The LA riots and related issues

The end of the social contract

Sandra Berns

What has emerged in Los Angeles is a new and frightening tribalism, a collapse of any sense of a national community

One does not have to be a social contract theorist in the strict sense to appreciate the force of the idea of a social contract as a metaphor for the fundamental principles of a society governed by the rule of law. In its simplest, and perhaps most forceful form, because life in a state of nature (Hobbes' metaphor for the English Civil War) is nasty, brutal and short, men would be willing to abandon their (equal) natural liberty in return for the protection of the rule of law. Thus the individual relinquishes his (or her) natural inclination to be a law unto himself (or herself) in exchange for the benefits offered by the rule of law, the protection of life, liberty and property against the depredations of others. Submission to Leviathan guarantees to the individual the formally equal benefits of the rule of law. One way of understanding the recent events in Los Angeles and in other American cities emphasises the breakdown of the social contract, the exclusion of certain individuals and groups of individuals from the benefits of the rule of law. Under such circumstances, it might seem reasonable to suppose that, while ghetto residents might by force be obliged to obey the law, they had no obligation to do so. Rather, they lived, and have lived for some time, in either a state of nature or, in Lockean terms, a state of war, such that legal obligations carried no moral weight.

Hobbesian analysis of LA (with reference to Redfern)

Following the acquittal of the Los Angeles police officers charged with assaulting Rodney King on Wednesday, 29 April 1992, arson and looting became widespread and rioting spread throughout the Los Angeles area. Initially, the violence was ascribed to an outpouring of rage against the acquittal itself, particularly in light of what had been seen as overwhelming evidence of the guilt of the officers. Subsequent analyses, while continuing to focus on the acquittal as the immediate provocation, placed greater emphasis on the background conditions within the affected communities and the overall relationship between the residents of those communities and the Los Angeles Police Department. It was here that a pattern began to emerge. During the past several years, in an effort to control open gang warfare and an escalating drug problem, the police department had adopted a policy described as proactive policing. In the barest essentials this policy demanded that squads of officers actively patrol target neighbourhoods seeking out groups or individuals deemed by them to be suspect. Routine surveillance, including evening and night searchlight patrols, officially said to be aimed at ensuring that evidence of gang activity or drug dealing could not go undetected, also constituted routine harassment of individuals in ghetto homes and apartments. Where gatherings[1] of a number of individuals were detected, proactive policing procedures included on the spot searching of premises and interrogation of individuals. No warrant was required nor was any report of criminal activity or allegation of such. Whether the suspect gathering was indoors or out, or whether it might be described as a party or as a meeting in a private residence was also irrelevant.

Similarly, motorists moving through target neighbourhoods were routinely subject to harassment by the authorities. Again, evidence of any criminal intent or activity was irrelevant. Once a vehicle had been stopped its occupants and driver were liable to be interrogated, often for a substantial period, irrespective of whether any evidence existed which suggested criminal activity. Presence in the target area together with membership in particular racial or ethnic communities was sufficient to trigger search and interrogation. The squads responsible for administering the policy of proactive policing openly acknowledged their obligation to attain an appropriate quota of arrests.

It was against this background of proactive policing that the Rodney King incident occurred and it is this background against which the violence took place. It was once said that the fundamental difference between a democracy governed by the rule of law and a police

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state was that in a democracy one knew that the early morning knock on the door was simply the milkman. In certain neighbourhoods in Los Angeles, given the prevailing policy of proactive policing, one might reasonably suggest that this fundamental difference no longer exists.

More than 300 years ago Hobbes described the state of nature thus:

> To this warre of every man against every man, this also is consequent; than nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall vertues. Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. If they were they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not in Solitude. It is consequent also to the same conditions, that there be no Propriety, no Dominion, no Mine and Thine distinct; but onely that to be every mans that he can get; and for so long, as he can keep it.[2]

