

## Student Example 2

### Essay Question

Justice and the Social Contract: Lessnoff (1978) suggests the philosophical concept of the social contract is that each individual undertakes to transfer their individual rights to a central authority in return for the security of knowing everyone else has also done so. In liberal democracies this trade is guided by the notion that those with authority will exercise it fairly, justly, and in a way which preserves wherever possible individual liberty.

Consider justice and the social contract. Define the social contract based on the approaches of the theorists studied in this class and using academic sources. How have each of their views influenced our system of governance? Provide an argument that the practices of the criminal justice often undermine original notions of the social contract using three (3) academic sources. Provide a counter argument, using two (2) academic sources. In a detailed discussion of the above arguments include three (3) examples from class to address how the justice system is integral in the preservation of the social contract. What obstacles exist to the fulfillment of this ideal and how might these be addressed?

## **The Social Contract: Original Intent and Current Application**

### **Introduction**

The fundamental basis for government and law in the United States is based on the concept of social contract. The contract involves the notion that people assume certain duties and accept certain restrictions on their liberties in exchange for protection and society. The social contract theory runs on the idea that those in power will rule in a fair manner and work to maintain society's individual liberties to the best of their ability (Pollock, 2007). Although the government was founded on the concept on social contract, over the years they have strayed from this original notion. The main notion of this theory is for the government to protect its citizens. Nowadays, it seems that the government is more concerned with policing citizens, rather than protecting them.

### **Thesis**

This paper will argue that the practices of our government and criminal justice system frequently undermine the original notions of the social contract theory.

### **Definition**

The social contract is defined as a concept in which, "individuals give up their liberty to aggress against others in return for safety (Pollock, 2007; 64)." The contract is formed between society, which promises protection, and individuals, who promise to abide by society's laws (Pollock, 2007). The social contract theory is nearly as ancient as philosophy itself has been one of the most prominent theories among political and social thought throughout history. Plato's

*Crito*, depicts an incarcerated Socrates using social contract ideology when he explains to Crito why he must remain in prison and accept the death penalty. This moral and political theory was given its first full explanation by Thomas Hobbes. John Locke and Jean-Jacques Rousseau contributed to the development of this highly influential theory. These philosophers developed the idea of social contract, which is the fundamental basis for the United States' Constitution, government and legal system (Friend, 2006).

Plato's *Crito* depicts a dialogue between Plato and Socrates where Plato is attempting to convince Socrates escape from prison. Socrates declines Plato's offer, stating he would rather await his imminent execution. Plato presents a plethora of arguments in his attempt to convince Socrates to escape imprisonment. Socrates dismisses Plato's arguments, recognizing there is only one major question at hand: whether escaping from prison would be a just action. He explains that the Laws of Athens are a single entity and breaking one would constitute breaking them all. When a person chooses to live in Athens they implicitly accept to abide by its laws. A sort of social contract is formed and when a citizen goes against the law, it is similar to a child disobeying their parent. Since Socrates willingly chose to reside in Athens for over seventy years it would be unjust for him to turn his back on the Athenian laws solely for the fact that he does not agree with his sentence (Plato, 360 B.C.E.). Socrates recognizes the social contract ideology that a just man is one who recognizes his obligations to his government.

Thomas Hobbes originated the concept of the social contract. In his most influential book, *Leviathan*, he argued that all humans are driven by two major impulses: the fear of death and the desire for power. He believes in a State of Nature where humans are in a constant state of war and life is "solitary, poor, nasty, brutish, and short (Hooker, 1996)." In order to avoid this State of Nature, society should be governed by a social contract. Hobbes believed that human

beings should give absolute power to a single entity in exchange for security from each other and protection from foreign invaders. While the individuals who take part in the social contract would lose some of their individual liberty, they would gain security and community (Hooker, 1996).

Like Hobbes, John Locke believes in a State of Nature. Locke's state of nature is simply the natural condition of mankind where people are completely free to conduct their lives as they best see fit. It is a state without politics, not a state without morals. Locke's State of Nature is not a state of near-war, as Hobbes depicts it, but it can develop into a state of war over property disputes. Since the State of Nature has no central authority, once war breaks out it is likely that it will continue. The most compelling argument for men to enter into a social contract is to protect their personal property. In Hobbes' social contract theory, the individual liberty of the citizen is key and can be violated only when the security of the whole is threatened (Friend, 2006).

