Social contract theory and its critics

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The historical background

At the heart of social contract theory is the idea that political legitimacy, political authority, and political obligation are derived from the consent of the governed, and are the artificial product of the voluntary agreement of free and equal moral agents. On this view, legitimacy and duty depend on a concatenation of voluntary individual acts, and not on ‘natural’ political authority, patriarchy, theocracy, divine right, necessity, custom, convenience, or psychological compulsion. Michael Oakeshott was thus right to call contractarianism a doctrine of ‘will and artifice’ (1975a, p. 7).¹

While traces of contract theory can be found in ancient and medieval thought, and while the doctrine has recently been revived by John Rawls, it is generally agreed that the golden age of social contract theory was the period 1650–1800, beginning with Hobbes’s Leviathan (1651) and ending with Kant’s Rechtslehre (Metaphysics of Morals, 1797; Rawls 1972, pp. 11–13; Riley 1982, 1983). For at least the following century it was eclipsed by utilitarianism, Hegelianism, and Marxism. But between the mid-seventeenth and the early nineteenth centuries consent emerged as the leading doctrine of political legitimacy. Hobbes urges in chapter 42 of Leviathan that ‘the right of all sovereigns is derived originally from the consent of every one of those that are to be governed’, and in chapter 40 he insists that human wills ‘make the essence of all covenants’ (Hobbes 1991, pp. 395, 323). Locke in the second of his Two Treatises of Government argues that ‘voluntary agreement gives . . . political power to governors’ (TTG, ii, §173, p. 383). Rousseau, in The Social Contract (1762), asserts that ‘I owe nothing to those to whom I have promised nothing’; ‘Civil association is the most voluntary act in the world; every man being born free and master of himself, no-one may on any pretext whatsoever subject him without his consent’ (SC, ii.6, p. 66, iv.2, p. 123). As for Kant, in the Rechtslehre he urges that all legitimate laws

¹ For the background to the theme of this chapter see Barker 1947; Riley 1982, 1986; Ritchie 1893.
must be such that rational men could consent to them (Kant 1965, pp. 97, 112–13). Similarly, the American Declaration of Independence holds that governments derive their ‘just powers’ from the consent of the governed. The theme is stressed in most major thinkers of the period between Hobbes and Kant, though Hume and Bentham are important exceptions. Even Edmund Burke, who rejected consent as the basis of authority, thought it useful to say that society was grounded on a metaphorical contract of some sort (Burke 2001, p. 260). Hegel, though scarcely an ‘atomistic individualist’ or a contractarian, explicitly argued that while ‘in the states of antiquity the subjective end was entirely identical with the will of the state’, in modern times ‘we make claims for private judgement, private willing, and private conscience’. When a social decision is to be made, Hegel continues, ‘an “I will” must be pronounced by man himself’ (Hegel 1991, pp. 285, 321).

Political philosophy since the seventeenth century was thus characterised by ‘voluntarism’, by an emphasis on the will of individuals. Why voluntarism came to hold such an important place in Western thought is debatable. It is probable that the introduction of Christianity facilitated a shift, from ancient theories of the good regime and the ‘naturally’ social end of man, to seeing politics as ‘good acts’, and hence requiring both knowledge of, and the will to do, the good. Politics now required moral assent, and the individual became implicated in politics by his own volition. The freedom to conform voluntarily to absolute standards had always been important in Christian doctrine; and the Reformation doubtless strengthened the element of individual choice and responsibility in moral thinking, while questioning the role of moral authority. It was natural enough that the ‘Protestant’ view of individual moral autonomy would pass from theology and moral philosophy into politics, forming the intellectual basis of social contract theory. By the end of the Reformation era, the mere excellence of an institution would no longer be sufficient to establish legitimacy: it would now require authorisation by individual men, understood, that is, as ‘authors’ of those institutions. However voluntarism and social contract theory arose, what is certain is that ideas of the good state increasingly gave way to ideas of the ‘legitimate’ state; and during the seventeenth century this legitimacy was often taken to rest on the notion of willing.

That shift represented a substantial break with much of ancient tradition, in which consent does not commonly function as a principle of legitimacy (perhaps because the concept of ‘will’ rarely has major moral significance in ancient philosophy) (Adkins 1960, pp. 2–4). While the need for consent to fundamental principles of political society in order to create a political
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construct through will and artifice is a doctrine characteristic of the ‘idiom of individuality’, the ancient conception of a highly unified and collective politics was dependent on a morality of the common good quite foreign to any insistence on individual ‘will’ as the creator of society (Oakeshott 1962, pp. 249–51). This is why Aristotle repudiates contractarian views of society: any true polis, he urges in the Politics, must devote itself to the encouragement of goodness if the city is not to sink into a mere ‘alliance’, a mere covenant that ‘guarantees men’s rights against one another’ (Politics, 3.9.8.1280b). For Plato, with the exception of Crito, the will counts for even less: it is often simply assimilated to arbitrary caprice, as in the Republic, when Socrates refutes Thrasymachus’ view that justice is the will of the stronger (Republic 1.338a–c).

The decisive turn in the voluntarisation of Western social thought came with Augustine, who appropriated the bona voluntas of Cicero and Seneca and deepened it into a central moral concept. In De libero arbitrio (Freedom of the Will) Augustine defines ‘good will’ as ‘the will by which we seek to live honestly and uprightly and to arrive at wisdom’ (3.1; 1968, 59:167; see Gilbert 1963). This is not to say that Augustine is a voluntarist or contractarian in his explicitly political writings, above all The City of God; but it is certainly true that he made important voluntaristic moral claims that later grew into political doctrines. In De spiritu et littera, for example, he insists that ‘consent is necessarily an act of will’ (Gilbert 1963, p. 33). Without the strong link that Augustine forged between consent and will, social contract theory would be unthinkable, since it defines consent in terms of will (Riley 1978, pp. 486–8).

The link between voluntarism and politics became more explicit in some of the Christian philosophers who followed Thomas Aquinas, particularly William of Ockham and Nicholas of Cusa. In the early fourteenth century Ockham urged in his Quodlibeta that ‘no act is virtuous or vicious unless it is voluntary and in the power of the will’, and this general moral doctrine finds political expression in his insistence that ‘no-one should be set over a universitas of mortal men unless by their election and consent . . . what touches all ought to be discussed and approved by all’ (Ockham 1957, pp. 145–6). For Ockham, then, Christian liberty is both the ground of virtue and the limiting condition of rightful politics. A political voluntarism is even clearer in the greatest of the conciliar theorists, Nicholas of Cusa, who argued in his De concordantia catholica, in an almost contractarian vein, that ‘since all men are by nature free’, legitimate rulership can come only ‘from the agreement and consent of the subjects’. Such subjects, Nicholas insists, must not be


‘unwilling’, and whoever is ‘set up in authority’ by the ‘common consent of the subjects’ must be viewed ‘as if he bore within himself the will of all’ (qu. Sigmund 1963, pp. 96–7, 140).

But the most advanced and subtle form of political voluntarism before the social contract school itself is contained in Francisco Suárez’s On the Laws and God the Lawgiver (1612). For Suárez free will and political consent are analogous or even parallel; will is the ‘proximate cause’ of the state. Suárez summarises his doctrine with the observation that ‘human will is necessary in order that men may unite in a single perfect community’, and that ‘by the nature of things, men as individuals possess to a partial extent (so to speak) the faculty for establishing, or creating, a perfect community’. Plainly, for Suárez that faculty is will: men can be ‘gathered together’ into ‘one political body’ only by ‘special volition, or common consent’; the people cannot ‘manifest’ consent ‘unless the acts are voluntary’ (Suárez 1944, pp. 66, 370, 375, 380, 383, 545).

It is possible to treat contractarianism as a narrowly political and secular idea, or as a theory of rational decision-making. But this would take inadequate account of the revolution introduced into political and moral philosophy by Christian ideas and thereby underemphasise the ethical components of contractarianism, such as autonomy, responsibility, duty, authorisation, and willing (Arendt 1978).

