

The Implicit Teaching Of Utopian Speculations: Rousseau's Contribution To The Natural Law Tradition

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I. INTRODUCTION

Legal philosophers, especially of the positivist variety, traditionally have assumed that the proponents of natural law theory present too facile an answer to the vexed question of whether an unjust law can be said to exist when it is duly sanctioned by legal and political authority. If not disappointed by the answer itself, they have been most unhappy with the explanation that accompanies it and, indeed, are prepared to challenge the very foundations of a theory of law which pays so little heed—either empirically or in terms of pure logic—to the actual operations of existing legal systems. Kant initiated the rebellion against the law-morality equation by distinguishing them as two separate spheres of activity.¹ Subsequent philosophers, thanks to the analogy between legal rules and the rules of a game, inaugurated the movement towards the purely systemic analysis of law.²

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1. See J. NEWMAN, CONSCIENCE VERSUS LAW 96 (1971). Kant's formal distinction between law and morality consisted in characterizing legality as the "accommodation *inter se* of the external liberty of men in community" and morality as the "regulation *intra se* of the *internal* liberty of the *individual* man by way of the dictates of his private conscience." *Id.*

2. One of the early advocates of positivism, the view of law which defines legality not as the conformity of laws to transcendent principles but rather as the expression of the essential operative features of the legal system, was John Austin. In his *Lectures on Jurisprudence*, first published in 1869, he defined law essentially in terms of reason and physical force: law is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." J. AUSTIN, LECTURES ON JURISPRUDENCE, pt. I, lec. I, sec. 2 (R. Campbell ed. 1875). The notion of law as a rule functioning within a neatly defined system laid the groundwork for the more modern positivist assessments of law, *i.e.*, the appraisal of legal phenomena in terms of a system of logically contrived rules, the operation of which is distinct, although not necessarily different, from considerations of morality. See, *e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H. HART, THE CONCEPT OF LAW (1961). American legal realists also were drawn to this type of systemic analysis, although in a less sophisticated way. See, *e.g.*, Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897). In retrospect, Hobbes was a precursor of legal positivism. See J. NEWMAN, *supra* note 1, at 81-83.

The critical reaction to natural law, however, misconstrues its essential purpose. Natural law theory is not meant to provide insight into scientific or quasi-scientific phenomena, but rather it is aimed at and actually is a product of man's humanity and speaks most eloquently of it. As Jacques Maritain has defined it, it is

an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being.³

To its proponents, natural law is law and imposes obligations on man "from the simple fact that man is man."⁴ It is not attached to the particular features of any real legal system; indeed, the primary and, possibly, the sole bond between natural law and positive, manmade laws consists in a relationship of general guidance. As Professor d'Entrèves has stated:

[W]e should turn to natural law for an "illumination of problems" rather than for a "blueprint of detailed solutions. . . ." [The] natural law can shed light on a number of problems. The nature of law, the relationship between legal and moral obligation, the necessity of referring positive law to some ideal standard: on each of these problems . . . [the] natural law has a word to say, that, indeed, natural law is perhaps nothing other than a name for the right answer.⁵

In a word, rather than representing a finely wrought logical appraisal of the elements of law, natural law theory symbolizes an attitude about law and, more importantly, about man himself—a conviction about the place of law in human society and a judgment about its content in terms of man's intrinsic nature. It perhaps can be best described as a quest to instill meaningfulness

3. J. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 61 (D. Anson trans. 1943) (emphasis omitted). The original text reads:

un ordre ou une disposition que la raison humaine peut découvrir et selon laquelle la volonté humaine doit agir pour s'accorder aux fins nécessaires de l'être humain.

J. MARITAIN, *LES DROITS DE L'HOMME ET LA LOI NATURELLE* 79-80 (1942) (emphasis omitted). For a discussion of natural law as it relates to other theories of law, see Bourke, *Two Approaches to Natural Law*, 1 NAT. L.F. 92 (1956); Constable, *The False Natural Law: Professor Groble's Straw Man*, 1 NAT. L.F. 97; Silving, *Positive Natural Law*, 3 NAT. L.F. 24 (1958).

4. J. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 63 (D. Anson trans. 1943) (emphasis omitted). For the original French version, see J. MARITAIN, *LES DROITS DE L'HOMME ET LA LOI NATURELLE* 82 (1942).

5. D'Entrèves, *The Case for Natural Law Re-examined*, 1 NAT. L.F. 1, 5-6 (1956). See generally 11 INT'L ENCY. SOC. SCI. *Natural Law* 80 (1968).

in existence, as an enterprise which minimizes human limitations and which is anchored in a deeply rooted, intuitively perceived belief about a "common ground where we can begin to draw all men, everywhere, together in a unity that reflects what is common to human beings as human beings."⁶

It is the purpose of this article to examine the evolution of natural law theory and Jean-Jacques Rousseau's contribution to it. The thesis that emerges from that examination asserts that the tension between law in its natural and positive forms is endemic to the human condition. If any common ground is to be found between theories of positive and natural law, it lies in the realization that natural law doctrine is not gratuitous and subjective optimism nor idealism pure and simple. The fact that natural law doctrine can serve but a role of general guidance, that it is alien to the concrete, positive manifestations of law, constitutes an implicit statement of man's metaphysical dilemma—his inability to fuse the ideal and the real. Rousseau's contribution to natural law speculation lies precisely at this juncture. Unlike his mentors who provided him with the classical natural rights framework in which to build his political theory, Rousseau, as a literary writer and artist, had a particularly acute sense of the dichotomy between the real and the ideal and of the corrosive effects that the intransigent character of reality could have upon the intrinsic aspirations of the individual. His shifting of the classical political discourse to a literary modality reveals in a unique way the ultimate significance of natural law as a theory about law and man.

II. THE QUEST DEFINED: THE TRIUMPH OF A MEANINGFUL UNIVERSAL PATTERN OVER SKEPTICAL INQUIRY

Although the contours of natural law theory have been modified to meet the intellectual preoccupations of different historical periods,⁷ a basic doctrinal core, premised upon an irreducible idealism, has remained constant throughout its evolution.⁸ Simply stated, this basic content of the theory consists in a set of general teleological assumptions about man and the universe—more specifically, about the interrelation between what is perceived to be an atemporal order and the legal conventions man

6. D'Entrèves, *supra* note 5, at 52 (remark attributed by the author to Father Hesburgh).

7. For a discussion of the various schools of natural law theory, see, e.g., *THE NATURAL LAW READER* 47-108 (B. Brown ed. 1960); O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800* chs. 1-2 (1957).

8. See A. D'ENTRÈVES, *NATURAL LAW* 50 (1951).

has established to govern his conduct in society.

Skeptical inquiry always has been a singularly alien methodology to the proponents of natural law theory. For example, the Pascalian conception of law—law as a purely human contrivance divorced from the truth of divine revelation—would have been antithetical to their most fundamental convictions, despite their recognition of the contingency of human affairs. According to Pascal,⁹ human life without faith amounted to a participation in an existential void; without divine grace, man's reason was corrupt, unable to recognize, let alone identify with, transcending truths.¹⁰ His activity was random and inconsistent; in ultimate terms, it was absolutely meaningless.¹¹ Despite the concession that natural laws "undoubtedly" exist,¹² Pascal declared that man was incapable of distinguishing between the natural laws and his own artificial rules.¹³ The frailty of the human condition was such that human laws bore no affinity to either Truth or Justice and varied with the whims of rulers, geographical location, and history.¹⁴ Customs and mores provided the only source of stability for legal institutions and were authoritative simply because they were accepted.¹⁵ Pascal reached the disparaging conclusion that human justice was no more than a fashionable empty social appearance—a process by which force subtly manipulated the minds of the many into believing in the illusion that

9. See B. PASCAL, *Pensees* in OEUVRES COMPLÈTES 493 (ed. Integrale) (L. Lafuma ed. 1963) [hereinafter cited as *Pensees*].

10. See, e.g., *id.* at 503, No. 24-127; *id.* at 505, No. 44-82.

24-127 Condition de l'homme.

Inconstance, ennui, inquiétude.

44-82 Imagination.

. . . .

. . . La Justice et la vérité sont deux pointes si subtiles que nos instruments sont trop mousses pour y toucher exactement. S'ils y arrivent ils en écachent la pointe et appuient tout autour plus sur le faux que sur le vrai.

11. See, e.g., *id.* at 504, Nos. 37-158, 38-71, 42-207:

37-158 Métiers.

La douceur de la gloire est si grande qu'à quelque objet qu'on l'attache, même à la mort, on l'aime.

38-71 Trop et trop peu de vin.

Ne lui en donnez pas: il ne peut trouver la vérité.

Donnez-lui en trop: de même.

42-207 Combien de royaumes nous ignorent!

12. See *id.* at 507, No. 60-294.

13. *Id.*

14. *Id.*

15. *Id.*

laws were just and must be obeyed.¹⁶

In general, rather than confront the Pascalian dilemma on its own terms, natural law theorists disregarded it and espoused a more optimistic *a priori* vision of man's place in the universe, a belief in a benevolent and meaningful universe containing valid guiding principles to which men should conform their temporal conduct and their institutions.¹⁷ Whether pagans, Christian theologians, or secular rationalists, all natural law thinkers shared the goal of highlighting the immutable backdrop which they believed should underpin human activity. Rather than focus upon the scientific or logical operation of the material components of empirical reality, they built their perception of law around their innate sense of the meaningfulness of man's existence which was supported not only by conceptual constructs, but also by their deep-seated beliefs and convictions.

