THE THEORY OF SOCIAL CONTRACT IN ENGLAND: 1642-52

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By

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PREFACE

This study does not attempt to provide an exhaustive treatment of the subject; it is rather a work of introduction and interpretation which the writer hopes will lead to further research and analysis. The social contract has long been an important concept in political theory and social philosophy. It is surprising that so little attention has been given to the history of its development and usage. The writer first became interested in the theory of social contract in attempting to trace the seventeenth century origins of the social philosophy of liberalism. He feels that the writers dealing with the social contract in the period to which this study is confined throw interesting light on the early development of English liberalism.

The writers whose work is analyzed in this study were selected both for their importance and for the accessibility of the original documents and tracts. Although the original sources were not available to the writer, it seemed necessary to include some consideration of the writings of John Lilburne and Gerrard Winstanley. Thus it is a source of regret to the writer that he has been compelled to rely entirely upon secondary material for the treatment in Chapter Seven.

The writer wishes to express his appreciation to Professors Max S. Handman and Roy W. Sellars whose interest and counsel have been most helpful during the successive stages of this study. The writer is also indebted to Mr. Samuel Kliger for a number of valuable comments and suggestions. The Librarians at the Union Theological Seminary Library very generously

made available for the writer's use a number of rare pamphlets and tracts from the McAlpin Collection of Seventeenth Century British History and Theology which otherwise would have remained inaccessible. Mr. Raymond A. Weitemier and Mr. Malcolm J. Williams have been of invaluable assistance in the preparation of the manuscript.

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CHAPTER ONE

INTRODUCTION TO THE PROBLEM

Liberalism has sometimes been defined as "the attitude which tests the validity of behavior and of institutions in terms of the rational consent of men." If one attempts to explain the development of liberalism, particularly in England, he must point out its relationships with the pattern of new institutions in the world of practical life which made possible the rise of the middle class to power.

In many ways the most significant event in seventeenth century England is the definite triumph of the idea of Parliamentary supremacy based on the political rule of the propertied classes. Upon this event we ordinarily confer the title of the English Revolution. To suggest that it was an event fails to do it full justice, for in reality it was a great political drama enacted during the age of England's most brilliant political theorizing. The English Revolution produced a rich crop of ideas, as well as men; for those who

made or opposed basic changes in church and state directed and rationalized their actions by complete systems of political principles. In this conflict of interest and opinion there were hammered out the political working rules and dogmas which were the fundamentals of English middle-class liberalism. The theory of toleration, the rights of property, the liberties of the subject, limited monarchy, the rule of law, and the tradition of compromise were all constituents of the doctrine of liberty which was gradually fashioned to meet the economic and social needs of middle class.

At the opening of the seventeenth century, theories of government, as set forth by Hooker and James I., were based upon scholastic theology; at its close, in the days of Bolingbroke, Swift, and Defoe, they had assumed the lay and transitory character of party programs. This change from scriptural authority to reason, from Divine Right to contract, reveals a complete revolution in thinking. This disappearance of the theological setting emphasizes that the effective basis of society had been transferred from religion to secular utility.

Our definition of liberalism indicates that it was partly a psychological attitude. In a general way it may be maintained that the liberals embraced an optimistic interpretation of human nature while their opponents made a more pessimistic analysis of Englishmen. The pessimists usually advocated absolute monarchy,

restrictions on individual freedom, the repression of privileged or nonconforming groups, the rule of tradition and the enforcement of a state religion. The optimists, on the other hand, distrusted little besides a strong executive, were ready to experiment with representative government and religious toleration, and preferred utility to tradition, mixed government to sovereignty, civil liberty to religious uniformity. Distrust of human nature was fundamental in both the doctrine of Divine Right and of Presbyterian theocracy, for the theologians regarded men as corrupt and likely to degenerate unless put under a strict discipline. Hobbes, although he disliked theologians, had a deeply-rooted belief in original sin and in the natural malevolence of mankind. Those, such as Hooker and Locke, who believed in the perfectibility and natural benevolence of man, were willing to take risks and allow the individual opportunities for progress. We can generally classify the defenders of absolute monarchy, with the doubtful exception of Hobbes, as basing government on command, either human or divine, and the advocates of representative government as making contract and consent the only valid sources of political power.

The theory of contract was the constitutional theory in which the middle class supporters of the cause of Parliament phrased their theoretical and practical attack upon royal prerogative. During the age of the

Civil War and the Republican experiments (1642-1660) the doctrine of contract performed yeoman service in behalf of the middle class rebels. Despite the need, a study has never been undertaken of the development of the doctrine of contract in this period. Conventional histories of social and political thought confine themselves to the analysis of the more classic expressions of the doctrine to be found in the writings of Hooker, Hobbes and Locke. Gooch and Laski, to be sure, have made illuminating suggestions about the doctrine in other connections, but no one has attempted to trace in any systematic or critical fashion the historical development of the contract theory as it emerges from the controversial writings of the various pamphleteers. For this reason the writer is attempting in this study a preliminary sketch of the development of the contract theory as it appears after a study of a number of writers, both royalist and parliamentarian in sympathy, whose work was done in the decade 1642-52. An attempt will be made to trace the development of the theory in its practical setting. Before we consider the writings of such men as Austin, Ferne, Filmer, Hunton, Hobbes, Lilburne, Milton, and Spelman, however, we shall attempt to outline very briefly the historic development of the doctrine of contract from the ancient Greeks to the opening of the seventeenth century. This effort will enable us better to appreciate what is new and what is

perennial in the seventeenth century English version of the theory.

CHAPTER TWO

A HISTORICAL SUMMARY OF THE THEORY OF SOCIAL CONTRACT

The theory of social contract has been historically the most important of all the philosophical efforts to discover a rational foundation upon which to build the exercise of political authority. Indeed, the theory of social contract is almost as old as political philosophy itself. If one would understand the peculiar role played by the theory of social contract in seventeenth century society, he must have some appreciation of the historical development of the doctrine.

It is in Greek thought that we encounter the earliest coherent political thinking in the western world. It represents the first effort really to meet, on rational grounds, the ethical problem provided by the subjection of individuals to the coercive processes of government. From the time of Protagoras this basic question was always present in Greek philosophical thought. Moreover, it came to be one of the central themes of philosophical discussion.

Aristotle, in his Politics,[1] speaks of the Sophist Lycophron as having held that law, and thus political authority, is merely a "contract," a surety for the mutual respecting of rights, and not capable of making the citizens good and just. In the second book of Plato's Republic, Glaucon, speaking for the new enlightenment of the fourth century, states an account of the origin of civil society which is practically identical with part of the view set forth much later by Hobbes.[2] All men, according to Glaucon, naturally attempt to get as much as they can for themselves. Finding the evils of mutual aggression intolerable, they make a compact to abstain from injuring each other. This compact defines what actions shall be regarded as right or wrong and thus constitutes what we call justice or law.

Perhaps the clearest statement of the theory of contract is the one which Plato has Socrates enunciate in the Crito. Socrates, facing execution in prison, is urged by his friends to escape from prison. He imagines the Laws of Athens as pleading:

> What are you about? Are you by an act of yours to overturn us - the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and overthrown by individuals?

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1 Book III.

2 The views of the Sophist Thrasymachus, in the first book, are similar to another of Hobbes' views, i.e. the conception of right as based on the command of the sovereign.

Socrates maintains that the injustice of the sentence does not afford a valid reason for its evasion, for the Laws may ask:

> And that was our agreement with you?...or were you to abide by the sentence of the state?...Tell us what complaint you have to make against us which justifies you in attempting to destroy us and the state? In the first place did we not bring you into existence? Your father married your mother by our aid and begat you. Say whether you have any objection to urge against those of us who regulate marriage?...Or against those of us who after birth regulate the nurture and education of children, in which you also were trained? Were not the laws, which have the charge of education, right in commanding your father to train you in music and gymnastic?... Well, then, since you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you. Would you have any right to strike or revile or do any other evil to your father or your master, if you had one, because you have been struck or reviled by him, or received some other evil at his hand? - you would not say this?...we further proclaim to every Athenian, that if he does not like us, when he has come of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him; and none of us laws will forbid him or interfere with him. Any of you who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, and take his goods with him. But he who has experience of the manner in which we order justice and administer the state, and still remains, has entered into an implied contract that he will do as we command him. And he who disobeys us is, as we maintain, thrice wrong. First, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our

> commands, and he neither obeys them nor convinces us that our commands are unjust; and we do not rudely impose them, but give him the alternative of obeying or convincing us; - that is what we offer, and he does neither....

One of the earliest accounts of a contract between King and people is to be found in Plato's interpretation of Peloponnesian history in the Laws.[3] Here he tells of three kings and peoples who were united by oaths, according to the common laws regulating rulers and subjects. The kings swore not to make their powers tyrannical while the people, subject to that condition, swore not to dethrone the kings.

It would be a serious error to cite these references to the notion of contract as proving that the dominant political thought of Plato and Aristotle tended to support an unprecise and rudimentary theory of contract. The opposite is much nearer the truth. Despite important differences in temper and emphasis, the political theory of Plato is predominantly organic and not contractual. According to Aristotle, the state is not a mere alliance which the individual can enter or leave without being permanently affected by it. Thus the individual apart from the state is not the individual citizen, i.e. the person with rights and duties.[4] But a careful reading of Plato and Aristotle will reveal

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3 Book III, 684A.
4 Politics, 1280b.

confusion and ambiguities as to whether they actually believed obedience to the state to be a duty (obligation) or only advantageous (contractual).[5]

Greek popular philosophy, however, did not remain purely Aristotelian. Epicurus had lost faith in the moral significance of the city-state, which in his time was no longer a reality. Thus in Epicurus we see a return to individualism and the contract theory. Civil society is an association into which men enter to avoid pains. "Natural justice is a compact of expediency to prevent one man from harming or being harmed by another."[6] This is precisely the same Sophistic theory advanced by Glaucon in the Republic.

There is a passage in Cicero's De Republica which describes the commonwealth as partly the expression of common will and consent. "But when there is mutual fear, man fearing man and class fearing class, then, because no one is confident in his own strength, a sort of bargain is made between the common people and the powerful; this results in that mixed form which Scipio has been recommending; and thus not nature or desire, but weakness, is the mother of justice."[7] Elsewhere Cicero declares: "...a commonwealth is the property of a people. But a people is not any collection of human beings brought

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5 Carritt, Morals and Politics, pp. 18-24.
6 Epicurea, p. 78, 8, golden maxim No. XXXI.
7 De Republica, Book III, sec. 13.

together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for common good. The first cause of such an association is not so much the weakness of the individual as a certain social spirit which nature has implanted in man. For man is not a solitary or unsocial creature, but born with such a nature that not even under conditions of great prosperity of every sort (is he willing to be isolated from his fellow men)..."[8] Although there is nothing original in them, it is significant to note the presence of these conceptions in the political theory of the time. They serve to call attention to the theory of the Roman lawyers who regarded the people as the only ultimate source of authority in the State. This was really a theory of consent, which is not the same thing as the theory of contract, but which expresses an aspect of political thought later appropriated in the medieval and modern democratic conceptions of the State.

There are few phrases better known than that of the Roman lawyer Ulpian, "Quod principi placuit, legis habet vigorem;" occasionally it has been overlooked that Ulpian continues, "utpote cum lege regia, quae de imperio ejus lata est, populuo ei et in eum omne suum imperium et potestatem conferat."[9] This is an unusual, and virtually

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8 De Republica, Book I, sec. 25.
9 Quoted by Carlyle, Medieval Political Theory in the West, Vol. I, p. 63.

paradoxical, description of an unlimited personal authority based on a purely democratic principle. The Emperor's will is law, but merely on account of the fact that the people so choose. Ulpian's terse phrase summarizes the universal theory of the Roman lawyers; this is the prevailing view in Roman jurisprudence. Beginning with Julianus, in the first part of the second century, and until Justinian himself in the sixth, the Emperor is the only source of law, merely because the people have legislatively decreed it thus.[10]

In the early Christian centuries the Church Fathers believed all civil society to be the result of the fall of man. From a philosophic standpoint this is akin to the anarchist doctrine that government is an evil - at its best a necessary evil. But the political doctrine of the Middle Ages was profoundly influenced by the realism of Aristotle's Politics. That "man is by nature a political animal" became virtually a dogma. Thus it is not surprising that the Sophistic and Epicurean interpretation of contractual or conventional justice found no place in the De Regimine Principum of Thomas Aquinas or in the De Monarchia of Dante. The Old Testament provided the medieval churchmen with a corrective to the doctrine of submission "To the powers that be",[11] which had come down from the early Christians who lived under

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10 Ibid., p. 63ff.
11 Romans 13.

the despotism of the Caesars, in a famous passage: "So all the elders of Israel came to the King to Hebron; and King David made a covenant with them in Hebron before the Lord; and they anointed David King over Israel."[12] Such a passage provided a means by which the mutual obligations of ruler and subject could be framed, and by which the responsibility of kings, not only to God but to their subjects could be asserted and maintained.

St. Augustine in his Confessions[13] stated a conclusion that was to be much quoted by medieval writers when he said: "There is a universal agreement in human societies to obey their kings." A clue to the meaning of this may be found in a quotation from St. Thomas Aquinas. "A law," he maintained, "is an ordinance of reason for the common good promulgated by one who has the care of the community....A law is most properly an ordinance for the common good, and the right to ordain anything for the common good belongs to the whole multitude or to some one who acts in the place of the whole multitude."[14] The whole political order of the Middle Ages really rested upon the principle of the supremacy of the law. The political significance of the medieval struggle over the question of taxation lies in the fact that this supremacy could be enforced even upon the prince. Under the feudal system the prince was legally

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12 II Samuel 5:3.
13 Book III, cap. 8.
14 Summa Theologica, Prima Secundae Partis, Q. xc, art. iii, iv.

entitled not only to specified services from his vassals or tenants, but for some purposes had the right to levy financial contributions. His right, however, in such matters was determined by local custom and law. The prince possessed no arbitrary or unlimited rights over the property of his vassals, any more than over their persons.

The authority of the prince was thus, in the political order, as well as in the theory of the Middle Ages, based upon law and limited by law. It is here that one discovers the contractual principle which was sometimes expressed and always implied in medieval political theory. The obligations of the prince and the people were mutual obligations and these obligations were expressed in the law.

The medieval thinkers were little, if at all, affected by the unhistorical and artificial theory of the seventeenth century of an original contract by which the commonwealth was formed (to beget "Leviathan, that mortal god"). They were concerned with the conception of a mutual agreement between the ruler and his subjects. The conception lay at the basis of all feudal relations, and was specifically maintained by the feudal theorists.[15]

It should be pointed out, however, that the conception of a contract between ruler and subjects was older

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15 Carlyle, op. cit., vol. V, p. 472.

and more deeply rooted than the developed structure of feudalism. It can probably be traced to the forms of the coronation order as far back as the ninth century, and it survives even in the English coronation order of today.[16] Although the subjects swear to obey the prince, the prince swears to administer the law. Manegold, in a classic passage[17] declared that the king who plays the tyrant has forfeited his right to his great office and that the people are free from all obligation to obey him, for he has violated the agreement or contract (pactum) by virtue of which he was appointed. With plain language he supports this by an analogy with the relation between the swineherd and the man who entrusts his swine to him for a suitable wage. If the swineherd slays or steals the swine, the owner will refuse to pay the wage and will dismiss the swineherd from his service. If the explicit terminology of this general statement of a contract between a ruler and his subjects was not typical, the principle itself was typical. It was the constitutional principle not only of Manegold, but of St. Thomas Aquinas. The whole history of the Middle Ages reveals clearly that it was not merely an abstract principle.

The doctrine of the social contract was refashioned in more modern and explicit terms during the sixteenth century to meet the needs of those controversialists who were collectively known as the monarchomachs. These

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16 Jarrett, Social Theories of the Middle Ages, p. 29.
17 Poole, Illustrations of the History of Medieval Thought, pp. 203-4.

writers as a group denied that the prince was entitled to unlimited obedience from his subjects. Some of the Protestant writers in the group were particularly interested in defending their religious faith from persecution. The monarchomachs, however, all shared the belief, held in varying degrees according to the particular situation in which they found themselves, that the prince held his authority not directly of God, but indirectly through the medium of the people.

During the early development of the doctrine the monarchomachs, such as Knox in Scotland and Goodman and Ponet in England, argued that resistance to a tyrant prince was justified simply by reason of his tyranny. After the massacre of St. Bartholomew, however, resistance seemed more a duty than a right to writers like Buchanan and the author of the Vindiciae contra tyrannos who founded it on a conception of contract. From this time until the end of the eighteenth century the doctrine of contract became the foremost theoretical weapon in the assault upon the use of arbitrary power.

