CONTRACT LAW AND THE SOCIAL CONTRACT: WHAT LEGAL HISTORY CAN TEACH US ABOUT THE POLITICAL THEORY OF HOBBES AND LOCKE

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Social contract theory has severed its links to basic principles of contract law over the past three centuries. When Thomas Hobbes published Leviathan in 1651, he included a chapter about contract law and built his theory of origins of the state on contract law principles. However, present-day readers have difficulty with the notion of a legally-binding contract of everyone with everyone, of which there is no historical record to which no living person has consented.

I begin with an overview of the ideology of contract law before and during the 17th century and examine the writings of Hobbes and John Locke against this backdrop, focussing on their ideas about what makes a contract binding. I argue that we have difficulty with their theories because of changes in contract law principles. In seventeenth century England, contracts were often seen as assents to relationships having standardized terms set by law and custom, so that an agreement whose terms were set by reason and not negotiated by the parties was a paradigmatic form of contract. Present-day theorists have forgotten the roots of social contract theory even as they revise the theory in order to make sense of it in the new legal context that surrounds them.

La théorie du contrat social a été dissociée des principes fondamentaux du droit des contrats au cours des trois derniers siècles. Lorsque Thomas Hobbes a publié le Léviathan en 1651, il a inclus un chapitre sur le droit des contrats, fondant sa théorie des origines de l'État sur les principes du droit des contrats. De nos jours, un contrat parmi les membres de la communauté, liant chacun d'entre eux, est difficile d'accepter, en considérant l'absence de documents historiques et le fait qu'aucune personne vivante y ait donné son consentement.

Le texte commence par un survol de l'idéologie du droit des contrats avant et durant le 17e siècle et passe en revue les écrits de Thomas Hobbes et John Locke dans cette optique, en cherchant à dégager leurs explications du lien contractuel. L'auteur propose que ces théories sont devenus problématiques en raison de l'évolution des principes du droit des contrat. Dans l'Angleterre du 17e siècle, le contrat était souvent perçu comme le consentement à des relations dont les modalités étaient conformes aux normes établies par le droit et la coutume, de sorte qu'une entente dont les conditions étaient définies en fonction du but recherché, sans être négociées par les parties, constituait un contrat de forme paradigmatique. De nos jours, les anciennes sources juridique du contrat social sont tombés dans l'oubli, même quand les théoriciens s'engagent à l'interpréter dans une contexte juridique qui a changée.

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TABLE OF CONTENTS

I. INTRODUCTION

There is a cultural gap between the disciplines of law and political science, across which the same words and concepts can have very different meanings. The social contract that many political theorists have presented as the conceptual foundation of political society seems, from the viewpoint of an Anglo-American lawyer, to be a very poor excuse for a contract, indeed, one that can be considered a contractual relationship only by a strenuous exercise of the imagination. This paper tries to bridge the gap by showing that both the social contract and the lawyer's definition of a contract have common roots in a substantially different understanding of contract law that prevailed in England at the time social contract theory first became prominent. The divergence between the two views is not just because the two disciplines have evolved independently. Rather, perhaps even without fully realizing it, political theorists have over time established new conceptual underpinnings for the social contract as contract law has moved away from older beliefs.

To demonstrate this point, I provide an analysis of the ideas of contract found in the writings of the two pre-eminent "contractarians" in English political thought, seventeenth century philosophers Thomas Hobbes and John Locke. Both philosophers believed that political obligation is rooted in individual choice manifested in a contract. They maintained that people have an inherent responsibility to live up to their bargains, and that both laws and the government that created them came into existence because of a bargain. Some time in the distant past, in order to ensure the security of their lives or property, the people had agreed amongst themselves to appoint a ruler who would protect them, and they conferred their natural rights and powers of self-governance on him. His successors continue to rule, according to the theory, under the authority of that ancient agreement.

Although widely accepted by seventeenth century theorists, the idea that anyone actually made such a contract sounds absurd today, not just to lawyers but to anyone with even a layperson's understanding of contract law. It seems to defy both common sense and our knowledge of history. We cannot imagine primitive people negotiating the terms of a social contract,[1] or accept that their choices are binding on us.

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[1] Many tribal and archaic societies structured exchange transactions in forms other than contractual relationships, as for example by potlatches and formal gift relationships, suggesting that gift-giving and gift relationships are earlier, and more "natural", than contracts. See R. Posner, "A Theory of Primitive Society, with Special Reference to Law" (1980) 23 J. of Law & Econ. 1 at 18; M. Mauss, "Essai Sur le Don", *Sociologie et anthropologie*, 5th ed. (Paris: Presses Universitaires de France, 1973); B. Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea*, 7th ed. (London: Routledge & Kegan Paul, 1966); J. Landa, "The Enigma of the Kula Ring: Gift-Exchanges and Primitive Law and Order", (1983) 3 Int'l Rev. L. & Econ. 137; M. I. Finley, *The World of Odysseus*, 2d ed. (Harmondsworth: Penguin, 1972) at 49-50, 64-68, 144-46; E.A. Hoebel & K. Llewellyn, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at 171, 226-37, 266-67; K. Polanyi, "Marketless Trading in Hammurabi's Time", in Polanyi et al., eds., *Trade and Market in the Early Empires: Economies in History and Theory* (New York: Free Press, 1957) at 22-23; L. Hyde, *The Gift: Imagination and the Erotic Life of Property* (New York: Random House, 1983); and C. Rose,

Accordingly, many modern-day followers and interpreters of the classic social contract thinkers do not accept this aspect of the theory, either claiming that the social contract was always intended to be a "what-if" experiment rather than a real historical explanation or else simply down-playing its importance.

I set the theories of Hobbes and Locke in their historical context by providing a brief overview of the ideology of English contract law before and during the seventeenth century, focusing in particular on the theories the lawyers and judges of those times had about why contracts should be binding and how the terms of a contract should be determined and applied. Several historians, even those who have argued that social contract theory had its origins in the older, more customary conception of contract,[2] view Hobbes and Locke to be avatars of capitalist market relations and the newer will theory of contract that came with it.[3] I argue, instead, that their theories take for granted many aspects of the older understanding and that, because of this, the theories of Hobbes and Locke made intuitive sense to their contemporaries in a way that they don't make sense to us.