All of them laid claim to the existence of some sort of transcending and meaningful universal order which embodied fixed and absolute principles, including a definition of right conduct and a program for man's full development. They also posited that all men shared an intrinsic nature by which they, with the help of their reason, could identify with and participate in the universal order. The statement of a necessary concordance between the dictates of the transcending morality and the conventional legality is the crux of traditional natural law theory. When laws ceased to conform to the natural order of things, they lost their source of legitimacy and functioned only in terms of the contingent, thereby sacrificing man's sense of eternal identity and his quest to develop to his full potential to the material demands of order and security.

III. THE GENESIS OF A NATURAL LAW STANDARD

As the history of various legal systems demonstrates, the proper place of natural law precepts in a system of positive laws is at the very top or at its periphery—providing it with the funda-

16. See *id.* at 508, No. 66-326. See also *id.* at 508, No. 61-309; *id.* at 509, No. 81-299; *id.* at 510, No. 86-297; *id.* at 512, No. 103-298; *id.* at 588, No. 645-312.

17. The optimistic vision referred to in the text is especially characteristic of Rabelaisian evangelical writings. See F. RABELAIS, *OEUVRES COMPLÈTES* (ed. Pleiade) (J. Boulanger & L. Scheler eds. 1955). In this sense, the episode of Judge Brideyz in *Le Tiers Livre* is especially significant; in the last analysis, it stands as a lesson in Christian humility. While men should do their utmost to achieve justice through their own means, they also should recognize the limitations of their nature and appeal for guidance and have confidence in the divine will that governs all things. See *id.* at 315, 468-84.

mental thrust or enveloping it with the flesh that it needs to sustain its life—in any case, it is not located inside it either explicitly or formally. For example, legal treatises written by natural law scholars set the stage for the first wave of European codification in the nineteenth century.¹⁸ Moreover, natural rights theory imbued the provisions of the French Declaration of the Rights of Man, the American Declaration of Independence, and the American Constitution.¹⁹ In other words, the natural law heritage was vital to laying the foundations for the Western democratic tradition.

Serving as a mold for nascent ideologies and systems, the natural law tradition makes the case for the "oughtness" of law. Its historical role corroborates the view that it always has endeavored to express man's highest potential. The idealism which it embodies—its uncompromising insistence upon the imperative of moral beliefs—never has been called into question by its advocates. The Thomistic distinction between the primary principles and the subnorms of natural law,²⁰ and, to a less formal extent, Plato's realization that his ideal of the philosopher-king was

18. These treatises, written in the seventeenth and eighteenth centuries, include Puffendorf's *De Jure Naturae et Genium* (1672), Burlamaqui's *Principes du Droit Naturel* (1747), and Vattel's *Droit des Gens ou Principes de la Loi Naturelle* (1783). In true natural law fashion, these works purported to contain the unalterable rules of reason and justice. They persuaded reigning monarchs that the time had come to lay the foundations of a perfect legal system. For a detailed discussion of the codification movement generally, see VARIOUS AUTHORS, *A GENERAL SURVEY OF CONTINENTAL LEGAL HISTORY* 434-51 (1912).

19. The natural rights of man were seen as *simple and indisputable principles and self-evident truths*; every man was endowed with *inalienable rights*; men were *born and remain free and equal in rights*; finally, these documents proclaimed the right of the people to abolish repressive forms of government. See A. D'ENTRÈVES, *supra* note 8, at 50, 54-59. The natural law influence on the American political tradition is very well documented. The Bill of Rights, the notions of due process of law and the equal protection of the laws, the implicit system of checks and balances, are derived from the natural law heritage. See C. BECKER, *THE DECLARATION OF INDEPENDENCE* ch. 2 (1942); P. CONKIN, *SELF-EVIDENT TRUTHS* 120-42 (1974); J. FOLEY, *NATURAL LAW, NATURAL RIGHT AND THE "WARREN COURT"* (1965); C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 52, 120 (1930). See also BROWN, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 *CATH. U.L. REV.* 81 (1954); Corwin, *Natural Law and Constitutional Law*, 3 *NAT. L. INST. PROC.* 47-49 (A. Scanlan ed. 1949); Desmond, *Natural Law and the American Constitution*, 22 *FORDHAM L. REV.* 235 (1953); Gardner, *Legal Idealism and Constitutional Law*, 10 *VILL. L. REV.* 1 (1964); Lucey, *Natural Law and American Legal Realism*, 30 *GEO. L.J.* 493 (1942); Manion, *The Natural Law Philosophy of the Founding Fathers*, 1 *NAT. L. INST. PROC.* 3 (A. Scanlan ed. 1949); McCoy, *The Doctrine of Judicial Review and Natural Law*, 6 *CATH. U.L. REV.* 97 (1956); Sternberg, *Natural Law in American Jurisprudence*, 13 *NOTRE DAME LAW.* 89 (1938); Wheeler, *The Foundations of Constitutionalism*, 8 *LOY. U.L. REV.* 507 (1975); Wilkin, *Status of Natural Law in American Jurisprudence*, 2 *NAT. L. INST. PROC.* 125 (A. Scanlan ed. 1949).

20. See note 31 *infra* and accompanying text.

inoperative in the daily administration of justice²¹ are isolated moments of hesitation and doubt in an otherwise unfaltering tradition of optimism about man and humanity in general. For natural law theorists, it seemed quite sufficient to make the claim that natural law was the purveyor of legitimacy, that its voice was dispositive on those issues relating to the foundations of human society, rights, and obligations and to state that the positive law should conform to the standard that it established.

Any acquaintance with the actual implementation of law, however, leaves one with the suspicion that the "is" of law, although it still bears a general relationship to the ideal, is somehow distinct from it. The judicial resolution of specific controversies and the practical necessities that dominate the administration of justice often do not refer, of their very nature, to notions of fundamental Justice and intrinsic Rights. For example, the desire to promote stable commercial transactions, the fact that French citizens have the legal prerogative of being sued before their national courts, and that intercourse with a person under a certain age will constitute rape are social policy determinations, not immutable principles of law aiming at or emanating from a sense of higher law or of man's humanity. The enactment of positive laws and their application transforms the original principle of absolute legitimacy into a notion of relative legality anchored in administrative expediency and buttressed by attempts at consistency, fairness, and reasonableness. The human transcription of fundamental law is riddled with imperfections, making its concrete manifestations but an ersatz of the ideal.

Rather than refuting the existence of an unwritten higher law or making its principles irrelevant for the formation of legal rules, the discordance between the ideal statement of law and its actual implementation speaks to the problem of human existence generally, and, more specifically, to the fate of uncompromising idealism in any human context. It reveals another, often neglected, face of natural law. Although men may premise their allegiance to a political and legal system on the ground that it reflects, in its theoretical form, a perfect merger of their intrinsic beliefs with the realities of political and legal organization, they are constantly aware or reminded that the external structure does not measure up to inward beliefs and that the mechanism for transposing the ontology of law is defective. To his great distress, one thinking about Man, through the prism of his own individuality,

21. See note 23 *infra* and accompanying text.

unimpeded by any obstacle but the barriers of his own feelings and mind, inevitably arrives at different conclusions about the potential of man and the role of law when he ponders the reality of deciding claims of injustice and injury by one individual against another.

The idealistic speculation about law began among the ancient Greeks;²² there, the natural law influence perhaps was most apparent in the various schools of Greek philosophy.²³ For example, it is among the Greek stoic philosophers that the term "natural law" first emerged as an explicit construct of legal theory.²⁴ According to the Stoics, man, although powerless to modify the divine plan governing the universe, was a product of the transcending order; he possessed an innate sense of right and wrong with an ability to gain insight into the natural operations of the universe through his reason.²⁵ Borrowing from his Greek predecessors, Cicero²⁶ integrated these ideas into Roman stoic

22. The idealistic speculation about law was reflected in the Greek concept of political organization, the "polis," and in the thinking of its statesmen and philosophers. The polis stood as a symbol of the people as a whole and of a unique way of life that was common to all of them. Moreover, it was the repository of moral and civic values. The function of law within the polis was to reflect general normative standards capable of fostering the good life among the members of the community. For a discussion of the Greek city-state, see H. KITTO, *THE GREEKS* 64, 68-69, 72, 75, 78, 94 (1957); Le Bel, *Natural Law in the Greek Period*, 2 NAT. L. INST. PROC. 3 (A. Scanlan ed. 1949). For a discussion of Solon's contribution to the Greek civic organization and its natural law influence, see I. LINFORTH, *SOLOON THE ATHENIAN* 67 (1919); PLUTARCH, *THE ACHIEVEMENT OF SOLOON*, in *GREEK LITERATURE IN TRANSLATION* 400, 403 (M. Grant ed.; I. Scott-Kilvert trans. 1973).