The nature of the contract of course varied with each of the monarchomachs. Occasionally it was conceived of as a single one in which the prince promises to act with beneficence towards his subjects; in this case religious persecution is regarded as a breach of contract, in which the people are pledged on the one hand to God

and on the other, but secondarily, to the prince; the superior obligation to God always takes precedence over the contractual obligation to the prince, and in case of conflict the latter may be resisted. Together with this the Monarchomachs preached a doctrine of natural law with which positive law had to be in accord. Where positive law fails to conform there is, under appropriate circumstances, the duty of resistance. The monarchomachs therefore very naturally rejected the widespread interpretation of law in the sixteenth century as a command which had to be obeyed because of the source from which it was decreed.

Neither among the medievalists nor the monarchomachs do we find the doctrine of contract applied to the establishment of political society itself; its explicit use is almost entirely restricted to the contractual relation between a prince and his subjects. It is not until the appearance of Richard Hooker's Ecclesiastical Polity, which is the last of the important expressions of political thought in the sixteenth century, that we find an attempt to apply the contract theory as an interpretation of the origin of political society. But even by Hooker the attempt is only made incidentally and is not really followed to its logical conclusions.

In the Ecclesiastical Polity, Hooker attempted to defend the Established Church in England by denying that the church was necessarily subject to direct divine

regulation in all matters; and by maintaining that laws for its government may be enacted by men so long as they are not contrary to the Scriptures. In upholding this argument, he made an analysis of all authority and based it on the consent of the governed. "To take away all such material grievances, injuries and wrongs, there was no way but only by growing upon composition and agreement amongst themselves, by ordaining some kind of government politic and by yielding themselves subject thereunto."[18] For it was apparent "that strifes and troubles would be endless, except they gave their common consent all to be ordered by some whom they should agree upon: without which consent there were no reason that one man should take upon him to be Lord or Judge over another."[19]

As to the form in which this common consent was given Hooker's language was ambiguous. "All public regiment of what kind soever," he declares in one section, "seemeth evidently to have risen from deliberate advice, consultation and composition between men."[20] In another place, however, he writes of politic society as based upon "an order expressly or secretly agreed upon, touching the manner of union in living together."[21] It should be noticed here that Hooker avoids the mistake of postulating a formal contract. What he urges is, briefly,

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18 Ecclesiastical Polity, I, 10, p. 241.
19 Ibid., I, 10, p. 242.
20 Ibid., I, 10, p. 243.
21 Ibid., I, 10, p. 239.

that political authority can only be rationally conceived as derived from what he calls consent. Although consent may be given deliberately, it need not be given formally; it may be given "secretly." If, however, it were not given at all, there could be neither government or body politic.

To Hooker the essential feature of the body politic was its right to make law. No sort of body politic or government can exist without it. But how is this right to make law derived? "Out of the precepts of the law of nature," declares Hooker, following Aquinas, "as out of certain common and undemonstrable principles, man's reason must necessarily proceed unto certain more particular determinations: which particular determinations being found out according to the reason of man, they have the name of human laws, so that such other conditions be therein kept as the making of laws doth require."[22] Society, however, requires a great deal of law which cannot be directly deduced from the law of nature. "All laws human," asserts Hooker, "be either such as establish some duty whereunto all men by the law of reason did before stand bound, or else such that make that a duty now that before was none."[23] How does the body politic derive the power to create obligations? Hooker's answer to that question was implicit rather than actually

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[22] Ibid., III, 9, p. 381.
[23] Ibid., I, 10, p. 248.

stated. Apparently the inference is that the right is derived from the need of it.

> Unto me it seemeth almost out of doubt and controversy, that every independent multitude, before any certain form of regiment be established, hath, under God's supreme authority, full dominion over itself....God, creating mankind, did endue it naturally with full power to guide itself in what kind of societies soever it should choose to live.[24]

It should be pointed out that the right itself is not created by any sort of contract, but it exists in every "independent multitude" before the body politic comes into existence. This conception is basic in Hooker's political thought and separates him rather definitely from the later contractualists. It furnishes, moreover, an answer to the divine right theorists, who maintained that no amount of human agreement could create obligation or give a right to create it. The establishment of the body politic is necessary to man's well-being; but a right to make law is implied not only in the existence, but also in the construction of the body politic. "Those things without which the world cannot well continue, have necessary being in the world."[25]

> By the natural law...the lawful power of making laws to command whole politic societies of men, belongeth so properly to the same entire societies, that for any prince or potentate

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24 Ibid., VIII, 2, p. 343.
25 Ibid., VIII, 4, p. 380.

> of what kind soever upon earth, to exercise the same of himself and not either by express commission immediately and personally received from God or else from authority derived at first from their consent upon whose persons they impose laws, it is no better than mere tyranny.[26]

Legislative power thus properly belongs to the whole community and must be conceived as conferred by the whole community upon some person or body. Laws made by such a properly constituted authority are laws made by the whole community by which it is empowered to act. So Hooker plunges into the distinctly modern problem of representation. "Laws," he goes on to say, "they are not therefore which public approbation hath not made so. But approbation not only they give who personally declare their assent by voice, sign, or act, but also when others do it in their names by rights originally at least derived from them. As in parliaments, councils, and the like assemblies, although we be not personally ourselves present, notwithstanding our assent is by reason of other agents there in our behalf."[27]

The fundamental issue here is the question of obedience. The sovereign exists; we did not by our own contract decide that he should be there; he gives a command which we feel to be wrong. What are we to do? Are we to disobey and thereby make one step, however small, towards that state of anarchy which society was constructed to

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[26] Ibid., I, 10, p. 245.
[27] Ibid., I, 10, p. 246.

avoid? Or are we to stifle our own conscience, and by so doing maintain the social solidarity? After, all, if the actual sovereign is not of our election, then the contract is not binding on us and we can do as we please. But Hooker, anxious at all costs to avoid anarchy, and influenced no doubt by the social spirit of the Tudor times, was determined to err, if he must, on the side of authority. We are bound, he claims, by the original contract unless the same has been revoked by universal agreement. "To be commanded we do consent, when that society whereof we are a part, hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore as any man's deed past is good as long as himself continueth: so the act of a public society of men done five hundred years sithence, standeth as theirs who are presently of the same societies, because corporations are immortal."[28] Clearly universal agreement would be almost impossible to obtain, and thus the problem of obedience is simplified by the drastic implication that any form of disobedience will nearly always be wrong.

Although Hooker did not solve many of the difficulties involved in the doctrine of social contract, we must admit perhaps that his views were more sensible than those of a more modern theorist like Hobbes. For

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[28] Ibid., I, 10, p. 246.

example, he recognized that society could never have been purely artificial and contractual. Hooker admitted that man is instinctively social and that contract must have come with the grain and not have been forced up against it by a giant despair. "Two foundations there are...a natural inclination, whereby all men desire sociable life and fellowship; the other an order expressly or secretly agreed upon,..."

The seventeenth century has been called, not without justice, the century of contracts. It is in the seventeenth century that the theory of social contract becomes an important practical weapon in the attack upon royal prerogative. Althusius, a German Protestant, who taught law in Holland, in his Politica methodice digesta (1603) gave theoretical expression to the experience of the Dutch revolutionists among whom he lived and worked. He presupposes the sovereignty of the people and maintains that the relation between it and the magistry is dualistic in its essence. On the one hand, certain fundamental conditions are postulated as regulating the exercise of authority by the ruler; on the other hand, the people swear allegiance to the ruler provided these conditions are obeyed. Althusius makes the assumption that a failure to observe the conditions justifies the people in breaking the contract; the prince or governing body thus becomes a tyrant who may be deposed. Althusius' doctrine was in effect a brilliant defense of both the Dutch revolution

and the system of government it created. This once again emphasizes the pragmatic character of all contractual theory which is conditioned by the peculiar historical circumstances that it is intended to rationalize.

Grotius, in his famous De Jure Belli ac Pacis, published in 1625, accepted the social contract theory although he did not emphasize it. It is important, however, to realize that he apparently recognized a distinction between society and the state. While he referred to social life as a natural condition of man, he placed the origin of the state in a deliberate agreement between men. This statement he made incidentally while treating the right of resistance to constituted authority. Whether or not the obligation to obey should hold good in all cases, he said, depends "upon the intention of those who first entered into civil society, from whom the power of sovereigns is originally derived... We must observe that men did not at first unite themselves in civil society by any special command from God, but their own free will, out of a sense of the inability of separate families to repel violence, whence the civil power is derived."[29] For Grotius, contract is the basis at once of the right to private property and of the sovereign power of the ruler. The latter, for him, is derived from a pactum subjectionis and becomes the foundation

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29 De Jure Belli ac Pacis, Book I, Chap. IV, sec 7.

of absolutism. Grotius, however, admits the ruler is always bound by natural law.

On the parliamentary side before and during the English civil war the notion of contract, explicit or implicit, was the basic and most common theoretical weapon of the rebels. It is to this struggle which we shall now turn our attention in the development of the theory of the social contract, particularly in the decade 1642-52.

CHAPTER THREE

ROBERT AUSTIN

Robert Austin was a Puritan divine who, in 1644, published a vigorous tract, entitled 'Allegiance not impeached, viz. by the Parliament's taking up of Arms (though against the King's Personall Commands) for the just Defence of the Kings Person, Crown, and Dignity, the Laws of the Land, Liberties of the Subject, etc.'[1] It is impossible to discover anything about the life or influence of Austin. None of the standard histories of Puritanism mentions him. The very brief account in the Dictionary of National Biography merely records the titles of the two tracts which he wrote without giving even the dates of his birth and death. The historians of political theory likewise fail to take notice of his existence or his writings. This neglect may, of course, be due to either of two

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1 This tract is to be found in the McAlpin Collection in the Union Theological Seminary Library.

factors. Austin may have been such a minor figure that his writings possess no importance for an understanding of political and religious thought during the Puritan revolution. On the other hand, studies of the Puritan revolution may be at the present time so incomplete that many interesting and important writers and their works have simply never been analyzed. The writer feels that the latter explanation is more likely to account for the neglect of Austin. The pamphlet literature during the Puritan revolution was voluminous; only a few scholars, such as Professor Gooch, Miss James and the late Professor Firth, have even attempted to work through sections of it. Moreover, we lack any adequate history of Puritanism written on the basis of recent research. The writer, therefore, feels that it will be of value to examine Austin's tract not only for traces of the theory of contract, but for the particular interpretation he gives of the parliamentary assault upon royal prerogative.

On the title page of '<u>Allegiance Not Impeached</u>' Austin informs us that his case is proved, partly from the words of the oath itself; and partly, from the principles of Nature and of Law, "alledged for such by Lord Chancellor Elsmore, and twelve other Judges in the case of Calvin (a Scot by birth) as appears in the seventh part of Justice Coke's Reports in Calvins case..." Austin gives a resume of this case in his Epistle to the Reader.

The first principle laid down by these learned judges, according to Austin, is that allegiance is a "true and faithful obedience of the Subject to his Soveraign...."[2] It is maintained that this obedience is always due because of some law.[3] In the second place,.. "Ligeance is as the bond that binds men's minds together, because as Ligatures and strings do knit together the joynts of all parts of the body: so doth Ligeance joyne together the Soveraigne and all the subjects as it were with one bond. (a) This bond between the Soveraign and the Subject, is double and reciprocall: because as the Subject is bound unto the King to obey him, so the King is bound unto the subject to protect him, deservedly therefore is Ligeance a Ligando (from binding) because it contains in it this double bond: And hence, as in some Acts of Parliament, the Subjects are called Liege people.... So in other Acts the King is called the Liege Lord of his Subjects...because he should maintain and defend them; (b) for the King is set up to this end, to defend the Law and the bodies and goods of those that are subject unto him: and therefore it is truly said, that as protection draws subjection, so subjection draws protection with it."[4]

Austin points out that the Judges distinguish four types of allegiance - natural, acquired, local and legal.

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2 Allegiance Not Impeached, p. 2.
3 Ibid., p. 2.
4 Ibid., p. 2.

For Austin's analysis the natural and legal are the more important types. "To the Legall belongs the Oath of Allegiance, the effect whereof is this, (c) you shall swear from this day forward, you shall bee true and faithfull unto our Soveraign Lord King CHARLES, and his Heires, and truth and faith shall beare of life and member (that is, unto the letting out of the last drop of your dearest blood) and terrene honour, and you shall neither know nor heare of any ill or damage intended unto him that you shall not defend: So helpe you God."[5]

"...Natural Ligeance, and faith, and truth (which are her members and parts) are qualities of the minde and soule of a man: and therefore we aske not where such a man is subject, but what kind of a subject he is, and the answer is, he is...a true and faithfull Liegeman. Yet answer may be made to the former question, viz. that the Ligeance of the Subject is of as great extent and latitude as the royall power and protection of the King, e converso: So that the King hath power to command, and they are bound by their Ligeance to goe with the King in his Warres, as well without as within the Realm, as in Scotland or Ireland..."[6]

Austin quotes the Judges as saying that it is evident that 'naturall Ligeance' is due only to the King. If this

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5 Ibid., p. 3.
6 Ibid., P. 3.

is so, there remains the important question whether natural allegiance is due the King in his natural or his political capacity. In his natural capacity the King is descended of royal blood and subject to death and all the infirmities of the flesh. As head of the body politic the King is held to be immortal, invisible and free from the ordinary limitations of human existence. The King derives his natural capacity from God while his political capacity has its origin in the policy of man.

In answering the question the Judges maintained that 'naturall Ligeance' was due to the natural capacity of the King. They based their answer partly on the fact that the King swears unto his Subjects in his Natural capacity (since the political capacity "hath no soul to sweare by"). Thus their oath to him must be to his natural capacity. This reasoning is reinforced by the form which indictments of treason take. When anyone makes an attempt upon the life of the King, he is held in the indictment to have done it against the duty of his allegiance.[7]

Austin states that the Judges further argue "...that the ligeance of the Subject is due to the King by the Law of nature;...that the Law of nature was before any judicial or municipall Law, as being written from the beginning in man's heart;...that the law of nature is immutable;...

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[7] Ibid., p. 4.

that this immutable Law of Nature, is a part of the Law of England...."[8]

Justice Coke, from whose Reports Austin draws the principles which have been quoted in the fore-going paragraphs, was as a law officer and judge one of the early leaders of the parliamentary attack upon royal prerogative. The main theoretical contribution of Coke was his revival of the medieval notion of the supremacy of the law. Coke and his colleagues in the Case of Proclamations (1610) maintained: "The King had no prerogative, but that which the law of the land allows him."[9] This emphasis upon the supremacy of the law is evident in the quotations we have selected from Austin's resume of the Case of Calvin. It is also clear here that there is no explicit reference to an original contract; all that we have here is a contractual relation between a prince and his subjects which makes no advance on the theoretical conceptions of medieval thinkers and the monarchomachs whose use of the theory of contract we have already discussed.[10]

In the light of Coke's principles Austin defends allegiance as "a quality of the soule, whereby wee are disposed to beare all truth and faith unto the person of the King, etc. ready to yeeld him all true obedience according to the Laws of Nature, of God, and of the Realme

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8 Ibid., pp. 4-5.
9 Bicknell, Cases on the Law of the Constitution, 7.
10 Cf. supra., pp. 12-17.

wherein we live."[11] This definition describes not only the duty due to the King, but the basis on which this duty is founded. And the basis is the supremacy of the law and not any theory of obligation rooted in divine right. "...I set down the law of nature...as the bond of our obedience...and if it be due by the Law of Nature... then certainly the Law of Nature must be the rule of it: for Nature will not bind us to go contrary to the Law of Nature, wherefore we must not go against the Law of Nature in our obedience."[12]

Austin finds the chief political principle in nature to be the safety of the Commonwealth. From this is made the familiar deduction that the whole commonwealth takes priority over any one member of it. Austin further deduces, partly from the experience of the times, that there must be a power in the commonwealth to save itself from ruin should any part rise against it. This principle of salus populi was a very important one, for it involved explicitly recognized limitation on royal prerogative - the safety of the people. It at once furnishes a basis for an implied contract between king and people, as well as an effective justification for the right of resistance. This is what Parliament stood most in need of in its attack upon royal prerogative.

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[11] Ibid., p. 5.
[12] Ibid., p. 8.

