

Social Justice In the Natural Law Tradition:
A Critique of Antimoralist Marxism from a Finnisian Point of View

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Qianlu Ying

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“So the virtues arise in us neither by nature nor against nature. Rather, we are by nature able to acquire them, and we are completed through habit.”

(Aristotle, NE)

“In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all.” (Marx:

Communist Manifesto)

“What is just draws the limits, the good makes the point.” (Rawls: Restatement)

Abstract

My thesis defends a natural law understanding of Marx against the view that Marxist social science theory is a value-free project incompatible with justice and morality. This defense has two aspects. The first aspect regards the substantive contents of Marx's notion of justice. The second aspect regards the methodology of social science. My arguments of both of the above two aspects are grounded in the natural law tradition, especially in the light of John Finnis's natural law theory of law.

In terms of the methodology of social science, Finnis endorses a the method of first person ideal-type description in describing legal phenomenon. Such a method distinguishes the focal cases of law from the marginal cases of law according to whether they embody or deviate from the ideal-type of law. The ideal-type of law, on the one hand, is defined by a set of first principles of natural law, which refer to a list of seven basic goods and nine requirements of the practical reasonableness. On the other hand, the description of legal phenomenon presumes that the human beings are practical agents who not only aim at the good, but have a self-understanding of themselves as practical agents as such.

In terms of the substantive aspect, Finnis identifies the rational foundation of law with the nature of human beings as persons in community. As persons in community, all individuals' well-being is inherently dependent on the thriving of the community; yet the thriving of the community is also dependent on free development of personality of all individuals. Persons and the community are two essential and integrated parts of the common good, which itself is a constituent part of the

well-being of an individual. Law and justice are understood by Finnis as the requirements of the common good in specific social and historical conditions. My work aims to show that both the Finnisian methodology of social science and his natural law understanding of justice is shared by Marx. Eventually, a liberal egalitarian theory of justice can be plausibly established.

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Part I

Introduction

There have been a number of works arguing for a Marxian conception of justice based on the comparative studies on Marx and Rawls. For example, it is claimed that Marx's ideas of alienation and exploitation can be construed as various forms of social injustice in the light of the two principles of justice argued by Rawls. It is also claimed that Marx's needs principle proposed in the *Critique of Gotha Programme* is an egalitarian distributive principle compatible with Rawls's difference principle¹. Moreover, when Rawls discusses Marx's criticisms of capitalism, he contends that his two principles of justice, and especially his distinction between liberty and the worth of liberty, meet socialist criticisms satisfactorily². As some have pointed out, "the lines drawn between contemporary analytical Marxism and contemporary left-liberal political philosophy are fuzzy", and there is a common core there yet to be elucidated³. To a great extent, my present work is to facilitate an understanding of such a common core.

Yet two types of objections have been raised to question the legitimacy of having such a comparative study of Rawls and Marx. The first type questions whether Marx's dismissive remarks about justice shows the mistake of treating Marx as a Rawlsian liberal egalitarian thinker. This question has divided analytic Marxists into two camps. One believes such a controversy is largely misguided in the beginning, for it is so obvious that Marx, like many other mainstream nineteenth century liberal thinkers strongly believes in the social ideal of "equal talent, equal opportunities",

¹ See Daniel Brudney, "Young Marx and Mature Rawls", in Jan Mandle and David Reidy, eds., *A Companion to Rawls* (Wiley-Blackwell, 2014), Chapter 6.

² See John Rawls, *Justice as Fairness: A Restatement* (Harvard University, 2001), pp. 177-8, 139.

³ See Rodney Peffer G., *Marxism, Morality, and Social Justice*, (Princeton University Press, 1990), p. 28.

and thus understands the need for creating proper social conditions to meet such an ideal⁴. But the other holds that Marx treats notions like justice, equality, distribution and etc., as ideological notions to be fully abandoned or surpassed in communism⁵.

The second type of objection is nonetheless a deeper methodological one. It is argued that Marx is a social scientist who seeks to describe the course of human history in a causal, explanatory way. Social scientists predict future tendencies without judging whether the predicted future events are good or not. Such an evaluation is not a scientific work. While Rawls, as a normative thinker, proposes a theory of justice to provide practical guidance for citizens to establish and maintain a just society, Marx, as a social scientist, does not think communism is a moral “ideal to which reality [will] have to adjust itself”, but rather a “real movement which abolishes the present state of things”⁶.

Previous scholars who are sympathetic with the moral dimension of Marxism have already been done a great work to handle the above two types of objections. My work, therefore, is based on an sincere acknowledgement of their important contributions to the construction of the Marxian theory of justice. However, I believe there is one shortcoming of the previous works, i.e., they lack a unified and systematic philosophical framework to be tied together. When I realize that Finnis’s natural law theory of law is intended as a social science theory of law, and covers both a substantive understanding of justice and a methodological defense for involving justice in the social science

⁴ See Brudney (2014), Chapter 6.

⁵ See Peffer (1990), p. 10.

⁶ See Karl Marx (1932), *German Ideology*. Marx claims that “communism is for us not a state of affairs which is to be established, an ideal to which reality [will] have to adjust itself. We call communism the real movement which abolishes the present state of things.” Retrieved from <https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>

description of law, the idea of handling Marx' relation to justice in the light of the Finnisian framework just occurred to me. With deeper understanding of Finnis's natural law theory, I grow more convinced in the possibility to remedy the shortcoming by appealing to the natural law tradition to shed a light on our understanding of the relation between Marxism and justice.

2

According to Finnis, law and justice are two indispensable, constitutive means for the well-being of human beings. To explain, first of all, the well-being of human beings is understood as the free development of individuals, and individuals are understood as persons in community. By "persons" Finnis means all individuals have their own unique personalities. They are nonfungible beings whose worth as persons are not commensurable, exchangeable or maximizable according to some common benchmark. Yet to say that individuals are distinct persons does not mean that they are selfish egoists or isolated atoms. Rather, individuals can only flourish in a community through cooperation with one another. This not only means that persons must cooperate with each other to survive, or must interact with each other so as to make use of each other to suit their own purposes. Cooperation is necessary also in the sense that the well-being of one's own person is inherently linked to other persons' well-being, and without other persons' well-being, one's own well-being would be substantively incomplete.

However, secondly, the well-being of all persons is impossible without a good maintenance of an ensemble of material and social conditions. The ensemble of conditions refer to the cooperative

modes, social and cultural resources that are necessarily required by the individuals who want to realize the free and authentic development of their personalities. Among these conditions one important condition is a stable and fair social coordination among all citizens. The principles we appeal to regulate forms of social coordination, therefore, are law and justice. They are understood as the concrete principles demanded in specific historical and social conditions for the purpose of the well-being of all individuals. In a word, law and justice should be regarded as necessary means for a further end.

The above understanding of human beings as persons in community, next, is included by Finnis in his description of legal phenomenon as a practical presumption, which provides the rational foundation for our understanding of law. To explain, there is a dual feature of his natural law theory of law. On the one hand, Finnis emphasizes that jurisprudence, which is intended as a social science theory of law, is a causal explanatory theory. It seeks to describe the “phenomenon of law” by using causal explanatory terms, rather than prescribe what kind of laws or legal phenomenon there should be. However, on the other hand, his description of law also involves a normative dimension by making moral evaluation of law an intrinsic part of the theory. The reason why a descriptive theory can also have a normative aspect lies in the method of ideal-type description used to describe the social phenomenon. In his description of legal phenomenon, Finnis identifies the ideal-type of law with laws aiming at the common good. The focal cases of law are those cases embodying the ideal type, and the marginal cases are those deviating from it. Thus by describing the marginal cases he is not only describing the cases as they are, but making a criticism of them as failing to satisfy the ideal type.

Besides the endorsement of ideal-type description, Finnis's theory of law also adopts a first person, participant point of view, rather than a third person, external one. By defining the focal cases of law as being conducted by human agents who presumed to be practically reasonable persons aiming at the good, its moral evaluation of law is given from within the theory of law and made from an internal participant point of view, rather than from an outside observer's point of view.

Such a Finnisian natural law theory of law can help us debunk both the substantive and the methodological objections to the interpretation of Marx from a liberal egalitarian point of view. In terms of substantive objection, the aspiration to go beyond justice has been long witnessed in Marxism. Different arguments have been raised to show that ideas like the common good, law and justice, and the political community are not needed in communism. Yet Finnis's understanding of justice as a constitutive means for the end of the realization of one's distinct personality would convincingly show that the idea of going beyond justice is neither humanly possible nor humanly desirable.

Specifically, I will distinguish five kinds of anti-justice arguments proposed by some Marxists so far, and then respond each of them in the light of the notion of persons in community. To enumerate, first, the Threat to Individuality Argument says that one could be deprived of one's individual freedom to live one's own life as one pleases in the name of the common good. Secondly, the Oppression Argument says that law and justice are mainly social rules and powers manipulated by class ambitions and group biases, whereas in a future ideal society without those biases they would be overcome and disappear. Thirdly, the Coercion Argument says that law and justice are tools of social control for punishing bad people and recalcitrant behaviors, and they would be no longer

needed if they don't happen in future societies. Fourthly, the Regulation Argument says that law and justice, as regulative and distributive principles, are needed only in certain unfavorable social and human conditions. If the scarcity of material resources and egoistic psychology were overcome, there would be no need to have law and justice. Lastly, the charge of ideology says that law and justice are formal, juristic notions that do not guarantee the substantive justice and fairness. Hence even if they are necessarily needed, they lack intrinsic value. Yet I will argue why from a Finnisian point of view none of the five arguments against justice are strong enough to show law and justice in general should be abandoned. In fact, quite contrary, it is both a requirement of the common good and a rational necessity based in practical reason that law and justice should be regarded as necessary social conditions for the well-being of human beings.

Next, in terms of the methodological objection, there is a long-standing positivist stance that social science should not be mixed with moral evaluation of its subject matter. Consider the example of jurisprudence. One reason behind such a contention lies in the worry that by mixing the descriptive and the evaluative one would be mistakenly conflating what law is and what law ought to be. Such a conflation would further result in a problematic understanding of the notion of legal duty. If unjust law should not be regarded as real law because it does not fit the ideal of what law ought to be, then it seems to lack legal validity for the citizens. Yet in most existing legal systems unjust laws impose the same type of legal obligation on citizens and provide genuine legal reasons for them to obey. A third reason is nonetheless a metaphysical one. It is argued that the natural law presumption of human beings as aiming at the good is a teleological theory of human nature that is metaphysically suspicious for a modern mind. While Finnis claims that his list of the basic goods is just self-evidently true and universally objective, it is impossible to justify from a scientific,

empirical point of view. Lastly, there is a pragmatic worry related to such a metaphysical one. Since the natural law presumptions of human nature and the basic goods cannot be sufficiently justified to all, an assertion of these principles could unjustly impose certain life styles by legal rules on some social members without respecting their freedom to live a life as they see fit.

Yet none of these worries are sufficient for disproving the natural law explanation of law. The first two challenges about the conflation between *is* and *ought* can be met by the method of the ideal-type description. Unjust laws are defective and marginal cases of laws. While they impose at least prima facie legal obligations on citizens, whether one has an all-things-considered reason to obey them is a concrete practical question subject to secondary principles of practical reasonableness. Next, as to the metaphysical worry, the presumptions of the practical agency of human beings and the list of the basic good are made in a de-metaphysical fashion in the sense that their truth needs not be justified by any deep metaphysical or religious groundings, such as the order of the universe and ultimate creator. Although philosophers have been answering those deep metaphysical questions in various ways, such as explaining human nature by the existence of a divine being, or human essence, or some form or idea, or some other descriptions of ultimate reality, Finnis contends that such a metaphysical quest should be regarded as a theoretical question rather than a practical one. Hence those metaphysical questions should not concern us from the point of view of practical reason, and it should be sufficient for us to “stipulate” the truth of the first principles without asking for further proof in any deep metaphysical sense. Lastly, Finnis emphasizes that natural law tradition has long recognized the open-endedness of social life. Given the reasonable diversity of the ways of combining different basic goods, and the limitless ways of participations into the basic goods, social life allows for a limitless possibilities of reasonable personal choices .

The purpose of forming community should not be regarded as determining the final ends for persons, but rather providing necessary material and social means for the effective exercise of persons' capacities and realization of their life goals irrespective of the contents of them. One most important aspect of the requirement justice, therefore, is to help people to self-help, which is called by Finnis the principle of subsidiarity.

3

I will show how Finnis's natural law theory of law can be used to shed some light on our understanding of the relation between Marxism and justice. Consider, first, the first substantive type of anti-moralist arguments. Marx can be regarded as sharing Finnis's understanding of individuals as distinct persons in community, and his social ideal can be understood as a collective creation of a social world by all for the end of the free development of the distinct personalities of all. Therefore, like Finnis, Marx should also be regarded as understanding our social cooperation as a constitutive condition for that end in virtue of its providing the necessary material and social resources for all. Moreover, these two similarities between Marx and Finnis constitute the grounding for my defense for the Rawlsian liberal egalitarian interpretation of Marx. I will show why the majority of the contemporary Marxists who attack the Rawlsian approach to Marxism have badly misunderstood Rawls. They wrongly accuse Rawls of being an egoistic or individualistic liberal thinker, and thereby failing to appropriately appreciate the value of constructing a Marxian theory of justice according to the benchmark of the Rawlsian principles of justice. As a matter of fact, the two principles of justice proposed by Rawls can help us recognize

Marx's insightful criticisms of the formalistic feature of equality and the claims on human rights in the existing capitalist system.

Although I will not argue for the specific principles of justice for Marx, I will stand along the same line with other main contemporary Rawlsian scholars in arguing that there are more agreements between the two than their disagreements. One most important and basic common ground between Rawls and Marx, for instance, lies in their natural law understanding of citizens persons in community. Precisely speaking, citizens as persons are both *rational* and *reasonable*, with the former being subject to the latter. The capacity for rationality means human beings are distinct persons who seek to realize their own individuality by living a determinate form of life according to their own conception of the good. The capacity for reasonableness means they are persons in community and by nature social beings, who cannot realize such a social nature without subjecting their individuality to the requirements of the common good of the political community. The well-being of individuals and the well-being of the political community are harmoniously integrated. On the other hand, although there might be some difference between Marx and Rawls on whether the difference principle constitutes the best principle of handling socioeconomic inequalities, Marx can nonetheless be regarded as endorsing Rawls's first principle and the first half of the second principle. It is therefore important to acknowledge that both theorists reject the idea of promoting economic equalities for its own sake without taking into account the equal standing of citizens in terms of other important rights such as constitutional rights and important political rights. Finally, although Marx seems to emphasize the abolition of the private ownership of the means of production, which is taken by many as the most important evidence for proving the incompatibility between Marxism and Rawlsian liberalism, there is explicit textual evidence showing that Rawls

is open to liberal socialist regime by allowing for the public ownership of the means of production according to the concrete empirical and historical contexts.

Next, in terms of the methodological objection to the construction of a Marxian theory of justice, Finnis's natural law theory can also convincingly show that Marx's social science explanations of human economic production and general history do not have to be understood as value-free or incompatible with justice and morality. According to Finnis, social science descriptions of social phenomenon are not only made for the sake of making causal explanations of empirical events, but also for the sake of understanding the point of our own social world and our own practical activities. Such an understanding is a practical self-understanding in the sense that as participants we take a critical view on our own behaviors with the purpose of improving them for the common good for all participants cooperating with each other in a community. By describing the focal cases and identifying the deviating marginal cases, theorists are also making moral criticisms and pointing toward the direction of social practice, or the end of changing status quo. This makes social science theory intrinsically liberating and revolutionary, which is core to Marxist methodology of social science. In criticizing the previous philosophers as only interested in "interpreting" the world and advocating the liberating project of "changing the world", Marx can also be viewed as sharing with Finnis on the primacy of practical reason over theoretical reason.

Last but not least, both Marx and Finnis are hopeful writers who believe in the possibility of the creation of a desirable form of social cooperation that fits with the needs of human beings. In fact, so dis Rawls. Their hopeful doctrines presume that human beings do not have an incorrigibly sinful or crooked nature no matter how material and social conditions are. Rather, human beings and

their interactions in the social world would best express, or best realize, their human nature as social beings aiming at the good under favorable material and social conditions, and they would be naturally motivated to collectively create such social conditions once they are able to do so. Not only the generation of favorable social conditions is well recognized by the practical reason by human beings as a rational necessity, but the historical generation of those conditions is realistically within the capacity of human beings.

Hence although Marx occasionally makes utopian remarks about the future social conditions, his advocacy for the needs principle, which demands proper distributive principles to regulate the use of the common and personal stocks, shows Marx holds on to the belief that a more desirable future human society is feasible. In fact in most cases Marx shows strong convictions in the necessary coming of such a future society. Yet irrespective of how optimistic he is, one message is clear: Marx believes some important changes of existing social conditions are needed to turn the existing exploitive social conditions into a better one. In that future society, there will be a more desirable mode of production, a more fair and just mode of distribution of the material and cultural resources, and thus a breakdown of the existing oppressive economic and power relations between citizens. The goal of such changes is also clear: following a natural law understanding, the change of social conditions into a better one is to make the social ideal realistic and feasible. That is, the necessary social conditions are provided to ensure that all individuals are equal beings, and their chances of free development of personality are all well provided by collective activities by all.

Although I defend the construction of a Marxian theory of justice on the basis of Finnis's natural law methodology of social science, there is nonetheless an independent question regarding what constitutes the most reasonable social science method. Answer to this question would affect how one should evaluate my use of Finnisian methodology from an independent and objective point of view. So in the last part of my work, I am going to provide a general picture of methodology of social science by discussing three different views in the broad spectrum from the Positivist Methodology, the Finnisian Natural Law First Person Methodology, and the Realist First Person methodology.

First of all, positivist methodology adopts a third person perspective without offering any internal evaluation of a social phenomenon from within the social science theory itself. It only describes the patterns of behaviors and provides causal explanations of the empirical events observed by the social scientist. But positivist social scientists do not necessarily deny the normative evaluation of the empirical phenomenon described in their theories. It is only that they try to separate the descriptive from the evaluative, leaving the latter to other disciplines such as moral philosophy and political philosophy. Furthermore, from a practical point of view, a positivist might emphasize the importance to do moral philosophy as a necessary supplement to the social science description of our social world, for the scientific prediction of human history and social tendency does not exhaust our self-understanding of ourselves. This would distinguish a positivist standpoint from a reductionist one. To explain, to think human self-understanding can be reduced to non-normative,

or nonmoral factual description would be a robust reductivist approach to social science, which amounts to an impoverished understanding of our social world.

In contrast to the third person positivist view, the rest two methodologies both take a first person and internal point of view by presupposing a certain theory of human agency that understand human beings as moral agents. They both include a moral point of view in the social science theory so that in criticizing the social phenomenon as described in the social science theory one does not have to take a look outside of it. Social scientists offer a critical diagnosis of human activities from within their theories by regarding the human actors as practical agents with reasonable and rational capacities and acting for the sake of realizing their nature as such. They do that just like doctors who offer pathological diagnosis by using medical terms, which are normative terms, and provide medical advices to patients. Doctors naturally presume that patients care about health and tend to be motivated to cure their diseases as long as they are reasonable persons.

Yet in terms of the substantive contents of the theories of human agency endorsed by these two methodologies, there can be a large variety of them. On the one hand, it might be highly abstract, only asserting a type of human nature in a formal way, for instance, by presupposing the social and historical nature of human beings. Or, it can be very abstract and formal by appealing to some vague ideas of self-realization, self-liberation, without using any substantive contents such as aiming at some specific forms of the goods. On the other hand, those theories might endorse either a positive form or a negative form. Some might positively regard human beings as hopeful agents capable of realizing the good and working for the well-being of both oneself and other fellow human beings. Yet others might understand human agents negatively by treating them as creatures

only having lower desires like survival and mutual exploitation. Even worse, human beings might be imagined by some as agents who are necessarily controlled by special psychologies like jealousy and desires to dominate and manipulate other fellow humans. Indeed, there would be a large variety of different theories of human agency, and correspondingly different versions of moral and political theories and finally different versions of first personal descriptions of social phenomenon. My work follows the Rawlsian and Finnisian tradition and endorses a hopeful understanding of human beings. Human beings are persons in community, and they are naturally motivated to express and realize such a nature. While this presumption might be objected by others who prefer a more Hobbesian understanding of human being, I will not address this issue in my work due to the limited space.

Yet there is nonetheless another important issue relevant to my project. That is, some who are sympathetic with Finnis would find his approach not metaphysical enough. The question about how metaphysical social science methodology should be would affect which of the two methodologies should be understood as the most plausible one, i.e., a Finnisian one, or a realist one. These two candidates disagree over what should be the proper relation between the moral dimension of social science and the metaphysical foundation for it. I would defend the Finnisian methodology against the realist one. People who contend for a complete systematic understanding of human agency as a necessary part of our understanding of social science might find the realist methodology more appealing. But from a Finnisian point of view, realism in a strong metaphysical sense should not be a necessary part of our understanding of a good social science theory. From the view point of practical reason, metaphysical questions regarding the ultimate creator, the order of the nature, and the justification for the truth of the first principles of natural law are not

necessarily needed for describing human social practice. I believe this is a better understanding of the metaphysical, or “de-metaphysical” aspect of social science, and it fits better with the practical spirit of Marxism, especially with the practical emphasis in Marx’s eleventh thesis on Feuerbach.

Last but not least, the scope of my work is limited in three aspects. First, the primary goal of my work is to establish the natural law approach to Marxist social science theories and to defend its moral dimension, so I would not offer a careful analysis of the textual details in Marx, either his early humanistic thesis on alienation and his later theory of political economy. By focusing on the structural defense of my natural law approach to Marxism, I will only offer to argue that Marx’s historical description of human economic activities presumes a theory of justice, and that theory can be understood in the light of the natural law understanding of individuals as persons in community. More detailed works on textual analysis have to be offered in future works. Secondly, in terms of Marx’s utopian comments on future communist society, I am going to take a critical look at it by standing along the Rawlsian and Finnisian lines to treat political philosophy as a realistic utopia subject to the feasibility restraints set by our human conditions. A critical look would be endorsed, and thus constructive discussions would be absent in my work about Marx’s utopian imaginations of the future human and social conditions. Related to the second limitation, the third one is that I am not mainly interested in defending Marx per se, but developing what I consider to be the most attractive reading of Marx based on an overall evaluation of his social science theory, or his capitalism criticism as an empirical social scientific project. I don’t deny that there are other plausible readings of Marx. For example, while it is probably most harmful to endorse a reductivist style of positivism in our reading of Marx, it might nonetheless be plausible to endorse the more sober, Hartian positivist methodology to interpret Marx. But for the sake of

my project, I am not going to explore the room for sufficient textual support for and theoretical consistency in either the positivist or the realist methodologies. While other readers might be able to give some plausible and attractive alternative interpretations, I will only try to reveal the merits of reading Marxism in the light of Finnisian natural law approach to social science.

Part II

Natural Law Theory of Justice

Chapter 1. The First Principles of Natural Law

According to Finnis, the principles of natural law reflect the “deep structure” of practical thinking”⁷. Although this structure is “not to be found on the surface of every piece of moral discourse of ordinary people, it nonetheless constitutes the foundation of any normative attitude we have, irrespective of whether we realize or admit it or not. They are “the practical principles which enjoin one to participate in [the] basic forms of good, through the practically intelligent decisions and free actions that constitute the person one is and is to be”⁸.

Specifically, there are two parts of the first principles of natural law. The first part refers to a list of basic goods: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) friendship (social relation), (6) practical reasonableness and (7) religion. However, this list does not really resolve our problem of action but rather raises the question. Since there are limitless ways of realizing each of the basic goods, and there are limitless ways of combining these goods, when one chooses his way of living, life plans and personal commitments, one would still raise the question of choice in a sharper way: what should I do, given such a highly diversified “horizon of attractive possibilities”⁹? This urgent practical question then leads to the second part of concrete principles of practical reasonableness, without which we have no practical guidance to make intelligible life decisions in concrete circumstances. Following the following nine concrete principles constitutes a basic good of practical reasonableness mentioned above: (1) have a coherent life plan, (2) no arbitrary preference among the goods, (3) no arbitrary preference among the persons, (4)

⁷ See John Finnis: *Natural law and Natural Rights* (Oxford University Press, 2011), p. 103.

⁸ Finnis (2011), p. 97.

⁹ Finnis (2011), p. 100.

commitment, (5) detachment, (6) consideration of efficiency within reason, (7) respect every basic good in every action, (8) the promotion of the common good, (9) the principle of conscience as the ultimate principle.

Knowing that there are forms of basic goods and basic requirements of practical reasonableness is inadequate. We also need to know more about our relation to those basic goods. What is action? How should we understand the idea of realization of the basic goods as ends of our action? Moreover, we might also want to know the relation of our own pursuit of basic goods and other agents' pursuits. Will our own pursuits be in conflict with each other's pursuits? Are we by nature driven by self-interests and egoism, and thereby our concern about other people's well-being must be based on a well-balanced calculation? To those questions regarding the nature of human actions and its relation to our human agency, Finnis provides three explanations.

First, the relation between our action and the basic good should be understood as a kind of "participation", or "participating", which is a dynamic activity of "self-constitution" or "self-constituting" of oneself rather than an end-state condition. We are presumed to be agents who have the capacities for self-development and self-constitution¹⁰. It is only by exercising our capacities that we are participating in human goods¹¹. He uses Robert Nozick's thought experiment of "experience machine" to emphasize that "we want to *do* certain things (not just have the experience of doing them); one wants to *be* a certain sort of person, through one's own authentic, free self-determination and self-realization; one wants to *live* (in the active sense) oneself, making a real

¹⁰ *ibid.*

¹¹ Finnis (2011), p. 147.

world through that real pursuit of values that inevitably involves making one's personality in and through one's free commitment to those values"¹². Self-constituting, therefore, is not mainly about achieving some successful result or finishing up a task, but rather the dynamic process or the enjoyment of the acting or doing of it. It points toward a less usual sense of the word "happiness", a special and deeper sense of "fullness of life, a certain development as a person, a meaningfulness of one's existence"¹³.