2 The equilibrium between consent and natural law in Locke

In the Second Treatise Locke argues that ‘voluntary agreement gives . . . political power to governors for the benefit of their subjects’ and that ‘God having given man an understanding to direct his actions, has allowed him a freedom of will, and liberty of acting’ (TTG, ii, §173, p. 383, ii, §58, p. 306). At first sight Locke appears to have taken up and extended the social contract doctrine of Hobbes; but there is disagreement as to what extent Locke was really a contractarian at all. He is sometimes represented as a consent and social contract theorist, sometimes as a theorist of natural law, sometimes as a theorist of natural rights (particularly natural property rights). The problem is that all three characterisations are correct; the difficulty is to find an equilibrium between them so that none is discarded in the effort to define Locke’s complete concept of right.

Nevertheless, some writers urge that consent and contractarianism are not central in Locke because natural law is for him a sufficient standard of right, obviating the need for mere consensual arrangements. It is true that
excluding from Locke’s system the obligations and rights to which consent and contract give rise leaves a tolerably complete ethical doctrine based on natural law and rights. But natural law, though necessary for Locke, is not sufficient to define explicitly political rights and duties, for there is a distinction to be drawn between the general moral obligations that men have under natural law and the particular political obligations that citizens have through consent and the social contract. This is clear not only in the Second Treatise but also in the *Essay concerning Human Understanding* (1689) (Locke 1959, pp. 472–3).

In book 2, chapter 28 of the *Essay* Locke draws a careful distinction between the natural law, to which all men as men are obliged to conform their voluntary actions, and the civil law, to which all men as citizens are obligated to adhere because they have created a human legislative authority by consent. ‘A citizen, or a burgher’, Locke says, ‘is one who has a right to certain privileges in this or that place. All this sort depending upon men’s wills, or agreement in society, I call instituted, or voluntary; and may be distinguished from the natural.’ In a commonwealth, which is what human wills institute, men ‘refer their actions’ to a civil law to judge whether or not they are lawful or criminal. Natural law, however, is not instituted by consent, not even by a Grotian ‘universal’ consent. Nor does it merely define ‘certain privileges in this or that place’. It is rather the law ‘which God has set to the actions of men’, and is ‘the only true touchstone of moral rectitude’ (Locke 1959, pp. 472–3, 475–6). But the natural law defines only general moral goods and evils, only moral duties and sins; it cannot point out what is a crime, in the strict legal sense, in a commonwealth, in ‘this or that place’:

If I have the will of a supreme invisible lawgiver for my rule, then, as I supposed the action commanded or forbidden by God, I call it good or evil, sin or duty: and if I compare it to the civil law, the rule made by the legislative power of the country, I call it lawful or unlawful, a crime or no crime. (p. 481)

To say, then, that the natural law is a complete and sufficient standard of political right is for Locke to conflate sin and crime, the duties of man and citizen, what one owes to God with what one owes to the civil magistrate. As a result, the kind of objection to Lockean contractarianism that one finds, for example, in T. H. Green (‘a society governed by . . . a law of nature . . . would have been one from which political society would have been a decline, one in which there could have been no motive to the establishment of civil government’) is at best only half-right (Green 1941, 351
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p. 72). It is partly wrong because a society governed by a law of nature would have had a motive to establish civil government – a motive based not merely on a desire to distinguish between sin and crime, divine and civil law, what one owes as a man and as a citizen, but also on a desire to set up some ‘known and impartial judge’ to serve as ‘executor’ of the law of nature, to avoid men’s being the judges of their own cases. Locke, after all, states clearly that there are three good reasons for allowing the natural law to be politically enforced:

First . . . though the law of nature be plain and intelligible to all rational creatures; yet men being biased by their interest . . . are not apt to allow of it as a law binding to them in the application of it to their particular cases.

Secondly, In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law . . .

Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. (TTG, ii, §§124–6, p. 351)

But Green is certainly right in saying that the transition from a society truly and completely governed by natural law, if such a society could exist, to one under political government, would involve a decline. In section 128 of the Second Treatise Locke argues that under the terms of the law of nature every man ‘and all the rest of mankind are one community, make up one society distinct from all other creatures’. If it were not for the ‘corruption’ and ‘viciousness’ of ‘degenerate men’, Locke goes on, ‘there would be no need of any other’ society; there would be no necessity ‘that men should separate from this great and natural community, and by positive agreements combine into smaller and divided associations’ (p. 352). If Green is right in pointing out that voluntarily instituted political society represents a decline, that does not mean that it is unnecessary, that there is no motive for setting it up. For Locke, as for Kant in Perpetual Peace, the mere fact that it would be better if natural law were universally observed, such that one could dispense with politics, does not make politics unnecessary, given human life as it is. The social contract, for Locke, is necessitated by natural law’s inability to be literally ‘sovereign’ on earth, by its incapacity to produce ‘one society’. Natural law and contractarianism, far from being simply antithetical in Locke, necessarily involve each other, at least given human imperfection and ‘corruption’.

The most familiar contractarian arguments are found in the Second Treatise. Sometimes – indeed, repeatedly – Locke contents himself with the bare claim that consent creates political right, as in section 102 (‘politic
societies all began from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors, and forms of government’) and in section 192 (rulers must put the people ‘under such a frame of government, as they willingly, and of choice, consent to’) (pp. 335, 394). Occasionally, however, he provides a more elaborate argument, particularly when he wants to distinguish legitimate political power from both paternal and despotic power.

Nature gives the first of these, viz. paternal power to parents for the benefit of their children during their minority, to supply their want of ability, and understanding how to manage their property . . . Voluntary agreement gives the second, viz. political power to governors for the benefit of their subjects, to secure them in the possession and use of their properties. (TTG, ii, §173, p. 383)

It is never the case that consent and contract are treated as the whole of political right, that whatever happens to be produced by this process would ex necessitatis be correct. In Locke there is no general will that is always right. This is perfectly clear, for example, in section 95, which is one of Locke’s best statements of an equilibrium between the naturally and the consensually right. Since men are naturally ‘free, equal and independent’, no-one can be subjected to the political power of anyone else ‘without his own consent’. In giving up ‘natural liberty’, and accepting the ‘bonds of civil society’, men agree to ‘join and unite into a community’, not for the purpose of being controlled by any objective to which a group may happen to consent, but for the purpose of ‘comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it’ (TTG, ii, §95, pp. 330–1). Security, of course, is authorised by natural law, which protects the innocent by allowing defence against wrongful attacks, while property is a natural right derived partly from God’s giving the earth to men and partly from human labour. A political order, created by consent, makes these things possible even given the ‘inconvenience’ of some men’s ‘corruption’ and ‘depravity’. In this passage there is an equilibrium between consent, natural law, and natural rights: it is because men are made free and equal by God, because they want to enjoy natural rights in the security of a political society in conformity with natural law, that they consent to become citizens, to conform their voluntary actions to the civil law as well as to the divine law and the law of reputation. Consent operates within a context for John Locke; it is a strand in a complex doctrine.
Before turning to contractarianism in the ‘high’ Enlightenment, we need to note that it was never unchallenged in the eighteenth century. One would not expect a partisan of divine right absolute monarchy to favour a view of government as the product of human ‘will and artifice’, set up between equals in a state of nature – that is, in the absence of any natural (especially paternal) authority. There is no trace of contractarianism in Bossuet’s claim, in his Politics Drawn from the Very Words of Holy Scripture (1709), that ‘there never was a finer state constitution than that which one sees in the people of God’, which was ‘formed’ by Moses, who was instructed by ‘divine wisdom’ and inspired to construct a polity **vraiment divine** – a divine politics then sustained by ‘two great kings of this people, David and Solomon . . . both excellent in the art of governing’ (Bossuet 1990, p. 2).