The term 'people' is made synonymous with the term 'commonwealth' by leaning heavily on medieval conceptions. Austin quotes Aquinas as defining a people as "a multitude of men comprehended under some kind of order." Next St. Augustine is quoted second-hand as defining a people as "a multitude of men knit together by consent of law and participation of utility." This definition Austin restates in the language of his time to mean: "A people is a multitude of men gathered together in the fellowship and participation of the same Laws, and liberties to their mutual benefit and emolument."[13] Again Aquinas' blessing is invoked for the idea that nature and essence of a people require their living together under just laws. Austin, however, finally defines a people, or a whole commonwealth, as constituted of "both of Governours, and those that are governed: all thus joyned together by consent of just Laws and Constitutions...."[14] This is the basic notion of his doctrine of contract.

We have already encountered the categories of natural and political which Austin borrowed for use as the fundamental categories in his argument. Whenever he speaks of the safety of the whole commonwealth he refers to it chiefly in its political capacity which is composed of liberties, privileges and rights. This political capacity can only be distinguished, not separated, from the natural. Although the people in their natural capacity as persons

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13 Ibid., pp. 8-9.
14 Ibid., p 9.

must die, the people's political capacity is eternal and inviolable. Austin does not identify the laws with the political capacity of either the King or the people. Rather he asserts Coke's "supremacy of the law" in maintaining that laws are the "common principle out of which both flow and in which they both subsist, and with which they make one body politic,..."[15]

Like all partisans Austin seeks to suggest that his interest is one with the universal interest in peace and harmony. We find him saying, "...though these capacities bee thus to bee distinguished, yet they must not be divided,...but agree and conspire together in one for the good of the whole, each mutually supporting one another, ...as members in the same body, as there is occasion; otherwise if they fall to division, and bee at variance one with another, it is to bee feared they will destroy one another: for a Kingdom divided in itselfe (as sayes our Saviour) cannot stand....But when they sweetly conspire together to uphold one another...and when the naturall capacity in the King, suffers itselfe to be swayed by the politick, ruling the people according to their lawes and liberties: and the naturall capacity in the people, shall hold themselves within the bounds of their Laws and

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15 Ibid., pp. 11.

liberties, and invade not the Kings political capacity, nor any flower that truely belongs into it, here is a sweet harmony, here is Peace."[16]

But any absolutist critic of the doctrine of contract could point out that here Austin was unduly optimistic about sweet harmony and peace. Only a few paragraphs later in answer to the question, "Shall not the safety of the people, as distinguished from the King, bee esteemed as the Chiefest Law?" we find him maintaining: "...that I nothing doubt, but a people may in a legall way stand upon their Lawes and Liberties, and by force of armes defend them too, if need require....if in the ruine of their Lawes and Liberties, the ruine of the whole bee involved as it is undoubtedly;...then it being the supreme Law of Nature to save the whole, they are bound by the same Law to preserve their Laws and liberties that so the whole may bee thereby preserved; But the chiefe Law of Nature does properly intend the conservation of the whole, as is manifest, in the worke of Nature, where heavy things will ascend, and light things descend, contrary to their particular inclinations, to conserve the frame of nature intere in its integrity...."[17] This would seem to indicate that the basic question revolved about who was to have the power to determine, in case of dispute, what the

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16 Ibid., pp. 11-12.
17 Ibid., p. 12.

contract, law, liberties and safety of the people really were in specific terms.

Austin believes that there is some first principle of order in the commonwealth which, if maintained, allows defects in the commonwealth to be corrected. But if anyone challenges or rises up against this first principle of order, he must be put down both by that order and the Prince of it lest anarchy ensue.[18] This principle of order can not be any man in his natural capacity because men die while the principle of order must necessarily be eternal. Neither can the King in his political capacity be identified with the principle of order, for he is the Prince of that order and not the formal principle of it. Austin asserts that then only the laws can be conceived to be the formal principle of order. It is the laws "by consent of which we are knit together in mutual society, as by a common principle, and are made partakers of the order of government in the common-wealth...."[19] This is, in effect, his definition of a people which we have already noted. Thus the medieval dogma of the rule of law has been neatly appropriated to serve the parliamentary assault on royal prerogative.

If the law is the first principle of the political order, it follows that the legislative power is the Prince of this order. The particular form of government is

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18 Ibid., pp. 13-14.
19 Ibid., p. 15.

derived from the legislative power. "...when I say that this Legislative power is...this prince of order, it is all one as if I had said, those to whom this power of right belongs, which...among us, belongs not to the People alone, nor the King alone, but to both: that is, unto the Parliament, where the King is...the chiefe."[20] The power of administering the law is first entrusted to the King, and by him to "inferiour governours."

If our allegiance is due by the "lawes of God," it should be remembered that these laws are "not those proper to the Jewes, but onely those that are common unto all, and so binde all people....because...God and Nature is one to all....and this that Law...both of God and Nature, that requires faith, ligeance, and obedience from the Subject to his Soveraigne and superiour."[21] But nature does not bind anyone to obedience against the laws of nature. This leads Austin to reassert that "neither doth Gods word binde us to obey the King against Gods Word." This is an important door which must be left open to justify rebellion in the name of saving the commonwealth.

To the Laws of God Austin adds the Laws of the Realm which also serve to regulate the obedience of the subject to the Prince. To justify the addition of Laws to the

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20 Ibid., p. 15.
21 Ibid., pp. 18-19.

Law of Nature he quotes Cicero as having said: "...when men could not obtain to have Justice done by one man alone, Laws were invented."[22] But what are the Laws of the Realm? Austin again borrows from the Judges (in the Case of Calvin) when he says that they are "first, written laws, secondly, custome, thirdly, the Law of Nature, or right reason.... if the written Law bee silent, wee must have recourse to Custome, if there bee no Custome, wee must runne to Reason ...."[23] It is important to know to whose reason we are to run. Therefore it would be proper to quote Coke's own description of the interview between the King and the Judges in connection with this matter:

> Then the King said that he thought law was founded upon reason and that he and others had reason as well as the judges. To which it was answered by me that true it was God had endowed his Majesty with excellent science and great endowments of nature, but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognisance of it; and that the law was the golden met-wand and measure to try the causes of the subjects, and which protected his Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said: to which I said that Bracton saith quod rex non debet esse sub homine, sed sub Deo - et lege.[24]

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22 Ibid., p. 19.
23 Ibid., pp. 19-20.
24 Coke, 12th Report, pp. 63-5, quoted by Tanner, English Constitutional Conflicts of the 17th Century, pp. 36-7.

In this passage what Coke in effect asserted was that the rule of law really was the rule of lawyers rather than the rule of Parliament. What Austin did not perceive was that Coke merely interpreted law in a popular sense. There was no guarantee that other lawyers or judges might not interpret the law in terms more congenial to absolutism. The real problem of course was really one of social power. The rule of law was only incidental to this struggle. It so happened that Coke's theories fitted the needs of those, like Austin, who saw the struggle with Puritan and parliamentary perspectives.

In the first half of the seventeenth century the three chief theoretical contenders for sovereignty were the rule of law, the King, and the King-in Parliament. Even though Austin did not clearly distinguish the fundamental differences between the theories of the rule of law and the King-in-Parliament, he was by the very nature of the struggle on the side of the latter theory. We find him, for example, saying, "sith by the Policy of the Law, a politick capacity is annexed to the person of the King, not subject unto infancy and nonage, and that moreover partly for necessity and partly for utility, that according unto this capacity, he may be present in all his Courts of Judgement and of Justice, though in his person he be not present; Hence it followes that he is also present, in this capacity, even now in His high Court of Parliament, in all acts of Judgement and of Justice, and

therefore that the Parliament by using of his name in their proceedings do not do amisse."[25]

Austin believes that the proceedings of Parliament are according to the Law of Nature and the Laws of the Realm. Consequently, he gives the following defense of Parliament's actions: "First, the Parliament being called, and the members chosen lawfully, they presented to His Majesty according to their duty, the maladies of the State, and the remedies; were instant to have the chiefe Delinquents (chiefe causes of their misery) to be brought to tryall according to the written Lawes: The King seduced (so they must judge) by evill counsell, stops his eares, detaines those delinquents from their tryall, by granting to some of them His Warrants to transport them beyond the Seas, comes with forces of arms unto their Houses, and invades their liberties, labours by force to dissolve this Parliament (not to be dissolved but by their own consent): they on the other side beseech His Majesty by all means to suffer justice to be done, or else that all will be undone, their Religion, Lawes, and Liberties will be ruined all: (and who shall be Judges of these things, if not they who are the Supreame Court of Judgement?) His Majesty, notwithstanding all intreaties, goes on in His course begun, raises forces to force the Parliament: they according to the Law of Nature,

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25 Ibid., pp. 25-6.

begin to provide for the safety of the Common-wealth, raises forces to defend themselves: seise on Forts and Ships, and labour the settling of the Militia of the Kingdome, and thus are imbarked in a defensive warre against the forces raised by His Majesty, and injoyne an oath to all, with all their power and might to oppose those forces raised by the King.[26]

Austin recognizes that he has made a partisan defense of Parliament's actions, but is willing to leave its acceptance to the reader's reason. He confesses that he is unable to believe that both Houses of Parliament would bear false testimony against the King. He declares: "rather let those who (having most injuriously possessed themselves of his sacred person) do now abuse, not only his eare, but His hand Seale, too, to the bringing over of Irish Rebels, and sundry wayes moreover have forfeited their credit and reputation; let these I say, with me fall short of credit and beleefe."[27]

Austin's defense of Parliament's taking up of arms may be reduced to the following paragraph: "Whatsoever King (living in a well regulated monarchy) is seduced to the apparent ruine of himselfe and of the common-wealth, he may by the Representative Body of that Kingdom rescued out of the hands of those seducers, even by force

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26 Ibid., pp. 26-7.
27 Ibid., p. 27.

of armes, and that without any violation of the oath of their Allegiance, yea they are bound by their Allegiance to do it....the Law supposeth the King to doe nothing amisse...and therefore if ought destructive to the Common-wealth come forth in his name, the Law supposeth the King to be seduced and abused by evill Counsellors."[28] The assumption that when the king's actions tended to the ruin of the kingdom his evil counselors were responsible was sanctioned by centuries of precedent. But it probably seemed to people at the time somewhat puzzling to see an army on foot for the inconsistent purpose of making war on the king to secure the safety of his person. Parliament, however, had to employ this terminology to cloak actions that were in reality justifiable only as acts of a sovereign power.

Austin's usage of the theory of contract, as we have seen, marks no advance on the theory of the medievalists and monarchomachs. The direction which it took was determined by the practical necessities of the Parliamentary struggle against royal prerogative. Consequently, Austin's argument to justify "Parliament's taking up of Arms" looks to the past more than the future. It was not until later in the decade that the theory of contract appeared in more explicitly democratic and liberal terms.

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28 Ibid., pp. 46-7.

CHAPTER FOUR

JOHN MILTON

After 1641 John Milton took an active part in the attacks directed by the Independents against most of the prevailing political and religious institutions. The earliest systematic presentation of his political views appears in the vigorous pamphlet, The Tenure of Kings and Magistrates. This is the work which won him the appointment as Latin Secretary of the Council of State in 1649. The pamphlet was probably written during the month of January 1649 and was published on February 13, 1649, a fortnight after the execution of Charles I. Milton's thesis is evident in the long title of the pamphlet: The Tenure of Kings and Magistrates: Proving, That it is Lawful, and hath been held so through all Ages, for any who have the Power, to call to account a Tyrant, or wicked KING, and after due conviction to depose and put him to death; if the ordinary MAGISTRATE have neglected or deny'd to doe it. And that they, who of late, so much blame Deposing, are the Men that did it themselves. Thus it is, in general, a defense of

tyrannicide. More particularly it is a defense of the execution of Charles I. and the subsequent setting up of the Commonwealth. This defense involved a sharp attack upon the Presbyterian party which had lately separated itself from the program of the Independents and had embraced the formerly hated Royalist cause.

Milton's main purpose was not to glorify the republican form of government as such, nor to derogate from the fair name of good kings. He had no quarrel with the monarchical principle itself; his political views in The Tenure of Kings and Magistrates were merely those of constitutional liberalism.[1] It is important to note this because it indicates a clue as to why Milton's basic ideas were able to survive and to become, in later decades, the Whig foundation for the limited monarchy. It is not difficult, however, to understand why at this time Milton was regarded as an arch-republican and an opponent of all monarchy. In the years between his return from Italy and the execution of Charles I. Milton penned one series of tracts in which he pleaded for intellectual and religious liberty, at first against the church, and, after the fall of the church, against the Presbyterians. In another he demanded domestic liberty despite the opposition of men from all parties. In his demands Milton appealed to the authority of some of the

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1 Gooch, English Democratic Ideas, p. 151.

worthies of Protestant theology. But these references were not enough to save him from the criticism of a Clement Walker, Presbyterian parliamentarian and pamphleteer, who on the appearance of The Tenure of Kings and Magistrates wrote: "There is lately come forth a book of John Meltons (a Libertine, that thinketh his Wife a Manacle, and his very Garters to be Shackles and Fetters to him: one that (after the Independent fashion) will be tied to no obligation to God or man)...."[2] Moreover, Milton's classical scholarship made him conspicuous as the foremost example of those whom Hobbes mentions as having in their youth read the works "written by famous men of the ancient Grecian and Roman Commonwealths, concerning their polity and their great actions, in which the popular government was extolled by the glorious name of Liberty and Monarchy disgraced by the name of tyranny, and who thereby became in love with their forms of government."[3] Despite the currency of such opinions as those of Walker and Hobbes, it was not until the collapse of the Commonwealth and the approach of the Restoration that Milton wrote his Ready and Easy Way to establish a Free Commonwealth in which he definitely rejected kingship as unnecessary, burdensome and dangerous.

In The Tenure of Kings and Magistrates Milton begins his argument with what has since become a modern assumption. "No man, who knows aught," he declares, "can be so stupid

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2 History of Independency, pt. 2, 199ff., quoted by Allison, Yale Studies in English, Vol XL, lii.
3 Hobbes, Behemoth, Dialogue i.

to deny, that all men naturally were born free, being the image and resemblance of God himself, and were, by privilege above all creatures, born to command, and not to obey...."[4] Men born free continued to live thus until Adam's transgression when men fell to doing wrong and violence among themselves. Fearing self-destruction, "they agreed by common league to bind each other from mutual injury, and jointly to defend themselves against any that gave disturbance or opposition to such agreement. Hence came cities, towns, and commonwealths."[5] This notion that human government was introduced as a result of the fall of man was first set forth by the Church Fathers and was certainly held by the Church until the time of Wycliffe. Aquinas was probably one of the first teachers to depart from this belief. Milton further observes that since no faith in all was sufficiently binding, it was necessary to set up some authority which might restrain by means of force and punishment all those who violated peace and the common right. "This authority and power of self-defence and preservation being originally and naturally in every one of them, and unitedly in them all; for ease, for order, and lest each man should be his own partial judge, they communicated and derived either to

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[4] Milton, Prose Works, Bohn Ed., pp. 8-9. Although it was to find its way into the American Declaration of Independence and into the slogans of the leaders of the French Revolution, the notion that all men were naturally born free was challenged at the time by Filmer, Heylin, Mainwaring and Hobbes.

[5] Ibid., p. 9.

one, whom for the eminence of his wisdom and integrity they chose above the rest, or to more than one, whom they thought of equal deserving: the first was called a king; the other, magistrates: not to be their lords and masters, (though afterward those names in some places were given voluntarily to such as had been authors of inestimable good to the people,) but to be their deputies and commissioners, to execute, by virtue of their entrusted power, that justice, which else every man by the bond of nature and of covenant must have executed for himself, and for one another."[6] Here we have the statement of an original contract as distinct from a contract between a people and a king such as we find in the monarchomachs. For Milton it is voluntary and derivative in character. Thus it stands in sharp contrast to the whole notion of divine right. Moreover, Milton's statement is so phrased as to suggest that power is only temporarily surrendered. If this note were to be omitted, the theory of contract might be m made into a defense of absolutism.[7] It might be interesting to speculate as to the source from which Milton derived the view that the King was selected by his fellows "for the eminence of his wisdom and integrity." It occurs in Buchanan[8] and in Aristotle[9], both of whom

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6 Ibid., pp. 9-10.
7 Hobbes, by regarding the surrender of power as final, was able to bend the theory of contract to the service of absolutism.
8 De Jure, p. 99.
9 Politics, Book 3.

Milton had read. It may also be maintained that when Milton said the people chose "magistrates: not to be their lords and masters" he was again drawing on the insights of Aristotle. In the Politics[10] we read: "It is manifest that, where men are alike and equal, it is neither expedient nor just that one man should be lord of all, whether there are laws, or whether there are no laws, but he himself is in the place of law."

