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LIBERTY, EQUALITY, AUTHORITY

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John locke introduces the project of the *Second Treatise of Government* as follows: "To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[1] Locke worries that the establishment of government deprives us of our freedom, but Locke's state of nature already contains "possessions," and, as many have observed, property rights also curtail our freedom.[2] If you own the field beside mine, you can invite me onto it or order me off it as you please. Am I not "dependent on another's will" here no less than when subject to a political authority?

Locke goes on to say that our "natural state" is

> a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that creatures of the same species and rank promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection.[3]

Locke's thought must be that while you can order me off your land, I can also order you off mine. Perhaps that puts us on a level, provided I have a field as big as yours; then the limits on my power and jurisdiction imposed by your property and those that my property imposes on you are indeed "reciprocal." Yet Locke provides no guarantee of equal holdings, and if your field is twice as big, and your writ extends twice as far, how does this constitute equal jurisdiction?

Egalitarians contend that the demand for equality must extend to property and perhaps to other social structures that, in Locke's eyes, precede the

1 Locke, *Two Treatises of Government*, 269.

2 Anderson, *Private Government*, 46–47; Cohen, *Self-Ownership, Freedom, and Equality*, 55–59; and Scanlon, *Why Inequality Matters*, 97–98.

3 Locke, *Two Treatises of Government*, 269.

invention of government.[4] Liberal egalitarians set limits on the inequality of holdings, and some anarchists call for the complete abolition of private property.[5] There is less concern about inequality when it comes to bodily rights, perhaps because we all have only one body, and, it is thought, differences in our physical and mental capabilities are relatively trivial unless magnified by differences in what we own. Or perhaps the equalization of bodily capabilities is just too gruesome to contemplate.[6]

Whether or not egalitarians are right to worry about inequality of holdings, political authority may still threaten our liberty in a way that (prelegal) proprietorial authority does not, establishing a distinctive form of inequality between people—a form of inequality that Locke finds especially objectionable. I call this concern with political legitimacy the *Lockean problematic*. Locke maintains that rulership also exists within the family and in the relations between master and servant.[7] To see what might be worrying him, we should ask what these three things have in common.

Government, parents, and employers each possess directive authority in that they can issue commands, and once you obey them, they assume responsibility for what you do. Furthermore, if you defy them, they are *pro tanto* entitled to enforce their commands. I argue that none of this is true of exercises of proprietorial authority, at least before informal property rights are codified and enforced by law. To differentiate political from proprietorial authority and vindicate the Lockean problematic, we must distinguish liberty from freedom.[8]

1. FREEDOM AND LIBERTY

Though the state of nature is devoid of political authority, it does contain rights and obligations.[9] Locke tells us that our conduct within the state of nature is constrained by the law of nature, a law promulgated to each of us by our reason,

4 Part 2 of Rousseau's *Discourse on the Origins of Inequality* opens with the words "The first man who, having enclosed a piece of ground, to whom it occurred to say 'This is mine' and found people sufficiently simple to believe him, was the true founder of civil society" (164).

5 For example, Proudhon rejects property along with state authority (*What Is Property?* 30–33).

6 Cohen, *Self-Ownership, Freedom, and Equality*, 70.

7 Locke, *Two Treatises of Government*, 319.

8 Locke (*Two Treatises of Government*, 330–31), Berlin (*Two Concepts of Liberty*, 121), and many others treat 'freedom' and 'liberty' as interchangeable. I instead use these words to mark a theoretically important distinction.

9 Both conventionalists about property rights like Hume (*A Treatise of Human Nature*, bk. 3, pt. 2, sec. 2) and anticonventionalists like Locke (*Two Treatises of Government*, bk. 2, ch. 5) recognize the existence of property prior to government. Even Kant acknowledges

which mandates respect for both bodily and property rights and the keeping of promises.[10] Hume also supposes that there are "fundamental laws" that are "antecedent to government" and secure "stability of possession" and "the performance of promises," though for Hume, these laws are conventions—customary rules that bind in virtue of the benefits brought by their social recognition.[11] For our purposes the difference between Locke and Hume is immaterial. The important point is that prior to government, we are bound by certain rules—rules that create genuine rights and obligations.

The state of nature contains many customary rules, but, like Locke, we are interested in those that secure our freedom. Locke says that one is free insofar as one is able to dispose of one's person and possessions as one sees fit. When Locke speaks of one's possessions, he is referring not to whatever is *actually* under one's control but rather to the things one is *entitled* to control. Thus, the sphere of one's *freedom* is the sphere within which one is entitled to arrange things as one sees fit without interference from other people—a sphere that includes one's own body, one's actions, and the external things that one is entitled to control by means of those actions. "Thinking fit" may be taken to include both making judgments about what ought to happen (or judgments about what would be best, or for what there is sufficient reason) and forming intentions (i.e., decisions that implement those judgments). I also refer to physical freedom, the nonnormative counterpart of my notion of freedom. *Physical freedom* is one's ability (as opposed to one's entitlement) to control one's own actions and the things around one without interference from others.[12]

Being free in either sense often serves the interests of the free person. There are many accounts of how and why being free might matter to you. On some of them, the value is purely instrumental (freedom matters only because it serves further values), while on other views, it is of value to the free person for its own sake.[13] Furthermore, giving each individual control over a certain sphere often serves a collective interest. That is what Hume thinks about both private property and promising.[14] Again, these variations do not concern us here.

"provisional" property rights outside the civil condition (*Practical Philosophy*, 409–11, 415–16). For a contemporary study of informal property rights, see Ellickson, *Order Without Law*.