Bossuet opposed contractarianism not just *en général* but *en particulier*, for he was deeply hostile to Pierre Jurieu, who spoke for French Protestant émigrés, and who had used contract theory radically to urge that the Edict of Nantes, which gave toleration to the Huguenots, was a contract between the Huguenots and the French monarchy, so that Louis XIV’s Revocation of the Edict of Nantes in 1685 was, *inter alia*, a breach of contract. Jurieu tried to find a scriptural provenance for his contractarianism by ‘locating’ a contract in Jewish antiquity: more precisely in David’s ‘waiting’ for popular approval before reassuming the throne after the revolt of Absalom. But Bossuet, anxious as he was to find a permanent model of perfect government in Hebrew monarchy, and to overturn any suggestion that the throne of David and Solomon arose out of popular concession or ‘will’, also offered ‘secular’ objections to contractarianism which showed an appreciation of Hobbes’s turns of phrase, if not of his conclusions. Beginning with an attack on Jurieu, Bossuet soon broadened the argument of his *Cinquième avertissement aux protestants* to take in the whole contract tradition.

To consider men as they naturally are, and before all established government, one finds only anarchy, that is to say a savage and wild liberty in all men where each one can claim everything, and at the same time contest everything; where all are on guard, and in consequence in a continual war against all; where reason can do nothing, since each calls reason the passion that transports him; where even natural law itself remains without force, since reason has none; where in consequence there is neither property, nor domain, nor good, nor secure repose. (Bossuet 1815, iv, pp. 403–5)

Not only, in Bossuet’s view, has Jurieu mistaken anarchy for ‘popular sovereignty’; he has made the still worse mistake of imagining ‘that it is
against reason for a people to deliver itself up to a sovereign without some pact, and that such an agreement must be null and against nature’. Here Bossuet’s sarcastic fury can barely contain itself: ‘‘It is’’, he says, ‘‘against nature to deliver oneself without some pact’’ . . . It is as if he said: It is against nature to risk something to pull oneself out of the most hideous of all conditions, which is that of anarchy’ (pp. 403–5). If Hobbes is right, then, that the state of nature is a state of war – here Christian ‘charity’ seems to be as vestigial for Bossuet as it had been for Hobbes – this does not mean that a ‘social contract’ is the means of peace and felicity. Here some broader comparisons between Bossuet and Hobbes may be instructive.

Bossuet as well as Hobbes gives prominence to the notion of covenant. But for Bossuet the covenant is ‘there’, on the opening page of Politics Drawn from Scripture, and is (or rather historically was) a pact between God and Abraham – from whom ‘kings’ then issue in an anointed patriarchal succession (Bossuet 1990, p. 3). For Hobbes, ‘wills . . . make the essence of all covenants’, and it is covenants expressive of everyone’s will which endow sovereigns with legitimate authority (Hobbes 1991, ch. 40, p. 323); if there is not a popular ‘sovereignty’ in Hobbes, there is at least a transfer of popular natural right to a sovereign beneficiary by an act of will. For Bossuet there is one permanent covenant – in Genesis – which provides the world with monarchs for all time (‘kings shall come out of you’); for Hobbes a covenant can arise – with the ‘will’ of all as its ‘essence’ – whenever escape from the state of nature is needed. The will of Abraham is replaced by the wills ‘of every one of those that are to be governed’ (Hobbes 1991, ch. 42, p. 395).

Hobbes, moreover, given his principles, had to give primacy to reason over revelation, because scripture (for him) has no ‘intrinsic’ meaning at all: the Bible must be made ‘canonical’ by legitimate sovereign authority. Inverting Bossuet, what Hobbes offers is a ‘Holy Scripture drawn from the very words of politics’. For Hobbes, then, popular ‘assent’, which creates sovereignty, also ‘creates’ the Bible, as something ‘canonical’. All of this confirmed Bossuet’s belief that contractarianism is impious and dangerous – whether one tries to make King David into a Lockean avant la lettre, or uses the idea of ‘contract’ for modern times.

4 The anti-contractarianism of Hume and Bentham

The most formidable anti-contractarian in the middle of the eighteenth century was Hume, whose attack took the form of annihilating the ‘Lockeanism’ which had been transformed from questionable innovation into
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received orthodoxy in the half-century between 1690 and 1740 (enabling Voltaire to speak of le sage Locke). In book iii of the Treatise of Human Nature (1739–40), and in the essay ‘Of the Original Contract’ (1748), Hume strove to sever the three intertwined strands of Locke’s politics: its contractarianism, its voluntarism, and its natural law. He undercut Lockean natural law by arguing that neither ‘reason’ nor God could provide it: not reason, because it was ‘passive’ or ‘inert’, having no bearing on ‘active’ moral feeling or sentiment; not God, because his real existence was undemonstrable (THN, iii.i.1). Lockean voluntarism he subverted by insisting that the will is no autonomous moral ‘cause’, but simply a fully determined datum of empirical psychology: ‘It is a will or choice that determines a man to kill his parent; and they are the laws of matter and motion that determine a sapling to destroy the oak from which it sprung. Here then the same relations have different causes; but still the relations are the same’ (THN, iii.i.1). Clearly, Hume could not say, with Locke, that by ‘voluntary agreement’ we set up ‘governors’ whose principal function will be to protect the natural rights (of life and property) which flow from a ‘natural law’ provided by God or reason.

If, for Hume, government cannot reasonably be viewed as an artifice for the protection of a natural order – a set of voluntarily ‘instituted’ magistrates who ‘give effect’ to natural law in an ‘inconvenient’ world – one must hold that the principal social institutions (peace, civility, property, legality) are held up by nothing more than a ‘sentiment of approbation’ concerning them: just as, for Hume, a ‘sentiment of disapprobation’ arises in the breast of normally constituted persons at the sight of a murdered body, so too all social institutions are recommended and sustained by nothing more than our general, shared sense or feeling of their necessity and utility. Hence Lockean contractarianism is not merely historically false, in Hume’s view, given that governments in fact began through force and violence, and only slowly acquired a veneer of acceptability; it is also philosophically ridiculous. Since the real reason for obedience to government is that without such obedience ‘society could not otherwise subsist’, it is useless to rest the duty of obedience on consent or a ‘tacit promise’ to obey. For we must then ask, ‘Why are we bound to observe our promise?’ And for Hume the only possible answer is that promise-observance is simply necessary because ‘there can be no security where men pay no regard to their engagements’. Since a shared sense of actual usefulness is the ground of obedience in general, as well as of promises, it is foolish to base one on the other, to ground obligation in ‘will’: ‘We gain nothing by resolving the one into the other’, because
‘the general interests or necessities of society are sufficient to establish both.’ Sentiments must take the place of contract, will, reason, and God (‘Of the Original Contract’; Hume 1994a, pp. 196–7).

Hume adds, in a caustic aside, that Plato’s Crito was the exception to the rejection of contractarianism by Greek and Roman antiquity, and that even that small but significant work was anomalous within the Platonic canon, since Plato usually stressed not consent but a mathematics-based harmonious psychic order (Republic, 443 d–e) which is then ‘writ large’ in a non-dissonant polis (and then largest in the harmony of the spheres). And even Crito, Hume continued, has an unexpected conclusion:

The only passage I meet with in antiquity, where the obligation of obedience to government is ascribed to a promise, is in Plato’s Crito; where Socrates refuses to escape from prison, because he had tacitly promised to obey the laws. Thus he builds a Tory consequence of passive obedience on a Whig foundation of the original contract. (Hume 1994a, p. 201)

‘New discoveries are not to be expected in these matters’, Hume tartly concludes. ‘If scarce any man, till very lately, ever imagined that government is founded on compact, it is certain that it cannot, in general, have any such foundation’ (p. 201).

More than a generation after Hume’s Treatise, Jeremy Bentham, in A Fragment on Government (1776), had occasion to lament that the Scottish philosopher’s anti-contractarian efforts had not been sufficient to arrest the appearance of Sir William Blackstone’s Commentaries: ‘As to the original contract, by turns embraced and ridiculed by our author [Blackstone] . . . I was in hopes . . . that this chimera had been effectually demolished by Mr Hume.’ For Hume had been simply right: ‘the indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction’. For Bentham, as for Hume, a sense of utility is the very thing that reveals the social contract as ‘dangerous nonsense’: ‘It is the principle of utility, accurately apprehended and steadily applied, that affords the only clue to guide a man’ in morals, politics, and (above all) law (Bentham 1988, pp. 51–2, 96).

