

# On First Considering Whether Law Binds

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## INTRODUCTION

The endless cycle of idea and action  
Endless invention, endless experiment,  
Brings knowledge of motion, but not of stillness;  
Knowledge of speech, but not of silence;  
Knowledge of words, and ignorance of the Word.  
—T.S. Eliot<sup>1</sup>

Perhaps the most important of all important fundamental questions about law is whether it is obligatory. Yet curiously enough, when one surveys the reams of scholarship generated by those with an interest in law and legal systems, the paucity of attention to this question is evident.<sup>2</sup> One cannot help but get the impression that discussion of certain matters is considered taboo; indeed, that unless one is prepared to face the collapse of the entire legal system, examination of the foundational premises upon which that system rests is off-limits. Examination of such premises is to be ascetically avoided by centering discussion on the range of technical subsidiary matters that

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1. T.S. ELIOT, Choruses from "*The Rock*", in *THE COMPLETE POEMS AND PLAYS* 96 (1971).

2. *But see, e.g.*, RONALD M. DWORKIN, *LAW'S EMPIRE* 190-224 (1986); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 314-43 (1980); PHILIP SOPER, *A THEORY OF LAW* 57-100 (1984).

surround and, through consequent preoccupation, deflect attention from the truly essential.<sup>3</sup>

There is no doubt that there is genuine value in concentrating on subsidiary matters that envelop those aspects regarding the nature of law itself. Such treatment enhances the meaning of specific legal rules, their relationship to whole areas of law, and the workings of the legal system. But unless the very thing that has precipitated such an outpouring of analytical and creative talent has the force to bind those to whom it is directed, then far too much cerebral energy has been spent on describing a will-o-the-wisp. Admittedly, the law may be backed by the bite of official social sanction. And commentators, evincing a natural preference for the organizing and ordering attributes of law, may even write and speak about it as though it were obligatory. Still, in passing over whether law binds and focusing instead on its interpretation, explication, application, and creation, the law is given an importance with regards to the resolution of social problems that is perhaps undeserved.<sup>4</sup> In light of the possibility of practical advantages incident to alternative conceptions of law, it may also be deprived of the chance to become all that it can be as a device for organizing and ordering the affairs of humankind.<sup>5</sup>

The importance of the question of the law's ability to bind is illustrated by looking at three specific areas, the first of which is contemporary *theoretical scholarship*. For some time now commentators have offered their considered opinions on the courts' authority to exercise judicial review to invalidate statutes not inconsistent with any plain constitutional text,<sup>6</sup> uphold statutes

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3. This is not a phenomenon confined to law, but appears in other disciplines as well. Organized religions seldom entertain inquiry concerning the omnipotence or equitableness of God. *But see generally* HAROLD S. KUSHNER, *WHEN BAD THINGS HAPPEN TO GOOD PEOPLE* (1981). Similarly, political ideologies scarcely ever examine the assumptions upon which their social constructs rest. *But see generally* ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975). The scientific community itself operates in a milieu that always takes current scientific laws for granted until enough incompatibilities appear and necessitate some form of reanalysis and reworking. *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

4. Law is generally viewed as an instrument for addressing social problems. When it is conceived of as binding, there is a heightened expectation that it will be able to address such problems with some apparent degree of success. As a result, it is not at all strange to witness members of a social community attempting to deal with the community's difficulties, in large part, through legal pronouncements. To the extent that efforts on other fronts are essential, they may receive less attention. *See infra* text accompanying notes 167-77.

5. A very rigid conception of law can produce a certain sterility or paralysis that impedes the use of law to advance social progress. *Cf.* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 253-66 (1977) (discussing the displacement of traditional legal doctrines that worked against commercial development with modern doctrines that promoted such). It should be observed that every learned first-year law student is aware of how the rejection of the ancient doctrine of the free flow of air and light allowed for the promotion of urban development. *See Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

6. A classic opinion taking such an approach is *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding a law forbidding contraception unconstitutional despite absence of constitutional language of prohibition). For commentary on such an approach to statutory invalidation, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

inconsistent with a plain text,<sup>7</sup> nullify other statutes because they happen to be antiquated,<sup>8</sup> or make "federal common law."<sup>9</sup> Commentators have also written much about the determinacy of law, questioning whether its application produces a single right answer or several opposed, possible answers.<sup>10</sup> In addition, they have dissected legal reasoning itself, focusing not so much on the appropriateness of the premises upon which the reasoning rests as on the way in which it explains the intellectual process by which a decision is arrived at on its own merits or from precedent.<sup>11</sup> And finally, under the appellation of "interpretivism," there has been a retreat from the traditional subject/object, idealism/nominalism, realism/antirealism debate and a move in the direction of emphasis on the preeminent place occupied by the act of interpretation, without regard to assessing the correctness of either the result of the interpretation or the reasoning by which it is achieved.<sup>12</sup>

7. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984); Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 145 n.131 (1988); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). For cases in the area, see East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945) (upholding state mortgage moratorium laws despite the constitutional prohibition on laws impairing contract), and Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444 (1934). On the contract clause, see also Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983) and Exxon Corp. v. Eagerton, 462 U.S. 176 (1980) (upholding state statutes impacting contracts). With regard to the First Amendment, see generally Schenck v. United States, 249 U.S. 47 (1919) (upholding § 3 of Espionage Act of 1917 from a First Amendment challenge associated with a conviction for circulation of a written document); Debs v. United States, 249 U.S. 211 (1919) (upholding an Espionage Act conviction for a public address); FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* (1849) (discussing cases upholding the Sedition Act of 1798 notwithstanding the First Amendment protection of speech and press).

8. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Allen C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982) (book review).

9. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Alfred Hill, *The Erie Doctrine and The Constitution*, 53 NW. U. L. REV. 427 (1958); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen & Lehman*, 78 MICH. L. REV. 959 (1980); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964). For basic cases, compare Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (urging an active role with regard to the formulation of federal common law), with Texas Indus. v. Radcliff Materials, 451 U.S. 630 (1981) (taking a restrictive view of power to formulate federal common law).

10. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1989); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

11. See Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985); Richard Warner, Comment, *Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523 (1989).

12. See generally Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (arguing that the context in which law is made is part and parcel of its meaning); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); James B. White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982). See also RICHARD

In each instance, theoretical scholarship has tended to proceed without considering whether law is obligatory. No matter what position a particular commentator takes, the unspoken assumption is that law does indeed bind those to whom it is directed. Obligation goes without saying. Yet in the event this unstated premise is faulty, if the force of law is something which has been incorrectly taken for granted, the significance of judicial review, legal determinacy, case law reasoning, and interpretivism would appear to be substantially undercut in all but the most formalistic of senses.

The second area illustrating the importance of this same matter has to do with existing *judicial precedent* involving real-life legal issues. As we all know, the courts frequently hold forth on sensitive and complex disputes concerning whether the straightforward words of a contractual commitment between private parties,<sup>13</sup> the character of an unequivocal rule of the common law,<sup>14</sup> the plain terminology of a legislatively decreed statutory mandate,<sup>15</sup> or the absolutistic expression of a constitutional provision<sup>16</sup> establish standards from which departure is disfavored. And just as with the commentary on contemporary theoretical issues, the judicial opinions tackling these disputes of obvious importance to the litigants are penned from the perspective that since it is universally accepted that law is binding, there need not be a single word said in defense of that proposition. Attention is focused almost exclusively on whether any of the sundry number of stratagems available for avoiding an adverse determination can be employed.<sup>17</sup> The power of law to obligate is simply viewed as a given. On the offhand chance no logical reason exists for accepting such a proposition, it seems that much that is onanistic could therefore be found in a substantial amount of judicial decisions.

A third area in which the question of law's ability to bind is important involves those individuals outside the formal machinery of the legal decision-making process as well as those within it who have a direct personal stake in

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RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). For a critical review of interpretivism see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989) (attempting to demonstrate the need to return to the realist/antirealist debate).

13. See *Clarkin v. Duggan*, 198 N.E. 170 (Mass. 1935) (finding private express easement for "teams only").

14. Consider the traditional common law doctrine of privity of contract, established in *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) (requiring a contractual relation between a plaintiff and the one sued for personal injury resulting from an item of tangible property).

15. See *State v. Shack*, 277 A.2d 369 (N.J. 1971) (disregarding a statute subjecting to a fine "any person who trespasses on any lands . . . after being forbidden so to trespass by the owner?"); see also *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (approving U.S. Customs Service regulations allowing certain imports when the controlling statute says importation "shall be unlawful"). On *K-Mart*, see Thomas O. Depperschmidt, *The Supreme Court Decision on Gray Markets in K-Mart v. Cartier, Inc.: When is 'Plain Language' Not Plain?*, 15 S. ILL. U. L.J. 67 (1990).

16. See *Schenck v. United States*, 249 U.S. 47 (1919) (interpreting U.S. CONST. amend. I); *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967) (interpreting U.S. CONST. art. I, § 9, cl. 5).

17. Those stratagems first resorted to would include attempting to identify determinative factual distinctions between the case at hand and the earlier precedent-setting case; closely examining the language of the contractual, statutory, or constitutional provision in dispute to ascertain whether it is susceptible to interpretation; and seeking the purpose or objective of the rule being applied so as to avoid arriving at a decision consistent with its strict language but inconsistent with its goal.

understanding how to act when facing a problem that can be answered by some rule of law. Whether private citizen, governmental official, lawyer, or judge, the *practical concerns* attendant to membership in a social community require reference to rules of law. When the rules indicate they expect actions at variance with those that happen to be contemplated, the matter of law's ability to obligate is directly implicated. This is certainly true whenever an individual contemplates civil disobedience,<sup>18</sup> a public official considers contravening a legislative mandate,<sup>19</sup> a lawyer advises a client of the morality (versus the immorality) of conduct currently deemed unlawful,<sup>20</sup> a judge considers departing from well settled rules of law,<sup>21</sup> or a jury reflects on ignoring the law so it can arrive at a decision it finds more appropriate.<sup>22</sup> Most who encounter situations that pit what they would like to do against what the law dictates, follow the law. However, even those who decide to pursue actions inconsistent with what the law declares most likely do so because they think it expedient, not because they have concluded law is incapable of fixing obligation. But is it not true that if law lacks the force to bind, many have already been, and many more in the future may be, compelled to endure anguish over their actions for the wrong reason? If law is not obligatory, it seems people facing the pinch of legal rules may be dealing with the dilemma without reflection on all the variables that should affect their decisions.

In the pages that follow, I offer some thoughts on whether law is obligatory. My most ambitious expectation is that the attempt will facilitate a better comprehension of the significance of the theoretical, precedential, and practical matters to which I have alluded. Candidly, however, the effort would prove more than satisfying if it did nothing but contribute to an increase in the number of those interested in reflecting on the deeper mysteries of law.

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18. On following the law in this context see generally HENRY D. THOREAU, CIVIL DISOBEDIENCE (1849), reprinted in THOREAU: WALDEN AND OTHER WRITINGS 85 (Joseph W. Krutch ed., 1962).

19. The Iran-Contra Affair provides a recent example of this at the highest levels of government. See, e.g., SENATE SELECT COMM. ON INTELLIGENCE, PRELIMINARY INQUIRY INTO THE SALE OF ARMS TO IRAN AND POSSIBLE DIVERSION OF FUNDS TO THE NICARAGUAN RESISTANCE, S. REP. NO. 7, 100th Cong., 1st Sess. (1987). For an earlier instance of executive disregard of a legislative enactment see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 106 n.42 (1972) (revealing that President Roosevelt placed reliance on an executive agreement overcoming earlier Congressional enactment).

20. With regard to an attorney's professional responsibility concerning an unlawful act contemplated by a client, once the fact of the act's unlawfulness has been communicated, the Code of Professional Responsibility does not clearly obligate the attorney to refrain from informing the client that the act is nonetheless moral. See A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 (1969), reprinted in BLACK'S LAW DICTIONARY LII (rev. 4th ed. 1968) ("Advice of a lawyer . . . need not be confined to purely legal considerations."). It is conceivable, however, that the Code may be directed toward allowing reference to morality and other factors only when such a reference supports urgings to follow the law and not when it cuts the other way.

21. See generally Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988) (arguing for decisions based on a rule of reasonableness).

22. See generally Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 483 (1968); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (examining the authority of a jury to refrain from convicting one because of the view that the settled law is unjust). For a very recent case reaffirming the power of the jury to acquit a defendant on the basis of its notions of justice see *Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990).

Part I proceeds by categorizing and critiquing the various arguments that support the notion that law binds.<sup>23</sup> Immediately following in Part II are a series of preliminary thoughts regarding my own views on the force of law and its role in social organization.<sup>24</sup> In the Conclusion I argue that movement away from law-orientedness is intended neither to discount totally the value of law, nor to substitute deleterious personal subjectivity incapable of assisting in the solving of day-to-day legal problems.

As will be apparent from the critique in Part I of the theories of obligation, none of the propositions in support of the binding force of law seem able to withstand sedulous examination. Nonetheless, Part II argues that chaos and disorder need not result if the preponderance of social energy is devoted to nurturing a heightened sense of personal responsibility and individual accountability.<sup>25</sup> The essential meaning of this is that—even with law being conceived of as non-obligatory—through cultivating in each member of society a sense of the importance of always acting so as to evidence recognition that we are answerable for what we have done or failed to do, harmony and stability can be secured. Law can be spoken of as binding when the contrary is known to be true, and, assuming fidelity to the task of nurturing conscientiousness, considerateness, and commitment borne of tolerance and skepticism, the virtues of responsibility and accountability can gradually be conditioned to take on the job of providing guidance for social organization. The conclusion of this article defends against possible claims that these virtues cannot prove as effective as law in ordering the affairs of society. By their very nature they create both internal personal and external societal constraints on pure subjectivity. The conclusion finishes by returning to the theoretical, precedential, and practical matters referenced in the opening pages of this paper and argues that, in moving away from faith in law, the social fabric can be preserved while allowing for new and creative perspectives on the resolution of difficult legal problems.

## I. POSSIBLE BASES OF LEGAL OBLIGATION

No man stood on truth. They were merely branded together, as usual one leaning on another, and all together on nothing; as the Hindus made the world rest on an elephant, the elephant on a tortoise, and the tortoise on a serpent, and had nothing to put under the serpent.

—Henry David Thoreau<sup>26</sup>

Quite obviously there are numerous ways to examine the entire range of bases potentially capable of imbuing law with the obligational force to bind. For instance, one might classify each basis under time-honored jurisprudential

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23. See *infra* part I.

24. See *infra* part II.

25. See *infra* text accompanying notes 168-77.

26. HENRY DAVID THOREAU, *LIFE WITHOUT PRINCIPLE* (1863), reprinted in THOREAU, *supra* note 18, at 353, 365-66 (Joseph W. Krutch ed., 1962).

headings like positivism<sup>27</sup> and naturalism,<sup>28</sup> adding something like

27. Positivism is frequently seen as emphasizing promise or consent as the basis of obligation. See JAMES L. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 17 (1958). It matters not whether the consent is evidenced through a social contract establishing a political sovereign, see THOMAS HOBBS, *LEVIATHAN* Pt. II, ch. XVIII (Everyman ed. 1914), or some more direct and participative method. On discussion of consent as the basis of obligation, see *infra* notes 56-58 and accompanying text. Positivism as a school of legal theory gained in strength between the latter years of the 18th century and the early years of the 20th century. This paralleled the ascendancy of the modern nation-state, see GEORGE C. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 292-93 (1973), and the advance of physical science, see ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 223-24 (1947). At the risk of oversimplification, positivism's distinguishing characteristics include the notions that law proceeds from the dictates of a sovereign, and that the legal order and the moral order are analytically distinct. See CHRISTIE, *supra*, at 292. Positivism is often associated with the view that law is infused with what is necessary to make it binding because the sovereign has surveyed the range of available standards and then manifested its consent to one by settling upon and formally prescribing, through the issuance of a statute, decree, or some instrument, a rule to be observed by those who are subject to the rule's embrace. See PHILIP SOPER, *A THEORY OF LAW* 17-18 (1984); James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT'L L.J. 327, 334 (1985).

The historical antecedents of positivism extend at least to the 17th century theorist John Locke, who maintained that consent created a majoritarian community that succeeded to the earlier state of nature and gave rise to the notion of legal obligation. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* Ch. VIII §§ 95-99, reprinted in JOHN LOCKE, *ON POLITICS AND EDUCATION* 75, 123-25 (Classics Club ed. 1947). A similar position on the force of consent in the international realm was expressed by Locke's contemporary countryman, Richard Zouche. See NUSSBAUM, *supra*, at 118-22 (citing Zouche for the proposition that the principles of international law are rules "accepted by custom conforming to reason among most nations or which [have] been agreed upon by single nations." RICHARD ZOUCHE, *JURIS ET JUDICII FICIALIS, SIVE JURIS INTER GENTES* (1650), quoted in NUSSBAUM, *supra*, at 121 (emphasis added)). Locke's and Zouche's views on the import of consent were reiterated in the 18th century by David Hume, who maintained that government is established by consent and that the duty to obey government derives from that consent. See DAVID HUME, *A TREATISE OF HUMAN NATURE*, 470-76, 539-49 (L.A. Selby-Bigge ed. 1888). By far the most influential early positivist was John Austin, founder of the English analytical jurisprudence movement of the 19th century. Unlike Locke, Zouche, and Hume, however, Austin did not view consent as vital to legal obligation, since the existence of obligation hinged on nothing other than the presence of positive, or man-made law. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832), reprinted in CHRISTIE, *supra*, at 471, 581-92. Positive law was "properly so-called," and consisted of a command from a sovereign political subordinate backed up by sanction, see AUSTIN, *supra*, at 472-75, 499, 527.

28. Naturalism, natural law, or the law of nature as a basis of obligation emphasizes that all human-made law is to be looked at and understood against a backdrop of principles discovered through use of human faculties, whether sensory or cerebral. The principles discovered bind because they reflect God's will, right reason, or some similar force. See CHRISTIE, *supra* note 27, at 84, for the observation that the important questions natural law adherents have struggled with include the effect of natural law upon human law, how one identifies the content of natural law, and whether natural law is binding. On natural law generally see A.P. D'ENTRÈVES, *NATURAL LAW: AN HISTORICAL SURVEY* (1951).

The natural law tradition seems to have had its roots in Greek Stoicism. Stoicism developed in the third century B.C., perhaps as a reflection of the disillusionment, following the decline of the Greek city-state in the preceding century, with man's ability to govern man. See ROBERT ADAMSON, *THE DEVELOPMENT OF GREEK PHILOSOPHY* 79-83, 257-94 (1908). The essence of the thought of early Greek Stoics was expressed by Chrysippus and included the following: that divine providence animates the world; that animation is expressed through nature; nature is rational; man is unique in that man has reason; the good life consists in living in accordance with nature and thereby resigning one's self to the purposes of the divine being. See generally JOSIAH B. GOULD, *THE PHILOSOPHY OF CHRYSIPPUS* (1970). Stoicism, as introduced to the Romans by Panaetius in the middle of the second century, B.C., perceived obligation to rest on natural law. Roman Stoics appeared to have accepted this in large part. See MARCUS CICERO, *ON THE LAWS*, bk. I (n.d.), reprinted in CICERO: *SELECTED WORKS* 218, 228-33 (Classics Club 1948); CHRISTIE, *supra* note 27, at 81 (Cicero held that the law of nature evidences what is just, and justice is to be practiced). For similar views by Roman Stoics, see MARCUS AURELIUS, *MEDITATIONS* ch. VII, § 55, ch. XI, §§ 9-10 (n.d.), reprinted in MARCUS AURELIUS AND HIS TIMES 75-

scientism<sup>29</sup> to round out the spectrum. Then again, one could simply address each basis of obligation individually, as though every one were an explanation discrete and separate from all the others. The approach selected here, however, arranges the various possible bases into four major categories. The names given to each of the categories try to capture a characteristic shared by the specific bases of obligation analyzed thereunder. In this way, the commonalities of certain explanations of why law obligates can be identified, discussed, and subjected to full consideration, without leaving the impression that every foundational argument stands on its own, or that one time-honored jurisprudential school suggests bases with characteristics endemic only to itself. With these comments firmly in mind, let us consider each of the categories of potential bases of obligation.

### A. Observable Facts

The first category to be considered might be labeled "observable facts." Each individual basis within this category manifests the feature of being something that can be perceived, ascertained, or determined. Through observation and empirical study, the characteristic which claims to make each of the individual bases within the broader category unique from each of the

76, 117 (Classics Club 1945), and EPICTETUS, THE DISCOURSES, bk. 2, ch. VIII (n.d.), reprinted in EPICTETUS, DISCOURSES AND ENCHIRIDION 103-06 (Thomas W. Higginson trans., Classics Club 1944). For theorists of natural law doctrine in post-Roman period see THOMAS AQUINAS, THE SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., 1915); FRANCISCO DE VITORIA, DE POTESTATE CIVILI (1528), translated in JAMES B. SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW, pt. I, Francisco de Vitoria and His Law of Nations (Gwladys L. Williams trans., 1934); HUGO GROTIUS, DE JURE BELLI AC PACIS (1625) (Classics of International Law No. 3) (Francis W. Kelsey trans., 1964); FRANCISCO SUAREZ S.J., DE LEGIBUS, AC DEO LEGISLATORE (1612) (Classics of International Law No. 19) (Gwladys L. Williams et al. trans. & James Brown Scott ed., 1964); and SAMUEL VON PUFENDORF, DE JURE NATURAL ET GENTUM LIBRI OCTO (1672) (Classics of International Law No. 17) (C.H. Oldfather et al. trans., 1934). Modern writings on natural law include FINNIS, *supra* note 2, and LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987).

29. Scientism is not a commonly spoken of basis of obligation, but it might be said to involve the identification of biological, physical, or socio-behavioral principles which function in the universe, and the articulation of how these principles can be used to explain why law should be viewed as binding. The principles identified would be ones that emerge from or can be confirmed by empirical analysis. Since these principles operate in the same milieu as man, and on all objects of the observable universe, the fact that human-made law is a formulation by one to whom these principles apply suggests that the idea the principles may serve as a theoretical backstop is sufficiently colorable to merit consideration. To the extent there has been anything like a "tradition" of scientism in law, it would seem to date from the period of rapid scientific progress following the Industrial Revolution. For discussion of some of the arguments that might be arranged under the heading of scientism, see generally BRUCE A. ACKERMAN, THE ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975); ALBERT A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE (1971); JEROME FRANK, LAW AND THE MODERN MIND (6th ed. 1948); ALAN HUNT, THE SOCIOLOGICAL MOVEMENT IN LAW (1978); HANS Kelsen, WHAT IS JUSTICE? 303, 324 (1957); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986) [hereinafter POSNER, ECONOMIC ANALYSIS]; RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981) [hereinafter POSNER, JUSTICE]; ADAM POGDÓRECKI, LAW AND SOCIETY (1974); LEPOLD J. POSPIŠIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1971); WILLIAM A. ROBSON, CIVILISATION AND THE GROWTH OF LAW 277-344 (1935); GEORGES SCELLE, LA THÉORIE JURIDIQUE DE LA RÉVISION DES TRAITÉS (1936) (linking law and biological principles); N.S. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW (1939); and Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).



others in the category can be confirmed or validated. That is to say, the presence of the distinguishing attribute of each separate individual basis can be verified by simple examination, perception, or measurement. Each basis possesses an ascertainable attribute, hence the label "observable facts." Though the ascertainable attribute possessed by each basis is observable, thus making each basis within the broader category like all the others therein, the ascertainable attribute of each of the bases is different, thereby distinguishing one from another.

The observable attributes themselves permit the bases to submit to grouping into separate phyla, but no effort of that sort is undertaken here.<sup>30</sup> Moreover, it is clear that even if such an effort were undertaken, the attributes of each separate basis are of such a nature that any delineation between phyla would not be precise. One phylum could include those bases which have attributes that seem most apparent in the context of individual persons, that is, they manifest themselves through the individual, while the other phylum could include those which evince themselves most often in the larger communal or societal setting, that is, through fraternal association between many individuals. Clearly, though, since the community is simply a conglomeration of individual persons, the potential for overlap and cross-participation of phyla must be acknowledged. Bases that might be referred to as individual in one setting might seem to appear in the community in another, and vice versa. The demarcation between phyla would be far from exact.

Putting aside these preliminaries and getting down to particulars, one of the bases of obligation falling under the label of "observable facts" is the social instinct: the inherent desire of people to associate with one another and pursue a common purpose. This natural urge to cooperate with others, whether deriving from an intuitively felt common bond or a recognized intellectual drive for affiliation that satiates curiosity, could supply the explanation for why law is to be observed.<sup>31</sup> The instinctual compulsion to create a social

30. Were the effort to be undertaken, the bases denominated herein as social instinct, rationality as a fact, and sense of right, *see infra* text accompanying notes 31-35, would be grouped together, with that denominated law as evolution. *See infra* text accompanying notes 36-39. The bases discussed under the idea that law is what is done and the physical law of causality, *infra* text accompanying notes 39-44, would have to be grouped separately.

