

## SOCIAL CONTRACT: A CRITIQUE\*

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### I. SOCRATES IN THE CRITO

In the *Crito*, Plato's dialogue on the death of Socrates, Socrates makes an argument about political obligation to justify his acceptance of the death penalty imposed on him by the Athenian mass jury.

Socrates' fundamental argument, which he puts in the mouth of the personified Laws in the *Crito*'s dialogue-within-the-dialogue, is that the government is "more to be valued and higher and holier far than mother or father or any ancestor, and more to be regarded in the eyes of the gods and of men of understanding, also to be soothed, and gently and reverently entreated when angry, even more than a father, and either to be persuaded, or if not persuaded, to be obeyed".<sup>[1]</sup>

To restate this, Socrates is simply maintaining that political society is valuable to people, a contention which he supplements by saying that political society could not function without civil obedience to the orders contained in the laws or in commands issued by officials.

Socrates does not specify what conditions must be present to make a regime worthy of obedience. Socrates does point to examples of the educative value of the Athenian regime, whose laws he says made possible his birth, training, and moral education.<sup>[2]</sup>

Socrates conflates rule of law and the institution of government. It is clear that rules delineating rights and obligations are necessary to societal life. But such rules may be accepted as a matter of custom, habit or rational insight. They do not have to be political in the narrow sense of being authorized and imposed by a government.<sup>[3]</sup>

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While Athens may have had a rather uniform mode of governmental supervision of the raising and education of children, other societies have been more permissive or pluralistic. Modern Western liberal societies have largely left early childhood to the privacy of the family and have allowed some nongovernmental education.

A society is certainly conceivable in which there was no governmental intervention in family life or education and in which the sole function of law enforcement was the upholding of universal rights.<sup>[4]</sup>

Socrates relies fundamentally on the conduciveness of the Athenian regime to the good life. He supports this account of the regime by noting benefits received from the state by citizens, the regime's openness to reasoned participation by citizens in political decision-making, and the possibility of free emigration.

Neither benefits nor openness to participation can be enough to obligate one to a regime. Just because someone gives you a gift does not make you obliged to follow his instructions in all things. As Richard Flathman says:

If past benefits constituted a sufficient condition of obligation any citizen who had received benefits from, say, the Nazi regime would have an obligation to obey the commands of that regime.<sup>[5]</sup>

Mere participation is not enough for obligation. If a burglar lets you argue with him while he is relieving you of your valuables, it does not place you under an obligation to him.<sup>[6]</sup>

Socrates' argument seems to be that reasoned argument about the laws (as opposed to mere participation) is the best way to bring the laws into accord with justice. But this does not seem to be a compelling justification for general obedience. It is the link with justice that is decisive. Just laws deserve to be obeyed. But

reasoned discourse by professional jurists and other interested persons can take place outside the state apparatus. Just as rules of social conduct can arise and be accepted outside the governmental process, so consideration of the proper content of those rules can take place outside the governmental process.

The possibility of free emigration is most important for our purposes here. Socrates' continued residence in Athens in the face of an opportunity to emigrate is said to set up a social contract between him and the Laws. Undertakings giving rise to obligations can be established by actions, as well as by formal written or spoken contract, according to the personified Laws who speak in the dialogue-within-the-dialogue.<sup>[7]</sup> By the act of remaining in Athens, Socrates is said to have "entered into an implied contract that he will do as (the Laws) command him".<sup>[8]</sup>

The contract argument set forth in the case of refusal to emigrate proves too much and embraces too much. In this sense it is like the benefits argument. It can be maintained that anyone living under the control of a regime receives something that the regime might call benefits. Ultimately, thus, the benefits argument reduces to the claim that all under the control of state should obey the state.<sup>[9]</sup> One thing that makes the benefits argument slightly more plausible than the refusal to emigrate doctrine is that one perhaps can reject the benefits and thus shuck off the obligation, but there is no way to stay put, refuse to emigrate, and yet dissolve the bonds of obligation.