It is no accident, indeed, that Bentham included contractarianism among dangerous ‘anarchical fallacies’, insisting that ‘The origination of government from a contract is a pure fiction, or, in other words, a falsehood. It never has been known to be true in any instance; the allegation of it does mischief, by involving the subject in error and confusion, and is neither necessary or useful to any good purpose’ (Bentham 1838–43, II, 501). Since, for Bentham
in the *Principles of Morals and Legislation* (1789), mankind is ‘fastened to the throne of pain and pleasure’, not to Lockean ‘will’ and ‘natural law’, it is essential to avoid the kind of error which is displayed in the thought of the Abbé Sieyès during the French Revolution: the abbé’s contractarian notion that ‘every society cannot but be the free work of a convention entered into between all the associated [members]’ must be firmly repulsed. ‘From a man’s being known to write such stuff’, Bentham urges, ‘it follows . . . that he is living either in Bedlam, or in the French convention’ (Bentham 1838–43, ii, 527). Bentham was as progressive (as a legal reformer) as Hume was conservative; nonetheless they shared the conviction that ‘sentiments of utility’ alone could underpin and justify social institutions. Hume used utility to recommend continuity and stability, Bentham to urge reform and change; what linked them was the conviction that Lockeanism was a tissue of fables.

5 French contractarianism before Rousseau

Before turning to Rousseau’s radical transformation of contractarianism in the 1760s, it is important to know how *le contrat social* was viewed in the period between Bossuet’s violently anti-contractarian *Politics Drawn from Scripture* and the advent of the *citoyen de Genève*. After the appearance of Bossuet’s treatise (and of Fénelon’s *Télémaque*, 1699), no commanding work of French political theory that was addressed to principles other than those applicable to French history alone materialised until Montesquieu’s *Persian Letters* (1721), *Considerations on the Causes of the Greatness of the Romans and their Decline* (1734), and *The Spirit of the Laws* (1748); and even these contain no hint of a contractarian strand. To be a social contract theorist, after all, one must view the state as generated, or justified, or both, by ‘voluntary agreement’ – by will viewed as the ‘essence’ of covenants, as a moral ‘cause’ yielding legitimate government as an ‘effect’. By contrast, Montesquieu was in search of physical and moral *causes générales* which could account for the *esprit*, the spirit, of a particular nation: ‘Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners – a general spirit is formed as a result’ (*SL*, xix.4). Despite the Malebranchian Platonic rationalism of book 1 of *The Spirit of the Laws*, which views justice as a ‘relation’ as eternal as the radii of a circle, Montesquieu’s main effort is devoted to a proto-sociological uncovering of the ‘causes’ of (for example) English constitutionalism, or ‘oriental despotism’.
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It is revealing that, when Montesquieu discusses Hobbes in his (unpublished) *Pensées* (no. 615), he says not a word about ‘will’ and ‘covenant’, but instead repeats Malebranche’s complaint (from the *Discourses on Metaphysics*) that Hobbesian notions of ‘natural’ human ferocity in a violent state of nature are simply mistaken: natural beings, for Montesquieu, are isolated, lonely, and timid, and inequality and domination begin only with the advent of society (cf. SL, i.2–3). Montesquieu regards Hobbes (and Spinoza) as ‘dangerous’ – because of their egoistic psychology, not because of their contractarianism, which goes completely unremarked. To be sure, in *Pensée* number 616 he combines ‘sociology’ with voluntarism: ‘Chance and the turn of mind of those who have agreed have established as many forms of government as there have been peoples: all good, because they were the will of the contracting parties’. But the first half of the sentence (‘chance’) cancels the force of the second half.

Of course voluntarism and contractarianism were present in French thought, if not in its most original and striking figures, such as Montesquieu, Helvétius, Condillac, or d’Alembert. For echoes of Locke one must turn to the *Encyclopédie* and to Jean Jacques Burlamaqui’s *Principes du droit naturel* (Principles of Natural Law, 1747). Indeed, the radicalism of Rousseau’s version of contractarianism becomes clear if one contrasts it with the orthodox Lockeanism of those contemporaneous articles in Diderot’s *Encyclopédie* which treat of ‘the social contract’. The essays by the chevalier de Jaucourt entitled *Etat*, *Etat de nature*, and *Gouvernement* are three of the least innovative pieces in a work which was frequently suppressed or delayed for its daring heterodoxy.

The essay *Etat de nature* repeats Locke verbatim, sometimes lifting the actual language of the French translation of the *Two Treatises*; and the article *Gouvernement* deviates not at all from the Second Treatise: ‘All political societies began through a voluntary union of individuals, who have made the free choice of a form of government’ (*Encyclopédie* 1756, vi, p. 22). Following Locke’s critique of Filmer’s patriarchalism *à la lettre*, the *Encyclopédie* urges that ‘men have never regarded any natural subjection into which they were born... as a tie which obliges them without their own consent to submit themselves to it’ (*Encyclopédie* 1757, vii, p. 788). For the chevalier de Jaucourt, as for Locke, politics derives not from the ‘natural’ subjection of children but from the artificial self-subjection of adult voluntary agents: ‘At the age of reason’, Jaucourt urges, a man ‘is a free man, he is the master of his choice of the government under which he finds it good to live, and of uniting himself to that political body which most pleases him; nothing is
capable of submitting him to the subjection of any power on earth, except his own consent' (Encyclopédie 1757, vii, p. 789). These lines could be invisibly woven into the Two Treatises – unsurprisingly, since they were drawn from it.

To be sure, in the article Etat, Jaucourt, while remaining essentially Lockeanc, introduces some slight quasi-Rousseauian notion of the general good of a corps politique.

One can consider the state as a moral person of which the sovereign is the head . . . This union of several persons in a single body, produced by the concourse of their wills and by the powers of each individual, distinguishes the state from a multitude: for a multitude is only an assemblage of several persons among whom each has his particular will (volonté parti culière), instead of which the state is a society animated by a single soul which directs its movements in a constant way, with reference to the common utility. (Encyclopédie 1757, vi, p. 19)

The provenance of various phrases is clear enough: ‘concourse of wills’ is Hobbes’s phrase from De Cive (1998, p. 72); volonté parti culière used negatively (as it is here) descends from the Pensées of Blaise Pascal; ‘constancy’ of movement comes from Cartesian–Gassendian physics. Nonetheless, the heart of Jaucourt’s thought is Lockean, despite the grafting on of phrases from different traditions; the Encyclopédie simply agrees that ‘voluntary agreement gives political power to governors’.

If the Encyclopédie simply echoes Locke, Burlamaqui’s Principes du droit naturel by contrast offers voluntarism without contractarianism, and says that sovereignty involves not merely power but wisdom and goodness as well – here following Leibniz’s critique of Hobbes and Pufendorf. In the Principes, Burlamaqui develops an elaborate theory of free will, urging that human beings are not merely intelligent, but also ‘spontaneous’ and self-determining; following Malebranche’s Traité de la nature et de la grâce (1680), he says that while we are determined to pursue le bien général, we have the power to ‘suspend’ our pursuit of any bien particulier while we determine what is intrinsically good (by the light of reason). The ‘state of nature’ he views as the juxtaposition of many such naturally equal, self-determining beings. The need for a ‘common defence’ necessitates the erection of ‘civil government’, in Burlamaqui’s view; but, unlike Locke, he does not make civil government the outcome of a contract. Men ‘will’ the state (and sovereignty) in the sense that they see its sheer necessity; here Burlamaqui almost anticipates Hegel’s notion that ‘willing’ the state really means recognising it as morally necessary.
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The essential character of this [civil] society, which distinguishes it from the simple society of nature of which we have spoken, is subordination to sovereign authority, which takes the place of equality and independence.