10 Locke, *Two Treatises of Government*, 270–71.

11 Hume, *A Treatise of Human Nature*, 541.

12 Thus, physical freedom is what Berlin calls negative freedom (*Two Concepts of Liberty*, 122–31). On the difference between physical freedom and what I call freedom, see Cohen, *Self-Ownership, Freedom, and Equality*, 59.

13 Scanlon, *What We Owe to Each Other*, 251–56.

14 Hume, *A Treatise of Human Nature*, bk. 3, pt. 2.

Our freedom consists in the possession of various *prerogatives*. I do not here go into exactly which prerogatives we should have, simply assuming (following Locke) that it is appropriate for each person to have a sphere within which they are free. My prerogatives define the area that I am entitled to control, thereby limiting your freedom in order to protect mine, and similarly for your prerogatives. Prerogatives include permissions to do things and prohibitions forbidding others to interfere with our doing them. Taken together, these permissions and obligations constitute rights—i.e., protected permissions.[15] Prerogatives also include *deontic powers*, i.e., powers to amend these rights in various ways by consenting to someone's doing something that would otherwise be forbidden or by promising to do something that one would not otherwise be obliged to do.[16] Ownership comes with additional powers, including the ability to transfer property to other people or receive property from them and thereby reallocate the rights and obligations of ownership. These rights and powers serve to give us control over the sphere occupied by our body and our property.

I lump bodily and property rights together under the title 'prerogatives', but are there not differences between the two that this classification elides? I doubt such differences are theoretically fundamental. Elsewhere I argue that the interest that underlines property rights is the same as that which underlies bodily rights.[17] That view cannot be defended here, but it is worth noting that one thing that has been thought to render both property rights and political authority problematic is no less a feature of bodily rights. I have in mind the idea that property rights enable owners to unilaterally change other people's rights and obligations by declaration.[18]

15 Thomson says that our right to liberty is a cluster "that contains our privileges, our claims to non-interference with certain of actions and certain immunities" (*The Realm of Rights*, 285). She herself prefers to exclude powers from our right to liberty but acknowledges that powers have come to be included. Thus, her conception of the right to liberty is close to my notion of freedom as a cluster of prerogatives.

16 In Owens, *Shaping the Normative Landscape*, I argue that prerogatives like the power to promise serves what I call an *authority interest* (ch. 6). There I used 'authority' to denote the power to control the deontic situation by declaration. Directive authority, the topic of this article, is a more specific phenomenon exercised by means of the power of command.

17 Namely, an interest in identifying with things that generates an interest in controlling them. See Owens, *Bound by Convention*, ch. 7. In the case of bodily rights, there is a particular thing that we each have a need to identify with (i.e., our own body), while in the case of property, our interest in identification can be gratified by various things. This difference, though practically important, is not theoretically fundamental.

18 See Kant, *Practical Philosophy*, 409; and Waldron, *The Right to Private Property*, 262–71. This leads Ripstein to argue that proprietorial authority presupposes political authority (*Force and Freedom*, 23–24, 90, 148–54).

Some nonconsensual normative change is innocuous. I usually have the right to move my body through empty space without asking your permission, and by so doing, I alter your rights and obligations without your agreement. In virtue of my bodily rights, you are now forbidden to move into certain places that you were previously permitted to occupy and permitted to move into certain places that you were previously forbidden to occupy. We are instead concerned with changes in rights and obligations that are brought about by *declaration*, something that happens when I impose an obligation on myself simply by communicating the intention to do so, as when I make a promise. That seems unobjectionable where, as here, the imposition is at my own discretion, but ownership enables me to impose obligations on you by declaration and without your agreement.

Consider the power to acquire property by purchase, acceptance of a gift, and so forth. Like promising, this power is exercised by declaration and (within limits) is part of any developed system of property rights, yet it alters the obligations of third parties by declaration and without their agreement.[19] Once I acquire a car or a house, other people owe various duties to me that they formerly owed to the previous owner, and effecting this change is the point of the purchase. My aim is to bring it about that these bystanders or neighbors must now ask my permission if they wish to use my property or compensate me if they damage it (etc.), and this change is effected by a mechanism (the communication of the relevant intention) quite unlike that by which what they owe me changes when I move across a room. In the latter case, it usually makes no difference whether I intend to change their obligations or whether and to whom I communicate such an intention. What matters is simply that my body is (permissibly) occupying a certain space.[20]

I maintain that on this point, there is no relevant difference between bodily rights and property rights for my bodily rights also include the power to change other people's rights and obligations by declaration and without their agreement. Here, I am thinking of the power of consent. Having declared that you may touch me, I can withdraw my consent simply by communicating the

19 Kant (*Practical Philosophy*, 411–26) and Ripstein (*Force and Freedom*, chs. 4–5) also postulate a power of original acquisition, i.e., a power to acquire unowned things by declaration. Locke thinks original acquisition (also?) involves labor (*Two Treatises of Government*, bk. 2, ch. 5). Critiques of historical entitlement approaches to property rights often focus on this power of original acquisition (e.g., Cohen, *Self-Ownership, Freedom, and Equality*, 72–79). My own account of proprietorial authority does not postulate any power of original acquisition, and I do not discuss it here. See Owens, *Bound by Convention*, 186.

20 Kolodny sees no deep difference between an exercise of deontic power such as the power of command and a normative change brought about by voluntary bodily motion (*The Pecking Order*, 79–80).

intention to hereby oblige you to stop touching me. None of this requires your assent, yet the normative change comes about by way of the same declaratory mechanism as that involved in the acquisition or transfer of property.[21] Some might argue that the withdrawal of consent is unproblematic because it creates no new obligation, only reimposing a preexisting obligation, but one can equally well maintain that a property transfer creates no new obligations, simply changing the focus of obligations that already exist. We return to this point in the next section.