Milton has next to account for the origin of laws. He declares that those who were originally chosen as rulers governed well for a time deciding all things freely and justly. In the course of time, however, they were perverted by the power which was in their hands to acts of injustice and partiality.[11] The people, who had by now through trial and error discovered the danger and inconvenience of committing arbitrary powers to the rulers, invented laws. These laws were either framed or consented to by all in an effort to confine and limit the authority of those whom the people chose to govern them; in other words that "law and reason, abstracted as much as might be from personal errors and frailities."[12] This account of the origin of law follows very closely that of two of the monarchomachs - Buchanan[13] and the author of the Vindiciae Contra Tyrannos.

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10 Politics, 3. 17. 2.
11 Ibid., p. 10.
12 Ibid., p. 10.
13 De Jure, p. 105.

"While, as the magistrate was set above the people, so the law was set above the magistrate."[14] Whenever the law was not executed or was misapplied, the people were forced to put conditions and to take oath from all kings and magistrates at their coronation or installation in order to insure the doing of impartial justice by law. Milton insists that it is upon these terms, and only these, that the king and magistrates received allegiance from the people.[15] Thus the people contract "to obey them (kings and magistrates) in execution of those laws, which they, the people, had themselves made or assented to. And this ofttimes with express warning, that if the king or magistrate proved unfaithful to his trust, the people would be disengaged."[16]

The people, according to Milton, also added counsellors and parliaments, not only to be at the king's "beck", but, with him or without him, "at set time, or

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14 This sentence Milton quotes without acknowledgment from Cicero, De Legibus, 3:1. Aristotle, however, was probably father of the saying. cf. his Politics, 4, 15, 4. Also, cf. Buchanan, De Jure, p. 193.

15 Milton, op. cit., p. 10.

16 Ibid., pp. 10-11. It is interesting to note that on this point Buchanan says: "Our kings at their public inauguration solemnly promise to the whole people to observe the statutes, customs, and institutions of our ancestors, and to adhere strictly to that system of jurisprudence handed down by antiquity. This fact is proved by the whole tenour of the ceremonies at their coronation, and by their first arrival in our cities. From all these circumstances it may be easily conceived what sort of power they received from our ancestors, and that it was clearly such as magistrates, elected by suffrage are bound by oath not to exceed." De Jure, p. 158.

at all times, when any danger threatened, to have care of the public safety."[17] The Royalists maintained that the later sessions of the Long Parliament were illegal because it had assembled without the king's consent. Milton is anxious to cut the ground from under this argument by contending that, whether with the king or without him, the parliament can assemble to improvise ways and means to advance the public safety. He rejects the notion of the defenders of absolutism that the parliament is merely the creature of the king. In this connection Milton quotes Claudius Sesell, a French professor of law, as saying: "The parliament was set as a bridle to the king."[18] This is a significant statement, according to Milton, because the French monarchy was, in principle, more absolute than the English. Milton sums up his argument in behalf of the peoples' rights by recalling that William the Conqueror was compelled a second time to take oath at St. Albans before the people would yield obedience.[19]

In a sentence which seems strikingly modern Milton declares that "the power of kings and magistrates is nothing else but what is only derivative, transferred, and committed to them in trust from the people to the common good of them all, in whom the power yet remains

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17 Milton, op. cit., p. 11.
18 Ibid., p. 11.
19 The writer has been unable to verify the occurrence of this second oath-taking.

fundamentally, and cannot be taken from them, without a violation of their natural birthright;..."[20] Here Milton seems to confuse somewhat natural and positive law. All talk of natural right is contradictory to artificial law. Milton, together with all the other political theorists of his time, counselled obedience to the law of the state. The fundamental issue is seen to lie in whether the source of (artificial) law was in the people or in the king. Since Aristotle[21] regards a tyrant as one who takes account of his own welfare and profit only, and not that of the people, Milton thinks it follows necessarily that the titles of sovereign lord, natural lord, and the like, are either arrogancies or flatteries.[22]

Sometimes it was argued that a king had as good a right to his crown and dignity as any man to his inheritance. To grant this, Milton replies, would be to reduce the subject to the position of the king's slave or chattel. However, if it be granted for the sake of argument, Milton asks, "what can be more just and legal, if a subject for certain crimes be to forfeit by the law from himself and posterity all his inheritance to the king, than that a king, for crimes proportional, should forfeit all his title and inheritance to the people?"[23]

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20 Ibid., p. 11.
21 Ethics, Book 10.
22 Milton, op. cit., pp. 11-12.
23 Ibid., p. 12.

For Milton it would be "treason against the dignity of mankind" to affirm that the people were all created for the king and not he for them.

One of the fundamental theories of the divine right of kings was declared to be that kings are accountable to God alone and since they are bound by no law, they may do as they please.[24] Milton emphatically points out that this is the overthrow of all law and government. If kings are answerable only to God, then all contracts or covenants made at coronation and all oaths are in vain.[25] If the king does not fear God, then the subject holds his life and property by the tenure of the mere grace of king. This must have been a telling argument with those men who feared either arbitrary taxation or the interference of the Crown with their economic activity.

The royalist contention that the election of a king, as in Jewish history, expresses really God's choice is very neatly turned against the defenders of absolutism by Milton. If the people's act in election

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24 A royalist writer argued as follows: "A Father may dye for the Murther of his Son, where there is a Superiour Father to them both, or the Right of such a Supreme Father; but where there are only Fathers and Sons, no Sons can question the Father for the death of their Brother: the reason why a King cannot be punished, is not because he is excepted from Punishment, or doth not deserve it, but because there is no Superiour to judge him, but God only, to whom he is reserved." Filmer, Observations Upon Mr. Milton, p. 190.

25 Milton, op. cit., p. 13.

is the act of God and a just ground for enthroning the monarch, why is not the people's act in rejection equally the act of God and a just ground for deposing? "So that we see the title and just right of reigning or deposing, in reference to God, is found in Scripture to be all one; visible only in the people, and depending merely upon justice and demerit."[26] Thus Milton reaffirms his fundamental principle that power resides in the people. In another passage Milton states the same principle when he says that "since the king or magistrate holds his authority of the people, both originally and naturally for their good, in the first place, and not his own, then may the people, as oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of freeborn men to be governed as seems to them best."[27] This statement of the doctrine had the advantage of appropriating the central position of the more extreme radical republicans without suffering the opposition which their questioning of the distribution of social power and property inevitably aroused. Milton's appeal to the "liberty and right of freeborn men to be governed as seems to them to be best" seems, retrospectively at least, to have been the correct one to make in the light of the subsequent development of English liberalism, individualism and laissez-faire

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[26] Ibid., p. 17.
[27] Ibid., p. 14.

during the following two centuries.[28]

Out of the doctrine of contract which we have been tracing comes Milton's declaration that the people may take up arms against a tyrant, "as against a common pest, and destroyer of mankind, that it is lawful and has been so through all ages, for any who have the power to convict, depose, and put him to death." Since this is his thesis, The Tenure of Kings and Magistrates occupies an unusual position, for it is the first attempt in English to trace the history of tyrannicide. Although Milton was indebted to Buchanan's dialogue, De Jure Regni Apud Scotos (1579), for some references on this topic, and also possibly to Bodin's De Republica (1576), his contribution was largely an original one. In The Tenure of Kings and Magistrates Milton devotes most of his attention to the illustrations of tyrannicide from Jewish history, although he makes some generalizations concerning the practice among the Greeks and Romans. Milton draws rather heavily upon Protestant writers and ignores the contributions of the sixteenth century

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28 In an effort to stem this tide Filmer protested that "...if any man may be judge, what Law is contrary to God's Will, or to Nature, or to Reason, it will soon bring in Confusion: Most men that offend, if they be to be punished or fined, will think that Statute that gives all Fines and Forfeitures to a King, to be a Tyrannical Law; thus most Statutes would be judged void, and all our Fore-fathers taken for Fools or Madmen, to make all our Laws to give all penalties to the King." Filmer, Observations Upon Mr. Milton, p. 191.

Roman Catholic writers on the subject. This is not difficult to understand since references to Catholic or Jesuit writers would have been offensive to most of Milton's audience. Neither the details of Milton's history of tyrannicide nor his strictures on the defection of the Presbyterian party, however, need concern us, for they lie outside the field of our investigation although they are built upon his theory of the social contract.

It perhaps should be remembered that in the seventeenth century the ultimate standards of judgment to which Puritans appealed in all their arguments were none other than scripture and reason. Milton was no exception to the Puritan tradition. In fact The Tenure of Kings and Magistrates opens with the appeal, "If men within themselves would be governed by reason, and not generally give up their understanding to a double tyranny, of custom from without, and blind affections within, they would discern better what it is to favour and uphold the tyrant of a nation."[29] One writer declares, "It was the common custom to prove anything from the Bible, sometimes with the consent of reason, sometimes

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29 Milton was less impressed by the noble savage than the noble Puritan; in 1644 he appealed to the Parliament to have confidence in "God's Englishmen" : "Consider what nation it is whereof ye are, and whereof ye are the governours; a nation not slow and dull, but of a quick, ingenious and piercing spirit; acute to invent, subtile and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to." Areopagitica, Works, II, p. 90.

in defiance of common sense."[30] If the Bible was used with advantage as an authority on general subjects, it was believed by Milton, and all Puritans, that no one could "impose, believe, or obey aught" in religion, but from the word of God alone. Since the subject's relation to his prince involved questions of conduct on such matters as the divine right of kings and the legitimacy of armed resistance to tyrants, the Bible was regarded as an authority which could be used to determine the rights and duties of both princes and subjects. The difficulty was that both the supporters and opponents of the theory of divine right could cite proof texts from the scriptures thereby always leaving the matter in a state of uncertainty. Milton, in the main, emphasized the rebellions and cases of tyrannicide in the Old Testament, while using a great deal of ingenuity, if not dishonesty, in explaining away the embarrassing passages in the New Testament. The use of the scriptures by Milton and other writers of his time doubtless seems a little grotesque and confusing to a modern reader, but it was indispensable as long as political and constitutional theory demanded a religious sanction.

When we try to summarize the ideas set forth in The Tenure of Kings and Magistrates, applied to a great political crisis in English history, we discover that

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30 Allison, op. cit., p. xxvi.

Milton is really elaborating his philosophy of freedom. In his earlier writings he had defended religious and domestic freedom, a free interpretation of the Bible, free education, liberty of investigation, speech and the press. In The Tenure of Kings and Magistrates he was to emphasize again most of these ideas. In the compact pages of this pamphlet, he presents the following leading ideas: (1) All men naturally were born free; (2) as a result of a voluntary compact, kings and magistrates were appointed by the people as deputies and commissioners, repositories of communicated and entrusted power; (3) laws were invented by the people as checks to confine and limit the authority of magistrates; (4) bonds or covenants were also imposed upon rulers to compel them to observe the laws which the people had made; (5) the power of kings and magistrates remains fundamentally in the people as their natural birthright; (6) the king or magistrate may be chosen or rejected, retained or deposed by the people; (7) men should be governed by the authority of reason. Taken together these ideas constitute Milton's theory of social contract. All the ingredients from which Whig, Republican and democratic systems were composed are found here. Its contemporary and practical value was that it provided a standard and authority by which to judge monarchy. That this was the case may be attested by the fact that the publication of the pamphlet won for Milton the post of Latin Secretary

to the Commonwealth. It had more than contemporary significance, for it did not fall with the rest of the Republican ideals and experiments of the Commonwealth; it survived to become the Whig foundation for limited monarchy and the traditional safeguard of the private and public liberties of the ordinary Englishman of property.

CHAPTER FIVE

ROBERT FILMER

Sir Robert Filmer was born some time in the last decade of the sixteenth century. He died in 1653 at the end of the decade to which this study has been necessarily confined. He was a Kentish Squire of somewhat studious and retiring habits who was knighted under Charles I. He was very likely too old for active service during the Civil War, but his loyalty to the Royalist Cause resulted in the loss of some of his property and in a short imprisonment. It is said that his home was sacked ten times during the Civil War.[1]

During Filmer's lifetime his work attracted little or no attention in the mass of pamphlets and tracts which descended upon the public during and immediately following the Civil War. Under Charles II., however, the debates on the exclusion of a Catholic heir revived the older discussion concerning the location of sovereignty.

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1 See the article on Filmer in the National Dictionary of Biography.

Since the newly organized Tory Party had no really able publicist, they fell back on the writings of Filmer which had passed virtually unnoticed during the decade 1642-52. Thus Filmer's Patriarcha was published in 1680. It is the earliest and, unfortunately, the best known of his writings. The reason the Patriarcha was remembered so long was that Locke caricatured it in his first essay on Civil Government. Neither Locke nor most of the subsequent commentators on the long history of political thought have made any real effort to understand Filmer's contribution.[2] The Patriarcha was the most confused and superficial of Filmer's writings and it is possible to make his defense of absolutism and Divine Right in it appear absurd. Filmer, however, was not only a defender of absolutism, but a shrewd critic of conceptions which were, after his death, increasingly accepted and finally approved by Parliament.

In 1648 Filmer published a mature and rather complete statement of his convictions in a treatise entitled The Anarchy of a Limited and Mixed Monarchy. It was written as a direct answer to Philip Hunton's Treatise of

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2 J. W. Allen's essay on Filmer in Hearnshaw, ed., The Social and Political Ideas of Some English Thinkers of the Augustan Age is the only recent attempt to re-assess the value of Filmer's contribution which the writer has been able to discover.

Monarchy.[3] In 1652 there appeared Filmer's Observations upon Aristotle's Politiques touching forms of Government and Directions for Obedience to Governours in Dangerous and Doubtful Times. Also, in the same year, was published his Observations concerning the Originall of Government which consists entirely of criticisms of the arguments and assumptions of Hobbes, Milton and Grotius. Another work, The Freeholder's Grand Inquest, has been attributed to Filmer, but it is increasingly doubted whether Filmer ever had anything to do with it.

In the effort to piece together Filmer's contribution, especially with reference to his criticisms of the prevailing notions of contract and consent, we shall restrict ourselves mainly to a consideration of his Anarchy and Observations upon Aristotle supplemented, to be sure, by some notice of the Directions and Observations concerning the Originall of Government. We shall not deal with the Patriarcha since it does not cast much light upon the purposes of our study.

In 1642 there was nothing to be gained by repeating that God had commanded obedience to every form of actually constituted authority and had forbidden active resistance in any case. It was, in fact, being asserted by

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3 Hunton's treatise is an altogether too little known argument for a limited and mixed monarchy by a "middle-of-the-road" thinker. See C. H. McIlwain, A Forgotten Worthy, Philip Hunton, and the Sovereignty of King in Parliament, in Politica, Feb., 1935.

writers on both sides of the political question. St. Paul's exhortation to obey the "higher powers"[4] could be and was used as a text by both the parliamentarians and the royalists because they were agreed that everyone should be subject to the higher powers. The real issue had been transformed into the question of determining what was the higher power in England.

The conflicting assertions and theories which were set forth during the decade 1642-52 forced Filmer to work out a set of first principles. He attempted to demonstrate that the King in England was the sole sovereign, i.e. an absolute monarch. He maintained that an absolute or arbitrary power had of necessity to exist somewhere in every society ruled by law. He, however, did not stop here. He went on to argue that sovereignty could not exist in the form of monarchy unless by legal fiction. The alternative to monarchy was anarchy or military despotism. One of Filmer's most basic assertions was that the fictitious sovereignty of such a constituted body as the English Parliament was of necessity devoid of all moral authority.

In 1648 it was being maintained by an increasing number of writers that man is born free; that he is free by nature; that no man has a right to give commands to another unless by his consent. Moreover, it was argued

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[4] In Romans 13.

that men were originally under no obligation of any kind except to themselves. Thus it was further asserted that all human authority is created by the act of man, although God sanctions and commands obedience to it. This was not a new idea, but, as we have already noted, one with deep historical roots. "By the natural law," Hooker had written a half century earlier, "the lawful power of making laws to command whole politic societies of men, belongeth so properly to the same entire societies, that for any prince or potentate ... to exercise the same of himself, and not either by express commission immediately and personally received from God or else from authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny."[5] The argument is that political authority is vested ultimately in the people as a whole, and the people may establish government in any form it chooses, delegate sovereignty to anyone it pleases, and place limitations on the authority so delegated. All actual constituted political authority is derived from such an act of delegation. This is just another way of stating the essence of the theory of contract. These were the ideas and theories which were criticized and attacked by Filmer.

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5 Hooker, Ecclesiastical Polity, Book I, ch. X. Cf supra pp. 17-23.

