of widespread excessive drinking in an effort to show that there should be no theoretical limits to the state's authority to legislate against immorality. But through this example we can see that, as with Locke's arguments for limiting toleration, community morals do no work in justifying political action aimed at preserving society. Devlin prompts his reader to consider a society in which a significant proportion of the population drinks excessively, and asks rhetorically, "what sort of society would it be?"⁴³ He suggests that if a community regards excessive drinking, even if only alone in one's home, as immoral, then they may legitimately criminalize the sale or consumption of alcohol. However, if we take the instrumental thesis' commitment to the preservation of society seriously, to justify criminal prohibitions, we must identify the specific negative effects of excessive drinking on society. It may well be the case that a society in which a significant proportion of the population drinks excessively cannot continue to function normally. If, for example, children's caregivers, police officers, and other administrators of public services were unable to perform their duties due to rampant alcohol consumption, society would be at risk of disintegrating. In this case, the society may justify prohibiting the sale and consumption of alcohol in an attempt to protect their society against the ills of widespread drinking.⁴⁴ Devlin takes his instrumental legal moralism to justify the community's attempt to eradicate excessive drinking; however, in the end, we do not rely on the perceived immorality of excessive drinking to establishing the need for restrictions. Rather,

⁴³ Devlin, *The Enforcement of Morals*, 14.

⁴⁴ Devlin, *The Enforcement of Morals*, 14.

the damage to society that widespread alcohol consumption occasions justifies the restrictions, independently of any consideration of morals.⁴⁵

Devlin claims that he advocates for, “toleration of the maximum individual freedom that is consistent with the integrity of society.”⁴⁶ Locke’s arguments in his *Letter* unfold along very similar lines, however, Locke ultimately argues for the toleration of unpopular beliefs and practices, while Devlin ultimately argues for the suppression of such things. The main thrust of Devlin’s arguments is that it is permissible to enforce community moral standards. The main thrust of Locke’s arguments is that it is not. Both claim to ultimately be concerned with the preservation of society; however, Locke shows that as long as we concern ourselves exclusively with the preservation of society, there is no conceptual space for enforcing morals as such.⁴⁷

Instrumental legal moralism, insofar as it takes seriously the end for which the enforcement of morals is supposedly instrumental, namely, the preservation of society, ends up neglecting the enforcement of morals as such. The preservation of society is a legitimate end of political action independently of community morals. If, as instrumental legal moralism holds, the enforcement of morals is only justified for the purpose of preserving society, and preserving society is justified on grounds entirely independent of community morals, then instrumental legal moralism becomes a conceptually untenable version of legal moralism. That is, instrumental

⁴⁵ Devlin does not spell it out like this. Here I am trying to make sense of his excessive drinking example in line with a distinctively instrumental reading of his legal moralism. As Devlin presents it, the excessive drinking example is ambiguous in the same way that his legal moralism generally is.

⁴⁶ Devlin, *The Enforcement of Morals*, 16.

⁴⁷ See note 13 above.

legal moralism fails to justify the enforcement of morals such that immorality itself is a salient reason for criminalization.

4.3.3 – Devlin’s Non-instrumental Legal Moralism

Again, unlike instrumental legal moralism, which regards the legal enforcement of morality as instrumental for the preservation of society, non-instrumental legal moralism regards the legal enforcement of morality as an essential facet of the criminal justice system. Instrumental legal moralists advocate the legal enforcement of morality with a view to the damage to society that immoral conduct occasions; non-instrumental legal moralists do not. Again, Devlin *appears* to advance the quintessential account of the instrumental thesis. However, insofar as he presents the claim that the enforcement of morals is necessary for the preservation of society as a necessary truth, or a priori assumption, or insofar as he mistakenly identifies society with its morals at a particular moment in history, he forfeits any plausible claim to instrumental legal moralism. Instead, we must understand Devlin’s position as an instantiation of non-instrumental legal moralism that aims at the preservation of morals for their own sake.

Insofar as we can understand Devlin as advancing a version of non-instrumental legal moralism, his justification for criminal prohibitions is politically illegitimate. Non-instrumental legal moralism, coupled with community morals as the standard of morality, results in a moral conservatism aimed at preserving the particular character of the community’s morals. Further, it justifies preserving community morals without appealing to any further end. Communities may enforce

their morals to preserve the particular character of their moral code as they see fit. On this model, the morality that Devlin argues for enforcing closely resembles a set of life values that I rule out as a possible object of agreement among independent parties to the social contract in the previous chapter.⁴⁸ There I define life plans and values as the values according to which persons desire to live their lives and argue that any attempt at agreement among parties to the social contract on the inclusion of substantive aspects of life plans and values among the responsibilities of political authority would be either oppressive or superfluous.⁴⁹ Community morals of the kind Devlin advocates enforcing through the criminal law are no more than values and life plans that a community supposedly favours, and, as a result, could similarly not be the object of agreement among parties to the social contract for protection and promotion in political society.

Additionally, Devlin's non-instrumental legal moralism, because it is non-committal on the content of community's morals, would justify societies in legally enforcing substantively unjust moral codes. In arguing that societies may legitimately enforce their morals through the criminal law, he makes no distinction between societies whose prevailing morality condones violence, oppression, or even slavery, of which there are historical and contemporary examples, and societies committed to comprehensive personal rights and freedoms. Devlin took his own

⁴⁸ See 3.4, 102-104 above.