23. Much of the classical philosophic thinking about law came about, at least in part, as a reaction to the empirical bent of the Sophists who divorced law from all ethical values and insisted upon its relative character and variability. See M. UNTERSTEINER, *THE SOPHISTS* 322-24 (K. Freeman trans. 1954). Later Greek philosophers rejected the sophistic conception of law and espoused a more idealistic conception of law. Plato, for example, contended that law had an intrinsic character. See PLATO, *THE REPUBLIC* (F. Cornford trans. 1945), in *GREAT POLITICAL THINKERS* 13 (W. Ebenstein ed. 1960). See generally I. RICHARDS, *THE REPUBLIC OF PLATO* (1942); PLATO, *THE LAWS* (A. Taylor trans. 1960). See also J. NEWMAN, *supra* note 1, at 10-17. For an assessment of Aristotle's contribution to juridical thinking and its difference from Platonic speculation, see, e.g., *GREAT POLITICAL THINKERS*, *supra*, at 64-75; J. NEWMAN, *supra* note 1, at 18-35.

24. See J. NEWMAN, *supra* note 1, at 36. For a detailed discussion of stoic philosophy, see, e.g., S. STOCK, *STOICISM* (1969); A. VIRIEUS-REYMOND, *POUR CONNAITRE LA PENSEE DES STOICIENS* (1976). Their pantheistic conception of being and their contemplation of nature led them to envision man as a part of a general humanity, to insist upon man's status as a being within the cosmic order. See J. NEWMAN, *supra* note 1, at 37.

25. See S. STOCK, *supra* note 24, at 8-9. See also J. NEWMAN, *supra* note 1, at 36.

26. For the following analysis of Cicero's thought, the author has relied extensively upon two principal sources: *GREAT POLITICAL THINKERS*, *supra* note 23, at 121-25 (preface to Cicero's *The Republic and the Laws*); J. NEWMAN, *supra* note 1, at 38-52. See also Levy, *Natural Law in the Roman Period*, 2 NAT. L. INST. PROC. 43, 44-49 (A. Scanlan ed. 1949); Wilkin, *Cicero and the Law of Nature*, 1 S.M.U. STUDIES IN JURISPRUDENCE 1, 16-25 (A.

thought, proclaiming the existence of a superior set of laws in nature to which all human conduct and conventions should conform. In 533, Justinian incorporated into his law books the fundamental notions of natural law theory, that law was divinely inspired (hence immutable) and that its authoritativeness stemmed from its intrinsic dignity and reason, not its coercive character.²⁷ Eventually, these same principles became part of church dogma.²⁸ The writings of Saint Thomas Aquinas provide the most lucid statement of scholastic natural law, of the merger of its pagan heritage with the imperatives of Christian teaching.²⁹

For Aquinas, the natural law not only was testimony to man's special place in creation, but also it reflected God-given and therefore objective principles of the universal moral order.³⁰ The natural law symbolized, as it were, a common meeting ground between man and his personal creator, a point of mediation at which the obscurity of existence dissipated and man gained insight into the meaning of the divinely-ordained cosmos.³¹ Positive human laws could not lay claim to a status of legitimacy unless their substance coincided with the fixed and unchanging principles of the natural law.³² Moreover, Aquinas achieved a remarkable reconciliation of the transcending and practical order of existence by limiting the invariability of the

Harding ed. 1954). According to Cicero, human laws were valid only to the extent that they conformed to the values and principles that were predetermined by the universal order and embodied in the natural law. See CICERO, *THE REPUBLIC AND THE LAWS* (C. Keyes trans. 1928), in *GREAT POLITICAL THINKERS*, *supra* note 23, at 125.

27. See A. D'ENTRÈVES, *supra* note 8, at 18. See generally J. HADLEY, *INTRODUCTION TO ROMAN LAW* (1876).

28. The attainment of human felicity no longer was relegated to the afterlife, as the proponents of Augustinian pessimism had maintained, but rather the City of God at least could be realized partially during man's terrestrial existence. See A. D'ENTRÈVES, *supra* note 8, at 33-38.

29. For a discussion of the theological implications of the doctrine of natural law, see, e.g., J. FUCHS, *NATURAL LAW—A THEOLOGICAL INVESTIGATION* (H. Reckter & J. Dowling trans. 1965). For a discussion of natural law concepts during the Middle Ages generally, see, e.g., Gerould, *Medieval Conceptions of Natural Law*, 2 NAT. L. INST. PROC. 73 (A. Scanlan ed. 1949). For a detailed consideration of St. Thomas Aquinas's work as it relates to natural law, see *THE NATURAL LAW READER*, *supra* note 7, at 27, 68-90; A. D'ENTRÈVES, *supra* note 8, at 39-45; Davitt, *St. Thomas Aquinas and the Natural Law*, 1 S.M.U. STUDIES IN JURISPRUDENCE 26 (A. Harding ed. 1954).

30. T. AQUINAS, *SUMMA THEOLOGICA II*, question 94, arts. 1-4, in 20 *GREAT BOOKS OF THE WESTERN WORLD* 220-24 (1952); see A. D'ENTRÈVES, *supra* note 8, at 39.

31. T. AQUINAS, *supra* note 30, question 94, arts. 1-3, in 20 *GREAT BOOKS OF THE WESTERN WORLD* 220-23 (1952); see *THE NATURAL LAW READER*, *supra* note 7, at 158-59.

32. T. AQUINAS, *supra* note 30, question 95, arts. 1-2, in 20 *GREAT BOOKS OF THE WESTERN WORLD* 226-28 (1952).

natural law to its "primary principles" and allowing for fluctuations in its "subnorms."³³

IV. THE MODERN STATEMENT OF NATURAL LAW THEORY

The influence of Thomistic thinking and scholasticism generally abated with the emergence of nation-states headed by powerful monarchs and with the increasing divisiveness in religious ideas. The benevolent union of God's will and man's reason in a meaningful universal and natural pattern was challenged by the unbending severity of protestant dogma and became untenable in light of the aspirations of reigning monarchs. The elaboration of a theory justifying the absolute temporal power of kings on the basis of their divine right to rule, the product of these new preoccupations, eventually engendered a reassessment of some of the fundamental assumptions of natural law theory.

In its implications upon law, the divine right theory held that the proper content of law could be ascertained only through the intermediary of an anointed temporal sovereign. The king, God's immediate representative within the nation-state, was the sole author of law, the judge of what was just and unjust: "Only he is absolutely sovereign who, after God, acknowledges no one greater than himself."³⁴ Through this theoretical schema, the sovereign monarchs gained independence from papal authority and retained a solid theological basis for the exercise of their power. Among the apologists for political absolutism, Hobbes perhaps was the most brilliant advocate of the command theory of law—in any event, the chief and most articulate spokesman for man's wanton depravity. In his view, man's domination by his natural passions led to his sequestration from fundamental values, relegated him to the pursuit of his enlightened self-interest and, finally, necessitated a rule of law based upon the fear of force.

Hobbes was one of the first political theorists to refer to a hypothetical state of nature and to make use of the concept of a social contract. According to Hobbesian vision, the physical and intellectual equality of men in the state of nature resulted in a condition of perpetual war in which the "continual fear and danger of violent death"³⁵ not only rendered civilized life impossible,

33. T. AQUINAS, *supra* note 30, question 94, arts. 2, 4, 5, in 20 GREAT BOOKS OF THE WESTERN WORLD 221-25 (1952).

34. J. BODIN, SIX BOOKS ON THE STATE (W. Ebenstein trans. 1960), in GREAT POLITICAL THINKERS, *supra* note 23, at 349, 350.

35. T. HOBBS, LEVIATHAN, in GREAT POLITICAL THINKERS, *supra* note 23, at 366, 368.

but also actually made "the life of man, solitary, poor, nasty, brutish, and short."³⁶ To assuage their fear of death, men agreed to enter into the social contract and to establish a legal and political structure which would guarantee their peace and security. Although not a party to the contract, the sovereign was its creation and his command became law; his will was valid law so long as it remained an effective instrument of stability—its reliance on the "fear of punishment"³⁷ notwithstanding:

The only way to erect . . . a common power, as may be able to defend . . . [men] from the invasion of foreigners and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men. . . . And in him consists the essence of the commonwealth; which, to define it, is *one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves everyone the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence.*³⁸

The Hobbesian will theory of law excluded any fundamental interpenetration between the substance of the civil laws and the values embodied in the natural laws. The relative insignificance of the general "moral virtues"³⁹ within civil society stemmed from the fact that the natural law lacked any coercive character and bore no necessary relation to the will of the sovereign. After postulating the supremacy of the commands of the sovereign, it was impossible for Hobbes to conceive of an illegal law within the framework of civil society, especially when the criteria for determining what was just and unjust emanated from a higher law founded upon natural reason or divine revelation.⁴⁰ Both legality and legitimacy were functions of sovereignty buttressed by force and necessity, not conviction:

[I]t is manifest that law in general is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him.⁴¹

. . . .

36. *Id.* at 368.

37. *Id.* at 371.

38. *Id.* at 371-72.