Filmer met these assertions head-on by denying that there was any sense in which man was really born free. Even Filmer's opponents were forced to admit that parents had the right to control their children. "...then farewel the Doctrine of the natural freedom of mankind; where subjection of Children to Parents is natural, there can be no natural freedom."[6] If it is replied that only children under age shall be bound by their parents' consent, Filmer retorts that "in nature there is no nonage;" it is merely a legal fact. He further observes that ordinarily children and servants outnumber their parents and masters. "For the major part of these to be able to vote and appoint what Government or Gouvernours their Fathers and Masters shall be subject unto, is most unnatural, and in effect to give the Children the government over their Parents.[7] "Every man that is born, is so far from being Free-born, that by his very Birth he becomes a Subject to him that begets him: under which Subjection he is always to live, unless by immediate Appointment from God, or by the Grant or Death of his Father, he become possessed of that Power to which he was subject."[8]

Filmer admits to having derived one benefit from reading Aristotle who was frequently quoted by the

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6 Anarchy, p. 251
7 Ibid., p. 251.
8 Directions for Obedience, p. 156.

parliamentarian writers. His Politics, Filmer confesses, serve as an admirable commentary on the text of scripture which declares: "In those days there was no King in Israel; every man did that which was right in his own eyes." "For he grants a liberty in every city, for any man, or multitude of men, either by Cunning, or Force, to set up what Government they please...."[9] Filmer makes allowance for this point of view which Aristotle sets forth by recalling that he was a heathen writer. "For it is not possible for the Wit of man to search out the first Grounds or Principles of Government, (which necessarily depend upon the original of Property) except he know that at Creation one man alone was made, to whom the Dominion of all things was given, and from whom all men derive their title."[10] Filmer could rightly insist that this could be learned only from the Scriptures, for his opponents went to great lengths to base their arguments on religious and scriptural grounds. As for the contract of the people, Filmer here declares the notion to be impossible unless "a multitude of men at first had sprung out, and were engendered of the Earth, which Aristotle knows not whether he may believe, or no."[11] If justice is the end of government, there must of necessity be a rule to determine how any man at

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9 Observations upon Aristotle's Politiques, p. 107.
10 Ibid., p. 108.
11 Ibid., p. 108.

first came to have a right to call anything his own. "This is a Point Aristotle disputes not; nor so much as ever dreamt of an original Contract among People: he looked no farther in every City, then to a Scambling among the Citizens, whereby every one snatcht what he could get: so that a violent Possession was the first, and best title that he knew."[12]

"Howsoever men are naturally willing to be persuaded, that all Sovereignty flows from the Consent of the People, and that without it no true title can be made to any Supremacy;...yet," comments Filmer, "there are many and great Difficulties in the Point never yet determined, not so much as disputed..."[13] Filmer wants to know why his opponents never address themselves to explaining in what manner the people give their consent, nor what part of the people is sufficient to constitute the giving of consent. Nor is it ever made clear whether the consent is expressed or tacit, collective or representative, absolute or conditional, free or enforced, revocable or irrevocable.[14] Next he raises the question of what is really meant by the phrase 'the people.' What people? If the people have the right to choose a king, it must be remembered that by the principles and rules of nature all mankind must be one people who are born

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12 Ibid., p. 108.
13 Observations Upon Aristotle, p. 146.
14 Ibid., p. 146-7.

with equal rights to freedom from subjection. If this is ignored and it is instead asserted the term 'people' means the people of a particular country, it remains to be explained what a country is in nature. There is nothing in nature which apportions men to particular countries. Countries are synonymous with governments. Filmer's opponents are basing their doctrine of contract on a state of nature which preceded the organization of government. Therefore they had no valid right to talk about the people of any particular country. "Since nature hath not distinguished the habitable World into Kingdoms, nor determined what part of a People shall belong to one Kingdom, and what to another, it follows, that the original freedom of mankind being supposed, every man is at liberty to be of what Kingdom he please, and so every petty company hath a Right to make a Kingdom of itself;..."[15] Thus every group - city, village, family - and individual has the right to choose a king. In order to avoid having one ruler over the entire people the theory has to embrace the other extreme - the doctrine of anarchy or individualism which will allow any man to choose his own ruler. Apparently, says Filmer, this doctrine still leaves every man with his natural liberty.[16]

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15 Anarchy, p. 248.
16 Ibid., p. 248-9.

There is, however, another possibility as to the usage of the term "people." Sometimes it is used to refer only to the majority of the inhabitants of the world or a particular part of the world. But Filmer objects even more strongly to this notion of majority. If it were lawful for particular parts of the world to choose by consent their Kings, their elections would bind only those who consented to it, or only where a higher power commanded it. "Now there being no higher power than nature, but God himself; where neither nature nor God appoints the major part to bind, there consent is not binding to any but only to themselves who consent."[17]

If it is admitted that either by nature or consent a coercive government with the power of delegating its authority can be set up, the question immediately arises as to how it actually can be done. "...it can not truly be said that ever the whole people, or the major part, or indeed any considerable part of the whole people of any Nation ever assembled to any such purpose."[18] Except for some miracle how could the multitude of people be assembled in any given time or place unless government itself already existed? If a lawful summons were lacking, how could the absent possibly be bound by any agreement made by the majority? This is what Filmer kept insisting that his opponents should describe.

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17 Ibid., p. 249.
18 Ibid., p. 249.

It is impossible for the People, even though they might and actually would set up a Government, ever to be able to do it. Strictly speaking, the people is "a thing or Body in continual alteration and change, it never continues one Minute the same, being composed of a Multitude of Parts, whereof divers continually decay and perish, and others renew and succeed it in their places, they which are the People this Minute, are not the People the next Minute."[19] "Mankind is like the sea, ever ebbing or flowing, every minute one is born, another dies,..."[20] It may be admitted that the consent of all cannot be obtained and that therefore a majority must suffice. To Filmer, it seems absurd to argue the necessity of the people's consent while admitting the impossibility of obtaining it.[21] If there is such a thing as a natural right to freedom, even infants must possess it, "not to speak of Women, especially Virgins, who by birth have as much natural freedom as any other, and therefore ought not to lose their liberty without their own consent."[22] This observation was one conveniently ignored by his opponents. From the fact that parents may or do consent in behalf of their children Filmer derives, partially, his thesis that

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19 Observations Upon Aristotle, pp. 145-6.
20 Anarchy, p. 250.
21 Observations Upon Aristotle, p. 146.
22 Anarchy, p. 250

government had its origin in the family. This thesis was more accurate historically than the contract theory.

To assert that a majority, or the silent consent of a minority, may be interpreted as binding on the entire people is, for Filmer, unreasonable and unnatural. "It is against all Reason for men to bind others, where it is against Nature for men to bind themselves."[23] To deprive any man of his liberty in such a manner is to open a wedge "for any Multitude what soever, that is able to call themselves, or whomsoever they please, the People."[24] This is, of course, precisely what did occur. Every group of men spoke in the name of 'the People' no matter what their doctrine. This phenomenon seems to suggest an enduring pattern in political thought and action.

It was believed by many other writers that at the first assembling of the people it was unanimously agreed that the consent of the majority should bind the whole. Of course it was never proved that such an agreement was ever actually an historical occurrence; it was simply asserted that such an agreement was necessary if there were to be any lawful government at all. Filmer naturally denied this although he admitted that such consent and agreement were necessary for the constitution

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23 Observations Upon Aristotle, p. 145.
24 Ibid., p. 146.

of popular government. "But if there were at first a Government without being beholden to the People for their Consent, as all men confess there was, I find no reason but that there may be so still, without asking Leave of the Multitude."[25]

Filmer declared that the conception of sovereignty as vested in the 'people' is in practical political terms always linked with some scheme of representative government. But for him there is no such thing as representative government; it is a sort of legal fiction if we may use the term. The theory, however, is that the people find it practically impossible to exercise their power of government; hence they select representatives.[26] These representatives, however, are never selected by the people as a whole. They are always selected by minorities of voters in a number of separate constituencies. "Now when such Representors of the People do assemble or meet, it is never seen that all of them can at one time meet together; and so there never appears a true, or full Representation of the whole People of the Nation, the Representors of one part or other being absent, but still they must be imagined to

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25 Observations upon Aristotle, p. 144.
26 Observations upon Aristotle, p. 140-1.

be the People."[27] But when the representatives actually meet to transact business, they find it so difficult to do that they are forced to refer it to committees chosen to represent the representatives. "Each Company of such Trustees hath a Prolocutor, or Speaker, who by the help of three or four of his Fellows that are most active, may early comply in gratifying one the other, so that each of them in their turns may sway the Trustees, whilst one man, for himself or his Friend, may rule in one Business, and another man for himself or his Friend prevail in another cause, till such a number of Trustees be reduced to so many petty monarchs as there be men on it."[28] Apparently log-rolling is an old political practise. But Filmer is not just making an attack upon the institution of log-rolling. He is, in effect, saying that the representatives of the people always serve particular interests, i.e. their own interests, rather than those of the people as a whole. Thus he is inclined to a pessimistic view of utilitarian interests and concepts as being conducive to a state of anarchy

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27 Ibid., p. 141. Elsewhere Filmer says, "Come to our Modern Politicians, and ask them who the People is, though they talk big of the People, yet they take up and are content with a few Representors (as they call them) of the whole People; a Point Aristotle was to seek in, neither are these Representors stood upon to be the whole People, but the major part of these Representors must be reckoned for the whole People;..." Filmer, Observations Upon Mr. Milton, p. 190.

28 Ibid., p. 142.

(always a broken monarchy for Filmer). His opponents, as we have indicated elsewhere, optimistically embraced in practice, at least, the view that the pursuit of individual or group interests was identical with the interests of the people as a whole.

Filmer noted that there was a great deal of talk about freedom and liberty in a popular commonwealth. But how far and in what sense is it correct to speak of liberty in a commonwealth? "True liberty is for every man to do what he list, or to live as he please, and not be tied to any Laws."[29] Such liberty, however, should not be sought in a popular commonwealth, for there are always more laws, and hence less liberty in a commonwealth than in a monarchy. The only liberty left to a subject in a commonwealth is the liberty of taking a small and indefinite part in legislation, together with the possibility of taking a larger part as a representative elected by some constituency. But "if the common people look for any other Liberty, either of their Persons or their Purses, they are pitifully deceived, for a perpetual Army and Taxes are the principal materials of all Popular Regiments: never yet any stood without them, and very seldom continued with them;..."[30]

It may be interesting to note Filmer's attitude

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29 Ibid., p. 143.
30 Ibid., p. 143.

toward the "Low Countries" which were always in the minds, if not in the arguments, of his opponents. "Two things they[31] say they first fought about, Religion and Taxes, and they have prevailed it seems in both, for they have gotten all the Religions in Christendom, and pay the greatest Taxes in the World; they pay Tribute half in half for Food, and most necessary things, paying as much for Tribute as the price of the thing fold; Exise is paid by all Retailers of Wine, and other Commodities; for each Tun of Beer six Shillings, for each Cow for the Pail two Stivers every Week: for Oxen, Horses, Sheep, and other Beasts sold in the Market the twelfth part at least: be they so oft sold by the year to and fro, the new Master still pays as much: they pay five Stivers for every Bushel of their own Wheat, which they use to grind in Publick Mills: These are the Fruits of the Low-Country War."[32]

Filmer believed that all the assertions about the nature and origin of government made by his opponents were based on entirely groundless assumptions. But more important, he accused them of evading the questions their assertions really bound them to deal with and with refusing to accept logical consequences. He also thought that he had proved beyond a shadow of a doubt that no theory of government under contracts or of an ultimate

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31 i. e. the Dutch
32 Ibid., p. 136-7.

popular sovereignty provided any basis for the establishment of real authority. Government must, he believed, be founded upon some recognition of a duty of obedience. All that the people could confer by agreement was merely an indefinite amount of coercive power. But Filmer stoutly maintained that it was foolish to talk of contracts. An implicit contract could bind no one; an explicit contract could result only in the disabling of government. In other words, if the sovereign is only the delegate of the people, then government rests on force and fear. Filmer is convinced that no society can exist for long on a basis of fear and force.[33] If men believe that they themselves have created sovereignty, they will not obey; nor is there any reason why they should. To use a modern expression, government can rest firmly only on a sense of absolute obligation. It was Filmer's belief that such an obligation existed in monarchy. Thus he was, in effect, charging his opponents with ignoring this question or with holding theories which really destroyed the moral authority of government.

If Filmer were asking such fundamental questions in his criticisms of the social contract and popular sovereignty, why were they not faced? It is difficult to answer this with any assurance. It may be that his writings were simply lost in the flood of writings that

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33 This he maintains in opposition to Hobbes.

descended upon the country in the decade 1642-52. Or, it may be that his questions raised such fundamental issues in political theory that his opponents despaired of answering them satisfactorily one way or another. What is even more likely is that Filmer's opponents either did not recognize the issues raised or else regarded them as being so theoretical as to merit dismissal by men primarily interested in practical political programs and slogans. In any event it must be admitted that Filmer's acumen was the most critical that the doctrine of contract had to encounter in the decade. His poor reputation as a constructive thinker in setting forth his patriarchal theory seems to have blinded most men to this fact.

CHAPTER SIX

THOMAS HOBBES

From many points of view Thomas Hobbes was the most significant thinker in the first half of the seventeenth century. In pure intellectual rigor he occupies the most eminent position in English political philosophy. He represents the first really systematic attempt in English philosophy to develop a theory of the state from assumptions entirely divorced from theological considerations. However absolutistic his conclusions may have been, the frame of mind which he adopted was basically what the developing liberal outlook of the seventeenth century necessitated. He is consistently rationalistic, utilitarian, and Erastian. He was basically materialist, and, in essence, entirely hostile to supernatural hypothesis in the field of social theory and description. Both his system of ethics and of psychology reveal how easy it had become to develop principles and theories in these two fields from presuppositions essentially secular in nature. These facts account, in part, for the frequent reference

to Hobbes as the father of modern social science. If Hobbes' political theory is the most thorough-going argument ever made for autocracy, it is an argument rooted in the belief that every state is a completely self-sufficient organism which does not require external or transcendent sanctions for its purposes and activities. This, perhaps, was the thesis of which the new order stood in need more than any other.

The wars of the Fronde in France and the Civil War in England constitute the all important historical background for an understanding of Hobbes' thought. The contest of king and parliament for sovereignty made such an impression upon Hobbes that he became virtually obsessed by the dangers of the revolutionary principles of the democratic leaders - especially of the Independents. Despite these fears and his partisan bias for the royalist cause, Hobbes' work was not that of a practical politician. He was by nature a retiring closet philosopher interested primarily in the analysis and elaboration of political principles and concepts. In this respect Hobbes and Filmer have more in common with each other than they have with any of the other writers we have been studying in the decade 1642-52.

In previous chapters we have become familiar with the concept of a natural or primitive condition of man which was supposed to have preceded the initial appearance of social or political life. Usually it was held

that this primitive condition was an historical actuality. Hobbes' theory, however, is definitely unhistorical; the natural state of man comes as an inevitable result from his interpretation of human nature and claims psychological, rather than historical, validity. Hobbes pictures the state of nature as really a state of anarchy in which every man's hand is against his neighbor's, and in which the lust for power destroys every kind of security. It is a state

> where every man is Enemy to every man;...wherein men live without other security, than what their own strength, and their own invention shall furnish them withall....there is no place for Industry;...and consequently no Culture of the Earth; no Navigation,... no commodious Building...no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.[1]

In such a state men may be taken to be equal in a broad sense, since, in the absence of a recognized power of control, no man has sufficient strength of mind or body to be free from the cunning or sudden violence of his fellows. From so anarchic and brutish a state the one object of life must be the organization of escape.[2]

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[1] Leviathan, xiii.

[2] For an opposing point of view cf. Filmer: "But if it be allowed (which is not yet most false) that a Company of men were at first without a comman Power to keep them in Awe; I do not see why such a Condition must be called a State of War of all against all men: Indeed if such a Multitude of men should be created as the Earth could not well nourish, there might be Cause for men to destroy one another rather

"Whatsoever is the object of any man's Appetite or Desire, that is it which he for his part, calleth Good: And the object of his Hate, and Aversion, Evill;...Pleasure therefore, (or Delight,) is the apparence, or sense of Good;..."[3] From this basic position follows Hobbes' ethical theory. "...no man obeyes them, whom they think have no power to help, or hurt them."[4] Our motives for obedience are, in addition to fear, desire of ease and sensual delight, and also of knowledge and the arts of peace.[5] It is absurd to talk of a moral obligation to obey in the war of all against all, for "Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre, the two Cardinall vertues."[6]

If man is avid of power he also fears death; he desires comfort, he seeks security. Reason therefore suggests to him some form of agreement whereby peace may

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than perish for want of Food; but God was no such Niggard in the Creation, and there being Plenty of Sustenance and Room for all men, there is no Cause of Use of War till men be hindered in the Preservation of Life, so that there is no absolute Necessity of War in the State of pure Nature; it is the Right of Nature for every man to live in Peace, that so he may tend the Preservation of his Life, which whilest he is in actual War he cannot do. War of it self as it is war preserves no mans Life, it only helps us to preserve and obtain the Means to life: if every man tend the Right of preserving Life, which may be done in Peace, there is no Cause of War. Filmer, Observations on Mr. Hobs's Leviathan, V.

