

nize that he is subject to civil law and all the penalties connected therewith until his ideas or acts no longer constitute those of a minority group, but have become "obvious" or "evident" to all and have resulted in dissolution of the compact.

The Declaration of Independence is clearly a document based upon utopian natural right, not on constitutional law. The unalienable rights to life, liberty, and the pursuit of happiness are natural rights: according to Locke, best served by membership in society.

The right to destroy the society of which one is a member is retained throughout one's membership in society. The exercise of this right, however, is "to declare war" on the society, and to discredit the very purpose for which the society was formed, that is, the security of its membership. No society, therefore, in the interest of stability, self-preservation, and preservation of its members, can allow individuals to exercise a *civil* right to revolt. No man, however, nor any society, can deprive a man of his *natural* right to do so.

Man is free when he is aggrieved, utopians would state, to protest against tyranny and to refuse to submit. Yet, it would be an invitation to anarchy, an absurd recognition of individualism and equality of men's minds, if a constitution were to guarantee self-determination in personal grievances, the very object which the institutions of civil law sought to end; for it is easily seen how natural liberty may tend to privilege and thence toward a disintegration of government and a susceptibility to aristocracy or monarchy.<sup>24</sup>

<sup>24</sup> See 3 J. ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE*, chs. 4-6, 10 (Garnier Frères ed. 1962).

The credibility of much of what has been said above depends upon the credibility of an original contract. It is unrealistic, however, to conceive of every member of a future society organized in a floodlighted coliseum off in the wilds of nature, all of whom are prepared to consent to rule by law and punishment by delegated power. It is conceivable that "many" men or "distinguished" men, representing the will of all, will organize to form some such contract. It ought to be forgotten that tables or parchments are in anyway involved, for the very issue may turn on the giving of *tacit consent* to civil rule.

Theoretical individualism suggests that no one need obey any government which he has not personally undertaken to obey. Locke was quite explicit on this point: "Every man that hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent and is obliged to obedience to that government's laws."<sup>25</sup> On the other hand, to reaffirm his belief that tacit consent should not be confused with subjugation or compliance by necessity, Locke stated further: "No man is a member of a society but by his actually entering into it by positive engagement and express promise and compact."<sup>26</sup> In other words, by tacit consent, man is bound by law and in conscience, but only by explicit consent does he become a full member. The distinction, if it exists at all, is a fine one, and seems only to strengthen the role of tacit consent in society.

<sup>25</sup> SOCIAL CONTRACT, *supra* note 12, at 71. See also *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring opinion).

<sup>26</sup> SOCIAL CONTRACT, *supra* note 12, at 72-73.