Socrates does not find either the benefits or the social contract arguments to be ultimately decisive. In the *Apology*, we have three indications of this: Socrates once refused to go along with the trial of Athenian naval officers who had neglected to rescue Athenians captured in battle.<sup>[10]</sup> This trial was later widely recognized as unconstitutional. In another case, Socrates disobeyed the command of the Thirty Tyrants to arrest another citizen so that citizen could be executed.<sup>[11]</sup> Most importantly, Socrates considers the possibility that the Athenian jury might acquit him if he were to agree to stop practicing philosophy. He says that he would never obey a command to stop

practicing philosophy.<sup>[12]</sup> These three examples show that other considerations could override any obligation apparently arising from benefits conferred or from a social contract to which there could be said to have been tacit agreement. In fact, Socrates' doctrine on contract and social contract is very carefully hedged about with requirements that contracts be in accord with justice. Socrates asks Crito "Ought one to fulfill one's agreements, provided they are right, or break them?"<sup>[13]</sup> So for Socrates, it is ultimately justice, and not contracts, which is paramount.

In stating his fundamental position that the Athenian government is valuable and hence ought to be obeyed, Socrates falls into a role-governed, or status-governed, argument about political obligation. He contends that a citizen has a role in his native state just as a child has a role in family life, and with such roles go duties. If the parents (or the Laws) have fulfilled their roles properly, the fact that they have a just claim over the children (or citizens) is a one-way, not a two-way, street. The duty to obey the state is like that owed by a child to a parent. The parents' duty (like the state's) is to nurture its subjects, not to obey them.<sup>[14]</sup>

In summary, we can say that Socrates' social contract, based on a refusal to emigrate, relies heavily on the tacit contract approach criticized above. It also contains a notion of contracts in which alienation of the will is legitimate.

The more justice-oriented, status-governed approach in the analogy to parent-child relations is subject to all the difficulties inherent in a modern justification of status-based obligation. In any case, Socrates' analogy breaks down. In a family, obedience to parents can be a legitimate, voluntarily accepted condition of parental supply of room and board to a child. Once such benefits are refused by the child, the obligation conditionally attached to them by the parents goes at the same time. In contrast, the obligation to obey the state described by Socrates is something imposed, not something that comes as a condition attached to a gift.

The alternative, that one should obey because the regime is just, is difficult to link to all acts of the regime. Socrates himself disobeyed

under certain circumstances and considered disobedience a valid option under other hypothetical circumstances. The traditional claim that by breaking a single unjust law one overthrows all rule of law is either nonsense or a notion that relies heavily on an implausible analogy between lawbreaking and contagious diseases — a metaphor that manifestly denies the free will and rational potential of human beings.<sup>[15]</sup>

## II. HOBBS

Part of the historical setting of Hobbes' version of social contract doctrine is the decline of scholastic philosophical thought. With the rise of experimental science and of the University of Padua's resolute-compositive approach came a questioning of the classical Aristotelian-Thomist account of the natures of entities.<sup>[16]</sup> Some of this questioning of classical metaphysics had implications for classical political thought.

While in the *Crito* undertaking a social contract was supplemental to and confirmatory of the obligation that according to Socrates was owed to good regimes, in later political thought the social contract became the primary source of obligation. Patrick Riley provides a suggestive sketch of the way in which this came about:

What is probable is that the ancient quasi-aesthetic theories of the best regime and the proper end of man gave way, with the introduction of Christianity, to thinking about politics after the model of "good acts": just as good acts required both knowledge of the good and the will to do good, politics now required moral assent, the implication of the individual in politics through his own volition. The freedom to conform voluntarily to absolute standards had always been important in Christian doctrine; the Reformation doubtless strengthened the element of individual choice in moral thinking, while downplaying the role of moral authority. And it was natural enough that the Protestant view of individual moral autonomy and responsibility should spill over from metaphysics into politics, forming the intellectual basis of contract theory. The mere excellence of a social institution would no longer be enough; it would now require rational assent.<sup>[17]</sup>

The background to Hobbes' social contract doctrine then includes shifting attitudes toward the proper models in natural science and toward the importance of the will in moral philosophy. Hence Hobbes' theory of the instituting of government via social contract is heavily

reliant on his concepts of liberty, will, representation, and contract.