I assume that the bodily and proprietorial prerogatives present in the state of nature include powers of consent and transfer. Prior to the institution of government, these and other prerogatives are all embodied in customary rules, and where everyone is acquainted and reputation counts, we might be able to manage for a while without organs of adjudication or enforcement. Once we move beyond such a face-to-face society, grave difficulties emerge, and at some point, a painful remedy is needed. First, there may be controversies over how the rules apply to particular cases; even impartial bystanders may sincerely disagree when the answer is not obvious, and once conflicting interests come into play, disagreements over what the rules require may become frequent. The state of nature contains no codifiers or adjudicators who can resolve such matters authoritatively. Second, there are people with little interest in what the rules require of them, people who must be forced to comply; the state of nature contains no agency whose job it is to enforce the rules. Finally, there are instances in which we need a prerogative, yet no relevant rule has been recognized; the state of nature contains no legislator to promulgate the required rule.[22]

To repair these defects, *directive authority* is required. Directive authority claims (1) the power to issue commands, binding us to do things by declaration (i.e., by simply communicating the intention to bind us) and (2) the right to enforce compliance with those commands. Here I focus on adjudication, leaving legislation for another day. Unlike a legislator, an adjudicator must purport to apply a rule that they did not create, but they do purport to make an authoritative application of that rule—i.e., one that we are bound to accept even if it is wrong.[23] An adjudicator could not settle the matter were we entitled to ignore

21 Though there is some controversy over whether valid consent requires the acceptance of the consentee, surely valid withdrawal of consent requires no such agreement unless there has been a promise. For discussion of consent, see Owens, *Shaping the Normative Landscape*, ch. 7.

22 These defects and the need for directive authority to resolve them are noted by Hobbes, *Leviathan*, 144–45, 180–81; Locke, *Two Treatises of Government*, 323–27; Hume, *A Treatise of Human Nature*, 541, 534–39; and Hart, *The Concept of Law*, 91–99, 198.

23 Hart, *The Concept of Law*, 141–45; and Raz, “The Institutional Nature of Law,” 105–15.

them whenever we deem their verdict to be incorrect, *even if we know we are right*. Thus, a power of command is needed not merely to legislate but also to ensure that the rules specifying our prerogatives effectively define our freedom by settling controversies about their application.

How do such controversies play out in the state of nature prior to the appearance of judges? Let us suppose the two of us disagree about where the boundaries of our land lie. In arguing our cases, neither of us is demanding that the other obey, that the other feel bound by our view of the rules simply because we have communicated the intention to bind them. Rather, we are trying to convince our neighbor that they are obliged to comply with our view of the rules (i.e., of what our prerogatives are) because that view is correct. If neither of us manages to convince the other, we may have to resort to force, and the stronger will prevail. Locke explicitly acknowledges that one can use force in defense of one's prerogatives, but again, each party maintains that what entitles them to use force is the fact that their view of both parties' prerogatives is correct, not that they are in authority over the other party.[24] If *A* secures the land by force, *B*'s physical freedom is curbed, but *B*'s prerogatives need not be compromised provided that *A* is in the right, both on the substance and about whether they are entitled to use force.

Might is not right, and such self-help provides no reliable protection for our prerogatives. To fix this, we must leave the state of nature, introducing an impartial adjudicator to make an authoritative determination of our rights and obligations. Adjudication transfers the decision to one whose interests are not engaged and whose verdict we are bound to accept. Such adjudicators are *pro tanto* entitled to enforce their verdicts, and enforcement restricts the physical freedom of the losing party; but provided the adjudicator's verdict is correct, it violates neither party's prerogatives. On the other hand, it is now up to the adjudicator to determine what those prerogatives are, and each party must act in accordance with the authority's judgment on this point, not their own.[25]

The intervention of an adjudicator *does* deprive both parties to the dispute of their *liberty*, which I define as the right to act on one's knowledge of what one is obliged (or entitled) to do. Liberty so defined gives you no right to act

24 Locke, *Two Treatises of Government*, 271–72.

25 Kantians emphasize the role of the law in resolving disagreements that stem from indeterminacies in property rights (e.g., Ripstein, *Force and Freedom*, 23). Where an adjudication performs this function, the distinction I make between proprietorial and directive authority blurs. On the other hand, prior to their legal recognition, there are many cases in which our property rights are settled either by preconventional morality or by prelegal convention in a way an adjudicator may get wrong. Once property rights have been legally recognized, an adjudicator may get the law wrong.

on a mistaken judgment about what you are obliged to do. Though you may be excused when your error is understandable, you would nevertheless be in the wrong. On the other hand, one might have thought, when someone *knows* what their obligations are, they are not to be blamed for acting on that knowledge.[26] Indeed, this may sound like a truism, yet, as we shall see, that truism is falsified whenever our liberty is legitimately curbed.

In the next section, I argue that exercises of directive authority curb our liberty while exercises of proprietorial authority do not. In the third section, I address what seems to many a more urgent matter—namely, coercion. Does the possession of directive authority give you privileges in that domain beyond those available to any owner? In the final section, we reconsider the Lockean problematic, asking whether the hierarchy implicit in any system of command is objectionable simply because it is one form of inequality or, more specifically, because it threatens our liberty. There is indeed a liberty-based objection to hierarchies of command that does not depend on any more general demand for equality.