The focus is not on which view of contract is right. One can argue that the choice between them appears to be one of convention rather than natural law, and that both are equally appropriate to ordinary exchange transactions. My focus is, instead, on how a concept which evolved in one particular discipline, long since forgotten or abandoned by that discipline's practitioners, can survive in another field of thought with its original context forgotten. Legal theory contains a number of examples of such fossil relics,[4] leading to speculation that the law is inherently conservative, preserving

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"Giving, Trading, Thieving and Trusting: How and Why Gifts Became Exchanges and (More Importantly) Vice Versa", (1992) 44 Fla. L. R. 295.

[2] P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 36-38; and H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 304-07, 393 and 506-07.

[3] Atiyah, *ibid.* at 41-52, as discussed more fully below.

[4] For example, the legal understanding of probability, as used in talking about the burden of proof in a trial, is a hold-over from a non-mathematical understanding of probability that was used at one time for assessing knowledge in science, religion and historical research. See: B. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships Between Natural Science, Religion, History, Law, and Literature* (Princeton: Princeton University Press, 1983). The M'Naghten definition of insanity, formulated by the English House of Lords in M'Naghten's Case (1843), 14(1) Crim., 8 E.R. 718 (H.L.), has been criticized for having preserved in amber an obsolete conception of the nature of insanity, one appropriate to the psychological knowledge of the mid-nineteenth century but inappropriate and misleading in the light of twentieth century knowledge. See D. Bazelon, "Psychiatrists and the Adversary Process" (1974) 230 Scientific American 18; and, S. Sobeloff, "From McNaghten to Durham and Beyond" in R. Nice, ed., *Crime and Insanity* (New York: Philosophical Library, 1958) at 139. However, one should also note that, although the M'Naghten test had medical advocates in its own time, it was not fully in accord even with nineteenth century medical science. See R. Smith, "The Boundary Between Insanity and Criminal Responsibility in Nineteenth-Century England", *Madhouses, Mad-Doctors and Madmen: The Social History of Psychiatry in the Victorian Era* (Philadelphia: University of Pennsylvania Press, 1981) at 363; and, B.L. Diamond & A. Platt, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey" (1966) 54 Cal. L. R. 1227 at 1248-50.

concepts as its own long after the disciplines that gave them birth have moved on to other things.[5] This paper, however, is about an opposite example; about how a concept that originated in law became preserved in political theory long after the law evolved different ideas, and about how political theorists forgot the roots of the concept even as they faced increasing difficulty trying to make sense of it in the new legal context that grew to surround them.[6]

II. CONTRACT IDEOLOGY BEFORE AND DURING THE SEVENTEENTH CENTURY

Two centuries before Hobbes, in the 1400's, jurisdiction over legally binding agreements was split between various courts, each with their own theories of what agreements should be enforced and why. Commercial relations often fell to be decided by local courts applying local customs, or by merchant courts applying merchant law and the custom of traders.[7] The church courts claimed jurisdiction over people who broke oaths sworn in the name of God, and would try cases concerning legal agreements under that justification.[8]

Only a small part of the court system of that time explicitly derived its power from the Crown. Merchant and church courts applied international law and local and city courts applied their own standards. The royal courts in which the common law was applied, such as the Court of King's Bench, were only one part of a much larger mosaic of interlocking, often competing, jurisdictions.[9]

The common law courts played a more limited role in enforcing contracts than did the other courts.[10] They had three causes of action which we would today consider to be types of contracts: covenant, debt, and detinue. Covenant enforced agreements made under seal. Debt and detinue were concerned with duties that arose when certain transactions were executed on one side but the other side failed to perform. Debt was a

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[5] Compare the discussion of "cultural lag" in appellate court opinions in G. E. White, "The Appellate Opinion as Historical Source Material" (1971) 1 Journal of Interdisciplinary History 491.

[6] Compare the discussion of the "conceptual apartheid maintained between the public and the private half of the contractarian tradition" in J. Boyle, "Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance", (1993) 78 Cornell L. R. 371 at 399.

[7] L. Trakman, "The Evolution of the Law Merchant: Our Commercial Heritage -Part I", (1980) 12 Journal of Maritime Law and Commerce 1.

[8] On the jurisdiction of the mediaeval church courts, see D. Millon, "Ecclesiastical Jurisdiction in Mediaeval England" [1984] U. of Illinois L. R. 621; R. Rodes, "Secular Cases in the Church Courts" (1990) 32 Catholic Lawyer 301; R. H. Helmholz, "Conflicts Between Religious and Secular Law: Common Themes in the English Experience, 1250-1640" (1991) 12 Cardozo L. R. 707; and R. H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian" (1976) 60 Minnesota L. R. 1011.

[9] Berman, *supra* note 2. For Hobbes' explanation of how canon and admiralty law could be part of the law of England in his own time, see T. Hobbes, *A Dialogue Between a Philosopher and A Student of the Common Laws of England*, Joseph Cropsey, ed. (Chicago: University of Chicago Press, 1971) at 62.

[10] J. H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979) at 271.

way of enforcing obligations to pay money or provide fungible goods, while detinue enforced obligations to convey specific items of property.[11] The common law courts would not enforce oral contracts unless they could be considered a form of debt, unlike the fifteenth century courts of Equity, or Chancery, which did enforce at least some other kinds of parole contracts.[12]

Given that we often think about contract as the enforcement of bargained-for mutual promises, it is important to stress that promising was not a central part of the theory behind the common law causes of action. Debt, for example, was an obligation that simply arose out of a certain kind of transaction, such as a sale, without any need for a promise, express or implied.[13] Covenant was binding because of the formality of a sealed document, quite apart from the substance of any underlying exchange.