⁴⁹ Briefly, a lack of enforcement of substantive life plans and values is only a problem persons' face outside of political society if parties to the social contract could not all agree to enforcement without some subordinating their aims and interests to others'. The enforcement of substantive life plans and values is oppressive if all persons' could not agree to it (in light of their independence), and superfluous if all persons' could (in light of the problems they would face outside of political society).

society's morals to disapprove of homosexuality, and, contra the Wolfenden Report's recommendations, argued for the right of his society to prohibit homosexual conduct. These considerations make the version of non-instrumental legal moralism that we can attribute to Devlin very unappealing.⁵⁰

In the latter half of this chapter I look at a new school of non-instrumental legal moralism that does not suffer from this defect. Rather, it aims to justify the legal enforcement of true moral principles that are substantively liberal, and it does so in a careful and limited way. As a result, it has gained widespread acceptance among criminal law theorists. However, as I argue, even in its strongest form, non-instrumental legal moralism provides a politically illegitimate justification for political action.

⁵⁰ One might suggest that there is a third interpretation of Devlin's legal moralism that I have failed to consider. Perhaps the strongest interpretation of Devlin's legal moralism is that the enforcement of morals is necessary to establish a kind of social cohesion that is necessary for the preservation of society. This interpretation does not solve any of the shortcomings of Devlin's view; it only postpones them. If the morals of the community are substantively unjust, social cohesion that preserves a society that reflects them, as Hart argues, should probably not be promoted (Hart, *Law, Liberty, and Morality*, 19). If the society aims at protecting and promoting persons' civil interests, and promoting moral ideas fosters social cohesion in a way that stabilizes legitimate political institutions as discussed above (4.3.1, 116), then we should regard the promotion of those ideas as legitimate. However, these moral ideas are not the community's morals that Devlin advocates enforcing. Rather, they are ideas that reflect a liberal political morality (more political morality below, 4.4.4). If, for some reason, enforcing community morals that do not reflect a liberal political morality fosters social cohesion that nonetheless stabilizes legitimate political institutions, then I suppose promoting them should be regarded as legitimate, but, again, this does not seem to qualify as enforcing morals *as such*. This is similar to how Alan Ryan regards Hobbes' requirement of uniformity of public religious worship. But Ryan argues that this makes Hobbes tolerant as it turns public religious worship merely into a "police matter" (See 2.3, 64 above. Ryan, Alan, "A More Tolerant Hobbes?" Susan Mendus (ed.), *Justifying Toleration: Conceptual and Historical Perspectives*, (Cambridge: Cambridge University Press, 1988), 57).

4.4 – Non-instrumental Legal Moralism is Politically Illegitimate

4.4.1 – Moore and Duff's Legal Moralism

Moore and Duff each argue that moral wrongs are the proper object of the criminal law. For Moore, the requirement that criminal wrongs be moral wrongs follows from his theory of the function of the criminal law and his theory of punishment. Moore argues that the function of the criminal law is to achieve retributive justice. Retributive theories of punishment hold that wrongful action merits punishment, full stop. Punishment does not serve any further end than responding to wrongful conduct. So, Moore contends, the proper aim of the criminal law is to mete out deserved punishment; and, one cannot deserve punishment unless he has committed a wrong, specifically, a *moral* wrong. After all, as Moore asks, “What is there to pay for if one has done no moral wrong?”⁵¹ Immorality is therefore a necessary condition for criminalization. Strengthening his claim, Moore states that, “The moral wrongness of any sort of behaviour... is always some reason to legislate against it in the criminal law.”⁵² For Moore, there is a strong *prima facie* reason for criminalizing all moral wrongs. From this seemingly simplistic legal moralism, Moore offers a number of “limitations and qualifications”. These include a relatively minimal view of the content of morality, epistemic caution in assessing moral truth, a presumption in favour of liberty, and an occasional right to do wrong.⁵³

Duff's argument follows a similar pattern; however, he locates the crucial aspect of criminal justice not in punishment, but, rather, in the criminal trial. Duff

⁵¹ Moore, Michael, *Placing Blame*, (Oxford: Clarendon Press, 1997), 70.

⁵² Moore, *Placing Blame*, 72.

⁵³ Moore, “A Tale of Two Theories,” 32-33.

argues that the criminal trial is a large-scale, institutionalized version of the common practice of calling persons to account for their moral wrongdoing. Duff suggests that the defining feature of the criminal law is that it condemns the conduct that it prohibits.⁵⁴ One might object that the role of the criminal law is merely to deter undesirable conduct; however, as Duff points out, governments can curb undesirable conduct through taxation, or education. When we criminalize conduct, we clearly and forcefully condemn it. To be justified in this condemnatory act, and to call persons to answer for their actions as Duff suggests we do in criminal trials, criminal law must take immoral conduct as its object.⁵⁵

Duff, however, does not claim that the criminal law ought to concern itself with all moral wrongs. Rather, the criminal law ought to concern itself exclusively with a subset of moral wrongs, what he calls *public* wrongs. Duff argues that public wrongs are wrongs that concern persons in their role as citizens, with an eye to the, “defining aims and values” of the polity.⁵⁶ While Duff does not offer a full account of the aims and values of liberal polities, he provides examples of crimes that we can safely suppose represent “serious violations of any polity’s core values,” namely, murder, serious physical assault, rape, and attacks on property.⁵⁷ These wrongs, Duff argues, ought to be criminalized by any political society concerned with protecting citizens, and allowing them to live ordinary lives. The implication of this claim is that protecting citizens’ lives, and assuring them a space to live a life of their choosing, are essential aims for all political societies.