Society is . . . the union of several persons for a certain end, which is some common advantage. The end is the effect or the advantage which intelligent beings propose to themselves, and which they want to procure; and the union of several persons is the concourse of their wills to obtain the end which they jointly propose to themselves. (Burlamaqui 1748, pp. 62, 119)

Here there is ‘will’ – indeed a ‘concourse of wills’ (De Cive again) – but not contract; the transition from nature (implying equality) to the ‘civil’ (involving subordination) mentions no intervening ‘Lockean’ stage of ‘voluntary agreement’ between natural equals. But if sovereignty is stressed as the hallmark of ‘civil society’, Burlamaqui avoids pure ‘Hobbism’ by saying that sovereignty involves ‘superior power’, wisdom, and goodness in equal measure (like the equal attributes of God in scholastic thought); here he mentions favourably Leibniz’s Opinion on the Principles of Pufendorf (1706), which had insisted that adequate rulership must rest on caritas sapientis, the ‘charity of a wise being’, not just on ‘irresistible’ power (Burlamaqui 1747, pp. 134–5; Leibniz 1988, pp. 3ff).

Burlamaqui’s thought, then, is a kind of compendium of Enlightenment doctrines: with Hobbes it insists on sovereignty; with Locke it stresses equality in the state of nature; with Malebranche it urges free will as suspension of particular desires; with Leibniz it insists on wisdom and goodness in addition to omnipotence; with Hegel subsequently it views ‘real’ will as recognition of the necessity of the state. None of the elements of Burlamaqui’s argument was original, but together they formed an unusual combination; strikingly the Principes show that one could favour aspects of Hobbism, Lockeanism, and ethical voluntarism, and yet still not emerge as a full contractarian.

Before turning to Rousseau, it is worth remembering that one other eminent Franco-Swiss theorist, Jean Barbeyrac – best remembered as the translator and populariser of Grotius and Pufendorf – used (more-or-less Lockean) natural law theory in the radical way that Hume had feared, while subordinating what is merely ‘willed’ to natural justice. Beginning with the assertion that ‘all that which is just is not of such a nature that it can be prescribed by civil laws’, Barbeyrac goes on to say that ‘from the moment that the most authentic laws of the most legitimate sovereigns are found to be in opposition . . . to these immutable [natural] laws’, it is necessary,
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‘whatever it may cost, to disobey the first, in order not to taint the latter’. The submission of men to civil government, he continues, could not have extended ‘to the point of placing a human legislator above God, the author of nature, the creator and the sovereign legislator of men’ – even if ‘men should have willed it’ (Barbeyrac 1717, p. 18, 1716, p. 15). Barbeyrac’s thought shows what happens if one radicalises natural law theory, then uses ‘natural justice’ to confine voluntarism (including both popular and ‘sovereign’ will).

6 Rousseau and the radicalisation of social contract theory

As has been remarked, political thought since the seventeenth century had been characterised by voluntarism, by an emphasis on individual will and consent as the standard of political legitimacy. Rousseau ordinarily upheld much of this tradition, sometimes even exaggerating his agreement with a voluntarist and contractarian such as Locke: the English philosopher, he said, had treated political matters ‘with exactly the same principles as myself’ (Rousseau 1962, ii, p. 206). In the Lettres de la montagne (Letters from the Mountain, 1764), speaking of contract and consent, Rousseau admitted that the foundation of obligation had divided political theorists: ‘according to some, it is force; according to others, paternal authority; according to others, the will of God’. All theorists, he said, establish their own principle of obligation and attack that of others. ‘I myself have not done otherwise, and, following the soundest element of those who have discussed these matters, I have settled on, as the foundation of the body politic, the contract of its members.’ And he concluded by asking, ‘what more certain foundation can obligation among men have, than the free agreement of him who obligates himself?’ (Rousseau 1962, ii, pp. 200–6).

But while voluntarism took care of legitimacy, it could say nothing about the intrinsic goodness of what is willed. It was precisely here that Rousseau made a stand for a particular kind of will: he wanted voluntarism to legitimise what he conceived to be the unity and cohesiveness – the ‘generality’ – of the ancient polity, particularly of Sparta and of (republican) Rome. Indeed, his political ideal was the ancient polity, now willed by moderns who were as concerned with reasons for obligation as with perfect forms of government. Against the alleged ‘atomism’ of earlier contract theory, Rousseau wanted the generality – the non-individualism, or rather the pre-individualism – of antiquity to be legitimised by consent. Hence Rousseau made ‘the general will’ the heart of his political theory (Riley 1986).
Rousseau was a severe critic of modern political life – of its lack of a common morality and virtue, of its neglect of patriotism and civic religion, of its indulgence in ‘base’ philosophy and morally uninstructive arts. At the same time, he was a great admirer of the more highly unified political systems of antiquity, in which, as he thought, morality, civic religion, patriotism, and a simple way of life had made men ‘one’, wholly socialised and truly political. He thought that modern political life divided man against himself, leaving him, with all his merely private and anti-social interests, half in and half out of political society, enjoying neither the amoral independence of nature nor the moral elevation afforded by true socialisation.\(^2\)

Why Rousseau thought unified ancient political systems preferable to modern ones is not difficult to understand. He conceived the difference between natural man and political man in very sharp terms; while for most contract theory political life was merely non-natural (a belief largely created to exclude arguments for natural political authority), for Rousseau it was positively unnatural, or anti-natural, requiring a complete transformation of the natural man. For Rousseau, the political man must be deprived of his natural powers and given others, ‘which are foreign to him and of which he cannot make use without the help of others’; politics reaches a peak of perfection when natural powers are completely dead and extinguished, and man is given ‘a partial and moral existence’ (Rousseau 1962, i, pp. 325–6).

The chief defect of modern politics, in Rousseau’s view, was that it was insufficiently political; it compromised between the utter artificiality and communality of political life and the naturalness and independence of pre-political life, and in so doing caused the greatest misfortunes of modern man: self-division, conflict between private will and the common good, a sense of being neither in one condition nor another. ‘What makes human misery’, Rousseau said in *Le bonheur public* of 1762, ‘is the contradiction which exists between our situation and our desires, between our duties and our inclinations, between nature and social institutions, between man and citizen’. To make man one, to make him as happy as he can be, ‘give him entirely to the state, or leave him entirely to himself . . . but if you divide his heart, you will rip him apart; and do not imagine that the state can be happy, when all its members suffer’ (Rousseau 1962, i, p. 326).

Ancient polities such as Sparta, Rousseau thought, with their simplicity, morality (or politics) of the common good, civic religion, moral use of fine

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\(^2\) For these themes see particularly his *Discourse on the Origin of Inequality* (1755; in Rousseau 1997a, pp. 111–18; *Discourse on the Sciences and Arts* (1751; in 1997a, pp. 1–28); *Considerations on the Government of Poland* (1772; in 1997b, pp. 177–260); and *Letter to M. d’Alembert* (1758).
and military arts, and lack of extreme individualism and private interest had been political societies in the proper sense: in them man was ‘part of a larger whole’ from which he ‘as it were receive[s] his life and his being’ (SC, ii.7, p. 69). Modern ‘prejudices’, ‘base philosophy’, and ‘passions of petty self-interest’, on the other hand, assure that ‘the moderns no longer find within themselves anything of that vigour of soul which everything instilled in the ancients’ (Government of Poland: Rousseau 1997b, pp. 180–2). And this spiritual vigour may be taken to mean the avoidance (through identity with a ‘greater whole’) of ‘that dangerous disposition which gives rise to all our vices’, self-love. Political education in an extremely unified state will ‘draw us out of ourselves’ before the human ego has ‘there become actively engaged in the contemptible concerns that do away with all virtue and make up the life of petty souls’ (Economie politique: Rousseau 1997b, pp. 20–1). It follows that the best social institutions ‘are those best able to denature man, to take away his absolute existence and to give him a relative one, and to carry the moi into the common unity’ (Emile: Rousseau 1962, ii, p. 145).

These social institutions, in ideal ancient polities, were always for Rousseau the creation of a greater legislator, a Numa or a Moses: they did not develop and perfect themselves in political experience, but were ‘handed down’ by the lawgiver (Poland: Rousseau 1997b, pp. 180–1).