Secondly, our participation in the basic goods constitutes a unique sense of personality for ourselves. One as a person has a distinct individuality, which can also be properly named as a "*nonfungible personality*". Although this idea of nonfungibility is not directly used by Finnis, it can be reasonably implied from his work. The first textual evidence lies in his criticism of the utilitarian calculation of overall happiness. The fact that two persons are doing the same things and sharing the some kind of situations does not make them identical or commensurable. What are subject to an interpersonal comparison are at most the objective situations, such as people's abilities, wealth, social positions, reputations, social and economic resources and etc., but the persons who have those comparable resources are not subject to a set of determinate objective rules of comparison. Secondly, it is more important to acknowledge that the reasons why a person should be regarded as having a unique personality does not consists in any particular ways of life she chooses to live; in contrast, it is her unique personality that constitutes the reason why any particular ways of life can be effectively practiced and why the relevant basic goods embodied by those ways of life can be meaningfully conceived of. Our ways of life and personal commitments can differ vastly due to our different temperaments, talents, interests and cultural and historical

¹² Finnis (2011), p. 96.

¹³ Finnis (2011), p. 97.

circumstances. One might be committed to doing philosophy, or emulating Mother Teresa, or being a narcissist, or choose to change one's life project every ten years, but one would still remain a unique person in virtue of one's own arrangement of the final ends and ways of life for oneself. It is one's doing a project, working on a commitment, or living a life that makes one a person. Our own personality not only provides the meaning of our living in the social world but constitutes the basis for our love for ourselves. In a nutshell, we are nonfungible persons, not reducible to or commensurable with other persons, no matter how similar our actions, psychological status and self-understandings are.

However, thirdly, it would be unfortunate if self-love means a rejection of equal respect for other persons. We all know what it is when self-interest is "sliding away from the dignity of 'self-constitution' towards the moral indignity of 'self-centeredness' and 'selfishness'"¹⁴. It is a pity for one to have no friends but to only love oneself. Therefore, "self-love (the desire to participate fully, oneself, in the basic aspects of human flourishing) requires that one go beyond self-love (self-interest, self-preference, the imperfect rationality of egoism...)"¹⁵. Finnis emphasizes that a complete understanding of the nature of human beings must involve the level of otherness. A complete self-constitution of oneself needs to be connected with the self-constitution of other people. There should be a mutual self-constitution between individuals, and each individual should both pursue their own well-being and contribute to the well-being of others. In other words, the self-constituting of individuals would only be fully realized in community and by subjecting one's own self-constitution to other demands of practical reasonableness such as the promotion of the common good, a non-arbitrary and equal respect for every person. Community is important not

¹⁴ Finnis (2011), p. 134.

¹⁵ Finnis (2011), p. 143.

merely because some important interests of individuals can only be realized through social cooperation, but also because one essential part of the basic goods for human beings is the good of friendship, as a social good, which refers to a care for the well-being of friends for the sake of friends. So far so good.

Besides the matter of the relation between the basic goods and our self-understanding of our distinct personality, we also need to know what is our relation to community. Two questions can be raised, one concerning the inner quality of community and the other external scope. In terms of quality, there are three types of relationships in community. First, people sometimes develop a business relation, or friendship of utility. Some common interests can exist between two persons, for example, if one is a student to the other. While the teacher receives payment from the student and the student acquires knowledge, they need to coordinate with each other and maintain the class in a good order so as to make sure both parties attain their own objectives. Yet they might be indifferent to each other's objective and only care about their own ones, each treating the other's realization of the goal as an instrument to her own goal.

The second kind of friendship, i.e., the relationship for fun, or friendship of play, is different from the first one in the sense that the success and enjoyable experience in the activity of coordination becomes an integral component of a person's success. Not only do the teacher and the student care about each other due to the utility brought about in the cooperation, they are also concerned about the pleasure of the cooperation for its own sake. The central feature of the relationship, therefore, is the good play of cooperation itself. The pleasure of teaching and learning is valued by both the teacher and the student as an intrinsically valuable experience and a source of their satisfaction.

Her partner's lack of pleasure in the activity would make her own pleasure lost¹⁶, and the lack of the good play of the cooperation would make the cooperation less valued by both of the two persons.

The last kind of relationship is friendship in its full sense. In that relationship, A and B have genuine love for the nonfungible personality of each other unconditionally, "not in devotion to some principle according to which the other (as a member of a class picked out by that principle) is entitled to concern, but in regard or affection for that individual person as such"¹⁷. The grounding for such a mutual love does not lie in a specific condition under which a friend's worth is assessed, such as a special type of character or a unique talent. Rather, it is one's nonfungible personality that constitutes such a basis for the unconditional love between A and B. With that love, they (i) act for each other's well-being for the sake of each other, and (ii) take each other's well-being as a constituent component of one's own well-being. Moreover, since self-constituting should be understood as a dynamic process of action, the full sense of friendship between A and B should also be viewed as an activity of doing things together, rather than an end-state. In other words, A and B's friendship is (iii) a "sharing of life or of action or of interests, an associating or coming-together ... a matter of relationship and interaction"¹⁸. Lastly, the reciprocal enjoyment or mutual pleasure gained by both friends in their active development of the friendship is "the source of the deep satisfaction", and "manifests the intrinsic value of the state of affairs [of friendship]"¹⁹. Such an ideal of friendship, i.e., the mutual self-constitution of both oneself and one's friend, shows an understanding of persons as beings in community. While most would agree it is much harder to

¹⁶ Finnis (2011), pp. 139-40.

¹⁷ Finnis (2011), p. 142.

¹⁸ Finnis (2011), p. 135.

¹⁹ Finnis (2011), p. 142.

achieve the last type of friendship than the first two kinds, it would be hard to dispute the value of it.

Next, in terms of the scope of a community, we need to know how large it should be to be a complete community. Should the size of a community defined by landscape, linguistic, ethnic or cultural difference? According to Finnis, a most inclusive sense of community should go beyond all kinds of territorial, economic and cultural differences. The best title to call such a community is the title of “body politic”. While family is an indispensable local community for human beings, it is exceedingly insufficient. As Finnis points out, as a thoroughgoing form of association “that breeds within itself”, family “is headed for physical self-destruction”²⁰. Family members, if they want to foster an all-round personal development, must go out of family to have a wider access to material and culture resources so as to acquire more opportunities and bigger room for diverse ways of self-direction and rich forms of self-constitution of their personality. We must go to society to initiate richer forms of interactions with people outside of family, such forming clubs, parties and other associations. But no matter how many types of associations there are in a society, it would follow that we must find ourselves in a most inclusive community that includes all members and all local communities from small scale families to a large variety of different kinds of associations. That community, which can also be called the political community, is most inclusive because there would be no aspect of human affairs outside of it²¹. The notion of the political community, therefore, is not a geographical, linguistic, economic or cultural notion, but rather a notion that covers and regulates all forms of human interaction and all aspects of human life.

²⁰ Finnis (2011), p. 148.

²¹ *ibid.*

But such an all-inclusive political community would naturally give rise to the problem of coordination. Our different upbringings, temperaments, interests and talents would make our ways of self-development highly diversified, and the limitless ways of combining the basic goods and limitless of ways of participating into the basic goods would necessarily bring about rich diversity and reasonable pluralism in human society. This would lead to the result that our personal commitments and life plans can be highly different and even in conflict with others'. One might object that no matter how diversified human values are, there would still be important unanimity on a wide range of issues. Finnis rejects this judgment as unrealistically oversimplified. Although it is right to acknowledge that there are some universal features of human pursuits that can legitimately exclude some forms of pursuits as indisputably unreasonable, we must also recognize the possibility of having deep disagreements among individuals on what constitutes the best form of life plans for themselves. Even in a family there can be reasonable disagreements on what is the best form of plan for each family member, let alone a large scale modern society that is composed of a large variety of people from different cultural and upbringing backgrounds. As a matter of fact, in the natural law tradition, there is a long-standing awareness of the reasonable diversity of human pursuits²².

While the fact of pluralistic forms of self-constitution is to be explained by the pluralistic combinations of the basic goods and forms of participation into them, there is yet another more important reason for us to be alerted to the risk of having an too optimistic conviction in unanimity as an easy resolution to the conflicts of interests. One basic aspect of the requirement of practical reasonableness is that one's well-being consists in her active, free and authentic practice of the

²² Finnis(2011), pp. 29, 81, and 127.

capacities for self-constituting by participating the basic goods, rather than her having a particular kind of life as an end-state as a result of being forced to do so by people with superior authority. Consider family. An assignment of a determinate end to a child without caring about her own interests or encouraging her to figure out her own personal commitment would be an oppressive demand. Finnis contends that “one who treats his or her spouse as a sheer possession, or who, when his or her children have been nurtured to the threshold of maturity, seeks to make those children’s basic commitments for them, robs that spouse or those children of a basic good”²³. One significant point of self-constitution lies in the freedom of one person to effectively use her own reason and knowledge to make free and authentic decisions. Without such a practice of one’s capacity to choose and reason, we cannot make sense of a number of moral notions such as freedom, authenticity, responsibility. All of these moral notions represent the constitutive aspects of the end of human flourishing²⁴. To sum up, for a political community that is modern, large-scaled, and highly diversified, there must be the problem of coordination among social members who are equal persons of distinct personalities. Unanimity is not sufficient to resolve the complicated problem of coordination due to the rich diversity of the life plans allowed by the first principles of natural law. So far so good about both the explanation of the internal quality and the external scope of the notion of the political community.

To conclude the whole discussion in this part, I want to claim that in Finnis’s natural law theory such a notion of human beings as nonfungible persons in community provides the rational foundation for our understanding of law and justice. Law and justice should be understood as constitutive means needed for the realization of the goal of the well-being of all persons in

²³ Finnis (2011), p. 146.

²⁴ Finnis (2011), p. 147.

community. It is out of a rational necessity that human beings must create the necessary material and social conditions to make the self-constitution and mutual self-constitution historically and realistically possible. The relation between human flourishing and the material conditions is a relation between an end and a means. In order for human beings to think, some biological and psychological conditions should be met, such as our having a properly functioning brain. In order for us and our society to flourish, we also need a provision of an ensemble of conditions, such as clean natural resources, languages, institutions like laws and property, and distribution of common stocks among social groups. However, these necessary and constitutive means should not be understood as forms of basic goods, but rather indispensable instruments we would need for participating in the basic goods²⁵. The final end is the realization of ourselves as nonfungible persons in community.

²⁵ Finnis (2011), p. 82.

Chapter 2. Threat to Individuality Argument and the Principle of Subsidiarity

To Finnis's views on law and justice as necessary means for the end of human flourishing, one might raise three objections. First, one might worry about the irreconcilable conflict between the private interests of an individual and the public interests of a community. It seems to be easy for the public regulations imposed by a community to jeopardize the free self-constitution of an individual, and thereby unfairly restricting and harming the distinctiveness of an individual's personality. Call this worry the "Threat to Individuality Argument".

Second, others might contend that law and justice should be, and could be, transcended in an ideal world. There can be two reasons for some to believe so. First, we might have observed that many political authorities have manipulative control of a majority of people who lack economic and political power, and their control is not for the sake of the benefits of those people, but for the sake of facilitating social stability by mitigating against class conflicts and potential social strife. The second reason for one to believe in the hope of transcending law and justice is rooted in one's hope of transcending unfavorable human and social conditions. In an ideal world, all individuals can freely decide what to do without being concerned with conflicts of interests. There should be no need to impose mutual interference on one's life plans and no need to distribute limited social and material resources among different people. Both two reasons, therefore, treat the need for a political community as a necessary evil. While the first reason states that in a better society without the oppressive control of some disadvantaged social groups there would be no need for public rules to regulate the social coordination, the second reason adds that in a more ideal society without lack of sufficient natural and cultural resources there would be no need for redistributive and

adjudicative principles to maintain an efficient and peaceful mode of coordination. These two reasons constitute two distinct forms of the “Beyond Justice Argument”.

Yet neither of the above two types of objection to the rational necessity of forming a political community that is ruled by law and justice are plausible. Finnis uses the analogy of ship-state to argue that there is an important value to be realized in the political community, which is called the common good, and such a good will neither threaten the distinct personalities of citizens nor be easily transcended as an unfortunate human need. Here is the analogy:

“The classical analogy of the ‘ship of state’, i.e. between governing a political community and navigating a ship, though it is by no means as unwarranted as many have claimed, is indeed misleading in one important respect. Since passengers normally board ships because they wish to get to an advertised destination (or to some set of ports of call), the analogy suggests that the political community, too, has some definite and completely attainable objective ... There is no reason to suppose that political community has any aim or destination of the latter sort. Equally there is no reason to suppose that the members of a political community each have, or ought to have, any such aim or determinate set of aims which political community does or should seek to support. Committing oneself to a life-plan is not at all like setting oneself to bake a cake. Nor is there only one reasonable life-plan or determinate set of reasonable life-plans, which the state should seek to get its citizens to commit themselves to. Yet there is a common good of the political community,

and it is definite enough to exclude a considerable number of types of political arrangement, laws, etc.”²⁶

To explain the similarities between the ship and the political community, first of all, it is the same in both cases that there is an ensemble of conditions to be met for the sake of realizing a certain end. In order to go to an advertised destination, people must embark on the ship. In order to reach the destination safely and pleasantly, they must also maintain an ensemble of conditions on the ship, such as securing safe food and clean water and certain degree of non-interference among travelers. The maintenance of the ensemble of conditions constitutes an important public interest for all members on the ship. By the same token, in order to exercise one’s capacities and carry out one’s own life plans, one must enter into the social cooperation to gain relevant material and cultural resources. And in order to do it well, one must also work with others to facilitate a peaceful mode of coordination and provide sufficient resources necessarily needed for one’s self-constitution.

However, secondly, a vital difference between a ship and a political community must be noticed. Although a political community is like a ship by functioning as a necessary means for the end of the well-being of all members in it, there is no determinate destination, or “the” destination, that should be assigned by the political community to its members. While all members on the ship are going to the same destination, all members in the political community can have remarkably different ends, since they can have different life goals. As is shown argued in the last part of my work, one essential requirement of practical reasonableness is our active and free exercise of our

²⁶ Finnis (2011), p. 155.

capacities by freely choosing and forming a coherent life plan and participating into the basic goods in a dynamic fashion. The great values in the authenticity, integrity and responsibility are all important aspects of our worth as a distinct person. Hence the ultimate goal of our entering into the political community is not to lose our distinct personalities, but to promote their free development. So Finnis claims that the most serious injustice done by a Nazi regime does not merely lie in its assignment of the unjust and immoral end to its citizens, but rather lie in the fact that “such regimes are in business for determinate results, not to help persons constitute themselves in community”²⁷. Hence, the reason why we should embark on the ship of political community consists in our need to fully express and realize our own human nature. We humans as practical agents are necessarily motivated to engage in the activities of free self-constitution. Under favorable social and historical circumstances, we would by nature develop ourselves “through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects (many of which will, of course, be co-operative in execution and even communal in purpose)”²⁸. Hence the political community should not be understood as a public authority that decide or choose on behalf of the individuals what kind of good life they must choose or what social groups they must attend, but rather provide the necessary conditions for the realization of her life project irrespective of its contents.

Finnis uses the term of “the principle of subsidiarity” to explain the above function of the political community. He further emphasizes that the principle of subsidiarity is not restricted to a political community but extended to families and social associations, small or large, simple or complex.

²⁷ See Finnis (2011), p. 274, and also VI.5, VI.8, VII.3, VIII. 5-6.

²⁸ Finnis (2011), p. 146.

Family is a smallest social association, whereas social associations are larger than family. In terms of the various forms of clubs and associations, the purpose of their existence is not to dissolve families by absorbing family members into the associations. When a person enters into an association, she is still a family member and family life might still be essential to her self-understanding. The all-round development of one's personality requires a richer scope of self-constitution and wider interactions with other individuals, both in and outside of associations. And precisely due to the high intelligence of human beings and the width and depth of the human interaction, different associations, like individuals, might have conflicts of interests. These conflicts might be deep but reasonable, so some sort of adjudication must be provided to publicly demarcate the boundaries to which the conflicting goals of associations should be subject so as to resolve the issue of coordination.

Thirdly, Finnis believes many people tend to underestimate the problem of coordination caused by the high intelligence of human beings. It has been argued that since individuals have different intelligence, dedication, skill, and commitment, when they form associations with people having a kindred spirit there would be a large variety of larger groups and associations that have difference and even conflicting goals. But it is also significant to realize the fact that even within a same social group of identical interests, dedicated groups members "will always be looking out for new and better ways of attaining the common good, of coordinating the action of members, of playing their own role", and thus many new proposals would emerge so that "until a particular choice is made, nothing will be in fact be done" within that group. Therefore, we can say that "the greater

the intelligence and skill of a group's members, and the greater their commitment and dedication to common purpose and common good", the more urgent the problem of coordination would be²⁹.

The urgency of problem of coordination, on the other hand, can be better understood if we recognize Finnis's emphasis on the requirement of equal respect for all persons. The natural tendency to freely self-constitute oneself is true to all human beings. That is, one of the basic requirements of practical reasonableness emphasizes the importance of respecting all persons as equal persons and rejects an arbitrary preference of some persons over others. Given the equal standing of all persons and the equal significant of their prospect of free self-constitution, an ensemble of social conditions should be maintained for all. However, such an egalitarian consideration of the equal prospect of all persons to realize their well-being does not mean that the goal of the political community should be a guarantee that all are happy, or that all must be provided with enough material resources to be adequately successful, irrespective of what their personal life plans are. Finnis's first reason is easier to acknowledge: there is no good reason to think that a society should be driven by the goal of satisfying every citizen no matter how disturbing, annoying, harmful her life goal is. It should be universally acknowledged that "art with all its (often competing) forms and canons really is better than trash, that culture really is better than ignorance, that reputation and privacy and property are aspects of or important means to human well-being, that friendship and respect for human personality really are threatened by hatred, group bias, and anarchic sexuality, that children really do benefit from a formation that defines path as well as illuminating horizons... and on the other hand, that servility, infantilism, and hypocrisy really are evils"³⁰. Yet the second reason is more important: between the extreme

²⁹ Finnis (2011), p. 232.

³⁰ Finnis (2011), p. 220.

good and the extreme bad there is still a large variety of diversified but reasonable life projects. Given the limited material and social resources, it is unrealistic to expect that all needs of all persons can be fully realized at the same time. Under such a limited human condition, what can be legitimately expected by citizens must first be determined by the political community according to the requirement of the common good. All persons, therefore, should adjust their ambitions and life projects within the restraints set by the political community.

I have used the above three explanations to illustrate the ship-state analogy to defend Finnis's view on the means-to-end relation between community and the well-being of individuals cooperating in it. I want to show that the point of the political community is to help the free development of the personalities of its members by resolving the problem of coordination. To recapitulate, in virtue of its being an urgent problem inevitably generated by realistic human and social conditions, having a political community subject to law and justice according to the requirement of the common good is necessarily needed as a constitutive means to the end of human flourishing. On the other hand, in an ideal society, the political community would not be oppressive since the ensemble of material and social conditions would be well maintained to promote all persons' self-constitution and mutual self-constitution. Both the Threat to Individuality Argument and the Beyond Justice Argument seem to be properly addressed.

However, two concerns might still arise. One might insist that if disputes among family members do not need to appeal to external authorities but can be resolved within the family, then disputes between larger social associations can also be expected to be resolved within associations without appealing to the external political authorities too. To answer this concern, Finnis first makes a

distinction between the principles of adjudicating conflicts between larger associations and those of adjudicating ones between families members. To try to treat larger associations as smaller ones like families is to fail to take into consideration the fact about the high intelligence of human beings. While in smaller associations that are formed by people sharing a common goal, resolution of disputes might be achieved by finding an unanimity among all group members, this cannot be realistically expected in the huge political community. On the one hand, this is because in a modern large-scaled political community, most people are strangers who live far away from each other. So the process of decision-making in larger associations is “more remote than the initiative of most of those many members who will carry out the decisions”³¹. On the other hand, it is also due to the “open-ended” feature of political community: “for here we have the most complex common good, which (subject to the principle of subsidiarity) excludes no aspect of individual well-being and is potentially affected by every aspect of every life-plan”, and “its ends are never fully achieved and few of its co-ordination problems are solved once and for all”³². Without such a realization of the open-endedness of a political community, one would be imagining maintaining the order of a political community to be a “simple objective like that of keeping a path free from weeds”, which amounts to “an utilitarian illusion”³³. Finnis strongly objects to the utilitarian illusion by arguing that utilitarianism treats human goods as “adequately quantifiable” and the common good as “a once-for-all attainable objective, like making an omelet”³⁴. In a nutshell, there is no good reason to think that the problem of coordination in large-scaled open-ended political community can be easily resolved in the same way disputes in families and associations are resolved.

³¹ Finnis (2011), p. 146.

³² Finnis (2011), p. 233.

³³ Finnis (2011), p. 262.

³⁴ Finnis (2011), p. 193, 262.

A second concern about the worth of the political community is rooted in Finnis's insistence on the realistic limitations of human conditions. One might contend that since there is no way under the existing human conditions to satisfy all persons' needs, and compromises and adjudications must be made according to some public rules according to which all persons adjust their own actions, this exactly shows that the political community must be an oppressive one. Yet we can still imagine an ideal world where there are no conflicts of interests and limitation on material resources. In that society law and justice, which were once necessary evils, are no longer needed. With the transcendence of law and justice, the need for political authority also would evaporate. Such a contrast between an utopian imagination of the future society and an existing society status quo strengthens the force of the Beyond Justice Argument in the sense that Finnis's natural law understanding of law and justice is too restricted by the feasibility restraint. A better understanding of justice, however, should not be limited by human reality but open to the creative imagination of the ideal.

There are two ways we can appeal to answer the second concern. First of all, I shall admit that theoretically speaking the utopian idealization of the future society can be logically coherent. Yet the problem is whether the idealization employed in political philosophy should go that far so as to transcend the realistic human conditions. It is not logically problematic to conceive human beings as saints or angels who are not recalcitrant and do not compete for material resources. The problem with such an utopian idealization, however, consists precisely in its utopian nature. If we are concerned with the political community made by and for the human beings like us, who are neither saints or angels, then we should restrict our attention to what is realistically feasible.

Secondly, under the presumption that we are not saints or angels, Finnis rejects the negative understanding of the requirement of the common good as only a punitive, oppressive and antagonistic instrument of social control. Some might insist that since it is not possible for all persons to realize their goals, the well-being of some persons must only be realized at the cost of other persons' well-being. However, Finnis provides a positive understanding of the common good as an objective requirement, which is made from the perspective of an ideal-observer and is publicly visible to and examinable by all persons. He explains such an understanding by discussing the idea of friendship. If two persons are friends, they would be naturally motivated to think about the well-being of each other, rather than only about oneself. As Finnis claims, "in friendship one is not thinking and choosing 'from one's own point of view', nor 'from one's friend's point of view. Rather, one is acting from a third point of view. This is a unique perspective form which one's own good and one's friend's good are equally 'in view' and 'in play'". Both of the two friends think from the point of view of an "impartially benevolent 'ideal observer', as a device for ensuring impartiality or fairness in practical reasoning"³⁵. Hence a positive value is realized in endorsing the objective, third person point of view in two friends' identification of the common interests between them. Before that common interest, each person's self-interest or the personal needs would lose their own priority, but be subject to the reciprocal relation between the two. But it is too hasty to conclude that the common interests between friends would be easy to determine. Quite contrary, it is not easy due to the complicated and diversified human pursuits. Finnis emphasizes that we need various procedural principles to help determine what is the real common interests for all social members. Fairness and equality in the procedure of decision-making, freedom of cultural and political debate, and the virtue of not pretending to be infallible and not

³⁵ Finnis (2011), p. 143.

silencing further rational discussions or reconsideration of the already made decisions, are all constitutive parts of the requirement of the common good³⁶.

In short, it is not only wrong to regard the political community as a larger scale of family or local social association, but also problematic to understand the requirement of the common good in the negative light by lifting the feasibility restraints of human and social conditions. The function of a political community is not to provide its members with the “ends in themselves but as means of assistance, as ways of helping individuals to ‘help themselves’, or more precisely, to constitute themselves”³⁷. One can only properly be called a free, authentic and responsible agent with practical reasonableness if one is able to freely self-constitute oneself by choosing a determine plan of life under the guidance of first principles of natural law. By participating in the basic goods that are embodied in one’s life plan, the nonfungible personality of oneself would be effectively constituted. One significant goal of the political community, therefore, is to protect “the dignity of self-direction and freedom from certain forms of manipulation”³⁸. Law and justice are concrete and specific applications of the above principles of natural law in determinate social, historical and empirical contexts. Hence, the Threat to Individuality Argument fails because the political community exists for the sake of respecting the unique personalities of all persons. All persons, on the other hand, given their reasonable disagreements and limited social resources, should be subject to the requirement of the common good by thinking from an ideal-observer point of view when they have conflicts of interests, because civic friendship requires impartial benevolence for the sake of the well-being of both ourselves and our friends’. This proves the problem with the

³⁶ Finnis (2011), p. 220.

³⁷ Finnis (2011), p. 169.

³⁸ Finnis (2011), p. 273.

Beyond Justice Argument. Relevant human and social limitations should not be easily negated but acknowledged as reasonable and realistic feasibility restraints on the idealization of political philosophy. In a word, the political community is a necessary and constitutive means for the realization of our own expression of our nature as persons in community. Such an expression should not be viewed in a negative light but rather be positively recognized as having important political values.

Chapter 3. Three Beyond Justice Arguments

Although I have already discussed the Threat to Individuality Argument and two forms of Beyond Justice Arguments by elaborating the key notion of persons in community, these discussions are not sufficient. In this part, I will provide a more detailed treatment of the Beyond Justice Argument by distinguishing three forms of it. Although there might be some overlapping points to be made, I believe they are necessary for a systematic presentation of the natural law response to the beyond justice concern.