⁵⁴ Duff, Antony, *Answering for Crime*, (Portland, OR: Hart Publishing, 2007), 81.

⁵⁵ Duff, *Answering for Crime*, 81, 93.

⁵⁶ Duff, *Answering for Crime*, 142.

⁵⁷ Duff, *Answering for Crime*, 143.

It is important to note that for Duff public wrongs are a subset of *pre-legal* moral wrongs.⁵⁸ By emphasizing that morality is pre-legal, Duff pushes us to conceive morality as conceptually prior to legality for the purpose of defining wrongs in political society. Though the notion of “the public” functions to whittle down the class of moral wrongs that are uniquely appropriate for enforcement in political society, those wrongs are identified as *moral* wrongs independently of, and prior to, a conception of a legal system, and of a political system in which the legal system play a part. It is in this sense that Duff’s public wrongs are pre-legal, and, further, pre-political.⁵⁹ And, it is in light of his commitment to the enforcement of pre-political morality that his non-instrumental moralism is most pronounced.

4.4.2 – Public Wrongs as Political Wrongs

Duff’s identification of criminal wrongs as public wrongs seems to me to be largely correct. Though Duff does not formulate a complete account of the aims of political cooperation, the examples he gives, and quick implications he draws, are consonant with the argument I developed in the previous chapter. He categorizes wrongs as public by appealing to the aims and values of the polity, and, the examples of crimes he gives are emblematic of a political society committed to the protection and promotion of persons’ civil interests of life and liberty. However, in the previous chapter I argue against the inclusion of life plans and values in the aims and values

⁵⁸ Duff, *Answering for Crime*, 86. Thorburn, Malcolm, “Criminal Law as Public Law,” R. A. Duff and S. Green (eds.), *Philosophical Foundations of Criminal Law* (New York, NY: Oxford University Press, 2011), 23.

⁵⁹ The system of political cooperation plays a vital role in whittling down the scope of wrongs that are appropriate to enforce, but not in defining them as wrong.

of political society, and, as I argue below, pre-political morality is relevantly similar to a set of life values. Therefore, concerns for morality as such cannot be the impetus of political action, and, in the present discussion, morality simpliciter cannot serve as the basis for criminal law.

In this section I argue that the social contract argument of the previous chapter shows that the enforcement of pre-legal or pre-political morality is illegitimate. That is, Duff errs in assuming that public wrongs must be a subset of pre-political moral wrongs. Rather, we can animate Duff's notion of public wrongs as a basis for the criminal law while eschewing his moralism if we appeal solely to the ends of political cooperation, without a concern for true pre-political morality.

Pre-political morality cannot legitimately be the impetus for political action, and cannot be a legitimate justification for the criminal law in general, or particular criminal laws. This follows from the contractarian argument of the previous chapter. There I argued that the only legitimate ends of political action are the protection and promotion of persons' civil interests. Further, I suggested that persons' civil interests include only their lives and liberty, and cannot include the substance of their life plans and values. Briefly, this is because to determine the legitimate ends of political action, we must consider the unique undertaking that political cooperation is. That is, our answer to the question, "what are the legitimate ends of political society and authority?" must respect the conditions that make political society both necessary and possible. Protecting persons' lives and liberty responds to a problem that persons would face outside of political society, and could

be the object of agreement among independent persons.⁶⁰ On the other hand, the enforcement of a particular set of life values either does not respond to a problem that persons would face outside of political society, or could not be the object of agreement among independent persons endeavouring to cooperate politically.⁶¹

I contend that, on the contractarian standard on which I rely, pre-political morality is sufficiently similar to a set of life values, and, therefore, is not a legitimate ground for political action. Like the enforcement of a set of life values, the enforcement of morality as such would be either oppressive or superfluous to parties to the social contract.⁶² As Arthur Kuflik points out, we should expect disagreement about the content of morality among independent persons.⁶³ If persons could not agree on the content of morality, its enforcement would be oppressive. Some persons' participation in political society would require them to subordinate their conceptions of morality, and therefore, their life plans and values, to others' as a condition of political participation. If they could agree on the content of morality, it would be unnecessary to charge political authority with its enforcement.⁶⁴ Persons would need to, and could agree to, charge political authority

⁶⁰ See 3.4 above.

⁶¹ See 3.4, 102-104 above. And on the worry of smuggling in pre-political rights to the social contract see 2.2, 39-41, 52, on the difference between the social contract of Locke's *Second Treatise* (strong pre-political rights and obligations institutionalized in political society), and the social contract of Locke's *Letters* (pre-political independence and the social contract to protect and promote civil interests).

⁶² Wootton, David, Introduction to *John Locke: Political Writings*, (Indianapolis, IN: Hackett, 2003), 100.

⁶³ Kuflik, Arthur. "Liberalism, Legal Moralism and Moral Disagreement." *Journal of Applied Philosophy*, Vol. 22, No. 2, 2005, 190.