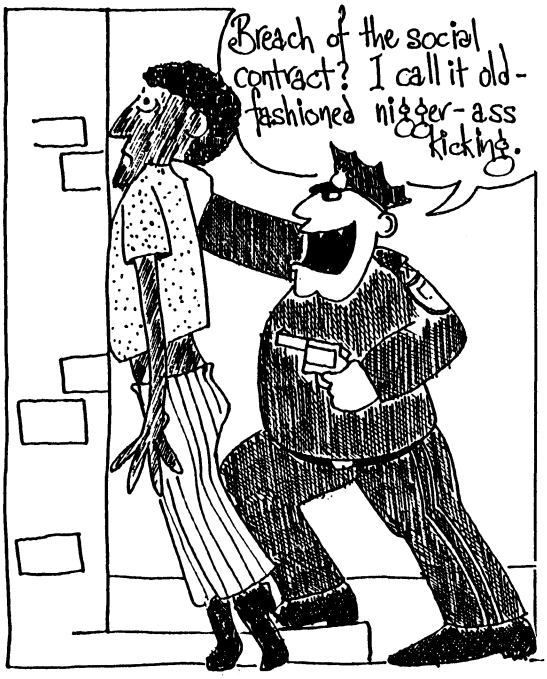
For Hobbes, it was to escape the uncertainty and undoubted misery of the war of all against all that men agreed to give up their natural liberty and institute a commonwealth. According to Hobbes:

> A Commonwealth is said to be Instituted, when a Multitude of men do Agree, and Covenant, every one, with every one, that to whatsoever Man, or Assembly of Men, shall be given by the major part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that Voted for it, as he that Voted against it, shall Authorise all the Actions and Judgments, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.[3]

For Hobbes a commonwealth might arise in two distinct ways, by institution, as described in the quotation above, and by force. Both were equally binding, the only natural rights remaining to the individual being the right of self-defence against the imposition of force, lawful or unlawful, by others and the right against self-incrimination. While Hobbes insisted that once submission to the rule of law occurred no group or individual might withdraw from the commonwealth, he also acknowledged that, in certain circumstances subjects might be absolved of obedience to their sovereign.[4] Thus, should the commonwealth be unable (or unwilling) to protect them, they need no longer obey. As Hobbes said, 'the end of Obedience is Protection; which wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it, and his endeavour to maintaine it'.[5]

Hobbes also insisted that:

> Justice be equally administered to all degrees of People; that is, that as well the rich, and mighty, as poor and obscure persons, may be righted of the injuries done them; so as the great , may have no greater hope of impunity, when they doe violence, dishonour, or any Injury to the meaner sort, than when one of these , does the like to one of them. For in this consisteth Equity; to which, as being a Precept of the Law of Nature, a Soveraign is as much subject, as any of the meanest of his People.[6]



While Hobbes did not allow that a commonwealth might be dissolved merely because it failed to meet the demands of equity, he did identify such failures in equity as tending towards the dissolution of the commonwealth and, I would suggest, would acknowledge that where such failures in equity by the agents of the commonwealth were joined with the failure of the commonwealth to protect the persons and property of ghetto residents against the lawless acts both of others and of the agents of the commonwealth itself, its laws ceased to have obligatory force.

In the context of the conditions which prevailed in Los Angeles when Rodney King was acquitted and the riots commenced, I would argue that Hobbes' condition is met. First, the commonwealth had, for some time, been either unwilling or unable to protect most of those resident in the ghettoes of Los Angeles. Lawlessness was a fact of daily life, and further, some significant part of that lawlessness proceeded from the duly appointed agents of the sovereign, the Los Angeles police. I refer here, not to the events for which the four police officers were tried and acquitted, but to the policing practices officially adopted within those communities. The practices followed in the ghetto communities of Los Angeles were and are peculiar to those communities. It was only in the Afro-American and Chicano communities that proactive policing was the norm. It was only in those communities that nightly searchlight surveillance occurred, only in those communities that individuals might be routinely interrupted in their private affairs without probable cause, and only in those communities that a presumption of guilt by the police followed the facts of residence, colour and ethnicity, nothing more being required. The use of excessive force was, apparently, commonplace. On the whole, allegations of excessive force were not dealt with according to laws which applied equally to all, but rather through internal administrative procedures by the police, violating equity which Hobbes identified as a law of nature binding subject and sovereign alike. Likewise, where evils such as those described above were inflicted on individuals by the police without a preceding public hearing they constituted not punishment, there being no wrong to be punished, but a hostile act directed against those whom the commonwealth was instituted to protect.[7] Such acts are outside the social contract and destructive of any obligation to obey the law.

