

# American Legal History – Russell

**Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State,"** 38 *Political Science Quarterly* (1923), 470-478.

"And while the House of Peers withholds its legislative hand,  
And noble statesman do not itch  
To interfere with matters which  
They cannot understand,  
As bright will shine Great Britain's rays  
As in King George's glorious days."  
-From W.S. Gilbert's *Iolanthe*.

The so-called individualist would expand this philosophy to include all statesmen, whether noble or not, and to include all economic matters as among those which they cannot understand. The practical function of economic theory is merely to prove to statesmen the wisdom of leaving such matters along, not to aid them in the process of interfering. And in foreign as well as in domestic affairs, they should make no effort to control the natural working of economic events. This would seem to be the general view of Professor Thomas Nixon Carver, [footnote omitted] although he likewise speaks frequently as a nationalist. But a careful scrutiny will, it is thought, reveal a fallacy in this view, and will demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or of "preserving the equal rights of others." Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to confirm to any Spencerian Formula. Since coercive restrictions are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the economic interests of persons living in foreign parts, statesmen cannot avoid interfering with economic matters, both in domestic and in foreign affairs. There is accordingly a need for the development of economic and legal theory to guide them in the process.

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What is the government doing when it "protects a property right"? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents. Yet Mr. Carver would have it that the government is merely preventing the non-owner from using force against the owner (pp. 104-5 and 106). This explanation is obviously at variance with the facts--for the non-owner is forbidden to handle the owner's property even where his handling of it involved no violence or force whatever. Any lawyer could have told him that the right of property is much more extensive than the mere right to protection against forcible dispossession. In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned.

That, however, is not the most significant aspect of present-day coercion in connection with property. The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner--consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided. Such obedience may take the trivial form of paying five cents for legal permission to eat a particular bag of peanuts, or it may take the more significant form of working for the owner at disagreeable toil for a slight wage. In either case, the conduct is motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative. In the peanut case, the consequence of abstaining from a particular bag of peanuts would be, either to go without such nutriment altogether for the time being, or to conform to the terms of some other owner. Presumably at least one of these consequences would be as bad as the loss of the five cents, or the purchaser would not buy; but one of them, at least, would be no worse, or the owner would be able to compel payment of more. In the case of the labor, what would be the consequence of refusal to comply with the owner's terms? It would be either absence of wages, or obedience to the terms of some other employer. If the worker has no money of his own, the threat of any particular employer to withhold any particular amount of money would be effective in securing the worker's obedience in proportion to the difficulty with which other employers can be induced to furnish a "job". If the non-owner works for anyone, it is for the purpose of warding

off the threat of at least one owner of money to withhold that money from him (with the help of the law). Suppose, now, the worker were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone owns. He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community--and that law is the law of property. It can be lifted as to any specific food at the discretion of its owner, but if the owners unanimously refuse to lift the prohibition, the non-owner will starve unless he can himself produce food. And there is every likelihood that the owners will be unanimous in refusing, if he has no money. There is no law to compel them to part with their food for nothing. Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation--unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property. And this again will not be likely to be lifted unless he already has money. That way of escape from the law-made dilemma of starvation or obedience is closed to him. It may seem that one way of escape has been overlooked--the acquisition of money in other ways than by wage-work. Can he not "make money" by selling goods? But here again, things cannot be produced in quantities sufficient to keep him alive, except with the use of elaborate mechanical equipment. To use any such equipment is unlawful, except on the owner's terms. Those terms usually include an implied abandonment of any claim of title to the products. In short, if he be not a property owner, the law which forbids him to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted *only* in case he works for an employer. It is the law of property which coerces people into working for factory owners--though, as we see shortly, the workers can as a rule exert sufficient counter-coercion limit materially the governing power of the owners.

Not only does the law of property secure for the owners of factories their labor; it also secures for them the revenue derived from the customers. The law compels people to desist from consuming the products of the owner's plant, except with his consent; and he will not consent unless they pay him money. They can escape, of course, by going without the product. But that does not prevent the payment being compulsory, any more than it prevents the payment of the government tax on tobacco from being compulsory. The penalty for failure to pay, in each case, may be light, but it is sufficient to compel obedience in all those cases where the

consumer buys rather than go without. On pages 620-621, Mr. Carver attempts to distinguish on the ground that in the case of the tax the government "did not produce the tobacco but only charges the manufacturer or the dealer for the privilege of manufacturing or selling." But this is equally true of the owner of the factory, if he is an absentee owner. Whether the owner has rendered a service or not bears only on the question of the justification of the income which he collects, not on whether the process of collecting it was coercive.