Rousseau had a slightly different take on the social contract. He theorized that the invention of property propelled humanity's "fall from grace" out of the State of Nature. Private property created inequality and developed social classes. Eventually, those who had property would create an establishment that would protect their private property from others. Therefore a government becomes established through social contract that proposes equality and protection. One of Rousseau's most famous lines is, "Man was born free, and he is everywhere in chains (Friend, 2006)." Rousseau states that humans were born free but during the creation of civilization, individual interests are given up for those of the collective. Rousseau is an advocate for direct democracy, claiming that since all men are equal by nature no one has a natural right to govern others (Friend, 2006).

## Evidence

The United States government frequently undermines the original idea of the social contract theory. The social contract theory explains that law is a contract. Each individual gives up some liberties in return for protection from others who have their liberties restricted as well (Pollock, 2007). The question is: how much liberty should be restricted and what behaviors should be prohibited?

Gay marriage is a prime example of the government undermining the social contract theory. The United States passed, the Defense of Marriage Act into law in 1996. This Act outlines that neither the federal government or any state may recognize a same-sex relationship as a marriage, even if another state recognizes this union as valid. This act contradicts the Full Faith and Credit Clause of the Constitution. The clause obligates states to give “Full Faith and Credit... to the public Acts, Records, and judicial Proceedings of every other State.” This violation of the Constitution not only jeopardizes the equality of the states, but the equality of the people. Heterosexual marriages are still recognized as valid when they cross state lines (Ruskay-Kidd, 1997). Granting part of the population rights while denying others the same fundamental rights undermines the idea equality as stated in the social contract. It would be different if homosexual marriages posed a threat once they crossed state lines, but that is not the case. This seems to be an act of governmental policing. There is no need for the government to protect its citizens from the “threat” of gay marriage; therefore the fact that it is denying citizens this liberty undermines the social contract.

Another example of the government undermining the idea of social contract theory is the Patriot Act. The Patriot Act was passed in response to the September 11<sup>th</sup> attacks. The Act eased

the restriction on intelligence gathering within the United States by permitting wiretaps, secret physical searches, and electronic surveillance without articulable probable cause. If no crime is found, it is not necessary for the government to advise the person that their phones were tapped or their residence was searched. However, any information obtained can be shared with the C.I.A., the National Security Council, and the Pentagon (Wheeldon, 2009).

Sharon H. Rackrow outlines in her article, “How the USA Patriot Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of “Intelligence” Investigations” how the Patriot Act directly violates the Constitution itself. She states that the Patriot Act “allows the government to compromise cherished freedoms the American people both enjoy and celebrate as part of our national identity (2002; 1693).” Though the Patriot Act was created simply to safeguard national security and protect Americans from further terrorist attacks, it is also necessary to consider how the Act will permit excessive government surveillance that violates the rights of its own citizens.

The Fourth Amendment states that people have the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...”<sup>1</sup> or in other words, their property. As Thomas Hobbes outlined, the main reason people enter into a social contract is to protect their property rights. If the Patriot Act allows personal property to be searched and seized without probable cause, it is in direct violation of the United States Constitution and the social contract.

Additionally, the Patriot Act expanded the definition of terrorism to cover “domestic terrorism.” A person can be charged with domestic terrorism if they commit an act that is

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<sup>1</sup> U.S. Const. amend. IV

dangerous to human life, in violation of a criminal law, or if the act appears to be intended to: intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping. The expanded governmental powers created by the Patriot Act to investigate terrorists are now applicable to domestic terrorists as well. Due to the broad definition this type of terrorism, the political protest activities of individuals and organizations can now be construed as domestic terrorism (Victoroff, 2005).

Political protest is protected by the First Amendment to the Constitution. While the behavior is no longer shielded when protest becomes dangerous to human life, the individual who becomes violent is held criminally liable and is subject to fines or other sanctions (Rackow, 2002). Nevertheless, these protests do not constitute acts of terrorism. Political protestors do not deserve to have their personal property seized without due process solely for expressing an alternative point of view. The government should be upholding the social contract by investigating and preventing actual terrorist attacks, not thwarting political protests.

A prime example of the United States government undermining the social contract theory owed to a specific individual is the story of Rick Convertino. Rick Convertino was a federal prosecutor in Detroit Michigan who was the lead Assistant U.S. Attorney in the Detroit Sleeper Cell prosecutions. The Detroit Sleeper Cell case was one of the Justice Department's earliest victories in the war on terror. However, the Department of Justice turned around and demoted Convertino and asked the court to dismiss the convictions stating that Convertino had failed to disclose evidence to the defense (Glass, 2008).