I would therefore, argue that, at the time of the so-called riots, a state of nature in Hobbesian terms prevailed. It follows that these were not riots but merely the war of all against all consequential upon the dissolution of the sovereign. Likewise the looting and arson which followed were not crimes. Those engaging in such acts were not subject to any legitimate government, the purported commonwealth having withdrawn its protection from them and having, as a consequence, no legitimate claim to their obedience.

A Lockean analysis of Los Angeles

For Locke, as for Hobbes, men instituted governments to escape the uncertain-

ty of the state of nature and the inconvenience and dangers of men holding themselves out to be judges in their own cause. For Locke:

> The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government is the preservation of their Property to which in the state of Nature there are many things wanting.[8]

While, for Hobbes, men established government to escape the dangers of the state of nature, for Locke, the advantages of a lawfully established government were plain, a public settled law, a public and impartial judge, and the power to enforce just decisions when made. Unlike Hobbes who sought to restrict to the narrowest possible compass those circumstances in which the social compact might be dissolved, Locke explicitly acknowledged that wherever those in authority acted contrary to the end for which they were constituted the social compact was dissolved. In an explicit attack on the views of Hobbes and others that no rebellion against authority might be allowed, he stated:

> 231. That Subjects, or Foreigners attempting by force on the Properties of any People, may be resisted with force, is agreed on all hands. But that Magistrates doing the same thing, may be resisted, hath of late been denied: As if those who had the greatest Priviledges and Advantages by the Law, had thereby a Power to break those Laws, by which alone they were set in a better place then their Brethren: Whereas their Offence is thereby the greater, both as being ungrateful for the greater share they have by the Law, and breaking also that Trust, which is put into their hands by their Brethren.
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> 232. Whosoever uses force without Right, as every one does in Society, who does it without Law, puts himself into a state of War with those, against whom he so uses it, and in that state all former Ties are cancelled, all other Rights cease, and every one has a Right to defend himself, and to resist the Aggressor.[9]

For Locke the powers of government were, being instituted by contract, necessarily limited. It was the obligation of government to secure the peace, safety and public good of all the people and government was to be tolerated only so long as it did so. To this end, rules were to be limited to those needful to secure these aims. It was essential that the commonwealth:

> govern by declared and received Laws, and not by extemporary Dictates and undetermined Resolutions. For then Mankind will be in a far worse condition, than in the State of Nature, if they shall have armed one or a few Men with the joynt power of a Multitude, to force them to obey at pleasure the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justifie their actions. For all the power the Government has, being only for the good of the Society, as it ought not to be Arbitrary and at Pleasure, so it ought to be exercised by established and promulgated Laws: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds, and not to be tempted, by the Power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly.[10]

I would argue that the conditions which obtained in Los Angeles prior to the acquittal clearly demonstrate the breakdown of any purported Lockean contract. First, those charged with securing the public peace and safety essentially constituted a law unto themselves. In the execution of the departmental policy of proactive policing they effectively deprived some of the residents of Los Angeles of the peace and security of their own homes. The application of these policies was arbitrary, depending on extraneous factors such as place of residence, race and ethnicity rather than on the violation of known and publicly promulgated laws. Further, I believe it is wholly proper to describe the departmental guidelines and procedures against which such raids were carried out as extemporary dictates and undetermined resolutions. Those affected by them were deprived of the peace and security due those who kept within the bounds of publicly known and promulgated laws. Indeed, prior evidence of criminal activity or intent appears to have been irrelevant to police procedures. Rather, police policies constituted harassment of individuals against whom no charges had been made and in circumstances where the aim was not the protection of the residents against known and reported criminal activity but the hope that by such harassment they might uncover evidence of criminal activity.