2. Liberty and Responsibility

In the state of nature, our prerogatives are limited by the prerogatives of others, by their bodily and property rights. For example, having invited me into your house, you can require me to leave. You thereby exercise control over this aspect of my rights and obligations by declaration. Are the edicts of an adjudicator on a par with such a withdrawal of consent?[27] If so, there may be no deep difference between proprietorial and directive authority, any more than between bodily and property rights.

In responding, we start with the less contentious case, bodily rights, and return to property rights at the end of the section. Bodily rights protect a private sphere, a space of personal freedom, and, we may suppose, each such space is approximately equal. Some of those rights may be inalienable (e.g., the right not to be tortured or enslaved); others, like the right not to be touched, are alienable because the ability to modify them by declaration is needed so that the holder can control what others owe them. If someone tells me to stop touching them, I defer to their judgment about whether I ought to be touching them. I might disagree with them on the merits of the case, thinking they really

26 It is less clear what we should say about a case in which they act on a correct opinion about their obligations but without knowing that it is correct.

27 Darwall regards the withdrawal of (bodily) consent as a form of command (*The Second Person Standpoint,* 12–13). I mistakenly conflate proprietorial with directive authority in Owens, *Bound by Convention*, 170.

ought to let me touch them, but once they withdraw their consent, I desist because I feel obliged to leave that decision to them.

We defined freedom above as the entitlement to act as you see fit. The bodily rights of others limit my freedom so defined (and mine theirs); I feel obliged to defer to their wishes and so feel bound not to touch them should they refuse. Still, there is another more fundamental point on which I do not defer to them. In the state of nature, I make my own assessment of their entitlements and act accordingly. For example, they have no authority over whether, once they have withdrawn their consent, I am obliged not to touch them. I take a view on this, and if I misjudge the situation and end up violating their prerogatives, that violation is down to me. Furthermore, I retain responsibility for any compliance with their demands.[28]

I am *responsible* for an action just when, where it is wrong, I am *culpable* for its wrongfulness.[29] The bodily rights of others limit my freedom (and mine theirs), but I now argue that liberty, not freedom, is a precondition for responsibility so understood. True, I should let you decide whether I touch you, but the fact that I stop touching you because I take myself to be under an obligation to stop does not absolve me of responsibility for whether I touch you. I am still potentially culpable for desisting when I get my obligations wrong or have conflicting obligations. (In the latter case, you may share in my culpability.) I am absolved of that responsibility only if it is not down to me to determine what I owe you. That involves a deprivation of what I earlier called liberty, and liberty *is* a precondition for responsibility so understood.[30]

To grasp the point, let us elaborate our example by supposing that I am touching you because I feel obliged to administer essential medical treatment. The medical facts are not in dispute, but nevertheless, you refuse to be treated by me, perhaps because you do not wish to be in my debt. Let us further suppose that the two of us disagree not merely about whether you ought to be treated by me; we also disagree about whether I am obliged to desist once you have withdrawn your consent. Resort to brute force is impermissible for there is an adjudicator with compulsory jurisdiction whose ruling binds us and who decides in your favor. Why should I comply, given that I continue to believe

28 The same is true when I make a promise, and the promisee demands performance of the promise. See Owens, "Command and Obedience," 455.

29 'Culpability' and 'moral responsibility' are often used interchangeably. I am concerned with culpability rather than liability to compensation, punishment, and so forth, though these forms of responsibility often depend on culpability.

30 In Owens, "Rules and Rulers," sec. 4, I do not distinguish freedom from liberty as preconditions of responsibility.

(and may even know) that the adjudicator has got my obligations wrong? I consider and reject two answers before offering my own model of adjudication.

In Rawls's view, I comply because the adjudicator's ruling creates a new obligation to desist, and I ought to desist when it overrides my obligation to administer treatment.[31] The verdict of a Rawlsian adjudicator adds an extra deontic consideration to my deliberations: now I must weigh the obligation to respect the judge's verdict alongside the competing claims that the verdict was meant to adjudicate. If I am lucky, that might resolve the matter by tilting the balance in one direction, but if I am unlucky, it might leave the matter without any clear resolution or even create a dilemma where none previously existed.[32] And there is as yet no guarantee that other parties would arrive at the same all-things-considered judgment, that we will all view the adjudicator's verdict as decisive. Perhaps some of these challenges can be addressed by assigning the obligation of obedience great weight, but that does not help with a more fundamental problem.

Rawls's model assimilates my situation to one in which there are two people I am obliged to treat, both of whom request help, though I can help only one of them. The method of resolution in each case is the same—I should go with the weightier obligation; yet the cases seem very different. First, I make the call about whom to treat while the adjudicator makes the call about whether I desist. Second, if I make the wrong call about whom to treat, that is down to me: those who suffer will address their complaints to me. By contrast, if the adjudicator makes the wrong call about whether I am obliged to desist and I obey, my desisting is down to the adjudicator. The sick person's relatives should blame the adjudicator (and perhaps also the patient) but not me.

According to a second model of adjudication, the judge's verdict both creates an obligation to desist and *cancels* my obligation to administer medical treatment; hence, there is no need for weighing. Though that would explain why I cannot be blamed for compliance, the cancellation model goes too far in the opposite direction. We should not imagine that a mistaken verdict simply extinguishes any obligation to help, as if one had been released from a promise. A judge's verdict relieves me of culpability but without absolving me of all responsibility. Though no longer a suitable target of blame or subject of guilt, a conscientious agent who reluctantly obeys the judge feels a distinctive form of regret. True, anyone should regret the fact that the patient is not receiving the right treatment, but I experience what Williams calls *agent-regret*, a feeling that

31 Rawls, "Legal Obligation and the Duty of Fair Play," 119–21. Rawls is concerned with our obligation to obey the law, but his model may be applied to adjudication.