Prior to his demotion, tensions between strong-minded Convertino and his superiors at the Department of Justice were escalating. Convertino was kicked off the Sleeper Cell case and a highly publicized retaliatory effort against him began soon after he testified before the Senate Finance Committee, against the wishes of his superiors. Subsequently, the Justice Department proceeded to seize Convertino's computer, mail, and work files, read his e-mail, launch at-least four investigations against him and do everything in their power to tarnish his name and reputation as a prosecutor. After four years and a tremendous expense to not only Convertino, but the prosecution as well, Convertino's charges were dismissed. The Department of Justice was more interested in office politics and retaliation than pursuing actual criminals and protecting the United States (Glass, 2008). The actions of the Justice Department are a clear violation of the social contract theory. The Department of Justice should be working to protect society as a whole, not wasting valuable time and resources pursuing a prosecutor who did not comply with a technical rule. The government could have used the resources they spent over the four years they pursued Convertino towards hunting actual terrorists.

### **Counter Evidence**

The argument can be made that America, just like any other institution that exists today, is not flawless. It does its best to uphold its part of the social contract by implementing countless governmental safeguards in the form of checks and balances. Additionally, the Constitution contains an entire bill of rights that ensures Americans are protected from governmental infringement. No governmental decision is going to appease 100% of the population at all times. The United States government upholds its end of the social contract by taking the proper steps that it sees fit to best protect its citizens, their property, and provide equality for all. The rights

and liberties restricted by the government are simply part of those that society forgoes when they enter into a social contract.

When it comes to the institution of marriage, there is a longstanding tradition that holds marriage is between one man and one woman. Marriage statutes are derived from English common law and have been a staple of the United States since its founding. Supreme Court cases which have described the right to marry as a fundamental one have repeatedly focused on the underlying interest of procreation. Historically, procreation could only occur within the confines of marriage since the sexual intercourse outside the bonds of holy matrimony was a criminal act. An argument stating the ban on gay marriage upholds the social contract theory is the fact that allowing same-sex marriage would start the United States down a slippery slope. This could eventually lead towards legalized incest, bestial marriage, and polygamy (Katsh, 2006). By banning same-sex marriage, the United States is upholding its end of the social contract by protecting its citizens from these possible outcomes that stem from the legalization of homosexual marriage.

In regards to the Patriot Act, the Department of Justice issued a report stating that the Act has proven successful in thwarting attempted terrorists attempts. They claim that increased intelligence sharing as a result of the Act has helped to “erode the legal and bureaucratic ‘wall’ that used to separate the intelligence and criminal sides of an investigation (<http://www.usdoj.gov> ).” Stating this “wall” was responsible for the F.B.I. and C.I.A. intelligence failures that could have possibly prevented the September 11<sup>th</sup> attacks. This report illustrates that even though the Patriot Act did violate certain Constitutional provisions, the government did indeed uphold their end of the social contract, by defending their citizens against further terrorist attacks (<http://www.usdoj.gov>).

Additionally, despite the fact the Supreme Court's landmark decision in *Katz v. United States* established that governmental interception of a person's telephone conversation a violation of the Fourth Amendment, the Court left the decision open for warrantless surveillance in circumstances concerning national security. Justice White agreed in his concurring opinion, stating that the Supreme Court should not require the President to obtain a warrant for reasonable matters of national security (Hodge, 2006). It can be argued that the government was acting in the best interest of society to further the countries national security and better protect citizen from foreign invaders.

### **Conclusion**

Although the social contract implicitly states that some of society's liberties will be restricted, numerous instances prove the government has taken this concept too far. The first example of this activity is illustrated by the Patriot Act. Rather than placing restrictions on a citizen's liberties, the government blatantly violates society's basic Constitutional rights by infringing on their property interests. Secondly, allowing a citizen to marry the person of their choice does not pose a threat to the safety of the United States. There is no need to limit the right to marry. This act denies a person of their individual liberties with no valid reasoning behind the restriction. In regards to the situation of Rick Convertino, the government blatantly targeted this man for disobeying its wishes. The government should be out defending its citizens, not releasing possible terrorists in order to prove a point and stroke its ego.

The United States should not monitor or police who we marry, or act in a retaliatory manner against a citizen simply for going against its wishes. Nor should it rob us of our guaranteed Constitutional rights. The United States government has clearly overstepped the

boundaries of the social contract's original notions, acting more as a policing agent than a protector.

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