Hobbes lays great stress on clarity of definitions and consistent use of words. He says that men deceive themselves by "the inconstancy of the significance of their words".<sup>[18]</sup>

Hobbes defines liberty as "the absence of external impediments" to human motion, energy, or power.<sup>[19]</sup> Hobbes relates liberty to the will by stating that a free person has no hindrance, no impediment, no stop to what he has "the will, desire or inclination" to do.<sup>[20]</sup>

This full-fledged bodily liberty is not the same as the liberty of subjects under a government. Subjects are bound by "artificial chains" called civil laws by which the subjects have fastened themselves to the commands of the sovereign.<sup>[21]</sup>

When we encounter Hobbes' discussion of the will a problem arises. He seems to be the heir of the tradition that rests political legitimacy and moral obligation on the assent of a free will. On the other hand, he seems to be a proponent of a mechanistic picture of man and to reject free will in favor of determinism.

Hobbes calls the will "the last appetite" in the process of deliberation.<sup>[22]</sup> This view of the will as appetite seems in accord with a view of human nature in which the will is not a morally relevant faculty but is merely a part of the human mechanism.

On the other hand, when Hobbes is discussing the transferring of rights to others or the abandonment of rights, he says that it is a person's *duty* not to make void his own voluntary act.<sup>[23]</sup> In this view, the will is a morally relevant faculty and voluntary assent sets up an obligation. In fact, Hobbes calls will "the essence" of contracts.<sup>[24]</sup>

For Hobbes, the social contract is a simultaneous agreement by all persons except the new sovereign to abandon full use of their powers and hence to permit the thus-created sovereign to make full use of his power without being hindered by his subjects.<sup>[25]</sup> The sovereign is really a beneficiary rather than a party to the Hobbesian social contract.

Not only was this regime initiated by the voluntary act of the individual citizens, but it is, according to Hobbes, sustained by their will as

borne by their designated representative, the sovereign.

To understand how Hobbes could view a subject's will as having been transferred via authorization to the sovereign in cases of government instituted via social contract and how Hobbes could view the will of subjects as transferred to conquerors in cases of government instituted via conquest, we have to go back to Hobbes' notion of will as appetite. This appetite is something that is pushed around by "fear of violent death". The subject faced directly with death abandons his rights and powers to the sovereign who faces him either as social contractor or conqueror. This sovereign therefore bears the will of the subject, and Hobbes can call him the subject's representative.

It is worth noting that Hobbes takes the analogies which he uses to illustrate his concept of representation not as one might expect from attorney-client relations or from the law of agency but rather from the dramatic stage. He says that an actor is authorized by the author of a play to do what is done on the stage and hence bears in his person the will of the author.<sup>[26]</sup> Similarly, the subjects authorize the sovereign to act for them.

In cases of conquest, kidnapping, or capture, Hobbes contends that contracts made under such conditions are entirely valid.<sup>[27]</sup> This more than anything else demonstrates that the will has for Hobbes a peculiar moral status. In the writings of most moral philosophers for whom assent generates obligation, contracts entered into under duress are invalid. Not so for Hobbes.

Because he believes that self-preservation is an elemental force in human nature, Hobbes does not expect a physically chained captive not to try to escape. But he says a captive who is trusted by his master with bodily liberty and is not kept in chains owes it as a duty to obey his master in all things.<sup>[28]</sup>

In some respects, there is little difference for Hobbes between government instituted by social contract and those instituted by conquest. He clearly states that the same sovereign can rule over different persons whose obligations have arisen some from contracts, some from conquest.<sup>[29]</sup> Both sorts of governance are instituted via surrenders or abandonment of

rights because of fear of violent death. In fact, both sorts of obligations could be established via acquiescence rather than any express declaration of will for Hobbes allows the existence of tacit contracts to be inferred from silences, forbearances, and the consequences of actions.<sup>[30]</sup>

Without Hobbes' peculiar ambiguousness as to whether the will is a moral faculty or part of a mechanical apparatus, without his notion of representation in which one person can transfer or surrender his will and rights to another, without Hobbes' stamp of legitimacy on contracts made under duress and without Hobbes' reliance on the always rather open-ended notion of tacit consent, Hobbes' political theory of political obligation cannot stand.