32 As Rawls ruefully admits, "it is as difficult to ascertain the balance of justice as anything else" ("Legal Obligation and the Duty of Fair Play," 129).

registers the fact that I am failing to discharge an obligation to help, albeit it a way that absolves me of culpability for that failure.[33] Such agent-regret would make little sense were my obligation simply cancelled by the judge.

Here is a better model of adjudication. I judge that I am entitled to treat you regardless of your refusal—sometimes we are obliged to ignore someone's objections in their own interests—yet, in recognizing the authority of the adjudicator, I also acknowledge that I am obliged to let the adjudicator decide what I am permitted to do. Their binding verdict gets me to desist neither by outweighing the obligation to persist nor by cancelling it but instead by excluding that obligation from my deliberations. I still claim to know that I have an obligation to persist—judicial verdicts are not self-verifying—but, out of respect for the adjudicator's (mistaken) verdict, I do not act on this knowledge in deciding whether to touch you. For the purposes of this decision, it is up to the adjudicator to determine what my obligations are. That is why, if I end up doing wrong, I can pass the buck to the adjudicator.[34] It is widely agreed that one cannot be blamed for violating an obligation when one cannot know that one is so obliged. The same is true when one is unable to act on one's knowledge that one is so obliged.

Unlike this mistaken but binding verdict, a withdrawal of consent (when valid) is self-verifying. When you tell me that I am obliged to stop touching you, you are not making a statement about what I am obliged to do anyway, a statement that is authoritative even if mistaken; rather, you are intending to *hereby* make it the case that I am obliged to stop touching you regardless of what I was previously permitted to do. And in the absence of an adjudicator, I comply as and when I judge that you have succeeded in making it the case that I am obliged to desist. Thus, my liberty (as we define it) is not compromised by a simple withdrawal of consent as it is by an adjudicator's verdict.[35]

Rawls might respond that I can pass the buck to the adjudicator for not touching this person simply because the judge's order justifies my not touching them: it is up to the judge to justify their order. This elides the difference

33 Williams considers a rather different case of agent regret: that of accidentally running over a child ("Moral Luck," 27–28). As Gardner suggests, this case is best regarded as involving the involuntary violation of an obligation ("Obligation and Outcome in the Law of Torts," 144–45).

34 For elaboration and defense of this model of adjudication, see Owens, "Rules and Rulers," sec. 3. In Owens, "Command and Obedience," I connect the model with Raz's notion of exclusion (446–47). See Raz, *The Authority of Law*, 21–25.

35 Korsgaard compares rebellion against a legitimate authority with "paternalizing an adult human being who is engaged in some sort of self-destructive behavior" since they both involve taking decisions that are not yours to take ("Kant and the Right to Revolution," 258–59). The two cases strike me as rather different.

between judging that you are not entitled to touch someone and judging that you are obliged to let the judge make that call for you—a difference registered in how we feel about what we must do.

Suppose I am placed in a dilemma by the patient's refusal to be treated: here I have clashing obligations to respect the patient's will, on the one hand, and, say, protect their interests or the interests of their relatives, on the other. All things considered, I may reckon that I ought to desist. Still, whatever I do, I wrong someone and suffer compunction, not just agent-regret. When I do as I judge best, I am committing a justified wrong.[36] Now an adjudicator intervenes. The judge's order releases me from this moral dilemma once I obey, and they assume responsibility for what I do. I react with some relief—or, if I prefer to make the call myself, with some resentment—and this is so even though I might happen to agree with the judge about how the dilemma ought to be handled and would have felt justified in so acting regardless. Even when the judge's order makes no difference to what I do, it gets me off the hook for doing it.

On all three models of adjudication, the rationale for the authority of an adjudicator is not the value of giving anyone control over their own body (or property) but rather the need to deal with disagreement about the content of our rights and obligations. In the first section, I suggested that neither a withdrawal of consent nor a transfer of property creates fresh obligations; rather, they simply reimpose or refocus existing obligations. Because the same interest in personal freedom explains their bindingness, it would be misleading to describe the obligations created by such exercises of deontic power as new. We can now see why it is otherwise when someone is called upon to settle a dispute over the exercise of these powers by issuing a binding verdict. The resulting obligation has a basis (in the need to resolve disagreement) quite different from that of the claims being adjudicated. Such an exercise of directive authority imposes a fresh obligation by declaration.

A system of adjudication is effective when it is significantly easier to identify adjudicators and their spheres of competence than it is to agree on our respective obligations in disputed cases. Still, must I not form a view about whether I am obliged to obey the adjudicator and act on *that* judgment? Yes, and if I get this wrong, I am responsible for my error; others can blame me if I do not check the authority's credentials or make sure they are operating within their jurisdiction, etc., but these are all matters that can be settled without addressing the underlying issues.[37] The fact that a properly credentialed authority tells me

36 Williams, "Moral Luck," 59–60, 73–74. On the inevitability of such dilemmas, see Owens, *Bound by Convention*, 103–4.

37 Raz, "The Institutional Nature of Law," sec. 3.

that I am obliged to do something may ensure that I must obey them without establishing that their verdict is correct. Once I am satisfied that their order binds, I need no longer consider whether the judge is correct (nor how disruptive disobedience would be and so forth). Directive authority can successfully manage disagreement only if I can settle whether I am obliged to obey without asking whether the authority has got my obligations right. Genuine authority is not absolute authority for there are limits on the range of considerations its orders exclude (no atrocities, etc.), but where the authority is legitimate, most of the time, I should obey without considering the merits of what I am being ordered to do.[38]