31. *See* GROTIUS, *supra* note 28, at 12-13; *see also* Sir Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 24 (1946). Hugo Grotius, often referred to as the father of international law, was an early 17th century Dutch proponent of natural law. *See supra* note 28 for discussion of the historical development of the natural law tradition. Grotius taught that all law is divided into natural law or volitional law. GROTIUS, *supra* note 28, at 38. Natural law is seen as self-evident, *id.* at 23, and not made by God, *id.* at xxxii, 40. Volitional law is established law, *id.* at 38, that is to say, it is either God-made or human-made, *id.* at 44-45, with the latter being further divided into the internal law of countries (municipal law) and the law of nations (*jus gentium*), *id.* at 44. The law of nations is said to spring from custom or consent, *id.* at xxxi, 45. It constitutes the established portion of international law, while principles of natural law applicable to international relations constitute the obvious, apparent, or evident portion. Thus, the law of nature and the law of nations together make up all of international law. But whether one is concerned with international or municipal law, it is the social instinct that in Grotius' estimation gives it the force to bind.

For two other theorists agreeing with Grotius' position that legal obligation derives from man's social instinct, *see* PUFENDORF, *supra* note 28, bk. II, ch. III, §§ 4-5, *reprinted in* CHRISTIE, *supra* note 27, at 161, 169-71. *See also* LÉON DUGUIT, *LE DROIT SOCIAL, LE DROIT INDIVIDUEL, ET LA TRANSFORMATION*

life with others is a basic, primordial desire furthered by rules maintaining social order.<sup>32</sup> From the order produced by rules comes greater success at efforts to nurture social fraternity. Human beings are by nature social creatures, creatures naturally desirous of collaborating with each other to attain the mutual end of ongoing community. To the extent that legal rules are geared toward the maintenance of social order, they are binding because they are designed to reach an end natural to all persons. Stated differently, the social instinct gives force to law because law brings order and order promotes the association between people that allows them to fulfill that which is in their very nature. Law is the progenitor of harmony, and harmony gives fruitful effect to the social instinct.

Related to the social instinct concept is the idea that the basis of obligation derives from the fact of human rationality, the capacity of each of us to respond to life's predicaments in a reasoned and thoughtful way. The essence of this approach is that since humans are distinguished from all other creatures in possessing the power of coherent reflection, that which is rational or reasonable is therefore binding<sup>33</sup> in that it gives full play to our native abilities and represents the product of a fact natural to humankind. Rationality is the matrix that provides shape to the law, the bond that unifies all of law's disparate strands. It is also the force which gives the law its power to obligate. By virtue of being the product of rational and temperate consideration, the kind of consideration common to all of humanity, law acquires the ability to command observance. Were this not so, in being able to ignore the dictates of law, individuals would be free to act in a manner violative of their own essence. If law is a social manifestation of human rationality, then actions contravening law cut against the very nature of those who created it. Being vested with an attribute which distinguishes us from other creatures fixes on us the requirement of adhering to that which rationality produces. Otherwise, our behavior may suggest we deny the significance of rationality and thereby imply that that which is palpable to all—that homo sapiens are different—is nothing more than an artificial and meaningless distinction.

The sense of right felt by man toward obedience to law, that is, the sense that it is only appropriate and proper to obey the law, is another of the bases falling under the category of observable facts.<sup>34</sup> It differs from the social

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DE L'ETAT (2d ed. 1911); Léon Duguit, *Objective Law*, 20 COLUM. L. REV. 817 (1920); 1 ROSCOE POUND, JURISPRUDENCE 184-91 (1959) (classifying Duguit as a natural law revivalist). A somewhat similar idea regarding law and obligation is found in DWORKIN, *supra* note 2, at 195-216 (1986) (stating that obligation arises from social associations).

32. See GROTIUS, *supra* note 28, at 12-13, 15-18.

33. Cf. JEAN DABIN, GENERAL THEORY OF LAWS, pt. III, ch. I, §§ 201, 203 (1944), reprinted in CHRISTIE, *supra* note 27, at 238, 250-52. Dabin, another of the natural law proponents, maintains that such law is a rule of conduct man is to follow and that it proceeds from the "basic inclinations of [man's] nature under the control of reason." *Id.* at 251 (emphasis added). Though it is not clear that he views law as receiving its force to obligate from reason alone, that may well be what he thinks. See also CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 289 (1965) (discussing Francois Geny's position that natural law has force from facts of human nature).

34. See Hugo Krabbe, *L'Idée moderne de l'Etat*, 13 RECUEIL DES COURS 513, 570-71 (1926); see also HUGO KRABBE, THE MODERN IDEA OF THE STATE (George H. Sabine & Walter J. Shepard trans.,

instinct and rationality in that it emphasizes the emotional response evoked by those interpersonal rules adopted through procedures sufficient to permit them to be denominated rules of law. The thrust of the sense of right idea is that individuals have certain intuitive, psychological feelings regarding the kinds of normative matters addressed by law. To the extent that certain rules of law are applicable to the state, it too experiences the same feelings, since in reality it is nothing more than a collection of individuals who serve to govern it. Thus the presence of the feeling that law is to be honored, whether apparent in each of the citizens comprising a larger community or in the official governmental organs of that community itself, is the source of law's obligatory force. Law binds because there exists the sense that it is right that it bind those it addresses.<sup>35</sup> Were there to exist no such emotional or psychological response to what we denominate as law, the standard prescriptions contained in the corpus juris could be freely ignored.

Beyond these three bases, there is the notion that the biological principle of evolution provides the foundation for legal obligation. The central thrust of that principle is that every aspect of the development of life involves the process of adaptation or eventual elimination. To the extent that a particular feature or attribute of life is incompatible with ambient conditions, that is to say, to the extent something about a life form happens to make the conditions in which that life form exists deleterious, elements possessing characteristics able to sustain existence will eventually replace those that had previously dominated. In this way, the process of natural selection assures that things best suited to control rise to the top and exert determinative influence, while those ill-fitted for that purpose settle to the bottom and are removed. Nature operates to foster the ascendance of those attributes most compatible with itself.

There are two senses in which evolution might be called upon in the context of law and the legal system. The first involves a historical perspective that views the entire landscape of law and concludes that law is not static, but constantly evolving in an effort to settle upon and incorporate the best and most effective methods for addressing societal problems. In short, it sees the natural evolutionary process at work in the history of law—as legal concepts destined to displace those destined to fail.<sup>36</sup> In this first sense, however, the reference to evolution says nothing about why law obligates. It confines itself

1922).

35. It must be observed that "sense of right" is an idea advanced by those positivists who view as deficient the classic idea that law binds because it has been consented to. See *supra* note 27 for the classic position of positivism. If one is inclined to think in terms of the traditional philosophical schools of thought, one might be amused by the fact that, even though raised by positivists, the "sense of right" idea is also available to naturalists. After all, given the fact that the feeling that it is right to follow the law is a natural one, it would be quite easy to tie the idea of "sense of right" to natural law theories of obligation.

36. For Justice Holmes' position, see OLIVER W. HOLMES, JR., *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 212 (1920) ("proper to regard [law] . . . as a great anthropological document"), *id.* at 217 ("we have evolution in this sphere of conscious thought and action no less than in lower organic stages"), and *id.* at 220 ("struggle for life among competing ideas").

to noting simply that a natural process is at work in the legal system. Thus, evolution in this sense is not put forward as a basis supporting the binding force of law.

The second sense in which evolution might be invoked does, on the other hand, clearly maintain that the legal rules of a particular society are to be observed or respected because of the principle of evolution itself.<sup>37</sup> The argument might go: evolution is an inescapable biological principle; man is a biological organism and is therefore subject to that principle in everything he does; law as the product of that organism's creative industry reflects the positions and opinions of the most powerful and driving members of the community;<sup>38</sup> being thus imbued with the essence of evolution, law partakes of the same force possessed by the evolutionary principle itself. This is the sense in which evolution is referred to as a possible basis of obligation under the category here styled observable facts. It contends that law binds because law flows from a species subject to the binding principle of evolution. Being of such heritage, law acquires the same compelling force as possessed by that to which its creators are subjected.

The physical principle of causality might be suggested as a closely related basis of obligation.<sup>39</sup> As a principle of physics, it would affect humankind and its social institutions since both are part of the realm to which it applies.<sup>40</sup> Simply put, the principle indicates that every consequence is the result of a string of connected generative events. Hypothesizing or positing a given stimulus in a controlled environment, causality suggests the ability to predict the eventual effect of any known events of that sort.

Causality can also be thought of in the context of law and the legal system in precisely the same two ways raised with regard to evolution. That is, causality can be referenced with regard to how laws or particular rules come about, or how laws come to acquire the force to command observance. Again, the point made earlier concerning this first form of reference applies here with equal force. To say that the content and character of law or current legal rules result from precipitative, antecedent conditions simply depicts the process by which existing laws have developed. No claim is made to law having the power to bind because of the principle of cause and effect. In this sense, causality is not advanced as a basis of legal obligation. Yet in exactly that second sense that evolution was called upon above, causality is called upon here. In looking to a principle of physics as a possible basis of obligation, one must refer to the view that the social legislation which homo sapiens produce

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37. See GEORGES SCELLE, *PRÉCIS DE DROIT DES GENS* (1932); SCELLE, *supra* note 29. Scelle's ideas are alluded to in L. OPPENHEIM, *INTERNATIONAL LAW* 16 n.1 (H. Lauterpacht ed., 8th ed. 1955).

38. See generally POUND, *supra* note 31, at 304-12.

39. Though I am not aware of any scholar who has suggested the principle of causality as the basis of legal obligation, it would seem as plausible a basis as evolution, which has at least received some reference in the literature. See *supra* notes 36-38. On the general topic of the relationship between law and science, see ROBSON, *supra* note 29, at 277-344. For an interesting essay using scientific theories in the context of examining "critical legal studies," see Williams, *supra* note 29.

40. See KELSEN, *supra* note 29, at 324 (positing that the physical and the social worlds are not separate).

partakes of the same obligatory force as the principle itself. While causality alone cannot account for the existence of governmental rules which apply to social interaction, since causality touches each component of the physical world it is no less drawn upon when the civil institutions of human-kind make law. Just as the results of causality which the scientific investigator is privileged to witness are spoken of as inescapable, so too may one speak of the prescriptive consequence of man's legislative activity. Being an object of the physical world that is acted on by causality, that which human beings produce therefore takes on the force of the principle itself.

The final basis that could be subsumed under the category here called "observable facts" would be one which views obligation as deriving from actual practice, conduct displayed with a degree of regularity. This socio-behavioral approach to the problem of law's ability to bind emphasizes the connection between what the various actors in the social environment actually do and the existence of law that requires observance.<sup>41</sup> Essentially, the idea is that if one is intent on discovering the law of a community, all that need be done is to identify the patterns of conduct in which the members of that community engage on a regular and recurring basis.<sup>42</sup> Law is synonymous with what specific actors do and how they respond to the complexities of life's daily travails. The members of a community do what they do or respond as they do because they view what has always been done as something that

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41. For this approach applied to international law see LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979); MYERS S. McDOUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1960). Henkin's approach is analyzed in David Kennedy, Book Review, 21 *HARV. INT'L L.J.* 301 (1981).

42. Socio-behavioral sciences as applied to law have seldom been used to claim that they identify the basis of legal obligation. If they were to be so applied, the argument may well be something as straightforward as that made here. Sociology has been used, however, to understand how particular influences lead to certain laws, whether and to what extent legal standards can be effective in securing behavior, and the mechanisms which function to translate law into specific sorts of individual conduct. For this view of the use of sociology with respect to law see PODGÓRECKI, *supra* note 29, at 24-25 ("The aim is to reveal as fully as possible the conditions for the efficiency of the working of law . . ."); and HUNT, *supra* note 29, at 104 (noting Max Weber's sociology of law "focuses upon the way in which legal materials in the form of substantive rules are developed and the way in which they are applied in arriving at decisions."). It seems that the furthest that sociologists have gone is to identify the principles by which particular societies determine the legitimacy of legal standards. In so using their science, these sociologists have done more than describe how law operates, or fails to operate, to accomplish certain tasks within the society studied. Advancing this more expansive role, see for example, Philip Selznick, *Sociology and Natural Law*, 6 *NAT'L L.F.* 84 (1961), and Philip Selznick, *The Sociology of Law*, in *SOCIOLOGY TODAY* 115, 116, 124 (Robert K. Merton et al. eds., 1959). For a critical view of this approach, see Donald J. Black, Book Review, 78 *AM. J. OF SOC.* 709 (1972).

The statement in TIMASHEFF, *supra* note 29, at 19, that "the sociology of law . . . aims to discover 'laws' of a scientific nature concerning society in its relation to law," should not be taken to mean that laws flowing from the acts of socialization supply the basis for providing man-made law with binding force. As Timasheff goes on to explain, the laws proceeding from acts of socialization are simply statements or formulae describing recurring or uniform patterns of behavior, scientific laws based on observation and experiment. Man-made law, however, is a human creation imposed with an eye toward affecting the manner in which behavior is carried out. *Id.* Thus, while it is very likely that there may exist some correlation between the sociological laws perceived through observation and man-made legal rules, *id.* at 19 n.1, that only means the man-made rules affect the way in which humans behave. *Id.* If one were to maintain, however, that sociological laws give force to man-made laws, it would seem that the argument should be that the laws of behavior would dictate the character of the laws made by man, and not that the laws of man dictate the character of the laws of behavior.

obligates them to continue replicating long-standing practices.<sup>43</sup> Seemingly recurrent behavior is regarded as behavior that must be repeated. When repeated, the behavior gains additional force that affects the assessment of the range of responses to future situations.<sup>44</sup>

Several difficulties present themselves when one carefully examines the social instinct, rationality as a fact, sense of right, the biological postulate of evolution, the physical principle of causality, and the socio-behavioral notion that law is what is done. Essentially, the problems result from each of these bases being nothing more than a way of describing law, a way of accounting for officially sanctioned rules of behavior. In this respect they are all true to the category that we have styled observable facts, for description or accounting flows from observation. But this extreme fidelity causes them to miss the point implicit in any attempt to disclose whether, and if so why, law is capable of obligating those to whom it is directed. When endeavoring to determine if there is a basis of legal obligation, it is not enough to just describe how what is regarded as law comes to be, or how that which has secured such regard comes to obtain the regard itself. Only by revealing what, if anything, gives law the inherent force to bind is the real basis finally pinned down. Nothing is made known by merely describing how law is produced or how it gains the attribute of "lawness."

The first problem that prevents the bases catalogued under observable facts from accomplishing the objective of identifying the force that gives law the power to compel observance is the simple one of the less than invariable nature of the facts involved. There seems no ironclad assurance that the facts each basis assumes are perfectly unchangeable. With regard to the social instinct, rationality, sense of right, and actual practice, the element of unconstrained free will<sup>45</sup> may deserve most of the responsibility for this. Human beings and the institutions they oversee all too regularly manifest their autonomy and independence, their freedom to make choices, through acts that regrettably are either selfish, impulsive, without compunction, or in total

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43. The socio-behavioral science of psychology has been used to ends similar to sociology. On its use to explain opposed theories of law, see EHRENZWEIG, *supra* note 29, pt. 1 (reviewing traditional natural law and positivist theories of law); and *id.*, pt. 2 (attempting to reconcile and explain these theories, and approaches on various substantive topics, through the psychoanalytic teachings of Freud and Jung). On psychology's use in explaining the workings of judicial decision-making see FRANK, *supra* note 29 (positing that psychoanalysis teaches that decisions are made, not from premise to conclusion, but from conclusion to justification). On Frank's approach, see Golding, *Jurisprudence and Legal Philosophy in 20th Century America: Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 459-60 (1986).

Anthropology also has been employed in the examination of law to ascertain whether disparate cultures indeed have a system of law. See POSPÍŠIL, *supra* note 29. Pospíšil observes that traditionally there have been three approaches on this matter: 1) law is custom and, therefore, there is no "law" as such; 2) law is a system of rules that does not include custom; 3) there is no universal notion of law, and different cultures may have different ways of securing desired behavior. *Id.* at 12-18. Pospíšil departs from these approaches and attempts to look at law according to its "attributes, functions, and processes." *Id.* at 341-43.

44. See A.S. DIAMOND, *THE EVOLUTION OF LAW AND ORDER* 54 (1951).

45. See *infra* notes 59-61 and accompanying text for discussion of "free will" as a basis of obligation.

disregard of established customs and norms. This suggests the vulnerability of placing great stock in the significance of facts regarding certain characteristics or traits of mankind. As these facts are never immutable, the validity of inferences we might be inclined to draw from them must rest on insecure ground.

The principles of evolution and causality suffer the same plight, though not nearly to the same degree, and for an entirely distinct reason. Being scientific in character, they are not subject to the whimsical oscillations of the human will. They are predictable and static. Impulse and caprice affect them not in the least. Nevertheless, no matter how firmly rooted in the general understanding of the scientific nature of things, these two principles are not incontrovertible and eternal verities. Since the discoveries at the turn of the twentieth century about the relativity of the generally considered absolutes of time (duration), space (distance), and matter,<sup>46</sup> and the additional discovery later in the century that at the subatomic level events or effects often occur without the existence of any certain and identifiable precipitative impetus,<sup>47</sup> the long-held belief in causality as a universal natural principle has been under siege.<sup>48</sup> For how else could it be that presumptive invariables like time and

46. Albert Einstein's theory of relativity provides that time (duration) and space (distance) interact with each other so as to create a four-dimensional continuum in which the familiar length, height, and breadth description of matter must also account for the additional component of time. See 1 RICHARD P. FEYNMAN ET AL., *THE FEYNMAN LECTURES ON PHYSICS* ch. 15 (1963), for a complete description of relativity. As a consequence of the interaction, observations of the same event by two separate individuals in motion relative to each other will be described as having occurred at separate intervals. *Id.* at ch. 15, p. 6. Also, an object in motion relative to a stationary observer will appear to experience a shortening in length, and to an observer accompanying the object as witnessing a slowing down of time. See JACOB BRONOWSKI, *THE ASCENT OF MAN* 248-52 (1973).

47. The principle of uncertainty was advanced by Werner Heisenberg in the late 1920's. See BRONOWSKI, *supra* note 46, at 366. On the need to modify the principle of causality, presumably in light of the uncertainty principle, see KELSEN, *supra* note 29, at 303. With regard to Einstein's theory of relativity setting the stage for Heisenberg's principle of uncertainty, see RONALD W. CLARK, *EINSTEIN: THE LIFE AND TIMES* 338-46 (1971). See also 2 EDWARD M. BURNS & PHILIP L. RALPH, *WORLD CIVILIZATIONS* 688 n.1 (4th ed. 1969) (arguing that Einstein apparently refused to accept the notion implicit in Heisenberg's uncertainty principle and maintained that an explanation would eventually be found); FEYNMAN ET AL., *supra* note 46, chs. 6-10 (illustrating Einstein's view of the uncertainty principle). Perhaps Einstein's confidence that an explanation would be found stemmed from a belief in the uniformity of physical laws throughout the universe. On the fact that we all grow up with this belief, see CHARLES J. SINGER, *A SHORT HISTORY OF SCIENTIFIC IDEAS TO 1900*, at 50 (1969).

48. For the view that the relativity theory in fact overturned, and did not simply build upon, earlier Newtonian physics, see KUHN, *supra* note 3, at 97-103. It should be noted that Einstein's relativity principle is based upon the premise that the speed of light in a vacuum is the ultimate speed limit in nature. An explosion occurring more than 170,000 years ago, as a result of the collapse of the star named Sanduleak, a 12th magnitude blue supergiant located in the Large Magellanic Cloud, a dwarf satellite galaxy of the Milky Way, was detected on February 23, 1987, by observers around the world. Kenneth Brecher, *Fascinating Supernova*, *PHYSICS TODAY*, Jan. 1988, at S-7; Stan E. Woosley & Tom Weaver, *The Great Supernova of 1987*, 261 *SCI. AM.* 32 (1989). Reports suggest that subatomic particles known as neutrinos were detected on earth several hours before the light from the explosion was observed. Eugene W. Beier, *Neutrinos From Supernova SN1987A*, *PHYSICS TODAY*, Jan. 1988, at S-33. This, however, does not mean neutrinos travel faster than light and thus undermine Einstein's basic premise. Neutrinos come from the stellar interior and are consequently emitted somewhat earlier than the light, which comes from the exterior photosphere. Nevertheless, since the late 1960's theoretical particle physicists have postulated the existence of particles tagged with the label tachyons, which are thought to be able to travel at speeds in excess of the speed of light. Empirical efforts to actually

space, or effect *ergo* cause, could admit of any departure? Likewise, in the discipline of biology, recent theories of evolution challenge the standard Darwinian approach of "gradualism" and its view of onward, upward, progressive, yet incremental development.<sup>49</sup> Indeed, some have even purported to advance the idea of dissolution as a natural opposite to evolution itself.<sup>50</sup> As a consequence, rather than witnessing constant refinement and improvement, organisms become overspecialized and thus reach a point at which further development is degenerative and may lead to extinction. Taken together, these ideas concerning the principles of evolution and causality suggest the factual weaknesses of both.<sup>51</sup>

demonstrate the existence of tachyons, though, have not yet proved successful.

49. A chief counter-theory has been advanced by NILES ELDRIDGE & STEPHEN J. GOULD, PUNCTUATED EQUILIBRIA: AN ALTERNATIVE TO PHYLETIC GRADUALISM, in *MODELS IN PALEOBIOLOGY* 82-115 (Thomas J.M. Schopf ed., 1972), and has come to be known as "punctuated equilibria." *But see* James S. Trefil, *Phenomena, Comment and Notes*, 20 SMITHSONIAN 34 (1989) (suggesting recent discoveries appear to support "gradualism").

50. *See* B.A.G. FULLER, *Modern Philosophy*, in *HISTORY OF PHILOSOPHY* 530 (1938).

51. Lest there be any doubt about the fact that the displacement of conventional wisdom concerning causality and evolution are not aberrations, the history of science need merely be surveyed to see how often once accepted explanations of phenomena have fallen to new and iconoclastic ideas. Three prominent examples include the displacement of the geocentric theory of location of celestial bodies with the heliocentric theory, the phlogiston theory of combustion with the oxygen theory, and the corpuscular theory of light with the wave theory.

Regarding the geocentric theory, it is often dated from the second century A.D. and Ptolemy of Alexandria (Claudius Ptolemaeus), not to be confused with the Ptolemies who ruled ancient Egypt. Actually, the theory had its roots in Aristotle and his model of concentric spheres. *See* SINGER, *supra* note 47, at 51-55, 89-91, 94-95. By the 15th century, Ptolemy's theory came under the attack of Nicholas of Cusa. *See* BURNS & RALPH, *supra* note 47, at 555. The downfall of the theory came with the publication in 1543 of *De Revolutionibus* by Nicolas Copernicus, who explained the universe as basically heliocentric. *See* SINGER, *supra* note 47, at 212-15. It should be observed that the Copernican theory had been advanced as early as the fifth century B.C. by the Pythagorean thinker Philolaus of Tarentum, *id.* at 27, and was reiterated by Aristarchus of Samos in the third century B.C., *id.* at 65. The 17th century German, Johannes Kepler, improved the Copernican system by noting that the planets travel around the earth in elliptical, rather than circular, orbits. ALAN G.R. SMITH, *SCIENCE AND SOCIETY IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 107-10 (1972). The movement away from a heliocentric universe, towards a heliocentric solar system surrounded by innumerable other such systems within our own galaxy, began with Giordano Bruno in the late 16th century. *See* SINGER, *supra* note 47, at 218-19. This movement was continued during the 17th century by Robert Merton, Christiaan Huygens, and Le Bovier de Fontenelle. *See* CARL SAGAN, *COSMOS* 146 (1980); SINGER, *supra* note 47, at 291.

On the phlogiston theory, it held that when an object burned, phlogiston in the object was used up. Thus, the process of combustion resulted in phlogiston being consumed, *id.* at 347, and the balance of the object being left as ash. The idea was originally formulated by J. J. Becker in the latter half of the 17th century and was given authoritative formulation by Georg Stahl. *Id.* at 281, 338 n.1. The phlogiston theory of combustion hampered the development of chemistry during the 17th and much of the 18th centuries. By the last quarter of the 18th century, the great French chemist Antoine Lavoisier, sometimes called the "Newton of Chemistry," a man who fell victim to the "Reign of Terror," *see* BURNS & RALPH, *supra* note 47, at 54-55, proved that combustion involved taking oxygen from the air surrounding the object burned, and not the taking of some mystical substance (phlogiston) from the object burned. This dealt a fatal blow to the phlogiston theory. *See* SINGER, *supra* note 47, at 339-40. *See generally* THE OVERTHROW OF THE PHLOGISTON THEORY (James B. Conant ed., 1950) (discussing the procession from Joseph Priestley's support of the theory to Antoine Lavoisier's development of a new conceptual scheme).