3 Ibid., vi.
4 Ibid., x.
5 Ibid., x, xi.
6 Ibid., xiii.

be attained. Reason urges him to leave the state of nature and thus gives him a law which we may term a law of nature in a sense that it is a precept of reason; but it is not a law of nature in the accepted sense. The law of nature is the power of man to do whatever in the state of nature he thinks fit. Included in it, indeed, are precepts which reason commands for the sake of self-preservation; and these, in their totality, are something akin to the moral law. But they are pointless enough in the state of nature, since there is no common authority to enforce them. This law of nature may bind us in reason, even in the pre-social state, since the rule not to do to another what you would not have done to you is the clear road to self-preservation. The one law or right of nature is

> the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life;...And because the condition of Man...is a condition of Warre of every one against every one; in which case every one is governed by his own Reason;...in such a condition, every man has a Right to every thing; even to one anothers body. And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man, (how strong or wise soever he be,) of living out the time, which Nature ordinarily alloweth men to live. And consequently it is a precept, or generall rule of Reason, That every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warres.[7]

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[7] Leviathan, xiv.

From man's first state of anarchy and fear, with its two rights, vainly to seek peace and by all means he can to defend himself, it is a consequence

> That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe....But if other men will not lay down their Right, as well as he; then there is no Reason for any one, to devest himselfe of his:[8].... And when a man hath in either manner abandoned, or granted away his Right; then is he said to be Obliged, or Bound, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he Ought, and it is his Duty, not to make voyd that voluntary act of his own: and that such hinderance is Injustice and Injury,...[9]

Hobbes therefore assumes the making of a covenant or contract between men such that all surrender their natural rights to a sovereign, either by institution or force. "A Common-wealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, every one, with every one, that to whatsoever Man, or Assembly of Men, shall be given by the major part, the Right to Present the Person

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8 cf. Filmer: Another Principle I meet with, pag. 65. If other men will not lay down their Right as well as he, then there is no Reason for any to devest himself of his: Hence it follows, that if all the Men in the World do not agree, no Commonwealth can be established, it is a thing impossible for all the men in the World, every man with every man, to Covenant to lay down their Right. Nay it is not possible to be done in the smallest Kingdom, though all men should spend their whole Lives in nothing else, but in running up and down to Covenant. Filmer, Observations on Mr. Hobs's Leviathan, VII.

9 Ibid., xiv.

of them all, (that is to say to be their Representative;) every one, as well as he that Voted for it, as he that Voted against it, shall Authorise all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably among themselves, and be protected against other men."[10] There is no suggestion of divine right in Hobbes, for he declares: "From this Institution of a Common-wealth are derived all the Rights, and Facultyes of him, or them, on whom the Soveraigne Power is conferred by the consent of the People assembled."[11] The subject, however, owes to this sovereign, be he one or many, an allegiance that is absolute and entire. This sovereign owes no duties whatsoever to his subjects, while they are bound to one another to obey his commands. If, indeed, protection from insecurity does not result from the relationship, the subject is entitled to the resumption of his natural rights. But even then he has no remedy against the sovereign (since the latter owes no duty to him) and he resumes them at his own risk (since he has broken the contract with his fellows) Hobbes assumes, then, a sovereign power which is unlimited in extent once it has been established, for he declares that "The Right of bearing the Person of them all, is

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10 Ibid., xviii.
11 Ibid., xviii.

given to him they make Soveraigne, by Covenant onely of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Soveraigne: and consequently none of his Subjects, by any pretence of forfeiture, can be freed from his Subjection."[12]

Once a congregation of men have made a contract or covenant even dissenters are bound to obey the sovereign. If they do not avow the actions of the sovereign, such dissenters may be justly destroyed by their fellows. According to Hobbes, anyone who voluntarily entered the original congregation which made the contract thereby tacitly agreed to abide by whatever decision the majority should reach. From this it follows that "every Subject is by this Institution Author of all the Actions, and Judgments of the Soveraigne Instituted" and hence "whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of Injustice."[13] This sounds suspiciously like the theory of the real will in more recent times. Thus, on Hobbes' view, it is difficult to see how anything could happen to a subject of a civil state which he had not already willed. This arises as a consequence from the fact that Hobbes' covenant or contract is not historical and that therefore no one living in civil society can escape from having given his tacit consent to it. Law, then, is simply a command of the sovereign

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12 Ibid., xviii.
13 Ibid.

enforced by the sanction he institutes. It is obvious that since there is no limit to the sovereign's power there is no such thing as the unjust command and, by inference, an unjust law.

It is important to notice that the parties to Hobbes' contract are individual natural men - not groups of any sort, not the "people," vaguely defined, and not any superior being or sovereign. A superior or sovereign exists only by virtue of the contract, not prior to it. Individuals, naturally equal, agree one with another to give up their natural rights to a common recipient; this recipient becomes by that fact their superior, but he himself is no party to the contract. It is to be noted further that submission to the will of the majority in respect to the designation of the sovereign is a tacit article of the contract; hence there is no ground left on which a minority can base just resistance. Also, the end sought by the parties, i.e. internal peace and defence from external foes, is an integral part of the contract. All these elements are important factors in Hobbes' theory of contract which stands out in contrast to the other theories we have been discussing.

Hobbes distinguishes the "Common-wealth by Acquisition" although in essence it is no different from the "Common-wealth by Institution." Both have their foundation in fear; but in the one case men fear the person who is said to acquire the power; in the other they fear one

another.[14] It is a characteristic and oft-repeated teaching of Hobbes that fear of death or violence does not naturally make void a contract entered into in view of such a condition. Moreover, Hobbes continually asserts that fear is the indispensable condition of the contract through which civil society is created. That the laws of a commonwealth once created will not enforce contracts made under duress is beside the point. Here fear of the sovereign and his will supersede the fear and power which constrain to the keeping of the contract. The agreement is void, not because it was made under the influence of fear, but because a power superior to both parties authorizes one of them to disregard it and forbids the other to visit a penalty upon him. On such principles Hobbes logically deduces that the submission of a multitude to one who threatens them with an overwhelming force is a contract in the same sense as the submission to one whom they deliberately select. Thus the relation of sovereign to subject are precisely the same in the two kinds of commonwealth.

In addition to "Dominion by Conquest," there is, Hobbes says, "Dominion by Generation." This distinction or category serves to re-enforce the notion that the social contract is eternal. Therefore

> He that hath the Dominion over the Child, hath Dominion also over the Children of the Child; and over their Childrens Children. For he that hath

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[14] Ibid., xx.

> Dominion over the person of a man, hath Dominion over all that is his; without which, Dominion were but a Title, without the effect.[15]

Some critics have frequently confined themselves to questioning Hobbes' cynical psychology, to doubting whether the contract was a fact, or to asking why, if made, it should not be a contract on terms, and why it should bind the maker's children. They have not gone beyond asking how there could be any obligation to keep a covenant or contract made among men with no obligations one to another. But such a question leaves Hobbes' main position really unchallenged, for the 'obligation' to keep the contract is merely the 'obligation' of self-interest. "And Covenants, without the Sword, are but Words, and of no strength to secure a man at all."[16] "The opinion that

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15 Cf. Filmer's criticism: Pag. 102 Dominion Paternal not attained by Generation, but by Contract, which is the Childs Consent, either express, or by other sufficient Arguments declared. How a Child can express Consent, or by other sufficient Arguments declare it before it comes to the Age of Discretion I understand not, yet all men grant it is due before consent can be given, and I take it Mr. Hobs is of the same Mind, pag. 249. where he teacheth, that Abraham's Children were bound to obey what Abraham should declare to them for God's Law: which they could not be but in Vertue of the Obedience they owed to their Parents, they owed, not they covenanted to give. Also where he saith, pag. 121. the Father and Master being before the Institution of Commonweals Absolute Sovereigns in their own Families; how can it be said that either Children or Servants were in the State of Jus naturae till the Institutions of Commonweals?...Filmer, Observations on Mr. Hob's Leviathan, XI.

16 Ibid., xvii.

any Monarch receiveth his Power by Covenant, that is to say on Condition, proceedeth from want of understanding this easie truth, that Covenants being but words, and breath, have no force to oblige, constrain, or protect any man, but what it has from the publique Sword; that is, from the untyed hands of that Man, or Assembly of men that hath the Soveraignty, and whose actions are avouched by them all, and performed by the strength of them all, in him united."[17] "Justice therefore, that is to say, Keeping of Covenant, is a Rule of Reason, by which we are forbidden to do any thing destructive to our life; and consequently a Law of Nature."[18] The only reason Hobbes gives why we 'ought' not to disobey or to rebel when we believe that we can escape or defy detection is that even "though the event[19] follow, yet it cannot be reasonably expected."[20] How little Hobbes really relied upon contract appears in his placing commonwealths by acquisition, that is, where the sovereign power is obtained by force, on exactly the same level as a commonwealth by institution. In these commonwealths by acquisition either the vanquished has made an unconditional contract to obey the victor, or a child's consent has been secured "either expresse, or by other sufficient arguments declared."[21]

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17 Ibid., xviii.
18 Ibid., xv.
19 i.e., advantage.
20 Ibid., xv.
21 Ibid., xx.

In the last analysis it is clear that no contract binds contrary to interest, since on Hobbes' view it is impossible even to make a contract which it must be contrary to our interests to keep, as for example, to endanger our lives or to obey one who is not strong enough to protect us in return. "The end of Obedience is Protection, which, wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it, and his endeavour to maintainit."[22] Hobbes even seems to agree that if the sovereign should make any distribution of lands in prejudice of peace and security, and consequently contrary to the will of all his subjects that committed their peace and security to him, such a distribution may be repudiated as void.[23] There is no obligation except self-interest; that is to say, no real obligation at all. Hobbes was probably justly enough, as well as tempermentally frightened, at the spread of the revolutionary doctrine that a man should obey no laws not approved by his own conscience - a doctrine which had proved to be as troublesome to Cromwell as to Charles Stuart. It was too late to appeal to the authority of the church for obedience to God's anointed, or at least it appeared to Hobbes, judging other men's scepticism, as he did their timidity, by his own. Furthermore, there were now rival churches, and the dangers

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22 Ibid., xxi.
23 Ibid., xxiv.

of ecclesiastical intrigue against secular power were increased. But he thought that in self-interest he had found a motive of obedience that would be a universal substitute for spiritual authority. Unfortunately, however, men's opinions as to where their interest lies are as divergent as their consciences. Hobbes himself had to admit that each must judge when the sovereign's orders endanger his life or property, or when the security offered is even less certain than the hopes of successful rebellion.[24] Moreover, men more frequently than Hobbes admitted are likely to take risks and even to take them from motives other than self-interest as usually understood.

In his effort to bridge the really impassible gulf between his assertion that "reason directeth man to his own good" (good being "the object of any man's appetite or desire," and our strongest desires being for security and power) and his assertion that we are under obligation to obey the sovereign, Hobbes really injected an ingenious line of argument. Having supposed that our ancestors, in order to escape dangers, voluntarily contracted either with one another (i.e. by institution) or with a victor (i.e. by acquisition) or with a parent (i.e. by generation) to obey the sovereign, he concludes that all the acts of the sovereign are our own. If the sovereign injures me I am injuring myself, and by the same argument, if I injure

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24 Ibid., xiv, xxi, xxiv.

him I must be injuring myself, so that there is no difference between the two injuries. The inference to be drawn from this seems to be that all the unforeseen consequences of my contractual act are, in the same sense, my acts.

> A Person, is he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether Truly or by Fiction. When they are considered as his owne, then is he called a Naturall Person: And when they are considered as representing the words and actions of an other, then is he a Feigned or Artificial person....A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Represented that beareth the Person, and but one Person: And it is the Representer that beareth the Person, and but one Person: And Unity, cannot otherwise be understood in Multitude.[25]

> The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man or Assembly of men, to beare their Person; and every one owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall act or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment. This more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such a manner, as if every man should say to every man, I Authorize and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition,

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25 Ibid., xvi.

> that thou give up thy Right to him, and Authorise all his Actions in like manner. This done, the Multitude so united in one Person, is called a Common-wealth, in latine Civitas. This the Generation of that great Leviathan, or rather (to speak more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence.[26]

> Though he that is subject to no civil law sinneth in all that he does against his conscience, because he has no rule to follow but his own reason; yet it is not so with him that lives in a commonwealth; because the law is the public conscience, by which he hath already undertaken to be guided.[27]

These, then, are the consequences which follow from assuming that there exists no bonds either of love or duty between persons: the great Leviathan must be one person, but we may recall, a feigned or artificial person; a

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26 Cf. Filmer: Pag. 87. The only way.... is called a commonwealth. To authorize and give up his Right of Government himself, to confer all his Power and Strength, and to submit his Will to another, is to lay down his Right of resisting: for if Right of Nature be a Liberty to use Power for Preservation of Life, laying down of that Power must be a relinquishing of Power to preserve or defend Life, otherwise a man relinquisheth nothing.

To reduce all the Wills of an Assembly by Plurality of Voices to one Will, is not a proper Speech, for it is not a Plurality by a Totality of Voices which makes an Assembly be of one Will, otherwise it is but the one Will of a major part of the Assembly, the Negative Voice of any one hinders the Being of the one Will of the Assembly, there is nothing more destructive to the true Nature of a lawful Assembly, than to allow a major part to prevail when the whole only hath Right. For a man to give up his Right to one that never Covenants to protect, is a great Folly, since it is neither in Consideration of some Right reciprocally transferred to himself, nor can he hope for any other Good, by standing out of the way, that the other may enjoy his own Original Right, without hinderance from him by reason of so much Diminution of Impediments, pag. 66. Filmer, Observations on Mr. Hobs's Leviathan, IX.

27 Ibid., xxix.

"fabulous monster." It was left for Rousseau to deny that the "moral person" or "common self" which he identifies with the state was an *etre de raison*.[28]

In fairness to Hobbes it must be admitted that he was emphasizing a sound point in maintaining that a duty to obey, when commanded to do actions which we should not otherwise have thought right, might depend on one of two things, either that we had promised obedience to the commander, or that his authority would be impaired by our disobedience, and is an authority that, upon the whole, secures to our fellow men a justice and a well-being which we see no better way of affording them. In the latter case our obligation to the sovereign is roughly proportional to its efficiency.

Hobbes' thesis is, then, clear enough. The evil nature of man makes peace an impossibility without some form of restraint. The more concentrated this restraint, the more successful it is likely to be. The liberty which is left to the individual is such that he may do whatever the law does not prohibit or he may break the law since what binds him to obedience is simply the fear of punishment. The object of the state, however, being security, Hobbes had to admit what for him is almost a legal right of resistance or disobedience in certain circumstances. Reason, he admits, does not permit us to hold that a man can be bound

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28 *Contrat Social*, I, vii.

to maim or kill himself, or to be compelled to self-incrimination; nor is he bound to kill others or perform work of a dangerous kind; and whenever the sovereign is unable to give the protection for which the state is made, man resumes his natural rights.[29] What, then, Hobbes has been attempting to do is to develop a theory of social organization in which the radical doctrine of contract is made over for the service of absolutism and despotism. He has been so influenced by the conflicts of his own times and the previous century that he seeks a technique of order, no matter what the cost to individual freedom may be. If Hobbes' doctrine in the Leviathan has any economic import it is precisely at this point. It's obvious implications are that the social contract and the authoritarian state alone make economic growth, general security, the development of culture, and happiness possible.

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29 This latter concession is undoubtedly born of the times in which Hobbes lived. Filmer's comment is: "I cannot but wonder Master Hobs should say, Pag. 112. The consent of a Subject to Sovereign Power is contained in these words, I Authorise, and do take upon me all his Actions, in which there is no restriction at all of his own former natural Liberty. Surely here Master Hobs forgot himself; for before he makes the Resignation to go in these words also, I give up my Right of governing my self to this man: This is a restriction certainly of his former natural Liberty, where he gives it away: and if a man allow his Sovereign to kill him, which Mr. Hobs seems to confess, how can he reserve a Right to defend himself? And if a man have a Power and Right to kill himself, he does not Authorise and give up his Right to his Sovereign, if he do not obey him when he commands him to kill himself." Filmer, Observations on Mr. Hobs's Leviathan, XIII.