Turning finally to property rights, we can now see why an exercise of directive authority like an adjudicator's verdict curbs our liberty in a way that an exercise of proprietorial authority does not.[39] Confronted with someone who tells me to stop touching them, it is my job to decide what I am obliged to do and my fault if I either get this wrong or otherwise fail to act correctly. Likewise, when you ask me to leave your house. Prior to adjudication, it is up to me to decide whether I am obliged to leave, and it is down to me should I violate your rights by remaining: my liberty remains intact.[40] Things change once either property or bodily rights are codified in law. So long as I am subject to the authority of an adjudicator, this is no longer my call, nor is it my fault if I do the wrong thing in compliance with their verdict.

One might concede this point but doubt its practical significance given that property rights are now codified in law almost everywhere: few of us inhabit the state of nature. I agree that the question of whether property rights (etc.) ought to be legally regulated at all is of largely theoretical interest, yet it remains a real issue how far we should extend that regulation. Take nuisance. There are norms, be they conventional or preconventional, that forbid me from polluting my neighbor's property, from disturbing their peaceful enjoyment of it with my noisy parties, and so forth. A version of these norms often binds us regardless of whether they are codified in the law. We must then decide which of these norms ought to be promulgated in written form and administered by judges with powers of adjudication and enforcement. Like adjudication, an authoritative codification purports to reflect prior norms, but we are obliged to accept it even if we happen to know that the code mispresents the norms.

38 Owens, "Rules and Rulers," sec. 3.

39 In the jargon used in Owens, "Rules and Rulers," ownership is not an office (sec. 2). See also Owens, *Bound by Convention*, sec. 7.4.

40 In both cases, it may be natural to say that I "obey" when I comply with the relevant demands. If so, demands for obedience are not confined to directive authorities.

Codification and adjudication both threaten our liberty in a way that the informal property rights that they seek to codify do not and in a way that bears on how far the codification should extend. Some things should be left to be settled by the conscience of individual neighbors, and one important reason for allowing people to sort matters out among themselves is that their liberty is curbed once the law intervenes. Even when there is a (sensible) law on the books that I can invoke, I might not take my neighbor to court in part because I do not wish to see them deprived of their liberty. Thus, it matters in practice as well as in theory that different forms of authority, proprietorial and directive, are to be justified in different ways, and each faces their own issues of legitimacy.

3. Liberty and Coercion

Directive authority involves both a power to impose an obligation and a right to enforce it. I highlight the fact that being obliged to obey deprives us of our liberty, of our right to act on our own view of what we are entitled to do, but many liberals are more worried by directive authority's association with coercion. Indeed, for Locke, it is by surrendering our right to enforce our prerogatives that we establish civil government.[41] Perhaps the fact that the state claims the power to bind us by declaration is, by itself, no big deal. The real problem is how it undermines our *physical* freedom by coercing us.

In the last section, I claimed that the edicts of a directive authority are objectionable in a way that the demands of a proprietor are not, but again, this may be doubted if the real issue is coercion.[42] In the state of nature, I may well be entitled to coerce my neighbor when using my Lockean right of self-help to enforce the prerogatives of land ownership, e.g., by forcibly removing my neighbor or their cattle from my land. Here, my neighbor's physical freedom is compromised though I exercise no power of command. Is my behavior any less problematic, except perhaps in the smaller extent of my power, than the enforcement activities of a directive authority?

We can see a difference here once we realize that what makes coercion a peculiarly problematic way of getting someone to do something is that it deprives them of responsibility for compliance. Nothing in the very nature of a prerogative authorizes you to deprive people of responsibility for respecting it should they threaten to violate it. Sometimes you are entitled to use force (or the threat of it) to enforce your prerogative, sometimes you are not; the

41 Locke, *Two Treatises of Government*, 323–25.

42 In making the case that proprietorial authority limits freedom, Cohen focuses on coercion (*Self-Ownership, Freedom, and Equality*, 55–59).

mere fact that you have a prerogative tells us little one way or the other. By contrast, to claim legitimate directive authority over someone is to claim to be entitled to deprive them of responsibility for compliance with your edicts. By the same token, if someone is genuinely entitled to command you to act, then the aspect of coercion that renders forcing you to act distinctively objectionable is removed.

Let us first ask why coercion is a distinctively problematic way of getting someone to obey you. By 'distinctively problematic', I mean objectionable independently of any physical or psychological damage it may cause. One familiar answer starts from the fact that coercion deliberately curbs physical freedom, i.e., our ability (rather than our right) to do as we judge we ought. The answer is plausible when coercion takes the form of brute force, as when the state imprisons you to prevent you from going abroad, or your neighbor removes you from their land. Brute force clearly limits your physical freedom; it also deprives you of responsibility for what happens. It is not down to me to justify my being imprisoned or removed from your land when these things were simply done to me, though I may be responsible for actions of mine that led to these outcomes. The coercer alone bears direct responsibility for what happens, and, I propose, it is this transfer of responsibility that makes coercion peculiarly objectionable. So far so good, but a rather more common mode of enforcement is to *threaten* you with imprisonment or deprivation of goods or some other undesirable result in the hope that, even if you do not conscientiously do what you are obliged to do, you at least comply in order to avoid the execution of the threat. On what I call a *justificatory model of coercion*, the threat shields you against blame for compliance with the threat not by depriving you of responsibility for compliance but by justifying your compliance.