But if Rousseau thought the highly unified ancient polity, and its political morality of the general or common good, superior to modern fragmented politics and its political morality of self-interest, at the same time he shared with modern individualist thought the conviction that all political life was conventional and could be made obligatory only through individual consent. Despite the fact that he sometimes treated moral notions as if they simply ‘arose’ in a developmental process, Rousseau often (and particularly when speaking of contract and obligation) fell back on a kind of moral theory in which the wills of free men were taken to be the causes of duties and of legitimate authorities. Thus in an argument against ‘obligations’ based on slavery in The Social Contract, Rousseau urged that ‘to deprive one’s will of all freedom is to deprive one’s actions of all morality’, that the reason one can derive no notion of right or morality from mere force is that ‘to yield to force is an act of necessity, not of will’ (SC, i.3–4, pp. 44–5). In the Discourse on the Origin of Inequality, in a passage which almost prefigures Kant, he insisted on the importance of ‘free agency’, arguing that while ‘physics’ might explain the ‘mechanism of the senses’, it could never make intelligible ‘the power of willing or rather of choosing’ – a power in which, he said, nothing could
be found but ‘purely spiritual acts about which nothing is explained by the
laws of mechanics’ (Rousseau 1997a, p. 141). It is this power of willing, he
emphasised, which (rather than reason) distinguishes men from beasts.

Rousseau very definitely thought that he had derived political obligation
and rightful political authority from this ‘power’ of willing: ‘civil association
is the most voluntary act in the world; since every individual is born free
and his own master, no-one is able, on any pretext whatsoever, to subject
him without his consent’ (SC, iv.2, p. 123). Indeed, the first four chapters
of The Social Contract are devoted to refutations of erroneous theories of
obligation and right (paternal authority, the ‘right of the strongest’, and
obligation derived from slavery). ‘Since no man’, Rousseau concluded, ‘has
a natural authority over his fellow man, and since force produce no right,
conventions remain as the basis of all legitimate authority among men’ (SC,
1.4, p. 44).

One may suspect, however, that for Rousseau contract theory was more
a way of destroying erroneous theories of obligation and authority than of
creating a comprehensive theory of what is politically right. Any political
system which ‘limits itself to obedience . . . will find difficulty in getting
itself obeyed. While it is good to know how to use men as they are, it is much
better still to make them what one needs them to be’ (Économie politique:
Rousseau 1997b, pp. 12–13). That, in a word, was Rousseau’s criticism of
all contract theory: it dealt too much with the form of obligation, with will
as it is, and not enough with what one ought to be obligated to do, and
with will as it might be.

His criticism of Hobbes is based on this point. Hobbes had, indeed, estab-
lished rightful political authority on consent; he had made law the com-
mand of an artificial ‘representative person’ to whom subjects were ‘formally
obliged’ through transfer of natural rights (save self-defence) by covenant.
But Hobbes had done nothing to cure the essential flaw (in Rousseau’s view)
of modern politics; private interest was rampant, and indeed paramount, in
Hobbes’s system. The essential error of Hobbes, Rousseau thought, was to
have read back into the state of nature all the human vices which half-
socialisation had created, and thus to see culturally produced depravities
as ‘natural’, with Hobbesian absolutism, rather than the creation of a feel-
ing of the common good, as the remedy for these depravities. ‘The error
of Hobbes’, Rousseau declared in The State of War, ‘is to confuse natural
man with the men they have before their eyes, and to move into one sys-
tem a being that can thrive only in another.’ Rousseau, who thought that a
perfectly socialised state (like Sparta) could elevate men, and turn them from ‘stupid and limited animals’ into moral and intelligent beings, was bound to think Hobbesian politics incomplete, one which ‘confines itself to mere obedience’, one which did not attempt to make men ‘what they ought to be’, but which, through a system of mere mutual forbearance, did not undertake any improvement in political life. And the result was that while Hobbes knew ‘well enough what a Londoner or Parisian is’, he never saw a natural man (Rousseau 1997b, pp. 164–5; SC, i.8, p. 53).

Rousseau had another objection to traditional contractarianism – an objection which, however, he kept under control in The Social Contract – namely that a social contract might simply be a fraud imposed by the rich on the poor with a view to ‘legitimising’ a ruinous inequality. In the Discourse on the Origin of Inequality Rousseau suggests that the rich man, ‘lacking valid reasons’ which he can use to justify his unequal possessions, and fearful of being plundered by the many, ‘at last conceived the most well-considered project ever to enter the human mind; to use even his attackers’ forces in his favour . . . and to give them different institutions, as favourable to himself as natural right was contrary to him’ (Rousseau 1997a, pp. 172–3).

‘Let us unite’, he told them, ‘to protect the weak from oppression, restrain the ambitious, and secure for everyone the possession of what belongs to him: let us institute rules of justice and peace, to which all are obliged to conform, which favour no-one, and which in a way make up for the vagaries of fortune, by subjecting the powerful and the weak alike to mutual duties.’ (1997a, p. 173)

Such an argument, Rousseau continues, would have worked quite well with ‘crude’ men who were ‘easily seduced’; ‘all ran towards their chains in the belief that they were securing their freedom’. Only the rich, who had something to lose, he urges, saw the danger involved since they were ‘sensitive in every part of their goods’ (1997a, p. 175).

It is worth noting, however, that in the published version of The Social Contract, where Rousseau wanted to rely on contractarian arguments, he very much mitigated the radicalism of this view: in the definitive version, indeed, he confined himself to the moderate observation that since ‘laws are always useful to those who possess something and harmful to those who have nothing’, the social state ‘is advantageous for men only in-so-far as all have something and none has too much of anything’ (SC, 1.9, p. 56n). In this work Rousseau emphasises the benefits of the social contract, provided that ‘conditions’ are roughly equalised for all parties to the agreement: ‘since each gives himself entirely, the condition is equal for
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all, and since the condition is equal for all, no-one has any interest in making it burdensome to the rest’ (SC, ii.6, p. 50). But in The Social Contract the notion that a social contract is a rich man’s confidence trick is distinctly subordinated.

Rousseau, in any case, held in his mind, at once, both the idea that the closely unified political systems of antiquity (as he idealised them) were the most perfect kinds of polity, and the notion that all political society is the conventional creation of individual wills through a social contract (at least when ‘conditions’ could be equalised). Holding both of these ideas created problems, for while the need for consent to fundamental principles of political society for the creation of a mere political construct through ‘will and artifice’ is a doctrine characteristic of the ‘idiom of individuality’, the ancient conception of a highly unified and collective politics was dependent on a morality of the common good quite foreign to any insistence on individual will as the creator of society and as the basis of obligation, and Rousseau sometimes recognised this, particularly in the Discourse on Political Economy.

He never really reconciled the tensions between his contractual theory of obligation and his model of political perfection. If Rousseau had cared to do so, he would have had to admit that his ancient ideal model, as the creation not of a contractual relation of individual wills, but of a great legislator working with political education and a common morality, is not ‘obligatory’ on citizens, is not founded in right. Moses, for example, ‘executed the astonishing enterprise of instituting as a national body a swarm of wretched fugitives’; he gave them ‘morals and practices’. Lycurgus ‘undertook to institute a people’ at Sparta; he ‘imposed on it an iron yoke’ (Poland: Rousseau 1997b, pp. 180–1). It is, really, only in The Social Contract that Rousseau makes much reference to consent or contract in ancient politics; the usual emphasis (as in the Discourse on Political Economy and Government of Poland) is on great men, political education, and the absence of a highly developed individual will. As Rousseau put it in an early prize-essay entitled Discourse on Heroic Virtue (1750),

men are governed [not] by abstract views; they are only made happy by being constrained to be so, and they have to be made to experience happiness in order to be made to love it: this is [the object of] the Hero’s care and talents; often it is with force in hand that he puts himself in the position of receiving the blessings of men whom he begins by compelling to bear the yoke of the laws so that he might eventually subject them to the authority of reason. (Rousseau 1997a, p. 306)

However these tensions are treated, it remains to be said that Rousseau was consistently clear that modern calamities caused by self-interest must
be avoided, and that the political systems created by ancient legislators were better than any modern ones. Although it did not always occur to him that both the merely self-interested ‘particular’ will which he hated, and the ‘general’ will necessary for consent to conventional society, were part of the same individualistic idiom of modern political thought, and perhaps inseparable, Rousseau always thought that mere will, as such, could never create a proper political society. For him, then, the problem of political theory, above all in *The Social Contract*, became that of reconciling the requirements of consent (which obligates) and perfect socialisation (which makes men ‘one’); men must somehow choose the politically perfect, somehow will such complete socialisation as precludes self-division.