39. GREAT POLITICAL THINKERS, *supra* note 23, at 362.

40. *Id.*

41. See T. HOBBS, *supra* note 35, at 379.

[T]he laws of nature, as *justice, equity, modesty, mercy*, and, in sum, *doing to others, as we would be done to*, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions that carry us to partiality, pride, revenge, and the like. And covenants, without the sword, are but words, and of no strength to secure a man at all. Therefore notwithstanding the laws of nature (which everyone has then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will, and may, lawfully rely on his own strength and art for caution against all other men.⁴²

The Hobbesian reduction of law to its principal systemic characteristics, his divesting it of any dependence upon an external normative standard, did not go long unchallenged. His theory of sovereignty, his use of the notion of a state of nature and of the concept of a social contract, however, had made significant inroads into legal and political thinking and had created a considerable distance between matters political and considerations of divinely ordained truth. Hobbes and the movement he represented had not proclaimed the demise of natural law, but had prepared the ground for the modification of its classical thrust. Opposed to the voluntarist theory of law, to the base subservience to absolute political authority it implied, and to the puritanical overtones of its conception of the lot of ordinary man, the new school of natural law, led by Hugo Grotius, attempted to integrate the tenets of the doctrine into an exclusively secular, rationalistic context. Their work, although reinstating normative ethical considerations into the determination of legality, set the stage for the transformation of natural law theory from a system of divinely proclaimed obligations and duties to a statement of inalienable individual rights.⁴³

Despite the reassertion of the ethical foundations of law and of its concordance with transcendent values, albeit on purely ra-

42. *Id.* at 371. See generally F. WINDOLPH, *LEVIATHAN AND NATURAL LAW* (1951).

43. See generally Leclercq, *Suggestions for Clarifying Natural Law*, 2 NAT. L.F. 64 (1957). Grotius reversed the Hobbesian assumption about the state of nature and the purpose and motivation of the social contract: a natural inclination to benevolence brought men to create civil society. See R. DERATHE, *JEAN-JACQUES ROUSSEAU ET LA SCIENCE POLITIQUE DE SON TEMPS* 41-42 (1970). Grotius's chief contribution to natural law thinking rests in his methodology and in the secular assumptions underlying that methodology. In *De Jure Belli ac Pacis* (1625), Grotius set out to prove that it was possible to establish a system of laws which were free from theological speculations. See, e.g., A. D'ENTREVES, *supra* note 8, at 51-53. Man's solitary reason could determine what was immutably right and wrong. Natural law precepts were inherently rational—self-evident truths which flowed from the very nature of things. See J. NEWMAN, *supra* note 1, at 88.

tionalistic grounds, the work of philosophers such as Grotius still was seen principally as a justification for absolute royal power—its secular orientation allowing kings to proclaim their autonomy vis-à-vis papal authority.⁴⁴ The response to the Hobbesian vision of the origins of political and legal obligations came from Locke. His *Two Treatises of Government*, published in 1690,⁴⁵ provided the theoretical substance by which natural law thinking ceased to serve the interests of all-powerful monarchs and became a cornerstone for the preservation of individual rights against the encroachments of arbitrary institutional power.

For Locke, the rule of law actually preceded rather than stemmed from the creation of civil society. In his description of the state of nature, men did not selfishly pursue their natural rights to the detriment of others;⁴⁶ on the contrary, they lived in natural and reasonable mutual accord—their natural rights to liberty and equality being exercised within the framework of reciprocal obligations and privileges provided by the natural laws:

To understand political power aright, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another. . . .

But though this be a state of liberty, yet it is not a state of license. . . . The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions . . . there cannot be supposed any such subordination among us, that may authorize us to destroy one another.⁴⁷

The purpose of establishing a civil society was to perfect the natural schema, to remedy its deficiencies, not to contrive an artificial civil construct which would undo the fundamental natural principles of the human community. According to Locke, the

44. See R. DERATHE, *supra* note 43, at 45.

45. J. LOCKE, *TWO TREATISES OF GOVERNMENT*, in *GREAT POLITICAL THINKERS*, *supra* note 23, at 393.

46. *Id.* at 393-94.

47. *Id.*

natural legal order evidenced a number of drawbacks:

First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. . . .

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

Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution.⁴⁸

Civil society provided the impartial institutional framework in which the laws of nature could be transcribed and enforced without "the inconveniences of the state of nature."⁴⁹ By consenting to the social contract, the men of nature acquiesced to an infringement upon their natural independence in order to safeguard, more precisely, to acquire the secure exercise of, their more basic natural rights:

[T]he obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have, by human laws, known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others.⁵⁰

Like Hobbes, Locke asserted that the social contract was done between the individual members of the nascent civil society; whereas for Hobbes sovereignty came in the aftermath of the agreement, for Locke the contractants established only a form of limited government. The people delegated law making authority in the form of a trust to the legislature, which reigned supreme among the organs of government. The people, however, were both the author and beneficiary of the trust, *i.e.*, they retained ultimate possession and the enjoyment of their rights; the legislature was no more than a trustee, an agent of the people entrusted with limited obligations, *i.e.*, to execute the duties imposed upon it by the people.⁵¹ Whenever the government violated its responsibilities under the trust, Locke maintained that the people had the right to dissolve it and establish a new government:

48. *Id.* at 405.

49. *Id.*

50. *Id.* at 398.

51. See GREAT POLITICAL THINKERS, *supra* note 23, at 387-88 (preface to Locke's *Two Treatises of Government*).

[W]henever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther [sic] obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society . . . by this breach of trust they forfeit the power the people had put into their hands . . . and it devolves to the people; who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.⁵²

The political writings of Jean-Jacques Rousseau⁵³ are part of the movement which transformed natural law doctrine into a theory of natural rights; they take their place at a point which perhaps is equidistant between Hobbes's absolutism and Locke's liberalism.⁵⁴ Like his predecessors, Rousseau is interested in arriving at an understanding of the foundations of legal and political obligations; he, too, elaborates a State theory by referring to a hypothetical state of nature and the concept of a social contract. His originality,⁵⁵ however, does not stem exclusively from his defi-

52. J. LOCKE, TWO TREATISES OF GOVERNMENT, in GREAT POLITICAL THINKERS, *supra* note 23, at 409. In the eyes of posterity, Grotius was the "father of natural law"; Locke, however, clearly had rescued it from any subservience to absolutism. See, e.g., Leclercq, *supra* note 43, at 69. In the modern reformulation of the doctrine, Locke was the chief guardian and advocate of its explicit teaching. For a discussion of the more moderate views of Grotius's followers, see R. DERATHE, *supra* note 43, at 44-45, 79, 87-93.

53. J.-J. ROUSSEAU, OEVRES COMPLÈTES (ed. Integrale) (M. Launay ed. 1971) [hereinafter cited as OEVRES COMPLÈTES]. The author assumes all responsibility for the translations of the original French text. Useful secondary works on Rousseau include: R. DERATHE, *supra* note 43; M. LAUNAY, JEAN-JACQUES ROUSSEAU, ÉCRIVAIN POLITIQUE (1971); J. STAROBINSKI, JEAN-JACQUES ROUSSEAU, LA TRANSPARENCE ET L'OBSTACLE (1957). See also Althusser, *Sur le Contrat Social*, 8 CAHIERS POUR L'ANALYSE 5 (1967); Hochart, *Droits Naturel et Similaire*, 8 CAHIERS POUR L'ANALYSE 65 (1967).

54. According to Professor Ebenstein,

Rousseau's conception of sovereignty differs from both Hobbes' and Locke's. In Hobbes' the people set up a sovereign and transfer all power to him. In Locke's social contract the people set up a limited government for limited purposes, but Locke shuns the conception of sovereignty—popular or monarchical—as a symbol of political absolutism. Rousseau's sovereign is the people, constituted as a political community through the social contract.

GREAT POLITICAL THINKERS, *supra* note 23, at 437 (preface to Rousseau's *The Social Contract*). Professor Ebenstein then adds that "[u]nlike all other major political thinkers, Rousseau considers the sovereignty of the people inalienable and indivisible." Accord, R. DERATHE, *supra* note 43, at 104-11, 116-19.

55. In retracing the influence of previous political theorists upon Rousseau, Professor Derathe asserts that Johannes Althusius, who published a work entitled *Politica Method-*

nition of political legitimacy in terms of the sovereignty of the people.⁵⁶ Rousseau's most important contribution to natural law thinking lies in the shift of focus he introduces into the classical political discourse. His literary sensitivity is ever-present in his political writings and enables him to pose the problem of merging the ideal and the real in its starkest terms. Rousseau's political writings are not merely a representative sample of the more modern natural law theory; they, in fact, engender a reassessment of the ultimate significance of the entire natural law tradition by demonstrating, implicitly but unequivocally, that utopian speculations, although they originate in optimistic and idealistic convictions, contain a message and teach man about the metaphysical dilemma of human existence.

V. ROUSSEAU'S LITERARY DISPOSITION

The consideration of Rousseau's status as a literary writer is indispensable to the proper assessment of his political theory.⁵⁷ He, like other creators of fiction, laid claim to a special sensitivity ("[T]he first of my needs, the greatest, the strongest, the most inextinguishable, was . . . the need for an intimate relationship and as intimate as possible"),⁵⁸ which not only accounts for his originality, but also allowed him to assert, as do other artists, that his fictional constructs could capture the true and vital essence of things. The *Confessions*,⁵⁹ for example, is an attempt to abolish the distance which Rousseau perceives between himself and others.⁶⁰ Despite his feeling of estrangement, Rousseau was convinced that a state of perfect happiness could be attained, that he could establish a personal intimacy between himself and the outside world without suffering any infringement of his individuality. The reconsideration of the past, however, inevitably entailed a good deal of interpretation and restructuring. The *Confessions* became a story of what could and should have been—an embellished but distorted textual reality, in effect, a

ice Digesta in 1603, some 150 years before *The Social Contract*, actually elaborated a theory of popular sovereignty that was very close to the one Rousseau advanced. See R. DERATHE, *supra* note 43, at 94-99.