The corpuscular (also referred to as the particle, or emission) theory of light was cast in modern form during the late 17th and early 18th centuries by Isaac Newton. It maintained that a luminous body emitted streams of very small corpuscles. *See* SMITH, *supra*, at 124-25. The wave theory, advanced by



Even if the social instinct, rationality as a fact, sense of right, and all the other bases listed under observable facts were to receive a stipulation concerning the invariable nature of the facts they involve,<sup>52</sup> the second problem would remain: how can inescapable and predictably recurring phenomena, constant and static features of human nature or the natural world, share their binding, ineluctable attributes with the rules of law they happen to produce? How can the law which is connected to one of these six possible bases partake of the obligatory character of the basis and become itself something able to command observance? By what process or device does the law that humankind creates acquire the same puissance as the basis to which it happens to be linked?

Clearly it is one thing to demonstrate or simply accept that everyone always believes that it is right to observe the law, or that everyone always acts in the kind of measured, temperate, and calculating way typical of rational behavior, or that the principles of law governing day-to-day life result from the hegemony of ideas superior in every respect to ideas that have been subjugated due to their unacceptability given existing social and contextual factors. Yet in such a demonstration or acceptance there is no reason to believe that the laws which one observes, or the mind concocts, or the most powerful social forces manage to put in place, happen to be laws that obligate just because they evoke a sense of right, or are rational, or are the product of social evolution. That law is somehow or other connected with an obligatory factual basis is no more a reason to view law as binding than is the fact that my tomatoes flourish in the brilliance of the daily sun a reason to conceive of exposure to sunlight as the obligatory horticultural technique, thus foreclosing the use of artificial lighting to simulate the natural. Though the amount of time it spends in the sky each day may be affected by the seasons, we can rest assured that the sun will make its daily appearance overhead. That the product of this invariable phenomenon is the vigorous growth of exposed plants does not mean we are compelled to use sunlight, rather than other methods available as a result of technological genius, to nurture and care for what our fancy has lead us to stick in the soil. Likewise with rules of law.

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Christiaan Huygens in his *Treatise on Light*, published in 1690, argues that space is enveloped by a mysterious substance known as ether, and that a luminous body propagates waves through that medium just like water carries waves caused by the splash of a stone. See SINGER, *supra* note 47, at 367. Through the work of Thomas Young, Auguste Fresnel, Leon Foucault, and Clerk Maxwell, the wave theory emerged in the 19th century as the accepted position of most who studied the phenomenon of light. *Id.* at 369-75. By the turn of the 20th century, experiments conducted on electromagnetic waves by Heinrich Hertz, Henrick Lorentz, J. J. Thomson, and Philip Lenard raised points of incompatibility with the wave theory. Then in 1900, Max Planck, at that time professor of theoretical physics at the University of Berlin, advanced a theory of the workings of radiation that seemed incompatible with the accepted wave theory of light. See CLARK, *supra* note 47, at 64-67. It was left to Einstein to explain, in his 1905 paper *On a Heuristic Viewpoint Concerning the Production and Transformation of Light*, that light has both the wave and corpuscular properties. *Id.* at 68-70.

52. Actually, a stipulation of that sort may not be required for either causality or evolution. If the ideas of relativity, uncertainty, and punctuated equilibria are viewed as merely qualifying the traditional doctrines of causality and evolution, then these doctrines may be capable of demonstrating their own merits.

That they may be in one way or another connected with or the product of some invariable observable fact does not mean that they are obligatory and able to command our faithful observance. The mere fact that a thing is the consequence, offspring, or relative of an inescapable phenomenon is not enough by itself to give the thing the force of that which has produced it. For law to be understood as fixing an obligation on those to whom it is directed, it must locate its force in something other than a generative factual invariant. The unchanging, unavoidable character of such an invariant is capable of nothing more than revealing the natural attributes of the invariant itself.

The third and final problem with the assorted bases under observable facts is closely related to that just discussed. It is distinct, though, because it goes further and suggests that, even if law partakes of the nature of the invariable facts which give rise to it, it is incorrect to speak of law as therefore obligatory, because facts of nature, no matter how inescapable and certain, can never give rise to obligation.<sup>53</sup> The quintessence of obligation is that it reflects something which "should" be done, not merely in the precatory sense of *urging* some particular course of action rather than *mandating* it, but rather in the normative sense of indicating that it is the appropriate, ethical, or moral thing to do. Unless reference is made to some "uncreated creator,"<sup>54</sup> that certain things exist as a matter of natural fact implies nothing in the normative sense. In their existence, the facts of nature simply are. And as such it would be erroneous to conclude that they evince an obligation that they must be, let alone that the things, like law, to which they may give rise, take on an obligatory character of their own. By their being, the facts of the natural world merely exist. That we can observe and verify their presence does not signify anything more than their presence alone. It would seem gravely presumptuous for one to take the existence of such natural facts as indicative of a normative standard that this is the way things were ethically or morally meant to be.

### *B. Considerations of Practicality*

The second category of the possible bases of obligation could be referred to as "considerations of practicality." The individual bases within this category include expectation/reliance, self-interest, free will, and economic efficiency. The principal attribute of each of these individual bases, the attribute which serves to distinguish this entire group from the category labeled "observable facts," has to do with the pragmatic reasons for honoring legal rules, rather than with the need for observance flowing from invariable facts of nature. These bases suggest simply that there are very down-to-earth and practical reasons for considering law obligatory. Recourse to certain

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53. See KELSEN, *supra* note 29, at 137-44, 174-97; ROBSON, *supra* note 29, at 339.

54. It might be suggested that natural facts set in motion by a higher authority, a supreme being, or divine entity, do implicate obligation in that they reflect the will of that authority, being, or entity. On this matter and related arguments, see discussion *infra* part 1.C.

natural or apparent facts need not be had. And beyond that, there exists no reason for having to draw inferences of obligation from such facts. What gives law the power to command observance is that accepting it as non-obligatory could produce serious practical problems. Without a recognition that law binds those to whom it is directed, lawlessness would overtake civility in due course. The modicum of order and tranquility apparent in social life would fall victim to individual impulse and desire.

The practical or pragmatic reasons giving law the force to bind can be broken into several subcategories. One subcategory might cover the practical considerations that center on those who are subject to legal rules, and examine in depth the motivations that various parties have for supporting the idea that law binds. The other subcategory might look separately at considerations that stand apart from those which have to do with the parties involved and the motivations they have for honoring law. As with the preceding category of observable facts, however, no attempt at subcategorization is undertaken herein with regard to considerations of practicality.<sup>55</sup> Yet even if it were, it should be emphasized that both of the possible subcategories alluded to above would still remain tied by a common theme. The practical reasons for viewing law as able to command observance always apply, whether attention is focused on the motivations of those subject to the law, or motivations that have nothing to do with interests those subject to law happen to embrace. The theme that would unite each and every product of any subcategorization effort would still be one founded on the practical nature of the considerations indicating that law binds.

Moving away from the linkage between potential subcategories, the notion that legal obligation can be founded on the practical consideration of expectation/reliance is essentially one which grows out of the significance of consent itself. Originally, the requisite consent to the first societal obligation may have been that given by a political superior, manifesting a desire that a particular rule of law be followed.<sup>56</sup> Perhaps to distinguish law from mere compulsion, however, consent on the part of those to whom the law applied eventually took on greater importance. A political superior's evident acceptance of a particular standard was not considered nearly as significant as the acceptance of those under the standard's thumb. In that context, the move was away from the consent given by the superior, and towards the consent given by the subordinate. As a consequence of that shift, the relevance of why consent gave rise to an obligation to do as one had consented to do became increasingly pronounced.<sup>57</sup> One did what a superior

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55. If an attempt were made to further refine the overall category, it should be noted that expectation/reliance would be grouped with self-interest, *see infra* text accompanying notes 56-59, and free will would be grouped with economic efficiency, *see infra* text accompanying notes 59-64.

56. This was certainly the focus of attention of John Austin, perhaps the foremost of the early positivists. *See* CHRISTIE, *supra* note 27, at 472, 499.

57. For discussion of an early theory concerning what there is about consent that gives rise to an obligation to do what one has consented to do, see the idea of self-limitation discussed *infra* notes 104-08 and accompanying text.

ordered out of deference to position alone. Nonetheless, that was entirely inadequate to explain why an obligation existed to do as one had consented.

The idea that by consenting to a particular standard one produces an expectation on the part of those to whom the consent is expressed, regarding the fact that one's conduct will comport with what has been consented to, suggests itself as a viable explanation. Consent to behave in the manner prescribed by a specific rule of law induces those to whom the consent has been voiced to rely on the rule being observed. Those people then change their own positions and agree to conduct affairs according to the same rule. Because of this reliance, legal rules must be seen as obligatory unless one is willing to forego the possibility of mutual interrelation. Stated simply, keeping one's word is essential if agreement is to be a realistic device in managing affairs between independent entities.

A second and discrete basis of obligation, one also drawing on practical considerations, might be found in self-interest. Self-interest as used here, however, is not meant only in the traditional narrow sense of that term—the limited individual interests of the parties directly involved in a transaction. Self-interest is used here in the broader sense as well, specifically, individual interests served indirectly through attentiveness to the larger interests of the entire community.<sup>58</sup> The nub of the self-interest theory is that legal rules have the force to obligate because they serve the interests of individuals, either directly through setting forth standards that ensure, for instance, that parties accomplish their desired objectives, or indirectly through contributing to the creation of a sound and solid system that benefits all those who are members of it. When two private persons agree to undertake the performance of certain tasks, each seeks a desired objective, which they can obtain by treating the agreement as obligatory. When the individual members of a community treat adherence to the standards embodied in the legal rules which that community has seen fit to adopt as something obligatory, each private person within that community receives benefits that individual action could not have produced. Thus, whether concern is with transactions between individuals or the maintenance of society itself, every one of us can be said to have an interest in the observance of law. When we honor our personal promises we recognize that interest. When we honor our societal promises we do the same.

In addition to expectation/reliance and self-interest, the practical consideration of individual free will<sup>59</sup> might be said to provide the basis of legal

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58. To some extent this rings of utilitarianism. For utilitarians, the objective of life is personal pleasure. It is appreciated, however, that one will find it difficult to be happy in the midst of unhappiness, for not only must the pursuit of happiness take into consideration the innate sympathy we have for others, immediate or remote, but it must also account for the possibility that if we alone are happy, others will be provoked into assaulting our own happiness. See GIORGIO DEL VECCHIO, *PHILOSOPHY OF LAW* 186-88 (Thomas O. Martin trans., 1953) (presenting Jeremy Bentham's views).

59. On whether humans possess free will, compare St. Augustine of Hippo in BURNS & RALPH, *supra* note 47, at 382-84 (divine predestination and consequent absence of free will), and 5 THOMAS HOBBS, *The Questions Concerning Liberty, Necessity, and Chance*, in *THE ENGLISH WORKS OF THOMAS HOBBS* 1, 247-70, 344-57, 367-72 (Sir William Molesworth ed., 1840) (postulating that

obligation. If free will is to be meaningfully respected, then the limitations on it fashioned by rules of law must be viewed as obligatory. To accept the notion that conduct is not determined, but rather the result of freedom of choice, means that the freedom of all to choose as they so desire can be respected only by recognizing that limitations designed to allow its exercise, to the extent not incompatible with free choice by others, are limitations that fix an obligation to do as they so prescribe.<sup>60</sup> Once the concept of free will is accepted, the only way to assure that each person is allowed to experience it to the greatest extent possible is by acknowledging that the limitations imposed on free will by law are capable of establishing obligation. Free will requires restrictions on the courses of action selected. Unless the restrictions are perceived as binding, the idea of free will as an end grand enough to unswervingly pursue would be seriously compromised. If legal standards are considered optional, the free will of a few could rapidly extinguish the free will of the others.

The last individual basis falling within the practical considerations category is that of economic efficiency. Economic efficiency might serve as a basis for legal obligation in one of two ways: by being considered the chief social value,<sup>61</sup> economic efficiency could be said to produce obligation to obey all economically efficient laws; by being considered an important social value,<sup>62</sup>

natural appetites determine conduct and thus there is no free will), with Immanuel Kant, S.E. FROST, JR., *BASIC TEACHINGS OF THE GREAT PHILOSOPHERS* 146-48 (rev. ed. 1962) (free will present), and ARISTOTLE, *NICOMACHEAN ETHICS*, bk. III, ch. 7, reprinted in ARISTOTLE, *ON MAN IN THE UNIVERSE* 83, 122-25 (Louise R. Loomis ed., Classic Clubs 1971) (free will). See also IMMANUEL KANT, *Fundamental Principles of the Metaphysic of Morals*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 9, 67-83 (Thomas K. Abbott trans., 6th ed. 1909) [hereinafter KANT, *Metaphysic of Morals*]; IMMANUEL KANT, *Critical Examination of Practical Reason*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 101, 167-91 (Thomas K. Abbott trans., 6th ed. 1909) [hereinafter KANT, PRACTICAL REASON] (addressing the idea of free will and deterministic laws of the physical world, yet both concluding in favor of the existence of the former).

60. Cf. KANT, *Metaphysic of Morals*, *supra* note 59, at 47 (discussing Kant's alternative formulation of his categorical imperative, the initial formulation of which appears *id.* at 31).

61. Though what has been said by the leading law and economics proponents is not entirely explicit, language has been used which suggests that the idea of tracing law's force to economic efficiency is somewhat acceptable. See, e.g., Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter Posner, *Utilitarianism*]. Judge Posner states:

While nowadays relatively few of the people in our society . . . consider wealth maximization or some other version of efficiency the paramount social value, few judge it a trivial one. And, . . . sometimes it is the only value at stake in a question. . . . But I am unwilling to let the matter rest there, for it seems to me that economic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments.

*Id.* at 110. Posner's position reappears in POSNER, *JUSTICE*, *supra* note 29, at 48-87; see also Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 27 (1987) [hereinafter Posner, *The Constitution*] (discussing economic efficiency as the best available instrument for public policy decisions).

To a large extent, Posner's position is probably grounded in the belief that economic freedom and individual freedom, which he undoubtedly values highly, see Sanford Levison, *Some Reflections on the Posnerian Constitution*, 566 GEO. WASH. L. REV. 39, 41-43 (1987) (criticizing Posner for the "egotistic" rather than republican implications of his theory), are closely linked. For one of the chief economists who promotes this view, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-36 (1962).

62. For theoreticians who argue for economics as one of a variety of factors law must consider, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24-27 (1970)

economic efficiency could be said to outweigh other values in some cases and thus indicate obligation to observe efficient laws. It is in this latter, weaker sense that economic efficiency is used here.<sup>63</sup> Every situation requires a selection among various courses of action favoring differing social values. If economic efficiency is considered such a value, it could, in some instances, prove the most favored of the range of values involved.<sup>64</sup> In the event a situation suggests promoting economic efficiency, that objective is accomplished by understanding the laws best suited to that task as societal standards that have the force to bind. Legal rules that advance an economically efficient result have the force to compel observance whenever economic efficiency is seen as more important than the other social values implicated by the situation under consideration. Thus, as with expectation/reliance, self-interest, and free will, a practical consideration—the simple promotion of economic efficiency—supports the obligatory nature of rules of law. If economic efficiency is to be pursued, there needs to be a recognition that laws inuring to that end have the force to obligate particular kinds of behavior.

Each of the separate bases of obligation discussed under the label of practical considerations has a certain appeal. Yet it seems clear that they all

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(providing that accident law involves the goals of "justice" and "cost reduction," with a choice made between these two when they conflict). *But see* Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980) (indicating that "justice" is a limitation, not a co-equal balance weight, on "cost reduction"). *See* ACKERMAN, *supra* note 29, at xiii-xiv (suggesting that perhaps the most important role performed by economic analysis is not in providing ready-made decisions for normative questions, but rather in providing a structured and intelligent way of understanding the distribution effects of various normative decisions). Ackerman elaborates on this theme in BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-71 (1984) [hereinafter ACKERMAN, RECONSTRUCTING] (suggesting that law and economics has broadened the conception of relevant contextual facts).

63. The argument using economic efficiency in the stronger sense is taken up *infra* notes 72-75 and accompanying text.

64. Note that many economists have concluded that the question of why economics or wealth maximization should govern societal decisions lies beyond the realm of their discipline. For the classic articulation of this position, see LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 120-41 (1932). *But see* Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977) (expressing need for economists to examine philosophical and descriptive questions); Amartya K. Sen, *Utilitarianism and Welfareism*, 76 J. PHIL. 463 (1979). Lawyers who have resorted to economic analysis, however, have recognized the need to address this matter. *See, e.g.*, POSNER, JUSTICE, *supra* note 29, at 48-115; Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEG. STUD. 243 (1980) [hereinafter Posner, *Wealth*]. They have sought to explain how the common law reflects accepted economic theory. *Compare* POSNER, ECONOMIC ANALYSIS, *supra* note 29, at 23, 229-38, with Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEG. STUD. 399 (1980); Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980); and Gary T. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799 (1979). They have also sought to explain why economics should govern societal decisions. *See* ACKERMAN, RECONSTRUCTING, *supra* note 62, at 78-93. Their interest in this matter may be somewhat generated by the malaise in current ethical thought, which seems to lean in the direction of decisionism, *see* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300-01 (1985), or emotivism, *see* ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 11-12 (2d ed. 1984). The effort may be to counter the subjectivity of these approaches with a quantifiable basis for decisions. *But see* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985) (arguing, *inter alia*, that objective values exist and judicial decisions should be based on them).

suffer from two significant deficiencies. The first deficiency is the erroneous nature of the premises upon which the various bases rest, and the second is the inability of obligation to derive from practical considerations indicating a need to observe law.

The claim that expectation/reliance, self-interest, free will, and economic efficiency fail to provide a basis for legal obligation because each rests on a false premise is indeed a serious one. Its validity, however, is evident. With expectation/reliance, for example, the idea is that law is to be observed because consent leads to reliance, and without reliance neither individuals nor states would enter into agreements or continue to honor those entered into once another contracting party has committed a violation.<sup>65</sup> If one's word is not kept, agreements would cease to be a viable instrument in the effort to effectively regulate behavior. Yet reliance is not the essential factor in bringing parties together in the first place, nor in keeping them together after transgressions have been committed. The real explanation for these phenomena is every contracting party's hope to accomplish something which cannot be accomplished unilaterally—the hope of controlling the exigencies of daily life, exigencies that often seem beyond the control of singular action.<sup>66</sup> Likewise, although self-interest as a basis of obligation rests on the fact that observance of law produces beneficial personal advantages, violations occasionally occur when the violator believes they will be self-serving, go undetected, and lead to nothing but indirect harmful consequences of a sort which manifest themselves sufficiently far in the future to insulate the violator from any real effect.<sup>67</sup> Observance of law is not imperative to the advancement of one's self-interest. In fact, there are many instances when the exact opposite is quite true. Similarly, free will may be said to require the observance of law, lest the will of the dominant be allowed to subjugate and suppress the will of others. But even without viewing law as obligatory, the freedom of all individuals to choose as they desire may be adequately accommodated through interpersonal social norms that stand in the place of "law." The need to limit free will, if there is to be anything resembling limitation, does not require that law be seen as binding. Restrictions of equal puissance lie well within the grasp of society. Economic efficiency, at least in its weaker sense as a weighty social value, claims nothing more than that efficiency needs to be viewed as obligatory in the event it is preferred over other competing values. There is no need to be concerned with a false premise. In the absence of a contention that law is automatically binding whenever it is economically efficient, no connection is asserted between the

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65. It might be thought that apart from the idea of expectation/reliance, obligation derives from mere consent alone. See *supra* text accompanying notes 56-58, discussing the relationship between consent and expectation/reliance. As set forth *infra* notes 66-68 and accompanying text, however, that one has consented directly or through a representative to a particular standard of behavior does not, by itself, fix an obligation to follow that standard.

66. Cf. SOPER, *supra* note 2, at 69 (arguing that sanctions and not reliance are the key).

67. The likelihood of an action being viewed as self-serving is surely amplified if one does not view one's self as benefitting from the current societal arrangement. This would suggest that untoward activity can be better deterred by a social structure that is more, rather than less, inclusive.

practical consideration of economic efficiency and legal obligation itself. To confine one's argument to the view that a law which promotes efficiency needs to be treated as obligatory whenever efficiency is preferred over other values is entirely distinct from insisting that whatever is economically efficient is ipso facto obligatory. In the former case all that is asserted is that, unless laws promoting efficiency are treated as binding, the value of efficiency will not be secured.

Even if the premises underpinning expectation/reliance, self-interest, and free will are accepted as unassailable, and even if the weaker sense of economic efficiency falls short of connecting efficiency and obligation, there still remains the second significant deficiency with the argument that legal obligation rests on practical considerations. That deficiency concerns the fallacy of thinking that simply because the observance of law is needed in order to address or deal with each of these practical considerations, law should therefore be conceived of as obligatory. The source of obligation of legal rules cannot be that which required the rules themselves. The exercise of free will by one person, for example, requires legal regulation if the phenomenon of one individual's freedom to choose is to be reconciled with the same phenomenon in other individuals. The fact of free will requires viewing the law controlling it as having the force to obligate. The same is true for expectation/reliance, self-interest, and economic efficiency. They all suggest some need to view law deriving from them as binding. Nevertheless, the need to regulate some practical consideration manifest in the human situation cannot serve to supply the precepts formulated to meet that need with what is essential to fix an obligation. That quality must spring from some source outside of what suggested the necessity for regulation. If that were not essential, every precept necessary to the accomplishment of some objective or goal would acquire binding force and be capable of commanding obedience. But there is a vast difference between recognizing that observance of a rule of law is necessary to the achievement of a particular end, and granting that rule the appellation "obligatory." To say that something is necessary in order for another thing to happen is merely to suggest that what is necessary is an essential precondition. To say, on the other hand, that the something is an obligation is to imply a responsibility, a duty on the part of one able to cause that something to occur to undertake efforts to endeavor to assure its occurrence. In the face of this alone, it is difficult to conclude that practical considerations can supply the basis of legal obligation. When conjoined with the matter of false premises, that conclusion would seem one impossible at which to arrive.

### *C. Constraining Externalities*

The third category of possible bases of obligation, here denominated "constraining externalities," is comprised of theories which endeavor to address the problem presented in the foregoing paragraphs. That is, the theories in this category go beyond finding law to be binding because of



certain practical considerations, since such considerations are simply incapable of doing anything more than indicating that it is a good idea to view law as obligatory.<sup>68</sup> Rather, these theories attempt to identify the notion that lies beyond the bare need for viewing law as binding; this notion explains why law has the force to command obedience. The individual bases subsumed under the constraining externalities category include common will, economic efficiency (in the sense that efficiency is the chief social value), divine will, evolution, and the principle of causality. Each claims that law obligates because of something exogenous to the observable facts apparent in the human condition. Each seeks to locate what generates obligation in a source outside of the practical need to obey the law.

Obviously these five theories might be subcategorized into two groupings, with both common will and divine will as specific illustrations of a more inclusive volitional or will theory, and with economic efficiency, evolution, and causality as examples of a scientific theory. If such a subcategorization were undertaken, a further distinction between "soft" and "hard" scientific theories would seem advisable, with evolution and causality slotted into the latter, and economic efficiency into the former. But putting aside the merits of such a subcategorization, what follows proceeds on the basis of discussing common will and economic efficiency first, and then taking up divine will, evolution, and causality. It might be suggested that associating the various theories in this fashion makes sense in view of the connection the common will or economics shares with society, and the connection the divine will, evolution, and causality share with obligation based on "higher authority." However, since both consent—at least as concerns the notion of expectation/reliance—and the matter of economic efficiency received consideration in the section just completed, continuity suggests itself as a more pragmatic reason for following the course here laid out.