It is not that people didn't bargain with each other, or that they didn't negotiate binding agreements. Rather, it is that the questions which the law asked in determining whether a bargain was enforceable have changed. Now, we focus on the nature and quality of the individuals' consent and try to determine and interpret the terms to which they agreed, or to which they would have agreed if they had put their minds to it at the time. Then, the common law courts looked first to whether a debt was owing, or whether there was a formal writing under seal. As Arnold puts it, "a debtor simply owed; and not, as we would say, because he impliedly promised to pay, but because of a duty that inhered in that relationship."[14]

Over a period of time from the mid-fourteenth century to the end of the sixteenth the tort of assumpsit, under which one could sue for the enforcement of a promise as such, came to the fore. It began as a remedy against people who had contracted to do something and caused damage by doing it badly. Its range of application was extended over the years, on a case by case basis, gradually becoming a general remedy for breach of contractual performance and leading to a specialized claim for the recovery of money owing under a contract, called *indebitatus assumpsit.* In a landmark case heard in 1602, known as Slade's case, it was decided that assumpsit could be pleaded even in a case that would also fit in the category of debt. Assumpsit moved from being a residual category, applied only to agreements which did not fit the standard categories of the common law, to become a general remedy for breach of agreements.[15]

The importance of Slade's case is that it marks, or symbolizes, a shift in

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[11] *Ibid.* at 266ff. See also A. W. B. Simpson, "Historical Introduction" in M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract,* 12th ed. (London: Butterworths, 1991) c.1.

[12] A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1987) at 276ff.

[13] *Supra* note 10 at 283; L. Wilson, "Ben Jonson and the Law of Contract" (1993) 5 Cardozo Studies in Law and Lit. 281 at 292; and S.F.C. Milsom, *Studies in the History of the Common Law* (Ronceverte: Hambledon Press, 1985) at 195.

[14] M. S. Arnold, "Towards an Ideology of the Early English Law of Obligations" (1987) 5 Law and History Review 505 at 512.

[15] *Supra* note 10 at 285; and B.J. Reiter & J. Swan, *Contracts: Cases, Notes and Materials* (Toronto: Butterworths, 1982) at 2-22 to 2-25. For a detailed account, see *supra* note 12.

common law thinking by which promising becomes central to the making of a contract. This shift had significance well beyond the borders of the legal community; it had an impact on the political negotiations between the King and Parliament, and even on the language of theatre and poetry.[16]

Slade's case is often seen as marking the beginning of a modern theory of contract,[17] but it was only one turning point in a course of evolution that continued for a long time thereafter. The holding in the case was occasionally disputed well into the 1670's,[18] meaning that the changes heralded by the case were still a live issue when Hobbes' *Leviathan* was first published. The major transformations that have defined modern contract law were still to come: Lord Mansfield's attempts to integrate the *law merchant* into the common law did not occur until the eighteenth century, and the will theory of contracts, with its concepts of offer, acceptance and a meeting of minds, did not emerge in the common law until the nineteenth century,[19] a bit earlier in England than in America.[20]

Lawyers now take for granted that a contract is something whose every clause is, or should be, the fruit of negotiation between the parties, arrived at by mutual agreement. That is not the reality of many contracts; but it is the paradigm example, the model of what a contract should be like. Legal thinking about contracts in Hobbes' and Locke's time was very different. Contract was clearly a kind of agreement, in their time like our own, but back then it was commonly an agreement to enter into various kinds of formal relationships whose terms were defined by custom and the courts rather than by the will of the parties. A marriage ceremony could be seen as a form of contract under such a definition, although in our contemporary legal world marriage is seen more as a status or institution than as an actual contract and general contract rules don't apply to it.[21]

Many duties that we now treat as contractual were then formulated in a way that had little to do with bargains or promises. Everyone who practised a particular trade or calling owed identical duties to their clients and customers, as a matter of law rather than contract. As Simpson explains,

> [t]hus the fact that a person was a common labourer brought him within the provisions of the Statute of Labourers, so that he could be compelled to serve whoever offered to retain him, and his wages were fixed by the Justices of Labourers. A common hosteler was under a duty to look after the horses and

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[16] See especially *Wilson, supra* note 13 at 282-83.

[17] *Supra* note 10 at 287; and *supra* note 12.

[18] *Baker, supra* note 10 at 287.

[19] *Ibid.* at 291; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) at 139ff.

[20] *Milsom, supra* note 13 at 194-95.

[21] Although in many jurisdictions parties can draw up marriage contracts which are in addition to, rather than a part of, the marriage ceremony. In Jewish and Muslim tradition, the parties sign a written marriage contract. In California, when interracial marriages were illegal, at least one Chinese-Caucasian couple wed by means of a formal business contract. See E. Tallent, "Chinese Roots" *The New York Times Book Review,* Lisa See, rev. (27 August 1995) 20. On the marriage contract in Iranian law, see Z. Mir-Hosseini, "Women, Marriage and the Law in Iran" in H. Afshar, ed., *Women in the Middle East: Perceptions, Realities and Struggles for Liberation* (New York: St. Martin's Press, 1993) at 61ff.

> goods of his guests, and was liable if they were lost through the default of himself or his servants. He must provide food at the market price. He was also bound to receive guests and their horses.... His liabilities were balanced by the lien he enjoyed over guests' property to secure payment of his charges. A common victualler must sell food in the market at market price if offered ready money; the food he sold must not be corrupt.... A gaoler who kept a common gaol was bound to receive certain classes of prisoner, must provide the prisoners with food and act as surety ... if a prisoner escaped from the gaol.[22]

These ideas about what later became known as the "common callings" persisted long after mutually bargained-for promises began to take center stage in theories about the enforcement of contracts. As Atiyah puts it in his discussion of the transformation of the common law in the eighteenth century:

> On the one hand, there were these newer notions about the inherently binding nature of promises, but at the same time there were still the traditional ideas in which promises were neither necessary nor sufficient conditions for obligations. In this older scheme, duties arose out of relationships or transactions; even where the relationship or transaction was itself a consensual one, such as a simple sale, the obligations that arose out of the transaction were, in a sense, the consequence of the law, not simply of the parties' intentions. A sale, for example, created a debt, but although it was the act of the parties which created the sale, it was the law that created the debt. Similarly, a contract of service might be created by the voluntary acts of the parties but most of its incidents were fixed by the law.... And then, of course, there were the cases concerning the common callings in which even the creation of the obligation was far from voluntary.[23]

The common callings to which Atiyah refers are said to have included common carriers, innkeepers, surgeons, apothecaries, lawyers, commodities brokers, veterinary surgeons, blacksmiths, barbers, bailees and employees in a master/servant relationship.[24]

It was not accepted that the people who followed these callings could over-ride by agreement the terms imposed by law or custom even as late as the nineteenth century. For example, common carriers were not allowed to contract out of their strict liability for the safe transit of goods until the beginning of the nineteenth century,[25] at the earliest.[26] Before then, the law accepted that different legal relationships and transactions had their own specific rules, flowing from the nature and purpose of the transaction rather than from terms agreed upon by the parties involved.