What is common to all three forms is the belief that we need law and justice only because there are some unfavorable human and natural conditions that make them necessary. When these conditions no longer obtain in an ideal world, we should not need them any longer. First of all, one might observe that states are usually oppressive and filled with groups bias and class ambition. In reality, many political authorities seek to promote law and order only because they want to stabilize their own rule and authority, making sure that the majority of disadvantaged people who lack economic and political power will not rebel. The principles of justice are correspondingly decided and legalized by class ambitions and group interests who have the social and economic resources to manipulate the claims of public interest. In an ideal world where there are no such oppressions and manipulations, we seem to have no need for those corrupted versions of law and justice. Call this form of Beyond Justice Argument “the Oppression Argument”.

Secondly, without class domination and oppressive social relations, there can nonetheless be people who are selfish, irrational, and jealous. They might either openly violate the basic

requirements of law or act as free-riders to take advantage of other social members' contribution to the common good. To these recalcitrant individuals we must set up some coercive and punitive institutions to push them to cooperate with the rest of the law-abiding citizens. Yet in an ideal world where there were no "recalcitrance of the selfish" or "the brutish many [with] unprincipled egocentricity"³⁹, there would be no need for remedies for those human deficiencies. The benign function of law and justice in terms of their providing efficiency, peace and stability in social cooperation is not needed then. This argument can be called the Coercion Argument.

Thirdly, in the absence of social oppression and recalcitrant behaviors, our society may still have competing claims on the material and social resources. We need law and justice because we need a public authority to set up the public and universal rules to adjudicate our disagreements the distribution of material resources. Such a pragmatic need for justice is caused by the unfortunate empirical conditions of our human world. In our existing non-ideal social world, there is a gap between the limited natural and material resources and the rich needs of human beings, which makes it impossible for all persons to meet their distinct needs for self-development, and, as a pragmatic necessity rather than human necessity, calls for the generation of a public authority to make public rules to fix the distributive issue. However, in an ideal world where both the ever growing productive power of human kind and the abundance of material resources became a reality, there would be no need for such an authority. In Marx's word, in communism, all individuals' needs can be met, and they would be free to engage in any activities as they like. Call this argument the Regulation Argument.

³⁹ Finnis (2011), p. 260.

Hence, three different forms of beyond justice reasons have been mentioned, i.e., the Oppression Argument, the Coercion Argument, and the Regulation Argument. Among the three arguments, I believe the Oppression Argument can be refuted first, if we understand the oppressive laws and unjust principles of distribution as reflecting an ideological understanding of law and justice. To explain, a distinction between the ideological, or illusory notion of justice and the non-ideological notion of justice should be made first. Although some social members sincerely believe in the worth of some laws and principles of justice, they could be badly wrong in holding such a belief. These principles might actually serve wrong purposes or violate the requirement of the common good, but such a fact is not correctly realized by people. While we can find the originating source of beliefs and who some people come to believe them, whether we can also find the normative justification for those beliefs, no matter how prevalent or firmly held in social convention, is a different matter. Such a distinction between the origin of a widely accepted, yet probably ideological, conception of justice and the normative justification for it amounts to distinction between the following two types of rejection of justice: the first is called a “restricted rejection” of justice in an ideological sense, and the second is a “global rejection” of any conceptions of justice no matter what. While the restricted rejection is based on the presumption that a non-ideological and legitimate conception of justice can be constructed to be an independent standard according to which we evaluate the principles of justice that are widely accepted in the society status quo, the global rejection asserts that there would be no such thing as an objective value called justice we can appeal to.

In my view, the proponents of the global rejection have a heavy burden to explain how we can meaningfully describe certain social relations as oppressive. But if one endorses the restricted

rejection of justice, the above-mentioned burden of explanation can be removed. On the other hand, recognizing the room for finding a plausible, non-ideological understanding of justice does not entail that people must have infallible knowledge of those principles. On the contrary, there are indeed a large variety of different ways in which people are deluded, misled, concealed when they try to make correct judgment on the matter of justice. However, this is precisely the reason why we should only endorse the restricted rejection rather than the global rejection of justice. In a society that can be said to have pathology, we should provide a diagnosis of its pathology, which cannot be made without a presumption of a proper, non-ideological conception of justice. The possibility of attacking an ideological conception of justice is conceptually dependent on a non-ideological one. To use Rawls's word, one important role of political philosophy is to show why a conception of justice is really immune to the charge of ideology. So far for the discussion on the first form of beyond justice argument.

The remaining two forms of beyond justice arguments, i.e., the Coercion Argument and the Regulation Argument, raise bigger challenges to law and justice. Advocates of both arguments might admit the distinction between the global and the restriction rejection of justice, and accept an non-ideological conception of justice. Yet they might still insist that a non-ideological conception of justice remains a necessary evil in our current society, but should be no longer needed in an ideal society. I will show why these two arguments do not succeed by analyzing Finnis's views on the three levels of the common good. And since all the three levels of the common good should be understood under the human conditions, to see the great value in the common good requires one to appropriately recognize the realistic human conditions. Conversely speaking, an appropriate recognition of the limitation set by the realistic human conditions in our

idealization about the form of coordination will help realize the fact that transcending justice is not a humanly desirable ambition. It is not humanly desirable because it is not humanly possible, for feasibility should restraint desirability.

Before explaining Finnis's analysis of the three levels of the common good, I shall first clarify the difference between the goods that can be commonly shared and the goods that cannot be commonly shared. For example, if I wanted to use this laptop to write my paper, others would not be able to use it. However, not everything is like the laptop. As David Braybrooke points out, a distinction between "limitative goods" and "public goods" should be made: there are some goods that one person's enjoyment of them prevents another's enjoyment, but there are also public goods that their benefits are such that consumption by one person does not impair or limit consumption by others, such as lighthouse, a broadcast of classical music, monetary stability and a safe environment⁴⁰.

According to the above distinction, one can conclude that the common goods refer to the goods that are not limitative but public. Now, Finnis distinguishes three levels of the common good in the following way: (i) the basic goods are common goods because they are good for any and every person; (ii) the basic goods are common goods because each of them can be participated by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions; (iii) the good of a political community is a common good because it refers to "a set of conditions which enables the members of a community to attain for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in

⁴⁰ See David Braybrooke, *Natural Law Modernized* (University of Toronto Press, Scholarly Publishing Division, 2003), p. 59.

a community”⁴¹; this sense of the common good is frequently called “the general welfare” or “the public interest”⁴².

A skeptic might argue against Finnis by insisting that the idea “public goods” must be hopelessly empty. (a) First of all, given the open-ended nature of a political community, it is impossible that in a political community all persons must necessarily want a same set of goods. While some in smaller groups might share common interests and want a same set of goods, it is impossible for all persons in a society to be like that. (b) Then, people wanting different sets of goods would probably need different sets of resources as necessary means for their ends. (c) But even if people have common goals and want same resources, they might not be aware of such a fact, but falsely believe that they don’t share the common interests in the public goods, which might be caused by their lack of enlightened visions of morality. (d) Finally, even if they have correct knowledge of what is their common interests, they might simply choose to disregard the claims of the common good due to their ill-intentioned motivations, such as wanting to harm others, attempting to be free riders, and taking advantage of their own bargaining positions to dominate others. Or, some individuals might want to dominate others to suit their own special psychologies like jealousy or desire for a feeling of superiority. For example, some developed countries might believe they have the right to dumping their electronic waste in other developing countries. In defending the legitimacy of such a right claim, they might appeal to the bargaining advantage without recognizing that other countries also need a clean environment. In a word, “people vary in their preferences for mixes of

⁴¹ Finnis (2011), p. 155.

⁴² Finnis (2011), p. 156.

public goods” due to a variety of reasons, which makes substantive agreement on the common good hard to achieve⁴³.

Among the above four concerns, (a) and (b) can both be resolved by just calling attention to the role of the political community as providing necessary conditions for the well-being of all individuals. To use a Rousseauian notion, the “General Will” is a will guided by the principle of subsidiarity, and its aim is not a determination of the final end or life plans of the citizens, but rather the provision of the commonly needed material and social resources for all citizens to effectively participate in the basic forms of the good, irrespective of the specific contents of their life plan. Since the common goods are not the basic goods that are constitutive parts of the final ends of citizens’ personal commitments but necessary means for the realization of those commitments, they can be viewed as a “shrinking subset” of all the goods that citizens want for themselves⁴⁴.

Next, both (c) and (d) can be answered by emphasizing the cognitivist feature of the theory of the common good. First, what is willed by the General Will should not be confused with the will of everyone. As Braybrooke points out, what is in the interest of all social members is to be determined by what “every prudent and well-informed person will want”, and that list should “rule out variations between people respecting their preferences for public goods as against private ones or respecting public goods compared with each other”⁴⁵. But in our actual society, it is often the case that a large majority of people hold a mistaken understanding of what should be the real

⁴³ Braybrooke (2003), p. 60.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

requirement of the common good, or what the idea of equal citizenship means. Yet it is the well-informed perspective on the common good that constitutes an objective understanding of it, which provides the basis for criticizing some citizens for either having an ideological understanding of the common good or failing to be motivated to act according to the requirement of the common good.

Three presumptions are endorsed by the above cognitivist view on the common good. First, it is presumed that the determination of the subset of the common good is possible. There are prudent and well-informed persons, at least under favorable conditions, who are able to determine the necessary material and social conditions that are commonly needed by all citizens to freely self-constitute themselves. Secondly, although there are people who can be corrupted and have special psychologies such as being reluctant to recognize the objective list of the common goods and act in accordance with their requirement, it is still presumed that citizens can be properly educated to recognize and follow them.

Lastly, it is also presumed that citizens' motivations can be hopefully reshaped, either by punishment, coercion or education, to be directed to aiming at the common goods. As a matter of fact, once we have the correct knowledge of the contents common goods as prudent and well-informed people do, we can then move to the next stage of education. In fact, the function of education constitutes an important aspect of the value of law and justice. "Those who defy or condemn the law", Finnis explains, "harm not only others but also themselves. They seize the advantage of self-preference, and perhaps of psychological satisfactions and/or loot, but all at the price of diminishing their personality, *their* participation in human good.... The punitive sanction

ought therefore to be adapted so that ... it may work to restore reasonable personality in offenders, reforming them for the sake not only of others but of themselves: 'to lead a *good* and useful life''⁴⁶. But the possibility of education and punishment is dependent on the cognitivist approach to the common good, for without the objective standard education and punishment would lose their point. So far I have shown why the cognitivist standpoint can answer both the epistemic and the motivational challenges raised in (c) and (d) respectively.

But some still object that a more ideal future society does not need the common good, just like a healthy person do not need to take medicine. While it is true that medicine is a good thing, one might find it useless if one does not need it. Such a concern expresses the ambition to go beyond justice by emphasizing that political philosophy should not restrict itself to the status quo, but rather aim to go beyond the realistic limit. So these people might re-formulate all of the above four challenges from (a) to (d) in the following way: (a*) first, since people have different life goals and thereby wanting different resources to realize their goals, we should imagine an ideal society where all of their needs could be satisfactorily met. Each person's individuality would be catered to by a provision of the goods that specifically correspond to her individuality. As a result, (b*) secondly, there is no need to identify a shrinking subset of the common good for all, since all persons' individuality would develop with adequate resources. (c*) Thirdly, if in an ideal world all social members are well-informed and reasonable, then there would be no need to further educate them to the idea of the common good. And (d*) finally, if all social members are properly motivated to freely realize their well-being in an authentic and responsible way, there would also

⁴⁶ Finnis (2011), p. 264; emphasis added.

be no need for education and correction. And there would be no need for normative direction or moral education in an ideal world.

One main reason for Finnis to reject the above challenges, as I will show, consists in his insistence on the feasibility constraints on the degree of idealization of the human conditions. This points toward a particular understanding of political philosophy as an art of the realistic utopia, to use Rawls's words. Radical utopian idealization of human society might be meaningful in its own light, but should not be treated as the most foundational basis on which law and justice are to be understood.

To explain, first of all, most human beings are not saints but liable to free-riding and recalcitrant and even criminal behavior. So one important function of law is to punish the recalcitrant citizens and to coerce the uncooperative citizens to be law-abiding citizens. Yet the punitive function of law is also important in a second sense: they provide psychological assurance for the rest of the "law-abiding" citizens. They would then have the social guarantee that "they are not being abandoned to the mercies of criminals, that the lawless are not being left to the peaceful enjoyment of ill-gotten gains, and that to comply with the law is not to be a mere sucker"⁴⁷. Therefore, the "bad man" view of law represented in the first punitive function of law is not sufficient. As a matter of fact, even in criminal laws there are also other important positive goods, such as procedural justice, equal treatment under the law, protection of the public interest in safety and etc. Finnis points out some important features of a modern system of criminal laws that go beyond just punishing the bad people:

⁴⁷ Finnis (2011), p. 262.

(1) It recognizes the demands of the common good as “unambiguously and insistently preferred to selfish indifference or individualistic demands for license”⁴⁸;

(2) It recognizes the value of “individual autonomy”⁴⁹, which is part of the practical reasonableness one needs to participate in the basic forms of goods for free and authentic self-constitution, and recognizes that value as a value for all persons;

(3) It offers the common, and publicly visible lesson, or education, to all social members, teaching them “what the requirements of the law – the common path for pursuing the common good – actually are” in the form of “the public and (relatively!) drama of the apprehension, trial, and punishment of those who depart from that stipulated common way”⁵⁰;

(4) It recognizes the importance of the rule of law, by providing “due process of law” and “substantive fairness (desert, proportionality)”, such as principles of *nulla poena sine lege*, and the principles that “outlaw retroactive proscription of conduct” and “restrain the process of investigation, interrogation and trial (even at the expense of that *terror* which a Lenin knows is necessary for attaining definite social goals)”⁵¹.

⁴⁸ Finnis (2011), p. 261.

⁴⁹ *ibid.*

⁵⁰ Finnis (2011), p. 262.

⁵¹ *ibid.*

(5) It recognizes an important aspect of human conditions that our exercise of self-will or free choice is not to be tolerated at the cost of one's gaining unfair advantage over another but to be allowed "within the confines of the law"⁵².

In a nutshell, a major function of legal sanctions is not merely about punishment, but to maintain or restore a rational order of proportionate equality and fairness between all members of a community. Yet there is a third important function of law that has not yet been covered by my previous discussion. Finnis argues that although in many cases laws are used mainly to provide "the 'social hygiene' of quarantine stations, asylums for the insane, and preventive detention", such a function should not be understood as accomplishing "a simple objective like that of keeping a path free from weeds" or launching "a campaign of 'social defense' against a plague of locusts or sparrows"⁵³. The function of punishment and sanction of law is only possible on the condition that there is already a public domain of law and justice to which each individual's free choice and interest are subject. Law, therefore, determines what is the proper domain within which the free choice or private interest of every individual can be legally or justly pursued. The identification and punishment of criminal behaviors is only one of the many aspects of the public domain.

Hence, one great value of law is its bringing about the important social benefit of providing a whole legal system in which private citizens can practice their own self-directive capacities by interacting with others. To explain, on the one hand, people interact with each other by "making a contract or sale or purchase or conveyance or bequest, contracting a marriage, constituting a trust,

⁵² Finnis (2011), p. 263.

⁵³ Finnis (2011), p.262.

incorporating a company, issuing a summons, entering judgment”⁵⁴. It is law that brings definition, specificity, clarity, and thus predictability into human interactions. On the other hand, we should also recognize that legal rules and institutions are themselves regulated by legal rules. This indicates one important working postulate of legal thought that what has been once validly created remains valid at present and probably in the future, until it determines according to its own terms or to some valid act or rule of repeal. Such an attribution of authoritativeness to past acts provides “a stable point of reference unaffected by shifting interests and disputes and a way for people to determine the framework of their future”⁵⁵. So not only in a world with “fraud and abuse of power” must we have “the law of wrongs and of offences, criminal procedure and punishment”, in a society free from recalcitrance, negligence, human malice and folly we also have strong reasons to need law and justice as public tools to regulate the patterns of social cooperation. Even angels, as Finnis contends, would face the fact of reasonable pluralism and the problem of coordination, let alone human beings.

I want to point out that all the above mentioned functions of law nonetheless have one important common feature: law provides psychological assurance for all social members. The determination of the public rules can make sure that no one have special and unfair advantages over another in the distribution of the burdens and benefits in their social world. Hence not only the protection of individuals from wanton crimes provides psychological mutual assurance, the a broader sense of protection from unfair bargaining situations also provides such a mutual assurance.

⁵⁴ Finnis (2011), pp. 268-9.

⁵⁵ Finnis (2011), pp. 269-70.

Given the analysis of a set of different functions and goals realized by law, we now can conclude that those who believe that we can go beyond justice due to our capacity to surpass the unfortunate social and human conditions have largely underestimated the problem of coordination. They suppose that the problem of coordination is only caused by bad people who are free-riders, jealous and greedy citizens, or simply wanton criminals. But this is not true. The problem of coordination can also be caused by well-intentioned motivation to gain superior bargaining positions, for responsible and sincere individuals might have deep disagreements on what is the most reasonable way of doing a certain thing. What complicates the issue, furthermore, is that we seem to have difficulties in judging whose claims about the share of material and social resources needed by them are legitimate and whose are not.

For example, an Elon Musk parent who knew the beauty of launching rockets to space might believe that a good society should prioritize the teaching of scientific knowledge over the teaching of religious doctrines. So in order to realize this end that parent might want the society to prohibit parents homeschooling their children from only teaching religion but no science. But a Billy Graham who prioritizes the good of religious faith over the other goods might disagree with that proposal. Who is correct, then? Or, is it possible that both are correct and both ways of parenting should be allowed? Without a public and universally acknowledged principle of distributing educational resources, we would have no idea how to tell which of these two parents is proposing an unfair claim about his share and thus imposing an unfair treatment on the other parent. Yet it is particularly in such cases that an agreement on the common good and fair distribution should be forged to avoid arbitrary judgment about who unjustly interfere into other people's fair share of the social resources. The more conscientious the competing parties are in insisting their personal

commitments, the more urgent the problem of coordination would turn out to be. Hence Finnis insightfully points out the following fact:

“But the fact is that recalcitrance—refusal or failure to comply with authoritative stipulations for co-ordination of action for common good—can be rooted not only in obstinate self-centeredness, or in careless indifference to common goods and to stipulations made for their sake, but also in high-minded, conscientious opposition to the demands of this or that (or perhaps each and every) stipulation. Practical reasonableness—from the genuine authority of which conscience, in the modern sense of that term, gets the prestige it deserves—demands that conscientious terrorism, for example, be suppressed with as much conscientious vigor as other forms of criminality”⁵⁶.

Competing, and yet not necessarily conflicting, interests and uncertainties in social cooperation, therefore, is unavoidable in human cooperation. This is a plain fact given the high intelligence of human kind. Natural law tradition takes this fact seriously, for it recognizes the fact that there are limitless possible ways of participating in basic goods and limitless combinations of the basic goods. To deny such a fact about the plurality of human commitments is unreasonable, and to have a pity for such a plurality is to have a pity for the high intelligence of human beings. It is under such a presumption of the plurality of human commitments and the recognition of the urgency of the problem of coordination caused by such a plurality that Finnis praises law as “a sufficiently distinctive, self-contained, intelligible, and practically significant social arrangement which have a completely adequate rationale in a world of saints”⁵⁷. The psychological assurance saints need is

⁵⁶ Finnis (2011), pp. 260-1.

⁵⁷ Finnis (2011), p. 269.

not to protect themselves from the harm caused and ill-intentions harbored by others, since in the ideal world of saints there are no special psychologies and criminal behaviors. However, saints would still care about whether disputing claims made by them can be justly adjudicated, whether the ensemble of conditions for their equal chances of self-realization and equal standing as a person in community are justly maintained.

To sum up, our need for law and justice is justified by a practical necessity given our human nature and human conditions. We are nonfungible persons in community. And our human conditions are characterized by two facts, i.e., the unsurpassable reasonable pluralism of our final ends, and the necessity of the need for social coordination among humans to realize their own final ends on the other. The Oppression Argument fails, because a properly formulated notion of the common good actually aims to help all individuals to self-help in their self-directive initiatives and free authentic self-constitution. According to the cognitivist and objective conception of the common good, ideological understanding of law and justice, and the corresponding oppressive social arrangements based on ideology are to be criticized. And people holding those ideological beliefs in justice are to be educated to a reasonable conception of justice. Next, the Coercion Argument also fails, for our social world is not a world of angels or saints. Treating law and justice as a matter in an ideal world of saints unreasonably extends the scope of political and moral philosophy to a unrealistic utopia. Given realistic human conditions, coercion should be recognized as a practical requirement, the surpassing of which is both humanly impossible and humanly undesirable. Finally, given the high intelligence of human kind and the reasonable pluralism of the final ends or forms of self-constitution, law and justice are necessarily needed to regulate patterns of social cooperation. They can identify the public rules and public domains of human interaction. Both the

coercive and regulative functions of law and justice would combine to indicate their great values. One of the great values is their provision of the important psychological assurance to all social members in their sincere and stable cooperation with each other in a public domain.

Hence none of the three arguments against justice under the title of “Beyond Justice Argument” are successful. Law and justice are constitutive means for the well-being of all social members, who are considered as nonfungible persons in community with equal standing and worth equal consideration. One important function of law and justice is to provide social resources that individuals need to realize their own personal commitments, rather than to determine on behalf of the individuals what these commitments should be. Not only do law and justice shape the way all individuals understand themselves as an individual and as a social member, they are also practical means, or necessary social conditions, for the realization of well-being of individuals.

Chapter 4. The Problem of Ideology and the Formal Features of Law

People usually claim that justice is ideology because it is used by the dominating social class to oppress others. This popular criticism has been discussed in the previous chapters. But sometime people also claim that justice is ideology because we don't need it in a future ideal world, because in that world justice would have been surpassed. Now the second use of ideology can have the same meaning with the first one, if one means that in a future ideal society the understanding of justice would not be manipulated by class interests. But in other cases what people are really meaning by ideology is that justice is only a formalistic notion that does not guarantee substantive justice.

I am here to single out the charge of ideology because it is highly relevant to my work on Marx. Anti-justice and anti-morality Marxists have been long focused on the ideology argument to reject the notion of justice. But different theorists have been focused on different aspects of the ideological charge of justice, and in many cases have created difficulties in coming up with a clear line of logic. For example, some Marxists' ideological charge just repeats the Oppression Argument by contending that justice is determined by the dominating social class and thereby are oppressive. But some other Marxists argue that justice is ideology due to its formal or juristic nature. Principles like "treating like cases alike", coherence, and other formal restraints of the Rule of Law are compatible with numerous kinds of substantive injustice. When this juristic feature is combined with other facts such as the social need to use law to regulate patterns of social interaction, it can lead to some harmful social consequences such as the systematic generation and reinforcement of the unjust laws in the name of Rule of Law. For example, although an equal

exchange in free market between two voluntary individuals meet legal rules and principles of justice as the existing capitalist society specifies, it actually reflects the oppressive relation between the two persons in the transaction. So the judgment that the exchange is a just one according to the existing laws is based on a juristic notion of justice. Hence, the criticism of capitalist production based on claims of justice is wrongheaded, and justice should be rejected as an ideological notion.

Except for the above two different uses of ideology, thirdly, some other Marxists also insist that, given the relation of productive power to the relation of production, the former determining the form of the latter, law and justice themselves should be understood as part of the ideological construction in the society. What we should do is to create a new mode of social production accompanied by a new ideology. But there are two different understandings of the above view. On the one hand, some might contend that there is a distinction between good ideology and bad ideology, and that communist ideology is a good one that we should rely on to criticize the capitalist bad one. This view seems to challenge the idea that justice is an ideology to be thoroughly abandoned. On the other hand, however, some others might make a more radical claim that there is no good ideology after all. Ideology is just ideology and no ideology can be said to be good or bad. Justice is an ideology not because of its substantively distorted and illusory understanding of an otherwise enlightened form of justice, but because all moral and normative languages are ideology determined by economic structure. There would be no point in defending justice in any case, for this would be unscientific. Such a rejection of justice as economically determined notion can be viewed as being based on a reductionist or determinist view.

Hence we have seen that there can be different reasons for Marxists to charge the idea of justice for being an ideology. Some are interrelated in one argument, and thus not clearly distinguished from each other. So I think to use the umbrella charge of ideology to refute justice without a further clarification of the nuanced difference would unfortunately obscure our understanding of the issue. So in this part I want to illustrate the problem of ideology in a more systematic and coherent way.

To begin with, as I have argued earlier, just as there should be a distinction between a restricted rejection of justice and a global rejection of justice, there should also be a distinction between a “narrow criticism of ideology” and a “global criticism of ideology”. It is true that sometimes unjust laws might be endorsed by social members as just, and in those cases those who are not well-informed might fail to see the pathology of their society. A narrow criticism of ideology seeks to expose the social and historical reasons for the popularization of those ideological understandings, without denying the existence of some objective and independent notion of justice. But a global criticism of ideology means that no law or no principles of justice can be ever meaningful constructed. All normative and moral languages are just ideological.

Is there any plausible justification for the global criticism of justice as ideology? I have argued in previous chapters that there would be a great explanatory burden for one who wants to criticize the existing social system as unjust while rejecting the legitimacy of the notion of justice. So here one might also think that there would be a great burden for one to endorse the global criticism of ideology. But here one might raise an challenging reason to justify the global claim: in virtue of the formal and juristic feature of law and justice, they by nature cannot guarantee the substantive good and thus should be abandoned altogether as ideology.