### III. LOCKE

Locke, in contrast to Hobbes, is able at least by 1694, in his revisions of the *Essay Concerning Human Understanding*, to develop a concept of the will as a moral faculty. The human will, according to Locke, is governed by a person's judgment and understanding, as opposed to a Hobbesian pleasure-pain mechanism that is pushed around by external pressures.<sup>[31]</sup>

Unlike Hobbes, Locke does not believe a person can, by consent or contract, enslave himself to someone else or place himself under the arbitrary power of another.<sup>[32]</sup> But Locke does say that at the time persons leave the state of nature to unite via a social contract in forming political society, they "must be understood to give up all the power necessary to the ends for which they unite into society".<sup>[33]</sup> Locke also believes that political obligation consists in authority which can be obtained by right of contract "when someone has voluntarily surrendered himself to another and submitted himself to another's will".<sup>[34]</sup> Consent then forms for Locke the mark of distinguishing characteristic which separates a pirate (like the one Cicero describes as confronting Alexander the Great) from a legitimate ruler.<sup>[35]</sup>

Again unlike Hobbes, Locke does not recognize the legitimacy of conquest or of contracts made under duress.<sup>[36]</sup>

Like Hobbes, Locke does rely on tacit consent. For Locke, consent is signified by the receipt or

acceptance of benefits, whether this be travelling on the roads enjoying the government's protection or, more importantly, holding real estate under the government's protection. In fact, Locke makes the social contract for landholders a covenant which runs with the land so that the inheritor of a piece of real estate inherits the obligation to the government.<sup>[37]</sup> Of Locke's tacit consent doctrine, Gough writes: "If consent could be watered down like this, it would lose all value as a guarantee of individual liberty, and the most outrageous tyrant could be said to govern with the consent of his subjects".<sup>[38]</sup>

While Hobbes was in rebellion against the natural law tradition in political theory, Locke was a continuer and modifier of natural law. So while the social contract sets up an absolute sovereign in Hobbes' theory, in Locke the social contract brings together the citizens so that they can delegate enforcement of the natural law to a trustee for the sake of convenience.<sup>[39]</sup> As Patrick Riley summarizes Locke's position:

Locke's view . . . was that even though God has "appointed" moral and political "ends" in the form of natural laws and rights, the "consent and contrivance" of men is necessary if those "ends" are to be *effective* on earth because men must voluntarily set up a "known and indifferent judge" who will require men to conform their conduct to God's appointed ends: "The law of nature would . . . be in vain, if there were nobody . . . (that) . . . had a power to execute that law". And the "power" which "executes" that law must be set up by consent and contract, since there is no natural political authority.<sup>[40]</sup>

The questions still remain whether consent of the majority can substitute for the consent of all.

Hobbes sought only to justify the original instituting of a government. Locke, however, does not believe that ancestors can bind future generations<sup>[41]</sup> and does not believe that members of a living generation can contractually enslave themselves. Therefore the legitimacy of the government depends not only on consent to its founding but also on consent to its ordinary on-going operations.

It seems as if Locke has given a plausible account of why all persons in some area might together appoint a policeman, who would be subject to continuing civilian review. But what if everyone does not concur? How can Locke

defend majority rule as a kind of consent?

His first argument draws on an analogy from physics. He says that it is necessary that a body move in the direction in which the greater force is applied. He then extends this out of physics to apply it to the body politic.<sup>[42]</sup> However, on another occasion Locke had forcefully argued that the number of persons imposing a government on those who did not consent made no difference and added no moral weight.<sup>[43]</sup>

A second argument Locke makes for majority rule is one based on expediency. He contends that obtaining unanimous consent is difficult and costly. At a minimum, sickness or the press of business will keep at least some citizens from participation in voting.<sup>[44]</sup> If Locke wished to make this argument for the convenience of majority rule he should have argued directly for the rule of the many over the few, rather than stressing consent since *all* parties bound by a contract must consent to it.

A third argument that Locke makes begins with the desirability of a government as a common judge of disputes and the fact that some persons recognize this. Locke says that the actions of this group would be in vain if they were not able to include minorities under their control. Once again, however, this seems to be an argument about the convenience of majority rule and has no bearing on consent.

Of course, if primacy is given to majority rule, it will be at the expense of individual rights. John Stuart Mill properly identified the majoritarian peril to liberty when he noted that what is called self-government turns out in practice to be not "the government of each by himself", but rather rule by the most numerous or most active.<sup>[45]</sup>

#### IV. ROUSSEAU

The principal problem of political theory for Rousseau is how to make the chains of society legitimate.