To retain the moral attributes of free will while doing away with will’s particularity, selfishness, and ‘wilfulness’ – to generalise this moral ‘cause’ without causing its destruction – is perhaps the central problem in Rousseau’s political, moral, and educational thought, and one which reflects the difficulty Rousseau found in making free will and rational, educative authority co-exist in his practical thought. Freedom of the will is as important to the morality of actions for Rousseau as for any voluntarist coming after Augustine’s insistence that *bona voluntas* alone is good; but Rousseau was suspicious of the very ‘faculty’ – the only faculty – that could moralise. Thus he urges that ‘the most absolute authority is that which penetrates to man’s inmost being, and affects his will no less than it does his actions’ (*Political Economy*: Rousseau 1997b, p. 13). Can the will be both an autonomous ‘moral cause’ and subject to the rationalising, generalising effect of educative authority? This is Rousseau’s constant difficulty. Even Emile, the best educated of men, chooses to continue to accept the guidance of his teacher: ‘Advise and control us; we shall be easily led; as long as I live I shall need you’ (Rousseau 1974, p. 444). How much more, then, do ordinary men need the guidance of a ‘great legislator’ – the Numa, or Moses, or Lycurgus of whom Rousseau speaks so often – when they embark on the setting up of a system which will not only aid and defend but also moralise them. The relation of will to authority, of autonomy to educative ‘shaping’, is one of the most difficult problems in Rousseau. The general will is dependent on ‘a union of understanding and will in the social body’ (*SC*, ii.6, p. 68). But that understanding, which is provided (at least initially) by educative authority, is difficult to make perfectly congruent with ‘will’ as an autonomous ‘moral cause’.

If will in Rousseau is generalised primarily through an educative authority, so that volition as ‘moral cause’ is not quite so free as he would sometimes prefer, it is at least arguable that any tension between will and the authority
that ‘generalises’ it is only a provisional problem. Rousseau seems to have hoped that at the end of political time (so to speak) men would finally be citizens and would will only the common good in virtue of what they had learned over time; at the end of civic time, they might actually be free, and not just ‘forced to be free’ (SC, i.7, p. 53). At the final point (of ‘decision’) there would be a ‘union of understanding and will’ in politics, but one in which ‘understanding’ is no longer the private possession of a Numa or a Lycurgus. At this point, too, ‘agreement’ and ‘contract’ would finally have real meanings: the ‘general will’, which is ‘always upright’, would be enlightened as well, and contract would transcend the mere rich man’s confidence-trick (legalising unequal property) that it is in Inequality. At the end of political time, the ‘general will [one] has as a citizen’ would have become a kind of second nature (SC, i.7, ii.3, pp. 52–3, 59).

For Rousseau’s theory to work, education must, therefore, lie at the heart of his thought. There are unavoidable stages in all education, whether private or public: the child, he says in Emile, must first be taught necessity, then utility, and finally morality, in that inescapable order; and if one says ‘ought’ to an infant he simply reveals his own ignorance and folly. This notion of necessary educational time, of becoming what one was not – Aristotelian potentially-becoming-actuality, transferred from physis to the polis – is revealed perfectly in Emile’s utterance, ‘I have decided to be what you made me’ (Rousseau 1974, p. 435). That is deliberately paradoxical (as are so many of Rousseau’s central moral-political beliefs), but it shows that the capacity to ‘decide’ is indeed ‘made’. It is education that ‘forces one to be free’ – by slowly ‘generalising’ the will. Similarly, Rousseau’s ‘nations’ are at first ignorant: ‘For nations as for men there is a time of maturity for which one has to wait before subjecting them to laws’ (SC, ii.8, p. 73). On this reading, Rousseau does not oscillate incoherently between Platonic education and Lockean voluntarism; if his notion of becoming-in-time works, then the généralité of antiquity and the volonté of modernity are truly fused by this ‘modern who has ancient soul’ (Rousseau 1962, i, p. 421; Riley 1991). Rousseau is the most complex contractarian of the eighteenth century.

7 Kant and the social contract as an ideal of reason

One cannot say that before Kant social contract theory flourished in Germany. Leibniz, the greatest pre-Kantian German philosopher, complained in the New Essays concerning Human Understanding (c. 1704) that English contractarianism was wrong in insisting on natural human equality,
and in viewing the state of nature as a state of war: Hobbes, in particular, he accused of ignoring Aristotelian ‘natural’ sociability. For Leibniz an enlightened prince should rule the state through ‘the charity of the wise’. This fusion of Pauline charity and Platonic wisdom has nothing to do with contract or ‘voluntary agreement’ (Riley in Leibniz 1988, Introduction). Much of the early German Enlightenment (including Thomasius and Wolff) placed its faith in the notion of enlightened monarchy – though Johann Jacob Brucker, the Augsburg polymath who wrote the first German history of philosophy – Historia critica philosophiae (1742–4 and 1766) – viewed Hobbes and even Algernon Sidney with some favour, saying that Hobbes had introduced genuine ‘improvements’ into ‘moral and political science’. But the decisive turn came with Kant, whose admiration for Rousseau finally made contractarianism central in German political philosophy.

Kant’s political writings of the 1790s are rightly viewed as completing and crowning the social contract tradition. Since, however, Kant’s contractarianism enters his thought late and at an oblique angle, it is first essential to characterise the heart of his social theory. That heart rests on the notion that ‘a true system of politics cannot therefore take a single step without first paying tribute to morality’, and that morality (in its turn) involves respect for persons as ‘ends in themselves’ – indeed as members of a Kingdom of Ends who ought never to be used merely as ‘means’ to relative, arbitrary ends (Kant 1991, p. 125). Kant’s contractarianism, when it arrives, must be related to this larger view of ‘public legal justice’ as a legal approximation to a Kingdom of Ends which ‘good will’ alone may be too feeble to attain (Kant 1960, pt 4). To be sure, Kant employs the Rousseauian vocabulary of ‘general will’ and ‘the social contract’ (Riley 1983, ch. 5). But Rousseau is a radically civic thinker for whom the ‘general will of the citizen’ (of Sparta, Rome, Geneva) is the highest social ideal; Kant by contrast is a universalist and cosmopolitan who aims at a Kingdom of Ends populated by ‘persons’ – all rational beings – and only reluctantly accepts contractarian politics as a mere approximation to a universal ‘ethical commonwealth’ (Kant 1960, pt 4).

Despite grounding politics on morals, Kant drew a strict distinction between moral motives (acting from good will or respect for the moral law) and legal motives, and insisted that moral and legal incentives must never be collapsed into each other. This is why he argued (in The Contest of the Faculties, 1798) that, even with growing ‘enlightenment’ and ‘republicanism’, there still will not be a greater quantity of moral actions in the world,
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but only a larger number of legal ones which roughly correspond to what pure morality would achieve if it could (Kant 1991, pp. 187–8). (At the end of time, a purely moral ‘Kingdom of Ends’ will not be realised on earth – though it ought to be – but one can reasonably hope for a better legal order which is closer to morality than are present arrangements.) Morality and public legal justice must be related in such a way that morality shapes politics – by forbidding war, by insisting on ‘eternal peace’ and the ‘rights of man’ – without becoming the motive of politics (since politics cannot hope for ‘good will’) (Kant 1923, pp. 162–5). Given this tension between a morality and a public legal justice which must be related but which equally must remain distinct, it may be that the notion of ‘ends’ can help to serve as a bridge: for public law certainly upholds some moral ends (e.g. the avoidance of murder), even though that law must content itself with a legal motive.