Finnis rejects the above defense for the global view, charging it for failing to see the interrelation between the substantive and the formal features of law. These two features cannot be absolutely separated in many cases. In discussing Lon Fuller's idea of the Rule of Law, Finnis emphasizes two important facts. First, the formal or juristic features of law's regulation of its own creation is not purely "formal"⁵⁸. Stability, clarity, reciprocity, fairness and respect, which are important aspects of the Rule of Law, are not "simply an efficient instrument which, like a sharp knife, may be good and necessary for morally good purpose but is equally serviceable for evil"⁵⁹. While it is true that the system of legal rules derives its validity or authority from some past act of stipulation or settled usage, or convention, it is also permeated by principles of practical reasonableness and motivated by a concern for the common good. Coherence, for instance, "requires not merely an alert logic in statutory drafting, but also a judiciary authorized and willing to go beyond the formulae of intersecting or conflicting rules, to establish particular and if need to novel reconciliations, and to abide by those reconciliations when relevantly similar cases arise at different times before different tribunals"⁶⁰. Also, the promulgation of law should be based on an open, reciprocal relationship with all persons in the community, and requires a professional class of lawyers who are competent to "advise all who want to know where they stand"⁶¹. A Nazi regime, Finnis explains, is exploitative for the rulers and rules only for their own interests without considering the interest of the rest of the community. Such a regime would normally violate the Rule of Law, since coherence, reciprocity, fairness and respect for persons are not purely formal but also substantive to a large extent by emphasizing the equal status of all participants in the

⁵⁸ Finnis (2011), p. 270-73; also see Chapter VI.

⁵⁹ Finnis (2011), p. 274.

⁶⁰ Finnis (2011), p. 271.

⁶¹ *ibid.*

community and the quality of communication between the ruler and the ruled. “Adherence to the Rule of Law”, therefore, “is always liable to reduce the efficiency of an evil government, since it systematically restricts the government’s freedom of manoeuvre”⁶².

Secondly, the satisfaction of the formal requirements of law usually involve requirements of the qualities of institutions and process, which are inherently substantive requirements as well. For example, as history suggests, we need the institution of judicial authority and constitutional government, the separation of powers, and “the openness of court proceedings, the power of the courts to review the proceedings and actions not only of other courts but of most other classes of official, and the accessibility of the courts to all, including the poor”⁶³. These institutional arrangements both prevent the unjust schemes of arbitrary, partisan, or despotic rules, and facilitate the positive good of quality interaction and the trustworthiness between ruler and the ruled. To judge that this is a “government of laws and not of men” we should not refer to a government that has a constitution on paper but in reality fails to establish a constitutional government. Now should we refer to a government that is ruled by a tyrant but he is a tyrant who can do whatever he wills as a rule of law and then depart from the rule himself⁶⁴. Most importantly, to say that the formal features of law and the Rule of Law are meant to be part of the requirements of justice and fairness, we actually recognize that a fundamental point of these requirements is the “dignity of self-direction and freedom from certain forms of manipulation”⁶⁵. We should not think that the “a

⁶² Finnis (2011), p. 274.

⁶³ Finnis (2011), p. 271, 27.

⁶⁴ Finnis (2011), p. 272.

⁶⁵ Finnis (2011), p. 273.

written constitution is a suicide pact” unrestrained by any prohibitions and authorizations intending to overthrow it⁶⁶.

However, although it is true that the formal feature of legal logic is mixed with substantive requirements of justice and morality, it is also true that there are limits of the Rule of Law, and formally just laws can be substantively unjust:

“In any age in which the ideal of law, legality, and the Rule of Law enjoys an ideological popularity (i.e. a favor not rooted in a steadily reasonable grasp of practical principles), conspirators against the common good will regularly seek to gain and hold power through an adherence to constitutional and legal forms which is not the less ‘scrupulous’ for being tactically motivated, insincere, and temporary. Thus, the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good”⁶⁷.

Even the most complex creation of an complicated administrative and judicial structure cannot fully guarantee the realization of every and all aspect of the practical reasonableness and the common good. This is true because ordering a human society for the greater participation of its members in the basic goods is not like following a recipe for baking a cake. Our legal system, as Finnis repeatedly emphasizes, must face a variety of appropriate but competing choices of final ends of individuals, and also complete claims about the most reasonable means to ends. Yet it is

⁶⁶ Finnis (2011) , p. 275.

⁶⁷ Finnis (2011), p. 274.

impossible for all of them to be realized all at once. Numerous “compromises”, or “adjustment[s] between commutative and distributive justice” have to be made in particular circumstances⁶⁸. Some claims by individuals may “on occasion be outweighed and overridden (which is not the same as violated, amended, or repealed) by other important components of the common good, other principles of justice”, although some of the claims “may never be overridden or outweighed, corresponding to the absolute human rights”⁶⁹. However, in many cases, even if the reasonable claims made by disputing parties can be “controlled by the complex of interacting ‘principles of law’”, in a largely open-ended political community, its legal authority would end up “without identifying any uniquely reasonable decision”⁷⁰.

Again, these difficulties in realizing all basic aspects of the common good in our legal institutions should be understood in the general understanding of the function of law as providing a good maintenance of an ensemble of conditions for all participants to help them self-help in free self-constitution. Since individuals are nonfungible persons, the final goals endorsed by them and the particular forms of well-being of them are not comparable. And thereby we cannot add up each person’s degree of satisfaction of their end-state of their pursuits to come up with a sum of happiness. However correct or reasonable a person’s view from certain moral point of view held by that person, or the association to which that person belongs, it might not be allowed by certain legal rules or principles of justice in some historical conditions. If the public authority and legal institutions of the political community sets the rule that certain ways of life are not allowed, and if

⁶⁸ Finnis (2011), p. 191.

⁶⁹ Finnis (2011), p. 288.

⁷⁰ Finnis (2011), p. 289.

this creates deep regrets for some individuals, they do not automatically gain unrestrained reasons to revolt or to judge the whole political community as an unjust one.

Even if the legal prohibition of that person's final ends might be unjust from an absolute point of view, this should be recognized as a human limitation with which all social members should reconcile. To deny the need of reconciliation is to aspire to go beyond human limitations. Not all prohibitions of certain ways of life are caused by corruptive manipulation of powers and biased moral thinking; many of them are caused due to epistemic limitation of human beings. In that sense, law and justice as they are instantiated in specific societies through historical legislative and political processes should be understood as *imperfect* instantiations of perfect idea of LAW and JUSTICE.

As a matter of fact, in Finnis's discussion of the limits of Rule of Law, he enumerates the six originating sources of injustice in law, and among them Finnis calls the first one an "Utilitarian Illusion" and refers to it as an ideology. He contends that in the background of an open-ended political community, it would be unrealistic, and a utilitarian ideology, to expect that our systems of law and principles of justice must be perfectly just and realize all aspects of the common good. This unrealistic expectation, as I would name it here, embodies the "Ideology of Perfect Justice from an Absolute Point of View".

One might think that there should be some clear ways of calculating the degree of all social members' realization of self-constitution in this system of law. Then we can compare different systems of law by comparing the degrees of realization of all people's realization of their final

ends. But such an understanding of law, according to Finnis, is based on an utilitarian illusion that human goods is adequately quantifiable; it treats the pursuit of the common good as a “pursuit of a once-for-all attainable objective, liking making an omelet”⁷¹. This illusion would further generate another harmful thinking that our legal institutions and principles of justice should aim at coming up with rules that are absolutely just from an absolute point of view, which is a view that our existing human conditions cannot hopefully achieve. The unrealistic expectation of generating human laws as perfectly just not only in a procedural and formal sense, but also from a substantive moral point of view, therefore, is based on an ideological understanding of law, the ideology of understanding law as necessarily embodying perfect justice from an absolute point of view.

Finally, except for the ideology of utilitarian illusion, or the ideology of perfect justice, Finnis also discusses five situations where substantive injustice can arise. In discussing the law of bankruptcy, for example, Finnis points that some people who could pay their just debts might choose to claim bankruptcy so as to have their debts cancelled. “No system of law can secure justice if its subjects, let alone its officials, are themselves careless of justice”⁷². Hence we must admit that a just law can be made the instrument of injustice. The kind of injustice involved here is not about the bankruptcy law itself, but is caused by some recalcitrant or free-riding behaviors. This is the first originating causes for the injustice in law. Secondly, there can be defects of partisan intention of legal authority. For example, there are cases of biased thinking and naked class ambitions that contaminate the legislative and political process. Thirdly, there can be abuse of power by assuming to oneself an excess of authority. Fourthly, there might be failures to follow the Rule of Law or to

⁷¹ Finnis (2011), p. 193.

⁷² Finnis (2011), p. 191.

respect the dignity of self-direction, and finally, the imposition of substantively distributive injustice on some persons or groups of persons⁷³. These sources of injustice in law share the common mistake by violating some basic requirements of the practical reasonableness. Yet it is important to realize that it is hard to tell whether a specific violation of requirements of practical reasonableness is purely formal or purely substantive. In a nutshell, law can be unjust either from a formal or a substantive moral point of view.

Yet there is one thing we should be alerted to, for the sake of understanding the value of Marxism, regarding the originating source of injustice of law. That is, it could be hard to identify the mistaken views held by people in a given society, and it could be even harder to educate them in some unfavorable social conditions. Plato's metaphor of "cave" well illustrates such a difficulty. So I propose that there can be a third use of ideology in the notion of "ideological study", which means that we should study the empirical and social generation of ideological understanding of justice. This use of ideology rejects the global criticism of ideology but endorses a narrow version of it, for it presumes the existence of a correct understanding of what is law and justice. It seeks to make a criticism of mistaken beliefs about justice. The criticism can include both an explanation of originating source of people's mistaken belief from a psychological and subjective point of view, and an explanation of the social cause for the generation of those false beliefs. Finnis's discussion of the originating sources of injustice should be regarded as only compatible with the narrow criticism of ideology rather than the global alternative. And, as I shall argue later in the part on Marx, a most plausible understanding of the value of Marxist ideology theory regards Marx as only using the "narrow criticism of ideology". Other uses of ideology might also be found, or

⁷³ Finnis (2011), p. 353.

omitted, in Marx's work, but we should take a critical look at it. We should not make the same mistakes that Marx has made.

To sum up my illustration of Finnis, there are three kinds of challenges for the idea of the common good, and law and justice as the normative and moral principle supposed to legitimately guide the social cooperation among citizens in a political community. The Threat to Individuality Argument says that the community might hinder the distinctive and unique development and self-expression of individuals. The Beyond Justice Argument has three expressions: The Oppression Argument, the Coercion Argument, and the Regulation Argument. They are all used to show that in an ideal future society the conditions under which we need justice can all be surpassed. And finally the Ideology Argument says we don't need justice because justice is ideology. With a close analysis of Finnis, I distinguish the following four uses of the notion of ideology: the Ideology of Utilitarian Illusion, the Ideology of Perfect Justice from an Absolute Point of View, the Narrow Criticism of Ideology Concealed in Social Structure, and the Global Criticism of Ideology. Yet none of these above challenges provides sufficient reasons for a pessimism about law and justice. They are necessary conditions for the realization of the well-being of human individuals as persons in community, and the practical necessity for our needs of them is bounded by human and social conditions. Surpassing justice is neither humanly possible nor humanly desirable. Recognizing such a practical necessity provides the grounding for understanding the work of political and moral philosophy as an art of realistic utopia.

Part III

A Marxian Conception of Justice and Natural Law

Chapter 5. The Problem of the Moral Dimension of Marxism

My work aims to offer a Marxian theory of justice according to the natural law tradition. This implies that Marx has a notion of justice that is used as an objective standard according to which capitalist system is condemned as unjust. In terms of the natural law aspect of my contention, I also believe Marx endorses an understanding of individuals as nonfungible persons whose individuality is of great value, and he understands human society as a necessary conditions the realization of free self-expression of all individuals. Such an understanding of social conditions as means for the end of human flourishing, thirdly, further implies that the classical Marxist doctrine of the abolition of private ownership of the means of production should be understood as an institutional design required by the Marxian principles of justice.

Yet the above contention has long been criticized by some Marxists as misunderstanding Marx. They claim that Marx rejects the notion of justice, and more generally, the notion of morality as ideological illusions. The disputes over whether Marx is committed to a positive notion of justice has kept looming large, and a large variety of anti-justice and anti-morality arguments have been raised to help Marxism do away with the ideas of justice and morality cherished in the traditional western political and moral philosophy. On the other hand, however, there are also a number of contemporary Marxists strongly object to the antimoralist standpoint. They seek to rescue a Marxian theory of justice by using the analytical methods and the academic resources in the studies of theory of justice by John Rawls, which has helped develop out of Marx's texts an egalitarian liberal conception of justice. Such a Rawlsian interpretation of Marx meaningfully points out many similarities between the two great thinkers. The disputes over whether Marx has a notion of justice

is largely misguided, for Marx, like most mainstream political and moral philosophers in the nineteenth century, believes that in order for all individuals to have a life expressing their own individuality, a set of social conditions must be met. I agree with this judgment, and believe we can see the role of natural law tradition in connecting Rawls with Marx to defend this judgment. Hence my work would join the contemporary Rawlsian interpretation of Marx to defend a liberal egalitarian Marxian theory of justice. But I will do that by appealing to the Finnis natural law theory and arguing that all three thinkers understand the function of the political community as a constitutive means for the realization of the distinct personalities of all persons in community.

Before defending my natural law interpretation of Marx, I am going to give a general review of arguments provided in antimoralist Marxism first. To begin with, there seems to be a historical background of the waning influence of Marxism in contemporary world politics. Although during the first three-quarters of the twentieth century, many of the terrible conditions Marx documented in European capitalism have lessened due to the political victories by labor, the last quarter-century has witnessed a reversed trend. Conditions around the world are subject to an increasing polarization of wealth and power, and the belief in the demise of socialism as a perceived alternative to capitalist society widely spreads⁷⁴. As Paul Blackledge observes, in the late 1960s and early 1970s, a series of defeats suffered by the workers movement opened the door to neoliberalism, fostering both a general sense of social injustice and a progressively growing pessimism among the left about the possibility of socialist advance⁷⁵. But an once widespread belief that Marxism died with the collapse of Soviet Communism was only partly true, and one of

⁷⁴ See Allen Wood, *Karl Marx* (Routledge, 2004), p. xxii.

⁷⁵ See Paul Blackledge, *Marxism and Ethics: Freedom, Desire, and Revolution* (State University of New York Press, 2013), p. 150.

the most important Marxist variant of the pessimistic trend was Analytical Marxism. Analytical Marxists attacked and abandoned the classical Marxist attempt to provide scientific accounts of the development of human history by analyzing the mode of production, and initiated a new project to reshape Marxism as a normative political theory with moral dimension⁷⁶.

Yet the attempt to save Marxism from mechanical materialism and economic determinism does not only belong to Analytical Marxism. There has been a general criticism of the Marxist rejection of morality. The stiff division between science and morality characteristic of mechanical materialism is notoriously inadequate for an explanation of social transformation and socialist revolution. And such an inadequacy grew even acuter when a number of Marx's most important scientific predictions had been falsified by history. As Terry Eagleton argues, there is a clash between the means and ends of communism: the people in capitalism are "most crippled and depleted", and yet "an aesthetic society will be the fruit of the most resolutely instrumental political action" and "the most resolute partisanship"⁷⁷. How is socialist revolution possible if such a dichotomy of human psychology and its transformation are not explained by some ethical and moral theory about the desirability of socialism and its normative force on human agency? Such a worry of motivational deficit the question of moral desirability seem to go hand in hand to generate an urgent theoretical need for the retrieving and reconstructing of the moral core of Marxist theory. Antonio Negri, for example, suggests that we snatch Marxism back from its scientific status and

⁷⁶ See Will Kymlicka, *Contemporary Political Philosophy: an Introduction* (Oxford University Press, 2002), p. 167. Also see Blackledge (2013), p. 151.

⁷⁷ See Terry Eagleton, *the Ideology of Aesthetics* (Blackwell Publisher, 1991), p. 206.

restore it to its utopian, or rather ethical, possibility⁷⁸. Critchley criticizes the “silence or hostility to ethics that one finds in Marx” and links it to “Lenin’s vanguardism” and moral “nihilism”⁷⁹.

To answer the motivational challenge, Alasdair MacIntyre insists that a moral core must be rediscovered from the fragments of both Marx’s political theory and his theory of history. And he particularly argues that Aristotelianism is the best choice, for Marx treats the realization of solidarity as a fundamental human desire and rejects the Kantian opposition between morality and human desires and needs⁸⁰. Scott Meikle also argues that “Marx was an Aristotelian in metaphysics”⁸¹, for they both recognize not only the “two substantial natures in the historical process: the nature of society and the nature of humans”, and the social reality as involving only “one substance: man, or man-in-society”⁸².

However, despite the coincidence between the emergence of Analytical Marxism and the general Marxist rediscovery of the ethical dimension, there is no necessary connection between retrieving the general moral dimension in Marxism and linking a Marxist political theory to egalitarian liberalism. The trajectory taken by Analytical Marxism is characterized by construing Marx’s socialist theory as a type of egalitarian liberal theory of justice. G. A. Cohen, one of the most prominent analytical Marxists, embraced “a form of utopian socialism that converges with

⁷⁸ See Antonio Negri, *Empire and Beyond* (Polity, 2008), p. 130.

⁷⁹ See Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (Verso, 2007), pp. 3-6.

⁸⁰ See Blackledge (2013), p. 181.

⁸¹ See Scott Meikle, “History of Philosophy: The Metaphysics of Substance in Marx”, in Terrell Carver ed., *The Cambridge Companion to Marx* (Cambridge University Press, 1991), Chapter 12, pp. 296-319.

⁸² Meikle: 306

egalitarian liberalism”⁸³. Some also remark that there is a “considerable overlap in the ethical views espoused by contemporary left-liberal moral and social philosophers within the analytic-linguistic tradition and Analytic Marxists”; the “lines” drawn between the two are “fuzzy”, which indicates a common core, yet to be elucidated”⁸⁴. However, not every Marxist interested in filling up the ethical lacuna endorses such a liberal project. Many other Marxists, classical or not, believe that analytical Marxists’ engagement with egalitarian liberalism is either a misunderstanding of Marx or an unfortunate “retreat” of Marxism⁸⁵.

So three different questions should be distinguished here. First, while it is not disputable that Marx condemns capitalism, it is disputable whether such a condemnation has a moral basis. Second, if the answer is yes, then there is a second question about what kind of moral foundation we should think Marx endorses. Finally, given certain moral foundation, there could still be dispute over what are the most reasonable substantive normative principles, or “social ideal”, Marx should be regarded as endorsing in his criticism of capitalism. These three questions are independent from each other.

Allen Wood, for example, positively constructs a Marxian criticism of capitalism based on the substantive charge of oppression, but denies that the such a charge is a moral charge or has some deeper moral foundation. Rather, he insists that Marx’s criticism of capitalism is an immoralist one. This immoralist social idea should not be conflated with all the previous claimed traditional notions like morality, justice, and equality, and human rights and freedom that are emphasized by

⁸³ Blackledge (2013), p. 7.

⁸⁴ See John E Roemer, “ ‘Rational Choice’ Marxism: Some Issues of Method and Substance”, in *Economic and Political Weekly*, Vol. 20, No. 34 (Aug. 24, 1985), pp. 1439-1442. See also Blackledge (2013), p. 155.

⁸⁵ Blackledge (2013), p. 7.

traditional political philosophy, for Marx has no sympathy with all of them. Paul Blackledge and MacIntyre, on the other hand, also believe in the need to find the ethical and moral aspect in Marx. But they propose their own Aristotelian Marxism and reject other forms of Marxism constructed under alternative modern moral philosophy as problematic. MacIntyre claims that only a “local forms of community within which civility and intellectual and moral life can be sustained through the new dark ages which are already upon us” is our rescue⁸⁶, whereas modern moral philosophy “has problems of its own” in virtue of its replacing the “objective character” of classical world ethics with personal preferences and “interminable” disagreements immune to rational assessment⁸⁷. While these two theorists both affirm the moral dimension in Marxism, their communitarian implications about the Marxian social idea are largely different from other proposals raised by other liberal, Rawlsian thinkers.

Not only is MacIntyre’s communitarian Marxism far from being widely accepted, even among those who favor the egalitarian liberal version of Marxism, there is still room for disagreeing on the matter about what are the most reasonable understanding of the idea of equality and of the best principles of equal distribution. For example, some believe that from a Marxian point of view, Rawls’s difference principle still unjustly tolerates too many inequalities, whereas others believe that Marx would endorse a distributive principle similar to Rawls’s.

However different these standpoints seem to be, one might think that both communitarian Marxists and liberal egalitarian Marxists are right that Marxism has a moral foundation and that the antimoralist understanding of Marx is unnatural. As Norman Geras points out, Marx condemns

⁸⁶Blackledge (2013), p. 171.

⁸⁷ Blackledge (2013), pp. 4-5.

capitalism, and therefore his theory has normative dimension, and the denial of this point is not worth taking seriously⁸⁸. To strengthen Geras's view, it is obvious that Marx endorses both the ideal of individuality (i.e., the all-round development of human capacities), and the virtue of solidarity. These two ideas were so prevalent in other mainstream political philosophers' works in Marx's time. Also, as many have admitted, the concern for the motivation and the timing of revolution remain pressing issues, and become exceedingly so in a post-revolutionary pessimistic time. This would give us stronger reasons to justify the moral desirability of socialism so as to facilitate people to revolt and change the world. So why has there been a longstanding academic trend to read Marxism as incompatible with moral dimension?

One main source of difficulty in defending the moral foundation in Marx is actually caused by the apparent inconsistency in Marx's own works. But this fact is further complicated by different attempts to handle his inconsistency. For the sake of building consistency, some Marxists have made complicated theoretical attempts to interpret Marx as an antimoralist and an anti-justice theorist. This attempt further gives rise to the worry about distorting Marx's own view to suit our own understandings. The question about whether our interpretations are faithful or unfaithful constitute the problem of "responsible exegetical practice": as Allen Wood points out, there is a risk of misrepresenting Marx's view according to our own perspectives. This worry is legitimate, for the distinction between interpretations that can be based on the texts on the one hand, and the speculative construction of Marx's moral theory on the other, "cannot always be drawn sharply"⁸⁹.

⁸⁸ See Norman Geras (1985). "The Controversy about Marx and Justice", in *New Left Review* 150, p. 33.

⁸⁹ See Allen Wood (1984), "Justice and Class Interests", in *Philosophia*, 1984, p. 10.

Chapter 6. Reevaluation of the Antimoralist Arguments

My method in this work in defending the liberal egalitarian interpretation of Marx is to first give an exhaustive summary of previous arguments against justice and morality by other Marxists, and then re-order them according to my Finnisian natural law framework so that a more systematic objection to those arguments is to be offered. The Finnisian framework can help us distinguish the substantive objections of Marxian theory of justice and the methodological ones. In this chapter I will focus on the former kind of objections, and the latter would be reserved to the third part of my work. To begin with, Allen Wood has provided at least twelve arguments against a Marxian theory of justice :

(W1) Nonmoral Good Argument. Marx does not see anything morally wrong or unjust with exploitation and oppression in capitalism because he is not interested in the philosophically interesting ideas of morality such as “virtue, right, justice, fulfillment of duty, and the possession of morally meritorious qualities of characters”, but rather the nonmoral goods such as the basic needs of the working class, “pleasure and happiness”, “self-realization, security, physical health, comfort, community, freedom”, and “prosperity and other nonmoral goods”. It is these nonmoral goods that serve as the grounding for Marx’s criticism of social oppression and exploitation⁹⁰.

(W2) Materialism Argument, or Economic Base Argument. Marx does not regard wage labor in capitalism or the capitalist exploitation of surplus value is as unjust, but rather a

⁹⁰ See Wood (2004), p. 128-9, and 154.

“peculiar good fortune for the purchaser [of this commodity] but no wrong or injustice at all to the seller”; for Marx believes that capitalist exploitation is a necessary functionary of capitalist production, and that “right can never be higher than the economic formation of society and the cultural development conditioned by it”⁹¹.

(W3) Abolition of Mode of Production Argument. Marx rejects the idea of distributive justice because capitalist exploitation can only be achieved by the abolition of the capitalist mode of production itself; in other words, Marx believes that under capitalism there is no realistic possibility to eliminate exploitation, whereas “under communism, on the other hand, it would be superfluous to demand that people be protected from *capitalist* exploitation”⁹².

(W4) Illusory Belief Argument. Marx does not regard capitalism as unjust but coercive and illusory, for Marx does not regard exploitation of surplus value as unjust, but rather emphasize that the belief as false, illusory, and ideological; while wage laborers believe that they are freer than slaves, serfs due to their free exchange of their own labor with capital, they have wrong and illusory understanding of themselves⁹³.

(W5) Moralistic Preach Argument, or Idealism Argument. Marx rejects moral criticism because he thinks social criticism based on moral norms as a form of “historical idealism”, for people’s faithful adherence to the correct moral precepts cannot effectively make

⁹¹ See Wood (2004), pp. 129; 134, 139, 250-1.

⁹² See Wood (2004), p. 161, 263, 158.

⁹³ See Wood (2004), p. 140.

progressive social change; it is the productive forces or economic relations that determines it⁹⁴.

(W6) Irrationality Argument. Marx does not regard capitalism as unjust but irrational; a more rationally, democratically, socialistically organized form of production would be a better system⁹⁵.

(W7) Conservative Function of Morality Argument. Marx rejects justice and morality because he is Hegelian in this aspect, viewing “moral values as normally on the conservative side in revolutionary situations”⁹⁶; for instance, the capitalist morality is a glorification of self-reliant individuality and the sanctity of private property⁹⁷.

(W8) Force of Evil Argument. Marx rejects morality and justice as the moral basis for capitalist criticism because of his Hegelian belief that “it is always the bad side which finally triumphs over the good side”, and that “evil is the form in which the driving force of historical development present itself”⁹⁸.

(W9) Justice as a Juristic Notion Argument. Marx rejects justice because justice is a juristic notion: “the justice of transactions which go on between agents of production rests

⁹⁴ See Wood (2004), p. 145.

⁹⁵ See Wood (2004), p. 129.

⁹⁶ See Wood (2004), pp. 151-2.

⁹⁷ See Wood (2004), p. 157.