What has coercion by threat, so understood, got to do with the loss of liberty? After all, you remain able to decide whether you ought to comply with a threat (as also whether you are permitted to comply) and to act accordingly. The effect of the threat is to change what you are justified in doing rather than to prevent you acting as you judge best. Thus, you remain responsible (i.e., potentially culpable) for your compliance with the threat, avoiding blame only when compliance is justified. Advocates of this model of coercion tend to argue that coercion by threat nevertheless wrongs the coerced when it proposes to curb their physical freedom in a way that violates one of their prerogatives.[43] I doubt this works, but rather than pursuing the matter, I suggest an alternative.[44]

43 See, e.g., Scanlon, *Moral Dimensions*, 74–82.

44 I develop the alternative in more detail in Owens, "Coercion as an Excuse."

To see how coercion by threat, whether backed by command or not, degrades our responsibility without affecting our physical freedom, we must adopt an *excusatory model of coercion* rather than a justificatory model. Provided they are not driven out of their mind by fear, most people subject to threats remain able to act on their judgments about whether to comply, and they are perfectly entitled to so act so long as the coercion is not backed by the command of a legitimate authority. Yet such an agent may have an excuse for compliance. Excuses come into play when the agent does something they know they are forbidden to do (or ought not to be doing for some other reason) even though they remain capable of acting on their practical judgment. Though I am physically capable of overcoming my fear of flying to visit my mother in her retirement home and though that fear does not justify my neglect, it might nevertheless excuse it, providing me with a shield against blame. Others should not condemn me for neglecting my mother, though I still feel remorseful at giving in to fear.[45]

Now suppose that a coercive threat is a threat that can excuse compliance even if it does not justify it. The bank robber with a gun might require you not merely to hand over the money but to seriously injure a braver colleague in the process. Provided you are not driven out of your mind by fear, you remain both able and entitled to act on your judgment about what you are obliged to do. Still, your weakness may be excused even if it is not, like simply handing over the bank's money, justified by the threat. Others should not blame you for injuring your colleague, though you may feel ashamed of submitting to the threat and guilty about the injury. By contrast, the coercer is fully culpable for getting you to comply with their threats. On an excusatory model of coercion, it is problematic to get someone to do something by means of coercion (whether by threat or brute force) because you are assuming responsibility for their compliance.[46]

We can now return to the special connection between coercion and command. As to prerogatives, the rationale for their enforcement is to ensure that the relevant person has effective control over some private domain. Whether a particular prerogative is enforceable depends on its importance, on the one hand, and the costs of enforcing it, on the other. That is the sort of thing that the private enforcer in the state of nature, whether a party to the dispute or a bystander, must judge on a case-by-case basis. Coercion is justified in the state of nature when people are entitled to use force to assert their rights or those

45 This remorse involves more than agent regret. And unlike a case of justified wronging, it involves shame as well as guilt. See Owens, "Excuse, Capacity and Convention," 302.

46 The fact that you seek compliance is important to the nature of the wrong. If you drug someone with a view to causing them to lose their wallet, you wrong them in a way that may render you responsible for their losing their wallet, but you do not coerce them. Thanks to Crescente Molina for this point.

of others. For example, they may be entitled to push someone off either their body or their land. This is so when the costs of coercion (or risk thereof) and the associated deprivation of responsibility matters less than the need to secure control over the relevant thing. Nothing in the rationale for prerogatives that we have offered settles the issue one way or the other.[47]

On the excusatory model of coercion, the enforcement of both prerogatives and commands faces this distinctive objection: when I enforce either a prerogative or a command, I deprive my counterparty of responsibility for compliance. Still, there is a crucial difference: in the case of a legitimate command, we know that the rationale behind the obligation supplies an answer to that objection for we know the assumption of responsibility is justified by the very consideration that ensures the bindingness of the obligation, i.e., the need to manage disagreement about our obligations. Managing disagreement is all about passing the buck around. No such thing applies in the case of a prerogative. The fact that you are bound to stay off my land leaves it open whether I am entitled to enforce that obligation and thereby deprive you of responsibility for compliance; it all depends on the case.

I am not claiming that a directive authority is always entitled to enforce its commands. My point is rather that there is a special objection to the coercive enforcement of any obligation—one that is rebutted when the obligation is the product of a legitimate command but remains in play when enforcement vindicates even a well-grounded prerogative. Suppose my neighbor forces me off a disputed piece of land. Given that I see myself as being in the right, I feel entitled to offer reasonable resistance or at least do nothing to facilitate my removal. By contrast, once an authoritative adjudicator rules against me, I am no longer entitled to resist enforcement of the judgment, even though I continue to think that the adjudicator has got it wrong. There may indeed be other objections to coercion that mean that the adjudicator ought not to use force all things considered, but it is only the commands of such a directive authority that are *pro*

47 Kant (*Practical Philosophy*, 388), Korsgaard ("Kant and the Right to Revolution," 237), and Ripstein (*Force and Freedom*, 55–56, 84) each maintain that since violations of your prerogatives hinder your freedom and since coercion in defense of freedom is "a hinderance of a hinderance," you are (*pro tanto*?) entitled to use force in defense of your freedom. Are they suggesting that any (binding) rule that regulates the distribution of freedom is enforceable simply in virtue of its content? Suppose there is a binding rule of etiquette that requires people on my side of the door to yield when we are both trying to get through. Does it follow simply from the fact that I would be hindering them by preempting them that they are *pro tanto* entitled to force their way through (which is surely a grosser breach of etiquette)? If the Kantian point is rather that a certain subclass of rules about the distribution of freedom is enforceable, we need to know what distinguishes the members of that class from our rule of etiquette.

tanto enforceable since it is only their rationale that connects the bindingness of the command with an entitlement to assume responsibility for our compliance. Hence the peculiarly oppressive character of a groundless claim to enjoy directive authority over someone, and hence the existence of a problem of legitimacy.