56. See note 54 *supra* and accompanying text.

57. For a list of works on the subject of Rousseau's autobiographical and political writings, see note 53 *supra*.

58. J.-J. ROUSSEAU, *Confessions*, in 1 OEUVRES COMPLÈTES, *supra* note 53, at 120, 281.

59. *Id.* at 120.

60. *Id.* at 120-21.

refuge from the hostility and incomprehension of the outside world.⁶¹ The world of the *Confessions*, then, harbored and nurtured Rousseau's craving for utopian felicity, allowing him, as it were, to authenticate his purported self-knowledge and to inveigh against the hostile world—to show that he did not share its imperfections and to state with absolute conviction that his life was the symbol of an exemplary morality:

I feel my heart and I know men. I am not made like any that I have seen; I dare believe that I am not made like any that exist. If I am not better, at least I am different. . . .⁶²

This conviction not only is at the very heart of Rousseau's dilemma, but also is the key to understanding his autobiographical enterprise and his earlier political writings. Rousseau believed steadfastly that he was a unique being—the only man to have escaped, albeit through fortuitous circumstances, the corruption of social institutions and to have remained a natural man capable of genuine virtue. His life epitomized an unabating adherence to absolute truth and morality. Blame for the incompatibility, therefore, could not be laid upon his shoulders; the conflict had arisen because the others, in their moral degeneration, were unable to understand Rousseau's natural simplicity and honesty. Moreover, by giving them an example of their possible natural moral perfection, Rousseau actually was rendering a service to his fellow man. Finally, Rousseau's moral sixth sense, his "open and frank nature,"⁶³ the transparency of his heart and feelings,⁶⁴ and the detail of his narrative⁶⁵ guaranteed the veracity and objectivity of his account.

What Rousseau attempted to accomplish in his autobiographical writings also had been his task in his political works, despite the fact that he addressed himself to a different level of human experience. The *Confessions* stands as an effort to trans-

61. *Id.* at 285.

62. *Id.* at 121.

63. *Id.* at 311.

64. *Id.* at 293.

65. *Id.* at 187. When the mission of the *Confessions* failed, Rousseau retreated to a less tendentious autobiographical mode, while still preserving the hope that his message of truth would reach his mistaken brothers. See J.-J. ROUSSEAU, *Les Reveries du Promeneur Solitaire*, in *id.* at 501, 503. Resigning himself to his fate but adamant in the belief that he would be vindicated someday, Rousseau decided to cultivate the experience of his own being for himself. See *id.* at 504, 523, 606. But even the promise of the literary vehicle proved unsatisfactory—its salutary experience being only temporary. Rousseau came to realize that his desire for utopian felicity could not be incorporated into or satisfied by reality.

form Rousseau's sense of his individuality into the collective consciousness of mankind. In that work, Rousseau states that any reconciliation will take place on his own terms: the others are obliged to acknowledge the superiority of his individuality and to have their personal identity mirror and become inseparable from his. When he realizes that his efforts have failed, his intransigence becomes absolute. In the eighth *Promenade*, Rousseau declares:

In whichever way men choose to see me, they would be unable to change my being, and despite their power and despite all their hidden intrigues, I will continue whatever they might do to be in spite of them what I am.⁶⁶

In the political writings, the tension again centers upon Rousseau's conception of the individual, of his natural liberty and independence, and of the constraints imposed upon them by a necessary but external collective body. The notion of the general will, which represents Rousseau's way of resolving the tension, is nothing other than a synonym for his autobiographical perception of the universality and righteousness of his being.

VI. THE DISCOURSE ON INEQUALITY

In this early work, Rousseau sets out to prove that men living in society have become alien to their own nature, that the moral principles which should govern men's behavior are inoperative within the social framework. Rousseau's concept of the history of mankind, built around a notion of natural morality and Rousseau's own sense of his humanity, consists of three principal phases: from an original primitive and solitary state, man becomes organized into groups; with the institution of property and law, man emerges from the presocial phase of his evolution and becomes a social being.⁶⁷

In the original state of nature, historical time was absent: men lived in the absolute stability of a nonhistory—their behavior was largely instinctive, limited to their immediate needs, and their basic makeup remained unchanged for centuries:

But without referring to the uncertain evidence of history, who does not see that everything appeared to distance primitive man from the temptation and the means of ceasing to be

66. *Id.* at 535-36.

67. J.-J. ROUSSEAU, *Discours Sur l'Origine et les Fondements de l'Inegalite Parmi les Hommes*, in 2 *OEUVRES COMPLÈTES*, *supra* note 53, at 204.

[primitive]? His imagination embellished nothing; his heart asked nothing of him. His slight needs were . . . [easily satisfied], and he is so far from the degree of knowledge necessary to want to acquire more knowledge, that he could neither foresee nor be curious. The spectacle of nature becomes indifferent to him . . . it is always the same order, it is always the same revolutions; he is not sufficiently mindful to be surprised by the greatest marvels His soul, which nothing disturbs, gives itself to the only feeling of its present existence without any idea of the future, however close it may be; and his plans, as limited as his perspective, hardly extend to the end of the day.⁶⁸

Unlike other animals, however, human beings could feel pity and possessed a latent capacity to perfect themselves⁶⁹—given the right circumstances, they could sharpen the use of their reason and leave the rudimentary state of existence:

It is then very certain that pity is a natural feeling. . . . It is . . . [the feeling] which brings us without thinking to help others that we see suffering; it is . . . [the feeling] which, in the state of nature, replaces the laws, the mores and virtue, with this advantage that no one is tempted to disobey its gentle voice. . . .

. . . [T]he perfectibility, the social virtues, and the other faculties . . . natural man had received [them] only potentially, and they could not develop themselves unaided⁷⁰

Geophysical revolutions finally ended the period of non-history; population growth, the division of the earth into continents, and the scarcity of food forced men to form families. Within the family, man began to acquire an understanding of property, slowly coming to envisage its possession as vital to his well-being. As families united into clans and grew into nations, men became industrious; the possession of property was buttressed by social preferences and public reputation. According to Rousseau, mankind was on the verge of giving primacy to its passions, of forever renouncing the possibility of true happiness. Men were ready to abandon *amour de soi*, this "natural sentiment which induces all animals to be attentive to their own preservation and which . . . engenders humanity and virtue,"⁷¹ for *amour-propre*, which

68. *Id.* at 219.

69. *Id.* at 224, 227.

70. *Id.*

71. *Id.* at 223.

is but a relative, artificial sentiment, born in society, which induces each individual to place more importance upon himself than anyone else, which inspires men to commit all the wrongs that they do to one another, and which is the true source of honor.⁷²

When men discovered the products of the earth, they extinguished all hope of ever realizing their moral potential. The technological advances which permitted the harvesting of wheat and the mining of iron required a division of labor which brought an end to the original independence and liberty. The physical inequality of men, which had no significance in the solitary state of nature, became the very foundation of the evolving human community:

Let us conclude that roving in the forests, without any occupation, without speech, without a home, without war and without relationships, without any need for his fellows as without any desire to prejudice them, perhaps without having ever recognized anyone of them individually, primitive man, subject to few passions, and sufficing to himself, had only the feelings and intelligence which were proper to this state. . . .

[Having described it in detail, I wanted] to show, in the portrait of the true state of nature, how inequality, even natural [inequality], is far from having in this state as much reality and influence as our writers pretend.⁷³

Without any system of organized constraints, however, property was distributed according to the rule of the stronger: mankind was in a perpetual state of war. In order to preserve their wealth, the strong duped the weak and poor into establishing civil society and, thereby, consecrated the principle of physical and economic inequality among men. As social beings living in a state of inequality, men lost all traces of their original potential for moral development. Dominance and servitude had severed any link between social man and natural pity, freedom, and independence:

Such was or must have been the origin of society and of the laws which gave the weak new impediments and the rich new force, destroyed forever the natural liberty, established forever the law of property and of inequality, of an adroit usurpation made an irrevocable right, and, for the benefit of a few ambitious [men], subjugated from that point on the entire human race in work, servitude and misery.⁷⁴

72. *Id.*

73. *Id.* at 226.

74. *Id.* at 234.

"History," for Rousseau, then consists in the gradual subjugation of nature and of man by the forces of time and culture. Historical time is a measure of man's moral deterioration, the destruction of his natural heritage. At a purely textual level, Rousseau's hypothetical accounts of the state of nature and history are designed to substantiate his initial statement about man's moral depravity in contemporary society. His historical inquiry is really a basis for moral commentary: as a social being, man no longer possesses accurate self-knowledge—his sense of genuine humanity no longer guides his reason and, in fact, has been lost in the labyrinth of his passions.⁷⁵

This account of man's historical progression to a social state, however, locks him into a prison of despair, placing his natural birthright beyond his grasp. Civil society is the inevitable product of History; man cannot break the barriers of time and regain his natural state. Rousseau has established a sequence of irreversible events which condemn man to exercise his potential for moral development within the totally alienating confines of civil society. Despite its presence throughout the text, the antagonism between the state of nature and society is not as clear-cut as it appears. After all, the state of nature was not the beatitude of mankind; in his primitive existence, man was not much more than an animal—his humanity being a latent but dormant possibility. The crucial problem lies in the process of mediation by which the natural and artificial are brought together. Rousseau does not restrict himself to decrying the tragedy of man's inevitable social corruption; rather he leaves his reader with the perplexing question of why civil society failed to accommodate man's moral potential and bring it to its culmination. In his subsequent political writings, Rousseau attempts to provide a solution that will redress the evolution of mankind. Believing that his authentic natural humanity and his exemplary individuality will provide him with sufficient inspiration and, most importantly, with the truth, he attempts to bridge the gap between the individual's

75. The historical fable is a textual transcription of the vital aspects of Rousseau's personality and his own personal dilemma. Even as a political thinker, Rousseau is struggling with his feeling of social incompatibility and attempting to reconcile it with his conviction that he is right and the others wrong. In the *Discourse*, Rousseau assumes the role of the self-appointed spokesman of Nature; his work is to be seen as an impartial, if not an altruistic, defense of an unsoiled humanity, of which Rousseau is the sole representative, against the belligerent incomprehension of a corrupt society. In this way, Rousseau establishes the authenticity of his deeply felt beliefs and finds fault with the outside world. See *id.* at 212.

natural freedom and independence and the historical necessity of imposing a legal and political order.