⁶⁴ See 3.4, 102-104 above. To the extent that agreement on morality appears to be necessary and possible for parties to the social contract, I contend that this agreement is actually an agreement on political principles and, to the extent that it is

with protecting and promoting only their civil interests, what I take to be their lives and liberty.

More important than the classification of particular things as civil interests, is the role of the social contract argument in demonstrating that the, in Duff's words, "defining aims and values" of the polity ought to be specified by appealing to the endeavour of cooperating politically, and not by any pre-political values, religious, moral, or otherwise. To make a legitimate claim on persons, we must understand political action, including, and perhaps especially, the execution of the criminal law, to advance the aims and values that independent persons engaging in political cooperation could agree to. To enforce pre-political values on persons, understood as values defined conceptually prior to political cooperation, is to make an illegitimate claim on them. It amounts to coercing conformity to aims and values established independently of persons' political cooperation, rather than because they can be understood as the aims and values that all participants in political society would and could endorse.⁶⁵

So, in large part, Duff is correct that criminal law ought to concern itself with public wrongs, and that we ought to understand public wrongs as actions that undermine the defining aims and values of the polity. However, Duff is incorrect in assuming that the wrongness of public wrongs must emanate from their inclusion among the class of pre-political moral wrongs. Rather, we ought to understand

an agreement on morality, it is an agreement on *political* morality. Substantively liberal accounts of morality will mirror liberal political principles. I consider this further at 4.4.2, 133-134, and 4.4.4 below.

⁶⁵ And, as I argue below, this feature of legal moralism undermines legal moralists like Duff and Moore's core commitment to respect for persons. See 4.4.3 below.

public wrongs as wrongs that refer to the defining aims and values of “the public,” understood as political cooperation between independent persons, and no further.

It is important to note that non-instrumental legal moralists like Duff or Moore, and contractarian liberals (who define the legitimate aims and values of political society as those that independent persons engaging in political cooperation could agree to), may well make similar assessments of actual systems of criminal law. That is, so long as the legal moralist has a sufficiently liberal account of “true morality,” the criminal laws, and limits, for which they advocate will be very similar to those endorsed by contractarian liberals. Moore acknowledges that his theory is “liberal-in-content if illiberal-in-form”.⁶⁶ Malcolm Thorburn says of Moore’s theory that it “provides illiberal arguments for designing a system of criminal law that would look a lot like the sort of system of which a liberal would approve.”⁶⁷ My disagreement with legal moralists like Moore and Duff then is essentially philosophical. More precisely, given that philosophical disagreement can occur at various levels, my philosophical disagreement with legal moralists occurs at the political level. That is, we disagree about what the criminal law ought fundamentally to be concerned with, and the precise claim that it makes on persons, even though we will likely agree on what the content of criminal law ought to be.

Further, I contend that the plausibility of any particular version of legal moralism, especially in the eyes of liberals, hinges on the moralist’s basis of true morality mirroring the contractarian liberal basis for political society. The contractarian liberal account of political society starts with the assumption of

⁶⁶ Moore, *Placing Blame*, 80

⁶⁷ Thorburn, “Constitutionalism and the Limits of the Criminal Law,” 91.

persons' independence from natural authority and develops standards of conduct by considering the ends of persons cooperating politically, or, in other words, by considering the shape that political society must take to be acceptable to the participants. This is an account of political society and political action. Importantly, it is a liberal account of political society and action in that it assumes persons independence, is non-committal on fundamental moral truth, and, therefore, provides the space for substantial personal liberties. The comparable account of political action put forward by legal moralists contends that standards of true morality ought to be legally enforced. This account of political action, as Moore acknowledges, is decidedly illiberal. On the political theoretical level, the liberal and the legal moralist are sharply opposed. However, when legal moralists fill in their account of political action with a substantively liberal account of morality, that is, an account of morality that mirrors the political liberal's account of legitimate political action by acknowledging the centrality of persons' independence, or advocating for a series of personal liberties, the space between the political liberal and the legal moralist appears to shrink. Moore and Duff's legal moralisms fall into the category of substantively liberal versions of legal moralism.

Though the systems of criminal law that liberal legal moralists like Moore and Duff, and a contractarian political liberal like myself, would endorse might be nearly indistinguishable, this analysis reveals the illiberal and politically illegitimate claims that all non-instrumental legal moralists take the criminal law to make on persons.

4.4.3 – Respect for Persons

The putative virtue of Duff and Moore’s versions of legal moralism is that they show a strong commitment to respect for persons. In fact, their moralism flows directly from features of the criminal justice system that they take to be essential for showing due respect for persons. Again, Moore’s legal moralism follows from his retributivist theory of punishment. He, like other retributivists, justifies his approach to criminal punishment by contrasting it with utilitarian theories that justify punishment by pointing to the positive social outcomes that punishment can occasion through incapacitation and deterrence.⁶⁸ Utilitarian theories, however, treat persons as tools to achieve broader social benefits, and, in doing so, fail to show persons the respect that is due to them as entities with capacities and ends of their own. Punishment, retributivists contend, is only consistent with respect for persons if we understand it as the proper response to wrongdoing itself.

Punishment is then justified in reference to persons themselves, and their culpable conduct, as opposed to the possibility of diffuse benefits to others. In this sense, we can understand his moralism as motivated by a concern for the respect for persons.