As we have seen, the expectation/reliance produced by consent fails to explain obligation. This then raises the question of whether there is something about consent itself, something about the very fact of agreement to be bound by specific prescriptions, that serves to bind one to act in accordance with that to which one has consented. Though it might be suggested that through consent one binds one's self because of externally revealing internal intentions,<sup>69</sup> unless we are prepared to acknowledge that commitments can

68. See discussion *supra* part I.B.

69. As best as I can determine, no commentator has actually advanced such a position. Nonetheless, it is interesting to observe that Maine, in SIR HENRY SUMNER MAINE, ANCIENT LAW 268-77 (The World's Classics ed. 1931) (1861), mentions an approach used in the Roman law of contracts that could be understood as a variation on this theme. Maine describes Roman law as distinguishing between conventions or pacts, on the one hand, and contracts on the other. The former involved only an agreement, the latter an agreement plus obligation. Obligation was the thing that made contracts binding. In the cases of what he styles verbal, literal, and real contracts, obligation arose from the existence of a particular formality (for example, seal). But in the case of what he calls the consensual contract (that involving agency, partnership, sale, or hire), "as soon as [the parties have assented], there is *at once* a contract." *Id.* at 277 (emphasis in original). The suggestion, at least, is that in some situations the Romans envisioned obligation as capable of arising from the simple fact of consent itself.

be avoided whenever a new and inconsistent intention is externally revealed (since, after all, obligation follows consent), the whole idea of the specialness of the mere fact of consent itself must be dismissed.<sup>70</sup> But how about the fact that in consenting one fuses his will with the wills of others. The product is the creation of a common will that is not only a collective force expressing the promises of all those who have agreed to be bound, but is a super-will which, by the very nature inherent in its character as more powerful than any single will, is able to demand that it be obeyed.<sup>71</sup> This is essentially the position implicit in the common will theory. The conjoining of the wills of individuals or sovereign political states results in the creation of a superior independent will that no longer retains the identity of each of the wills comprising it. As a consequence, the separate expression of will evinced in individually given consent may not be effectively recanted. The common will fixes an obligation from which departure is not permitted.

The relationship between the common will theory and the expectation/reliance theory differs considerably from that between the part of the economic efficiency theory which emphasizes efficiency as a social value, and the part that emphasizes it as the *chief* social value. Thus, common will acts to answer objections posed to expectation/reliance. Law binds not because one anticipates that it will be followed, but because in agreeing to follow it one helps produce a will superior to that of any individual will. Efficiency as the chief social value, however, does not act to address similar problems with the theory that economic efficiency is the basis of obligation because occasionally efficiency is a value that may be preferred over others. The reason is that efficiency as a value makes no claim to the primacy of efficiency itself. Efficiency as the chief social value, on the other hand, makes precisely that claim and, therefore, asserts the previously absent connection between economics and obligation.<sup>72</sup> Perhaps the notion that obligation should be equated with whatever is economically efficient results from the malaise in current ethical thought, which seems to lean in the direction of decisionism<sup>73</sup> or emotivism,<sup>74</sup> both of which emphasize the subjectivity of value judgments. By finding the source of obligation in what is economically efficient, theorists inclined to this approach can rest comfortably in having identified a clean, quantifiable basis for evaluating legal problems.

The third possible individual basis of obligation under the category styled "constraining externalities" is that of divine will. In its modern form, this

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70. See JAMES L. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 11-12 (Sir Hersch Lauterpacht & C.H.M. Waldock eds., 1958).

71. See HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899); Heinrich Triepel, *Rapports Entre le Droit Interne et le Droit International*, I Recueil des Cours 77 (1925). See also the discussion of Triepel's views in BRIERLY, *supra* note 70, at 15-16.

72. See *supra* text accompanying note 69 for the absence of the connection. On intimations that economic efficiency is the chief social value, see POSNER, *JUSTICE*, *supra* note 29.

73. See generally Cornell, *supra* note 64, at 300-01 (1985) (defining decisionism and its relation to moral relativism).

74. See generally MACINTYRE, *supra* note 64, at 11-12 (explaining the theory of emotivism).

classic theory travels under the guise of things like "practical reasonableness,"<sup>75</sup> just "entitlements,"<sup>76</sup> or the "original position,"<sup>77</sup> all of which, in the final analysis, seem to hinge on the existence of some sort of all powerful moral presence.<sup>78</sup> Roughly stated, the divine will theory might be taken to contend that there is a coherent plan discoverable in the mere existence of the universe. Since that plan is the product of an uncreated creator, immanent normative essence, or timeless eternal power, it is something which must be obeyed.<sup>79</sup> Particular rules of human-made law consonant with the divine will command the same degree of obedience as the divine will itself, while those that are inconsistent lack the force to bind.<sup>80</sup> One might also argue that, of necessity, the discoverable universal plan evinces a commitment to honesty, integrity, and fidelity, since without such the plan itself could never reach fruition. Consequently, the divine will can be said to establish a moral obligation requiring that one's word (that is, consent, agreement, or promise) be kept.<sup>81</sup> By honoring commitments, conduct is aligned with the larger blueprint of faithfulness that governs all existence. Especially pleasing about this position is not only that it results in adherence to the obligations set by the divine will, but that it also displays deserved respect for the will that is honored by adherence itself. In tracing obligation to that from which all moral or normative order derives, compliance with that order is heightened, and conigned deference to its source is shown.

The divine will theory is clearly quite distinct from either the notion of the common will or of efficiency as the chief social value. Plainly the idea of the divine will implicates an obligational touchstone of an immensely different sort. It also distinguishes itself, however, from the common will and economic efficiency as the chief value by doing what neither of the other two attempt to do. In maintaining that the true source of law's obligation resides in that to which all of creation has been and will remain indebted and subordinate, the theory depicts humankind as having no voice in the generation of what actually causes law to bind. The common will theory finds the causal source

75. See FINNIS, *supra* note 2, at 100-27.

76. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-64 (1974).

77. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (suggesting a conception of justice in which all persons begin in a position of equality).

78. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275-76 (1986) (using entitlement analysis to explain the consensual nature of contract law, reference is made to the underlying moral force of the analysis); see also *id.* at 293 (discussing "shared intuitions"); FINNIS, *supra* note 2, at 406-07 (viewing God as the ultimate basis of all obligation).

79. This suggestion is typical of natural law proponents. For discussion of the ideas of early advocates of natural law, see *supra* note 28; see also PUFENDORF, *supra* note 28, ch. III, § 20.

80. See AQUINAS, *supra* note 28, pt. 1, 2d pt., question 95, art. 2, answer ("[E]very human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."). But see JEAN DABIN, *General Theory of Law*, reprinted in *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* 332-50, 416-70 (Kurt Wilk trans., 1950) (contending that natural law and human law are of two separate spheres and that, therefore, inconsistency between the two does not take away the force of either).

81. This approach would allow a proponent of the common will theory, for instance, to argue that obligation follows a promise, no matter that the obligation fails to derive from the fusion of individual wills.

in the conjoining of individual wills. The economic efficiency theory finds it in the aversion to subjectivity and the certainty which accompanies analysis based on quantification. In doing so, both envision humankind as active participants in the very making of that from which obligation springs, not as uninfluential underlings imposed on from without. The divine will theory, however, denies that obligation can arise from anything short of a source completely distanced from man. It is only by understanding all the ramifications of the eternal normative order, an order in which our input is inherently ineffectual, that one comes to have some appreciation for what really makes law bind.

The biological principle of evolution, and the causality principle in physics, can add a fourth and a fifth feasible basis of obligation here, just as they added bases earlier under the category entitled "observable facts."<sup>82</sup> It must be mentioned, however, that evolution and causality looked at as constraining externalities have a different twist than they did when looked at above. As observable facts they were considered as maintaining one of two things: first, that a historical, long-range view of law indicated evolution and causality at work in the changing content of legal rules; or second, that law binds because it is the creative product of a species subject to those biological or physical principles, therefore possessing the same force as the principles themselves. Only the latter approach received real attention. The notion that both the evolutionary process and the concept of cause and effect are able to describe what goes on with law over the long haul were said to provide no explanation for why law binds. In short, when cast in terms of the former approach, evolution and causality did not purport to represent themselves as bases of legal obligation. With regard to evolution and causality in the instant category (*i.e.*, constraining externalities), however, both principles are drawn upon in yet a third distinct sense. They are considered here as going beyond the claim that law binds because it is made by mankind—creatures admittedly subject to these binding principles of the natural order. The essence of the claim is not that the human species, as both biological creature and physical object, is bound by principles whose force is imparted to the civil prescriptions the species happens to adopt. Rather, the claim is the direct one that both evolution and causality are much more than principles of biology and physics, indeed that they are principles of the social world.<sup>83</sup>

The claim that evolution operates in the social world refers to the fact that the content of any particular legal rule reflects a struggle between disparate and perhaps dramatically opposed concepts of what is essential to deal with the problem the rule addresses. The result of this struggle embodies the position considered most fit for the task. Given the inherent dominance or superiority of the position the rule reflects, its emergence as the officially

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82. See *supra* text accompanying notes 36-41.

83. I am unfamiliar with any commentator who has taken such a position, but it is quite conceivable that since these principles have been called upon in the senses referred to above, see *supra* text accompanying notes 36-41, they might also be looked to in the manner discussed herein.

endorsed societal approach could not have been avoided. The essence of evolution is the selection of that which is best suited to the issue at hand. As the appropriate social organs adopted rules of law which had competed with other proposals for that privileged status, the rules they adopted had to be adopted simply because those rules were superior in all important respects. In short, the law-making process was destined to turn out precisely the way it did.

Similarly, with regard to causality, one could refer to any specific legal rule as the consequence, effect, or result of certain identifiable, determinable, antecedent events or conditions. To the extent that such reference is confined to the view that every extant rule of law is the result of some traceable precipitative circumstance, causality could be turned to as a source of obligation. Like evolution, causality can admit to no other way for bringing about law. Rules of law come into being not because they somehow magically materialize out of thin air, but because some situation, thought, or condition sets in motion the process that leads to their adoption. It is impossible to deny that rules of law flowing from the setting in motion of such forces are the result of those causes. And given that causality postulates the unavoidable fact of some generative phenomenon, the rules of law give life to inescapable products of such phenomena.

Perhaps some of these five possible bases of obligation have a certain appeal. Nonetheless, they all suffer deficiencies which seem to raise legitimate questions concerning their ability to explain law as obligatory. The deficiencies fall into two areas and are related to, yet quite distinct from, matters to which I have already alluded. Speaking with greater specificity, those earlier addressed matters dealt with the inability to explain obligation as derived from observable facts. The idea was that even presumptively invariant facts of nature do not reflect normative standards,<sup>84</sup> and the mere existence of inescapable and predictably recurring phenomena says nothing about how it is that law connected therewith shares in the same ineluctable attributes.<sup>85</sup>

The two problems with the various bases of obligation under the constraining externalities category are the foundational one that common will, economic efficiency, divine will, evolution, and causality all rest on unexamined assumptions about the force of that which supports those bases, and the equally complex problem of whether any of the bases themselves actually make the kind of normative claim to which they aspire. The foundational problem and the criticism concerning invariant facts not reflecting normative standards have parts in a continuum designed to argue that law is obligatory. The problem of constraining externalities making normative claims, and that of recurring observable facts not transmitting their inescapable nature to the laws with which they are connected, share in the incompleteness of arguments designed to demonstrate the force of law to bind.

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84. See *supra* text accompanying notes 53-55.

85. See *supra* text accompanying notes 52-53.

Focusing with greater precision on how a relationship exists between the foundational problem faced by the five bases of obligation under the category styled "constraining externalities" and the problem that observable facts of nature do not establish normative standards, the connection to a continuum which argues for the obligational force of law seems readily apparent. Even if it is stipulated that law is the product of unchanging, inescapable, natural facts like rationality, social interest, sense of right, or empirically verifiable community practice, such facts of nature only reflect that it can be no other way, not that legal rules which flow therefrom are binding. Rules of law gain no force from the facts of nature, because facts of nature lack normative content.<sup>86</sup> In moving from "observable facts" to "constraining externalities" to demonstrate that law is obligatory, the idea is to address the problem of normativity through relying on things outside of, or exogenous to, mere facts all of us can observe in our daily lives. In this respect, the bases listed under the heading of constraining externalities build upon, or add to, the line of argument aimed at proving that law has the force to bind. If the existence of recurrent facts fails to demonstrate law binds, then perhaps law's binding force can be shown by going a step further and pointing out the things independent of those facts that may serve as the driving force behind the facts themselves.

With regard to the problem of none of the bases in the constraining externalities category making a normative claim, and observable facts not transmitting their unavoidable, recurring nature to law, a more precise focus is revealing here as well. As discussed earlier, not only does the repetitive nature of facts like rationality, sense of right, or social instinct suggest nothing other than things just happen to be the way they are, it does not speak to whether the legal rules connected with such facts take on the same inescapable, invariant quality.<sup>87</sup> Phenomena of the social or natural world may be obligatory, in the sense that they will occur. Yet the mere fact that rules of law are somehow connected with those phenomena does not mean that the rules share the same obligational force. Therefore, arguments for legal obligation resting on observable facts of the social or natural world necessarily come up short. Compensation for such incompleteness is not forthcoming by a turn to the common will, economic efficiency in the strong sense (as the chief value), evolution, or the other constraining externalities. These simply share with observable facts an incompleteness of argument. Beyond the claim that law is linked to a super-will, or a timeless eternal power, the bases of obligation under the category of constraining externalities make no assertion of normative force. The most they do is use external sources, sources other than mere practical necessity or assuredly recurring facts, to anchor legal rules and thereby support the arguments about law's ability to obligate.

Staying with the problem of the failure of the bases catalogued under constraining externalities to make a normative claim, it is clear the problem

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86. See *supra* text accompanying notes 53-55.

87. See *supra* text accompanying notes 52-53.

cuts out the very heart of what was supposed to distinguish this entire category from that of practical considerations. The whole idea behind looking to sources external to the need to follow what law prescribes, lay in the identification of something which gives law a link to normativity. To assert that neither common will, nor economic efficiency in the strong sense, nor divine will, causality, or evolution in the sense of a generative source, make true normative claims, is to eviscerate constraining externalities as a basis of obligation. Yet when each of the five theories subsumed under the label attributed to that category is examined, the fact that they really make no such claim clearly suggests itself.

Take the common will theory. It revolves around the notion of a collective super-will. But to characterize a will as "super," and conclude from this that the will makes a normative claim, is to miss the point about obligation. As previously observed, obligation suggests that something "should" happen.<sup>88</sup> Not in the sense that it is being encouraged to happen, rather in the sense that from an ethical or moral perspective it is the most appropriate thing that could happen. The idea that the common will fixes obligation, however, understands obligation to imply that something "must" happen. That seems to be the essence of the super-will theory. Its very label rings of mandate, with consequences associated with noncompliance. The feature that is central, the feature of virtuousness, is left completely aside. So, too, when reliance is placed on the biological principle of evolution or the physical principle of causality. In such a case, it is not enough to argue that law reflects the operation in the social world of these two principles. It is not enough to claim that the law which exists is to be obeyed because it is the fittest product available or the consequence of precipitative community forces. Though arguments of this sort may invoke evolution and causality to explain why law binds, in doing so they only indicate that the law which exists is the kind of law these forces "will" produce once evolution and causality are put in play. But if law is to be obligatory, if it is to command obedience, then it must go further and indicate that what will be produced through evolution or causality is also something that not only "will" be obeyed but "should" be obeyed.

The theories of divine will and economic efficiency in the strong sense, that is, as the chief social value, are much more nettlesome as regards this matter of a normative claim. By their very nature, both resonate with normativity in that they clearly appear to entreat observance of the principles they embody. Common will, evolution, and causality do not ring of an urging that they be obeyed. They lack the "should" of normativity. Divine will and economic efficiency as the chief social value, however, seem, almost by virtue of some inherent quality, to make unmistakable normative claims. The moment one considers the idea of a timeless eternal force, or the chief among all social values, it is difficult to avoid the intrusion of overtones of morality. As we all know, with morality comes the intonations of conscience associated with what "should" be done.

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88. See *supra* text accompanying note 54.

It would be an oversimplification, though, to ignore the fact that both divine will and efficiency in the strong sense can be referenced in two entirely distinct ways. They can be said to give binding force to those laws which are consonant with the divine will or present themselves as economically efficient, since divine will and efficiency have a certain righteousness or virtuousness about them. Or they can be said to give the force to bind because the divine will, as the will of an omnipotent, almighty essence, is something caution dictates be observed, and economic efficiency, as a concept permitting the evaluation of law to be streamlined and quantified, is a standard that merits utilization out of the sheer elegance of simplicity. Many times the distinction between these two ways of thinking about the divine will and economic efficiency as sources of legal obligation becomes blurred. Just with regard to our moral lives alone, there are times when the admonitions in sacred scriptures like the *Bible*, *Talmud*, *Koran*, *Vedas*, or *Tao Te Ching* are thought about as warranting observance out of a sense that they represent the word of a deity that is all powerful. Yet on other occasions we treat those same admonitions as entitled to respect because of a sense that they state positions capturing the truly ethical or genuinely noble.<sup>89</sup> The same commingling is also evident in the phraseology we use to describe divine will and economic efficiency as bases of legal obligation. With regard to the former, we speak of "displays [of] deserved respect."<sup>90</sup> As to the latter, our descriptions are in terms of "a coherent and attractive basis for ethical judgments."<sup>91</sup> But respect can be displayed for the divine will, and the coherency and attractiveness of efficiency can become apparent, without necessarily acknowledging that their pull derives from virtue or righteousness. That, however, is what lies at the heart of normativity. Both divine will and economic efficiency can be perceived as satisfying the requirement of things that "should" be observed. Such is the result of conceiving of the divine will as a manifestation of a supreme and mighty being, or of efficiency as a way to simplify and mechanize the process of making decisions. To fully capture normativity, however, what is offered must make a claim to its own intrinsic "value." When divine will and economic efficiency are thought about in the sense that understands them as postulating moral or ethical positions, then, and only then, do they meet that exacting test.

Leaving the problem of normativity and the bases of obligation under the category of constraining externalities, and shifting to the foundational problem associated with the bases listed under that same category, it is clear that even when divine will and efficiency as the chief value are understood as making claims to virtuousness, neither they nor the theories of common will,

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89. It seems worth noting that there is at least a third possibility as well. Specifically, some may yield to the teachings of authoritative religious works out of mere faith alone. The idea may be that humans can never know all of time. Therefore, it is impossible to rationally assess the virtuousness of any theological admonition. However, since such admonitions reflect the will of God, the One who surpasses all understanding and was before time, they should be observed.

90. See *supra* text accompanying note 82.

91. See comments by Richard Posner, as discussed *supra* note 61.



evolution, or causality prove able to supply obligational force to law. Stated another way, even if every one of the theories comprising constraining externalities were to be taken as making a normative claim, a claim to its own intrinsic "value," the power of law to bind would remain absent. The foundational problem responsible for this circumstance concerns the assumptions upon which common will, divine will, economic efficiency, the physical principle of causality, and the biological principle of evolution happen to be based.<sup>92</sup> The culprit is the perennial one of infinite regress.<sup>93</sup> Just as law cannot bind of itself, and an effort must be made to search for something behind it if an explanation is to be offered for why it obligates, so what is discovered in that search cannot of itself explain why law binds, unless there is something about the thing discovered that gives it internally generated obligational force.

In the context of divine will and economic efficiency, it would seem there are problems with finding internally generated obligational force. While there is reason to believe in an all powerful, uncreated creator,<sup>94</sup> both knowledge of and obedience to that essence's will are matters that cannot be taken as given. As to knowing the will of some omnipotent force, the suggestion that it is revealed through all we see about us in nature and our daily lives,<sup>95</sup> ignores the possibility that what is seen is something other than the reflection of a deliberative and intentional choice.<sup>96</sup> Yet without conscious choice

92. See *supra* text accompanying note 86.

93. On infinite regress in the context of international law, see Sir Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8-9 (1956).

94. With regard to the existence of a supreme force, it might be reasoned that everything in the universe must have come into being as a consequence of something able to create the original matter from which all that has ever been can be said to have descended. Things that we see today are the result of mechanisms of creation that existed prior to today's things coming into being. Long before the mechanisms of today's creation came into being, there existed still more antecedent and earlier mechanisms, going ever backwards to the first of all creative mechanisms. Yet the very first creative mechanism was itself created out of matter, and that matter, because there existed no earlier creative mechanism in the universe to create it, had to have been created by something. Whatever created the matter from which the first creative mechanism was created had to have been either itself the uncreated creator, or created by something that was, or could trace its lineage back to, the uncreated creator. See generally GERMAIN GRJSEZ, *BEYOND THE NEW THEISM: A PHILOSOPHY OF RELIGION* (1975) (referring to the existence of an "uncaused cause").

95. See CICERO, *supra* note 28, at 225-27 (sensory perception and careful reflection). Several variations of the divine will theory have existed. Cicero proposed that humans draw rational inferences from what is known about humankind and the environment, and that justice is to be sought in what is natural to man. *Id.*; see also SAMUEL CLARKE, *A DISCOURSE CONCERNING THE UNCHANGEABLE OBLIGATIONS OF NATURAL RELIGION, AND THE TRUTH AND CERTAINTY OF THE CHRISTIAN REVELATION* (7th ed. 1728), reprinted in *BRITISH MORALISTS: 1650-1800* § 244 (D.D. Raphael ed., 1969) (the duties of natural law "may . . . be deduced from the nature of man."). Another variation holds that humans must focus their reflection inward in order to obtain an awareness and deeper understanding of what they already know. See AQUINAS, *supra* note 28, pt. 1, question 94, art. 2, answer, at 1009.

96. If what exists about us is the result of a conscious rejection of all but the adopted plan, or at the minimum a conscious choice from alternatives considered less attractive, deliberation may indeed reveal one's will. But we can never be sure that such a process has been utilized. Even Aquinas observed that "the will of God cannot be investigated by reason, except as regards those things which God must will of necessity; and what He wills about creatures is *not* among these." AQUINAS, *supra* note 28, pt. 1., question 42, art. 2, at 243 (emphasis added). To be sure, some have described creation

nothing but the will to refrain from choosing is evinced. Similarly subject to question is obedience to the will of the timeless force. This is certainly so with regard to arguments for obedience that hinge on the force being the creative wellspring of all that exists in time and space. While in such a case one may think of adhering to the divine will out of a desire for friendship and affinity, thereby displaying a certain element of gratitude for the gift of one's existence,<sup>97</sup> since raw creative power is not necessarily an indication of the presence of intrinsic moral or ethical worth, obedience cannot be said to be compelled on that basis alone. Economic efficiency as the chief value is no less free from criticism. The basic difficulties it faces derive from both wealth's inability to be the chief social value and, even more, its inability to qualify as a value at all. Traditional mythic social narrative<sup>98</sup> depicts wealth as vastly inferior to other things sought by members of the community. The classic example of a value prized above wealth is that of love.<sup>99</sup> And, indeed, thoughtful and careful philosophical commentators on the condition of the world have ventured insights that, when developed, prove to undermine the notion that efficient wealth accumulation can ever be anything more than an

in terms of a play or drama rather than in terms of a choice revealing an overall normative blueprint. See 2 PLATO, *THE LAWS OF PLATO: BOOKS VII-XII* 803 b-c (1921) (man as God's plaything); FRITJOF CAPRA, *THE TAO OF PHYSICS* 78 (Bantam Books, 2d ed. 1983) (1975) (Hinduism and creation seen as a play).

97. See FINNIS, *supra* note 2, at 406-07 (1980).

98. On the role and impact of narrative in law see Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

99. Since childhood we have all been familiar with the myth of the king who lost his daughter to the "golden touch." See, e.g., OVID, 2 METAMORPHOSES, bk. XI at 127-31 (Frank J. Miller trans., 1916) (the original inspiration for the children's story). The same theme is expressed to adults in the painting "Death of a Miser," which hangs in the National Gallery of Art, Washington, D.C., the work of the 15th century artist Hieronymous Bosch. Bosch, whose real name was Jerome van Aken, was born about 1450, probably in the town of 's-Hertogenbosch, duchy of Brabant, Burgundy, in what is now the Netherlands. See generally, Meisler, *The World of Bosch*, 18 SMITHSONIAN 40 (Mar. 1988) (describing and interpreting Bosch's works, including "Death of a Miser"). For those who are not familiar with this painting, it depicts a somewhat emaciated man who is afflicted with a presumably terminal malady. Though he is being urged by an angel to fix his thoughts on a nearby crucifix, for entering through a side door and portrayed in the style of a cloaked and hooded skeleton carrying an arrow about to be thrust at him, the man seems preoccupied with a bag of coins being offered by a creature from "below." Various interpretations may be given to this work by Bosch, but the one I have a personal prejudice for is that which suggests the artist was attempting to teach us that many things, and especially life itself, have greater value than wealth. When it is remembered that a frequent theme in Bosch's works was condemnation of the worldly sins, the plausibility of my own prejudice does not seem quite so unlikely. See DESIDERIUS ERASMUS, *THE PRAISE OF FOLLY* 224-25 (originally translated into English in 1549) (Classics Club ed. 1942) for an example of a writer making the same point about an inferior position accorded to wealth in comparison to wisdom. Taking a similar approach to Erasmus is Thoreau. He observes:

Men rush to California and Australia as if the true gold were to be found in that direction; but that is to go to the very opposite extreme to where it lies. They go prospecting farther and farther away from the true lead, and are most unfortunate when they think themselves most successful. Is not our native soil auriferous? Does not a stream from the golden mountains flow through our native valley? [A]nd has not this for more geologic ages been bringing down the shining particles and forming nuggets for us?