VII. THE ARTICLE ON POLITICAL ECONOMY

Rousseau's *Discourse on Political Economy*⁷⁶ is a necessary epilogue to the historical pessimism of the *Discourse on Inequality* and also functions as a preface to the State theory elaborated in *The Social Contract*. In this writing, Rousseau again acts as the spokesman for the inalienable rights of man and of his moral nature; this time, however, his purpose is to formulate a theory of the legitimate State. He takes violent exception to previous theories justifying political absolutism, contending that they portray humanity as it has been perverted by *amour-propre*. According to Rousseau, the legitimate political State must be founded upon the consent and for the good of all its members. In a word, it must offer man the possibility of redressing the course of history and allow him to develop his moral potential.

Prior to Rousseau, Bossuet⁷⁷ and Filmer⁷⁸ had argued for absolute royal power on the basis of the divine right theory. Using an analogy between the State and the family, they equated royal power with the paternal authority ordained by God. As mentioned previously,⁷⁹ Hobbes was one of the most brilliant representatives of the absolutist tradition. Rather than rely explicitly upon a theological vision of man and history, he maintained that civil society was founded upon the basis of a social contract in which the individual contractants surrender all their rights to an absolute master. Despite this total alienation, the civil society was legitimate since it had been founded upon a voluntary basis: men preferred the security of an absolute regime to the anarchy of a state of perpetual war.⁸⁰

For Rousseau, absolute royal power is the very antithesis of the legitimate State. In his view, no amount of theological speculation can justify an infringement upon man's most sacred attributes as a human being—nor can it condone the coercive abandonment of man's inalienable natural rights. The State exists for the benefit of its members, not its rulers; rights can be surrendered

76. J.-J. ROUSSEAU, *Discours Sur l'Economie Politique*, in 2 OEUVRES COMPLÈTES, *supra* note 53, at 276.

77. J.-B. BOSSUET, *POLITIQUE TIRÉE DES PROPRES PAROLES DE L'ÉCRITURE SAINTE* (J. Le Brun ed. 1967).

78. See J.-J. ROUSSEAU, *supra* note 76.

79. See text accompanying notes 36-47 *supra*.

80. See text accompanying notes 35-36 *supra*.

only voluntarily and solely for the good of the individuals involved. More specifically, Rousseau finds that the makeup of the family differs markedly from the organization of the State on a number of important grounds, especially in respect to the foundation and purpose of political power and paternal authority:

But how can the government of the State be similar to that of the family the foundations of which are so different? The father being physically stronger than his children for as long as his aid is necessary to them, paternal authority is rightly conceived of as being established by nature. In the great family of which all the members are naturally equal; political authority, purely arbitrary as to its institution, can be founded only upon conventions, nor [can] the magistrate command others except in virtue of the laws. . . . The duties of the father are dictated to him by natural feelings. . . . [Political] leaders have no similar rules, and are only obliged to the people by what they have promised to do⁸¹

In Rousseau's estimation, conferring the same wide-ranging power upon government officials as nature has bestowed upon the father of the family would be tantamount to inviting tyranny within the civil structure: the leaders' pursuit of their personal interests would constantly undermine the operation of the laws and the integrity of the public interest. Having no bonds of reciprocal natural affection and devotion to hold it together, the social framework would degenerate into a chaos of arbitrary abuse:

Although the functions of the father of the family and of the first magistrate should aim at the same end, it is by means so different [from one another], their duties and their rights are so distinct, that we cannot confuse them without arriving at a false idea of the fundamental laws of society, and without falling into errors which would be fatal to mankind.⁸²

Having challenged the foundations of the divine right theory, Rousseau then considers the Hobbesian dichotomy between man's right to liberty and the need for order, recognizing it as the most difficult problem of classical political theory but with a view to reconciling the tension by elaborating a novel concept of the role of law within political society. Rousseau separates the various types of States into two categories according to the function of law in their internal organization. In the illegitimate State,

81. See J.-J. ROUSSEAU, *supra* note 76.

82. *Id.* at 277.

the law consists in the command of a ruler; the laws are not really laws at all, but only a political mechanism for subjugating men to arbitrary rule. Whereas in the legitimate State, the law is the expression of the public interest and of the vital principle of the State; the laws are truly laws in that they have an equally salutary effect upon the individual members of the body politic and the political community as a whole. Theorists who have attempted to justify the State in its illegitimate form have been content to observe the moral perversion of man and have been unwilling to recognize the potentially dynamic character of the historical process—the possibility of rectifying the imbalance between natural morality and acquired culture. The principles of the legitimate State are the offsprings of the unity of human reason and transcending morality; they are the particular concern of those theorists who are sufficiently enlightened to recognize the ravaging of humanity by the force of *amour-propre* and who wish to put an end to its work.

In the state of nature, men complied with the natural imperatives instinctively and of necessity. As social beings, having reached a point in their evolution in which they can exercise their moral potential, men can tolerate only those constraints which lead them to moral virtue. A form of civil servitude, therefore, is as unsatisfactory as it is unacceptable; the tension between liberty and order is to be resolved by creating a legal and political regime which guarantees stability and safeguards the most precious heritage of man: his moral perfectibility. If they are to lay claim to a status of legitimacy, the laws must fulfill the task of mediating between the intrinsic and historical features of man's nature.⁸³

Although Rousseau vehemently rejects the view of the State structure as the apotheosis of order, he sees the imposition of constraints for the sake of prompting man's moral development as vital to, indeed as the sole *raison d'être* for, civil society. Laws exist to make men virtuous and to foster a love for moral virtue among men, to redress the course of history, to arrive at an appropriate accommodation between man's moral heritage and his evolved state:

83. Not only has Rousseau framed his statement of the classical political problem in terms of the traditional verities of natural law doctrine, but he has also managed to orient the debate along the lines of principles and concepts which are at the very core of his personality and thinking. Rousseau's definition of the legitimate political order emerges from a conceptual construct in which he occupies the central role, in which the notion of legitimacy itself gains its substance from his self-knowledge.

By what inconceivable art have we been able to find the means of subjugating men to make them free; . . . to enchain their will by their own declaration; to make their consent prevail against their refusal, and to oblige them to punish themselves when they do what they did not want? . . . These prodigious [things] are the work of the law. It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all, which re-establishes in the rules of law the natural equality among men.⁸⁴

The laws are not simply coercive instruments, but the vehicles of unity and harmony within the body politic—a means of infusing ideal aspirations into the positive organization of humanity. For Rousseau, the laws to be cherished, not feared;⁸⁵ the function of the government is to establish an intimacy between the people, the laws, and the civic principles which they embody:

The power of the laws depends much more upon their own wisdom than the severity of their ministers, and the public draws its greatest weight from the reason which dictated it. . . . In effect, the first law is to respect the law: the rigor of punishments is but a vain resource imagined by small minds to substitute terror for this respect they cannot obtain.

But when the citizens love their duty, and when the depositories of the public authority make a sincere effort to nourish this love by their example and by their care, all difficulties vanish.⁸⁶

According to Rousseau's theoretical schema, the creation of the general will and the establishment of the body politic and its functions are the two principal stages leading up to the institution of the political order. With some rather significant reservations, Rousseau analogizes the operation of the body politic to the workings of the human body, conceiving it as an organic unity which functions in harmony with its vital principle, the general will:

Permit me to use for a moment a common comparison [which] is imprecise in many respects, but [which] is suitable to make myself better understood.

The body politic, taken individually, can be considered as an organized, living body, similar to that of man. The sovereign power represents the head; the laws and the customs are the brain, principal of the nerves and [the] seat of understanding,

84. J.-J. ROUSSEAU, *supra* note 76, at 280.

85. *Id.* at 280, 282.

86. *Id.*

of the will and the senses, of which the judges and magistrates are the organs; . . . the citizens are the body and the limbs which make the machine move, live and work

The life of one and the other is the common *self* to the whole, the reciprocal sensitivity, and the internal concordance of all the parts. . . .

The body politic is therefore a moral being who has a will, and this general will, which always tends toward the preservation and well-being of the whole and of each part, and which is the source of laws, is for all the members of the State, in relation between them and it, the rule of the just and unjust⁸⁷

Through his consent to the social compact, the individual fuses his will with the will of all the other contractants to form the general will, the vital principle of the political order which impregnates the entire body politic—the laws are its expression, the government, its instrument of implementation. The concept of the general will is Rousseau's answer to the historical despair of the *Discourse on Inequality*. It allows him to reintegrate the principles of natural morality into History by establishing the outlines of a State structure which accounts for the totality of human nature—both in its moral and cultural dimensions. Although the general will certainly conforms to an egalitarian ideal—it imposes the same obligations upon all the members of the political community—its concordance with democratic principles is more questionable. Rousseau's theory does not appear to admit of any form of individual dissent or deviation from the natural and now the civic moral ideal; it even seems to give the government the right to regulate and to mold the very minds, to penetrate into the innermost convictions, of the individual citizen. The promotion of moral conduct seems to abolish completely any claim the individual might have to a liberty interest.