Under such circumstances lawlessness prevailed on the part of those charged with the enforcement of the laws. In Lockean terms, the police had placed themselves in a state of war with the community they were bound to protect and individuals within that community lived, not under the rule of law, but in a state of war such that all ties and obligations might be supposed to be cancelled. It follows that the residents of the communities involved were under no legitimate obligation to obey the commands of those who claimed authority. Once violence erupted, in the absence of legitimate authority to restore the peace (the Los Angeles Police Department having acted so as to deprive itself of any legitimacy), all those within such communities were entitled to preserve their lives and property as they might deem fit. As Locke noted in distinguishing between a state of nature and a state of war:

> Want of a common Judge with Authority, puts all Men in a State of Nature: Force without Right, upon a Man's Person, makes a state of War, both where there is, and is not a common Judge.[11]

In short, the actions of the Los Angeles Police Department put it into a state of war with a significant part of the community it was under an obligation to serve. Once that occurred, the escalating violence and the descent into mob rule were inevitable. In Lockean terms, such state of war may be deemed to continue, given that violence and lawlessness had been the policy of those charged to administer justice, until a new social contract is concluded and the institutions of government are reconstituted according to its terms.

A Rousseauian analysis of Los Angeles

Unlike Hobbes and Locke, who were prepared to accept that a valid and binding social contract could arise between conqueror and conquered, or, in the case of Hobbes, master and slave, Rousseau explicitly denied that possibility. Given the history of the United States, and in particular, its recent history of slavery, and subsequently, of the systematic oppression of its Afro-American population, two quite separate inquiries are essential. First, in Rousseauian terms, can there be said to be a social contract such that the Government of the United States and of its subordinate political authorities can be said to be legitimate? Secondly, if it can be said that at some time there was a social contract, does it continue to exist or has it been terminated? Rousseau explicitly acknowledged that 'Might does not create Right, and that no man is under an obligation to obey any but the legitimate powers of the State'.[12] Thus 'no matter how many isolated individuals may submit to the enforced control of a single conqueror, the resulting relationship will ever be

that of Master and Slave, never of people and Ruler'.[13] For Rousseau, the idea of a social contract presupposed the unanimous and voluntary agreement of individuals possessed of natural freedom and equality. Any failure in this regard vitiated the very idea of a social compact, leaving only the relationship of master and slave.

> The act of association implies a mutual undertaking between the body politic and its constituent members. Each individual comprising the former contracts, so to speak, with himself and has a twofold function. As a member of the sovereign people he owes a duty to each of his neighbours, and, as a Citizen, to the sovereign people as a whole.[14]

The social contract, for Rousseau, involved for each individual, the complete alienation to the community of all his rights. Should this absolute equality of surrender fail, 'each associated individual would at once resume all the rights which once were his, and regain his natural liberty, by the mere fact of losing the agreed liberty for which he renounced it'.[15]

For Rousseau, quite clearly, the United States came into being under circumstances in which with respect to substantial parts of its population no social contract might be said to have existed. Slavery was explicitly recognised by its Constitution, and the Native American population was subject to the law of the conqueror rather than the rule of law. With respect to these two substantial groups at least, the complete equality of surrender emphasised by Rousseau did not exist. Even following the American Civil War, I do not believe that it is possible to argue that the Afro-American population might have become parties to a reconstituted social contract adequate in Rousseauian terms. At no point in time were such individuals free to accept or reject the authority of the United States Government and the subordinate governments exercising local rule under its authority.[16] They remained deprived of choice and equality of surrender could not be said to have prevailed. Native Americans were not acknowledged as citizens until the 1920s, remaining subjugated and fundamentally alien peoples within the body politic.

Similarly, even if at some point in time it may have become possible to argue that the Afro-American and Chicano residents of the Los Angeles ghettos in conditions of authentic freedom of choice affirmed their participation in the social contract, I would argue that conditions at the time immediately prior to the riots were such that the social contract had been violated. Rousseau emphasised absolute equality before the law as the basis of the social contract. For Rousseau, the social contract substituted moral and legal equality for natural inequality and he went so far as to suggest that:

> under a bad government such equality is but apparent and illusory. It serves only to keep the poor man confined within the limits of his poverty, and to maintain the rich in their usurpation. In fact, laws are always beneficial to the 'haves' and injurious to the 'have-nots'. Whence it follows that life in a social community can thrive only when all its citizens have something, and none have too much.[17]