Duff’s theory is also animated by a keen commitment to respect for persons. Again, his moralism follows from the centrality of the trial to the criminal justice system. Duff envisions the criminal trial as a large-scale, institutionalized version of the common moral practice of calling persons to account for their immoral action. It is an opportunity for those accused of criminal conduct to justify their actions, or take responsibility for their wrongful conduct. By contrast, the persons that we do

⁶⁸ Moore, *Placing Blame*, Chapter 2.

not expect to answer for their wrongful conduct include young children and persons with a diminished capacity for responsible action. Calling persons to account for their wrongful conduct is a show of respect for their personhood, for their responsibility over their actions.⁶⁹ In the everyday context we expect to hold persons to account for their moral wrongs. In the political context, we should similarly expect persons to answer for their *public* moral wrongs.

We ought to praise Moore and Duff's theories of criminal law for their commitment to promoting a view of criminal justice that aims to show due respect to persons. However, I believe that the strength of this commitment to respect for persons is only decisive over alternative conceptions of law when considering the criminal law in isolation. If instead we consider criminal law as a subset of political action, emanating from political authority,⁷⁰ and governing the relationships between independent persons engaged in political cooperation, as contractarian liberals do, we see that the legal moralism to which Moore and Duff commit themselves undermines their commitment to respect for persons.

We can contrast the claims that legal moralists, like Moore and Duff, and contractarian liberals take the criminal law to make on persons by considering the example of a religious extremist who attempts to justify a criminal act by appealing to his religious beliefs. Suppose a citizen bases his conception of morality on religious teachings. Suppose further that his religion holds that apostates ought to

⁶⁹ Thorburn, "Constitutionalism and the Limits of the Criminal Law," 94. Duff, *Answering for Crime*, 178.

⁷⁰ Thorburn, in "Criminal Law as Public Law," advocates conceiving of the criminal law "as concerned with the basic question of public law: when the use of state power is legitimate." 24.

be killed. We can ask what the legal moralist and the contractarian liberal respectively take the criminal law's claim to be in trying and punishing a religiously motivated murderer. The contractarian liberal justifies the prohibition on murder, and a conviction in this case, by pointing to the principal aim of political cooperation, that of protecting persons' civil interests, which I take to consist of their lives and liberty. Prohibiting murder is a direct instantiation of the protection of the civil interests that persons' would enter political society for the purpose of protecting. If, as I argue, we understand political cooperation as the protection and promotion of persons' civil interests, and persons' lives and liberty are included among those civil interests, it is difficult, if not impossible, to understand political cooperation without a prohibition on killing. So, to the religiously motivated killer, the contractarian liberal takes the criminal law to declare that all killing, including religiously motivated killing, subverts the ends of political cooperation among independent persons, and, therefore, cannot be permitted. Note that, in parsing the claim that the criminal law makes on persons, the contractarian liberal makes no claim regarding the veracity of the religious beliefs that motivate the killer's actions. In relation to the killer's beliefs, contractarian liberals claim only that religious beliefs cannot justify killing in a system of political cooperation among independent persons.

The same cannot be said of the claim that legal moralists take the criminal law to make on persons in this case and in similar cases. The legal moralist is committed to holding that the justly convicted criminal has contravened the true standards of morality, and, consequently, if his action was motivated by his

conception of morality, that he is wrong about moral truth.⁷¹ If, as legal moralists maintain, legal wrongs must be moral wrongs, and, further, the moral wrongness of criminalized conduct is the salient reason in favour of criminalizing it, then it must be the case that in prohibiting that conduct, political authority, through the criminal law, asserts the truth of the conception of morality that animates the criminal law, and denies the truth of any alternative conception of morality that motivates prohibited conduct.

To be clear, I do not dispute the truth of the claim that murder, whether religiously motivated or not, is morally wrong. I do however take issue with the legal moralist's claim that claims about moral truth as such can be legitimately expressed by the criminal law. In this rather extreme case, the criminal law straightforwardly expresses the falsity of some persons' intimately held conception of moral or religious truth. Some may applaud this feature of the moralists' conception of criminal law; however, it makes clear that in all cases, legal moralists take the authority of criminal law to ultimately rest on the truth of pre-political morality. Even if the law ultimately prohibits conduct motivated by one's conception of morality, or the good, we can justify those prohibitions in ways that do a better or worse job showing respect for persons. I contend that the conception of political society to which this commits legal moralists reveals a lack of the respect for persons that they take to motivate their approach.

In any endeavour persons may be treated either as active participants, or as passive subjects. Active participants play a role in shaping the endeavour; passive

⁷¹ This additionally supposes that the law accurately reflects true morality, which, presumably, a law against murder does.

subjects find themselves bound by the terms of the endeavour without a role to play in shaping its course. We do a better job respecting persons to the extent that we treat them as active participants in their endeavours. As active participants, persons' capacities and ends shape the ends of the endeavour; their purposes are taken seriously and they are shown due respect. In political society, we show respect for persons to the extent that we treat them as active participants whose ends shape the ends of political cooperation. We do a worse job respecting persons when we treat them as political subjects, liable to the constraints of political society, without a role to play in shaping its ends.