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[22] Simpson, *supra* note 12 at 231-32 [footnotes omitted]

[23] Atiyah, *supra* note 2 at 141-42.

[24] *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority* [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577 (S.C.C.) at 606-08. [hereinafter *BG Checo* cited to D.L.R.] On how feudal ideas about master-servant relationships governed employment relationships in the United States until the end of the nineteenth century, see K. Orren, "Metaphysics and Reality in Late Nineteenth-Century Labor Adjudication" in C. L. Tomlins & A. J. King, eds., *Labor Law in America: Historical and Critical Essays*, (Baltimore: John Hopkins University Press, 1992) at 160.

[25] M. J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977) at 204.

[26] *BG Checo, supra* note 24 at 608.

III. THOMAS HOBBES

At first glance, the analysis of contract found in Thomas Hobbes' *Leviathan*,[27] first published in 1651, seems relatively modern. Like present day contract theorists, he defined a contract as a kind of mutual agreement, a voluntary act of the will, and maintained that a person cannot be bound by a contract unless he or she has chosen to be bound. This has led legal historian P. Atiyah, among others, to identify social contract theory with the then just emerging will theory of contract law. Strongly influenced by the writings of C. B. MacPherson, Atiyah sees the theories of both Hobbes and Locke as part of the transition from an understanding that relationships should be based on naturally existing rights and duties to one in which relationships are based on free will.[28]

Yet, although Hobbes started from the premise that contractual duties are grounded in free choice, he reached a very different conclusion. It was this about-face that allowed him to assert the existence of the social contract, and to deduce the terms it must contain. It was also, I will argue, the characteristic of his theory that best demonstrates the closeness of his thinking to seventeenth century common law contract ideology.

Hobbes defined a contract as "the mutual transferring of right."[29] However, since it was a foundation block of his theory that people had full rights of self-governance until they ceded those rights to another, he had to reconcile a belief that contract is a way of obtaining rights with his belief that each individual is already born with a right to do anything he or she wishes. He did so by saying that contract is not about acquiring rights, but renouncing them: "...he that renounces or passes away his right gives not to any other man a right which he had not before - because there is nothing to which every man has not right by nature - but only stands out of his way, that he may enjoy his own original right without hindrance from him, not without hindrance from another."[30]

Two people each giving up different rights, one to the other, are making a contract. The words they use, or the form, doesn't matter, so long as they have the intention to make the agreement. By definition, contracting is a voluntary act. A sign of a contract "is whatsoever sufficiently argues the will of the contractor."[31]

For Hobbes, the "glue" that bound two contracting parties together and made their agreement binding, was the fact that a promise or choice had been made. There

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[27] T. Hobbes, *Leviathan Parts I and II*, H.W.Schneider, ed. (Indianapolis: Liberal Arts Press, 1958). [hereinafter *Leviathan*]

[28] Atiyah, *supra* note 2 at 41. Macpherson is cited by Atiyah on pages 42, 49, 70, and 71. Atiyah recognizes that men of the eighteenth century would be more receptive to a belief in social contract theory than we are today in part because consent, as such, played a less dominant role in contractual thinking then than it does now at 36-38. However, this insight plays no part in his interpretation of Hobbes and Locke, who he tends to see as heralds of bourgeois economic liberalism at 42 and 70.

[29] *Leviathan, supra* note 27, c. XIV at 112.

[30] *Ibid.* c. XIV at 111.

[31] *Ibid.* c. XIV at 113.

was no need for consideration, part performance, or the receipt of a benefit.[32] For example, he believed that a declaration of a gift or a promise to give, even in the absence of consideration, could be binding, as "free gift" or "grace".[33] In discussing contracts where a promise to pay is made only after the benefit is received, Hobbes does not root the obligation in the fact of having received and accepted the benefit, although this would have been consistent with both a formalist definition of contract and the nature of the old common law action of debt. Instead, he roots the obligation in the fact of having made the promise.[34] Similarly, in his discussion of covenants made out of fear, he treats the contract as coming into being with the making of the promise.[35] He describes performance of a covenant as "keeping of promise or faith", and the voluntary breach of covenant as "violation of faith."[36] Custom is seen as a natural sign of the will, binding in the absence of expressed intention on the ground that, if someone who knew of the custom had willed otherwise, they could easily have declared their will.[37]

Hobbes could not, however, have believed in a pure will theory of contracts, at least not when it came to the social contract. If Hobbes believed that contracts were pure expressions of the will of the parties, he would have been hard-pressed to show that governmental power originated in a transfer of rights from the people, or that all citizens were contractually bound to respect the will of the sovereign. If a social contract such as his theory describes was ever made, it was made long before written history began. How can we say that our ancestors ever took part in such a contract? Even if they did take part, why should their promises bind us? Hobbes did not answer these questions by saying that the obligation flows from the consideration or benefits that we receive by being part of society. Nor did he point to any examples of historical agreements on which governments were founded, although accounts of such agreements were available to him.[38] Instead, he dealt with the problem by maintaining that it is a law of nature that people must enter into the social contract. It is the way Hobbes travels from a promise-based theory of contracts to a formalist definition of the terms of the social contract that ties him most closely to the evolving contract law of his era.

"Law of nature" means something different to Hobbes than it does to others. For most natural law theorists, "natural law" carries with it a sense of what is right and

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[32] For an opposing interpretation, arguing that for Hobbes the binding force of a contract comes from an exchange of consideration and that the promise is purely evidentiary, see I. Ward, "Thomas Hobbes and the Nature of Contract" (1993) 25 *Studia Leibnitiana* 90. My reasons for rejecting this interpretation are given in the text immediately below.