The social contract Rousseau sought to describe was a participatory association of free and equal individuals, not an agglomeration of alienated individuals and warring interest groups, each seeking to impose its will on the others for its own advantage. For Rousseau, the contract of association was one in which:

> the whole strength of the community will be enlisted for the protection of the person and property of each constituent member, in such a way that each, when united to his fellows, renders obedience to his own will, and remains as free as he was before. That is the basic problem of which the Social Contract provides the solution.
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> The clauses of this Contract are determined by the Act of Association in such a way that the least modification must render them null and void . . . So completely must this be the case that, should the social compact be violated, each associated individual would at once resume all the rights which once were his, and regain his natural liberty, by the mere fact of losing the agreed liberty for which he renounced it.[18]

Given the conditions obtaining in the ghetto communities of Los Angeles and, in particular, the fact that the purportedly legitimate authorities acted arbitrarily both in failing to protect the persons and property of the residents and in themselves violating the resident's right to the security of their own persons and property, one may conclude that their natural liberty had been restored. Were that insufficient, it may further be argued that under the conditions prevailing today in the United States with the proliferation of competing interest groups no truly general will is possible and no common interest. For an act of the general will to be authentic in Rousseau's sense, the same obligations must be laid on all and the same benefits conferred. Only under such circumstances can the rule of law be legitimated.[19] Here, I think of one of the scenes in the aftermath of the riots, where a young, white, middle class woman argued that her taxes ought not be increased to assist them to rebuild their community. The language of a valid and binding social contract in the sense Rousseau intended is a language of we the people and of our community, not a language which emphasises separate communities devoid of social bonds to one another.

Thus, within the frame of reference established by the Rousseauian tradition, one may justifiably conclude either that no social contract ever existed between the 'wider community' and the ghetto residents, or in the alternative, that such had been dissolved.

On the possibility of legitimacy

While what has been written above is, because of its focus, particular, and because of the unpleasant truths recent events have brought home to at least some of us, pessimistic, the questions raised are of wider concern and the pessimism implicit in what has been said even more a call for renewal than an acceptance of defeat and despair. In a broader sense we need to explore how a racially and culturally pluralistic society can come to form a people rather than, as Rousseau feared, an agglomeration of competing interest groups incapable of acting in the common welfare. Most thinking individuals believe that we have, albeit in some unspecified and inchoate sense, a moral obligation to obey the law. Civil disobedience is seen as exceptional, often as a challenge to the morality of a specific law or laws even while acknowledging the obligatory force of the rule of law itself. What occurred in Los Angeles was not, however, civil disobedience. Instead it seemingly represents a challenge to the legitimacy of prevailing laws and legal institutions, an implicit statement that while the residents of the Los Angeles ghettos might be obliged (that is, compelled) to obey the law they were under no moral obligation to do so. In an important and fundamental sense, it was not their law. It had been imposed on them from without, and the necessary sense of participation and obligation was absent. The community to which 'the law' pertained and to which the police belonged was in a fundamental

and horrifying sense not their community at all. The sense of otherness was finally inescapable.

A contemporary legal and political philosopher, Ronald Dworkin, has argued that for the laws of a political community to possess moral force certain conditions must obtain. While denying allegiance to the social contract traditions he has argued that associative obligations arise within political communities simply as a consequence of the social practices within those communities provided certain conditions are met. Members of the community must regard these obligations as holding uniquely within the group. They must accept that they apply among themselves, binding member to member. They must believe that they reflect a concern for the well-being of each of the members and that the practices of the group demonstrate equal concern for all members. While he emphasises that where these conditions are met individuals are bound irrespective of whether or not they wish to be bound, he also acknowledges that these obligations may be lost, as where the community refuses to extend the benefits of membership to some individuals. Dworkin argues that:

> most people think that they have associative obligations just by belonging to groups defined by social practice, but that they can lose these obligations if other members do not extend to them the benefits of belonging to the group.[20]