Using teleology as a bridge connecting the moral to the political-legal realm is not a very radical innovation, since Kant himself had already used ‘ends’ in the Critique of Judgement (1790) to unite his whole philosophy. He did this by arguing that nature can be estimated (though never known) through purposes and functions which mechanical causality fails to explain, that persons as free agents both have purposes which they strive to realise, and view themselves as the final end of creation, and that art exhibits a ‘purposiveness without purpose’ which makes it (not directly moral but) the symbol of morality. Surely, then, if ends can link – or be thought of as linking – nature, human freedom, and art, they can link (much more modestly) two sides of human freedom: namely the moral and the legal realms (Kant 1952, Intro. § ix; §§ 74ff, 84–6; Riley 1983, ch. 4).

Now if ‘good will’, in the moral realm, could mean never universalising a maxim of action which would fail to respect persons as ends in themselves, then morality and politics/law could be connected through Kantian teleology. If all persons had a good will, then they would respect all others as ends – indeed as members of a ‘Kingdom of Ends’; but, although it ought to, this does not actually happen, thanks to the ‘pathological’ fact that man is ‘radically evil’. If, in sum, good will means respect for persons as ends in themselves, and if public legal justice sees to it that some moral ends (such as avoiding murder) get observed, if not respected, then public legal justice in Kant might be viewed as the partial realisation of what would happen if all wills were good. In addition Kant frequently suggests that law creates
a kind of environment for good will, by eliminating occasions for political
sin (such as fear of others’ domination) which might tempt (though never
determine) people to act wrongly.

Perhaps Kant’s whole position on politics as the legal realisation of moral
ends is best summed up in two passages, the first from his *Metaphysical
Principles of Virtue* (1797):

Man in the system of nature . . . is a being of little significance and, along with the
other animals, considered as products of the earth, has an ordinary value . . . But man as
a person, i.e. as the subject of a morally practical reason, is exalted above all price. For
as such a one (*homo noumenon*) he is not to be valued merely as a means to the ends of
other people, or even to his own ends, but is to be prized as an end in himself. (Kant
1964, pp. 96–7)

In *The Contest of the Faculties* Kant translated this passage – or so it seems –
into the language of politics:

For man in turn is a mere trifle in relation to the omnipotence of nature, or rather to
its inaccessible highest cause. But if the rulers of man’s own species regard him as such
and treat him accordingly, either by burdening him like a beast and using him as a mere
instrument of their ends, or by setting him up to fight in their disputes and slaughter
his fellows, it is not just a trifle but a reversal of the ultimate purpose of creation. (Kant
1991, p. 185)

On this teleological view, sovereigns deny the rights of man (or perhaps
more properly the rights of persons) by treating men as mere means to a
relative purpose (e.g. territorial aggrandisement). In Kant’s view war, which
necessarily treats men as mere means to an immoral purpose, causes the
state to attack and subvert morality, when in fact the state and the legal
order ought (as qualified goods) to provide a stable context of peace and
security within which men can safely exercise the sole unqualified good,
a ‘good will’. So the notion that persons are ends who ought never to be
used merely as means to arbitrary purposes provides ‘good will’ with an
objective end which is the source of the categorical imperative, and it sets a
limiting condition to what politics can legitimately do. Despite what Hegel
says, then, Kantianism is not merely a formal doctrine in which (to quote
Hegel’s language) ‘chill duty is the final undigested lump left within the
stomach’ (Hegel 1896, III, p. 461).

Kant is clear, moreover, that consenting *citizens* (not mere feudal sub-
jects) in a ‘republic’ would dissent from war, out of the legal motive of
self-love. Thus republicanism (internally) and eternal peace (externally) are
interlocked and are absolutely inseparable. This is why Kant says that in ‘a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war’ – despite the fact that ‘moral-practical reason within us pronounces the following irresistible veto: there shall be no war . . . for war is not the way in which anyone should pursue his rights’. Therefore republican citizenship is instrumental to an essential moral end that good will alone may never realise, thanks to human pathology. For Kant, the outside is shaped by the inside; it is that which leads him to say that the first definitive article of eternal peace is that ‘the civil constitution of every state shall be republican’, that all just laws must be such that ‘a people of mature rational powers’ could consent to them (Kant 1991, pp. 99, 100, 104, 174, 187).

All of this is brought out in the last pages of the Metaphysical Elements of Justice, where it is asserted that it is morality itself that vetoes war (doubtless because war treats ends as mere means, persons as mere things); that peace as a moral end can be legally approached by establishing that constitution (namely ‘republicanism in all states, individually and collectively’) that may bring self-loving, consenting rational citizens to veto war; that to think that the moral law that forbids war might be misleading is to renounce reason and to fall back on the ‘mechanism of nature’; that right, which legally realises some moral ends (even without good will), has universal and lasting peace as its ‘entire ultimate purpose’ (Kant 1991, p. 174). It is doubtful whether there is any other passage, anywhere in Kant, that so vividly and movingly fills out his notion of a politics that pays homage to the ends of morals. It is a passage whose visionary but sane breadth redeems the drier parts of the Metaphysical Elements of Justice. It confirms, in sum, what should never have been doubted: that Kant is a political philosopher of the first rank who fits contractarianism into a powerful general moral theory.

8 The decline of social contract theory

Kant’s subtle and careful but oblique and attenuated contractarianism – shaped by the notion that a self-loving rational being would consent to life-saving eternal peace and dissent from war – might stand as the perfect illustration of Hegel’s dictum that the Owl of Minerva takes flight only with the falling of dusk: that forms of thought perfect themselves at the moment they begin to vanish. Certainly Hegel himself, in the Philosophy of Right (publ. 1821), was contemptuous of mere contractarianism, and urged
that modern men can be said to ‘will’ the state only in the sense that they ‘recognise’ it as the sufficient and satisfying ‘realisation’ of non-capricious rational freedom (Hegel 1991, preface, p. 22, and pp. 333–4). If, for Hegel, a person finds his ‘subjective satisfaction’ in willing membership in the modern state qua ‘ethical’ order, then one will be secured and freed up for the pursuit of what has ‘absolute’ value – art, religion, and (especially) philosophy. But this willingness has nothing to do with ‘mere’ consent or contract: rather one ‘sees’ the state for what it is (Kelly 1978, chs. 1–3). The ‘recognition’ which is so important in the Phenomenology of Spirit – in the servant’s acknowledgement of the master – is now transferred to the citizen’s Anerkennung (recognition) of ‘the ethical world’ (Kelly 1978, chs. 1–3; Riley 1992, ch. 1). Hegelianism simply severs the link between ‘will’ and ‘consent’ which had been in place since Augustine, and which had been made politically central by Hobbes, Locke, and Rousseau. Hegelianism then had enormous weight throughout the nineteenth century – together with utilitarianism, now flourishing and able to insist on Hume’s argument that social institutions are justified by their necessity and utility alone, that it is useless to ground legitimacy in a contract whose utility will still have to be settled. It was for Bentham to say that the social contract is ‘nonsense upon stilts’; but Hume had pulled out the first props (Bentham 1843, II, p. 501).

To be sure, one of the most celebrated paragraphs in Burke’s Reflections on the Revolution in France (1790) uses contractarian imagery – but it is only a vestigial echo of a doctrine that Burke undercuts even while seeming to employ its customary rhetoric:

Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure – but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, callico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue, and in all perfection. (Burke 2001, pp. 260–1)

Burke’s real view, of course, was that social goods (including political rights) should be viewed as an historical ‘entailed inheritance’, not as dictates of ‘reason’ or products of ‘will’; when he uses Lockean words it is with a view to subverting the Lockean world.

By the early 1800s, then, social contract theory was being displaced from its eminence by Burkean historical ‘organicism’, by various stripes
of utilitarianism (whether Benthamite or Humean), and by the flowering of Hegelianism over a political spectrum stretching from far left to far right (Kelly 1978, ch. 5). With Hegel’s death in 1831 and Bentham’s in 1832 the death of contractarianism might also have been pronounced – except in America where a fairly unreconstructed Lockeanism continued to hold the field (Hartz 1955, ch. 1). Few in 1831–2 would, therefore, have predicted a new era of contractarianism in the late twentieth century, driven by a work, John Rawls’s *Theory of Justice*, which avowedly built on Hobbes, Locke, Rousseau, and Kant (Rawls 1972, pp. 11–13).