THOREAU, *supra* note 18, at 362-63 (emphasis in original).

instrument for the requisition and nurturing of things having genuine value.<sup>100</sup> Given all of this, it is clear that foundational problems plague both efficiency as well as divine will.

With regard to common will, evolution, and causality, the assumptions upon which they rest are equally troublesome. The addition of one will to another does not give rise to a will with super powers that fix obligation. The process of several entities agreeing to shape their conduct around some specific standard yields a product that depicts how widespread the commitment is to address a particular problem in a particular fashion. It does not, however, reflect a force beyond that of any one of the individual wills involved.<sup>101</sup> Similarly, the basic assumption supporting evolution as a constraining externality is flawed in that evolution cannot be said to make law bind by virtue of social fitness. The mere fact that a certain standard regarding conduct is promulgated by the authoritative decision-makers of a particular community, because they had no option but to endorse the best alternative then available, does not mean that what has been established as the rule of society binds those to whom it is directed. It means only that what is established has been established out of a natural rhythm dictating that the fittest resolution of the particular social issue be endorsed. There is a world of difference between the best solution always rising to the top, and the ability of solutions of that sort to command obedience.<sup>102</sup> Causality has no easier a time with this distinction. To view the laws brought into being by the setting in motion of inexorable social forces as therefore obligatory reveals a myopia that blends the matters of what must "exist" and what must be "obeyed." That the existence of something could not have been avoided is no reason to think of that which exists as able to command obedience.<sup>103</sup>

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100. Using a rather convincing illustration involving a hypothesized machine able to supply one with a life-time of one type of sensation, a distinguished scholar argues that humans value *doing* above *experiencing*. See NOZICK, *supra* note 76, at 42-45. This conclusion clearly admits of the view that wealth itself is not a value. See also RONALD DWORKIN, A MATTER OF PRINCIPLE 246-48 (1985) (discussing wealth's lack of value). The mere instrumental nature of wealth is also the prime moral in CHARLES DICKENS, A CHRISTMAS CAROL (Michael P. Hearn ed., 1976) (1843).

101. To insist that the common will binds, even though it is nothing but a conjunction of individual wills and, therefore, is invested with no greater obligational force than any of the individual wills comprising it, fails to consider the earlier referenced point, see *supra* text accompanying notes 69-71, regarding the external revelation of internal intentions.

102. It is quite obvious that the fact that a certain solution is the best available does not guarantee its adoption. But even if one assumes that the biological principle of evolution functions in the social world to always produce the best option for the resolution of any particular problem, there can be no doubt that this mere fact alone does not signify that the option thus produced binds those to whom it is directed. Evolution may dictate that what is adopted by those with the power to establish legal standards be nothing but what reflects the fittest alternative then extant. To concede this, however, concedes nothing other than that those serving as society's authoritative decision-makers cannot escape from adopting the standards they adopt. The task of demonstrating that law has the force to bind those to whom it is directed, though, requires a showing that once adopted, there is something about law that makes it bind.

103. The observation made *supra* note 102, could also be made, with appropriate changes, on the matter of causality.

### *D. Intellectual Constructs*

The fourth and final category of bases of obligation can be fastened with the appellation "intellectual constructs." The theories this label contains share with constraining externalities a desire to locate and describe what lies outside the law that explains the commonly held belief that law binds those to whom it is addressed. The principal divergence between the basis styled intellectual constructs and that of constraining externalities, however, resides in the latter identifying the source of obligation as springing from one of the various theories listed thereunder (for example, common will, divine will, efficiency). The theories falling within the intellectual constructs category do not in and of themselves serve to supply law with the force to obligate. Instead, they simply identify a variety of arguments about how law acquires that force. In other words, with constraining externalities law is said to be made obligatory by externalities (for example, common will, etc.) that constrain obedience. With intellectual constructs, however, what is advanced does not constrain observance of law, but only calls attention to propositions about why law binds.

But if this last category of bases of obligation only calls attention to propositions about why law binds, how is it to be differentiated from the first two bases—observable facts and practical considerations? Those bases also identified arguments about how law acquires the force to bind and, thus, would seem in no way distinct from intellectual constructs. Actually, observable facts diverges in its focus on the tension which the failure to recognize law as obligatory creates with presumably invariant characteristics displayed by human beings and presented in the natural world. The practical considerations category is similarly positioned in its view that untoward societal consequences flow from the failure to see law as binding. Intellectual constructs highlights propositions invested with validity only when law binds, and in that sense it is tied neither to needs connected to certain natural or apparent facts, nor to needs essential to the avoidance of unfortunate social results. Any affiliation it has with needs-based analyses stems from its attempt to demonstrate that if particular propositions about law and human beings are utilized, then law must be understood as obligatory in order to confirm the strength of those propositions.

The theories of obligation under the category entitled intellectual constructs are basically three: self-limitation; hierarchy of rules; and rationality as an end. These can be further broken down and placed in two subcategories, one for simple and another for complex theories. The most obvious candidate for the complex-theory subcategory is hierarchy of rules. Rationality as an end can be slotted into the same category, largely because it argues by the same kind of indirection to the position that law obligates those to whom it speaks. Self-limitation is a simple-construct theory by virtue of its more direct connection with the expressions of will that evidence themselves as law. As with the previous bases of obligation, however, no effort is made to more deeply explore this subcategorization. What is focused on is limited to an

analysis of the important aspects of each of the three theories catalogued under intellectual constructs, followed by a critique aimed at illuminating deficiencies that impede utilization of the theories to explain why law binds.

The self-limitation theory is somewhat associated with both the common will theory mentioned in the preceding section,<sup>104</sup> as well as the free will theory discussed considerably earlier.<sup>105</sup> Though the common will theory argues that law derives its force from the fact of conjunction of several individual wills, the self-limitation theory finds obligation in the significance of each individual will being expressed. The idea is not that the revelation of one's will to the larger community, or the fusion of one individual's will with the will of another, acts as the catalyst giving law the force to bind. Instead, the idea is that by freely imposing a limitation on how one agrees to conduct one's own affairs, self-determination and personal autonomy are given play. Since consent alone, whether expressed singly or in conjunction with others, cannot create obligation, it must be said to arise from consensual expressions that evidence operation of the free, autonomous nature of every promisor. Beyond this, if unfettered self-determination is to be accepted as genuine, then the capacity to choose to restrict the options from which future choices can be made must be perceived as establishing obligation. Here, self-limitation departs from the free will theory in that the latter argues that, because free will exists, law must be viewed as obligatory. The essential component in the self-limitation theory, however, is a limitation imposed by self on self.<sup>106</sup> Law is not binding because free choice indicates it needs to be viewed as binding, but rather because choice, self-determination, and freedom have validity only when law binds. External revelations of internal intentions, or the marriage of several individual wills through agreement, simply act as the occasion or the device that affords obligation the chance to arise.<sup>107</sup> Autonomy, self-determination, and free will function not as practical considerations that demonstrate the need to perceive law as obligatory, but rather as the sources of argument about why law is to be understood as obligating those to whom it is directed.

Rationality as an end shares with self-limitation the characteristic of disclosing what it is that suggests law binds. It also shares with rationality as a fact<sup>108</sup> a certain emphasis on things reasoned and reasonable. Rationality as an end, however, stands in contradistinction to self-limitation and rationality as a fact. For example, it extends the chain of argument beyond that used for self-limitation and focuses on the importance of making

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104. See *supra* text accompanying note 71.

105. See *supra* text accompanying notes 59-61.

106. For the classic statements on the self-limitation theory, see generally GEORG JELLINEK, *DIE RECHTLICHE NATUR DER STAATENVERTRÄGE* (1890); *ALLGEMEINE STAATSLEHRE* (1900); *GESETZ UND VERORDNUNG* (1895). For a discussion of Jellinek's views, see SIR HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 407-15 (1966).

107. The "will" theory is related to the self-limitation theory. See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1981). For a review, see Anthony T. Kronman, *A New Champion for the Will Theory*, 91 *YALE L.J.* 404 (1981).

108. See *supra* text accompanying notes 33-34.

decisions or selections from the standpoint of the natural inclination of decision-makers to act in a considered and temperate fashion. This is distinctly evident from the fact that self-limitation postulates the obligational force of law on the basis of the autonomy and independence of every individual, while rationality as an end goes further to say that it is the fact that decisions are made on the basis of a commitment to the inherent value of things reasoned and reasonable which explains why selections by autonomous individuals have the power to bind. In other words, the actual pursuit of rational solutions to societal problems, and not the ability of individuals to determine their own destiny, is what argues for law having obligational force. The distinction between rationality as an end and as a fact is even more pronounced. Specifically, rationality as an end stresses the standards guiding decisions, while rationality as a fact concerns the thoughtful and reflective processes that naturally typify evaluative judgments of humankind.

The message about the inherent value of a commitment to rational decisions fixing obligation captures the essence of rationality as an end. The idea is that rationality or reason obligates one to do what it determines appropriate, because in arriving at criteria of judgment, rationality identifies objective principles rather than maxims of subjective volition (that is, interest and desire), and thereby appears to the individual will as the kind of neutral, external thing needed to command or necessitate observance through the creation of the normative prescription referred to as the "ought."<sup>109</sup> Judg-

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109. Cf. KANT, *Metaphysic of Morals*, *supra* note 59, at 38, 47 (noting that the ground of the "categorical imperative" is that "rational nature exists as an end in itself"); see also 6 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 328 (Image Books 1985) (1960) (depicting this as a "postulate" assumed by Kant).

Kantian philosophy is extremely tedious. With regard to the notion of the basis of obligation, however, Kant appears to take the position that the mind can have as its object both the phenomenal world, the world of experiences and reality, and the noumenal world, the world of pure thought. Man, though, can never know of God, immortality, and freedom. They may or may not exist. Nevertheless, the mind is so comprised that it is obliged to introduce these thoughts in an effort to attain a unity or a totality with regard to what it experiences, knows, or is able to contemplate. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 271, 290-91, 304 (F. Max Muller trans., 2d ed., Anchor Books 1966) (1781); 6 COPLESTON, *supra*, at 280, 283, 304 (noting that the mind is obliged because unification is a natural disposition of the mind). To conceive of God, immortality, and freedom as more than noumena, that is to say, to conceive of them as things in themselves, is to partake of illegitimate "paralogisms" (logically false syllogisms). See *id.* at 284-86. They can never be experienced, proved, or disproved. But even though they can only be the object of thought, man can act as if they exist and thereby allow them to serve as transcendental ideas (regulative ideas) that aid the process of further unification. The moral or natural law is not founded "on belief in God" but in pure reason. See *id.* at 313. Neither is "the basis of obligation . . . [to] be sought in human nature or in the circumstances of the world in which he (man) is placed, but *a priori* simply in the concepts of pure reason." KANT, *Metaphysic of Morals*, *supra* note 59, at 4. From reason Kant formulates the categorical imperative, the supreme principle of morality, which serves not as a premise from which rules of natural law can be deduced, see 6 COPLESTON, *supra*, at 346, but rather as a criterion for judging maxims generating specific acts of behavior. The imperative provides: "I am never to act otherwise than so that I can will that my maxim should become a universal law." KANT, *Metaphysic of Morals*, *supra* note 59, at 18. As an imperative, the categorical imperative commands that the will conform to something which is a good in and of itself. Though Kant raises the issue of whether the imperative is binding, see *id.* at 43, he answers that question affirmatively by postulating that man's "rational nature exists as an end in itself," *id.* at 47, and then by observing that objective principles of reason appear to the individual will as

ments that are reasoned and reasonable obligate because rationality is a thing sufficient in and of itself.

When one moves away from rationality as an end and towards the theory of hierarchy of rules as the basis of obligation, a shift is made to an approach which is completely aseptic. Unlike rationality's reliance on a notion familiar to the probing thinker, hierarchy of rules employs an arcane and stilted multilevel explanation for why law binds those to whom it is directed. The suggestion is that at the level of daily life, rules of one kind set the limits directly controlling community affairs. These rules comprise the body of law with which the citizenry comes into everyday contact, rules that might be styled first-order rules. At an entirely distinct level exist the rules by which the validity of all first-order rules can be determined. These rules might be styled second-order rules.<sup>110</sup> A form of second-order rule might be that legislative enactments in line with customary behavior by the public, or consistent with the decreed desires of those who fashioned our governmental system, should be honored.<sup>111</sup> In either case, beyond the explanatory superstructure resides an appeal to some sort of postulate said to give law (that is, first-order rules) force by virtue of validation. Rules of one order can be stacked on or linked to rules of another order, but it is the hypothesis that the rules of the loftiest order are to be followed which makes the theory more than a sterile diagrammatic exercise and serves to support the argument that law takes on an obligatory character.

The attractiveness of the three theories just outlined—self-limitation, rationality as an end, and hierarchy of rules—is evident. Nevertheless, all

something external which commands or necessitates consonant behavior, thus creating the "ought" of obligation. *Id.* at 30-31. On Kant's view that legal norms are *politically* superior to ethical or moral norms, see EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 385-86 (1953).

It is interesting to note that in addition to the postulate of reason as an end in itself, Kant's other major postulates concern the transcendental ideas of God, immortality, and freedom. See 6 COPLESTON, *supra*, at 328-31, 334-43. Also, with regard to the matter of the phenomenal and noumenal worlds, there seems to be something in this of the split between the philosophical schools of "realism" and "nominalism," with the former espousing that for everything experienced or known in the world there exists an ideal but nonetheless real archetype outside the world, and the latter insisting that all that can ever be known and all that exists is found in the experiences of the world. See C. WARREN HOLLISTER, *MEDIEVAL EUROPE: A SHORT HISTORY* 272-73 (2d ed. 1968). Some of the earliest adherents to these two schools of thought appear to have been Plato and the 11th century philosopher Roscelin (Roscellinus), respectively. See 2 PLATO, *TIMAEUS*, *reprinted in THE DIALOGUES OF PLATO* 3, 12-15 (B. Jowett trans., 3d ed., Random House 1937) (MacMillan 1892) (speaking of the creator (*demiurgos*) who unites matter and ideas, material of the senses, and the unchangeable patterns of the cosmos to make what man experiences and sees). For the views of Roscelin, canon of the cathedral at Loches, see 2 COPLESTON, *supra*, at 143-45.

110. For commentators advancing similar hierarchical rule systems, see DIONISIO ANZILOTTI, *CORSO DI DIRITTO INTERNAZIONALE* 43 (3d ed. 1928) ("a complex of norms which derive their obligatory character from a fundamental norm"); H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961); HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1945), *reprinted in* CHRISTIE, *supra* note 27, at 621-23; and SIR JOHN W. SALMOND, *SALMOND ON JURISPRUDENCE* 137 (Glanville Williams ed., 11th ed. 1957) ("ultimate legal principles").

111. Kelsen certainly suggests this in the international realm. See HANS Kelsen, *PURE THEORY OF LAW* 214-17 (Max Knight trans., 1967). A similar approach is taken by Kelsen with regard to the municipal or domestic realm. See Kelsen, *supra* note 110, at 625 ("[O]ne ought to behave as the individual, or the individuals, who laid down the first constitution have ordained.").

suffer from problems that erode their ability to stand as touchstones for the binding force of law. Take self-limitation for instance. That theory is plagued by the first of two very specific difficulties affecting each of the theories under the label intellectual constructs. Specifically, since self-limitation finds the basis of legal obligation in the limitations imposed by one's self on one's self, it looks to a source that proves unsatisfactory and incapable of explaining law as binding. This is amply demonstrated by the fact that the very creation of an obligation under the theory depends upon manifestations of will to be bound by some rule or rules of conduct. If such manifestations bind because individuals possess the capacity to limit themselves, how can the obligation to which the will is said to bind be described as legal in nature? After all, it need hardly be mentioned that the very notion of legal obligation rings of something designed to constrain the will of the one who is said to be obligated. Constraint seems to imply the springing of an obligation from a source outside of, or other than, the will of the one who is obligated. The difference is between an obligation imposed from some source beyond the will of the individual, and an obligation arising from a source within the will of the individual.<sup>112</sup> A limitation imposed on self by self is a limitation only so long as behavior is in conformance therewith, and can never rise beyond the level of mere limitation to the level of legal obligation. The most that self-limitation can achieve is to describe the mechanism used by individuals to indicate that their actions shall be in accordance with a particular standard. In no way can it serve as the source of legal obligation.

The unacceptability of the sources of obligation proffered for rationality as an end and hierarchy of rules is equally as pronounced. The essential idea with regard to the former is that of the sufficiency of choices guided by reason. As long as reason produces the choices upon which one settles, then those choices fix obligation. To think that reason, however, is the value which imparts obligation to law is to ascribe not only to an extreme rationalism resulting in the primacy of commitment or duty over good ends (because obligation is always thought of as following from what reason identifies),<sup>113</sup> but also to a view that gives short shrift to other values that are ends-in-themselves. One could easily number in addition to reason the values of life, knowledge, play, aesthetic experience, friendship, and perhaps even religious belief and worship.<sup>114</sup> Irrespective of the inclination to alter this listing, it

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112. See BRIERLY, *supra* note 27, at 14.

113. See 6 COPLESTON, *supra* note 109, at 347. For an illustration favoring duty over good ends, see IMMANUEL KANT, ON A SUPPOSED RIGHT TO LIE FROM ALTRUISTIC MOTIVES (1797), *reprinted in* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346, 349-50 (L. Beck trans., 1949) (obligation to tell truth even though it may lead to death of another). The idea of duty over ends is anti-consequentialist and is probably motivated by the same impetus that has led to the doctrine of double effect (that is, one must not use an inappropriate means to produce a good end). In opposition to consequentialism, see FINNIS, *supra* note 2, at 111-25 (1980). In support of consequentialism, see JUDITH J. THOMSON, *The Tolley Problem, in* RIGHTS, RESTITUTION, AND RISK 94-116 (William Parent ed., 1986).

114. See AQUINAS, THE SUMMA THEOLOGICA, *supra* note 28, pt. 1, 2d pt. question 10, art. 1c and question 94, art. 2d; FINNIS, *supra* note 2, at 85-92; WILLIAM K. FRANKENA, ETHICS 87-88 (2d ed. 1973); GERMAIN GRISEZ & RUSSELL SHAW, BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF



is abundantly clear that the moment more than reason alone is recognized as an end-in-itself kind of value, the problematic character of selection arises. Every instance which involves more than just reason presents the possibility of values conflicting with each other. Acceptance of the primacy of reason over a good outcome is not adequate to provide more than a capricious resolution of such a tension. Adherence to a position simply preferring the outcome produced by reason still leaves the stark reality of assessing the other values involved, and then balancing and selecting among the many values that are all ends in themselves.<sup>115</sup> While it might be agreed that with this as the task, reason is always to be the value attributed preeminence, because it is both an indispensable precondition to the occurrence of assessment as well as the only thing able to engage in the exercise of weighing and choosing from among the values concerned, one must not lose sight of the fact that the weight accorded to particular basic values fluctuates in relation to the degree to which a specific factual situation happens to involve one value more than another. Thus, in a life-threatening situation, the value of life becomes preeminent to, and indeed a precondition for, the value of reason.<sup>116</sup> True, reason may be called upon in deciding the best action for extricating one's self or another from such a situation. That, however, only illustrates that reason can be participated in when preferring the value of life (or some other value).<sup>117</sup> It does not indicate that reason receives higher priority, for in the absence of life itself reason is nothing. Indeed it is quite conceivable that many others might feel that, without knowledge or friendship or aesthetic experience, one either has none of the primal ingredients essential to permit reason to be rational (since, for example, with what is reason to function if one has no knowledge?), or none of the ingredients essential to permit one to claim, and feel the claim is well-founded, that the fullness of the good life has been experienced.

With regard to the unacceptability of the source put forward by the hierarchy of rules theory, it need only be recalled that the second-order rules which serve to validate the first-order rules are nothing but postulates. Furthermore, like all postulates, these second-order rules are faithful to the etymological Latin ancestor *postulatum* (that is, to assume) and state propositions that are simply taken as given. Second-order rules make a claim to normativity by exhorting adherence to legislative enactments that parallel

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FREEDOM ch. 7 (1974); see also JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* (1938) (discussing play as a basic value); John M. Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 232-37 (1967) (discussing aesthetic experience as a value); Thomas Aquinas, *De Veritate*, ques. 16, art. 1, reply 9 (discussing practical intelligence or reason as a basic value).

115. On the incommensurability of basic values, see FINNIS, *supra* note 2, at 92 (no objective hierarchy among basic values). For disagreement with Finnis, see Donald H. Regan, *What a Sensible Natural Lawyer and a Sensible Utilitarian Agree About and Disagree About: Comments on Finnis*, 36 J. LEGAL EDUC. 496, 498-99 (1986).

116. Cf. FINNIS, *supra* note 2, at 92-94.

117. See *id.* at 100 (discussing how reason or "practical reasonableness" is participated in when shaping participation in other basic values).

the desires of the Founding Fathers or what has customarily been done. They speak in terms suggesting one "ought" to observe or "should" follow what the rules decree. The basic shortcoming with the normative claim they make concerns the failure to indicate that the rules themselves have a normative quality. Clearly it is one thing to say that a proposition (first-order rule) consonant with the desires of the Founding Fathers or customary behavior "should" be followed, and something entirely different to say that the desires of the Founding Fathers or the practices evident in custom (second-order rules) "should" be followed. The former looks no further than the matter of consistency between first- and second-order rules. The latter is directed at the second-order rules alone and ascribes to them essential normative force. In stipulating the propositions that comprise second-order rules, and in failing to attach to those rules the admonition that they be observed,<sup>118</sup> the hierarchy of rules theory shares with self-limitation and rationality as an end the problem of an ineffectual source upon which to rest constructs advanced. More than likely, the absence of an ascription of normativity to second-order rules reflects a reluctance to face the problem of dealing with the question: Why should custom or the desires of the architects of our system of government be followed? Given that the chief proponents of the hierarchy of rules theory happen to be positivists, it is not at all surprising to find this kind of preference for a purely descriptive model of obligation.

The second major difficulty with the three theories catalogued under intellectual constructs concerns non-neutrality. Whenever law is spoken of as having a normative basis underpinning it, the implication is that the basis is not only one that makes a "should" or "ought" claim, but also one that suggests the existence of some internally generated obligational force. It would seem that since any basis with such force is to reside outside those which the law attempts to regulate, the force internally generated by the basis is to be possessed of an impartial character, without affiliation with those to whom law is directed. For want of a better description, this character might be termed "neutrality." When self-limitation, rationality as an end, and hierarchy of rules are considered, the entire category labeled intellectual constructs seems woefully devoid of any sense of neutrality.

In providing that the force of law derives from the capacity of one to limit one's own choice from available options, the self-limitation theory relies on a construct that is patently non-neutral. By asking those whom law is designed to regulate to supply the basis of legal obligation, the theory fashions an argument which necessarily leaves law in the position of being subject to the whim of the regulated. As earlier observed, the essence of an obligation that is legal in nature is that of an external constraint, a constraint residing outside the one to whom law speaks.<sup>119</sup> In locating the source that makes law bind

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118. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 111 (1945) ("basic norm presupposed as valid"); KELSEN, *PURE THEORY OF LAW*, *supra* note 111, at 215-17; KELSEN, *supra* note 29, at 262 ("basic norm . . . we presuppose as a hypothesis").

119. See *supra* text accompanying notes 112-13.

in the ability of individuals to limit themselves, self-limitation supplies a basis of obligation only so long as the actions of individuals are in conformance with previously manifested limitations on will. Once a divergence occurs between limitations assumed and actions undertaken, the obligation to conform behavior with what had been assumed is removed, since non-conforming behavior presents the current dimensions of the limits on will. Permitting those whom law regulates to slide in and out of obligation in accordance with what they now desire to be the limits on self is palpably non-neutral.

This proposition is also true with regard to rationality as an end and hierarchy of rules. As to rationality, it has already been indicated that there are problems deriving from the existence of other values considered ends in themselves. On the point of non-neutrality, rationality as an end is under the shadow cast again by the involvement of the one to whom law speaks. Specifically, the whole idea behind rationality as the basis of obligation relates to the faculty of reason identifying criteria for judgment, which obligates because rationality is a thing sufficient in and of itself. But the neutrality or objectivity of reason is called into question when it moves to apply the criteria for judgment it has identified to actions in which one has a personal stake. Once reason has settled upon the principles for judgment, it then translates them by considering their exact meanings and requirements in the context of deciding how to react to specific factual situations involving the person then engaged in the reflection. There are always two steps. The criteria for judgment are identified by reason, seeking only reason as an end in itself. Then the principles identified are converted by reason into actions directing the volition of the one by whom they were identified. It is at this second stage that the purity of impartial objectivity breaks down. When reflecting upon the identification of the objective principles, detachment is always more complete than when reflecting upon converting those principles into actions that affect and direct one's desires.<sup>120</sup>

As to hierarchy of rules, it would seem that the structured and formulaic nature the approach it captures would depict a basis of obligation free from the same kind of non-neutrality that undermines the acceptability of rationality as an end. By maintaining that the source of legal obligation resides in an intellectual construct designed to empower first-order rules consistent with second-order or master rules, the theory advances a suggestion which seems to supply generative force, for officially sanctioned standards of behavior, through an objective and impartial touchstone. The fact of the matter, however, is that hierarchy of rules is far from a neutral and uninvolved source of obligation. The content of both first- and second-order rules is not self-applying; the rules do not speak for themselves. In every case the meaning of a first-order rule must be determined by some member of the society to which the rule applies. That meaning must then be measured against the appropriate second-order rule, which has also had its own meaning determined by the

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120. See BERNARD A.O. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 66-69 (1985).

exact same person. Clearly, then, at every step along the way, there is direct involvement by parties with an interest. Hierarchy of rules does not provide us with a theory that assures neutrality. Given the essential need for interpretation of any standard, there is always unavoidable participation by those to whom the standard applies.