Yet it is precisely that sense of community which is strikingly absent in the accounts coming out of Los Angeles. The image which emerges is less that of a common political community attempting, however ineptly, to chart a mutual destiny than one of fragmented and inchoate communities defined by their otherness and subject to external rule by a wider nation state with whose commands they are obliged to comply. It seems to me that the most fundamental benefit of a political community in the sense Dworkin uses the term is the protection or benefit of living under the rule of law, of the sense that the early morning knock on the door is that of the milkman, and it is precisely this benefit of which the Afro-American and Chicano residents of Los Angeles have been and are being deprived. Whatever may or may not be made right on the national level, it is at the local level that laws and social practices most directly impact on individuals, and it is at the local level that things have gone very wrong indeed. What has emerged in Los Angeles is a new and frightening tribalism, a collapse of any sense of a national community and its replacement by fragmented interest groups defined by bonds of economic status, of ethnicity, of race, of employment culture (as with the police). (It has, I believe, much in common with the tribalism now emerging in Eastern European states as a consequence of the collapse of the Soviet Union, although that is a topic for another time and another place.)

Given the (increasing) gulf between rich and poor, and, in particular, the emergence of a permanent black underclass with little, if any, prospect of escaping from poverty and making its way into the mainstream of American life, real questions must arise. When the nation was established the Preamble to the United States Constitution in words strongly reminiscent of the social contract tradition stated:

> We the People of the United States in order to form a more perfect union, to establish justice, to insure domestic tranquillity, to provide for the common defence, to promote the general welfare, and to secure the blessings of liberty to us, and our posterity do hereby . . .

Today it is necessary to ask whether 'we the people' exists in any meaningful sense. (I recognise, of course, that even at the nation's founding we the people was in fact exclusive rather than inclusive. 'We the people' were uniformly white, affluent males. Women, slaves, Indians not taxed were excluded from the people of whom the constitution spoke and to whom its benefits applied. They were obliged to obey the laws of the United States but, in Rousseau's terms could not be said to have an obligation to do so.)[21] The beginning of renewal might be seen as an attempt to establish the conditions under which every American is included in that 'we', to reconstitute a general will which is truly general, which breaks down inequalities and seeks to insure that we as a people submitting to the rule of law also may truly be said to rule ourselves.

References

1. A report on Los Angeles Police Department practices filmed by the BBC and shown on 'Sunday' on 3 May 1992 indicated that parties and other social gatherings were routinely targeted and those present frisked and the premises searched for drugs, guns and other evidence of criminal activity. From the report it would appear that this was normal policy and that the usual rule of law safeguards such as a warrant were unnecessary.
2. Hobbes, T., *Leviathan*, edited with an introduction by C.B. Macpherson, Harmondsworth, Penguin, 1968, p.188.
3. Hobbes, above, pp.228-9.
4. Hobbes, above, pp.272ff.
5. Hobbes, above, p.272.
6. Hobbes, above, p.385.
7. Hobbes, above, p.354.
8. Locke, J., *Two Treatises of Government*, a critical edition with an introduction and apparatus criticus by P. Laslett, New York, Mentor, 1960.
9. Locke, above, pp.467-8.
10. Locke, above, 406-407.
11. Locke, above, p.321.
12. *Social Contract, Essays by Locke, Hume, and Rousseau with an Introduction by Sir Ernest Barker*, London, Oxford Univ. Press, 1947, p.173.
13. *Social Contract*, above, p.178.
14. *Social Contract*, above, p.182.
15. *Social Contract*, above, p.180.
16 Rousseau explicitly argued that even if one supposed that an individual might 'consent' to enslavement or to arbitrary rule, he was incompetent to 'consent' for his descendants. His children were born free and only they might dispose of their own liberty. It followed therefore 'that an arbitrary government can be legitimate only on condition that each successive generation of subjects is free either to accept or to reject it, and if this is so, then the government will no longer be arbitrary'. *Social Contract*, pp.174-5.
17. *Social Contract*, above, p.189.
18. *Social Contract*, above, p.180.
19. *Social Contract*, above, pp.196-7.
20. Dworkin, R., *Law's Empire*, London, Fontana, 1986, p.202ff. The passage quoted in the text may be found at p.196.
21. Even Rousseau, as is well known, excluded women from his social contract, but he at least did deny the legitimacy of rule imposed by force.