Within Rousseau's State structure, the government, in addition to its duty of administering the laws and pursuing a moderate fiscal policy, has the obligation of providing the citizens with civic education, of inculcating a sense of State values into their hearts and minds, making them aware that the salvation of all rests with the obedience of each individual to these cardinal precepts:

It is not enough to tell the citizens, be good; we must teach them to be [good]: and example itself, which is in this respect the first lesson, is not the sole means that is to be used: the love

87. *Id.* at 278.

of the fatherland is the most efficacious; because, as I have already said, each man is virtuous when his individual will conforms in every aspect to the general will, and [when] we want voluntarily what the people who love us want.⁸⁸

According to Rousseau, this education is necessary to ward off corruption and abuse, to prevent the political order from degenerating into a form of arbitrary tyranny:

[W]hen . . . all the individual interests are united against the general interest which is no longer than of anyone, the public vices have more force to upset the laws, than the laws have to suppress the vices; and the corruption of the people and the leaders spreads finally to the government, however wise it may be; the worst possible abuse is to obey the laws only in appearance only to violate them in effect in security; soon the best laws become the most fatal; it would be a hundred times better if they did not exist

It is then that for the voice of duty which no longer speaks in the hearts, that the leaders are obliged to substitute the cry of terror.⁸⁹

Although the civic instruction might be necessary to maintain the ideology of the State intact, its repressive overtones reveal the rather fragile balance in the Rousseauian political order between the omnipotence of the general will within the State structure and its democratic establishment. Once man is a citizen in a legitimate State, Rousseau no longer appears to have any confidence in man's intrinsic moral nature. The moral development of the individual appears to imply the loss of his liberty, his chief natural moral right; the ideal political order appears to have been transformed into a form of benevolent dictatorship. While nature had invested man with a capacity for moral perfection, the fortuitous events of History had left him with a propensity for corruption.

The apparent failure of the political quest, however, should not cast doubt upon Rousseau's sincerity as an advocate of universal human felicity. Even within the confines of his conceptual system, Rousseau was trying to achieve the impossible, *i.e.*, to reconcile fully the contradistinctive exigencies of a natural morality and those of an acquired artificial culture. For Rousseau, man, evolved as a social being, no longer could choose what was intrinsic to his nature without the support of a moral political order.

88. *Id.* at 282.

89. *Id.*

Rousseau's goal was to bring men to an awareness and understanding of their moral nature despite their inclination to corruption. *The Social Contract* represents the culmination of his efforts at constructing a legitimate political order for mankind.⁹⁰

VIII. THE STATE THEORY IN *The Social Contract*

In the writings which precede his major political work, Rousseau clearly has established that man, in the present state of society, is an empty moral being. His moral perfectibility, inherited from nature and which, according to Rousseau, is the distinctive, if not the quintessential, quality of man's humanity, is but a dim remembrance of the past, an imperceptible shadow in the darkness of nonhistory. Looking towards the horizon of the future, man sees only the possibility of civil servitude. In *The Social Contract*, Rousseau sets out to devise a State theory which will redress the historical evolution of mankind and rectify the imbalance between man's natural and acquired attributes. The final task of Rousseau's political thinking is to integrate some measure of the primitive liberty and equality of man into his increasingly sophisticated cultural evolution:

Man is born free [of artificial constraints], and everywhere [in society] he is in chains. One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate? I think I can answer that question.⁹¹

For Rousseau, the legitimacy of the political order does not

90. Although the thrust of Rousseau's political teaching is aimed at establishing the brotherhood of mankind, fostering the love of moral virtue among men, and advocating the goodness of humanity, it suffers from Rousseau's uncompromising belief in his own righteousness and from his unbending conviction that the salvation of other men rests upon their compliance with the intransigent demands of his personality. All of Rousseau's creativity is dedicated to the utopian reconstruction of existence, to constructing moments in which a feeling of harmony and conciliation dominates existence, in which the quintessential moments of being also become its ordinary moments. As Rousseau progressively realizes, even the literary medium, over which he exercises complete control, is incapable of fully sustaining the energy of such an ambition: the momentary serenity and plenitude that it provides dissipate and extinguish themselves in the very imperfections of the language in which it is conceived. The artist, no matter how imaginative, cannot infuse the breath of real life into his dream: he is a creator, but one relegated to human, not godly, devices and accomplishments. Rousseau's political speculations do not escape this predicament. It appears that the perfect sublimation of the will of each citizen in the vital principle of the State structure, although it establishes a moral order, is inconsistent with democratic ideas and the notion of individuality itself.

91. J.-J. ROUSSEAU, *Les Reveries du Promeneur Solitaire*, in 1 OUVRES COMPLÈTES, *supra* note 53, at 518.

lie simply in a guarantee of order and stability; rather, it is inextricably bound to the promotion of the moral integrity of humanity. Unlike the abject subservience proffered by despotic regimes, the legitimate State is founded upon the willing consent of all its members who see in its structure the possibility of inserting their full intrinsic nature into the Historical process. The institution of a legitimate civil society through the social contract enables mankind to make up for its historical losses by gaining the possibility of developing its moral capacities:

This passage from the state of nature to the civil state brings about a very remarkable change in man, by substituting justice for instinct as [the rationale] of his conduct, and giving his actions [a] moral [quality] that they lacked before. It is only then that, the voice of duty replacing physical impulsion and law [replacing] appetite, man, who until then had only regarded himself, sees himself constrained to act on other principles, and to consult his reason before listening to his passions. Although he deprives himself in this state of many advantages that nature has given him, he gains such great ones, his faculties awaken and develop, his ideas widen, his sentiments become more noble, his whole soul is lifted up to such a point that, if the abuses of this new condition did not often degrade him below that one from which he came, he should bless unceasingly the happy moment that forever pulled him out of it and which, from a limited and stupid animal, made an intelligent being and a man.⁹²

By consenting to the provisions of the act of association, man bridges the historical gap between the state of nature and civil society; he registers his common voluntary consent to distance himself from his natural independence and to establish a new and immutable political order, thereby transforming himself into a moral political collectivity, the members of which simultaneously acquire mutual rights and obligations. Mankind's consent to the social contract is a gradual process which is accompanied by a progressive awareness of the ultimate significance of the contract. At first, man adheres to it because it corresponds to his self-interest; he sees it as a means of protecting his property and material goods. Then, he realizes that the guarantee of equality has a collective advantage: it is a means of attaining the moral birthright of humanity. By incorporating the principle of natural equality into the social structure and stabilizing, as it were, the

92. *Id.* at 519.

social inequalities among men, the social contract affords man the possibility of moral development:

“To find a form of association which will defend and protect with the whole common force the persons and the goods of each associate, and by which each, uniting himself with all, nonetheless obeys [no one], but himself, and remains as free as before.” Such is the fundamental problem to which the social contract provides the solution.

If therefore we discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms: “Each of us puts his person and all his power in common under the supreme direction of the general will; and we receive each member as an indivisible part of the whole.”

At once, instead of the individual person of each contractant, this act of association creates a moral and collective body, composed of so many members as the assembly contains voters, and which receives from this same act its unity, its common *self*, its life and its will. This public person, which is so formed by the union of all the others, . . . [is the] *body politic*.⁹³

Through his consent to the social contract, each individual unites his will with the collective political consciousness, which is personified by the general will—the unalterable and indivisible expression of the common good which reigns supreme over the entire political order. The general will embodies the vital principle of the State, the rule of Justice emanating from the will of all and which applies to the conduct of all. By having their individual conduct conform to the laws which transpose the precepts of the general will into the activity of the body politic, the citizens acquire a moral dimension: they heed the counsel of reason and the command of duty and learn to benefit from their collective rights and obligations:

[W]hat man loses by the social contract . . . is his natural liberty and an unlimited right to whatever tempts him and he can succeed in getting; what he gains . . . is civil liberty and all the property he possesses. In order to avoid being mistaken about these compensations, we must distinguish clearly between natural liberty, which knows only the bounds of the individual's strength, and civil liberty, which is limited by the general will

We might, over and above what precedes, add to the gains of the civil state moral liberty, which alone makes man truly

93. *Id.* at 522-23.

master of himself; for the impulse of appetite is slavery, and obedience to the law that we have prescribed to ourselves is liberty.⁹⁴

Rousseau justifies the omnipotence of the general will by claiming that it represents no more than a principle of self-rule; the people, who retain inalienable and indivisible sovereignty within the State, simply are exercising sovereign authority upon themselves. By proclaiming themselves to be equal and by constituting a national political body—the people, the men of the social contract, in effect, simultaneously are part of the sovereign who rules the State and also the members of the physical body of the State. They exercise power over themselves through the legislative authority, the source of laws, which are valid rules for the entire body politic.