[33] *Leviathan, supra* note 27 at 113-14. For Hobbes, promises to make a gift were not binding if simply an expression of an intention to give in the future, but a bare statement that the gift was being made now for delivery tomorrow was binding, as was a promise to give a prize to the winner of a race.

[34] *Ibid.* at 114.

[35] *Ibid.* at 114: "If I be forced to redeem myself from a thief by promising him money, I am bound to pay it until the civil law discharge me."

[36] *Ibid.* at 113.

[37] *Ibid.* c. XIX at 161.

[38] See section 5, below, for a discussion of Biblical and feudal precedents.

just for us to do, something that can be and often is opposed to our baser instincts. It was, for many people of Hobbes' society, the law of God, something higher and nobler than the laws of humanity. These connotations of the phrase only lead to confusion when reading *Leviathan.* Hobbes' laws of nature are closer in form to scientific laws about behaviour; they are his observations about human nature, combined with rational arguments about what behaviour would best serve to satisfy people's natural needs and wants. They are the laws of God in that God created the human race with these kinds of behaviours.[39] The cornerstone of Hobbes' explanation of contract, that in a state of nature anyone had a right to do anything, was not based on any moral right, but rather on the fact that there was no overwhelming authority such as government to stop anyone from doing anything.

The essence of the law of nature is, for Hobbes, self-interest. We do what is necessary to survive.[40] He maintained that the natural condition of humanity is a "war of everyone against everyone", in which "there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily allows men to live."[41] From these principles he derives his first law of nature: "that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war."[42] It is his second law of nature, derived from the first, which requires people to enter into the social contract: "that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down his right to all things, and be contented with so much liberty against other men as he would allow other men against himself."[43]

Notwithstanding his definition of a contract as a voluntary act, evidenced by signs indicating the contractors' will, Hobbes deduces the terms of the social contract by reasoning about what people must rationally do rather than from empirical evidence. People must have agreed to confer all their power and strength on a sovereign without reservation, because that is the only way they can be protected against the invasions of foreigners and the attacks of each other.[44] They agreed to choose a sovereign by majority vote, and are obliged not to withdraw from the Commonwealth they have created or submit to the will of another sovereign, because that would be an injustice and contradict the absolute grant of power they had to have made.[45] Because the contract is amongst citizens to create a sovereign, and the sovereign is not a party to it,

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[39] *Leviathan, supra* note 27 c. XIV at 117. See also M. Lessnoff, *Social Contract* (London: Macmillan, 1986) at 53-58. Most commentators would agree with D. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969) at 98 that "the Hobbesian 'moral' system is nothing more than a system of common, or universal, prudence." For an opposing interpretation, giving a religious conception of Hobbes' laws of nature, see A. P. Martinich, *The Two Gods of Leviathan: Thomas Hobbes on Religion and Politics* (Cambridge: Cambridge University Press, 1992) at 71ff.

[40] *Leviathan, supra* note 27 at 109 -10.

[41] *Ibid.* at 110.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.* at 142.

[45] *Ibid.* at 143-144.

he cannot be bound by the contract, and his power is not restrained by any obligations owed by him to his subjects.[46] Hobbes goes on to elaborate many other terms of the contract - that, for example, sovereigns have the right to censor books and speech[47], and that citizens are released from the contract when the sovereign can no longer serve his purpose of protecting them[48] - on the basis of what logically follows from the original purpose of the contract.

If this were a contract whose terms were actually negotiated amongst the people in some distant historical past, such arguments would have little substance. In real negotiations, people do not always arrive at the best terms for themselves. They are inconsistent, they make mistakes, they fail to recognize where their own interests lie, and they are not perfectly rational. These objections, however, are of no concern to Hobbes. He has gone from saying that a contract is a voluntary act, proved by signs of the contracting parties' wills, to describing a contract into which the law of nature dictates that everyone must have entered and whose terms are demonstrated by reason rather than by evidence.

IV JOHN LOCKE

John Locke's *Two Treatises of Government*, which first appeared almost 40 years after *Leviathan*, makes the same shift. Locke first argues that the social contract is a result of actual historical choices, only to then elaborate its terms as if they were dictated by reason.

Locke devoted little space to explaining why contracts are binding. He simply accepted that men had a responsibility to keep their promises, justifying it on empirical information about behaviour. In contrast to Hobbes, who tried to argue the point from first principles, Locke devotes less than a paragraph to the issue.

> ... other Promises and Compacts [apart from the social contract] Men may make one with another, and yet still be in the State of Nature. The Promises and Bargains for Truck, &c. between the two men in the Desert Island, mentioned by *Garcilasso De la Vega*, in his History of *Peru*, or between a *Swiss* and an *Indian*, in the Woods of *America*, are binding to them, though they are perfectly in a State of Nature, in reference to one another. For Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society.[49]

Like Hobbes, Locke maintains that government was created by a compact amongst men in the state of nature, "agreeing together mutually to enter into one Community, and make one Body Politick...."[50] As with Hobbes, this could only have been done by a voluntary act. No one can be "subjected to the Political Power of another, without his own *Consent*"[51]; "the *beginning of Politick Society* depends upon

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[46] *Ibid.* at 145. For the different views of modern anthropologists, see *supra* note 1.

[47] *Ibid.* at 147.

[48] *Ibid.* at 179.

[49] J. Locke, *Two Treatises of Government*, 2d ed. by P. Laslett (New York: New American Library, 1965), Book II, c. 2, para. 14. This and all further quotes are from the revised critical edition.

[50] *Ibid.*

[51] *Ibid.* at c. 8, para. 95.

the consent of the Individuals...."[52]

It is difficult to be clear about what Locke meant by "consent". Locke's philosophy was often inconsistent,[53] on this point particularly so.[54] However, although he never defined his terms with the fastidiousness of Hobbes, we know that he distinguished between tacit and explicit consent to the social contract. Express consent binds one to the laws of the Commonwealth and makes one a member of it. The person who has given consent in this manner no longer has the right to withdraw from the Commonwealth or to join another. Tacit consent, on the other hand, binds one to the laws of the Commonwealth but does not create membership in it, and leaves one free to join or create another. Consent is tacitly given when one takes the benefit of the laws, services and protection of the Commonwealth, even to the most minor extent; simply setting foot on the public highway is enough.[55]

Accordingly, in Locke's theory, consent to the social contract does not necessarily mean actual consent to its specific terms. Instead, a person who derives the benefit of the contract in even the smallest degree is taken to have consented to it, even though the terms of the contract are not expressions of his or her will.