Rousseau considers invalid a contract by which one sells oneself into slavery. Since selling oneself into slavery deprives one of the opportunity to exercise one's free will, it deprives all one's actions of their moral character.<sup>[46]</sup>

Rousseau wants to establish a relationship between citizens that will provide each with adequate protection backed by the community while preserving the free will and liberty of each. Rousseau's suggestion is the simultaneous alienation by each person of his rights to the absolutely sovereign community.<sup>[47]</sup>

Rousseau argues that this subordination of each to all is not an instance of illegitimate self-enslavement. He advances two reasons. First, for Rousseau, the essence of slavery is personal dependence of one person on another. It is subjection to the arbitrary, despotic will of another individual. Rousseau, in fact, defines freedom as "that condition which by giving each citizen to his country, guarantees him from all personal dependence".<sup>[48]</sup> Hence, the process of each giving himself to the community creates an impersonal sovereign.<sup>[49]</sup>

In addition, Rousseau expects that the laws enacted via popular sovereignty will be general and impartial in form. A necessary condition for the development of a popular desire for generality in the applicability of the laws is the re-education of the populace.<sup>[50]</sup>

Rousseau hopes that a charismatic law-giver on the model of Moses or Lycurgus will instill in the populace the civic virtue that was characteristic of ancient Sparta or the Roman Republic.<sup>[51]</sup> Once the populace has been re-educated, the laws decided on by the sovereign people will reflect the common interests and values around which the people have been united by the prophetic Legislator. The assembly of people will be inspired by a will to generality in the laws.

Second, Rousseau contends that in a contract of self-enslavement, there is no mutuality. The slave loses all. The contract negates his interests and his rights. It is entirely to his disadvantage. Since the slave loses his status as a moral agent once the slave contract is enforced, the slave cannot act to enforce anything owed to him by his master.<sup>[52]</sup>

On the other hand, Rousseau believes that since there is no member of the social group over whom we do not acquire precisely the same rights as those over ourselves which we have surrendered to him it follows that we gain the exact equivalent of what we lose, as well as an added power to conserve what we already have.<sup>[53]</sup>

Rousseau's account leaves several questions unanswered. First of all, if ancient virtue is the mainstay of a good regime, why is consent necessary to its imposition? Since societies like Sparta were characterized by destruction and suppression of individual will and choice, it seems singularly inappropriate and unnecessary to require for the sake of legitimacy an act of will whereby one gives up being willful.

Second, there is the question of the extent to which law violators consent to have the law imposed on them. Hobbes says that since the sovereign bears the will of his subjects, the subjects do consent to law enforcement. Thus punishments are no injury since each subject authorizes the sovereign who imposes the penalty. In the case of decisions of the sovereign which imperil the life of the subject, the subject can either obey in order to preserve societal life, or, for the sake of his own self-preservation, return to a state of war *vis-à-vis* the sovereign.

The problem for Rousseau lies in the fact that the body politic is sovereign and thus is attacking itself by executing or punishing its own members. This problem does much to reveal the practically Hobbesian character of Rousseau's supposedly democratic state.

Rousseau's solution reveals the consequences of confining the function of the popular law-making assembly to the making of general rules. The sovereign people delegate to a supposedly subordinate commission of magistrates or rulers the administration of government on a day-to-day basis. It is this ruler or commission of rulers that asks the citizen to die for the sake of the state to which the citizen has surrendered all rights. The member of the sovereign populace must (like the citizen of Hobbes' state) submit to the supposedly subordinate ruler or be excised from the body politic through exile or death as a violator of the social contract.<sup>[54]</sup>

Third, the day-to-day administrative government is subject to the iron law of oligarchy. It is a sociological law of organizational life that the few will govern the many. Rousseau himself says: "It is against the natural order that a large number should rule and a small number be ruled".<sup>[55]</sup>

Thus, not only will the people eventually forget or lose sight of the importance of ancient virtue and a will to generality in law-making, but from the first there will be a tendency for the democratic elements in Rousseau's mixed regime to be subordinated to the oligarchic elements.