As already intimated, however, the owner's coercive power is weakened by the fact that both his customers and his laborers have the power to make matters more or less unpleasant for him--the customers through their law-given power to withhold access to their cash, the laborers through their *actual* power (neither created nor destroyed by the law) to withhold their services. Even without this power, it is true, he would have to give his laborers enough to sustain them, just as it is to his own interest to feed his horses enough to make them efficient. But whatever they get beyond this minimum is obtained either by reason of the employer's generosity and sense of moral obligation, or by his fear that they will exercise the threat to work elsewhere or not at all. If obtained through this fear, it is a case where he submits by so much to their wills. It is not a "voluntary" payment, but a payment as the price of escape from damaging behavior of others. Furnishing food to one's slaves is essentially different; the owner may do it reluctantly, but if there is any "coercion" it is the impersonal coercion by the facts of nature which account for the slaves' labor being less efficient without the food; he is not influenced by the will of any human being. In paying high wages to wage-earners, on the other hand, he is. But for their will to obtain the high wages, and their power of backing up that will, he has no reason for paying them. Yet he does. What else is "coercion"?

There is, however, a natural reluctance so to term it. This can be explained, I think, by the fact that some of the grosser forms of private coercion are illegal, and the undoubtedly coercive character of the pressure exerted by the property-owner is disguised. Hence the natural reaction to any recognized form of private coercion is, "forbid it." One who would not wish to take from the laboring man his power to quit the employer, or to deny him the wages that he gets for *not* quitting, is apt to resent the suggestion that those wages are in fact coercive. But were it once recognized that nearly all incomes are the result of private coercion, some with the help of the state, some without it, it would then be plain that to admit the coercive nature of the process would not be to condemn it. Yet popular thought undoubtedly does require special justification for any conduct, private or governmental, which is labeled "coercive," while it does not require such special justification for

conduct to which it does not apply that term. Popular judgment of social problems, therefore, is apt to be distorted by the popular recognition or non-recognition of "coercion". Hence it may be worth while to run down into more detail the distinctions popularly made between coercion and other forms of influence over people's conduct.

"Threats" are often distinguished from "promises". If I tell a man I will do some positive act whose results will be unpleasant to him, unless he pays me money, and if as a result he pays it, I would usually be said to be collecting it by means of a "threat." If, on the other hand, I tell him I will do some positive act, whose results will be pleasant to him, *if* he pays me money, and he does, it would be said more commonly that I collected it by means of a "promise." Partly as a result of the moral connotation generally given to these terms partly as its cause, the law more frequently interferes to prevent the doing of harmful acts than it does to compel the doing of helpful ones. Many (but not all) positive acts which are disadvantageous to others are forbidden; not so many positive acts that are advantageous to others are compelled. In other words, most torts and crimes consist of positive acts. Failure to help does not as a rule give rise to legal punishment or a right of action. Yet there are exceptions. Certain acts not in themselves actionable at law, may give rise to legal duties to perform positive acts. If I start an automobile in motion, I have committed no legal wrong; but if subsequently I fail to perform the act of stopping it when "reasonable care" would require me to do so, the victim of my failure to act can recover damages for my nonperformance.[footnote omitted.] Again, and more significant, if I have promised to do certain things (with certain formalities or "consideration"), my act of promising was not a legal wrong. But if I subsequently fail to perform at the time specified, the promisee has a right of action for my failure to act. It is significant of the reluctance to admit the existence of positive legal duties, that in both cases language is used which makes my wrong conduct seem to consist of wrongful acts instead of wrongful *failure* to act. It is said, in the one case, that I "ran over" the victim, in the other that I "*committed* a breach of contract." Yet in neither was the wrong an act, but a failure to act: in the first case, my failure to make the requisite motions for stopping the car; in the second, my failure to perform the act promised.

Now suppose that instead of actually refraining from doing the acts which the law requires, I say to a man, "Pay me a thousand dollars, and when I meet you on the road walking I will use sufficient care to stop my car or to steer it so that it will not hit you; otherwise I will do nothing about it." Is that a "threat" or a "promise"? Or if I say, "Pay me a thousand dollars and I will perform the acts I have already contracted to perform"? I believe most people would call these statements threats

rather than promises. Why? It may be partly due to the misleading language which speaks of the *act* of running over and the *act* of breaking a contract. But even were the fact recognized that payment were demanded as the price of *not abstaining*, I believe the demands would still be called threats. The reason, I believe, is partly because to abstain is contrary to legal duty, partly because it is adjudged to be contrary to moral duty. Popular speech in this case seems to apply the term coercion to demands made as a price of not violating a legal or moral duty, whether the duty consists of acting or of letting alone. But this criterion will not do, either.