Rousseau's theoretical State structure unquestionably allows mankind to effectuate a salutary transition from an original primitive state of existence to the advanced form of cultural existence within the political community. The social contract brings man to an awareness of his humanity—transforming him into a partisan of an accommodation between the development of his natural moral qualities and his increasing cultural sophistication. The sublimation of man and of his nature are attained in the transcending moral ideology of the political order, when the collective identity subsumes the individuality of each man and makes it consubstantial with the *moi commun* of the political order. The citizens of the Rousseauian State enjoy freedom so long as their conduct conforms to the imperatives of the moral conscience of the State—a constraint which they have imposed upon themselves voluntarily:

In effect, each individual can, as a man, have a particular will contrary or dissimilar to the general will that he has as a citizen: his particular interest may speak to him quite differently from the common interest; his absolute and naturally independent existence may make him look upon what he owes to the common cause as a gratuitous contribution, the loss of which will do less harm to others than the payment of it is burdensome to himself; and regarding the moral person who constitutes the State as a being of reason, because not a man, he would benefit from the rights of the citizen without wanting to fulfill the duties of the subject; an injustice the progress of which would cause the ruin of the body politic.

94. *Id.* at 524.

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whosoever refuses to obey the general will, shall be compelled to do so by the whole body: this means nothing less than that he will be forced to be free; such is the condition which . . . alone legitimizes civil obligations.⁹⁵

Therefore, by abandoning his primitive independence and creating a political culture which accounts for the intrinsic features of his nature, man allows himself to reap the full benefits of his natural predisposition to morality. Instead of responding instinctively to animalistic instincts or living in servitude, men yield only to the coercion of laws grounded in a transcendent morality, in the expression of their own will as a human community.

Within the framework of Rousseau's political writings, the State theory elaborated in *The Social Contract* is Rousseau's response to the historical despair of the *Discourse on Inequality*. With the emergence of the concepts of the social contract and the general will in Rousseau's political vision, man's nature no longer is flouted by the fortuitous events of History—nor is he condemned to live in a state of perpetual moral corruption. Moreover, man in the original state of nature is seen for what he really was: a primitive and solitary human being who, like other animals, was incapable of engaging in conduct having any moral implications. With the rehabilitation of civil society, man acquires the Historical possibility of mastering his reason and acquiring an authentic moral consciousness—an accurate awareness of himself. As an evolved rational being, man has the right, indeed the obligation, of living within a political culture worthy of his moral potential and which also accounts for his heritage to freedom and equality. In a word, the political order does not alienate man, but rather the State becomes the protector and guarantor of the common well-being of humanity.

As has been apparent throughout his political writings, Rousseau's conception of the State and the legal order that it represents reveal a very close affinity between his thought and traditional natural law doctrine. The basic task of his writing has been to incorporate the notion of a transcending morality into the positive political culture of mankind. The formulation of the notion of the general will and its status as the ultimate source of legitimacy for positive legal and political institutions attests even more

95. *Id.* at 523-24.

closely to Rousseau's participation in the natural law tradition. Rousseau believed, as did the ancient Greeks, the medieval scholastics, and some of the more modern proponents of natural law theory, that the political community should enable man to reach his highest moral development by having his conduct and his positive institutions conform to the precepts of transcending Justice.

It is equally apparent, however, that, unlike his predecessors, Rousseau's natural law thinking reflected a deep personal dilemma, namely his preoccupation, both conscious and subconscious, with his inability to adapt to the outside world or, perhaps more accurately, his inability to have the outside world mirror the values that were his, which he thought were the natural and universal birthright of mankind. The quest to elaborate a plan for the moral salvation of men by providing them with an ideal political structure cannot be separated from, indeed it cannot be understood properly without a reference to, Rousseau's autobiographical writings in which he transposes a latent sense of guilt into a purportedly altruistic defense of his personality and individual temperament. Rousseau's unabating belief in his privileged status as a natural man and his overwhelming need for intimacy and transparency between his innermost being and the external reality are indispensable to the proper assessment of all his writings—be they autobiographical or political. Although the explicitly personal epistemology renders his theory more vulnerable to attack, in this sense also Rousseau is part of the natural law tradition. Like Plato, Aquinas, and Grotius, he built his vision of the law around the elevated and noble convictions that he held about man based upon his intrinsic sense of his own humanity. Like them, he was not afraid to express his faith in a benevolent and meaningful universe without looking for support in empirical data or hiding behind the security of a tightly knit and intentionally limited logical structure. Rousseau's most significant contribution to natural law thinking, however, lies elsewhere than in his conformity to its salient characteristics. The link between Rousseau's State theory and his literary preoccupations goes to the very heart of his political thinking and actually reveals a face of natural law doctrine which had gone unnoticed, or at least escaped the explicit commentary of both its proponents and its critics.

Although men are free to act morally within the Rousseauian political order and are equal, the institution of the moral political community is attained apparently at the price of destroying their

personal identity. Before the creation of the general will, men are distinct individual beings; after its creation, they lose both their natural independence and their individual personality. The creation and maintenance of a transcending moral ideology within the State demand not only that the citizens coexist with the collectivity, but also that they become consubstantial with the political order. The citizens undoubtedly are equal, but their freedom, their right to assert their individual discretion, is almost completely circumscribed, subsumed into the impersonal order of the State—limited to a choice between conforming their conduct to the fundamental and unbending moral precepts of the State or incurring punishment. Rousseau successfully bridges the gap between the potential morality and the cultural evolution of man, but only by eliminating all possible deviations from the moral standard of the political order. His solution, then, bears a remarkable affinity to the method he would use to resolve the tension he perceived between himself and his fellow man in the *Confessions*. There as well, he could admit of no blame or fault in his own personality; the dilemma had arisen because the others were socially corrupt and unable to understand what was right and just; finally, any reconciliation was to take place on Rousseau's terms—by having the individuality of others come to mirror his own. In *The Social Contract*, Rousseau's personality acquires its first expression in the form of an ideal political order.

IX. CONCLUSION

The drawbacks and personal tone of Rousseau's political writings, however, do not leave his political thinking or the natural law tradition which it represents devoid of merit. Rousseau, as a natural law advocate, discerned in man the quintessential qualities of humanity and argued that the political order should be founded upon principles which express man's highest human potential—not his wanton depravity. In considering the problem of the gap between a transcendent morality and the positive legal order, he aimed at conceiving a State in which man could achieve his sublimation and deploy his full moral being. The only legitimate form of political coercion consisted in restrictions which established equality among men and promoted their freedom to conform to their moral birthright and destiny. What Rousseau and other natural law theorists were attempting to do was to accomplish the superhuman feat of reconciling the contradistinctive elements of man's human nature—his potential for morally good conduct and his propensity for immoral behavior. Rous-

seau's political thought adds another dimension to the natural law tradition, namely that its exuberant optimism about man carries within it the seeds of its own destruction, as it were, that it not only relegates itself to fulfilling a role of general guidance in relation to the positive law, but also that it contains an implicit sense, a message about man's metaphysical dilemma.

Rousseau's contribution to elucidating the ultimate significance of the natural law teaching is brought out by the literary tone which underpins his political writings. His State theory, like his attempt to achieve a personal reconciliation between himself and his fellow men, was destined to fall short of transposing the dream which it was meant to express. The writer of fiction is presumed to be aware of the limitations of his art and of the general infirmity of human capacities; he knows that the fullness of his dreams finds only an approximate expression within the contours of the written word. Moreover, the dynamic character and the diversity of reality frustrate the artist's attempt to stabilize reality's essence and to transpose it into the confines of a literary work.

The utopian moment that Rousseau attempted to consecrate forever in his vision of the State occurs at the fugitive moment when men are consenting to the terms of the social contract. In those few and fleeting moments which immediately precede the birth of civil society, time comes to a momentary standstill—the tension between the dichotomous tendencies of the human personality, between the individual's egocentric concerns and his desire for brotherhood, abates; seemingly, a fully balanced and perfectly transparent harmony instills itself between the personal individuality of each man and the collective personality of the political order. The time of existence stabilizes and is filled with the feeling of serenity that emanates from the coexistence of the opposed features of human and political existence. The plenitude of the social contract, however, is without the bounds of History, located in an impalpable time frame, within the imperceptible gulf that separates the present and the past time. It has no historical temporality of its own; it serves as an imperfect juncture between two of the principal modalities of time. As a consequence, the moment of utopian felicity cannot be integrated into History; once the gap is bridged between the past and the present, once the particular wills of the individual contractants are fused into the general will, the balance between the individual identity of men and the collective personality of the State is irretrievably lost: the political order becomes immutable and in-

divisible and is devoid of deference to the individual. As with the autobiographical writings, the political enterprise results inevitably in the disintegration of the moment of plenitude once it enters into the boundaries of real experience. Even through the imaginary fabric of literary works, a man cannot reconstruct a past which is free of unwanted faults and have it pass for his real self; he cannot transpose an idyllic existential moment in which he is at one with the sensation of being into the framework of real life. Nor can he, despite the shift in focus of the classical political discourse, invent a political order which heralds the consubstantiality of man and the State and hope to have the individuality of man come out of it intact. Once the dreams of the writer or political theorist confront reality in its positive manifestations, he only can hope that the energy of his vision will enlighten the conduct of man, serving as a general guide in the establishment of human institutions. Although utopian speculations speak most eloquently of man's human potential, their transcription into the reality of human existence is destined to be only approximate; they, thereby, point to the inevitable metaphysical dilemma with which man must contend.