We can use this scheme of respecting persons by treating them as participants in their endeavours to understand how Duff and Moore's conceptions of criminal law succeed, to the extent that they do when considering the criminal law in isolation, in showing respect for persons. Duff, in placing the trial at the centre of his conception of criminal law, prompts us to recognize persons as active participants in the administration of criminal justice. In calling persons to answer for their wrongful conduct, we treat accused criminals with respect by acknowledging their responsibility for their conduct, and providing a platform in which they may justify their wrongful conduct, or accept responsibility for it. On this understanding of criminal justice, persons' capacities and ends are acknowledged and play a vital role in shaping the system. So we can understand the commitment to respect for persons, as a commitment to understand persons as active participants in their endeavours, in which their capacities and ends are acknowledged by, and shape the endeavours they find themselves involved in, and affected by.

Moore, in placing retributive punishment at the centre of this theory of criminal law, casts criminal punishment as a direct response to persons' culpable conduct. This, in contrast to utilitarian theories of punishment, acknowledges persons' capacities and ends, and treats them as participants in the criminal process. Though criminals ultimately participate in the criminal process in an undesirable role, their personhood is respected. Utilitarian theories of punishment, in focusing solely on the benefits to others that punishment occasions, treat criminals as subjects of criminal justice, without any role to play in shaping the process.

That said, If we step back and consider criminal justice in the context of the broader political system in which it plays a role, we see that legal moralists do a worse job respecting persons when they hold that criminal law makes claims about pre-political moral truth. By making persons liable to retributive punishment, or answerable for their conduct in criminal trials, based on a standard of conduct derived independently of, and conceptually prior to, their political cooperation, legal moralists cast persons as political subjects.⁷² The contractarian liberal view, on the other hand, views persons as independent political cooperators. It defines the standards of acceptable conduct in political society by considering the interests that those persons could agree to protect and promote. So, the impermissibility of murder, religiously motivated or not, lies not in the dictates of pre-political standards of morality, but, rather, in properly *political* aims and values that

⁷² This may seem uncharitable to Duff who explicitly argues that the law ought to address persons as citizens rather than subjects, Duff, Antony, *Punishment, Communication and Community*, (New York, NY: Oxford University Press, 2001), 59; *Answering for Crime*, 86. However, I believe that Duff fails to recognize the extent to which his legal moralism interferes, for reasons I identify, with this laudable ideal.

independent persons would and could endorse.⁷³ And, therefore, when we consider criminal law not in isolation but in the broader scheme of political action of which it is a subset, we see that the contractarian liberal model does better than the legal moralist model at treating persons as active participants in political cooperation, and, therefore, affording respect for persons.

If the appeal of Moore and Duff's versions of legal moralism is that they better display a commitment to the respect for persons than alternative models of criminal law, the considerations of this section should significantly weaken that appeal.

4.4.4 – Anti-moralism and Political Morality

One may object to my argument against non-instrumental legal moralism by pointing out that it too is a moral argument. The notions of independence and legitimacy on which I rely are moral notions, the agreement I envision among parties to the social contract is an agreement on moral principles, and the contractarian argument of the previous chapter is a moral argument.⁷⁴ That is, in arguing against legal moralism, one may accuse the anti-moralist of hypocrisy.

⁷³ One could ask whether we really treat the religiously motivated murderer as a participant in political society when we straightforwardly thwart his religious ends. Insofar as he participates in political society and enjoys the protection and promotion of his life and liberty among independent others, his religious ends contradict his ends as a political participant. We resolve the contradiction by prohibiting religiously motivated violence and preserving the conditions of political cooperation among independent persons. If he would choose to pursue his religious ends to the exclusion of his political ends, political society is justified in thwarting him, but again, we do a better job respecting his personhood by holding that he is mistaken about the grounds of political cooperation rather than about the truth of morality.

⁷⁴ Jan Narveson actually raised this objection to an early version of this chapter at the CS-IVR 2014 meeting at Brock University, St. Catharines, Ontario.

To be clear, in arguing against legal moralism, I do not purport to offer an amoral alternative account of the criminal law, or of political action in general. I do not purport to derive political principles exclusively from prudential considerations, or to justify and limit political authority with anything less than moral arguments.

While I do not argue against moral argument in political philosophy, I do argue against, and offer an alternative to, legal *moralism*. Legal moralists provide moral arguments contending that it is appropriate to straightforwardly apply standards of true pre-political morality to the legal sphere *because* they are the true standards of moral conduct.⁷⁵ In response, I provide (admittedly) moral arguments that this straightforward application of moral standards to the legal sphere is inappropriate. Hart attempts to clarify the levels at which morality enters debates regarding legal moralism by pointing out that we are asking questions not only *about* morality, but *of* morality as well. That is, we are asking, “whether the enforcement of morality is morally justified”.⁷⁶ Arthur Kuflik acknowledges this understanding of the debate and argues that there is “*good moral reason not to enforce by law all of what there is nevertheless perfectly good moral reason to do.*”⁷⁷

The position I advance is anti-moralist in an additional way that Hart and Kuflik’s remarks do not capture.⁷⁸ Not only do I agree that there are good moral reasons not to legally enforce morality as such, I additionally maintain that those reasons, and all moral reasoning about legal enforcement, and political action

⁷⁵ Often, as we have seen, with some qualifications.

⁷⁶ Hart, *Law, Liberty, and Morality*, 17.