## II. TOWARDS A THEORY OF LEGAL OBLIGATION

[Abgarus said to Artaban:] My son, it may be that the light of truth is in this sign that has appeared in the skies, and then it will surely lead to the Prince and the mighty brightness. Or it may be that it is only a shadow of the light, as Tigranes has said, and then he who follows it will have only a long pilgrimage and an empty search. But it is better to follow even the shadow of the best than to remain content with the worst. And those who would see wonderful things must often be ready to travel alone.

—Henry Van Dyke<sup>121</sup>

Before subjecting my own curious views about legal obligation to the light of public scrutiny, it need be recalled that the problem of whether law binds those to whom it is directed led to this point. As was noted in the introduction, the importance of this question for the legal theoretician, public official, judge, juror, or private citizen is strikingly obvious. Concerns regarding the determinacy and objectivity of law, the interpretation of legal texts, the meaning and force of precedent, the rendering of judgments out of line with what is seemingly dictated, and the freedom to pursue actions which are inconsistent with societally-established expectations all feel the impact of such a query. From the analysis contained in Part 1, there appears to be scant support in any of the philosophical hypotheses one can imagine which can be pointed to as providing incontrovertible evidence of law's inherent capacity to obligate. Bases of obligation considered within the category "observable facts" are plagued by the presence of factual divergences,<sup>122</sup> the distinction between what leads to law and the conclusion that law therefore binds,<sup>123</sup> and the inability of naturally recurring facts to speak normatively.<sup>124</sup> Theories drawing on "considerations of practicality" have problems with the significance of the need to take law as obligatory<sup>125</sup> and the use of false premises for developing the considerations driving the need itself.<sup>126</sup> "Constraining externalities" are equally troubled by the failure to couple a claim that one should observe or honor law with the externality upon which it relies,<sup>127</sup> and by the absence of something situated behind the externality

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121. HENRY VAN DYKE, *THE STORY OF THE OTHER WISE MAN* 20 (Ballantine Books 1984) (1923).

122. See *supra* text accompanying notes 45-51.

123. See *supra* text accompanying note 53.

124. See *supra* text accompanying notes 53-55.

125. See *supra* text accompanying note 68.

126. See *supra* text accompanying notes 67-68.

127. See *supra* text accompanying notes 87-92.

that compels the externality's observance.<sup>128</sup> "Intellectual constructs" suffer from both ineffectual sources upon which to rest the constructs advanced,<sup>129</sup> as well as the absence of neutrality or impartiality.<sup>130</sup>

A satisfactory theory of legal obligation must locate the "law" within the total context of human experience. The law is part of life. It is not only a formal articulation of the human species, but an articulation voiced with the purpose of assisting the preservation and advancement of the species. As such, law is of necessity both imbued with the life of its enunciator and designed to affect the manner in which that very life unfolds. Thus, any complete understanding of the law must acknowledge this reality. Having said this much, I now proceed in Part II, with a great deal of reluctance born out of a natural hesitancy to drop one's guard and reveal innermost thoughts, to set forth what some may perceive as a rather heretical and seemingly nihilistic view of law and obligation.

Like most trained in the law, I have long assumed, but never questioned, the notion that law is binding. At present, however, it is my (undoubtedly ill-considered) opinion that there is nothing inherent in the nature of law that gives it the force to obligate. The absence of law's obligatory force certainly seems to have been the point of what has been reviewed in the many preceding pages. Perhaps this iconoclasm results from the frustration that I, like so many others, feel over instances in which society's hands seem to be tied when it comes to dealing with the many acts of insensitivity, neglect, and indiscriminate brutality suffered daily by innocent individuals. Or perhaps, it is simply the result of a tendency to slip into intellectual lethargy that all those who face middle age and continue to make contributions to disciplined thinking must battle and successfully defeat. Then again, it is distinctly possible that the iconoclasm shows an awareness for that stark reality of realities we all sense, but because of an unnerving fear of anarchy, cannot bring ourselves to admit.<sup>131</sup> Let me hasten to add, however, that I do not

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128. See *supra* text accompanying notes 92-103.

129. See *supra* text accompanying notes 112-19.

130. See *supra* text accompanying notes 119-20.

131. It has always been my firm belief that knowing something about the person who is revealing her thoughts—stated colloquially, what makes her tick—is at least as important as knowing the thoughts themselves. Out of a sense of fidelity to this belief, the following revelations are offered. I am a happily married father of two wonderful sons—ages three and nine—who regularly seem to test my parenting skills. As the eldest of nine children, I was raised as a Catholic and Democrat in a somewhat close-knit family. I now regularly attend an Episcopal church, consider myself to be nonpolitical, and am active in feeding programs for local street people and have been active in reading programs for their children. My father was a professional baseball player who spent the overwhelming portion of his working life as a carpenter. My mother was the protective principal in charge of most of the child-rearing, a condition that I suspect was very typical in the 1950's and 1960's. My father strongly desired that his sons take athletics seriously; thus, I spent untold hours (some fondly remembered) under perfectionist guidance at the baseball diamond. I still vividly recall one occasion, however, when as a young chap my interest in selling school chocolate bars in the neighborhood, rather than in going to the ballpark—as my father, in a conscientious and devoted way, thought I should—irritated him to the point that he literally cut up and destroyed my baseball cleats. Knowing the many hours he lost at work by leaving early to get me to the diamond for practice before sundown, having the perspective of a twenty-five-odd year hiatus, and personally experiencing frustration as an involved father deeply committed to the goal of helping his own sons succeed, I now look back with empathy. Indeed, the part in the movie *FIELD*

believe that what stands for law need be nothing more than politics.<sup>132</sup> Indeed, I find the very thought of urging the politicization of law to be nothing short of detestable. My current thinking is that law has two central characteristics. The first is that the result it seeks to advance is one that is sought to be justified, rationalized, and explained by reference to some legitimating principle. The idea is not simply that a particular outcome is desired, and the necessary manipulation, cajolery, or power has been employed to assure that this outcome is preferred above the various alternatives. It is this characteristic of a legitimating principle, this feature of something beyond mere ad hoc, unbridled discretion, which is chiefly responsible for illustrating the distinction between law and politics. The second central characteristic of law is that it acts as a mechanism for permitting principles, referenced as legitimating principles that sanction a desired outcome, to be considered, thought about, and reflected upon by those officials who are instrumental in establishing the rules that set the boundaries of acceptable societal behavior. In this capacity law accommodates the potential for changing perceptions of the legitimating principles, changing perceptions that seem to typify law's need to capture its essential character as a device for dealing with difficulties facing reflective individuals committed to associative existence. By virtue of such accommodation, the essential ingredient for doctrinal alteration appears. Each of these issues will now be examined in some detail.

### A. Law and Obligation

To take the position that law does not obligate is not to deny that many, if not most, people act in accordance with what law declares.<sup>133</sup> A large part of this conformance between action and standard probably belies the fact that

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OF DREAMS (Universal, 1989) where actor Kevin Costner, on first seeing the spirit of his estranged father as a young man, remarked to his wife, "Look at him! He's got his whole life in front of him . . . [Life has not yet worn him down]," touched an incredibly responsive chord. Within a few months thereafter, I telephoned my own parents, with whom I have a close relationship, and lachrymously expressed regret for the part I played in the life that wore them down. The importance of this episode, at least for me, resides not in its suggestion that I somehow think apology might serve to insulate me from abrasions with my own children, nor in its evidentiary value as revealing a perhaps overly sensitive and maudlin personality type. For me the real importance is that the episode suggests a personal perception about the unavoidably tragic nature of life. That is to say, a perception that it has always been and will always be the child's way to unwittingly hurt those who love him most, and the parents' way to inescapably receive the injury inherent in the child's action. In a condition of that sort, even the moral directive to "honor thy father and thy mother" seems grossly inadequate to accomplish the real objective of securing familial respect. If that is true for one born of another, how much more true it would seem to be for mere legal injunctions designed to regulate relations between those associated by nothing more than membership in the same species.

132. But see the writings of adherents to "critical legal studies" suggesting that law is nothing but politics, for example, Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 506 (1986), and, presumably, can therefore never have any real independent force.

133. With respect to this assertion, even in the controversial realm of international law, see HENKIN, *supra* note 41, at 47 ("[A]lmost all nations observe almost all principles of international law . . . almost all of the time.").

much of law is simply a formalization of norms of conduct that would otherwise be customarily followed. There is, to be sure, another part which proceeds from an awareness and fear of the sanctions associated with conduct at variance with the formalized norms, and most likely yet a third which involves actions influenced by an internal assumption that what law commands is always to be obeyed. In stating that law does not fix an obligation to do as it directs, however, what is meant is simply that, while it may be obeyed out of a feeling that one is obliged, or out of a fear of sanctions, or out of an identity between a specific standard and traditional behavior, law contains nothing which, by its very nature, its endemic character, is able to require its observance. Neither observable facts nor practical considerations, constraining externalities nor intellectual constructs give law what it needs to obligate.

If law does not obligate, why is it called "law"? Is not the very essence of law the notion that what it commands is obligatory? Is it not incorrect to denominate a societal standard "law" when that standard lacks the force to compel behavior? I suspect that the overwhelming majority of people have been taught, since they first indicated a sense of social awareness, that the law is to be obeyed, and that the law describes what one must do and how one must act. To the extent that this teaching is designed to emphasize law as an imperative, with the idea being to either enhance the chances that the proselytized will not engage in deviant behavior which exposes them to the imposition of sanctions, or to inculcate an ethic of compliance with standards accepted by the society in which one lives, the teaching seems relatively immune from criticism. To the extent that the teaching is meant to capture the nature of law, however, to depict its inherent ability to fix constraints on one's freedom to pursue particular conduct or make certain choices, the teaching seems somewhat wide of the mark. What stands for law may be spoken of as binding, but there is nothing about its character that makes it so. Everyday discussion about law may contain references motivated by interest in stimulating compliance. Nonetheless, the discussion fails to disclose the true essence of law as something with which compliance may be obtained through fear or admonition, rather than through the ingredients that constitute its basic nature. Although sound and logical reasons may exist for following the law, there is nothing about it that gives law the inherent force to obligate those to whom it is directed.

One might suspect that an extremely important reason why certain societal standards are selected for description as "law" has to do with the consequence known to proceed from using that description. If from early life we have been taught that law is to be obeyed, then how better to generate substantial interest in compliance with a societal standard than to attach to it the appellation "law"? Doing so invests the standard with a puissance it would not otherwise possess. There is nothing especially disturbing about appropriate authorities capitalizing on the consequence of this phenomenon. The idea is obviously to channel conduct into orderly and predictable patterns. In the realm of relations between nation-states, I periodically get the impression that

the reason some strongly insist upon calling international law "law," and that others insist just as strongly that this description is inappropriate, has to do with their particular perception regarding the desirability of the rules of international law. Those who would view the rules as an attractive substitute for *max politik* seem inveterately committed to the idea that the rules are part of international "law." The hope is that because of the description the chances of securing particular behavior will be enhanced. On the other hand, those viewing the rules as inconsistent with objectives which the application of power might secure stand by the position that the rules are not really "law" at all, but simply a reflection of the way some would like to see affairs conducted. For those wishing to operate without the constraint of principle, the advantage of this view is all too apparent.

Where does this lead? It seems to me to lead to the following: the societal standards called law are often obeyed, but for a variety of reasons, some of which have nothing to do with law being considered obligatory; law is thought of as binding because of the fact that part of human socialization involves the teaching that it is to be obeyed; the idea of obedience to law is stressed in order to move conduct in a desired direction; and standards characterized as law are so designated because of an appreciation for the increased likelihood that they will thus be respected. Yet to say that law is thought of as binding because we are urged to believe it is so, and then to acknowledge that the reality of this phenomenon is used to give certain societal standards greater influence than others, is not to demonstrate that law is, in fact, able to establish obligation. Obligation implies not only that certain behavior ought to be engaged in, but, more unequivocally, that one has a responsibility to engage in this behavior. Both of these forms of description suggest that something lies behind them, something which indicates that what they describe has a certain force.

By way of contrast, it makes no sense to speak of there being a responsibility to follow, for instance, patterned, replicative, and observable facts. Adhering to something like natural scientific laws is not really observance at all. Adherence is simply a fact which occurs, not because something lies behind the natural laws to give them force, but because consonance with them cannot, of necessity, be avoided.<sup>134</sup> The societal laws which govern human conduct are clearly distinct, in this respect, from the scientific laws of nature. Laws regulating the affairs of mankind are not, in and of themselves, necessarily observed. While this distinction might suggest that it is appropriate to speak of the term responsibility in the context of law, that would seem so only if it could be demonstrated that something exists which makes law binding. Yet, as has already been noted, even in the realm of the physical world, questions have been raised about whether the so-called laws governing it are anything more than subjective formulations depicting what one thinks

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134. See *supra* text accompanying notes 53-55 and 86-88.



one has seen.<sup>135</sup> Thus, what is left to give law force besides a series of hypotheses (for example, that law binds because of a master norm or because reason is an end in itself)? Perhaps these hypotheses are used to avoid the problem of "infinite regress," the problem of tracing obligation back through an unending array of still more antecedent and ever remote causes. Hypotheses, however, can never provide law's basis of obligation, for without something more than a hypothesis, a presupposition, or an indemonstrable truth, law can never be acknowledged as having the real force necessary to compel specific behavior.<sup>136</sup>

### B. Law and Politics

It is quite conceivable that one might conclude that if law is not obligatory, if it lacks the force to compel behavior, then it represents nothing more than the configuration of policy choices that are made by those in a position to exert influence on the law-establishing organs of a particular social system. Furthermore, since official policy choices made within the context of social systems represent the essence of politics, one might conclude that law is really politics. By clothing the political choices of society's most influential groups with the description "law," a certain respectability, legitimacy, and force to preferred courses of action is thereby obtained.

There is no doubt that a particular society's policy preferences, or the preferences of a particular society at one historical juncture as compared with

135. See *supra* notes 46-52 and accompanying text; see also SIR ARTHUR EDDINGTON, *THE NATURE OF THE PHYSICAL WORLD* 244 (1935); J.W.N. SULLIVAN, *THE LIMITATIONS OF SCIENCE* 228 (1933) ("Mathematical characteristics, it may be argued, are put into nature by us."); KUHN, *supra* note 3, at 170-71. On occasions when the subject of the limits of man's ability to comprehend objective reality happens to arise, I always recall Dante's encounter with Beatrice in purgatory. When she, then a spirit, speaks to him, still a mortal guided among the wraiths of the underworld by the long-deceased and much-admired Roman poet Virgil, in words he fails to understand, Dante inquires:

But tell me why it is, your longed-for words  
Soar so far above my comprehension,  
That, seeking aid, it needs it all the more?

Beatrice responds:

That you may know your chosen school,  
And see how all its teaching parallels  
The truths that I have uttered in my discourse—  
And also, that the path which you now tread  
Is just as distant from the way of God  
As farthest heaven is remote from earth.

DANTE ALIGHIERI, *Purgatorio* canto 33, in *THE DIVINE COMEDY* 124-25 (Lawrence G. White trans., 1948). While the fact that Dante has strayed towards worldliness is what prompts the journey through the underworld, see DANTE ALIGHIERI, *THE INFERNO* 27 (John Ciardi trans., 1954), and, therefore, may explain Beatrice's response, to what extent is she indicating that the ways of heaven are so different from the ways of Earth that man can never fully comprehend the truth?

136. Presumably, if the existence of objective truth can be demonstrated, then it might be possible to base law on more than a hypothesis, with the consequence being that law would fix an obligation to act as it prescribes. For views on the matter of objective truth, compare, for example, PLATO, *Phaedo*, in *THE REPUBLIC AND OTHER WORKS* 487 (B. Jowett trans., 1973) (theory of forms), and PLATO, *The Republic*, in *THE REPUBLIC AND OTHER WORKS*, *supra*, at 7, with DAVID HUME, *AN INQUIRY CONCERNING HUMAN UNDERSTANDING* (1949) (questioning objective truth).

another, affects not only the ideological direction of the society but its perception and understanding of the law as well. Were this not so, it would be difficult to account for revolutionary developments that occur from time to time in various legal doctrines. Privity of contract, "due process" entitlements, and territorial acquisition by conquest and annexation are but three such projects which readily come to mind in the private, public, and international fields.<sup>137</sup> Yet the fact that changes in policies often produce profound and significant changes in a society's understanding of the content and meaning of the law is not evidence for the position that law and politics are synonymous. Law and politics are two entirely distinct creatures. Both share responsiveness to the policy choices made by a particular society, and the objective or goal of being the production of a decision on some particular issue of concern. Nevertheless, both seem typified by radically disparate characteristics which indicate their differing natures.<sup>138</sup>

The distinguishing characteristic of politics is that the decisions it produces are decisions founded upon the outcome of the voting process. Politics involves the effort to establish one's own preferences as those which will direct the course of social affairs. The political process is content to accomplish this objective on the basis of nothing more than the sheer force of numbers. Politics aims at gaining the recognition that a particular policy preference represents the position desired by the society concerned. This is not to say that political representatives give no consideration to the essential goodness of the proposition which they may be inclined to support. Indeed, during the course of deliberation on a specific matter, representatives frequently find themselves under intense pressure to see the merit of an alternative approach and to defend that to which they subscribe. The basic

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137. Every law student is familiar with the policy choices underpinning erosion of the doctrine of privity of contract and the rejection of the classic "right vs. privilege" distinction in the area of constitutional "due process." See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (on privity of contract); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (on "due process"). What most may not be familiar with is the fact that similar dramatic reversals have occurred in the law of international affairs. The text refers to the idea that sovereignty to territory could, at one time, have been claimed by virtue of military conquest and annexation. See J.L. BRIERLY, *THE LAW OF NATIONS* 171-73 (Sir Humphrey Waldock ed., 6th ed. 1963). The current view is that this method of acquisition is no longer acceptable. See I L. OPPENHEIM, *INTERNATIONAL LAW* § 241(a) (H. Lauterpacht ed., 7th ed. 1952); G.A. Res. 2253, U.N. GAOR, 5th Emergency Special Sess., Supp. No. 1, at 4, U.N. Doc. A/6798 (1967) (urging Israel to rescind measures taken and to desist from future action in Jerusalem); S.C. Res. 252, U.N. SCOR, 23d Sess., 1426th mtg., at 9-10, U.N. Doc. S/INF/23/Rev.1 (1968) (rejecting, by vote of 13 to zero, with two abstentions, Israel's effort to absorb Jerusalem after the 1967 war); G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974) (defining aggression). Similar radical changes have occurred with regard to issues as diverse as the permissibility of war, see 2 OPPENHEIM, *supra*, § 52fe, the status of coastal waters beyond the territorial seas, see 2 GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 197 (1941) (high seas); Ann L. Hollick, *The Origins of 200-Mile Off-Shore Zones*, 71 AM. J. INT'L L. 494 (1977) (coastal state zones), and the use of national preferences in government procurement, see General Agreement on Tariffs and Trade, art. III 8(a), GATT Document IV Basic Instruments and Selected Documents (1969) (permitting procurement preferences); H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1, at 74 (1979) (prohibiting preferences in government procurement, though recognizing exceptions, as part of the Tokyo Round of the Multilateral Trade Negotiations).

138. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (separating politics, which is seen as "manipulative," from law).

point about the observation that politics' distinguishing characteristic is bound up with the voting process and the effort to garner the largest number of electoral commitments possible is that it is perfectly appropriate for a political representative to vote a particular way simply because a majority of the representative's constituents are seen as holding a view consistent with that vote. No doubt there are innumerable instances where political careers have been ended or imperiled as a result of voting one's conscience. That phenomenon, however, is more a reflection on the problems inherent in representative majoritarianism<sup>139</sup> than of the principal distinction characterizing politics as unique and particularly different from law. Politics is a numbers game, and no one would seriously view it as entirely illegitimate for a representative of the people to voice the majority's will through a vote registered with the intent of permitting that will to effectuate itself fully. There may exist some sense that the vote should be able to stand on its own.

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139. The basic problem with representative decision-making is that there are so many possible positions on each substantive issue that it is very likely that even representatives selected by a true, absolute majority of the constituents they represent will not vote in accordance with the view held by a majority of those constituents on each and every matter. A more fundamental question is why the principle of majority rule is to be utilized in the first place. The answer that it is the best device for giving all views an equal chance seems unsatisfactory in light of the obvious fact that majority rule guarantees that the majority's view will always be preferred while the minority's will always be rejected. It is not enough to meet this observation with the response that majority rule suggests itself because it stands as the substitute for what would otherwise be a war of every man against every other man, with raw power being determinative. That observation may provide a practical explanation for why majoritarianism is more acceptable than a pure state of nature, but in stressing the comparative consequences of majority rule, it overlooks the fact that enlightened despotism, monarchy, or some other form of political decision-making may also produce a better end result than decision-making through brute force. In making this point, the real gravamen of the matter is touched. For when it is appreciated that majority rule must be evaluated in the context of other alternatives, it becomes apparent that at some point it must be directly defended by proof of its unique validity, its inherent necessity, and its basic moral force. Majority rule may prove more acceptable than every other alternative, but what is it about majority rule that gives it legitimate authority over those in the minority? What is it about majority rule that suggests that it provides the ultimate yardstick by which the real justification for governmental power is to be assessed? Though most have been taught from a very early age to accept the idea of majoritarianism (indeed, some might even argue that its acceptance is more a reflection of a natural psychological predisposition than of external proselytization), when confronted with the need to directly defend the idea, we are frequently at a loss to develop any fool proof argument.

One argument that has been advanced is that, in the "original contract," unanimous consent was given to the idea of majority rule. *See, e.g.,* LOCKE, *supra* note 27, at 123-25. Separate and apart from the problems with consent creating obligation, which have already been dealt with at length, *see supra* part I.A., there is also the problem that the original contractors could just as easily have consented to dictatorship, minority rule, or divine right of kings. Had that been so, would the mere fact of consent have been enough to justify those forms of decision-making? Another argument in support of majoritarianism is that electoral decisions really reflect a judgment on what voters think the "general will" wants with regard to a particular matter. Thus, those on the losing side have not cast their votes for what they want, but have simply miscalculated or erroneously guessed what the "general will," of which their individual wills are a part, actually wants. *See, e.g.,* JEAN J. ROUSSEAU, *SOCIAL CONTRACT AND DISCOURSES* 102-41 (G.D.H. Cole trans., Everyman's Library ed. 1950) (1762). If we accept the notion that the majority always knows what the "general will" wants, then perhaps this argument proves more successful than the first. If we do not accept that hypothesis, then the "general will" theory would seem unable to directly defend majoritarianism. Perhaps majoritarianism cannot be directly defended. In the event that this is the case, then majority rule is probably best justified from the standpoint of comparing its consequence with those of every other form of decision-making. Maybe all that can really be said is that it is the worst form of decision-making, except for all the others.

Nevertheless, it is perfectly appropriate for it to be explained by reference to nothing more than its reflection of the will of the majority.