4. LIBERTY AND EQUALITY

We have formulated a conception of liberty and a conception of directive authority that explains how the latter undermines the former. But why exactly is this loss of liberty objectionable? Is it because the hierarchy implicit in directive authority conflicts with some general demand for human equality, because it involves an imbalance of social power of a sort also generated by the unequal distribution of property? Or does the fact that it deprives us of our liberty generate a specific complaint about directive authority, a special problem of legitimacy?

The latter seems to be Locke's view:

> Though I have said above ... that all men by nature are equal, I cannot be supposed to understand all sorts of equality: age or virtue may give men a just precedency: excellency of parts and merit may place others above the common level; birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects, may have made it due; and yet all this consists with the equality, which all men are in, in respect of jurisdiction or dominion one over another, which was the equality I there spoke of, as proper to the business in hand, being that equal right that every man hath, to his natural freedom, without being subjected to the will or authority of any other man.[48]

This special aversion to "being subjected to the will or authority of any other man" makes sense provided we understand a person's "natural freedom" as consisting in what I call liberty rather than in what I call freedom.

Locke tells us that a state is established when people surrender their right to enforce their prerogatives by promising to let the state do so on their behalf.[49]

48 Locke, *Two Treatises of Government*, 304. Locke may not be quite so blasé about social inequality for he thinks that the great inequalities produced by the institution of money are licit only because we have (tacitly) consented to the use of money as we must consent to the authority of our rulers (300–2).

49 Nozick's version of the Lockean problematic consists of an attempt to build a state on its citizens' rights of private enforcement. It is not clear to me whether either Nozick's protective associations or the minimal state that arises from them must claim directive authority in my sense. Perhaps they claim to be entitled to use force only when the prerogatives of their members have in fact been violated. See Nozick, *Anarchy, State, and Utopia*, ch. 2.

Such a surrender involves the loss of a freedom (to use force) without any loss of liberty so long as everyone makes their own judgments about whether the rights of enforcement that both they and others have surrendered entitle the state to coerce them in this particular instance. Of course, this "moral" freedom does not translate into much physical freedom when the state can overpower us all, but it does mean that you are not obliged to either obey or submit to coercion when the authority has got it wrong. Thus, in respect of your liberty, you are in the same situation as you were in the state of nature. Disagreements about prerogatives may be suppressed by collective force, but they are not met with any authoritative resolution.

To ensure such a resolution, the state's entitlement to use force must be grounded in the authority of a prior adjudication rather than in a combination of the prerogatives being adjudicated together with a right to self-help. Here, the state is not merely claiming to be entitled to use force against you; it is claiming to have that right *because* you are obliged to obey its edict (and so obliged not to resist any force it may use or to defy any threats it may make), all regardless of whether you know the authority to have got it wrong. It is this demand for obedience rather than a bare claim to be entitled to use force that both compromises your liberty and raises the problem of legitimacy.

The distinction we offer Locke between freedom and liberty makes good sense of what I call the *Lockean problematic*. Liberal egalitarians find significant imbalances of property holdings objectionable and propose to restrict them. They also seek to constrain state authority in various ways, and, for some, curbs on proprietorial and directive authority are based on the same concern with imbalances of social power.[50] I said earlier that our prerogatives, including those that protect our property rights, delimit the extent of our freedom, and I agree that we all have an interest in being free and that each person's interest in freedom deserves equal consideration. Perhaps this grounds at least a presumption that property holdings should be approximately equal. Be that as it may, the problem of legitimacy posed by directive authority concerns our liberty, not our freedom, and some societies refuse to tolerate inequality only when it assumes that specific form.[51]

50 For example, Kolodny suggests that what makes state authority more problematic than other forms of social hierarchy is not the nature but rather the extent of its power over us, together with the absence of various tempering factors present in those other contexts (*The Pecking Order*, 87–95, 122–25). Kolodny concludes, "If you press hard enough on worries about the state's encroachment on the individual, I have argued, you end up in a posture not so much of defense of personal liberty as opposition to social hierarchy" (403).

51 For example, Clastres describes American tribes with chiefs who have many more wives and much more prestige than their fellows but who wield little or no directive authority

There is a specific objection to directive authority that depends upon the fact that all competent agents have an interest in liberty, in being deemed responsible for their own actions, in not being treated like children. To be sure, normal people do not wish to be blamed, nor do they wish to be worthy of blame; but they do want to be taken seriously as agents, and that means being held responsible for their wrongdoing as well as being praised when they resist temptation or go beyond the call of duty. Such an agent has a complaint against being subject to directive authority. On some occasions, they may not press this complaint: relief at having a difficult decision taken out of one's hands can overcome any resentment. Still, self-respecting adults do not value for its own sake being ordered around. Since this interest in liberty is distinct from our interest in freedom, we should not expect legitimations of proprietorial authority to legitimate directive authority (or vice versa).[52] Nor need we adopt some controversial form of egalitarianism to motivate liberal worries about directive authority. Whether or not one should strive to reduce imbalances of social power more generally, claims to directive authority require a distinctive justification—a justification that lies in the need to deal with disagreement.[53]

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over them (*Society Against the State*, 27–32).

52 Hence, libertarian anarchism and authoritarian communism are each coherent.

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