⁷⁷ Kuflik, Arthur, “Liberalism, Legal Moralism and Moral Disagreement,” 186.

⁷⁸ Though, Kuflik ultimately does acknowledge the importance of the political context in his case against legal moralism by stressing the centrality of moral disagreement among persons who must cooperate politically.

generally, ought to be circumscribed in a particular way. Specifically, all moral reasoning about the criminal law, and about political action in general, ought to be limited to uniquely *political* considerations. Richard Vernon suggests that one of the strongest enduring contributions of Locke's *Letters* to contemporary political theory is the case he builds for a uniquely *political* morality, the view that "what is politically legitimate cannot simply be read off from what can be ethically (or religiously, or epistemically) justified."⁷⁹ This means that the appropriate grounds for political action do not follow immediately from moral truth; rather, they must emerge from specifically political considerations. Vernon further explains that, for Locke, those political considerations emerge from the social contract.⁸⁰ In this sense, my case against non-instrumental legal moralism is strongly Lockean.

The reasoning appropriate for justifying legitimate political action must ultimately appeal to the ends and terms of political association. I understand these in terms of a social contract in response to the circumstances of politics.⁸¹ Recall that I understand the circumstances of politics as the necessity of political cooperation in the face of the insecurity of persons' civil interests, and the possibility of political cooperation in light of persons' independence.⁸² When I argue that the justification of political action ought to be limited to uniquely political reasoning, I mean that it ought to ultimately respond to the circumstances of politics so understood. By responding to the circumstances of politics, we acknowledge the

⁷⁹ Vernon, Richard, Introduction to *Locke on Toleration*, Richard Vernon (ed.), (New York: Cambridge University Press, 2010), xxx.

⁸⁰ Vernon, Richard, *The Career of Toleration: John Locke, Jonas Proast, and After*, (Montreal, QC: McGill Queen's University Press, 1997), 90.

⁸¹ See 3.4 above.

⁸² See 3.4, 92-93 above.

moral starting point of liberal political theory, namely, persons' independence from natural authority, and acknowledge a limited sphere of legitimate political action. Further, responding to the circumstances of politics allows us to define the political sphere without straightforwardly enforcing our best account of morality and, therefore, respect persons as independent political cooperators.

So while the contractarian account of political action is generally moral in that it ultimately concerns how persons ought to act in relation to others, and it has an unequivocally moral starting point, namely, persons independence from natural authority, it is uniquely *political* in a way that legal moralism is not. That is, it responds directly to the circumstances that make political cooperation necessary and possible.⁸³

⁸³ I am not alone in responding to non-instrumental legal moralism by stressing the importance of the political context. Notably, Malcolm Thorburn argues that, in justifying the criminal law, non-instrumental legal moralists fail to account for the state dominated character of the criminal justice system, and its coerciveness. In its place, Thorburn offers a "public law account" of criminal justice that confronts the question of political power's legitimacy. To make sense of criminal law's place in the political context, Thorburn, following Kant, begins with a conception of persons as free and equal moral agents and argues that the state is the "unique instrumentality" through which persons can interact with each other as such. In other words, political society and authority respond to a particular problem that persons' outside of political society would face, that of interacting with others as free and equal persons. So, Thorburn responds to legal moralism by presenting an account of the criminal law in the broader political context. Thorburn's account of political cooperation, however, differs from my own in that, following Kant, he maintains that engaging in political cooperation is morally obligatory because it responds to the problem of being unable to interact with others as free and equal actors. I envision the circumstances of politics such that political cooperation is necessary to remedy certain problems persons would face in its absence, and possible insofar as it respects persons' independence. See Thorburn, "Constitutionalism and the Limits of the Criminal Law," and "Criminal Law as Public Law," especially 42-43.

4.5 – Conclusion

I take legal moralism, in all its forms, to be a defective grounding of criminal law, and theory of criminalization. Instrumental legal moralists, insofar as they keep in view the supposed damage to society that immoral conduct occasions, fail to enforce morals as such. Alternatively, if they adopt a spurious definition of society, or of the connection between society and its morals, instrumental legal moralists make illegitimate political claims on persons, and permit the legal enforcement of substantively unjust systems of law. Contemporary non-instrumental legal moralists who hold substantively liberal accounts of morality fare better by advocating for substantively liberal and just systems of criminal law, and pursuing the ideal of respect for persons. However, when we consider the criminal law in the broader context of the political system in which it plays a part, we see that legal moralists do not do as good a job respecting persons as their liberal political opponents. Ultimately, legal moralism provides a politically illegitimate justification for criminalization, and political action in general.

Conclusion

The conclusion of the fourth chapter provides a fitting conclusion to this dissertation. As Richard Vernon argues, the enduring appeal of Locke's *Letter* is the case it builds for a political morality.¹ From Locke's *Letters* on toleration I have identified a distinctly Lockean political morality that defines the political sphere by showing that the only values appropriate for enforcement in political society are those that emerge from considering the ends and terms of persons' political cooperation. We can identify a limited range of interests that are uniquely suited for protection and promotion acting in concert with independent others in political society. These interests constitute the legitimate object of political authority's concern. These are our *civil interests*.