Hobbes had no confidence in any power but the sword, no belief in any motives but the meanest in human nature. All that he wanted was a sovereign - whether Charles I or Cromwell made no difference - who could keep the peace.[30] The state was thus, for him, concerned not with social good but with the condition upon which all human welfare depends; it was a restraint, evil, it might be, but necessary upon men's appetites. The form Hobbes gave to his argument cut away the ground from under the feet of his opponents. If one grants his premise - it is difficult to see how a Calvinist, for instance, could do otherwise - his conclusion follows inevitably. In a very real sense Hobbes is the clearest exponent of that intense desire for a strong authority which was so natural in many quarters in his time.

Hobbes, however, had come too late. A theory of absolutism such as his did not meet the needs of a generation which wanted, emphatically, order, but an order that was somehow compatible with individual freedom for important classes of people. How genuine were these needs can be gathered, partially, from the rapidity with which England recovered from the shock of the Cromwellian regime.

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30 Even in Hobbes' own time Clarendon pointed out that his theory tended to bolster up the Protectorate fully as much as the Stuarts.

The legitimate was restored, but he, as well as the people, recognized that he had been restored upon conditions. The debate between 1660 and 1689 is concerned basically with the terms of the constitution, for both parties in the nation had to recognize that a constitution was inevitable. When the brief reign of James II seemed to imply a monarchical experiment outside the limits for which men were willing, the invitation to William of Orange followed immediately. Its consequence was a king who reigned by parliamentary title upon conditions laid down in the statues. The revolution of 1688 led, among other things, to the Bill of Rights and the Act of Settlement. This was incompatible with the theory of Hobbes and accounts for the fact that the successful theorist of the doctrine of social contract later proved to be Locke. But such considerations lead us beyond the scope of our study.

CHAPTER SEVEN

LILBURNE AND WINSTANLEY

It may appear from our discussion that the political and social theory of the decade 1642-52 was monopolized by the Constitutional struggle. This was decidedly not the case. The Puritan Left, with slight respect for the Parliamentary leaders and their timid approaches to democracy, carried on the medieval tradition. They did not relegate Natural Law to the realms of theoretical discussion, but attempted to advance it as a rule of practise by which men might be guided. With Natural Law they supported communism and a simple, Christian, social life. While the main body of Dissenters were preoccupied with the great political-legal problem of the day, i.e. the defense of the Common Law from the tyranny of Royal Prerogative, and consequently expressed their political theory in terms of contract and of law, the extremists were true to the medieval practise of uniting political with economic

and ethical theory. It has been observed that "The Law of nature had been invoked by medieval writers as a moral restraint upon economic self-interest. By the seventeenth century, a significant revolution had taken place. 'Nature' had come to connote, not divine ordinance, but human appetites, and natural rights were invoked by the individualism of the age as a reason why self-interest should be given free play."[1]

The consequences of the victory of Puritan individualism were not limited to the canonization of the business virtues as has sometimes been supposed. Before the new doctrines were monopolized by the middle classes, they were seized upon by the lowest orders in the state, and made the basis for a wide development of democratic theories and practises. The decade was truly one of dissent. Waller had prophesied correctly when he said: "I look upon the episcopacy as an outwork or barrier, and say to myself that if this is stormed by the people and the secret thereby discovered, that we can deny them nothing which they demand, we shall have a task no less difficult to defend our property against them than we had lately to preserve it against the prerogative of the Crown."[2]

"In the last years of the Civil War, and above all

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1 R. H. Tawney, Religion and the Rise of Capitalism, pp. 180-1.

2 Quoted by G. P. Gooch, Democratic Ideas in the Seventeenth Century, p. 175.

after Cromwell's 'apostasy', certain groups emerged which bore Baptist characteristics with the addition of some peculiarities of their own. In the unsettled state of affairs, and in the widespread attitude of 'spiritual' indifference to forms of worship and organization, there were now no longer any groups with particular forms of worship; these groups had all become politico-social parties; they, however, display all the more plainly the politico-social conclusions drawn from the religious idea as such."[3]

The largest and most important of these groups was known as the Levellers. The growth of the Leveller movement was due, not only to the triumph of the less orthodox and more democratic form of Puritanism known as Independency, but to the peculiar position held by the army in 1647, and to the unique leadership of John Lilburne. The victory of Independency prepared the way for extensive criticism of the established forms of government, both secular and ecclesiastical. The Independents were accused of having bared the mysteries and secrets of government to the vulgar and of teaching both the people and soldiers to criticize the government in the light of first principles. "They have made the people so curious that they will never find humility

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3 E. Troeltsch, The Social Teachings of the Christian Churches, II, p. 710.

enough to submit to a civil rule."[4] By 1647, the army, which was predominantly Independent in opinion, was in a position of considerable political power; levelling doctrines spread rapidly among its members, particularly among the rank and file, who in cooperation with civilian Levellers drafted the Agreement of the People.[5] This document, presented to the House of Commons in January, 1648-49, gives what remained the essence of the Levellers' political demands despite many subsequent extensions and revisions.

If there is any truth in the statement that Liberalism stressed the rights of Parliament as against Autocracy, while Radicalism stressed the rights of the people as against Parliament, then the Levellers were the first radicals. They stood for the sovereignty of the people, not the sovereignty of the people's representatives. In the Agreement of the People it was made clear that every individual within the nation should sign the document which inaugurated the new constitution. Parliament was reduced to the level of a mere delegation, and certain important matters were taken completely out of its jurisdiction. The Levellers seemed not to have realized fully the implications of their "agreement;" indeed it was Ireton himself who pointed out that a

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4 C. Walker, The Compleat History of Independency, pt. 1, 1661.

5 For a complete narrative see Pease, The Leveller Movement, p. 263ff.

political constitution which was founded on the inalienable rights of the individual would lead inevitably to criticism of a social order based on class distinctions.[6] This sovereignty of the people was to be guaranteed by adult suffrage, annual parliaments, and the customary democratic checks, the whole policy being based upon Natural Law, rather than social contract.[7]

Although the Levellers were mainly inspired by motives other than those of a religious character, they drew many of their followers from the sects. Occasionally the Levellers even attempted to justify their movement on religious grounds. In a manifesto published by Lilburne, Walwyn, and Prince, the theory of social obligations is based partly on religion, "since no man is born for himself only, but obliged by the Law of Nature (which reaches all), of Christianity (which ingages us as Christians) and of Public Societie and Government to employ our endeavours for advance of a communitive Happinesse, of equall concernment, to others as our selves."[8]

From the sovereignty of the people is derived the most distinctive, if not the most enduring, contribution of the Levellers to English political theory, viz. their insistence on the doctrine of reserved powers -

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6 M. James, Social Policy During the Puritan Revolution, p. 25.

7 I. J. C. Brown, English Political Theory, p. 54.

8 Manifesto from Lilburne, Walwyn, Prince, and Overton, 1649, E. 550 (25) quoted by James, op. cit., p. 26.

powers so basic and sacred that they must be kept from the control of the elected assembly. This conception of fundamental law, which eventually failed to become a part of the English Constitution, was not at all uncommon during the Interregnum. Men of divergent views were united in maintaining that the constitution should be protected by much more rigid means than had existed. Cromwell himself believed in certain fundamentals which should be beyond the power of Parliament to change.[9] The Agreement of the People restating in explicit terms this doctrine of fundamental powers makes provision for the vigorous curtailment of the jurisdiction of the elected assembly. Religion is removed entirely from its sphere, and basic principles are set down for religious governance. In the same general spirit the elected assembly is forbidden, among other things, to force citizens to serve in a military capacity abroad or to exempt individuals from the power of the laws.[10]

Another feature of the Levellers' political program was the doctrine of the separation of powers. The Agreement of the People forbids any member of the council of state, any army officer, treasurer of public money or practising lawyer to sit in the elected assembly. In a Defiance to Tyrants Lilburne explicitly states that

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[9] Gooch, op. cit., pp. 198-9.
[10] Pease, op. cit., pp. 208-9.

lawmakers such as Members of the House of Commons should not also be law executors.[11]

Although the Levellers were essentially a political party, and disclaimed all connection with extreme social democrats, such as the Diggers, their manifestos and pamphlets were frequently concerned with the correction of social and economic grievances. The latest edition of the Agreement of the People (May, 1649) shows this clearly. The important monopolies of the trading companies were declared to be contrary to the rights of Englishmen to trade freely beyond the seas. Lilburne waged vigorous and unceasing warfare on privilege and monopoly in all its forms. "One day he was in London attacking the monopoly of the Merchant Adventurers' Company, and the London Government, and the next he was at Epworth urging the commoners to revolt against the enclosure of the fens."[12] The reform of the law both civil and criminal was demanded, particularly the reform of the law of debt and the abolition of capital punishment except for murder. Excise and custom were attacked as weighing too heavily on the poor and "middle sort" of people and causing obstruction of trade, and the employment and care of the poor were insisted upon. In their criticism of certain features of the existing land laws

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11 Ibid., 239.
12 James, op. cit., p. 26.

the Levellers came nearest to the Diggers when they censured primogeniture and copy hold.[13]

It would be a serious mistake to interpret our statement that the democratic theories and programs of the Levellers were based on Natural Law rather than contract[14] to mean that the contract theory was not used by the Levellers. The fact is that they found the notion of contract to be a valuable weapon in their defense of democratic principles. Indeed the various editions of the Agreement of the People were themselves voluntary contracts which proposed that the people establish a democratic form of government, limited and restrained by an exact written statement of the laws of nature and of reason.[15] It was Lilburne's contention that Parliament could be supreme only if the House of Commons recognized that its power was derived from the people's trust, and designed for the people's welfare. When on such terms the Commons claimed supremacy, they empowered the people to revoke their trust if it was abused.[16] The law of nature under whose authority the members of the Houses had armed the people in 1642 would justify people and army in cutting them off in 1647.[17] One writer has

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13 See M. James, op. cit., pp. 26, 98.
14 Supra, p. 101.
15 Pease, op. cit., pp. 358-9.
16 This idea contains all the essentials of a contractual principle.
17 Ibid., p. 182.

summed up the basis of Leveller theory as follows: "They appealed freely to the constitutional rights inherited from their ancestors; but they based their philosophy not on precedent but on the law of nature. Liberty, they believed, was not only guaranteed by a primeval contract, but was a right inherent in the very nature of human beings. By liberty they understood not merely freedom from the restraint of others, but a definite participation in whatever practical arrangements the community found it desirable to make. From this right of the individual to a share in power and responsibility springs the sovereignty of the people."[18]

It is interesting to note that the conservative elements of the time were anxious to identify the Levellers with the "True Levellers," or Diggers, and thereby to create strong opposition to both. Although it may be maintained that advanced political democracy must, perhaps unconsciously, lead to advanced economic democracy, it is not possible to discover a direct relation between the Levellers and the Diggers.[19] The doctrines of the Levellers were individualistic, and in the main political and secular; those of the Diggers were predominantly communistic, social, economic, and religious. The Levellers disavowed all responsibility

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18 Gooch, Political Thought in England from Bacon to Halifax, pp. 86-7.

19 M. James, article on "Levellers" in Encyclopedia of the Social Sciences.

for the theories and practises of the Diggers; in fact, the power to level estates was taken away from the elected assembly in the Agreement of the People.

In the matter of numbers, organizations and tactical skill the Levellers seem to have been greatly superior to the Diggers. The Diggers were so named after their habit of descending upon wasteland and quietly preparing it for cultivation. In April, 1649 some twenty Diggers, under the guidance of Everard and Winstanley, began to sow parsnips, carrots, and beans upon St. George's Hill in Surrey. This act was not only a sincere agricultural effort, but it was a dramatic "religious" gesture. It symbolized the withdrawal of the Diggers from what they regarded as the corrupt society of their day. The Diggers connected the destruction of the state of nature and of Natural Law with the Norman invasion, which revealed to their thinking the institution of private property and the bondage of Common Law.[20] In a sense the Diggers represent the last stand in England of medievalism before the new progressive and liberal forces of the seventeenth and eighteenth centuries. "The Digger Movement, although small in the number of its adherents, was an agrarian revolt on a surprisingly extensive theoretical basis. It was as if all the Peasant Wars of the past had suddenly become articulate. It aimed at making

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20 Brown, English Political Theory, p. 55.

the earth the common treasurey of all. The whole substance of mediaeval communism reappeared, but in a rationalist and sectarian setting."[21]

In his written works, the most important of which was The Law of Freedom, published in 1652, Winstanley emphasizes that politics, economics, and ethics are fundamentally one and the same thing. It is true that this had been a medieval commonplace, but in Winstanley's time the segregation of the three was an accomplished fact. The Levellers had attacked the political problem with a great deal of thoroughness, but the Diggers had added to their radical democracy the additional provision that no amount of political jugglery could be of any use unless society had first undergone a moral revolution and had been rebuilt upon Christian ethics and peaceful, voluntary communism.[22]

The importance of the Diggers lies almost entirely in the realm of theory. In pointing out the inadequacy of political democracy without economic democracy, Winstanley maintained: "Wee know that England cannott bee a free Commonwealth unless all the poore commoners have a free use and benefitt of the land; for if this freedome bee not granted, wee that are poore commoners are in a worse case than we were in the King's dayes,

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21 Beer, History of British Socialism, p. 60.

22 This point was later emphasized in a different manner by Harrington, a well-born republican, who saw that economic power was the basis of political power.

for then wee had some estate about us, though wee were under oppression, but now our estates are spent to purchase freedome, and wee are under oppression still of Lords of Mannours' tyranny."[23] The abolition of private property in land would improve relations between individuals and between nations and prepare the way for widespread social reforms. In one respect the Diggers were more representative of the times than the Levellers, for their doctrines were saturated with a type of religious mysticism which was closely related to contemporary Quakerism.[24] "Throughout the various pamphlets, which together make up a fairly complete social theory, the mystical element is dominant, whereas other reformers trusted to mechanical devices to improve men's lot, Winstanley insisted that the spirit alone could give new life."[25] In one of his most striking passages Winstanley declares: "At this very day poor people are forced to work for 4d. a day, and corn is dear. And the tithing-priest stops their mouth, and tells them that 'inward satisfaction of mind' was meant by the declaration 'The poor shall inherit the earth.' I tell you, the scripture is to be really and materially fulfilled...You jeer at the name Leveller. I tell you Jesus

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23 The Clarke Papers, ii, 217 seq. Quoted by James, op. cit., p. 102.
24 See Troeltsch, op. cit., pp. 711-2.
25 James, op. cit., p. 27.

Christ is the head Leveller."[26]

A century before Rousseau's Discourse on Inequality made its appearance, Winstanley examined existing institutions in the light of the principles of Nature and Reason and condemned them as evil. Undoubtedly influenced by the highly self-conscious religion of the Puritan sects, Winstanley disagreed with Rousseau in interpretating the 'natural man' as a direct emanation from God. In the beginning, men were created by God's word, and the word dwelt among them and became their light. "This light I take to be that pure spirit in man which we call Reason, which discusseth things right and reflecteth, which we call conscience; from all which there issued out that golden rule or law which we call equitie."[27] During the Golden Age which followed on the Creation, man had dominion over the beasts of the field, but not over his own kind. In contrast to the cynical account of Hobbes, Winstanley based equality on the common divinity which resided in all men. Private property was unknown in this society, but had its origin in the conquest of the life of the spirit by fleshly lusts.[28] When man "began to delight himself in the objects of Creation more than in the spirit of Reason and Righteousness," the time

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26 The Curse and Blessing that is in Mankind, pp. 41-43, quoted by Gooch, English Democratic Ideas, p. 187.
27 A Light Shining in Buckinghamshire, 1648, E. 475 (11) quoted by James, op. cit., p. 103.
28 See account by Troeltsch, op. cit., pp. 711-12.

was ripe for the work of the encloser.[29]

Such arguments drawn from the more or less rarefied heights of Nature and Reason did not prove to be good rallying cries. In the appeal to all Englishmen to unite in destroying the Norman power, the abstract was made definite and concrete; the theory of a Golden Age and Fall was given English historical clothing. According to Winstanley's account, the Fall coincided with the coming of the Norman Conqueror when the English nation lost its ancient liberties. Norman soldiers were granted land and power, their successors became tyrannical lords of manors, and Norman laws were made to uphold the power which they had usurped. But Charles I's defeat had destroyed the Norman tyranny and power had returned to the people.[30]

In November of 1649 the little Digger colony on St. Geroge's Hill was forcibly dismantled by a group of soldiers acting under instructions from the Council of State. Thereupon Winstanley addressed a long and eloquent letter to General Fairfax and the Council of State. Here for the first time the arguments are entirely devoid of the familiar Digger philosophy of Nature and Reason.[31] The right of the common people to share in the fruits of victory was put on a more practical basis by utilizing a

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29 Quoted by James, op. cit., p. 103.
30 Ibid., p. 103; Gooch, op. cit., pp. 182-3.
31 Gooch, op. cit., p. 185.

contract made between the people and their rulers to throw off the Norman yoke. In the letter Winstanley declared that "everyone without exception by the law of contract ought to have liberty to enjoy the earth for his livelihood, and to settle his dwelling in any part of the commons of England without buying or renting land of any, seeing everyone by agreement and covenant among themselves have paid taxes, given free quarter and adventured their lives to recover England out of bondage."[32] If the Government denied this request, it would have to raise money for the support of the Diggers and the impoverished agrarians; whereas, according to Winstanley, if they were allowed to reclaim the waste land, England would be correspondingly enriched. Moreover, it was a blot upon a Christian nation that there should exist so much waste land and that so many should starve for want.[33]

The utopia outlined in unprecise terms by Winstanley in The Laws of Freedom in a Platform (1652) represents a vague type of communism. Everyone is to work in cooperation at the task of planting and reaping and the fruits of his labors are to be deposited in storehouses, from which individuals may fetch supplies. The question of

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32 A Letter to Lord Fairfax and the Council of War, Harl. Misc., viii, 586, quoted by James, op. cit., p. 104.