Law is entirely unlike politics in this latter respect. While it would be appropriate for a political representative to explain a vote as the simple manifestation of the will of the majority, a governmental official vested with the authority to resolve matters through an adjudicative or nonlegislative process would never be seen as able to justify a decision successfully on the basis of reference to the will of the public. The fact that a majority of the public wants a particular resolution undoubtedly exerts an effect on understandings of the content and meaning of law. As much as one may wish that this were not so, it is a proposition impossible to deny. Simple reference to the public's desires, though, could never serve as the explanation that justifies an official nonlegislative decision. Law is characterized by something more; law makes a claim to its own legitimacy. Decisions of law are justified by rational explanation of why the principle, rule, or "law" they embody and use produces results more appropriate than all of the alternative resolutions then available. Officials rendering decisions of law may let their perceptions of the public's preference weigh on how they decide, but they cannot appropriately assert that the decision itself derives from what the public desires. It is appropriate for a legal decision-maker to explain the decision made and the law established on only the basis of a claim to the legitimacy of that which results. Political decision-makers, on the other hand, act entirely within the bounds of decorum when they explain their decisions by reference to consonance with the will of the majority. No further explanation need be advanced to justify a political decision. Yet with law, while the extent or degree of public support for a particular approach is not meaningless, the determinative consideration, the real desideratum, the only acceptable and appropriate explanation in opting for one form of principle rather than another, is the claim that the approach selected is somehow the most correct of those available.<sup>140</sup>

This assessment seems accurate, as far as it goes. It fails, however, to take account of the characteristics just mentioned which distinguish law from politics, and proceeds instead on the premise that what is really law is determined by what is called law or by what has the force of some sanction associated with its contravention. Since decisions of the legislative process, as well as decisions of the adjudicative or nonlegislative process, are called law and have the force of sanction behind them, they, too, are considered law. To my way of thinking, it may be convenient to lump decisions of the two processes together. By doing so it becomes clear that both are to be equally respected and that violations of either will not be countenanced. Whether law flows from the workings of political maneuverings in the legislative process, or from the deliberations and measured explanations of officials in the adjudicative or nonlegislative process, it expresses the officially endorsed view about the policies designed to guide social action. It seems, however,

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140. See Smith, *supra* note 7, at 129-33.

that by equating the two types of decisions, more than a little precision is lost to convenience. It may simplify the complexities of political science to call decisions of both the nonlegislative and legislative processes by the name "law," but there would still seem to be no denying the fact that legislative decisions can be justified by reference to the will of the majority, while it would strike one as entirely inappropriate were such a justification offered in explanation of a nonlegislative decision. In light of this, real "law" may be seen as proceeding only from the nonlegislative process. Decisions of the legislative process which are styled "law" are perhaps more accurately termed political enactments.<sup>141</sup>

### C. Law and the Claim to Legitimacy

Keeping in mind the distinction between law established through the legislative process, and law established through the adjudicative or nonlegislative process,<sup>142</sup> the idea of law's claim to legitimacy should now be examined in some detail. The best place to begin is with an unpacking of the very words "claim to legitimacy." Their use connotes that the position expressed by the government, through one of its officials making an adjudicative or nonlegislative decision on the basis of a principle which is established as law, is a position that is asserted, argued, and explained as the most appropriate, just, and fair position from among those then considered available. To "claim" that a nonlegislative decision that is made is the one which should have been made is to recount, state, and articulate the essence of the decision's underpinning or rationale and the steps producing it. To make a claim to the "legitimacy" of the decision is to include in the articulation of the decision's rationale some reference to or indication of an underlying theme or value that suggests that the decision made is better than any other which could have been made.

It is unlikely that the idea that adjudicative, nonlegislative decisions involve a "claim" to legitimacy is terribly provocative. This is probably not the case with respect to the idea that the claim be one to the "legitimacy" of the decision produced by the adjudicative or nonlegislative process. To assert that

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141. The fact that decisions of the legislative process are called "law," when they are perhaps best seen as political enactments, is not meant to suggest that violations of such decisions should be any less susceptible to sanctions than violations of real "law" coming from the nonlegislative or adjudicative process. In both instances, the decisions establish the principles according to which the affairs of the community are to be conducted. As a result, there is no reason why society should subject violators of one type of decision to punishment, but not violators of the other. See *infra* notes 165-79 and accompanying text.

142. In observing that law may be "established" through the adjudicative or nonlegislative process, no view is meant to be offered on the question of whether the judiciary "makes" or "discovers" law. On this matter one might see generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (noting that to Langdell, judges "discover" the law); OLIVER W. HOLMES, *THE COMMON LAW* (1881) (asserting that judges "make" the law); and Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923) (stating that judges both "discover" and "make" law). The point is that the content and meaning of the law are enunciated by officials acting through the adjudicative or nonlegislative process.

there is a theme or value, or set of themes or values, indicating that a decision which is handed down is more appropriate or fair than any other, raises the matter of the various themes or values implicit in the other possible decisions, themes, or values which some may see as certain and knowable truths. While one might argue that many decisions turn on the principle of *stare decisis* and, therefore, do not involve the matter of objective truth, this argument seems to overlook the fact that *stare decisis* itself reflects the theme or value of predictability<sup>143</sup> and claims its preeminence (at least in most cases) over all others.<sup>144</sup> Thus, the very idea of a decision, even one based on nothing more than earlier precedent, which makes a claim to the legitimacy of the position it reflects, pushes one up against the question of the very existence of certain, objective truth.

Earlier, it was observed that in the field of "hard" sciences, what were labeled scientific laws may have been nothing more than subjective formulations of what scientists thought they had seen.<sup>145</sup> The idea is that, even if objective truth exists in the hard sciences, we can never presume to know more than what the finite capacity of the human mind will permit us to know.<sup>146</sup> This being the state of affairs in what is generally regarded as the most empirical and certain of all human intellectual endeavors, it would be quite understandable for one to conclude that, in the more intuitive and uncertain field of ethics, all is but subjective speculation. Objective truth is nowhere to be found.

Whether or not objective truth actually exists, however, is unimportant in the description of law. It may be that if there is objective truth, then perhaps natural law exists and is binding, and human laws which are inconsistent therewith lack real moral force. The existence of objective truth can have no effect on describing law as making a "claim to legitimacy," however, since the description itself envisions nothing more than a rational explanation as to why one theme is to be preferred over those implicit in other decisions. To "claim" that a decision is legitimate does not require absolute proof that it is objectively correct in the sense of measuring up to demonstrable, knowable, and external truth. All that is essential is that the decision coherently and sensibly articulates why it decides as it does and not in a manner that gives preference to some other value. Once that is done, the decision reflects the law—the officially endorsed view of what values are to control.

If, on the other hand, the view that even science is not founded on objective truth leads to the conclusion that surely such does not exist in non-scientific disciplines, the point just made with respect to the existence of objective truth would seem to apply with equal force. That law is described as making a claim to legitimacy does not signify that it is making a claim to "correctness."

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143. For the view that law seeks to maximize predictability, see HART, *supra* note 110, at 223-24.

144. For instances of departure from long-standing precedent, see *supra* note 137 and accompanying text. Departures through the adjudicative or nonlegislative process occur when some theme other than predictability is more highly valued.

145. See *supra* notes 46-52 and accompanying text.

146. See *supra* note 135 and accompanying text.

All that is meant is that adjudicative or nonlegislative decisions establishing law provide a suggestion as to why the decisions conclude that the themes or values they prefer are better than those that would be promoted by the alternative decisions available. Where objective truth does exist, the fact that law is described as making a claim to legitimacy does not invalidate the description, since all that the decision does is rationally contend, state, or argue that it is better than other decisions which present themselves.

Laying to rest any fears raised by the matter of the existence (or nonexistence) of objective truth, there is still the problem of how one knows the themes or values implicated by problems arising in specific factual contexts. If objective truth exists, then from what source does it proceed? If it does not exist, then what does one look to in order to identify the themes or values presented by the matter in dispute? Here one might reference those grand theories of the psyche which envision humanity's ability to be indelibly marked by experiences of our ancestors, and then go further and suggest that one possible source of knowledge of relevant themes or values is what can be gleaned or deduced from a deeply felt sense of the themes or values involved.<sup>147</sup> But surely experiences from the distant ancestral past are extremely faint and provide influences of no more than an equivalent nature. The most luminous and perhaps instrumental influences are probably those of more immediate and contemporary origin.

Take politics, for instance. While it may not be synonymous with law, the theoretical or ideological positions which make it a vibrant part of the cultural experience have an effect on law, since those positions prefer certain themes or values in which all have received some form of schooling, including individuals who may eventually turn out to be legal decision-makers. Nonlegislative decision-makers do not start with an entirely clean slate, a *tabula rasa*, so to speak. In principle they may be free to pick and choose from the entire spectrum of theoretical justifications. As a practical matter, however, that kind of open-endedness is subconsciously limited through the inculcation of a certain political tradition. The ideological premises of politics leave their imprints on law by having shaped the very perceptions of those who make law. There is, in other words, a certain given with which all decision-makers start. This is perhaps best illustrated by the fact that the political ideology prevalent in one society is not likely to be considered readily available to a decision-maker establishing law in a society that functions under diametrically opposed political principles. In establishing the law, that one has been brought up in a particular political tradition may serve subtly to restrict the latitude of what the law can be.

Beyond political ideology, however, there are also many other subconscious influences that affect knowledge about the themes or values implicated by a

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147. See, e.g. 14 SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 285 (James Strachey & Anna Freud eds., 1979) (discussing the imperishable mind reflecting all earlier human history); PLATO, *Phaedo*, in THE REPUBLIC AND OTHER WORKS, *supra* note 136, at 505-11 (discussing the doctrine of recollection and immortality of the soul);

dispute in a particular factual context. These influences can flow from religion, education, family, and social environment, to name but a few of the more familiar. Each of these structures of learning seeks to influence through some sort of institutionalized teaching that aims at imparting to those in its minion an appreciation and desire for things considered timeless and important. It would seem inaccurate to think that influences from such primary sources of socialization would not at least vie for a decision-maker's attention. In the end, the influences may be ignored or overshadowed because they seem somehow inconsistent with themes or values stressed by a political ideology which may be regarded as of dominant prestige. It cannot be denied, however, that such sources provide a wellspring for efforts to ascertain what may be implicated by a specific dispute.<sup>148</sup> Indeed it might be that when confronted with a dispute presenting questions not addressed by some other officially controlling source, the religious, educational, familial, and social influences are the initial sources which supply cognizance of the things that really matter to the resolution. Political doctrine may in the end be used to determine which themes or values will be accorded controlling weight, but it is unlikely to serve as more than a secondary standard against which themes or values coming from more basic, almost instinctive, sources are assessed.

Consider the roles of the family and social peers. Both teach important lessons about the relationship between self and others, and thus communicate the central underpinning of public life. On the level of the autonomous self, the same is true about religion. Its message deals with how one is to live one's life so as to remain in the grace of the Almighty. The fundamental values which religion cherishes are evident in its catechism. The educational experience rounds out the picture by stressing the values of thought, curiosity, and exploration, and by nurturing an appreciation and taste for creative endeavors. Ultimately it may be that the things these sources consider important are "trumped" by what is viewed as of utmost importance by the accepted political ideology. As true as that can be, one's initial awareness of the values or themes presented by a particular dispute is likely to spring from experiences with family, peers, religion, and education. These are more likely than not the real touchstones of what every one believes to be of any significance. Political theory may be the source for deciding whether the themes or values deriving from these other sources can be officially endorsed, but in our heart of hearts it is likely that few would admit to finding political theory to be the first of sources to be consulted.

Having made the point that law from nonlegislative authorities makes a claim to legitimacy, that this implies an assertion that a particular decision can be explained on the basis of it being the best of the available alternatives given the themes or values involved, and that the initial sources for these themes or values are religion, education, family, and society, with accepted

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148. See generally Winter, *supra* note 98 (noting how these sources are drawn on).



political doctrine playing a secondary, though decisive, role,<sup>149</sup> there is another matter which also deserves some consideration. That matter concerns the fact that adjudicative or nonlegislative determinations based on a claim to legitimacy are subject to criticism and even sanction when they happen to be inconsistent with what the majority perceives as acceptable law.

On the domestic level, decisions announced through the adjudicative process can be subjected to public ridicule. In instances where the belief motivating the outcry is sufficiently strong, that can eventually lead to a legislative effort to adopt a political enactment overturning decisions the legislature has the power to reverse.<sup>150</sup> On the international level, the same type of scenario might develop. Nonlegislative decisions taken by official government representatives in one nation may be claimed as legitimate and in accordance with law. The other nations of the world community may reject that characterization as a self-serving rationalization advanced to justify purely political actions. The acting state may then be rebuked for its "violation" of accepted international standards. On occasions when claims by the acting nation have aroused especial ire within the world community, sanctions may be formally endorsed by appropriate international organs and imposed with the hope of discouraging further acceptance of what is seen as a miscreant view.

In both the domestic and international instances, our normal understanding of the concept of sanctions is turned on its head. Sanctions are not used to enforce the decisions of the nonlegislative process, but to bring them down. In a very graphic way this emphasizes the power that the majority possesses in coloring perceptions of what is regarded or treated as law. As a consequence, just as the legislator who feels constrained to cast a vote on the basis of conscience risks political suicide, a nonlegislative decision-maker who develops finely crafted and tightly woven decisions based on a claim to legitimacy risks sanction of another sort. What is of importance here is that no claim to legitimacy, however well intentioned and rational, can ever insulate those who advance it from the repercussions incident to the claim being out of line with accepted understandings of what the law happens to be with regard to a particular matter.<sup>151</sup>

A related matter exposed by the fact that nonlegislative, adjudicative statements of law are subject to criticism and legislative reversal, takes us back to the distinction between those statements of law coming from the legislative process, styled "political enactments," and those coming from the nonlegislative process, which comprise law in its truest sense. After all, legislative reversal suggests legislative response to the wishes of political constituents—the idea of majoritarianism—and this suggests that the

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149. The initial thinking about values may be most immediately influenced by religion, education, etc., but political ideology probably offers the determinative influence.

150. This is most likely to occur through proposed legislative or constitutional amendments reacting to Supreme Court decisions. Lower courts also feel a compulsion to avoid decisions that appear too radical in nature. It derives, however, from the check of higher court review rather than from prospects of legislative or constitutional change.

151. See Joseph R. Grodin, *Do Judges Make Law?*, CAL. LAW., May 1989, at 61.

constituents themselves support different values than those advanced by the approach taken by nonlegislative authorities. In short, legislative reversal indicates that, while at the level of authority where political enactments are formulated and adopted (that is, the level of promulgation of statutes), law may be justified by nothing more than reference to numbers. What precedes legislative action is really very much like what is involved in nonlegislative, adjudicative decision-making. Specifically, both involve value assessments. Adjudicative, nonlegislative authorities identify, weigh, and balance values. The voting public does the same. The difference is that the former uses its value assessments to justify or legitimate the legal principles it develops, while the latter does not. As far as the legislative process is concerned, value assessments may lead to political representatives acting to promote the desires of the majority of the voting public, but such representatives need not justify their actions by anything more than numbers alone.

From this, two points are clear. The first is that it is correct to distinguish between law and political enactments on the basis of law making a claim to legitimacy. Nevertheless, that distinction should not lead one to believe that values play no role in the political arena, even though the arena acts in a purely representative manner.<sup>152</sup> To the extent that a political representative acts as a conduit for the views of her constituents, value assessments are indirectly reflected in all political enactments. The second, and perhaps more important, point is that legislation indirectly reflects value assessments. This suggests that the values promoted by political enactments may not always be as well considered or thought out as those claimed as legitimating or justifying adjudicative, nonlegislative statements of law. Presumably, nonlegislative decisions are taken by government officials who attempt to use a broader, more inclusive perspective than that likely to be evinced in the individual assessments of members of the voting public. All too often, the positions of citizens, whether discrete individuals in the domestic realm, or the elected leaders of nations acting as citizens of the world community in the international realm, are shaped by narrow, self-serving, parochial interests.<sup>153</sup>

#### *D. Law as a Mechanism for Thought on Claims to Legitimacy*

The fact that adjudicative or nonlegislative decisions making a claim to legitimacy can be subjected to sanctions, evincing the displeasure of the majority, also tells us something more about law. Serious problems exist with

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152. See Hutchinson & Morgan, *supra* note 8, at 1763. On the idea that legislatures should make "value" choices, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985), and Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

153. Decisions made by civil servants, on the other hand, though subject to criticisms on a variety of other grounds, are more likely to turn on institutional considerations connected with stability. While the general public is susceptible to the winds of emotion, the perspective of serving the interest of institutions acts as a buffer resulting in the long-term view carrying great weight.

the notion that law is obligatory, since nothing seems to lie behind it but various hypotheses.<sup>154</sup> Furthermore, law's involvement in the making of policy choices does not mean that it is like politics, for law makes a claim to legitimacy while politics can be justified solely on the basis of majoritarianism.<sup>155</sup> Finally, attention has been called to the fact that law's claim to legitimacy is not a claim to objective and certain "correctness," but only to the rationality of its explanation for why certain themes or values have been given preference.<sup>156</sup> The fact that a claim to legitimacy does not protect nonlegislative decisions from sanction adds another feature to our picture of law. That feature is of law as a mechanism or process, not simply for dispute resolution, but for fashioning and refashioning its own substantive character. In other words, the second feature about law that deserves reference is that it is a process for giving itself content; a process, one might say, for defining itself substantively.<sup>157</sup>

When we give attention to law as a mechanism, a process, a procedural device or structure for thought, we normally think of law as the implement by which humankind is able to avoid rather untoward ways of resolving disputes. In the state of nature, the state of pre-legal existence, problems not susceptible to some sort of amicable resolution witnessed raw, unbridled power used to effect a desired outcome. With the advent of law as an institution<sup>158</sup> and the subjection of rulers to the power of the law,<sup>159</sup> disputes no longer had to result in confrontations involving the use of force, since law provided a device through which confrontations could be peacefully averted. But there is another aspect of the law's mechanistic or procedural side, an aspect often overlooked, though of inestimable importance in any effort to develop a more complete conception of the law. Specifically, as a process or mechanism the law not only allows claimants to avoid the resolution of disputes through force, it also allows them to make claims about the substantive content of the law concerned, claims that are part of a dialogue about what themes or values are perceived by society as sufficiently important to warrant some form of official endorsement.<sup>160</sup>

154. See *supra* notes 122-30 and accompanying text.

155. See *supra* notes 137-41 and accompanying text.

156. See *supra* notes 142-53 and accompanying text.

157. Any system that produces and reproduces itself through action between its own elements can be described as an "autopoietic" system. See generally Niklas Luhmann, *Law as a Social System*, 83 *Nw. U. L. Rev.* 136 (1989).

158. On theories concerning the origins of law, see JAMES J. ATKINSON, *PRIMAL LAW* (1903); SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey trans., 1961); SIGMUND FREUD, *TOTEM AND TABOO* (A.A. Brill trans., 1918); JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT* (Oskar Priest ed., 1947) (6th ed. 1764); and ROUSSEAU, *supra* note 139.

159. On customary law and the subservience of the ruler, see generally FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES 153-54* (1948); NORMAN ZACOUR, *AN INTRODUCTION TO MEDIEVAL INSTITUTIONS 137* (1969).

160. *Accord* HANS-GEORG GADAMER, *TRUTH AND METHOD 345-97* (Garrett Barden & John Cummings eds., The Seabury Press 1975) (1960) (developing a theory of interpretation for written texts); see also *id.* at 261-63 (discussing how change in understandings of particular texts develops from a dialogical process between interpreters and text). See generally DONALD DAVIDSON, *INQUIRIES INTO*

Law can be thought about from both the perspective of what the rules of law say, and from the perspective of the actual institutional workings that lead to the rules being announced. With regard to what the rules of law say, it must be observed that there is no effort here to call attention to some special insight allowing one to cut through interpretive ambiguities and obtain a clearer comprehension of what the rules mean. The concern with the meaning of rules focuses on nothing more than the substantive side of the law. That is to say, the law as a body of principles dealing with the affairs of society, a body of principles that emerges from an adjudicative or nonlegislative process characterized by a claim to the legitimacy of the themes or values the principles prefer. There is nothing new in this beyond what has previously been said. Not so, however, for the view of the law that examines the institutional workings leading to the creation, enlargement, or alteration of rules forming the law. Here there should be no confusion between the law as a procedure, a device, a process, a structure, a mechanism for averting unfortunate methods of dispute resolution, and the law as a process or device for ongoing and unending conversation about the themes and values with which society happens to be concerned. What has previously been said about the law's procedural side as an alternative to the resolution of disputes through force reveals nothing about law as a mechanism for society's dialogue on how its affairs should be ordered.

With regard to the dialogue matter alone, it might be observed that there are two official ways by which a society expresses its desires on important themes or values. Reference has already been made to political enactments coming from the use of the legislative process. These undoubtedly reflect at least the preferences of the representatives of society who vote on such enactments, and may indeed reflect the true wishes of society itself. The other way by which these preferences are voiced, use of the adjudicative or nonlegislative process, has also been mentioned. The focus, however, was on how law is distinguished from politics. It is not that distinction which concerns us at this juncture. Rather, what concerns us here is that it be made clear that the adjudicative or nonlegislative process plays an important and instrumental role in a society's official endorsement of important themes or values. Most would recognize the political process as important in this respect. But law, too, has an integral function to perform in giving authoritative and official approval to matters and concepts held in high esteem. And both processes involve give-and-take, constant argument, assessment, decision, and pronouncement. Just as the political enactments of one group of legislators must often give way to those of another, so the legal doctrines of one nonlegislative body may, over the years, give way to those of another. There is never any "established" political enactment. Nor is there any "established" rule of law. Positions on both fronts are under constant siege and subject to interminable reevaluation. What is accepted political nostrum today is rejected tomorrow as chimerical

panacea. What is said to be the law at any one time can just as easily be swept away by changing conceptions of what is of paramount importance in arranging the affairs of society's everyday life.

Recognizing that law is a dialogue or conversation, as well as a body of rules making claims to legitimacy, facilitates a better understanding of law in its totality. It has a substantive side and a procedural side comprised of a means for both amicably resolving disputes and for allowing discussion to take place about the themes or values society should officially endorse. To describe the law in a manner that captures only its substantive component would seem incomplete. Likewise, to give it a description that captures substance and process, but confine the latter to dispute resolution alone, would seem only slightly better. A more perfect picture of law reflects the substantive side, and distinguishes that side from official pronouncements of the political process regarding preferred themes or values. Going further, it then acknowledges the position of dispute resolution on the procedural side, but enlarges that side to incorporate the notion that law participates with the political process in serving as an instrument of official discussion and decision about the entire range of themes or values the mind identifies as relevant. Any description of law that fails to depict the conversational role of law would seem somewhat deficient. Such a description would leave out a vital element. The reality is that law must be seen as a device for allowing dialogue to proceed on important social concerns.

One reason why it is imperative that law be described with reference to its conversational component has to do with the matter of expressions of disapprobation toward law established by the adjudicative or nonlegislative process. As was alluded to above, domestic as well as international legislative bodies may adopt political enactments subjecting unpopular official decisions to some form of sanction.<sup>161</sup> The legal basis underpinning an adjudicative or nonlegislative decision may be changed by a representative governmental organ. The legal justification advanced for a particular international action may be rejected by an appropriate intergovernmental body responding with punitive impositions. The possibility for such expressions suggests that law must be described in a way which includes the conversational component. A description without the conversational might be limited to depicting the law as a vehicle for developing a justification for nonlegislative decisions, and expressions of disapprobation as nothing more than rejections of the justifications advanced. History, however, is replete with episodes of legislatures going well beyond reproaching nonlegislative bodies, including legislative reversal of nonlegislative decisions. Obviously, this would not happen if nonlegislative decisions were nothing more than justificatory.<sup>162</sup> Without them being more than that, there would be no need for legislatures to do more than remonstrate against proffered justifications. Yet because the legislative process does more when it undertakes legislative reversal, the

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161. See *supra* part II.C.

162. On the role of courts as justificatory, see SOPER, *supra* note 2, at 112-17.

nonlegislative process itself must also be viewed as doing more. Because legislative bodies occasionally act to displace the various bases which happen to undergird those nonlegislative decisions which are seen as objectionable, the very process that produces those decisions must be seen as going well beyond providing mere justification for nonlegislative decisions. Indeed, they must be seen as going so far as to providing official expression on the prioritization of important social themes and values.

The most basic reason why it is imperative that law be described in a fashion which includes a conversational component has to do with what we know about the real characteristics of law as a result of extended consideration of it. Law is an instrument of social policy, a creation of humankind designed to set forth the parameters of acceptable communal behavior. As such, every dispute involving an existing principle of law focuses either on how that dispute differs factually from previous situations that have drawn on the principle, or on how the societal perceptions of the themes and values underpinning the principle have changed and thus warrant a change in the principle itself. To state it more succinctly, adjudicative or nonlegislative legal disputes focus either on the facts or on the law. When the focus is the law, the relevant decision-maker may entertain and consider divergent assessments of pertinent foundational themes and values. Additionally, foundational themes and values may be relevant in the context of arguments turning on factual distinctions. For even in those cases, the pertinent themes and values have at least been stipulated by silence. But clearly, whether by asseveration or stipulation, the purpose of placing themes and values before the decision-maker is to elicit response, generate cogitation, and produce measured judgment reflected in a rational, well-articulated opinion.