⁹⁸ Wood also cites Engels, who claims in expounding Hegel that “it is precisely the bad passion of men, greed and love of dominion”. See Wood (2004), pp. 143-4.

on the fact that these transactions arise out of the production relations as their natural consequences”⁹⁹; hence according to Marx, the judgment that ancient slavery was unjust is a wrong judgment due to the material or economic basis of morality.

(W10) Justice as Allocative Principles Argument. Marx rejects the idea of distributive justice because redistribution of wealth through taxation on the rich grants to the poor does not change the power relation between the vulnerable and the powerful¹⁰⁰.

(W11) Limitation of Legal Regulation Argument. Marx rejects the law and justice because he is aware of the limitation of interference by law of minimum wage, restriction of the length of the working day and etc.; such claims made by Mill in terms of individuals’ “valid claim on society to be protected in your possession of something” is too limited in Marx’s view¹⁰¹.

(W12) Morality as Individual Responsibility Argument. Marx does not condemn any individual persons’ bourgeois morality for the social fact of class oppression, because he denies that as individuals they are morally responsible for the exploitation from which they benefit; he has never urged Engels to give up his textile mills in Manchester¹⁰².

⁹⁹ See Wood (2004), p. 130.

¹⁰⁰ See Wood (2004), p. 262.

¹⁰¹ See Wood (2004), p. 261.

¹⁰² See Wood (2004), p. 155; Marx claims that it should be “personifications of economic categories”, rather than “individuals”, who is “responsible for the relations whose creatures they remain socially, however much they may rise above them subjectively”, cited from Wood (2004), p. 154.

Next, Norman Geras has summarized nine anti-justice arguments when he attempts to criticize the antimoralist standpoint:

(G1) Marx's Self-denial Argument. Marx actually says that capitalism is not unjust¹⁰³.

(G2) Ideology Argument. Marx refers to notions of fair distribution, “Justice, Liberty, Equality, and Fraternity” as “mythology”, “obsolete verbal rubbish” and “ideological nonsense”¹⁰⁴

(G3) Internalism Argument, or Functionalism Argument. Marx has a functional definition of justice, treating it as internal or relative to specific modes of production, and thereby rejecting a trans-historical notion of justice¹⁰⁵.

(G4) Relativism Argument. Marx believes “morality, religion, metaphysics, and all the rest of ideology” belong to the “superstructure of any social formation”, and thereby lacking any objective, trans-historical value¹⁰⁶.

(G5) Reformism Argument. Marx believes that appealing to justice is a reformist approach since it is merely a distributive value focusing narrowly on the distribution of income and the differentials within it, whereas what socialism requires is a thoroughgoing

¹⁰³ See Geras (1985), p. 35.

¹⁰⁴ *ibid.* See also Karl Marx, *Capital I* (Penguin Classics, 1993), pp. 178-9.

¹⁰⁵ Geras (1985), pp. 36-7.

¹⁰⁶ *ibid.*

revolution of the mode of production. In Marx's words, we need "Abolition of the wage system!" rather than "A fair day's wage for a fair day's work!"¹⁰⁷.

(G6) Idealism Argument. Marx believes that actual transformation lies in the real historical revolutionary forces, rather than "projects of moral enlightenment and legal reform"; the latter is a form of "idealism" in the sense that one believe "historical process occurs through a change for the better in people's moral and juridical ideas"¹⁰⁸.

(G7) Juristic Justice Argument. Marx believes that principle of justice are juridical principles imposed by the state on the members; yet the state and the whole institutional apparatus of law and sanction would wither away in communism¹⁰⁹.

(G8) Beyond Justice Argument. Marx believes that communism is beyond justice. The need principle that would be endorsed in a full-fledged period of communism is not a distributive principle endorsing any equal standards or egalitarian point of view under which people are subsumed; there would be circumstance of justice and there is only emphasis on "specific individuality"¹¹⁰.

(G9) Nonmoral Good Argument. Marx is not committed to justice but other values such as freedom, self-realization, well-being and community, which are nonmoral goods rather than moral goods¹¹¹.

¹⁰⁷ Geras (1985), p. 38.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ Geras (1985), p. 40.

¹¹¹ Geras (1985), p. 41.

Next, in 1990, Rodney Peffer, based on the previous discussions of the matter, continued to provide a more inclusive list of anti-justice and anti-morality arguments in his book, *Marx, Morality and Social Justice*. He distinguishes the anti-morality arguments from anti-justice arguments, and claims that many of the confusions made in the latter are closely related to the confusions made in the former. He first discusses six types of anti-morality arguments and I am listing them according to Peffer's own ordering¹¹²:

(P1) Althusser Argument, or Ideology As Theoretical Pretention Argument. Marx believes that ethics is ideology. Although worker's movement might need motivational stimulation such as normative ideals or moral commitments expressed in Marx's early humanism, we should only accept the practical function of it but rejects itself as "theoretical pretentions".

(P2) Nonmoral Good Argument. Marx rejects moral goods, and in general all types of humanitarian and moral ideologies, in favor of nonmoral goods such as potentialities, needs, security, self-realization, physical health, community and freedom; and Marx's concern for those nonmoral goods are not based on objective, trans-historical, universal moral standard but on the basis of class interests¹¹³.

(P3) Egoism Argument. Marx sees morality as an egocentric form of practical reasoning, a means by which an individual's naturalistic inclinations are repressed by existing social norms so that the oppressed classes accept their oppressions; self-interest thus is the only

¹¹² See Peffer (1990), Chapter 4-8.

¹¹³ See Peffer (1990), p.190, 181, 191.

motivation, exclusively, of the working class, whose practical reasoning is not universalist but only about changing oneself and satisfying their own basic needs like survival¹¹⁴.

(P4) Moral Historicism Argument, or Economic Base Argument. Marx insists that whatever social structures have evolved or will evolve, the moral views of that society is morally justified, and thereby moral criticisms of the local status quo fails to see the determining effect of the mode of production on the social morality¹¹⁵.

(P5) Ideology as False Consciousness Argument. Marx rejects ideology as false consciousness that cannot be part of a true theory of a correct world view; since morality is ideology, it should be repudiated¹¹⁶.

(P6) Relativism Argument. Marx is a relativist that denies the objective moral standards¹¹⁷.

After anti-justice arguments, he further examines eight anti-justice arguments, some of which are viewed by him as sharing the same type of confusions made in the anti-justice arguments :

¹¹⁴ See Peffer (1990), pp.196-7, and 199-200, see also Andrew Collier, “The production of Moral Ideology”, in *Radical Philosophy*, 1974, No. 009, and Brian Leiter, “Why Marxism Still Does Not Need a Normative Theory”, in *Analyse & Kritik* (2015), Vol. 37, Iss. 1-2, pp. 23-50.

¹¹⁵ See Peffer (1990), Chap. 5.

¹¹⁶ Peffer (1990), p. 242.

¹¹⁷ Peffer (1990), Chap. 7.

(P7) Justice as a Metaphysical Entity Argument. Marx rejects notions like “justice” and “eternal truth” as religious notions that are “metaphysically suspect”; instead he looks for materialistic foundation for social criticism¹¹⁸.

(P8) Factual Disagreement Argument. Marx does not believe in the possibility of defining a proper conception of justice, even both bourgeois and socialists differ on their principles of justice¹¹⁹.

(P9) Ideology as Conservative Morality Argument. Marx rejects justice and rights talk because he believes that all moral theories are ideological in terms of their necessary facilitating and strengthening the social status quo, which is most manifestly embodied by the bourgeois defense of the structure of capitalism as a “very Eden of the innate of rights of man”¹²⁰.

¹¹⁸ Marx makes the following claim: “what opinion should we have of a chemist, who, instead of studying the actual laws of the molecular changes in the composition and decomposition of matter, and on that foundation solving definite problems, claimed to regulate the composition and decomposition of matter by means of the ‘eternal ideas,’ of ‘*naturalite*’ and ‘*affinite*’”? Do we really know any more about “usury”, when we say it contradicts “justice *eternelle*,” “*equite eternelle*,” “*mutuallite eternelle*,” and other “*vertites eternelles*” than the fathers of the church did when they said it was incompatible with “*grace eternele*,” “*foi eternelle*,” and “*la volante eternelle de Dieu*”?”. Cited from Peffer (1990), pp. 321-2, and see Marx (1993), pp. 84-5.

¹¹⁹ See Peffer (1990), p. 322. Also, Marx questions “What is a ‘fair distribution?... ‘Do not the bourgeois assert that the present-day distribution is ‘fair’?...Have not also the socialist sectarians the most varied notions about ‘fair’ distribution?””. See Karl Marx, *Grundrisse* (Penguin Classics, 1993), p. 385.

¹²⁰ See Peffer (1990), p. 323. Marx says that the bourgeois description of the surface (exchange) structure of capitalism is a very pernicious ideological defense of the bourgeois social status quo—“as a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property, and Bentham”. See Marx (1993b), p. 176.

(P10) Moralistic Preach Argument. Marx rejects notions of right and fair distribution because he does not see the promulgation of them as effecting significant social change; only vulgar socialism treats distribution as independent of the mode of production, while the real change of distribution comes with the change of the material conditions of production¹²¹.

(P11) Rights as Egoistic Claims Argument. Marx rejects rights talk because he believes they are only related to the conception of man as the “egoistic” individual, “as a member of civil society ... separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice”¹²²; human emancipation requires evolution of communist society where egoism is negated.

(P12) Beyond Justice Argument. Marx rejects justice and rights as juridical notions because he “envision[s] a the higher stage of communism as a stateless and coerceless form of social cooperation” where the Humean conditions of justice are superseded¹²³.

(P13) Moral Historicism Argument, or Economic Base Argument. Marx rejects justice and rights because they are internal standards of social systems. Since “each mode of

¹²¹ After attacking “ideological nonsense about right and other trash so common among the democrats and French Socialist”, Marx continues to claim in *Gotha* that “the material conditions of production are the co-operative property of the workers themselves, then there likewise results a distribution of the means of consumption different from the present one....Vulgar socialism (and from it in turn a section of the democrats) has taken over from the bourgeois economists the consideration and treatment of distribution as independent of the mode of production and hence the presentation of socialism as turning principally on distribution. After the real relation has long been made clear, why retrogress again?” Cited from Peffer (1990), pp. 323-4.

¹²² See Peffer (1990), p. 324.

¹²³ See Peffer (1990), p. 329.

production has its own mode of distribution and forms of equity...it is meaningless to pass judgment on it from some other point of view”.

(P14) Class Interests Argument, or Economic Base Argument. Marx rejects justice because it is only a “vehicle or mask for the pursuit of class interest”¹²⁴, which turns out to be those that “represent the economic needs of the prevailing mode of production”¹²⁵.

Readers must have noticed that the above different summaries of the antimoralist arguments have some redundant claims. Some of the arguments simply overlap with others, and some can be viewed as natural implications of the others. For example, in terms of Wood’s anti-justice arguments, first of all, (W4), (W9), (W10) and (W11) actually express the same criticism that some principles of justice do not change the power relation in society. Interference by law in the length of working hours, redistributions of wealth, and the legal protection of the non-coerced voluntary exchanges between social members in the free market are all compatible with the oppression and exploitation of the working poor. So one might say that these arguments are just different forms of one argument against justice, i.e., the charge of justice for being merely a formal juristic notion without substantive moral quality. Secondly, (W2), (W3) and (W5) are based on a common “historical materialist” presumption that what is actually endorsed in existing social relation legitimized by the society status quo is really legitimate or just from an objective point view. In other words, the factual social system justifies the normative principles factually endorsed in the system. One important presumption of such historical materialism is a rejection of objective evaluation of the system from some independent normative principle.

¹²⁴ Wood (1984), p. 27; see also Peffer (1990), p. 354.

¹²⁵ See Peffer (1990), p. 345.

The same kind of problem can nonetheless also be seen in Geras' and Peffer's summaries of other anti-justice arguments. (G2), (G3), (G4), and (G5) are based on the above mentioned basic presumption of historical materialism that rejects objective assessment from outside the system. And (G5), (G7) and (G8) are all focused on the juristic feature of law and justice, since what is formally just in an existing social legal system might be highly compatible with substantive injustice such as exploitation, oppression, social antagonism and etc.

Finally, to some extent, several arguments so far raised can all be regarded as expressing the same idea that justice could be, and would be, surpassed in communism. Yet such a title of "beyond justice argument", which I believe can be assigned to many of the above mentioned arguments, is too broad to alert us to the different reasons one might have to have such a conviction. For example, some claim that communism does not need justice (1) because they think in the end any normative notions are just internal, functional, and relative to a given social system or a determinate mode of economic production, and thereby lacking real normative force in an objective sense. But some others believe that communism does not need justice (2) because they think communism does not need distribution of social resources among competing claims, or (3) because they think communism would be a non-coercive society due to the change of mode of production and disappearance of class domination, or (4) because they think communism would satisfy the needs of everyone by fully considering the specific individuality of everyone and transcend the juristic form of equal consideration of people's needs. These different reasons for beyond justice, therefore, should be distinguished from each other. While (1) is based on one of presumptions of historical materialism that justice is by nature a functional internal notion and thereby lacking any objective normative force, the rest of (2), (3) and (4) are not necessarily based

that presumption. Rather, they do not have to deny the legitimacy of the notion of justice in a pre-communist society as an objective normative standard social members still need in order to remedy the social deficiencies. Strictly speaking, the functional and internalist claim about justice proposed in (1) cannot be properly called a beyond justice argument, for it amounts to saying that all societies have its corresponding internal ways of arranging social relations, from pre-capitalist societies via capitalist societies to socialist societies. Justice as a functional notion exists in all societies, and as long as the particular mode of production can be identified, the corresponding notion of justice can be identified.

Given the problems mentioned above of previous discussions of antimoralist Marxist arguments I want to nonetheless emphasize two problems of those discussions so far done by previous Marxists. First of all, they have a problem of a lack of a systematic organization according to a unified framework to hold them together. Second, they do not question the underlining methodology or strategy used by the antimoralists who want to build consistency out of inconsistency in Marx. What is the point of having consistency after all? And are those antimoralist re-reconstructions of Marx's texts truly convincing? To resolve the two problems, I am going to use Finnis's natural law framework to re-categorize those arguments for the sake of offering a more unified discussion that covers all most all the above mentioned ones. Then I will evaluate those arguments according to the natural law understanding of justice, revealing what are the merits and demerits of the quest for consistency.

First, I am going to offer a shortened list of Finnisian reconstruction of the antimoralist arguments so far proposed by previous Marxists:

(F1) No Oppression Argument. Since communism is classless and abolishes exploitative social relations, it will have no oppression; so it does not need justice.

(F2) No Coercion Argument. Since communism has no recalcitrance, it does not have coercion; so it does not need justice.

(F3) No Regulation Argument. Since communism has no conflicts of interests, there is no need to adjudicate between conflicting interests; so it does not need justice.

(F4) Juristic and Formal Justice Argument. In communism the principle of formal justice would be replaced by the “needs principle”. The previous distributive principles are restricted to formal equality regarding political powers in terms of the equal rights to vote and freedom of conscience, equal distribution of incomes, regulations of working hours, and equal distribution according to contribution. Yet in communism the needs principle does not require equal distribution but unequal distribution according to the needs of every specific individuals.

(F5) Historical Materialism Argument (Function Argument). Since the mode of production determines justice and morality, they are functional, internal and relativist standards depending on the existing material and economic conditions of a society.

Next I want to analyze the notion of ideology. It is worth noting that both (4) and (5) can be called the charge of ideology. One might claim that morality is ideology because all claims about morality

are superstructure of a given mode of production. But this expression seems to repeat the charge in (F5). One might also claim that justice is ideology because the working class are made to falsely believe that their voluntary transactions with capitalists in a free market economy are just, and their mistaken belief is a socially constructed ideology. This seems to express (F4).

Yet some may also claim that morality is ideology because it has the conservative function of facilitate the existing social convention, and they think Marx strongly believes in this judgment and even bases his belief in the Hegelian metaphysical explanation of history. This use of ideology is neither connected with (F4) or (F5), but rather regards the question about whether conservative morality exhaust all possible kinds of morality in a given social system. If there is more than one type of conservative morality popularized in society to offer some enlightened revision of the status quo, then it is highly suspicious that morality must by nature be an ideological illusion. Next, one might argue that all morality are just ideology because moral notions are mysterious metaphysical entities. This actually expresses the point made in (G2) and (P7), which is based on a particular understanding of historical materialism. It states that the use of abstract ideas in moral talk is a form of idealism, and since idealism should be rejected, moral talk should be rejected.

Finally, as Geras points out in (W5), (G5), (G6) and (P10), morality could also be rejected as ideology because by purely appealing to moral talk one must fail to change the mode of production. Only the historical and material change, for instance the change of private ownership of the means of production, would be really effective in making real epochal change from capitalism into socialism. All the other attempts should be regarded as reformist, useless and even harmful.

Hence we can at least see five different uses of ideology: (1) justice is ideology due to its functional or internalist feature; (2) justice is ideology because in communism justice would be transcended; (3) morality is ideology because it is only a conservative tool for social control; (4) morality is ideology because moral notions are abstract and thereby metaphysical entities; (5) morality is ideology because moral talk cannot change historical conditions. Despite the differences in the five uses of ideology, however, one thing in common is that they all completely deny the legitimacy of moral and political ideas, rather than just criticize some problematic understanding of moral and political ideas according to some independent standards that are objectively true. Following my analysis of Finnis's in the first part, I suggest we call distinguish the following two arguments about ideology, a global one and some restricted ones:

(F6) Global Rejection of Morality as Ideology: All moral claims are ideological because they are either purely juristic and formal standards, or idealist metaphysical entities, or serving conservative functions, or determined by the mode of production, or incapable of facilitating real social change.

(F7) Restricted Criticism of Morality as Ideological beliefs: Some claims about morality are ideological because, for example, they are actually not moral from a more enlightened point of view but falsely believed by the citizens to be moral.

(F8) Restricted Criticism of Morality as Lacking Causal Power in Social Change: Some moral claims are ideology because they cannot facilitate social change as effectively as material change of the mode of production.

I believe that the above eight antimoralist arguments are more important than others. Although other arguments also make sense, they are too weak. For example, (W12) emphasizes that Marx is more focused on the structural evil of capitalism as a social system than on the personal responsibility of one capitalist. (W5) and (G5) both emphasize Marx's awareness of the limited social impact of giving moral lectures to the working class. They understand Marx's key point as trying to facilitate the real social change by collective actions by the workers, such as abolishing the existing capitalist mode of production. Moreover, (W10) and (W11) both raise the important point that formal justice are not adequate for protecting the substantive equality between social members. Formal justice does not necessarily preclude an egoist's selfish claims about what she deserves from the public resources. It is true that all of the above arguments are valid. Yet we can also see that they are not sufficient reasons why justice in general should be rejected. A properly formulated theory of justice should be a theory recognizing the truth in (W12), (W5) and (G5), and yet still viable enough to immunize it from the global charge of ideology. By the same token, recognizing the limitation of juristic or formal justice pointed out in (W10) and (W11) can help us construct a well-formulated conception of justice, which can be used to impose some substantive restrictions on an egoist to criticize her self-claimed entitlement to the material resources.

Lastly, the same problem can be seen when we look into Wood's famous Nonmoral Good Argument. He contends that capitalism is condemnable due to its imposed exploitation, which defines the idea of oppression in Marxist theory. However, since oppression is nonetheless not a moral term but rather a nonmoral term, according to him, capitalism is not morally wrong. Let's first add the Nonmoral Good Argument as the ninth one, since it is quite independent of the rest of the arguments:

(F9) Nonmoral Good Argument: Marx is not committed to justice but other values such as freedom, self-realization, well-being and community, which are nonmoral goods rather than moral goods.

It might be true that a well-defined notion of nonmoral good can help us construct a coherent anti-morality Marxist point of view, but why must we embrace such a twisted use of the notion of morality? Does it really convincingly show that the traditionally valued idea of social justice should be excluded from our understanding of Marx?

If we read Wood's views carefully, however, we should notice an interesting remark. Despite his great effort to help people build a most sympathetic anti-justice reading of Marx, Wood nonetheless emphasizes that perhaps the most reasonable reaction to Marx's views about morality is to "reject these analysis as excessively reductive, failing to capture everything we mean by justice and other moral properties"¹²⁶. Why he spends so much effort to defend an anti-morality Marxist view is that he is "also impressed by the combination of radical novelty with overall coherence found in Marx's views about morality, and think it would be highly erroneous to dismiss them too quickly just because in the end we decide we cannot agree with them"¹²⁷. Yet Wood himself admits that if "any far-reaching views about human well-being count as 'moral views'", then "in this sense I would not deny that Marx's conception of human self-realization is a 'moral' conception"¹²⁸. As a matter of fact, Wood identifies the "Aristotelian conception of self-actualization, the development and exercise of our 'human essential powers'" in Marx and shows

¹²⁶ Wood (2004), p. 160.

¹²⁷ *ibid.*

¹²⁸ Wood (2004), p. 12.

sympathetic attitudes to Engels' remarks on "the actual human morality" in future society that substitutes for the false, ideological moralities of class society¹²⁹. In terms of historical materialism, Wood even claims that "Marx and Engels may be expressing the mistaken belief that historical materialism alone suffices to justify their contemptuous rejection of a long and broad tradition of moral thinking"¹³⁰.

Wood's sympathy with the Aristotelian notion of self-actualization is worth noting. He recognizes the strength of the "long and broad tradition of moral thinking" and the "far-reaching views of human well-being" in the Aristotelian sense. Such sympathy should be understood as his acknowledgement of the interpretive methodology that coherence should be regarded as a secondary standard when we try to understand an interesting and important theorist as Marx. Once we place the matter of compatibility between Marxism and morality in a larger background and ask the question about *the value of Marxism*, an alternative standard other than coherence should be needed. What is the point of denying justice, and morality in general, in understanding Marx's social science? Is it a purely theoretical question regarding what is the most correct understanding of Marx's own words, or is it a practical question regarding what we can learn from Marx's capitalist criticism so as to change the existing social system? If we acknowledged that the motivational problem, the timing and desirability of revolution, were real and urgent issues for Marxism, then one would have overriding reasons to construct a Marxian moral and political theory.

¹²⁹ Wood (2004), p. 158.

¹³⁰ Wood (2004), p. 146.

Hence the second major problem with the previous summary of anti-justice arguments in Marx, as I see, is its lacking a more thoroughgoing methodological questioning of the value of Marxism. Reading Marx is not purely interpretive task, but also an evaluative one, or even a practically revolutionary one. Marxism, as a social science theory, want meant to be a practical science aiming at changing the world by Marx himself. This should also be endorsed by ourselves as interpreters.

However, we would encounter a different type of antimoralist argument here, which is more difficult to handle but has been omitted in my previous Finnisian classification. This last argument is connected with on the scientific nature of Marxist social science. Some insists that even if a Marxian moral theory, or Marxian conception of justice, can be constructed, this moral part of Marxism should not be viewed as belonging to the Marxist social science, but only an external resource we would use when we want to evaluate the moral aspect of human actions. A descriptive theory of human history is a causal, explanatory and predictive theory that should not be subject to some moral evaluation internal to it. If we want to address the practical concern about the motivation for revolution, which is a reasonable concern by itself, we should not do so at the cost of sacrificing the scientific nature of Marxism. A Marxian moral theory might be established, yet it should not be regarded as a core aspect of Marxism. Hence we have the tenth argument as follows:

(F10) Scientific Explanation Argument. Causal explanatory explanations offered by social science theories is incompatible with morality, for social science is an explanatory task, explaining what is predictively true without judging whether the predicted future events are morally good or not.

Whether (F10) is a plausible argument depends on whether one understands social science theory as a purely explanatory one or a both explanatory and evaluative one. For those who think that description of human history can be at the same time evaluative, there is nonetheless another distinction between the following two standpoints. To explain, some might think that, as MacIntyre does, Marx endorses an Aristotelian understanding of human agency, and his prediction of future society is based on a morally laden world view according to which a future society is a better one. But there can be two different views on the relation between the metaphysical understanding of human nature and the causal explanatory understanding of future tendency. On the one hand, some might endorse a strong teleological and naturalistic understanding of human history, believing that communism must be realized, or that there is something called the “iron law” of history, based on the teleological human nature, according to which communism must come. On the other hand, there is a much weaker thesis that human beings are only presumed to be able to be naturally motivated to realize their ends under favorable social and cultural conditions, without a strong presumption that they are necessarily so on the basis of a metaphysical necessity in human nature or in the structure of nature. Call the first strong thesis Teleological Necessity Argument, which argues for the moral dimension of Marxism in terms of the functional understanding of human beings. Then second weaker thesis, however, despite its endorsement of the teleological understanding of human nature, only endorses it as a presumption without asserting it as a metaphysical truth or as necessarily realized in human history. Rather, it only makes an empirical claim that given favorable social and human conditions, human agents who are properly educated to the teleological understanding of their own nature, would be naturally motivated to pursue the goods.

Now, depending on which version a moralist Marxist is arguing for, a strong thesis or a weaker thesis, there are two different versions of antimoralist arguments one might propose correspondingly:

(F11) Rejecting Strong Teleological Necessity Argument. Explanations of human history should be a causal explanation, rather than a teleological explanation that uses the consequence as the causal explanation for its precedent and regards the world as necessarily determined by some suspicious metaphysical entity called human nature or human function.

(F12) Rejecting Weak Teleology Argument: Even if one endorses a teleological understanding of human nature as a metaphysical presumption and use it as a guiding principle in the empirical and causal analysis of human history, such a presumption is unscientific and should be rejected. Causal explanations of human history should be purely empirical without presuming any sense of teleological understanding of human agency.