Fourth, this tendency to oligarchy is encouraged by Rousseau's reliance on tacit consent once political society has been instituted. Whereas Locke required continuing consent of the majority, Rousseau says that commands issued by the day-to-day rulers will properly appear the same as the general will of the populace as long as the people are silent and do not oppose the commands.<sup>[56]</sup> He says that once the state is founded, residency implies consent to the regime. "To live in a country means to submit to its sovereignty."<sup>[57]</sup> Here, as in previous thinkers' writings, the open-ended concept of tacit consent when it is reduced to brute facticity is the same as being under a government's control.

Finally, Rousseau's social contract does appear to be a contract of self-enslavement. On the one hand, personal rulers have reappeared in Rousseau's society as administrative magistrates, who can have the power of life and death over citizens. On the other hand, since the sovereignty of political society is unlimited and includes the right to impose capital punishment or send persons to their death in war, it is not clear that the social contract puts all in the same condition and in a more advantageous position than they enjoyed before the social contract. Even the inculcation of conscientiousness in striving for generality in the laws is an inadequate protection against abuse. For laws written in general language can easily be aimed at repressing specific individuals or minority groups.<sup>[58]</sup>

## V. RAND

Ayn Rand's social contract theory is in some respects more Hobbesian than Lockean. Locke believed that the content of the natural law was discoverable by man's reason. He further held that the natural law was directly obligatory for humans.<sup>[59]</sup>

However, Rand speaks of the individual consenting to the natural-rights principle of non-aggression.<sup>[60]</sup> For Rand the citizen must consent not merely to the law-enforcement agency (as in Locke), but also to the law of nature. Ordinarily in political theory, natural law is right for man whether or not men consent.

Rand appears to share Locke's fears that without a state monopoly on law enforcement, it will be difficult to have a single legal code, impartial judgment, and final settlement of disputes. But the language which Rand uses to depict a society without government is Hobbesian. She describes a war of all against all, while Locke had spoken somewhat more mildly of the inconveniences of the state of nature.

Paul Beard has expanded on the brief contractarian passages in Rand in an effort to develop a Randian theory of political obligation. Beard maintains that his account of political obligation "answers all of the objections anarchists have made" to Rand's account. Like Rand, Beard appears at crucial points to make the will of men more important than natural law. Beard calls voluntarism, "the beginning principle of libertarianism."<sup>[61]</sup>

Beard writes:

A government derives its just powers from the consent of the governed. If a government (or defense agency) is to provide justice justly, its first requirement is that it act only on those who have consented to its activities.

... Since a proper government may act only on those who consent to it, its proper object of action is only the life and property of those persons who subscribe to it.<sup>[62]</sup>

He explicitly contends that the fundamental principles of justice are not simply right in and of themselves but must be assented to:

In any legal clash between two parties there can be a just settlement only if both parties are agreed on the grounds of justice.<sup>[63]</sup>

In Beard's system:

1. Government has monopoly on procedure, retaliation, and rectification.<sup>[64]</sup>
2. Persons can hire private guards, enlist the help of neighbors, or defend themselves to enforce man's natural rights to life, liberty, and justly owned goods.<sup>[65]</sup>
3. But even here all persons affected by the self-defense must consent.<sup>[66]</sup>

4. If the accused criminal does not consent to what the private sword is doing to him, he is entitled to call upon the public sword.<sup>[67]</sup>
5. This is because the procedural rights belonging to a suspect override any ontological truth of his having committed a crime: "Even if (the suspect or criminal) was unmistakably seen committing a crime and was immediately captured, it is his rights the government is protecting".<sup>[68]</sup>
6. Beard does not derive these procedural rights for us from the nature of man. So we remain ignorant of their derivation until he writes more on the subject.

Other natural-rights liberals may favor exacting evidentiary standards and careful procedures for prudential reasons. Good procedures will help prevent those engaged in law enforcement from themselves committing crimes. No consent doctrine is needed to favor prudent law enforcement. Beard wants criminals to consent to their own punishment. But he never explains adequately why he rejects the notion that "the criminal has lost at least the measure of his rights equal to the destruction he caused, so his consent is not necessary to that extent".<sup>[69]</sup>