Locke acknowledges that there is no historical record of Britons entering into a contract to appoint a sovereign.[56] Like Hobbes, he deduces the terms of the social contract by reference to the ends which the contract is intended to serve. Because, he writes, "no rational Creature can be supposed to change his condition with an intention to be worse ... [the power of government] can never be supposed to extend further than the common good, but is obliged to secure every ones (sic) Property..."[57] This means, for him, that the social contract requires established laws made known to the people, impartial judges to apply the laws, and that the government employ force only according to the laws.[58] Necessary terms of the contract include, for example, that there can be no taking of property without consent[59] and that the legislature cannot sub-delegate its power to others.[60]

Although the purposes they conceive men to have had for entering into the social contract are different, and the terms they deduce for the contract even more so, Locke and Hobbes are alike in at least one respect. Both begin by saying that contracting is a voluntary act, one requiring consent, and then go on to deduce the terms of a contract by the use of reason, without any evidence of what the people who had entered into the contract actually agreed to.

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[52] *Ibid.* at c. 8, para. 106.

[53] *Ibid.* at 94.

[54] For discussions of what Locke meant by consent see, among others, M. Lessnoff, *Social Contract* (Basingstoke: Macmillan, 1986) at 66; J. Dunn, *The Political Thought of John Locke* (London: Cambridge University Press, 1969) at 134; and A. J. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, N.J.: Princeton University Press, 1993) at 80-90.

[55] Locke, *supra* note 49 paras. 119-22.

[56] *Ibid.* at paras. 100-101.

[57] *Ibid.* at c. 9, para 131.

[58] *Ibid.*

[59] *Ibid.* at paras. 138-39.

[60] *Ibid.* at para. 141.

V THE TRUTH OF THE SOCIAL CONTRACT: MYTH, HISTORY, OR THOUGHT EXPERIMENT?

Those trying to understand and apply social contract theory in the twentieth century have followed two main paths. The first has been to say that the social contract is meaningful even if it lacks historical truth. The other involves moving the making of the contract forward in history, to a time when civil society and government already existed, treating documents such as a written national constitution as social contracts. One path preserves the foundational nature of the contract by sacrificing its claim to historical reality. The other preserves the historical quality of the contract by diminishing its explanatory value, discarding the idea that it is at the foundation of all other legal and social relationships.

On the first path, the social contract is understood to be an "idea of reason,"[61] a theoretical construct that can improve our understanding of society or guide us in deciding what society should be like. For example, John Rawls maintains that the social contract idea has moral value, even though no-one ever actually entered into such a bargain. Rawls uses it to conduct a kind of thought experiment, imagining the kind of political scheme a group of people would agree on if they were utterly incapable of knowing what role they would then have to play in that society, whether they would be rich or poor, male or female, dark-skinned or light. Rawls believes that such an experiment would generate a fair society, based on just principles, and therefore that people who care about creating a just society can learn from the experiment.[62] Similarly, some philosophers, called contractualists or contractarians, define right and wrong according to hypothetical agreements about morality that reasonable people would reach.[63]

For others, the value of the social contract is logical rather than moral. The thought experiment, they hold, demonstrates the logically-necessary relationships between the origins or nature of political institutions and the duty of obedience.[64]

Some have argued that Hobbes and Locke understood their social contracts to be as much a fiction as Rawls does his. Gregory Kavka writes that:

> [l]ike certain modern writers, for example John Rawls, Hobbes is essentially a hypothetical contract theorist. For him, the social contract is not an actual historical event, but a theoretical construct designed to facilitate our understanding of the grounds of political obedience.[65]

Similarly, Geraint Parry maintains that Locke's social contract is rationalist and conceptual, not historical. In his opinion, the historicity of the contract is not necessary to Locke's case.[66] For many modern day interpreters of Locke, "the idea of the compact has come to be recognized as an expository device, as a way of saying that society

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[61] In Kant's phrase, quoted in Lessnoff, *supra* note 54 at 90-91.

[62] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).

[63] See *e.g.* D. Gauthier, *Morals By Agreement* (Oxford: Oxford University Press, 1986).

[64] M. Seliger, *The Liberal Politics of John Locke* (London: Allen & Unwin, 1968).

[65] G. Kavka, *Hobbesian Moral and Political Theory* (Princeton, N.J.: Princeton University Press, 1986) at 22.

[66] G. Parry, *John Locke* (London: Allen & Unwin, 1978).

cannot exist unless its members act as if they had negotiated a contract."[67]

Others disagree. For them, the theories of Hobbes and Locke would be meaningless without a belief in an actual consent to government. As Gordon Schochet explains with regard to Hobbes,

> [t]he central axiom of Leviathan... is that political obligation is a product of personal will, that it is consent or agreement that actually ties one to the sovereign ruler. It is the burden of the book to demonstrate to people that they have already consented and are obliged to the regime and to provide them with reasons grounded in personal commitment, self-interest and rationality for accepting and acting on their obligations.[68]

John Simmons rejects the "hypothetical contractarian reading of Locke" because:

> that interpretation simply cannot be rendered consistent with the many passages in Locke in which he stresses his interest in the *actual, personal* consent of each individual subject - not the consent of the subject's parents, the majority of subjects, the people as a whole, some ancient historical consent, the hypothetical consent of a rational person, or the subject's disposition to consent.[69]

The other path, taken by those who insist on the historicity of a contractual relationship among members of society, is to drop the belief that the social contract created civil society *ab initio* and instead to study actual historical contracts, ones entered into in the context of a pre-existing civil society but which created new institutions and political structures. On a local, or sub-state level, scores of religious communes, labour unions, condominium corporations and other institutions have adopted a constitution and require all new members to formally assent to this social contract when they join.[70] On the state level, the theory takes the form of modern constitutionalism, describing how people already existing in civil society agree, either directly by referendum or indirectly through their representatives, on a civil constitution which then becomes the law of the land.[71]

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[67] Seliger, *supra* note 64 at 224-25.