So far I have summarized twelve antimoralist arguments. Before evaluating those arguments, I want to highlight the fact that there are two different types of arguments here. The first nine arguments from (F1) to (9) belong together in the sense that they are all substantive arguments concerning whether a theory of justice can be constructed from Marx texts, and what the substantive contents it should have. Yet the last three arguments from (F10) to (F12) belong to a second type in terms of the matter of methodology of social science theories. Therefore our treatment of these arguments should be divided into two parts. Such a distinction between two types of arguments, interestingly, corresponds to a distinction we can identify in Finnis's natural

law jurisprudence too. What I have discussed in the first part on Finnis is about the substantive understanding of law, whereas the methodological aspect of his theory regarding the nature of social science theory of law would be left to the final part discussing the Marxist methodology of social science. So here in this chapter I will only criticize the first nine antimoralist arguments from Finnis's point of view.

Now recall the first nine antimoralist arguments:

(F1) No Oppression Argument. Since communism is classless and abolishes exploitative social relations, it will have no oppression; so it does not need justice.

(F2) No Coercion Argument. Since communism has no recalcitrance, it does not have coercion; so it does not need justice.

(F3) No Regulation Argument. Since communism has no conflicts of interests, there is no need to adjudicate between conflicting interests; so it does not need justice.

(F4) Formal Justice Argument. In communism the principle of formal justice would be replaced by the "needs principle". The previous distributive principles are restricted to formal equality regarding political powers in terms of the equal rights to vote and freedom of conscience, equal distribution of incomes, regulations of working hours, and equal distribution according to contribution. Yet in communism the needs principle does not

require equal distribution but unequal distribution according to the needs of every specific individuals.

(F5) Historical Materialism Argument (Function Argument). Since the mode of production determines justice and morality, they are functional, internal and relativist standards depending on the existing material and economic conditions of a society.

(F6) Global Rejection of Morality as Ideology: All moral claims are ideological because they are either purely juristic and formal standards, or idealist metaphysical entities, or serving conservative functions, or determined by the mode of production, or incapable of facilitating real social change.

(F7) Restricted Criticism of Morality as Ideological beliefs: Some claims about morality are ideological because, for example, they are actually not moral from a more enlightened point of view but falsely believed by the citizens to be moral.

(F8) Restricted Criticism of Morality as Lacking Causal Power in Social Change: Some moral claims are ideology because they cannot facilitate social change as effectively as material change of the mode of production.

(F9) Nonmoral Good Argument: Marx is not committed to justice but other values such as freedom, self-realization, well-being and community, which are nonmoral goods rather than moral goods¹³¹.

Now, (F1), (F2) and (F3) are all to be refuted according to Finnis's natural law point of view. The function of justice is more than sanctioning bad people and correcting the oppressive status quo, and its regulative function has great social benefits such as providing mutual assurance among citizens. The aspiration to go beyond justice is humanly impossible. Political philosophy should be restricted to the art of realistic utopia. Next, (F4) does not succeed, for the formal features of justice is more than just the "formal equality", such as an equal right to vote, an equal distribution of incomes, formal regulations of working hours. On the one hand, the juristic sense of equality is also deeply connected with some substantive regulations of the use of power and authority for the sake of respecting the common good. On the other hand, in an open-ended modern political community, the fact of reasonable pluralism urges us to recognize not only the value of the procedural justice in adjudicating competing interests of citizens, but also the importance of having a public recognition of the legitimacy of those procedures and adjudications.

(F5), then, seems to be more tricky, for it is partly a substantive argument but also partly a methodological one. One substantive objection to (F5) is that we can find in Marx an social ideal of communism in which all individuals are able to freely self-constitute themselves and mutually constitute one another in a common community. Such an social ideal is based on an understanding of individuals as distinct personality aiming at the good of free expression or self-realization for

¹³¹ Geras (1985), p. 41.

both themselves and other fellow citizens. If that society has a corresponding mode of production, then we can say that both that society and that mode of production are more just, or morally better, than the previous ones. Hence functional and internalist understanding of justice does not mean that Marx rejects a communist conception of justice, which is an objectively valid moral standard he relies on in his capitalist criticism.

But (F5) can also be viewed as a methodological argument, if we realize that there can be different versions of historical materialism, some of which can be compatible with a teleological understanding of human nature, but some of which is said to be incompatible with it. Hence refuting (F5) would involve an exploration of historical materialism. Moreover, in terms of the relation between historical materialism and Marx's political economy, some interpret historical materialism as implying economic determinism, whereas others don't. Obviously, not all versions are plausible. But which version is the most plausible one is largely dependent on how one understands the methodology of social science, and thereby a detailed discussion of (F5) would be provided later. Briefly put, I believe the most plausible understanding of Marx's historical materialism is the one that is compatible with, or could be understood in the light of Finnis's natural law methodology of social science. This means, first of all, that Marx can be regarded as endorsing an ideal-type description of the economic phenomenon, which treats the focal cases of human productive activities as human social actions that aim at the basic goods and follow the basic requirements of practical reasonableness. The economic activities and modes of production in capitalism, therefore, can be interpreted as marginal cases that violate those principles. Hence Marx's economic theory is both evaluative and descriptive, just like Finnis's jurisprudence. Secondly, Marx believes in the hopeful prospect of changing the existing watered-down cases of

human production into an ideal one. And the creation of such a future society is made possible by the collective actions of human beings who would be driven to change the mode of production by the class consciousness under favorable historical and social circumstances. And finally, both his theory of anthropology and theory of political economy are meant to provide such a practical guidance of human practice in terms of educating the citizens to the focal cases of production and facilitating them to revolutionize their social relations to realize the focal cases of human production. Both the last two points show Marx's affinity to Finnis in the sense that both theorists' social science theories are not only serve the theoretical purpose but also the liberating purpose. More would be said in the last section of my work.

(F6), (F7), and (F8), then, can be evaluated together. According to Finnis, since law and justice are both constitutive means for the realization of the well-being of individuals and the thriving of their community, the global rejection of LAW and Justice altogether should be wrong. Hence (F6) is implausible. What is meaningful, on the contrary, is a restricted ideological criticism of the wrong understandings of justice. (F7) correctly sees that citizens would come to accept mistaken beliefs in justice, and this would help us reveal the fact that the social, legal, institutional arrangements are the causes of their holding the false beliefs. And (F8) is also correct in the sense that claims about morality by itself cannot change the world. However, both arguments are only correct in the sense that they have correctly diagnosed the problems of some moral claim. They do not justify the overall rejection of morality in itself.

Finally, as I have argued earlier, (F9) is only plausible if we accept such a notion of nonmoral good for the sake of consistency in Marx. But such an acceptance lacks a good theoretical motivation.

If the idea of well-being of human beings is a human good, which can be so naturally understood according to traditional moral philosophy as a moral good, then there is no reason why we must give up such a traditional understanding.

Last but not least, it must be pointed out that my evaluation of these arguments is not for the sake of understanding Marx for an exegetical purpose, simply wanting to make a consistent Marx out of his inconsistent texts. Nor does my evaluation aim at proving the truth of Marxism. A responsible exegetical practice should not exhaust our reading of Marx. If the purpose of reading Marx is to understand the social reality and change the world into a better one, we should first realize what a better world needs. This interpretive principle should guide us as a first principle, and the quest for consistency should be rendered as a secondary one. If going beyond law and justice is neither humanly impossible nor humanly desirable, then we should apply such an understanding into our reading of Marx. Hence we should recognize that Marx's dismissive remarks about law and justice to some extent are oversimplified or shortsighted. There is no good reason, according to the natural law theory, to abandon law and justice. The well-being of all individuals and the thriving of the political community require that law and justice be publicly defined, applied and educated to all citizens.

Chapter 7. A Rawlsian Interpretation of Marx

Although I have shown that justice is an important common good for all the individuals and the community, I have not answered the substantive question regarding the content of justice. Although people might endorse a concept of justice, they might have different or even conflicting conceptions of justice. It is also the case when it comes to the question what the Marxian conception of justice we should construct. While there are comparatively fewer disagreements over whether Marx has an Aristotelian tone in his moral theory or whether there is a moral dimension in Marxism, there are many objections to understanding Marx's principles of justice in the light of Rawlsian theory of justice or egalitarian liberalism in general. MacIntyre strongly rejects modern moral philosophy in favor of communitarianism. The idea of "liberal" is also deeply troubling in some other theorists' view. For example, Slavoj Zizek believes that liberals are those who think there should be no alternatives to capitalism because "any struggle for an alternative to contemporary capitalism will lead to a new Gulag"¹³². Paul Blackledge also insists that Marx is not "liberal", for being liberal is being an atomized individual. He claims that "the modern liberal assumptions, best articulated by Kant", treat social members as "supposedly universal atomized individuals"¹³³, and charges Kant for naturalizing "the modern experience of the atomized egoist" and "egoistic individualism"¹³⁴.

¹³² See Slavoj Zizek, *Welcome to the Desert of the Real: Five Essays on September 11 and Related Dates* (Verso, 2002), p. 168.

¹³³ See Blackledge (2013), p. 3.

¹³⁴ See Blackledge (2013), p. 15.

However, such criticisms of liberalism are attacking a strawman. The criticized forms of liberalism do not represent Rawlsian liberalism and Kantian liberalism. In terms of Rawls, since *A Theory of Justice*, Rawls has already emphasized that citizens are persons who are subject to the requirements of the common good of the body politics. He clearly denies the so-called private persons whose claims about liberty and freedom are immune to the principles of justice and the good of the political community. Justice functions as a requirement of the common good that shapes the reasonable scope of what an individual can legitimately expect. Secondly, Rawls also emphasizes the distinct personality of every citizen and the worth of one's personal commitments. Justice should not be understood as a deprivation of the distinct personality of individuals. This reflects Finnis's ship analogy of the function of the state. The principles of justice, as the concrete requirements of the common good of the whole political community in specific social and historical circumstances, should not be understood as principles of designating specific final ends or determinate ways of living to all citizens, but rather an ensemble of necessary conditions all citizens need for the expression of their own individuality, irrespective of what their final ends are. When these two points are combined together, we will be able to see the Finnisian point in Rawls's claim that "what is just draws the limit, and the good makes the point"¹³⁵. Finally, such an understanding of individuals as distinct persons in community is further used by Rawls as the theoretical foundation for his constructivist theory of justice, which is compatible with Finnis's understanding of social contract theory as a heuristic approach to theory of justice¹³⁶.

¹³⁵ See Rawls (2001), p. 144.

¹³⁶ See Finnis (2011), p. 108.

To explain the above contentions, I will first state the two Rawlsian principles of justice, and then explain how they are constructed in a way compatible with Finnis's natural law theory¹³⁷. To begin with, according to Rawls, the "two principles apply to the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages"¹³⁸. Specifically, the first principle is the Principle of Equal Liberty. It applies to those aspects of the social system that define and secure the equal basic liberties. Those liberties include the political liberties such as "the right to vote and to hold public office", and "freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and the freedom from arbitrary arrest and seizure as defined by the concept of the rule of law"¹³⁹. Yet the right to own certain kinds of property, such as the ownership

¹³⁷ Since the projects of Finnis and Rawls were done for different purposes, it might be controversial to claim that Rawls's conception of justice is just an outgrowth of Finnis's natural law theory, or vice versa. The matter of the public justification for the principles of justice, for example, constitutes an essential part of Rawls's theory, whereas Finnis does not particularly discuss it. The late Rawls contends that the principles of justice should be publicly justifiable to all social members who have deep doctrinal disagreements. Such a public justification does not aim at reaching an agreement on the truth of a certain objective conception of justice but rather emphasizes a reasonable overlapping consensus on it by all citizens holding different comprehensive doctrines. Their allegiance to such a conception of justice is not based on the truth but rather reasonableness of it, and the conception of justice is treated as a free-standing "political" conception independent of citizens' own comprehensive doctrines. Citizens would have their own ways to generate allegiance to it within the scope of their own doctrines for the sake of maintaining a public domain of social cooperation without losing their own specific ways of living. Finnis, however, appeals to a list of basic goods that is claimed to be objectively true and self-evidently so to all human beings. The Rawlsian distinction between a justification of a conception of justice from a political point of view and the alternative justification from the nonpolitical and comprehensive doctrines is not to be found in Finnis. Given the above difference, therefore, I shall avoid making a substantive claim about the deep relation between the two thinkers but only seek to single out a number of views on justice shared by them. For the matter of public justification and political turn, see Gerald Gaus, "The Turn to Political Liberalism", in Jan Mandle and David Reidy, eds., *A Companion to Rawls* (Wiley-Blackwell, 2014), Chap. 13.

¹³⁸ See John Rawls, *A Theory of Justice* (Belknap Press: An Imprint of Harvard University Press, 1999), p. 53.

¹³⁹ See Rawls (1999), p. 53.

of the means of production and the freedom of contract as understood by the doctrine of laissez-faire, are not basic and thereby not protected by the priority of the first principle¹⁴⁰.

The second principle applies to the aspects that specify and establish social and economic inequalities, i.e. to “the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility”¹⁴¹. It requires both that positions of authority and responsibility be accessible to all, and that socioeconomic inequalities must be to everyone’s advantage and especially for the benefit of the least advantaged.

There is nonetheless a lexical order of the two principles of justice. The first has a priority over the second, which means that the “infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages”¹⁴². If one is willing to forego certain political rights to gain some significant economic returns, such a kind of exchange would be ruled out by the two principles of justice: “being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains except under extenuating circumstances”¹⁴³, like “it is essential to change the conditions of civilization so that in due course these liberties can be enjoyed”¹⁴⁴.

But why do the parties in the original position select the above principles of justice other than their alternatives? What is their reasoning? And who determines the way they think? To answer

¹⁴⁰ See Rawls (1999), p. 54.

¹⁴¹ See Rawls (1999), p. 54.

¹⁴² See Rawls (1999), p. 53-4.

¹⁴³ See Rawls (1999), p. 55.

¹⁴⁴ See Rawls (1999), p. 132.

these question we should emphasize the representational function or heuristic function of the original position. As is mentioned earlier, Rawls distinguishes three perspectives. The first perspective is the citizens who are represented by the parties in the original position, the second is the perspective of the parties who are representative of the citizens. And the third perspective is the one of us as readers, including you and me who live in the real society outside the constructive procedure. It is the third perspective that determines the reasoning of the parties and the fundamental interests of the citizens that the parties should be aiming to protect. In Rawls's view, the purpose of clarifying the presumptions endorsed by the third perspective is to help "make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice"¹⁴⁵. In other words, the original position that employs these restrictions in its own settings is an "expository device" for us to understanding the reason why the two principles of justice should be favored to other alternatives¹⁴⁶.

To explain, according to the third external perspective, the parties representing the citizens aim to protect the exercise of their two fundamental capacities and three highest ordered interests. First, all citizens are regarded as having two fundamental capacities of being both reasonable and rational. They are reasonable in the sense that they have a sense of justice and act according to the requirement of justice even if at the cost of their own interests, and they are rational in the sense that they have the capacity for form a coherent life plan according to one's conception of the good. Next, there are three highest ordered interests of all citizens: the first two correspond to the interest in developing their capacity for reasonableness and for rationality respectively, and the third one corresponds to an interest in living a determined form of life according to their own conceptions

¹⁴⁵ See John Rawls, *Political Liberalism* (Columbia University Press, 2005), p. 16.

¹⁴⁶ Rawls (1999), p. 19.

of the good. Lastly, all citizens are regarded as equally sharing the fundamental capacities and having the three highest ordered interests. The setting up of the original position and the use of the veil of ignorance, therefore, are treated as heuristic tools for explaining to readers like you and me about how the parties come to an agreement on what is the best way to protect those interests of the citizens they represent.

The Rawlsian understanding of the highest ordered interests of citizens and their two fundamental capacities, as I will argue, corresponds to Finnis's natural law understanding of individuals as nonfungible persons in community. We can see the correspondence in the following three aspects. First, Rawls's emphasis on the nonfungibility of personality of all individuals can be seen both in his early work *Theory of Justice* and later work *Political Liberalism*. To say that all citizens are equal in sharing the two fundamental capacities is not to say that they are all the same or identical with each other. In *TJ*, Rawls criticizes that one of the major mistakes of utilitarianism is its failing to capture the separateness and distinctness of personality: utilitarian emphasis on the maximization of happiness is charged for its "mistak[ing] impersonality for impartiality"¹⁴⁷. In *PL*, Rawls contends that one of the highest interests is our having a determinate conception of the good, and living a life according to one's own personal commitments: our personal commitment defines who we are, and losing that would make us think life has no point¹⁴⁸. Our personal life is highly valued by Rawls as a constitutive part of our person, and therefore "no matter how much welfare it can generate by depriving a citizen's personal life, this would have to be viewed as a violation of justice"¹⁴⁹.

¹⁴⁷ Rawls (1999), p. 167, 25.

¹⁴⁸ Rawls (2005), p. 28.

¹⁴⁹ Rawls (2001), pp. 103-4.

Secondly, to say that we all have a distinct personality by living a life according to one's own determinate conception of the good is not to say we must be an egoist or self-centered. Distinctness is not selfishness. And criticism of egoism need not be exclusively based on a moral ideal of a saint. Within the range of scope between being a pure egoist and being a pure altruistic saint one has much freedom to decide what kind of life she wants for herself. On the other hand, however, nor does an emphasis on distinctness of personality necessarily imply that the free development of individuals should not be immune to any restrictions imposed by other individuals and social rules. A steadfast anarchist might contend that the public authorities like the state and government must oppress individual freedom and we'd better do away with these political institutions so as to get rid of any interference into individual freedom.

Both the above charges of self-centered egoism and the charge of unrestrained individualism misunderstands the point of individual freedom. According to Rawls, the moral questions understood in a much narrower sense about what is selfish or altruistic cannot be meaningfully discussed without an already existing public recognition of what is the appropriate public domain of freedom and liberties. What is assessed as a selfish interest from certain moral point of view might not be judged as selfish but legitimate and reasonable expectation from the view point of justice. Hence we should first appeal to a set of principles of justice to decide what count as legitimate personal interests and illegitimate ones, and then the questions regarding what is selfish and what is others-regarding would be addressed in the next stage as secondary issues.

The above separation of the two stages, therefore, does not suggest that our distinct personality would necessarily lead to selfish moral character or unrestrained practice of individual liberties,

but rather only presume that the one constitutive aspect of our distinct personality lies in our capacity for a sense of justice and acting according to the requirement of justice. As Rawls emphasizes, “although justice as fairness begins by taking the persons in the original position as individuals ... this is no obstacle to explicating the higher-order moral sentiments that serve to bind a community of persons together”¹⁵⁰. When discussing Hegel’s criticism of liberalism, Rawls also emphasizes that while justice as fairness proceeds from a suitably individualistic basis, since the original position is conceived as fair between free and equal moral persons, such an individualistic idea of the person is also “a moral conception that provides an appropriate place for social values”¹⁵¹. Rawls explicitly rejects such an understanding of an individual as a private person: “if there is something called the private that is immune to justice, there is no such a thing”¹⁵². Citizens’ personal life commitments are to be limited by the scope allowed by the principles of justice¹⁵³.

As David Reidy argues, the theme of “persons in community” is central to Rawls’s whole projects since his early phase¹⁵⁴. In his undergraduate thesis, Rawls claims that “the problem of politics is not the reconciliation of the individual and the social, for personality and community are mutually interdependent”¹⁵⁵. Then what would be called by later Rawls as “the reasonable” had already been proposed in Rawls’s graduate paper, “A Brief Inquiry into the Nature and Function of Ethical

¹⁵⁰ Rawls (1999), p. 167.

¹⁵¹ Rawls (2005), p. 286.

¹⁵² Rawls (2001), p. 166.

¹⁵³ Rawls (2005), pp. 30-1.

¹⁵⁴ See David Reidy, “From Philosophical Theory to Democratic Theory: Early Postcards from an Intellectual Journey”, in Jan Mandle and David Reidy, eds., *A Companion to Rawls* (Wiley-Balckwell, 2014), p. 10.

¹⁵⁵ See Reidy (2014), p. 23. It is true that at that time Rawls insists that the self-realization of persona in community is impossible without God’s grace. But the religious aspect is clearly removed from later Rawls

Theory”. In that paper he identifies one kind of practical reason of human beings in terms of their forming “noncontroversially competent judgments regarding one’s relation as a person with other persons in social life”¹⁵⁶. These early concerns about the citizens’ self-realization as persons in community casts “significant shadows over his later work in political philosophy”¹⁵⁷. The familiar charge of liberalism for its regarding social members as atomistic individuals does not fit with the Rawlsian version of liberalism.

The last aspect in which we might see the similarity between natural law tradition and Rawls’s principles of justice lies in the idea of the common good. This aspect is closely related to the above idea of persons in community in the sense that the common good is both good for the individual citizen and good for the whole body politics in which all citizens cooperate with each other. Rawls points out that there are six notions of the good in his conception of justice as fairness, and one of them is the good of political community, i.e., “the political good of a well-ordered society”¹⁵⁸. Such a good is a good for all citizens cooperating in a social system, and realizing such a good in their social activities both fits with one of their fundamental capacities and shapes the distinct personality of citizens by demarcating the reasonable boundaries of their personal commitments.

¹⁵⁶ Reidy (2014), p. 14.

¹⁵⁷ See Reidy (2014), p. 10. In commenting Rawls’s 1946’s treatment of the problem of “radical evil” of human nature, Reidy claims that “notwithstanding his recollection late in life of having abandoned his faith during or very shortly after the war, the evidence suggests that Rawls’s prewar theistic commitments were slowly altered and abandoned over a period of some 10 years following the end of war. In 1954, Rawls taught a course in Christian Ethics at Cornell. He was then still thinking very seriously about Christianity and was still in the process of finding this way to the ‘nontheistic’ orientation on which he would eventually settle by the late 1950s or early 1960s.” see page 29.

¹⁵⁸ See Rawls (2001), pp. 141-4.

Yet there are two issues about the common good worth noting here. First, although the common good limits the legitimate expectations by the citizens, it does not directly determine on behalf of the citizens what kind of personal life choice one should make. To say that all citizens have to capacity for a sense of justice and care about the self-constitution of other citizens does not mean that they should directly interfere into other citizens' choices of personal commitments. Each has his or her own conception of the good, and living a determinate life according to that conception is essential to one's development of personality.

In *TJ*, Rawls distinguishes two parts of "self-respect", which is one of the five primary goods. The first part of self-respect includes a person's sense of his own value and his "secure conviction that his conception of his good, his plan of life, is worth carrying out". The second part refers to one's "confidence in one's ability, so far as it is within one's power, to fulfill one's intentions". Both aspects are significant. The first part is particularly important in the sense that once our personal life plans are judged as of little value in the social world or forbidden by other people as of little value, self-doubt would ensue, and "all desire and activity becomes empty and vain, and we sink into apathy and cynicism"¹⁵⁹. But in order for the individuals to flourish, we should also provide the material and cultural assistance. This is linked with the second aspect of self-respect, since confidence in one's ability to carry out one's life plans relies on a set of social and material conditions. The provision of those materials is the requirement of the principle of subsidiarity. But it is nonetheless still very important to recognize that the purpose of providing material assistance is to help citizens self-constitute, irrespective of what their life plans are as long as they do not violate the principles of justice.

¹⁵⁹ Rawls (1999), p. 386.

As Finnis emphasizes, it is helpful to think of community not as “a community” or “an association”, but rather “an ongoing state of affairs, a sharing of life or of action or of interest, an associating or coming-together”, or in short “a matter of relationship and interaction”¹⁶⁰. The most complete community, i.e., the body politics, then, should be understood as a coming-together of all social members who act together to maintain the good conditions of the community for the sake of everyone’s free self-constitution. Such a point can also be found in Rawls since he contends that in the original position the parties are mutually disinterested. What is publicly and commonly good for all citizens is not the final ends they choose for themselves. In fact one might actually have no idea of another citizen’s life plan, or even be strongly opposed to that plan. Later Rawls in *Restatement* uses the analogy of competition in a game to illustrate the same idea. While the competing players are concerned with winning the game over the other, and thereby having conflict of interests, the real point of playing the game is not to beat the competitors, but rather to have a good show, or a “good play of the game” so that every player can freely exercise his capacities and talents¹⁶¹.

Next, the second issue about the common good worth noting is Rawls’s emphasis on the egalitarian feature of the personality of all citizens . All citizens are equally worth respecting and none of them should be positioned in such a place where one’s self-respect is disadvantaged. This means not only that no citizens should have their conceptions of the good unfairly dismissed or negated by others, but also that the comparatively worse positioned citizens should be compensated for, in terms of providing them with more material and social resources, so as to regain an effective sense of self-respect as others have. But it is important to see that although compensation is provided in

¹⁶⁰ See Finnis (2011), p. 135.

¹⁶¹ Finnis (2011), p. 140.

the form of material and social resources, what people are really compensated are social bases for self-respect. And the reason why social basis of self-respect should be compensated for the worst disadvantaged citizens consists in the fact that all citizens are equal persons. Therefore, compensation for the disadvantage citizens should not be understood as merely for the sake of the disadvantaged citizens, but also for the sake of all citizens' good. This is a requirement of the common good, rather than just a requirement of the worst off citizens. The self-respect of other people in the same social world where we ourselves live matters to us because we and others are both persons who are equal beings sharing two fundamental capacities and three highest interests.

To sum up, first of all, according to Rawls, the social nature of the human relation is an intrinsic part of the nature of human beings. Yet the social nature of a person should not be viewed as in opposition to the distinct personal aspect of the individual too. Individuality and community are two integrated parts that cannot be separated from each other. Yet, secondly, to realize the effective self-constitution, citizens must need some material and social recourses. The principle of subsidiarity requires that those recourses be provided for citizens to assist them to carry out their own life plans according to their conceptions of the good. And the specific ways to distribute those resources constitute the concrete principles of justice. Thirdly, since some citizens might be positioned in a disadvantaged way so that their confidence and ability to carry out their own life plans would be much lower than others, compensations by distributing more material and social resources to the disadvantaged should be provide so that they can gain, or restore, their confidence and self-respect. Such a mode of distribution is egalitarian not in the sense that citizens should receive equal share of stocks as an end-state. Distribution of those stocks are be unequal, and how many stocks they receive or how unequal it should be is dependent on how many they need for

restoring their equal standing as a person in community. Finally, the principles of justice would determine the legitimate expectation citizens can reasonably have. All citizens should subject themselves to justice. The so called atomized individuals who are immune to the requirement of the common good of the political community is rejected by Rawls.