7. In Beard's scheme, persons tacitly consent to the principles of justice enforced on some piece of territory and to the governmental agency giving effect to those principles of justice by stepping onto a piece of property that has been placed under a government's jurisdiction by a property-owner.<sup>[70]</sup>
  - (a) To make principles of justice binding in this fashion is unlikely in practice even to meet the standards of due notice that Rand and Beard set for themselves.<sup>[71]</sup>
  - (b) Fundamental principles of justice should always be based on rational inquiry into the nature of man and human society, never on the whim and caprice of property-holders.
  - (c) Beard appears to have a double standard of tacit consent. He says criminals cannot and do not consent to private action against them when they enter on a piece of private land. But criminals can and do consent to government action against them when they enter a piece of

land under some government's jurisdiction. One can't have it both ways.<sup>[72]</sup>

- (d) If the law-enforcement agency enforces correct principles of justice and is in every way what Beard calls "proper", why must as a matter of right notice be given of this fact to every entrant onto the territory served by that law-enforcement agency? Furthermore, surely if the law administered in some territory is unjust, a person is not rightfully subject to it, even if he is given notice.<sup>[73]</sup>
- 8: In Beard's proposed regime, property-holders can secede from a government. But the rules governing secession are governed ultimately by the explicit provisions of the social contract signed between the government and the property-holder. Apparently, there is no way for a person who merely steps onto a piece of land under some government's control to secede from the government if he discovers that the legal principles applied by that government are in fact unjust.

In contrast, in Locke if the legislators invade rights, they are the rebels against law and the people have a right to protect themselves against such aggressors just as they do against robbers and pirates.<sup>[74]</sup> In Locke's view, the king unking himself if he violates the rights of individuals. It is at least possible that in the case of unjust governments, according to Beard's political theory, it is right to rebel only through contract-release provisions in the case of property-holders. For others, it may never be permitted as a matter of right to rebel.

## VI. CONCLUSION

Social contract doctrine is no longer taken seriously as an accurate historical account of the origins of the state. But social contract doctrine still survives as an account of political obligation. For example, John Rawls' widely-acclaimed *Theory of Justice* is very much part of the contractarian tradition.

Yet careful consideration of the social contract theories of Socrates, Hobbes, Locke, Rousseau, and Rand shows that they do not survive close scrutiny. Socrates ultimately relies on an analogy between citizens and children in a



patriarchal family. In doing so, he is relying on a concept of status-governed duty that is difficult to rationally justify as a basis for political obligation. Hobbes makes consent quite like succumbing to force and relies heavily on cryptic signs of tacit consent. Socrates, Locke, and Rousseau rely somewhat more definitely on tacit consent inferred from benefits received or from residency. But this too is an overbroad extension of consent that makes it meaningless as a criterion of legitimacy.

Most importantly, all the social contract theories appear to entail in practice a contract of at least partial self-enslavement to Socrates' Athenian regime, to Hobbes' sovereign, to Locke's majority, to Rousseau's popular law-making assembly and administrative government, or to Rand's law-enforcement monopoly.

In the end, therefore, social contract theory is incompatible with natural-rights liberal theory since this latter theory derives rights from the factual premise of the inalienability of the will and hence rules out from the start legitimate self-enslavement. Instead, we can recognize that the duty of obedience to the rule of just law can be explained, without any recourse to a social contract, in terms of the duty of non-aggression which is the necessary correlative of human rights.<sup>[75]</sup>

## NOTES

1. *Crito*, 51 in Plato, *Dialogues* trans. by B. Jowett, 3rd ed. (London: Oxford University Press, 1892) Vol. 2, p. 152.
2. *Crito*, 50, Vol. 2, p. 152.
3. Richard Flathman, *Political Obligation* (New York: Atheneum, 1972) p. 262.
4. Murray N. Rothbard, *For a New Liberty* (New York: MacMillan, 1973) Chap. 7.
5. Flathman, p. 279.
6. Rothbard, "Civil Obedience", *Libertarian Forum*, Vol. 2, No. 13-14 (July 1970); Flathman, p. 292.
7. *Crito*, 52, Vol. 2, p. 154; cf. Hobbes, *Leviathan* (Oxford: Basil Blackwell, n.d.) Chap. 14, p. 88.
8. *Crito*, 51, Vol. 2, p. 153.
9. Flathman, p. 288.
10. *Apology*, 32, Vol. 2, p. 125.
11. *Apology*, 32, Vol. 2, p. 125.
12. *Apology*, 29, Vol. 2, p. 123.
13. *Crito*, 49, Vol. 2, p. 151.
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