[68] G. Schochet, "Intending (Political) Obligation: Hobbes and the Voluntary Basis of Society", in Mary Dietz, ed. *Thomas Hobbes and Political Theory* (Lawrence, Kansas: University Press of Kansas, 1990) at 57; see also J Wolff, "Hobbes and the Motivations of Social Contract Theory", (1994) 2 Int'l. J. Philosophical Studies 271.

[69] J. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993) at 206; and see also Seliger, *supra* note 64 at 224-25.

[70] Founding covenants of several nineteenth century religious communes are reprinted in the Appendix to W.A. Hinds, *American Communities* (Oneida, N.Y.: Office of the American Socialist, 1878) at 165-167. On the Basis of Union of the United Church of Canada, and the contractual underpinnings of church organizations in general, see J. Kary, "From Bonnets, Ruffles and Slavery to Sexual Abuse: the Jurisdiction of the Methodist Church and the United Church of Canada over Secular Matters", in Outerbridge *et al.*, eds., *Ecclesiastical Minefields* (Toronto: Or Emet Publishing, 1994) at 31, 41ff. On how the jurisdiction of labour unions over their members is based on contract law principles, see *Re: Rees and United Association of Journeymen etc., Local 527* (1983), 43 O.R. (2d) 97, 150 D.L.R. (3d) 493 (H.C.J., Div. Ct.).

[71] The features of modern constitutionalism are described in J. Tully, *Strange Multiplicities* (Cambridge: Cambridge University Press, 1995) at 62-70.

The constitutionalist approach to social contract theory would have been very familiar to Hobbes and Locke. It was characteristic of the oldest historical models of a social contract about which they would have had knowledge, those found in the Bible. The covenant between God and Abraham in Genesis is made in the context of an existing social and legal framework, one in which contracting is an established part of civil and commercial law. Successive covenants, including the covenant at Mount Sinai in which the written law is given to the Hebrews, the later contract in which the twelve tribes of Israel re-establish and redefine their confederacy, and the contract in which the Israelite monarchy is established, all added to the law while building on existing civil law.[72] Similarly, many of the major cities of Europe were founded by formal collective oaths, in which the citizens of the city swore to live by its charter.[73]

Such precedents would, however, have been of little use to Hobbes and Locke. One of the purposes of Hobbes, in particular, was to establish civil law as a creation of the state, and to make the common law subordinate to state power.[74] He would have been unable to accept an approach such as the Biblical one, according to which the social contract was itself grounded in civil law. To assert the primacy of his social contract he had to push it back to prehistory and the establishment of society.

For a present-day reader, accepting the hypothetical social contract means abandoning any claim to actual historical validity; the social contract may still have logical necessity or moral value, but we can no longer claim that people actually chose to consent to it. Conversely, if we wish to preserve its claim to historical validity, we have to abandon the claim that it explains all forms of political obligation.

Seventeenth century readers, however, do not seem to have recognized this dilemma. The historicity of the social contract has been an issue for social contract thinkers since the eighteenth century,[75] but was not a major problem for Hobbes' and Locke's contemporaries. We see a social contract made in the state of nature as being almost a contradiction in terms; but, back in the seventeenth century, Hobbes' and Locke's critics were far less concerned about this issue.

Some seventeenth century critics, it is true, did argue that the social contract was unreal. George Lawson dismissed Hobbes' contract as "but an Utopian fantasy", saying that as far as "the covenant of everyone with everyone, it is a mere chimera -

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[72] On Biblical covenants, see D. J. Elazar, "Covenant as the Basis of the Jewish Political Tradition", in D. J. Elazar, ed., *Kinship and Consent: The Jewish Political Tradition and Its Contemporary Uses* (Washington: University Press of America, 1983) at 21; D. McCarthy, *Treaty and Covenant: A Study in Form in the Ancient Oriental Documents and in the Old Testament,* rev. ed. (Rome: Biblical Institute Press, 1978); M. Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford: Clarendon Press, 1972); J. Kary, "'Ask Me Ever So Much And I Will Give It...': A Biblical-Era View of Contracts" (1997) 28 Ottawa L. Rev. 267; and M. Walzer, *Exodus and Revolution* (New York: Basic Books, 1985) at 71-98.

[73] Berman, *supra* note 2 at 393.

[74] On Hobbes' opposition to a belief in the autonomy of the common law from state power, see generally Hobbes, *supra* note 9 at 10 and *passim.*

[75] Lesnoff, *supra* note 54 at 86-97; J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992) at 253-258.

there never was any such thing."[76] Sir Robert Filmer criticized Hobbes on similar grounds, asking "[w]as a general meeting of [a] whole kingdom ever known for the election of a Prince?" He thought it impossible for a large group ever to agree on anything like a social contract, "though all men should spend their whole lives in nothing else but in running up and down to covenant."[77] However, these critics were exceptions. Most political theorists of the time accepted a literal interpretation of the social contract.[78] As Gough explained, "[t]he state of nature and the whole concomitant apparatus of natural rights and the social contract was the regular stock-in-trade of the political writers of [Locke's] age. He adopted all this because he could hardly help doing so, and because it was what the readers of political treatises expected and accepted."[79]

VI THE SOCIAL CONTRACT AND THE LAW

Why is it that so many seventeenth century writers accepted a literal social contract theory so readily, while modern theorists seem embarrassed and uncomfortable with it? Some believe it is because people in our time have a more realistic sense of the past than the people of the seventeenth century.[80] Back then, anthropology and archaeology did not even exist as scholarly disciplines, and understanding of prehistory was extremely limited. Yet this cannot be the whole explanation. As Lawson and Filmer had been quick to point out, a formal negotiated social contract makes little sense, in any era. One did not need an historical consciousness to realize that such a contract was too unlikely and impractical to be believed.