33 Gooch, op. cit., p. 186.

education is considered in detail; Winstanley insists that every child must learn some manual trade, as the exclusive devotion to book learning results in presumption and domination. The political apparatus of this utopia is somewhat shadowy and is evidently considered to be of less significance than the social and political organization. Parliament is retained, but more as a court of equity rather than as a legislative assembly. The soldiers are also magistrates and one of their chief duties is the supervision of criminals, who are regarded as erring members of society rather than as outcasts.[34]

It is difficult to estimate the influence or importance of the Diggers, but it is clear that Winstanley should occupy an important place in any history of English thought. Of all his English contemporaries, he alone recognized that the well-being of the proletariat constituted a criterion not only of political, but of social and economic conditions. In so doing he anticipated the modern theories of socialism and communism. He also anticipated these theories in his belief that human nature is capable of transformation if certain social conditions are effected. For our purposes we have been more particularly interested to note that, although on occasion he did for practical reasons make the appeal to the contemporary doctrine of contract, Winstanley's social philosophy was essentially

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34 Gooch, op. cit., pp. 188-90.

medieval, for it arose from a religious world-view which clashed with the growing liberal and secular tendencies of the seventeenth century.

CHAPTER EIGHT

CONCLUSION

The Social Contract theory was a striking way of expressing the relation between the individual and the state. It was one of the theories in which political science has been conditioned by jurisprudence. A contract, in the terms of everyday law, is an agreement freely entered into by two parties in which each of them undertakes to do something on condition that the other also does what he in turn promises. To state the argument for political obedience in the form of a contractual relation between subject and state has the advantage of seeming to reconcile the conflict between the need for obedience and the need for the consent of the governed. If it is by his own promise, explicit or implicit, that the subject is bound, then he may be reconciled to the possibly unpleasant consequences of fulfilling his obligation. Unfortunately, as we have seen, writers of different views built their various

structures on the same scaffolding and thereby proved that the social contract could be made to serve quite divergent uses.

The contract was an explanatory and symbolic fiction rather than an historical event; the essence of the theory was not that there had been, but that the relation of the parties was as though there had been, a contract. There was, moreover, nothing which necessarily indicated who had been the parties, or precisely what had been the terms on which they had agreed. When the theory was first revived in the sixteenth century, the major emphasis was laid upon the mutual character of the obligation. The parties were - supposed to be kings on the one part and their subjects on the other. Whatever the king's promise was, there was some duty which he owed to the subject in exchange for allegiance. Thus there were Huguenot writers under Catholic kings, and likewise there were Jesuit writers under heretical monarchs, who 'proved' that the states which persecuted their friends had broken their agreements and so forfeited the right to obedience. The social contract was therefore a ground for resistance and rebellion. The more extreme of the monarchomachi even went so far as to advocate the right to kill a tyrant. On the Catholic side this doctrine was repudiated as a result of public indignation at the murder by a religious fanatic of Charles' father-in-law,

Henry IV of France. It had a brief rebirth in England when Milton and his fellow republicans had to justify the execution of Charles I.

The shocks of civil war and regicide set men debating about institutions and traditions that had been instinctively obeyed for centuries. The immediate question was: Monarchy or Commonwealth? Although England was a Republic in name for eleven years, this was not the chief political issue of the century. The establishment of the Commonwealth by an armed minority was not so much the result of a reasoned objection to Monarchy as of a practical conviction that the Stuart line was tainted. Despite the support of Milton, the doctrinaire Republicans were isolated in a nation which demanded a Constitution with "somewhat monarchical" in it, whether Protector or King. The great majority of the people accepted Monarchy as the necessary executive of the State. Various limits were set to its powers, but the more fundamental problems were concerned with probing the functions of government as such, whatever form it might take.

Three basic questions were discussed: the origin, the form, and the limits of the powers of the state. Can the rulers demand unquestioning obedience from their subjects, or are their powers derived from the free consent of the people? Should the powers of government be concentrated in the hands of a single

person or body of persons, or should they be divided between independent persons or bodies of persons? Should any ruler or rulers have unlimited powers over subjects, or are there any rights or duties of men which the state cannot infringe upon or limit?

The origin of government was found either in divine command or in human invention. Those who supported divine sanction for the powers of rulers maintained that subjects had a duty of unconditional obedience; monarchy on earth was the pattern of monarchy in heaven. Those who based government on human foundations were divided on the question of obedience. If authority was their objective, they demonstrated the legitimacy of a strong executive from history or nature. Charles I.'s lawyers appealed to legal precedent, Filmer to the patriarchal household, and Hobbes to the egoistic nature of man. They were all united in believing that obedience, which was traditional, was imposed from above and could not be questioned or withdrawn. If, on the other hand, liberty was the objective, the contention was that the state had been established by the agreement of a free people, and that subjects could not alienate their historic and natural right of choosing or changing the rulers they had appointed for their own convenience. This was the view of Milton, Lilburne and the defenders of parliamentary supremacy. In the main, the defenders of absolute monarchy with the doubtful exception of

Hobbes, based government on command, either human or divine, while the advocates of representative government made contract and consent the only valid sources of political power.

In describing the proper form of government the believers in authority naturally insisted that government must be unified to be effective: that "mixed Monarchy" or division of powers led inevitably to anarchy. Hobbes asked: "For what is it to divide the power of a Common-wealth, but to dissolve it; for powers divided mutually destroy each other."[1] He declared without qualification that confusion and rebellion were certain unless all rights were derived from, and revocable by one supreme authority; his fundamental doctrine was the necessity of sovereignty. A united and all-powerful executive alone could save the state from the "fatal diseases of the overmighty subject, the unruly corporation and the interfering Papacy." It is sometimes overlooked that the supporters of monarchy performed a service in stressing the function of the Monarchy as the nation's bulwark against sectional interests and foreign intervention. The opponents of monarchy and absolutism, however, saw its abuses as greater than its uses. They maintained that no man was strong enough to resist the temptation of abusing such concentrated and arbitrary power. Since liberty rather than slavery was their

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1 Leviathan, xxix.

objective, they favored division instead of unity of powers, limitation rather than efficiency of government. The constitutional struggle of the period was mainly an effort to find a fair division of powers between Crown and Parliament which would prevent 'arbitrariness' in either. The constitutionalists, whether oligarchs or democrats, saw in the King, not a 'mortal God' to be worshipped, but a public official to be respected or rebuked as his conduct warranted. Not only Kings were suspect; the defenders of liberty smelled tyranny everywhere. Lilburne, for example, denounced vehemently the tyranny of the Long Parliament. The whole democratic movement of the century, in fact, aimed at a system of checks and balances, whereby the supremacy of the people and the freedom of the individual could be protected against the excesses of their officials and representatives.

The greatest divergence of opinion, however, between the supporters of authority and of liberty developed on the third question - the proper scope of government. The former saw in the state a living force, greater and more significant than the individuals it protected and ordered; it was at one and the same time the guardian and sum total of the happiness of its citizens, and the King was its personified symbol. Their view of the state was organic, paternalistic, and collectivistic. The Divine Right of Kings, from

James I. to Filmer, had its chief strength in the argument that the King was the father of his people. The collectivist or 'totalitarian' character of the state was best described by Hobbes, in defining his Commonwealth, his Leviathan or Mortal God, when he said that it was "more than consent or concord," for it was "a real unity of them all in one and the same person," the Sovereign. Such an ideal of an all-powerful state, with unlimited powers for the public good concentrated in the hands of the Crown, not only failed to do justice to the pride and intelligence of Englishmen, but it failed to take account of the social forces which were making for the development of individualism. Consequently, the absolutist theory fell before the views of those, like the Puritan and the thriving merchant, who distrusted the state as the guardian of the individual and as the complete expression of the life of the community. For them the private individual, not the sovereign, was the basis of society, and government was his servant to preserve his life and goods - his natural rights.

To attain and justify government by consent, these individualists turned to the notion of a primitive agreement between man and man or between the community and its chosen ruler. In so doing they borrowed and developed the chief controversial weapon of the monarchomachi in the sixteenth century. When free men, in the

unknown past, decided to form a community, they appointed officials to protect their pre-existing and inalienable rights; in this theory the state was the product and servant of the individual, and not the individual of the state.

It is easy to antedate the influence of the contract doctrine. It should be remembered that in the first half of the century the opposition to the Monarchy gathered momentum, fought and won on practical and immediate issues. Whatever theory the opposition had, it came from Common Law and Protestant Theology rather than from philosophy. The social contract really appeared as a political factor directly after the end of the first Civil War when the problem of reconstruction divided the victors into rulers and subjects. Lilburne and Winstanley lamented that the new liberty had revealed itself as nothing more than a change of masters. But perhaps it is to the credit of the social contract alone that the persecuting Presbyter did not assume the role of the persecuting bishop, and that the arbitrary Parliament did not assume all the powers of the arbitrary King. The clergy, the Rump and the Protector were never allowed to forget the existence of the inalienable rights of the people. Those rights, to be sure, were often violated or neglected, but they had able and vocal defenders. Consequently the governors had to render lip-service to the rights

of the people and excuse or minimize their infraction. This policy was naturally made easier by the lack of any definition of the term "people." Although the term signified to most Republicans "best people," i.e. people of property, it was capable of expansion. Taken in its most limited scope the term was broader than the ruling oligarchy, and thus it involved some conception of responsibility in the government.

Hobbes was the only thinker who attempted to shape the theory of contract to the needs of absolutism. In contrast to the more individualistic and democratic defenders of the contract doctrine, Hobbes reserved only one inalienable natural right which the Sovereign could not touch - the right to life. Although Hobbes saw fundamentally that Law and government are the necessary guardians of civil liberty, his arguments tended to destroy this insight. He maintained that he had an infallible formula for a strong state. But the fact was that his state suffered from two basic shortcomings. First, no community can endure which is openly built on fear and suspicion. It is difficult to see how society can be established from anti-social instincts. Secondly, since the essential basis of Hobbes' state is not contract, but force, it is imperative that force should be available in unlimited quantities. Hobbes, however, by granting the right of resistance to the rebel and criminal and thereby depriving the state of

the right of life and death, makes his Leviathan weakest at precisely the point where it should have been strongest.

Hobbes then sacrificed the individual in everything except bare life, and yet he did not save the state. The chief virtues of the liberal, individualistic advocates of natural rights are to be seen in their disagreement with Hobbes on the two points of social instincts and the value of force. They rejected Hobbes' egoistic interpretation of human nature and his dogma that government by force was the sole guarantee of the safety of the individual. On the first point, Milton, although he appealed to the mythical rights of his ancestors, in reality directed his arguments to the reasoning power of living men.[2] This was, in part, the result of the Renaissance which had set free a flood of ancient authors and called forth a growing rationalist spirit and of the appeal to what appeared to be "reasonable."

The second point of disagreement with Hobbes is also important. Without a distinction between the state and society freedom is always in danger of being destroyed. If there is no alternative between obedience to the government of the moment and sheer anarchy, Hobbes is probably right in holding obedience the lesser evil.

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[2] See footnote, Supra, p. 54.

If Kings, and magistrates embody the whole of communal life and purposes, the duty of non-resistance is clear. In other words there is no right of conscience. An acceptable theoretical answer to this problem did not appear in the decade with which our study is mainly concerned. It was not until Locke's time that such an answer met with wide acceptance.

It has been the purpose of this study to demonstrate how the idea of contract became the basic doctrinal weapon in the resistance by Parliament to James and Charles. We have seen how once the idea was accepted of a people as a body of persons entitled to certain rights, whether historic or natural, the notion of their denial by a ruling authority at once gave birth to the idea of power as trust, with the inference that when rulers broke the trust their title to allegiance disappeared. In our treatment it has been evident that the idea of contract was an abstract form which could be filled with a variety of contents. On the one side it was filled with absolutism and on the other with constitutionalism. But even the absolutists defended the rights of kings on the grounds of consent, i.e. by making the consent of the father binding on the children. The contractual relation and argument was essentially a rationalist one and therefore we have attempted to trace the growing appeal to rationalistic principles during the decade 1642-52. It has been our

contention that the theory of social contract drew upon the newly developing notions of democracy, individualism, reason and liberty which by Locke's time had become the fundamentals of English middle-class liberalism. For this reason, then, we have tried to keep the formulation of the contract doctrine in its practical context.

Our study has been necessarily confined to the theoretical development of the contract doctrine. This does not imply, however, that the doctrine was without sociological foundations. What was it in economic and social life in 1642-52 that made the contractual relation seem so reasonable and self-evident to certain groups of Englishmen? This is an important question the answer to which requires a careful study in itself. For the present we shall have discharged our responsibility if we have been able to make coherent the development of the structure of the theory itself.

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APPENDIX A

The Subjects Liberty Set Forth in the Royal and Politique Power of England, Printed for Ben: Allen in Popes-head Alley, 1643, page 6:

"....there is a tacite consent in the power, and it is sufficient to administer Justice, and provide for dangers, and an explicite consent is onely necessary to new Laws, and the reason is because with their election by the people, his confirmation is required by his Oath. First, to the Laws made by his Progenitors, which hee sweares to keep in all his publique Judgements. Secondly, to those Lawes that he grants and promiseth to be made by himself, as often as his people shall justly and reasonably chuse them, which out of Parliament they cannot, and therefore confirmation and corroboration, expresseth the Kings consent, as having no part in the Election of Lawes. From whence I gather that the peoples Election at the first made the King, not to make them lawes, but to receive them from their people, and by them to protect them: but first they are to confirm them, and give them all the strength they can; and is this any reasonable plea in Parliament:..."

APPENDIX B

Hunton, Philip, A Treatise of Monarchie, London, 1643, pp. 3-4:

"...some particular men we find whom God was pleased by his own immediate choise to invest with this his Ordinance of Authority: Moses, Saul, David, yea God by his immediate Ordinance determined the Government of that People to Davids posteritie and made it successive; so that that People, after his appointment and word was made known to them, and the room voyd by Sauls death, was as immediately bound by divine Law to have David, and his Sonnes after him to be Magistrates, as to Magistracie it selfe. But God hath not done so for every people: a scriptum est cannot be alledged for the endowing this or that person or flock with soveraignty over a community: They alone had the privilege of an extraordinary Word. All others have the ordinary and mediate hand of God to enthrone them: They attaine this determination of Authority to their Persons by the tacite and virtual or else express and formall consent of that Society of men they governe, either in their own persons, or the root of their succession, as I doubt not, in the sequele it be will made appeare. But let no man think that it is any lessening or weakening of Gods Ordinance in them, to teach that it is annexed to their Persons by a humane Meane: for though it be not so full a title to come to it by the simple Providence of God, as by the express Percept of God: yet when by the disposing hand of Gods Providence a Right is conveyed to a person or family, by the meanes of a publique Fundamental Oath, Contract and Agreement of a State, it is equivalent then to a Divine Word; and within the bounds of that publique Agreement the conveyed power is as Obligatory as if an immediate word had designed it. Thus it appears that they which say there is divinum quiddam in Soveraigns, and that they have their power from God, speak in some sense truth; as also they which say that originally Power is in the People, may in a sound sense be understood...."