Hence we should see that the worry about reading Marx in the light of liberal egalitarian tradition in the name of egoism and individualism is based on some misunderstanding of that tradition. One of the core Marxist contentions that in an ideal communist association “the free development of each is the condition for the free development of all” captures both Rawls’s and Finnis’s understandings of individuals as distinct persons in community. And Marx’s classical claim about distributive principle “from each according to his ability, to each according to his needs” also captures the natural law thought that the real subject of equal distribution is all citizens’ distinct individuality.

With the above understanding, let’s recall the two principles of justice by Rawls and see if we should think Marx would endorse them. First, the Principle of Equal Liberty says that citizens have equal basic political liberties such as “the right to vote and to hold public office”, and “freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and the freedom from arbitrary arrest and seizure as defined by the concept of the rule of law”¹⁶². Would Marx, or should he, reject this

¹⁶² Rawls (1999), p. 53

principle? We can find a substantive number of texts proving that Marx endorses those political liberties.

Next, the second principle applies to the aspects that specify and establish social and economic inequalities. The first part of the second principle is the Equal Opportunity Principle, which says that both positions of authority and responsibility be accessible to all under conditions of equality of opportunity. But the equal opportunity should not be just a formal one, but rather refer to a more accurate notion of the “fair equality of opportunity”. This not only means that careers should be open to all talents, but also that those with the same talents and ability and intention to use the talents should have the same prospect of success irrespective of their economic origin, race, gender and other contingent social and personal factors. Would Marx object to the idea of fair equality of opportunity? Given Marx’s criticism of human rights as merely formal rights in his early writings, he must agree with Rawls on that.

The second part of the second principle is the Difference Principle, which says that the most morally desirable reason for allowing for social and economic inequalities is that they would make the worst-off citizens’ life prospect better. While many Marxists criticize the difference principle as not egalitarian enough, I want to emphasize three points about it with which Marx also agree. First and most importantly, for Rawls, the real concern of difference principle is not about social and economic equality per se but about the reciprocal relation between citizens who are equally worthy of the free development of their personality. Marx share with this thought. He rejects a

“crude” form of socialism that only aims at equal distribution of income and wages¹⁶³, but instead contends for the equal prospect of free development of all individuals. Secondly, what is compensated by the difference principle is not liberty per se, but the worth of liberty. While citizens have equal basic liberties, the worth of liberty is not the same for all. Since different people have different capacities for making use of the material and social resources, their prospects of success are unequal. For Marx, it is also important to focus on the worth of liberty, and Rawls’s emphasis on it is used to remedy the defect of formal justice criticized by socialists. Hence there should be no disagreement between the two theorists on that matter. Lastly, in the Rawlsian ideal of reciprocity, there is a general sense of civic friendship among all citizens. In his early scriptures, Marx’s emphasis on species nature corresponds to the such a Rawlsian idea. Marx claims that one important good of human beings is their producing and creating for another human being¹⁶⁴.

Last but not least, some Marxists claim that Marx is not a liberal because he rejects the private ownership of the means of production. They claim that liberal thinkers have largely failed to realize that one essential feature in communism is the abolition of the private ownership of the means of production. But such a criticism of “liberalism” cannot be correctly applied to Rawls. For, first, Rawls argues that the basic liberties involved in the first principle do not include the ownership of the means of production, or the kind of freedom of contract as understood by the doctrine of

¹⁶³ Marx criticizes the crude form of communism in his 1844 Paris Manuscript. He claims that “[In crude communism] the domination of material property looms so large that it aims to destroy everything which is incapable of being possessed by everyone as private property. It wishes to eliminate talent, etc. by force. Immediate physical possession seems to it the unique goal of life and existence. The role of worker is not abolished but is extended to all men. The relation of private property remains the relation of the community to the world of things”. Retrieved from

<https://www.marxists.org/archive/marx/works/1844/manuscripts/comm.htm>

¹⁶⁴ See Daniel Brudney, “Young Marx and Mature Rawls”, in Jan Mandle and David Reidy, eds., *A Companion to Rawls* (Wiley-Blackwell, 2014), Chapter 6.

laissez-faire¹⁶⁵. More importantly, Rawls is explicitly open to a liberal socialist regime where the public ownership of the means of production is endorsed and the worker-managed firm is practiced¹⁶⁶.

It is usually claimed that Rawlsian Marxists fails to acknowledge the classical Marxist tenets on the abolition of private property. While such a criticism is not textually true in Rawls, there is yet a deeper problem with this view. Those who rejects the Rawlsian interpretation of Marx based on the strong conviction in the abolition of private property overemphasizes the matter of ownership of the means of production, without correctly seeing it as a practical requirement depending on the empirical and historical social conditions. The two principles of justice might imply an abolition of the private ownership, but it might not. What mode of ownership should be endorsed is a question about institutional design, which is a question falling in the domain of background justice and relying on relevant empirical knowledge on economic rules and social conditions. As to the design of basic social structure, Rawls makes an important distinction between public ownership of productive resources and public regulation or redistribution of social resource, which is troublingly lacked in Marx. As a matter of fact, since the late 1980s, a number of proposals for a market socialism have been raised to complement Rawls's general idea of property-owning democracy. These projects all call for giving workers effective democratic control of the productive enterprises, but they are all proposed under the presumption that an effective constitutional framework of liberal democracy and a market economy should be working in the background without demanding a political revolution¹⁶⁷. But the idea of "free market", on the one

¹⁶⁵ Rawls (1999), p. 54.

¹⁶⁶ For Rawls's detailed discussion about dispersed private ownership of the means of production, see Rawls (2001), pp. 135-40.

¹⁶⁷ See Joshua Cohen, "Democratic Equality," in *Ethics* 99, No. 4 (Jul., 1989), pp. 725-751.

hand, is restricted to the domain of resource allocation rather than extend to political domains to cover basic liberties or other important political liberties. On the other hand, it is to be supplemented with the redistribution of large social and economic inequalities to fit the Rawlsian idea of fair equality of opportunities¹⁶⁸.

Overall speaking, despite the possible difference between Marx and Rawls on their views on the difference principle, they nonetheless can be viewed as having many important consensus. A Marxian conception of justice can be reasonably constructed in the light of Rawls's two principles of justice. Thus so far I have dealt with the first nine antimoralist arguments, and specifically argued for a Rawlsian liberal egalitarian interpretation of Marx. I believe both Marx and Rawls can be understood in the light of natural law tradition in virtue of their endorsing the idea of individuals as persons in community. All individuals are distinct personalities, and their free development of their individuality is the purpose of a political community. But on the other hand, the thriving of a political community is also a common good for all individuals, and no one should be understood as a purely private being immune to the requirement of the common good. In that sense, the principles of justice are concrete principles necessarily needed both for the sake of the well-being of individuals and the thriving of the political community. While Marx makes inconsistent remarks about justice, we should take a critical look at his dismissive ones and construct a proper Marxian conception of justice out of his texts.

¹⁶⁸ For detailed discussion about the role of free market, see Freeman Samuel Scheffler (2003). "What is Egalitarianism?", in *Philosophy and Public Affairs* 31 (1): 5-39, and "Illiberal Libertarians: Why Libertarianism is Not a Liberal View", in *Philosophy & Public Affairs*, Vol. 30, No. 2, pp. 105-151, Samuel Freeman (2011), "Capitalism in the Classical and High Liberal Tradition", in *Social Philosophy and Policy*. Vol. 28 (2), pp. 19-55, and Elizabeth S. Anderson (1999). "What is the Point of Equality", in *Ethics*, Vol. 109, No. 2.

Part IV

A Marxian Social Science and Natural Law

Chapter 8. Legal Positivism and Natural Law Jurisprudence

As I have mentioned in the earlier chapters, there is nonetheless a second type of antimoralist argument concerning the methodology of social science theories. Recall the following three methodological objections first:

(F10) Scientific Explanation Argument. Causal explanatory explanations offered by social science theories are incompatible with morality, for social science is an explanatory task, explaining what is predictively true without judging whether the predicted future events are morally good or not.

(F11) Rejecting Strong Teleological Necessity Argument. An explanation of human history should be a causal one, rather than a teleological one that uses the consequence as the causal explanation for its precedent and regards the world as necessarily determined by some suspicious metaphysical entity called human nature or human function¹⁶⁹.

(F12) Rejecting Weak Teleology Argument: Even if one endorses a teleological understanding of human nature as only a metaphysical “presumption” and use it as a guiding principle in the empirical and causal analysis of human history, such a presumption is unscientific and should be rejected. Causal explanations of human history should be purely empirical without presuming any sense of teleological understanding of human agency.

¹⁶⁹ See Jon Elster, *Making Sense of Marx* (Cambridge University Press, 1985), pp. 107-117.

All the three arguments share the same conclusion that social science should be free from moral evaluation but purely descriptive and empirical. Yet they have different reasons for the conclusion. (F10) rejects morality based on the reason that explanatory theory cannot be at the same time evaluative. (F11) rejects morality based on the reason that notions of human nature and human function are metaphysical ideas. (F12) rejects morality based on the reason that a teleological understanding of human nature, even if it is not a deep metaphysical truth but a guiding presumption, is incompatible with social science.

To complete my defense of a Marxian conception of justice, I am now going to criticize the common conclusion shared by (F10, (F11) and (F12). I shall show that social science theories can be both explanatory and evaluative, or that having a moral dimension does not necessarily make social science unscientific. Natural law tradition has influenced social science studies for a long time. What is unique in Finnis's theory of law is the rational foundation for the causal explanatory description of legal phenomenon. By basing the descriptions of legal phenomenon on the first principles of natural law, namely a set of basic goods and requirements of practical reasonableness, law and morality are combined and inseparable in theory. In that sense Finnis rejects the is/ought or explanatory/evaluative divide. Such a natural law approach to social science, as it happens in the debate in Marxism, has been strongly opposed by legal positivists who insists on the divide between what law is and what law should be. My critical evaluation of both the positivist and natural law theories deal with the relation between empirical description and moral evaluation will be based on a discussion of an independent methodological scheme. And I hope that scheme can help us see why Finnis's natural law methodology is better. Once we can see the desirability of the

natural law methodology, then we would have reasons to favor a Finnisian interpretation of Marxian social science.

To start with, early legal positivists before Hart appeal to the notions like volition and power to explain what is law. Bentham defined law in terms of “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state”, and Austin’s key words were demand, political superior and habits of obedience. These definitions were charged by Hans Kelsen for its failure to see law as a special social technique whose function consists in making sure people do things that should be done. This technique is particularly associated with its power to punish those who do not obey the rules they are supposed to obey. Therefore, a proper definition of law should include the above feature, treating law as norms for the applications of sanction for the sake of making sure people follow the rules they should follow. What’s more, such a definition is believed to be the best one because it tends to cover all the legal phenomenon from the ancient tribes to the modern constitutional regime and thereby is a universal description of law.

However, Hart challenges all the previous positivist views. He points out that although Kelsen is right to regard law as a special social technique, he understands that technique too narrow as only providing norms of the application of sanction. Hart contends that law, as a special social technique, is extended from sanctioning the disobedient and predicting the future events into a more general function of prescribing what should be done for social members from a particular legal point of view. There are different types of social controls that cannot be understood as just sub-forms of sanction or punishment. Many legal rules are about how to make legal rules, so there is a distinction in legal rules between the primary rule of recognition and the secondary rule of

recognition. Only very primitive and small communities can have a very simple social structure as one of “primary rules of obligation” rooted in customs or some general attitude of the social group without a need for legislature, courts or officials of any kind. Yet such a simple form of social control must grow defective and require supplementation in various ways. When doubts about what rules are and how to apply the rules in concrete and controversial circumstances arise, there will be an urgent need for “procedure for settling the doubts, either by reference to an authoritative texts or to an official whose declarations on this point are authoritative”¹⁷⁰. The establishment of such procedures is necessary for addressing the defect of uncertainty of the simple social structure of primary rules. Considering that there are other defects of such a simple society, we need different types of procedures to remedy them too. Such a remedy is considered as “a step from the pre-legal into the legal world”, whose nature is to identify forms of secondary rule, that is, “a rule for conclusive identification of the primary rules of obligation”¹⁷¹. These secondary rules include “rules of recognition, change and adjudication”¹⁷².

However, in continuing to criticize the previous positivist views on law, Hart also points out that the prescriptive function of law further generates a special normative attitude by the rule followers, and that normative feature of our rule following behavior is essential to our understanding of law. To say that we are rule followers is not only to say that our actions can be stably predicted according to the content of the rules, but also that our future actions are normatively expected if we treat law as providing reasons for action. A legal rule provides a legal reason for acting in such and such a way, so our rule following behaviors are not merely actions based on mechanic or

¹⁷⁰ See H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1994), p. 92.

¹⁷¹ Hart (1994), pp. 94-5.

¹⁷² Hart (1994), p. 98.

predictive mode of movement but rather being based on our normative, or internal attitudes toward these rules. According to Hart, jurisprudence should grasp the fact that we have an internal attitude toward law. In other words, ideas of legislation, jurisdiction, legal validity and legal power should not be understood as purely “scientific” or “fact-stating” predictive ideas; “the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers and other ‘acts-in-the-law’” are all rule following behaviors conducted by legal agents who have a normative attitudes toward law, understanding their own actions as following or accepting the legal reasons from an internal, first-personal point of view¹⁷³.

Yet the insistence on the internal point of view or the normative attitude toward law does not mean a necessary relation between law and justice or morality. Hart contends for the separation of law from the morals, claiming that legal rules should not be conflated with moral rules and that the normative force provided by law is not a moral kind, but just a legal kind¹⁷⁴. While it is true that sometimes there can be a link between these two, a correct definition of law should still be clearly distinguished from morality. There are two reasons. First, whether a legal system exists is a factual question, which is answered by checking the following two minimum conditions: are there a large majority of obeying ordinary citizens acting in accordance with the legal rules, irrespective of why they obey the rules (they can obey laws from any motive such as self-interests, or long-term calculation etc.)? And, are there a sufficient number of officials accepting the rules of recognition, of change and adjudication, as public, common standards for their making legal decisions and “appraise critically their own and each other’s deviations as lapses” according to these public

¹⁷³ Hart (1994), pp. 84-5, 89.

¹⁷⁴ See H.L.A. Hart, “Positivism and the Separation of Law and Morals” , in *Harvard Law Review*, Vol. 71, No. 4, pp. 593-629.

standards¹⁷⁵? In such a division of labor, it is fine for the ordinary citizens to have a relatively passive attitude by just acquiescing in the legal rules or even obeying them for trivial reasons without forming critical assessments of the laws. It might be true that ordinary citizens often have good reasons to obey laws. For example in almost any human society there are minimum contents of natural law such as the protection for persons, property and promises for the sake of peaceful cooperative activities, and citizens often obey these rules for good reasons¹⁷⁶. Yet it is nonetheless possible that they might live in a sick society where laws are oppressive to them. But in that case they might also obey the existing legal rules, and their law-abiding behaviors would make them “deplorably sheeplike”, and even bring them to an “end in the slaughter-house”. But irrespective of living in a good society or an oppressive society, we should not deny both societies the title of a legal system¹⁷⁷. Since moral laws and immoral laws are both laws, and they are both normatively efficacious, we should not define law in terms of its moral character.

The second reason for the separation of law and morals offered by Hart is related to the matter of ultimate justification of legal validity. Hart admits that people would usually seek to find further justification for the legitimacy of a legal rule by appealing to the morality or justice of its content. But this is misguided, for what makes a primary legal rule legitimate is the second rule of recognition that confers the legitimate legal force on it. In our modern legal system, the rule of recognition is more complex. The sources of law can be some authoritative text like a written or unwritten constitution, a customary practice, an enactment by a legislature, and some past judicial precedents. The internal aspect of law means only that as long as those kinds of rules of recognition

¹⁷⁵ Hart (1994), pp. 114-6.

¹⁷⁶ Hart (1994), pp. 193-9.

¹⁷⁷ Hart (1994), p. 117.

are accepted and used by the officials and citizens, they are valid rules of that legal system. Hart admits that it is always possible for one to go further to ask for the criteria of validity of the relatively subordinate rules of recognition, and finally we will reach to the point of figuring out an ultimate rule that provides the criteria for the assessment of the validity of all other rules. For example, we ask the regressive questions about the criteria of validity of a legal rule and reach the conclusion that the ultimate rule of recognition is a rule that is customarily practiced by legislature, officials, or private citizens. This should be the end of the inquiry. But some might continue to question about the legitimacy of custom: why should we accept the legal rules that are made by such and such officials or customs? These people, in Hart's view, are tempted to raise the further question about the desirability of such a ultimate rule or of the whole legal system. But the questions about the worth of legal system or the desirability of the existence of certain custom are no longer an internal statement of law. They become external evaluative questions explored by an observer outside of the legal practice. Statements of value should not be wrongly thought of as statements of legal validity¹⁷⁸.

The above Hartian positivist approach to law, however, is criticized by natural law theorists who believes in the necessary link between law and morality. Lon Fuller, for example, contends that there are eight standards necessarily linked to the procedure of making law, which provides the moral foundation or rational foundation for it. For a principle to be acceptable as a law, it must satisfy these standards, rather than simply be observed to be regularly followed by social members who do not have to have a normative attitude toward law. These standards constitute the inner morality of law (or, the virtue of legality). While Finnis agrees with Fuller's criticism, he goes

¹⁷⁸ Hart (1994), p. 108.

further to criticize Fuller's idea of inner morality as insufficient too. The inner morality of law is still too formalistic to grasp the substantive good that is inherent in law. I will then explain Finnis's own natural law theory of law.

First, Finnis contends that a proper definition of law should endorse the methodology of focal case description, or ideal-type description, a standard according to which a marginal case of law can be identified. But the focal cases of law should include both the formalistic feature of law and the substantive aspect of it. In terms of the latter, a theory of law should recognize the practical reason of human beings, and treat both citizens and legal officials as agents who would by nature follow the first principles of natural law, aiming at the basic good, following the basic requirement of practical reasonableness and obeying law and justice as a requirement of the common good. Once those focal cases are so identified, we will then be able to identify the watered-down cases, or the marginal cases of law that violate those principles. By both describing the focal cases and the marginal cases, therefore, we are at the same time evaluating concrete laws as either morally good or morally bad according to the first principles of natural law.

One might find the above dual feature of jurisprudence a strange one. But this should not surprise us if we realize how common, as our daily language shows, that explanatory account can be evaluative at the same time. Medical notions like "pathology" and "function" both have that dual feature. So do the moral notions like "honesty" and "flourishing". But why do positivists forcefully deny such a necessary link between law and morality, claiming that "it does not follow from it that

the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice”¹⁷⁹?

The first reason for positivists to deny the evaluative aspect of description is that in many cases there is equal normative force and equal legal validity for both just and unjust laws. In our society, many legal rules that are routinely followed by a majority of social members are not just according to some enlightened moral point of view. To say “unjust law are no laws”, therefore, conflates the legal validity of laws with the moral quality of them. Such conflation is dangerous, moreover, for citizens might find it easy to disobey laws as long as they think they are not moral from certain point of view. Hence such a conflation between legal and moral obligation should be avoided to make sure laws are generally obeyed and social stability is maintained. Secondly, positivists believe that we must admit the fact that the making of laws is mainly only restricted by formalistic principles. For example, the requirement of “Natural Justice” only refers to the procedural principles of impartiality, publicity and the justice in the application of law, which are formal restrictions that are not sufficient for eliminating the most odious laws¹⁸⁰. But recognizing the conceptual independence of law from justice and morality does not, and need not prevent us from recognizing the importance of changing and improving the moral quality of law. In his insightful criticisms of the inner morality of law, Hart claims that it is vital to “reveal a sobering truth: the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost...[The] cost is the risk that the centrally organized

¹⁷⁹ Hart (1994), p. 185.

¹⁸⁰ Hart (1994), p. 206.

power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not”¹⁸¹. If separating in theory the moral quality of law on the one hand, and the existence and application of law on the other, is well compatible with our criticizing bad laws, and even beneficial for reminding people of the fact that laws can be easily manipulated by power, then there seems to be strong reasons for us to reject the natural law treatment of law as inherently linked to morality.

However, the above two reasons are criticized by Finnis as based on misunderstanding of natural law jurisprudence. He emphasizes that in fact natural law theorists have never simply claimed that “unjust laws are no laws”, or that “every law has moral worth”¹⁸², or that we have no duty to obey unjust laws. Moreover, natural law theorists have never been that simple-minded to think that all laws are necessarily morally right. On the contrary, they recognize the fact that there are various types of injustice in law, and they seek to identify the different sources, or causes, of injustice in law. On the matter of unjust laws and our duty to those laws, what they do is to distinguish between a narrowly defined legal obligation to obey particular laws in particular circumstances on the one hand, and a broadly defined moral obligation to obey LAW as a whole system for the sake of the common good of human beings on the other. The necessary link between legal obligation and moral obligation consists in the latter broader sense, whereas in particular circumstance there is no such necessary legal obligation. In some cases we would find no good reasons to obey unjust laws, but in other cases we might find strong reasons to obey them. Questions regarding when and how

¹⁸¹ Hart (1994), p. 202.

¹⁸² Finnis (2011), p. 26.

such a demand for obeying unjust laws are not just randomly decided, but constitute important issue depending on practical considerations¹⁸³.

Yet there could be a third reason why a legal positivist objects to the natural law link between law and morality. That is, natural law theory has a suspicious metaphysical assertion on the teleological nature of human beings and unjustifiable presumes some determinate eternal law reflecting the whole structure of the nature. These assertions and presumptions, according to Hart, are too “grandiose” for modern people to accept¹⁸⁴. Such a deeply doubtful look at the metaphysical feature of natural law theory is closely tied to a Humean rejection of teleological understanding of human behavior. Humeans believe that there is an unbridgeable gap between is and ought. What human beings seem to be naturally inclined to do is one thing, but what are the principles of practical reason that human beings should take as guiding rules is the other. In Hart’s words, “the difference is that on the teleological view, the events regularly befalling things are not thought of merely as occurring regularly, and the questions whether they do occur regularly and whether they should occur or whether it is good that they occur are not regarded as separate questions”¹⁸⁵. Since observed empirical regularity does not entail rationality or reasonableness, natural law theorists wrongly derive the latter from the former. What we moderns can accept, therefore, is only a “very attenuated version of Natural Law” focusing on human beings’ basic desires for survival. This is because such a desire is “widely reflected in whole structures of our thought and language” and its truth is empirically verifiable¹⁸⁶.

¹⁸³ Discussions about legal obligations to unjust laws, see Finnis (2011), Chap. XII.

¹⁸⁴ Hart (1994), p. 192-3.

¹⁸⁵ Hart (1994), p. 190.

¹⁸⁶ Hart (1994), pp. 192-3

Lastly, related to the above positivist criticism of the teleological presumption of human nature, a positivist might argue that what is the correct answer to questions about basic goods and well-being of human beings cannot be easily answered. Lacking a universally recognized answer, such ideas must be too vague and uncertain to serve as a reliable guidance in legislation. Enlightened moral perspectives can conflict each other, and people disagree with each other what is best for themselves and the society. If so, then there would emerge another dangerous social consequence of unfair treatment of individual freedom. That is, the conviction that there is some unchanged and determinate natural law to guide everyone's deliberation and life choices can impose unfair restrictions on one's freedom. Moral legislations based on a specific moral perspective, therefore, might be an evil due to its deprivation of an individual's freedom to exercise one's creative talents and try diverse ways of life experiments¹⁸⁷. In a word, natural law theory does not fit well with the diversity of human morality in our modern times.

The above two reasons for rejecting natural law theory are related in the sense that they both raise concerns about the metaphysical presumption of human nature as aiming at the good as an end of their actions. While the third objection emphasizes the difficulty in justifying the truth of these presumptions, the fourth emphasizes the harmful social consequence following from the lack of justification. However, neither of the above two objections are tenable. Consider the problem of last objection first. Finnis points out that natural law tradition has long been focused on the diversity of human life. It is actually an essential part of natural law theory that human morality is a highly diversified landscape due to the limitless variety of reasonable ways of life choices and personal commitments¹⁸⁸. The principles of practical reason only provide a list of basic forms of

¹⁸⁷ Tucker (1965), p. 273; See also Hart (1994), p. 205.

¹⁸⁸ Finnis (1994), p. 29, 127.

goods and abstract guiding principles for individuals to rely on when they deliberate about what they should do and should not. If we understand the notion morality in a narrow way, treating it as a kind of life style or personal choice in certain social and cultural circumstance, then we can say that the first principles of natural law are not moral principles in that sense, but rather “pre-moral”, rational foundation for the generation of moral principles in certain social and cultural contexts and the deliberative guidance for our moral choices in concrete circumstances¹⁸⁹.

Moreover, the fourth positivist objection seems to be self-conflicted when they claim both that survival is the only universally recognized goal of human beings and that legislation should allow the free experiment of individual morality. Not only is the minimum content of natural law reflected in legislation, other pursuits of individuals are also included, such as forming social groups with people having kindred spirit, protesting the unjust social conditions in a manner consistent with the requirement of the public interests and under the rule of law, and etc. This means that the Humean criticism that only desires for survival is widely observed in human society and thereby empirically verifiable is problematic. It is actually empirically wrong to hold that human beings only universally pursue survival, since we pursue a wide range of things, and our broad interests in a variety of different life projects are empirically verifiable too. The objection that natural law jurisprudence could threaten our understanding of social world as a diverse and open-ended one is not tenable.