I would put forward another explanation: that the gap in thinking between Locke's time and our own can in part be explained by differing theories about contractual obligation. A "hypothetical contractarian" model suits an era in which it is believed that a contract is a meeting of minds, the outcome of a process of negotiation in which both sides come to an agreement on all the terms that are to govern their behaviour. If that is how one defines contracts, then a social contract can be no more than a "what if?" experiment. But such a theory of contract is far from universal; as discussed above, it did not exist in the late Middle Ages, at least not in the common law courts, and was just emerging at the time when Hobbes and Locke were working out their theories of government. When ascertaining the terms of legally-binding agreements, the English courts of the Middle Ages and the early modern era put far less emphasis on negotiation and bargaining, and were far more ready to decide the terms that a contract should have according to custom and the nature of the contract.

Hobbes and Locke explained their social contracts, not as if they were a

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[76] G. Lawson, "Examination of the Political Part of Mr. Hobbs (sic) his Leviathan, 1657" quoted in J. Bowle, *Hobbes and His Critics; a Study in Seventeenth Century Constitutionalism* (London: Frank Cass & Co., 1969) at 90, 92.

[77] R. Filmer in P. Laslett, ed., *Patriarcha and Other Political Works* (Oxford: Blackwell, 1949), quoted in Lessnoff, *supra* note 54 at 85.

[78] Bowle, *supra* note 76 at 90.

[79] J. W. Gough, *John Locke's Political Philosophy*, 2nd ed. (Oxford: Clarendon Press, 1973) at 77.

[80] Lessnoff, *supra* note 54 at 97; and Bowle, *supra* note 76 at 90.

meeting of minds, but as a formal relationship whose purpose dictated its nature and features. The terms of the contract come from its nature, and what reason tells us the parties would have agreed to, rather than from any historical record; and, at least for Locke, it is binding on us because of the nature of our relationship with society rather than as a pure expression of our will. Consent is still an important element, the one which gives the contract its moral authority; but the consent is to a specific kind of relationship defined by logic, rather than to the letter of an agreement.

All this is very similar to the way a lawyer of their time would have viewed an ordinary commercial contract. One chose to lodge at an inn, for example, so the contract was consensual; but the duties the innkeeper and guest owed to each other were defined by the customs and law concerning inn-keeping. A couple chose to marry each other; but the mutual duties of a husband and wife were the same for all married couples. A common carrier and his customer entered into a contract through an act of the will, but they could not choose to over-ride the carrier's duty for the safe transit of goods.[81]

In practice, today, there are many contracts that are similar. The mutual duties between landlord and tenant, for example, are in many jurisdictions set out in a statute and cannot be over-ridden by contract. There are many other contracts - between customer and public utility or between lawyer and client, contracts for the sale of goods and a host of others - whose terms are dictated by legislation or professional codes. So many types of contracts have their terms set in this manner that it has led one commentator to conclude that:

> [t]he result... has been to leave classical [nineteenth century] contract law still standing, but as a residuary body of rules, of little application in practice. What began by being the *general law* of contracts has (it seems) become the 'law of left-overs, of miscellaneous transactions, the rag-bag and bob-tail which do not get treated elsewhere.' Even in the case of straightforward commercial transactions between commercial organizations, the development of standard business forms... has left the classical model much shaken. Freedom of contract remains in theory the fundamental basis of the law, while in practice it has been eroded, and as a value it has been rejected.[82]

Our theory of contracts is very different from the time of Hobbes and Locke; perhaps our practice is less so.

We should not expect the social contract as described by Hobbes and Locke to have seemed unusual to their contemporaries. Locke's argument that walking on a public highway was enough to make one a party to the contract with the sovereign[83] seems almost facetious to us, but it made sense in an era where contract was understood as involving a set of formal rules that come into play for everybody who enters into a certain kind of relationship. To us, the social contract is a very unusual kind of contract; to Hobbes and Locke, it would have seemed typical of the contracts of their time.

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[81] See Section II above.

[82] Atiyah, *supra* note 2 at 687. For an opposing view, see C. Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981).

[83] Locke, *supra* note 49 at para. 119.

VII CONCLUSION

Locke, Hobbes and their contemporaries have been described as lacking a historical consciousness.[84] They were willing, so it is maintained, to accept the validity of a historically implausible social contract because they didn't understand how different their ancestors' way of looking at the world was from their own. Whatever the merits of such an argument may be, a reading of legal history suggests that twentieth century interpretations of Hobbes and Locke are vulnerable to the same accusation.

It is true that if we define a contract in twentieth century terms, the social contract theories of the seventeenth century are as historically implausible as their critics have painted them. Our contemporary paradigm holds that contracts are the product of the wills of the contracting parties and, in comparison with Locke and Hobbes, takes this principle to an extreme. It holds that a contracting party doesn't just choose to enter into the contract, but also chooses each and every term of the contract. That obviously didn't happen with the social contract; so we are forced into rationalizations, such as that these are the terms that one would have to choose if one was rational, or else we have to treat the making of the contract as a useful fiction. Yet, if we view the contract from the perspective of seventeenth century legal ideology, we no longer have to introduce these justifications. In that era, legal theory placed far less emphasis on negotiation. The mutual obligations of parties to an agreement then were more often defined by custom and by law, and by what it would be fair and reasonable for two parties in that kind of relationship to do. In the seventeenth century, one could agree to a sale, and be bound by all the rules that flow from the nature of a sale contract, whether one knew about them or not. One could agree to marry and so become governed by all the rules surrounding the institution of marriage, or one could choose to enter into a contract for services and so be bound by those of its incidents fixed by law.[85] Similarly, according to Hobbes and Locke, people who formed a community or chose to enter into an existing community were bound by the rules that would naturally flow from that relationship. Consent to those rules may have been a fiction, but if so it was the same fiction that one could find in ordinary commercial contracts.

Once we start seeing a contract as a relationship instead of a meeting of minds, the idea of a real binding contract which was never negotiated or signed and to which people are bound simply by being citizens of a country no longer seems like a contradiction in terms. Legal history gives us a model of how Hobbes and Locke would most likely have viewed their theories, in the context of the legal system in which they lived. Within that context, their theories cohered far more readily than we can recognize today.

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[84] Lessnoff, *supra* note 54 at 97; and Bowle, supra note 76 at 90.

[85] I leave aside the question of whether modern law is different in practice or only in theory; but see, *inter alia*, Atiyah, *supra* note 2 at 687.