If an act is called "coercion" when, and only when, one submits to demands in order to prevent another from violating a legal duty, then every legal system by very definition forbids the private exercise of coercion--it is not coercion unless the law does forbid it. And no action which the law forbids, and which could be used as a means of influencing another, can fail to be coercion--again by definition. Hence it would be idle to discuss whether any particular legal system forbids private coercion. And if an act is called "coercion" when, and only when, one submits to demands in order to prevent another from violating a *moral* duty, we get right back to the use of the term to express our conclusion as to the justifiability of the use of the pressure in question; with the ensuing circular reasoning of condemning an act because we have already designated it "coercive." One is likely, that is, to have a vague feeling against the use of a particular form of economic pressure, then to discover that this pressure is "coercive"--forgetting that coerciveness is not a ground for condemnation except when used in the sense of influence under pain of doing a morally unjustified act. And obviously to pronounce the pressure unjustified because it is an unjustified pressure is to reason in a circle. Hence, it seems better, in using the word "coercion", to use it in a sense which involved no moral judgment.

But popular feeling sometimes makes another distinction. If I plan to do an act or to leave something undone for no other purpose than to induce payment, that might be conceded to be a "threat." But if I plan to do a perfectly lawful act for my own good, or to abstain from working for another because I prefer to do something else with my time, then I take payment for changing my course of conduct in either respect, it would not be called a threat. If a man pays me to keep out of a particular business, or if he pays me to work for him (when I am not legally bound by contract to do so), then it seems absurd to many to say that he paid me under threat of coercion--unless, in the first case, my sole motive in entering the business was to bring him to terms, and unless in the second I preferred working for him to any other occupation of my time, and my sole motive in abstaining was again to bring

him to terms. For purposes of ordinary conversation, some other word than coercion may be preferred to describe payments made to a man who makes a sacrifice to "earn" them. But can a line be drawn? I believe the popular distinction along these lines is based on moral judgment. If a man gives up a job he likes, or if he works for another man, why shouldn't he be paid for it?--it will be asked. Perhaps he should. But unless the term "coercion" is applied only to conduct adjudged immoral, does the justifiability of receipt of payment prevent it from being coercive?

If those distinctions are all invalid, then, which seek to remove the term "coercive" from some of the influences exerted to induct another to act against his will, it seems to follow that the income of each person in the community depends on the relative strength of his power of coercion, offensive and defensive. In fact it appears that what Mr. Carver calls the "productivity" of each factor means no more nor less than this coercive power. It is measured not by what one actually *is* producing, which could not be determined in the case of joint production, but by the extent to which production would fall off if one left and if the marginal laborer were put in his place--by the extent, that is, to which the execution of his threat of withdrawal would damage the employer.[footnote omitted] Not only does the distribution of income depend on this mutual coercion; so also does the distribution of that power to exert further compulsion which accompanies the management of an industry. Some extremely interesting suggestions of the likelihood of control by capitalists, cooperative buyers, cooperative sellers and laborers are to be found on pages 222-225. This power is frequently highly centralized, with the result that the worker is frequently deprived, during working hours and even beyond, of all choice over his own activities.

To take this control by law from the owner of the plant and to vest it in public officials or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of the government. It would merely transfer the constraining power to a different set of person. It might result in greater or in less actual power to a different set of persons. It might result in greater or in less actual power of free initiative all round, but this sort of freedom is not to be confused with the "freedom" which means absence of governmental constraint. Mr. Carver himself points out (pp. 134-5 and 424), that the governmental constraint involved in the maintenance of traffic policy results in giving the average individual *greater* "freedom of movement." But "freedom of movement" does not mean freedom from governmental constraint, or even from constraint by private individuals. It means freedom from physical obstruction--in other words, greater physical *power* to move. Whether in other

cases, too, physical power to exercise one's will is enhanced by a certain amount of legal restriction depends upon the particular facts of each case

. [footnote omitted] Whether Mr. Carver's scheme of things would be more or less "free" (in the sense of giving people greater power to express their wills) than would a state of communism, depends largely on the economic results of communism respecting the character of factory work. Neither can be said to be any "freer" than the other in the sense that it involved less coercion on the part of other human beings, official or unofficial.

The distribution of income, to repeat, depends on the relative power of coercion which the different members of the community can exert against one another. Income is the price paid for not using one's coercive weapons. One of these weapons consists of the power to withhold one's labor. Another is the power to consume all that can be bought with one's lawful income instead of investing part of it. Another is the power to call on the government to lock up certain pieces of land or productive equipment. Still another is the power to decline to undertake an enterprise which may be attended with risk. By threatening to use these various weapons, one gets (with or without sacrifice) an income in the form of wages, interest, rent or profits. The resulting distribution is very far from being equal, and the inequalities are very far from corresponding to needs or to sacrifice.

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