What, then, seems to constitute the real metaphysical worry about natural law theory lies in the third objection. It is challenged that natural law theory makes an illicit inference from fact to norm,

¹⁸⁹ The distinction between “the rational” and “the moral”, or between “the basic good” and “the moral good”, see Finnis (1994), p. 25, 42, 72, 100.

or from empirical regularity to practical reasonableness. Yet Finnis explicitly rejects such a charge by emphasizing the self-evident, non-derivable nature of the first principles of natural law. These principles need not be based on any further metaphysical justification or explanation. They are not “inferred” from anything, but self-evident, underived principles that every practically reasonable individual would admit upon reflection under favorable circumstances. Moreover, under favorable circumstances reasonable human beings would be naturally driven to follow these principles¹⁹⁰. It is true that if some empirical conditions of human beings and human societies changed radically, it would be impossible for us to follow these principles and it would even be hard for us to tell what human societies and our legal phenomenon would be like. Yet natural law theorists are not concerned with those circumstances, for their concerns are within certain empirical limitations given by the nature of human beings and human societies. Finally, for those insisting on asking the justificatory grounds for these truth of the first principles of natural law, such a justificatory concern is treated by Finnis as a theoretical question whose importance is secondary to the practical concern. From the perspective of practical reason, by contrast to theoretical reason, the principles of practical reason are considered as necessary metaphysical presumptions and need no further demonstration¹⁹¹. Finnis’s affirmation of these principles is metaphysically light, without appealing to the traditional or Aristotelian conception of essence, or any other religious or metaphysically thick doctrines about human nature. So a modern mind would not find it too “grandiose” to accept.

To sum up, Finnis provides his responses to all the four positivist objections. Natural law theory not only recognizes the risk of legalism of law by clearly distinguishing legal obligation from

¹⁹⁰ Finnis (1994), p. 33.

¹⁹¹ Finnis (2011), p. 94, 370, 387-8, 389, 404.

moral obligation, but also embraces the modern de-metaphysical temperament of social science. Moreover, the first principles of natural law inherently acknowledge the diversity of human morality. All these features are shared by legal positivists, and we can conclude that on those matters there is actually the differences between Hart and Finnis is much smaller than some think. The major difference, therefore, lies in whether criticism of law should be an internal one that is provided from within jurisprudence itself like the natural law theory suggests, or an external one that is provide from an independent moral theory from which jurisprudence is autonomous. To explore this issue is the task of next chapter.

Chapter 9. The Finnisian First Person Methodology

In order to provide a general method of evaluating different theories of law, I am now going to provide an analysis of the idea of autonomy:

(A1) Disciplinary Autonomy. Each branch of social science theory is mutually autonomous and has no interrelation with each other. Jurisprudence and political science are independent of each other not only in the sense that they are two different branches of disciplines but also in the sense that there is no overlapping data studied by both. Theorists should only focus on the subject matter belonging to their own domain.

(A2) Restricted Autonomy from Internal Moral Assessment. Social Science is an autonomous field that only uses causal explanation to analyze the patterns of movement and behaviors. Moral assessment of the patterns of behaviors is not internal to its own theory, but is provided by other theorists like moral philosophers, enlightened social activists and religious practitioners and etc. While social scientists might be sensitive to those outside criticisms, they should not conflate their own causal explanatory task with the moral assessment.

(A3) Absolute Autonomy from Any Moral Assessment. Not only is social science description of human behavior purely explanatory and predictive, they are not subject to any external moral assessments. Social scientists reject any third-personal criticisms of the patterns of movement and behaviors.

(A4) Empirical Autonomy from Metaphysical Necessity. Social science theory uses causal explanations to analyze the patterns of movements or behaviors, but rejects any deep presumptions about necessary realization of telos and the strong essentialist understanding of human agents.

Now, in terms of the attitudes toward the four types of autonomy, a Hartian positivist does not endorse (A1). It is easy to see why disciplinary autonomy is implausible. To explain legal phenomenon and figure out the source of legal validity, we are inevitably required to observe the historical practice and social conventions to identify what is the highest legal authority and what customary rules are widely accepted by the social members. This requires empirical analysis of different aspects of human interactions, which might involve the cultural, economic and other domains of social practices. Next, a Hartian would also endorses (A2), i.e., restricted autonomy from internal moral assessment. According to the positivist view, the task of social scientists is to describe, to make predictions based on the previously observed patterns of behaviors, and to infer causal links to explain those patterns. These descriptions and predictions can be judged as correct or wrong, and they are subject to empirical check. Whether the future states of affairs are morally desirable or not, however, is a question answered not by social scientists themselves from an internal point of view, but by other theorists or from external perspectives, such as a more enlightened moral point of view or a religious point of view belonging to other disciplines. As Hart himself contends, it is actually important to separate the two kinds of statement, the factual and the evaluative, for this would make us aware of the fact that laws can be, and probably can often be, oppressive from an enlightened moral point of view.

Yet the above awareness of having a critical attitude toward existing laws suggests a rejection of (A3), i.e., absolute autonomy from any moral assessment. While social scientists are not entitled to make an internal judgment about whether their descriptions are morally good or not, they are also not entitled to make a general judgment that no external moral criticism can even be made on the descriptive theories they make. Lastly, we can see that Hart endorses (A4), i.e., explanatory autonomy from metaphysical necessity, since he rejects any metaphysical presumptions of human nature and exclude them from social science as grandiose and hard to accept by the moderns.

Based on the above analysis of four types of autonomy and Hart's attitudes on it, therefore, we can now conclude the following Hartian positivist stance on the relation between social science and morality:

Hartian Positivist Method: Social science, as a descriptive and causally explanatory theory, is incompatible with moral assessment as an internal part of it. Yet external, third personal evaluation can be, or might be encouraged to be raised to make independent moral criticism of the social phenomenon described in the theory. On the other hand, social science explanations should be not regarded as being based on strong metaphysical presumptions about teleological necessity or determinism, but rather be restricted to the empirical methods of observing the patterns of behaviors and checking and revising the scientific models used in the explanations of the subject matter.

I believe this attitudes reflects a plausible understanding of the limited scope of social science theories. Empirical observations and causal explanations of social phenomenon cannot give us a

strong necessary prediction of the future events. Although the metaphysical thesis on determinism might be true and social scientists work under the presumption of determinism, the empirical scientific method of social science does not allow social scientists to make a strong claim about the necessity of the realization of some historical goals or of human essence. Some predictions about the future tendencies could be proposed, or some revisions should be made if counter-evidence emerges. Social scientists are not entitled to demonstrate the truth of the metaphysical necessity in terms of the necessary realization of some human plans. This is a philosophical claim beyond the domain of social scientist analysis. Such a restriction is well taken by Finnis, who explicitly prioritize practical reason to practical reason by limiting the first principles of natural law as a self-evident principle that needs no demonstration for a practically reasonable person, under favorable empirical conditions. We start with the “presumption” that we “are” practically reasonable persons, says Finnis. In that sense Finnis, like Hart, endorses (A4), i.e., empirical autonomy from metaphysical necessity.

In terms of the rest kinds of autonomy mentioned earlier, both a Hartian and a Finnisian would agree that we can make moral criticism of social phenomenon. The main difference is just about whether such a criticism can be made from within social science theory itself or must be made from an external point of view. While Finnis contends for an internal point of view of social scientists and make moral assessment of its subject matter internal to the descriptive theory, Hart objects that only a third person point of view external to the descriptive theory can be appealed to when one evaluates the subject matter. So both Hart and Finnis reject (A3), i.e., absolute autonomy from any moral assessment, whereas Finnis also further rejects (A2), i.e., the restricted autonomy

from the internal assessment. So now we can conclude the methodology employed by Finnis as follows:

Finnisian Natural Law Method: Social science as a descriptive and causally explanatory theory is compatible with moral assessment as an internal part in itself. It endorses a first personal evaluation in itself when it describes the subject matter. But social science explanations should neither be regarded as being based on strong metaphysical presumptions about teleological necessity or determinism, nor be narrowly restricted to the empirical methods of observing the patterns of behaviors and checking and revising the scientific models used in the explanations of the subject matter. In endorsing the first personal evaluation, the theorist herself must endorse a first person perspective of practical reasonableness, and thus some weak metaphysical presumptions about human nature, to offer the theoretical guidance to the empirical analysis of social phenomenon. Teleology in the strong sense of realizing metaphysical necessity in human history is substituted for by a weak metaphysical presumption of human telos as aiming at the good, which needs no further theoretical justification.

By introducing the first person perspective to provide certain standard of practical reasonableness, a social scientist cannot avoid also introducing some presumptions of human telos and human nature. However, although the “theoretical guidance” is much weaker than the one offered by the metaphysical assertion about the necessary coming of certain future events, one might nonetheless still wonder if we should involve such a theoretical guidance into social science. Would it be better if we choose a purely descriptive and third person approach to social science?

Finnis's answer is negative. He offered two reasons to explain why we should not choose such a positivist method. First, actually the positivist separation of the moral philosophy and jurisprudence is not consistently held by themselves. In real historical legal practice we are inevitably citing the reasons more or less connected with the principles of ethics and political philosophy. For example, the claims made by legal positivists about the function of formal features of legal order as maintaining social order to remedy the social defect of uncertainty, and about the justification of lawyers' treating certain principles of justice as principles of legality, are both unintelligible unless we understand them as aspects of practical reasonableness and constitutive of the promotion of the common good of a whole community. Finnis claims that:

“One will not understand either the ‘logic’ or the ‘sociology’ of one’s own or anyone else’s legal system unless one is aware (not merely in the abstract but in detail) how both the arguments in the courts, and the formulation of norms by ‘theoretical’ jurists, are affected, indeed permeated, by the vocabulary, the syntax, and the principles of the ‘ethics’ and ‘political philosophy’ of that community, or of its elite or professional caste. In turn, one will not well understand the ethics or political philosophy of that community or caste unless one has reflected on the basic aspects of human well-being and the methodological requirements of practical reasonableness....[A] jurisprudence which aspires to be more than the lexicography of a particular culture cannot solve its theoretical problems of definition or concept-formation unless it draws upon at least some of the considerations of values and principles of practical reasonableness which are the subject-matter of ‘ethics’ (or ‘political philosophy’). Since there can be no sharp distinction between the ‘two

discipline' at that basic level, it is not clear why the distinction, if such there be, should be thought so very important at other levels" (357-8).

The second reason is a stronger one. Finnis goes further to emphasize the practical concern of jurisprudence, or broadly speaking, the practical function of social science in terms of its directing human agents and their social activities to realize the requirements of practical reasonableness. The type of social science explanations offered in natural law tradition, Finnis argues, is not to just describe some "ordinary concept of law", for an ordinary concept is "unfocused": by allowing us to understand all the varied contexts of legal phenomenon and all the varied types of legal agents, no matter a sophisticated legal systems in professional lawyers' talk, elementary legal systems reported by the anthropologists, and tyrants' and bandits' talk about the orders and the customs of their syndicate, such an ordinary concept only reports what we have all been well understanding non-controversially¹⁹².

A proper theoretical purpose of jurisprudence, therefore, should not be simply to "explain a concept, but to develop a concept which would explain the various phenomena referred to (in an unfocused way) by 'ordinary' talk about law – and explain them by showing how they answer (fully or partially) to the standing requirements of practical reasonableness relevant to this broad area of human concern and interaction" (278-9). Explanation of a social phenomenon has a practical function of guiding human practice to following the principles of practical reasonableness. The positing of law is an act "which can and should be guided by 'moral' principles and rules; and those moral norms are a matter of objective reasonableness, not of whim, convention, or mere

¹⁹² Finnis (2011), p. 177.

‘decision’”¹⁹³. Those objective requirements would not only explain the reason why the basic social structure of a body politics work in such ways that separation of powers and other economic and legal institutions are established and maintained, but also offer evaluative criticisms of the deviating cases and even facilitate revolutionary requirements on social members. So Finnis argues:

“[W]hat truly characterize the tradition is that it is not content merely to observe the historical or sociological fact that ‘morality’ thus affects ‘law’, but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens” (p. 290).

A Hartian positivist might have no objection to the ambition of natural law tradition in offering practical guidance, yet she might insist that it aims too high at the cost of “rul[ing] out as non-laws which failed to meet, or meet fully, one or other of the elements of the definition”¹⁹⁴. Would the laws that lack rational basis and legislators who manipulate their powers fail to be considered as a relevant explanandum in Finnis’s explanation of law? If it is the case that a theory cannot include all relevant and ordinary phenomenon, then we should have reasons to reject it due to its lack of explanatory power.

However, the distinction between the focal cases and marginal cases can exactly remove such a worry. The focal cases of law are multi-faceted. They all aspects of the practical reasonableness, and thus the marginal cases of law are defined as marginal ones due to their failing to embody one or several aspects of the practical reasonableness. To explain, the complicated long definition of

¹⁹³ Finnis (2011), p. 290.

¹⁹⁴ Finnis (2011), pp. 276-7.

law provide by Finnis is the following: law is defined as a social phenomenon primarily referring to “rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and standardly, constituted as an institution by legal rules) for a ‘complete’ community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions”, and “this ensemble of rules and institutions [are] directed to reasonably resolving any of the community’s co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities”¹⁹⁵. This multi-faced definition does not exclude any ordinary legal phenomenon from its explanatory scope, but only serve as a standard according to which we judge what aspect of practical reasonableness is violated by a marginal case of law. A law that does not well address some aspect of the common good for the community is a defective piece of law, and there can be various ways of having a bad law. A legislative authority that does not fully respect the reciprocal relationship between the subjects of the law is a defective authority. So is a law whose substantive contents discriminate certain social members.

The above method of defining the focal cases of law is also called by Finnis an “ideal-type” description of law. It both covers the focal cases and the marginal case when it explains the relevant social phenomenon. Moreover, it both positively evaluates the focal cases and negatively evaluates the marginal cases. As is mentioned earlier, such an ideal-type method is widely used in other

¹⁹⁵ *ibid*

disciplines. When a doctor uses the notion of pathology, illness, and disease to explain an X-ray photo to a patient, both the patient and us readers, who are external observers, seem to have no problem with her use of those notions. Describing a symptom is at the same time making a normative judgment about states of affairs in the medical practice, and there is no need to further reflect upon the question whether using evaluative notions is legitimate or not.

More importantly, it might be universally acknowledged that a doctor should always be prepared to cure the disease of a patient, if this is a doctor with normal psychology and work under favorable social conditions. Also, it seems naturally so that the patient should have already been motivated to cure her own diseases. There seems to be no reasons for the doctor to intellectualize the whole point of her medical practice and the need for the patient to take her illness seriously. It might be true that definition of disease would change, and with further development of medical science our current knowledge system can make different judgment about what a best treatment should be endorsed, but this does not mean that the medical practice must be purely descriptive without any evaluative dimension.

The same reasoning can be applied to our understanding of natural law methodology of social science too. First, when a social scientist explain the social phenomenon according to an ideal type description of the phenomenon, she is both describing, and diagnosing, the health conditions of society. defines what is the healthy condition and what is the pathological condition. In offering a description of social practice, she also makes corresponding normative criticism of it. Moreover, she also tacitly presumes that readers and practical agents like us would be naturally motivated to learn from the diagnosis and criticisms to meet the ideal descriptions of the relevant subject matter.

Secondly, just like in medical science definition of health might change with new empirical discoveries, social science also needs solid empirical evidence and discoveries. Moral philosophy and empirical social scientific studies should be viewed as having a “dialectical” relation and mutually dependent on each other¹⁹⁶.

To sum up the comparison of Hart and Finnis, they both endorse the de-metaphysical treatment of social science. Also, they both agree that social scientific explanations should be empirical and causal ones. Moreover, in actual theoretical practices, they both reject the disciplinary autonomy by including explanations of moral and political phenomenon as part of jurisprudence, and thereby treating the autonomy of disciplines as no more than a conceptual or pedagogical ideal. Last but not least, they both reject the understanding of social science as absolutely autonomous from any moral assessment. Their disagreement, therefore, seems to mainly lie in whether the moral dimension is internal or external to social science theories. In other words, their disagreement eventually boils down to one on the issue about the practical function of social science. While a Finnisian natural law believes that a first person point of view should be endorsed, a Hartian positivist believes that a third person point of view should be endorsed.

Hence here are the two modes of description endorsed by Hartian and Finnisian methodologies of social science respectively:

(D1) Hartian Third Person Positivist Description: Social science descriptions should endorse a third person perspective, avoiding involvement of principles of practical

¹⁹⁶ Finnis (1994), Chap. I.

reasonableness or metaphysical presumptions about human nature presumed as a rational basis for social practice. While other non-social scientists can, and could be invited to, make moral criticisms of social practice from an external moral and political principles, social scientists themselves only provide explanatory descriptions in terms of making empirical observations and causal predictions. Hence social science by itself does not have the practical function of guiding human social interactions.

(D2) The Finnisian First Person Natural Law Description: Social science descriptions should endorse a first person perspective, which refers to a weak metaphysical presumptions of the practical reasonableness of human agents as the rational foundation for their social practice, rather than a strong metaphysical assertion about the historical necessity of realization of telos. These presumptions are treated as first principles that need no further demonstration, serving its the practical function of guiding the social practice to approximate the ideal-type description of it on the basis of those first principles. Hence social science theories are both explanatory in terms of making empirical observation and causal predictions and evaluative in terms of offering moral criticism and practical guidance.

However, a social scientist, either a Hartian or a Finnisian one, should not deny the need to do moral and political philosophy at a different level. Although social scientists themselves do not necessarily need to clarify their metaphysical groundings for the principles of practical reason in order to offer an causal explanatory account of the subject matter, those metaphysical questions by themselves are still valid questions. Finnis claims that when one says that it is “too late”, one

is actually relying on a metaphysical nature of time as being irreversible¹⁹⁷. Hence there is a separate discipline of metaphysics that specializes in the nature of time, which is not necessarily included in our daily use of the term.

As to Finnis, although the explanatory aspect of social science description is compatible with a moral dimension, it does not have to be at the same time further based on a strong metaphysical thesis on the nature of human beings and the whole structure of the universe. It might tacitly presumes some metaphysical premises, but can fly metaphysically light by remaining silent about the truth or falsity of the premises. Unless some strong evidence shows that practical agents are radically different from the kind of agents described as practically reasonable, either due to some change of human nature or some unfavorable empirical and social conditions, social scientists need not be concerned with a further need to demonstrate of truth of first principles of natural law. It is enough, for the sake of social practice, that those presumptions serve as the rational foundation for the social scientist to explain the pathology of some social practice.

Yet even if one agrees with Finnis on the practical function of social science, she might disagree with his de-metaphysical inclination. One might worry, first of all, that such an inclination might make the rational foundation for social science explanation shaky. Also, the theoretical reason and practical reason should be regarded as equally important. Although they provide different levels of explanations, a complete system of explanations of the factual, the normative and the metaphysical should be all sought for. Hence some might propose a mode of description that

¹⁹⁷ Finnis (2011), p. 64.

involves a deeper justification for the metaphysical knowledge of human nature. Call such a mode of description as follows:

(D3) Deep Metaphysical First Person Natural Law Description: Social science descriptions should endorse a first person perspective, which affirms a set of metaphysical stipulations about the practical reasonableness of human agents as the rational foundation for their social practice. These stipulations have the practical function of guiding the social practice to approximate the ideal-type description of it, and thus social science description is both explanatory in terms of making empirical observation and causal predictions and evaluative in terms of offering moral criticism and practical guidance. But their practical function does not prevent social scientist from seeking to further justify their truth and include that justification in social science itself. Rather, these stipulations could also be, and should be, further demonstrated as true claims inside social science, rather than be merely suspended as necessary presumptions for the sake of practical need.

The above analysis of three modes of social science explanation, i.e., (D1), (D2) and (D3), is relevant to our evaluation of Marxism, for we can ask which is the one that best reflects Marxist social science.

One popular classical interpretation of Marx, as is known to all, endorses (D1), i.e., a positivist mode of social science description. Marxism must be a purely descriptive and predictive theory without a normative dimension. But some other might think Marx should be regarded as using (D3). For example, Jon Elster claims, although in a critical attitude, that Marx's theory of human

history is deeply Hegelian, for his explanation presumes the necessary realization of the human telos and use the future events as the causal explanation for the existing social phenomenon¹⁹⁸. This judgment of Marx's mode of social science description, we should admit, does have solid textual basis, for Marx talks about the iron law of human history and the necessary coming of communist society as the end of human history. Finally, some other theorists suggest that Marxists should endorse (D2). Kai Nielson, for example, agrees that Marxism has two aspects, one normative and the other empirical, but it should treat the normative theory "metaphysically light" just as Rawls does¹⁹⁹. Such an emphasis on the primacy of practical reason over theoretical reason is endorsed by both Rawls and Marx. They are both hopeful writers believing in the realistic possibility of making a more just and more desirable social world.

According to my view, (D3) is the most reasonable standpoint. According to both Finnis and Rawls, a deeply metaphysically inclined social scientist endorses an unnecessarily strong stance on the theoretical reason. Despite the fact that an extension of logic from the justification of the first-order substantive principles, via the justification of the rational foundation of those principles, to the highest abstract metaphysical stipulations is a natural tendency rooted in human reason, such an extension is a necessarily needed for the sake of social practice. The final justification for the metaphysical stipulations about human nature and human history can be suspended, therefore, if the purpose of social science is to guide that practically reasonable human agents to function under favorable historical and empirical conditions. A fuller justification of the Finnisian and Rawlsian de-metaphysical temperament on the matter of practical reason cannot be offered here, and my

¹⁹⁸ See Elster (1985), p. 15, 29, 109.

¹⁹⁹ See Kai Nielson, "Analytical Marxism: A Form of Critical Theory", in *Erkenntnis* 1993, Vol. 39 (1), p. 12.

goal here is limited to showing that although all of the three modes of social science explanations are reasonable, the Finnisian natural law mode is the most attractive one.

To sum up, the Finnisian First Person Natural Law Description is the most plausible mode of description in the light of which we should understand Marx's social science theory. It is both descriptive and evaluative, providing an internal critical perspective on the described social phenomenon. Although that internal perspective is substantively decided by the first principles of natural law, which constitutes the rational foundation for our understanding of our social practice, it does not have to be based on deep metaphysical assertions about human telos or human end. These principles are only presumed to be the pre-moral foundation for the description of social phenomenon, and serving as a practical guidance directing the theorists and readers into the practice of social liberation. Yet social liberation also needs empirical studies, which are the main contributions provided by Marx's rich analysis of the economic activities and legal structures of modern world. Such a Finnisian understanding of Marxism, therefore, truly represents the spirit of Marxism: while the philosophers have only interpreted the world, the real point is to change it.

In terms of my criticism of antimoralist arguments, next recall the last three methodological objections. (F10), i.e., Scientific Explanation Argument, rejects morality based on the reason that explanatory theory cannot be at the same time evaluative. This is wrong from the Finnisian point of view, since the ideal-type description methodology means that identifying focal cases according to the principles of natural law would make us able to both describe the marginal cases as non-ideal ones and negatively evaluate it as violating the principles. (F11), Rejecting Strong Teleological Necessity Argument, rejects morality based on the reason that notions of human

nature and human function are metaphysical ideas. This reason is not sufficient because moral ideas endorsed in social science do not necessarily presume any metaphysical understanding of them, but can be highly autonomous from any metaphysical thesis. Even a Hartian positivist must presume some minimum moral ideas such as the good of survival and social stability, but presuming these notions does not generate any unnecessary metaphysical burdens. Finally, (F12), i.e., Rejecting Weak Teleology Argument, rejects morality based on the reason that a teleological understanding of human nature, even if it is not a deep metaphysical truth but a guiding presumption, is incompatible with social science. This seems to reflect a Hartian positivist stance explained by (D1). Although this understanding of Marxism may have solid textual basis, it does not fit well with the overall spirit of Marxism. The spirit of Marxism is best expressed in the Finnisian natural law framework. If there is something called Marxist methodology in the name of “historical materialism”, I believe, the Finnisian First Personal Natural Law Description should be the best explanation of that name.

To sum up, although the Hartian positivist reading of Marx can also have its solid textual support, I believe overall speaking the natural law reading of him best reflects the practical function of social science that is highly valued by Marx. The “scientific turn” made by mature Marx should not prevent us from recognizing the valuable moral dimension throughout his works. The rich social historical data discovered by Marx and analyzed in his later works are valuable precisely because they are guided by the practical reason, or by the practical goal of changing the social world into a better one. So I propose we follow Finnis in adopting the mode of first person ideal-type description, identifying the focal cases of human production according to the first principles of natural law. Such a multi-layered definition of human production, on the one hand, like Finnis’s

definition of law, involves the a list of basic human goods and basic requirements of practical reasonableness as the end of human production. And the marginal cases of human production are cases violating those principles in different ways to different degrees, and thus describing those cases as marginal amounts to criticizing them in a negative light. On the other hand, giving an ideal-type description of human production does not prevent, but rather encourages us, both the theorists and the readers, to do further empirical studies to find the causes for the deviation and the remedy for it. The apparent tension, therefore, between treating epochal change in human history as following the iron law and treating historical change as a result of collective human practice by active human agents with moral consciousness, therefore, need not trouble us, if we understand that “iron law” in a weakened way in which it is only stipulated as a necessary presumption that human productive activities would naturally aim at both the well-being of individuals and the common good of the community as long as favorable social and human conditions were provided. That necessary presumption plays an important practical role in social science, making it intrinsically liberating and a revolutionary guidance in our understanding of human production and human history.

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Related Dates*. Verso.

Vita

Qianlu Ying was born in Shanghai, China. She got interested in philosophy of religion in high school and decided to apply for the philosophy department of Fudan University in Shanghai, China. During her studies in Fudan, she received a fellowship provided by John Templeton Foundation and spent a year in Waco University in the US as a visiting student. She had a great philosophy learning experience and grew a strong interest in keeping further studies in the US to acquire better analytical skills and broader exposure to western moral and political philosophy. In the year 2012, she got a full sponsorship from the philosophy department of University of Tennessee, Knoxville, and stayed in Knoxville for six years to finish the doctoral degree. Her thesis was instructed by professor David Reidy, Jon Garthoff, Adam Cureton and Allen Dunn, The thesis is on the relation between western natural law tradition and social justice, which reflects both her long term interest in political philosophy and metaphysical inclination.