I have argued that Locke's contractarian argument for identifying persons' civil interests as things other than their salvation is a prominent line of argument in his *Letters*, and a good argument for toleration. I have argued that analyzing social contract theories in light of the idea of civil interests enriches our understanding of social contract theory generally. I have argued that persons' civil interests consist of only their lives and liberty, and that political action may be legitimately deployed only for the sake of protecting and promoting these things and the means of enjoying them. And, I have argued that this rules out the enforcement of morality as such as a legitimate goal of the criminal law, and of political action in general.

¹ Vernon, Richard, Introduction to *Locke on Toleration*, Richard Vernon (ed.), (New York: Cambridge University Press, 2010), xxx.

The work of this dissertation sets the stage for future study of political legitimacy and liberal political theory. Having identified the reasoning appropriate for identifying the values appropriate for enforcement in liberal political society, we are well equipped to apply that reasoning to hard cases in Canadian constitutional law. What reasoning could justify, for example, the federal government's proposed ban on religious face coverings in citizenship ceremonies? In 2011 the Canadian Immigration Minister cited the "Canadian values" of equality and of openness in support of the ban.² We can certainly recognize equality as a value appropriate for promotion in a system of political cooperation among independent persons, though we must recognize the tension between religious equality and gender equality. I am not as confident that we can recognize the relatively vague notion of openness as a value that legitimately shapes our political cooperation in a diverse polity. In this case and analogous cases,³ we must ask whether legislatures, ministers, and courts have justified their actions consistently with the conception of political society as cooperation among independent persons for the protection and promotion of their civil interests. We can further investigate how requests for religious accommodations and exemptions force us to precisely define the objectives of our laws, and recognize the dialogue this creates between legislative objectives and persons' liberties. What, for example, is the exact purpose of a citizenship oath, and

² Kim Mackrael and Les Perreux, "Muslim women must show faces when taking citizenship oath," *The Globe and Mail*, December 12, 2011. Retrieved from www.theglobeandmail.com.

³ For example, the case of polygamous religious sects in Bountiful, British Columbia challenging the prohibition on polygamy in the name of their religious freedom, and Sikh men being denied exemption from Ontario's motorcycle helmet laws where exemptions exist in British Columbia and Manitoba.

can and should we aim to fulfil that purpose in a way that impairs persons' religious freedom less?

And then there is the question of how to respond to the demands of quasi-religious associations determined to satirically push the boundaries of religious accommodation. In British Columbia an "ordained minister in the Church of the Flying Spaghetti Monster" lost his fight with the Insurance Corporation of British Columbia (ICBC) in charge of driver licensing to wear a colander on his head in his driver's licence photo.⁴ The man desired to wear the colander according to the same permissions that allow members of other religions to wear head coverings in their driver's licence photos. His request was denied when he failed to provide evidence that his faith prevents him from removing the headgear for his photo. Notably, in jurisdictions such as Oklahoma and Austria, similar requests by "Pastafarians" have been permitted. We may be inclined to dismiss these claims as frivolous; however, they ought to move us to reflect on the justification of the political demands we place on one another in the same way that more conventional cases do. Why do we require photographs on driver's licences, and how does headgear, religious or otherwise, interfere with those reasons? Further, what would count as sufficient evidence of one's religious requirements, and, really, what sets religious life choices apart from other life choices? A similar but more serious driver's licence photo dispute arose in South Carolina when a transgender teen was required to remove her makeup for her driver's licence photo to adhere to the requirement that persons not alter their appearance in a way that would misrepresent their identity. She won

⁴ Josh Elliot, "B.C. 'Pastafarian' loses driver's licence over holy colander hat," *CTV News*, October 6, 2014. Retrieved from www.ctvnews.ca.

her subsequent lawsuit against the motor vehicle agency and prompted them to change the requirement such that persons be photographed the way they regularly appear.⁵

Analyzing political action in terms of civil interests can help us navigate these difficult questions. We can ask what civil interest is protected or promoted through the law, regulation, or political action, and we can ask how that civil interest is identified as such by considering the ends of persons' cooperating politically. More concretely, we can ask how the measure fares in its task and whether, in light of persons' claims that it unduly interferes with their liberty to live as they please, an interest for which they undoubtedly participate in political society, the measure's objective can be achieved through a more balanced approach. In the case of persons' driver's licence photos, we can ask whether headwear of any kind interferes with the objective of promoting persons' safety by requiring licensed drivers to identify themselves as such when necessary. In this case we see that it should not matter whether persons' reasons for appearing a certain way are religiously motivated or not. The important question is whether the objective of the regulation promotes a bona fide civil interest, and whether persons' preferred manner of appearance interferes with that objective. Governments and their agents need not enter the business of deciphering persons' religious beliefs, their gender identities, or any other part of their life plans. Where a law or regulation's objective can be achieved while interfering less with persons' abilities to live as they please, a civil interest for sure, regulations ought to be tweaked as they were in South Carolina.

⁵ Colleen Jenkins, "Transgender teen gets South Carolina to change driver's license policy," *Reuters*, April 22, 2015. Retrieved from www.reuters.com.

It has been my aim in this dissertation to articulate the view that the nature of persons' political cooperation constrains the legitimate exercise of political authority. I have presented a Lockean conception of political society as political cooperation among independent persons for the purpose of protecting and promoting their civil interests. This clarifies scope of legitimate political action, and helps us better understand the nature of our participation in political society.

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