The opinion or decision flowing from resolution of a dispute contains the statement of the law as it is understood at that time by the decision-maker. In relation to past resolutions of identical or analogous disputes, the decision-maker's statement of the law is one chapter in an unfolding story, a continuing dialogue regarding society's official view of various themes and values. Just as one vested with the power to speak officially has to sort through the divergent assessments of themes and values proffered by the advocates of opposed positions, so too must she evaluate those assessments, as well as her own conclusions, in light of what has gone before. The voice of the past may be viewed as unpersuasive, or it may be thought to be as perspicacious now as in bygone ages. In either case, the judgment of the decisionmaker adds to the ongoing exchange. Officials of greater rank in the hierarchy may set aside the decision and thus speak with more authority or persuasiveness.<sup>163</sup> Time itself may reveal that the decision lacks the prescience to securely hold the more general and timeless elements of important themes and values.<sup>164</sup> Be this as it may, each statement of the law simply

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163. See *supra* notes 150-51 and accompanying text.

164. For the idea that place and time can even affect one's understanding of "justice," see D. Don Welch, *Big Pictures and Little Puzzles*, 38 J. LEGAL EDUC. 463, 467 (1988) (book review).

gives another perspective, and adds another angle to the discussion of the themes and values implicated by social action. As with any conversation, new conditions, demands, participants, and insights can radically alter the cogency of conclusions once seen as unassailable in their wisdom. Law is as much a discourse concerning the officially sanctioned arrangement of social priorities as any exchange regarding that matter which occurs on a less authoritative level. And as with any such exchange, law is never to be seen as definitive, final, or fixed. Law never "is," it is always in the process of "becoming." And as the word "becoming" implies, law is always changing, permutating, and altering its appearance but never reaching any final state or condition.

### *E. Considerations and Concerns*

Perhaps what proves most troubling about the idea that law is not obligatory, and that it is a continuous dialogue about social priorities with whatever position is currently accepted being justified by a claim to legitimacy, involves the fear that such a conception sets the stage for every actor to define the law as she sees fit. If there is nothing about law which dictates that it must be followed, will not everyone do as she chooses? If law is nothing more than an unending conversation about how society's affairs are to be organized, is not dissident behavior encouraged, if for no other reason than the contribution it makes to the exchange? If law is characterized by the fact that it makes a claim to the legitimacy of the themes or values it prefers, cannot every person who explains an action with reference to its legitimacy contend that the action happens to be in accord with the "correct" view of law?

These are truly significant questions. Perhaps if law were viewed as inherently obligatory they would not arise, or at least not in as pronounced a fashion. But given the view of law expressed in this Article, the questions exist and merit some sort of response. One place to begin might be by observing that a prime focus of concern is with the affect of the idea of "no obligation" on law observance in general. With regard to this matter, it is important to say something about both the inclination of most humans to act in a fashion which is socially acceptable, and the impact that apprehension of sanctions has upon decisions regarding how one is to act. A second focus of concern touches the matter of law observance indirectly, but is specifically aimed at whether the idea of "no obligation" reflects a basic contempt for any type of social standards and a desire to promote a free-wheeling, cavalier, perhaps even devil-may-care approach to life. The important thing to say with regard to the latter involves accountability and responsibility and their role in developing a genuine sense of seriousness of purpose, conscientiousness about actions, and sensitivity to the fact that everything we do, say, or think has some consequence for either present or future inhabitants of this planet.

Now with respect to the idea of "no obligation" and its affect on law observance, the first of the focuses referenced above, there would seem to be little dispute that the inclination of most humans to do what is socially

acceptable,<sup>165</sup> or to act in a way that averts the displeasure associated with the imposition of sanctions,<sup>166</sup> serves to shape conduct and claims made to justify such. Since we live in community with others and can seldom repair to the tranquility of total isolation, the very realization of interconnectedness tempers our thoughts about what we are at liberty to do. It is on this score that official statements that "the law says" we must act in a particular fashion have tremendous value, even though the statements may have no meaning on the matter of obligation itself. By the simple fact of them having been made, the statements draw attention to the established parameters of behavior, and thereby stimulate the desire for moderation that derives from the sense of community, whether that sense has its origin in our social nature, or purely in selfish calculations suggesting that the greater good is also our own.

The apprehension of sanctions produces a similar effect. The knowledge that certain kinds of behavior can result in the infliction of penalties has its own impact. In many instances the desire to act in a socially acceptable manner operates in conjunction with the fear of sanctions to produce the behavior we see. To be sure, however, there are undoubtedly occasions in the process of decision when individualism overshadows community. When that occurs, sanctions operate independently of an interest in social acceptability. Nevertheless, on either occasion the sanctions are likely to take the more familiar form of centrally imposed penalties, or be evinced through reciprocal actions, whenever the harmed and the entity which has contravened some established standard have cause to associate. But regardless of when or how they might occur, sanctions loom constantly over any reflective form of decision. Indeed it is unlikely that such decisions can ignore the weight attributed to calculations concerning the reaction to behavior to be taken.

A complete picture of human nature must acknowledge that some decisions are more reflexive than reflective. This may well be the case when important personal beliefs or inveterate natural passions are involved. When the process of decision is based on deep-seated, strongly held principles, or when it capitulates to powerful, almost irresistible urges, the decision becomes either more doctrinaire than contemplative, or more impulsive than rational.<sup>167</sup> On such occasions, social acceptability is completely lost in shaping conduct, and sanctions are not likely to have much of an effect either. Curiously enough, for those wedded to the idea of the obligatory nature of law, it is even important to note the extreme improbability that exhorting an actor to see the law as binding will have great impact on how one behaves when passion or ideological doctrine is involved. One is going to act as one is going to act, and neither social disapprobation nor sanctions, nor the fact of law violation

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165. See DIAMOND, *supra* note 44, at 18, 51, 54-55 (making this statement in regard to even the most primitive societies).

166. *Id.* at 51-52.

167. Impulsiveness can come from more than firm adherence to personal beliefs. On recent studies concerning the workings of the brain and the possibility of physiological/neurological conditions or processes that overcome what we think of as individual free-will, see RICHARD M. RESTAK, *THE MIND* 275-314 (1988).



is likely to change anything.<sup>168</sup> Actions based on principle or impulse are motivated by such basic, elementary attributes that no amount of exhortation, castigation, or punishment can be sure to produce success. When both the interest in community and in rational, considered processes of decision are subjugated to attributes of this sort, there is probably little that exogenous forces can accomplish in directing conduct.

This brings us to the matter of whether the idea that law does not establish obligation discloses a certain irreverence or contempt for boundaries or parameters or restrictions on behavior. This second possible focus of concern does draw attention to the fact that more than the simple external forces of social acceptability and sanctions can be employed in law observance's struggle against dogmatism and passion. Of essential importance, however, is the attention that it draws to the topic of personal accountability, individual responsibility for every action each of us takes as actors in the social arena. True, accountability and responsibility can augment the outside influences that affect the conduct of an actor. In doing so they contribute to the observance of officially established legal standards. Where deep-seated principle or natural impulse overshadows the sense of community or rational and reflective processes of decision, the seriousness, conscientiousness, and sensitivity resulting from the lessons of responsibility and accountability can take up some slack. But the prime significance of these lessons is not found in their role of benefactors of law. It is found in what they reveal about and can do for the entire legal process. The importance of this point cannot be stressed enough. From the making of law to the rendering of decision on facts in light of that which is made, responsibility and accountability have a vital role to play in the legal system. Furthermore, close attention to responsibility and accountability suggest an alternative to reliance on "legalism" for improving human behavior. That law may gain from personal accountability and individual responsibility is laudable. Yet it is the relationship that accountability and responsibility have with both law and behavior that is of much greater importance.

Consider for the moment accountability and the legal system. The prevalent view in our society often appears to be that of complete and total faith in the capacity of law to solve most problems.<sup>169</sup> If something has gone awry, call on the legislature to adopt political enactments targeted at resolving the matter. If the traditional approach of the common law made by the courts has proved to be unsuccessful in addressing a societal ill, prevail on the judiciary to do what is necessary to come up with a cure.<sup>170</sup> To the extent that the

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168. Impulsive behavior would seem little affected by social disapprobation or characterization as violative of law. Perhaps this is why some sanctions are so especially severe (for example, death), the idea being to curb such behavior with extreme punishment. Obviously, though, impulse can often overwhelm even fear of sanctions. In seeming recognition of this fact, the law admits impulse as a mitigating factor.

169. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467-68 (1897).

170. To the extent that either "conservatives" or "liberals" argue that a Court dominated by justices of the other persuasion has created rules detrimental to social stability, and then go on to suggest that a new Chief Executive should counter this trend by appointing individuals sharing with them a certain

evolution of civilization is the story of humankind's progression from individual self-help to greater reliance on community and organizational structure,<sup>171</sup> the notion of "improvement through law" seems quite explicable. To be sure, movement away from self-help has been salutary. Without it we may never have emerged from the dark ages. Nonetheless, both legislatures and courts do nothing more than express a judgment when establishing some societal standard officially regarded as binding. And like all judgments, those expressed by legislatures and courts are susceptible to influences that may render them less than insightful and well considered.

The shortcomings of the legislature already have been alluded to.<sup>172</sup> The fact that adjudicative, nonlegislative entities make a claim to the legitimacy of the standard they establish does not mean that we can remain comfortable in the assumption that they are insulated from many of the same influences which produce the legislature's shortcomings.<sup>173</sup> The best protection against what some would view as ill-considered judicial judgment, and the best insurance that legislators will resist pressures that constantly threaten to undermine wisdom can be found in the lessons of personal accountability and individual responsibility.<sup>174</sup> When all nonlegislative officials appreciate the magnitude of what they do when expressing the government's judgment concerning a matter before them, when every last legislator really takes to heart the tremendous significance of the service performed by sifting through the complex and often close arguments behind various pieces of legislation, in short, when those who establish the social standards officially considered to be binding and receiving the name "law" approach their task with a sense of seriousness of purpose, genuine conscientiousness, and a sensitivity to the fact that what they do has an impact on a scale of space and time far more encompassing than they might imagine, then and only then will the faith in law so pervasive in modern society even begin to seem realistic. Nearly all legislative and nonlegislative lawmakers are decent, hard-working, ethical

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ideological affinity, we again see a prime example of faith in law's ability to solve society's problems. The same appears on a more simplistic level with regard to efforts to change the ideological persuasion of the legislature through the election process and thereby affect the nature of statutes adopted by those representative bodies.

171. One interesting example of how greater communal effort redounded to the overall benefit of society concerns the growth of feudalism. With the decline of the Roman Empire in the West, and the invasion of the Goths, Huns, and eventually the Vikings, the peoples of the European continent were forced to take measures of collective self-preservation. Perhaps growing out of the institution of the *comitatus* among the Germanic peoples (and the *bucellarii*, its ancient predecessor, among the Romans), collectivism eventually displayed itself most fully in feudalism. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 509-10 (5th ed. 1956). With growth of homage, fealty, knight service, castles, lords, barons, and kings came movement out of the dismal rubble of the early middle ages, the rebirth of cities, and the conditions necessary for the development of nation-states.

172. See *supra* note 139.

173. Recall the idea that indeterminacy (or neutrality) surrounding nonlegislative, adjudicative decisions is not without bounds. See *supra* text accompanying notes 147-53.

174. On restraint by adjudicative decision-makers, see *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting) ("[T]he only check upon our own exercise of power is our own sense of self-restraint . . ."), and LON L. FULLER, *ANATOMY OF THE LAW* 19 (1968) ("[A]ll that can be done safely and effectively is to choose able and honest men as judges and to invest their office with a degree of independence that will make them secure against outside influences.").

people, but it is imperative that they be much, much more. They must have the characteristics necessary to permit them to rise above partisanship, personal ideology, parochialism, self-centeredness, and a dozen other afflictions which inhibit humanity's ability to achieve what it is truly capable of achieving. Law can never hope to match current public expectations until such time as lawmakers fully meet the challenge of accountability and responsibility.

Even if we were to hypothesize the ideal condition of a totally responsible lawmaker, legislative or adjudicative, that would do nothing more than provide an explanation for society's faith in law's ability to improve the human condition. Explanations, however, occasionally have a way of being deceptive illusions. They may tell us why one believes what one believes, while all along unintentionally concealing that the belief itself is founded upon an imperiling deficiency. This would appear to be the case even with respect to law made under ideal conditions.

As shown by processes that conceived it and gave it birth, law made under ideal conditions would surely warrant expressions of faith. But in light of the fact that the extent of progress towards society's improvement is really determined by the actual behavior of those to whom law applies, it would seem that law can never claim entitlement to what most are prepared to freely accord it. There can be no ignoring that whether law is entitled to the current level of public confidence turns principally on what it is that is likely to affect behavior most. As we have seen, law does have impact in this area. Nonetheless, the single most important factor in shaping human conduct would not seem to be law, but the sense of commitment to considerate thoughtfulness, based on dedication to the notion we are all answerable for how we conduct ourselves, that has been repeatedly trumpeted here as personal responsibility and individual accountability. Accountability and responsibility are not simply used here in the sense of getting people to realize that they must be prepared to take the consequences of their actions, but also in the sense of getting those who go far beyond this and take their own lives ever so seriously to realize that by everything they do (or do not do), say (or do not say), or think (or do not think) they impact others and thus contribute to shaping every aspect of the world about them. Accountability and responsibility as used here have a scope far broader than that envisioned by those in our political culture who seem constantly to dwell on those concepts.

Reference was made earlier to the fact that stressing responsibility and accountability indirectly inures to the benefit of law observance. The thrust of what has just been discussed is that, although responsibility and accountability can go further than that and enhance the very nature of law itself, it is not the fact that there is law, nor that that which exists is better because of the influence of responsibility and accountability, which really matters when concern is with improving human behavior and generally elevating the human condition. Instead, what really matters is that raising the overall levels of responsibility and accountability, in their broadest sense, can alone do more

to improve the human condition than any body of law, whether established by lawmakers who are conscientious or who are just plain capricious. Stressing responsibility and accountability may move a large portion of society's members to observe the law. Observing law, however, is not necessarily synonymous with improving the human condition, for surely it might be said that there are laws which protect things antithetical to elevating the level of the society generally. And even if that position were rejected and law observance were thought of as synonymous with societal advancement, observance alone could never lay claim to being the best facilitator available, for the rate and extent of improvement of the human condition would thus be linked to the existence of official pronouncements of social standards, rather than left free to proceed at the pace and distance set by the more ambitious program of inculcating everyone, from the earliest stage of moral cognition, with a genuine sense of conscientiousness, considerateness, and commitment. No doubt ambition may outstrip results. The effort to raise the level of personal responsibility may fall short of full success. But even in such a case, at least the law will benefit—chances are that it will be observed more often. When such a harmless risk of failure is never untaken, however, the chance of ineffably vast societal advancement is delayed or, perhaps lamentably, forever lost.

Two points emerge from the emphasis on responsibility and accountability. The first is that the notion of law as incapable of fixing obligation has hardly any significance. It matters very little that law is not inherently obligatory if one of the outgrowths of stressing responsibility is an increase in law observance on those occasions when emotion or principle might otherwise prevail.<sup>175</sup> Whether it is said to proceed from law's obligatory character or from a sense of personal responsibility, for those concerned with consonance between law and action, the only real interest should be basically in the bottom-line matter of observance. The second point is that there is no merit to the claim that, because law is said to lack what is necessary for it to obligate, an irreverence towards restrictions, boundaries, or standards is at least implicitly evinced. To the contrary, it might be suggested that, if the main justification for restrictions or boundaries lies in the overall advancement of society, then the plea for responsibility and accountability reveals an even stronger commitment to control than is revealed by faith in law. As already stated, if law is looked to for improvement of society, then assuming that the ideal social condition has not yet been achieved, there will be a continuous need for more or different laws to be brought into being, lest stagnation makes its stifling entrance and thus obstructs future progress. On the other hand, if emphasis on responsibility is looked to, if responsibility is perceived as being in the nature of a substitute for law, which is, after all, non-obligatory, then the extent and speed of improvement in the human condition is not tied to whether, and how, lawmakers decide to act. In stressing responsibility, it thus seems one can claim to be even more

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175. See *supra* text accompanying notes 167-71.

committed to restrictions, standards, and boundaries than would be the case when confidence is reposed in that massive edifice of social norms carrying the cognomen law.

The most significant of the problems confronting a shift from emphasis on law to emphasis on responsibility and accountability is that of the loss of an external measure for evaluating appropriateness. With law one can always exhort actors to stay within the bounds of some identifiable, established, definite, often publicly articulated rule. With responsibility, the best that can be done is exhortation encouraging reflective, measured, ideologically skeptical, open and receptive, considerate action that recognizes the real impact of the action on others. But abuse is born of losses like that of the external measure of appropriateness. One may be unwittingly beguiled into thinking that she has acted in a personally responsible fashion, a fashion which signifies an awareness of accountability. The ambiguity of the unfamiliar, less certain, indeterminate ideas of responsibility and accountability can result in occurrences of precisely this sort. There will never be total clarity, absolute illumination about which decisions are the truly responsible ones. Room always will be available for one to claim that her actions were, if not consonant with the "letter" of responsibility, at least consistent with its "spirit." Yet as significant as this problem confronting a shift from emphasis on law to emphasis on responsibility and accountability happens to be, it is a problem that those who appreciate the limitations of law's capacity to address effectively the inveterate ills of today's world must always endeavor to minimize.

Could it perhaps be that minimization of the problem of abuse incident in a move from law to responsibility and accountability is best addressed by highlighting that these two admirable traits are expressed by nothing short of a sincerely earnest, conscience rending, heartfelt, anguishing attempt to discover the most prudent course of action? Surely decisions emerging from less intense, exacting, and agonizing processes would seem to run the risk of deceiving one into believing that judgment has been exercised appropriately. Against such self-deception we must always remain vigilant.

But then again it must not be supposed that, simply because judgment may have been exercised appropriately, there is some guarantee, an assurance if you will, that the "best" of an entire range of decisions available will be settled upon. Pains may be taken to guard the decisional process from subconscious perversion. Yet that alone cannot provide a warrant of superiority for the decision which is ultimately made. The fallibility of humankind is far too great to permit the feeling of complete confidence. Struggle and confusion would seem to be mankind's lot for as long as the successors of our race trod upon earth's firmament. Keeping this in mind, one must not lose sight of the fact that a shift in the direction of responsibility and accountability holds out promise for society far beyond that which emphasis on law is able to offer. Perhaps on the basis of this and this alone we should hold our heads high, set our course, and venture into the unknown and bewildering frustrations that cumulatively comprise daily life.

A final thought is suggested before proceeding to draw on the ideas related in this Part of the Article in order to offer some observations on theoretical scholarship's concern with the likes of determinacy and interpretivism, judicial precedent's attention to plain language, and the citizen's, official's, or juror's interest in legal obligation. Matters of this sort, after all, supply the reason for this diversion examining my own views on law and obligation. Moreover, they are also what we are compelled to return to if the circle I have been sketching in such a faint and unclear hand is to be closed. The final thought I have in mind has to do with professing and believing; that is, professing that law establishes obligation, even while believing that it does not.

For some, it may seem as though the call for a reinvigoration of the concepts of responsibility and accountability carries with it another side, a side indicating a call equally as strong for law to be portrayed as it really is—a *non-obligatory* articulation of how society wishes its affairs to be ordered. Such an inference may be logical and axiomatic, but nothing could be further from capturing the course I think perhaps most prudently taken by those who have devoted their lives to divining the mysteries of law and legal process, though such mysteries may never submit to comprehension. To my way of thinking at this juncture in my life and career, it is one thing to believe and recognize that there is nothing inherently obligatory about law, and something entirely different to advocate the tempering of behavior through the inculcation of a sense of conscientiousness, considerateness, and commitment. No doubt the latter may be needed because of the former, but it is just as clear that even if law were able to obligate, any effort to foster and husband responsibility and accountability would have independent justification due alone to the benefit it would produce for law observance. It would therefore seem that responsibility and accountability are capable of standing on their own. Nothing requires that they be tied to the matter of whether law is obligatory. From this emerges the idea that advocating the virtues of responsibility and accountability does not necessarily mean that an equally active effort to educate people about law's inability to obligate is an essential correlative. The advantages and benefits of responsibility and accountability can be extolled, and labor expended to help them flourish, without a concomitant campaign to rivet public attention on law's non-obligatory character. To call for a reinvigoration of responsibility and accountability does not mean one also calls for open professions about law lacking the inherent force to bind.

As was alluded to previously,<sup>176</sup> law is often obeyed because we are trained or taught to believe that it must be obeyed. Implicit in this is the idea that there is something about law which makes it obligatory. From a very early stage we come to think and feel that we are obligated to observe the law. It may be wise to capitalize on these psychic sensations and take advantage of the order and control resulting from the general perception of

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176. See *supra* part II.A.

law by continuing to refer to it as obligatory, while simultaneously endeavoring to use existing social institutions to heighten the basic level of individual responsibility and personal accountability.

Candidly, there is an element of duplicity in this approach. Dissimulation must be undertaken. Those who see law as lacking the power to command obedience must maintain in communication with others that no such deficiency exists, all along knowing what the real case happens to be. However, the gain resulting from an approach of this sort allows retention of what is positive about the belief regarding law's nature and permits a move from one plane of behavioral control stratagem to another without the kind of backsliding likely to be experienced were law simply to be exposed for what it is and responsibility and accountability emphasized instead. For those involved with the law to go forth and profess to the masses that they are not, and should not feel, obligated to do what the law provides would have untoward consequences of the most unseemly sort. Fear of sanctions would surely deter many from engaging in activity violative of the law's standards. For those who follow the law primarily out of a sense of obligation, perhaps violations may become more frequent in instances where sanctions are seen as insufficiently severe and self-interest as especially strong. In view of this, caution would dictate that the course be one of maintaining the appearance of obligation while working to shift the real point of decisional reference from what is provided by law to what is provided by matters of a much more fundamental nature.

The great attraction of seeing law in the way I have suggested is that it puts it in its proper place in the entire social context, thus reminding us that all law grew out of the need to order affairs so as to allow the promotion of values thought sufficiently important to be desired, while stressing that law is to be understood as only one of the many devices by which an ordering of affairs can be accomplished. When viewed in this light, the real question that must be confronted in every instance of an action having some legal implication is not the question we as lawyers might be most inclined to ask, the technical legal question of whether the conduct involved is within the parameters of some legal rule. The real question is whether the conduct itself is consistent with the ordering of affairs essential to allow values which advance the human condition to be pursued. No doubt, if a potential actor asks and answers this question in a fashion different from a nonlegislative decision-maker, sanctions can follow and should be accepted if the actor claims to honor accountability. Nonlegislative decision-makers, however, would seem able to take a decision endorsing the action in the event they believe it to be in line with important values promoting social advancement and consistent with the ordering of affairs necessary to attain that objective. Nonetheless, higher authority (for example, an appellate body, a legislature, a constitutional referendum) is able to overturn what is viewed as unacceptable. Ideally this would only happen when an equally fair and honest, yet divergent, assessment is arrived at. The ideal, though, is not always to be

expected. Notwithstanding the discouragement and disappointment incident to such failures, the struggle for the ideal should continue unabated.

Whether the focus is on potential actors or nonlegislative, adjudicative decision-makers, when a thoughtful judgment to act or decide in a particular way is arrived at, any move away from rules and in the direction of discretion raises once again the potential for abuse, or even well-intentioned mistake.<sup>177</sup> It seems far simpler to have decision-makers or actors controlled by straightforward, articulated standards, than left free to exercise their own judgment on how best to evaluate a particular situation. Does it not seem equally as clear that standards help to eliminate abuse or mistake, while discretion, even though couched in terms of responsibility and accountability, tends in the opposite direction? Is it not true that the perennial tension between "the rule of law" and "the rule of man" is one which should always be resolved in favor of the former? Any lawyer who favors ambiguity and discretion over certainty and limits has missed out on a teaching that is basic to all who have successfully completed the novitiate year of their professional education, and is surely one whose views are not just naive and misinformed, but downright heretical and subversive.

The presence, definiteness, and accessibility of the rules of law have never been, nor will they ever be, sufficient to insulate us from innocent prejudices, well-intentioned errors, deficiencies resulting from structural inadequacies in the legal process, let alone those hopefully rare occasions of outright incompetence, bias, and abuse. Rules are far from being deliverers of salvation.<sup>178</sup> Nevertheless, in that they spell out what is acceptable they would seem to minimize, at least somewhat, or lessen the chances of mistake, abuse, or wrong thinking by setting forth parameters which unsuspectingly tether the influence of idiosyncracies accompanying personal discretion, and by providing a measure against which decisions that are taken can themselves be subjected to the moderating pressure associated with public evaluation. But perhaps more importantly, through the establishment of rules and, concomitantly, the central part played by thought and discussion about the applicability, meaning, and scope of the rules, the phenomenon of process becomes institutionalized. Rules lead to the system of legal decision-making taking on a life of its own. This institutionalization of process strengthens order by moving us away from self-help. To turn a phrase, the process is the message. In light of the benefits of the institutionalization of process, no matter how strong my commitment to the idea of promoting responsibility and accountability, I feel compelled to register the view that I do not favor a complete, total, and final break from rules of law. Rules must be blended with

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177. You will recall that this Article raised this same concern earlier in regard to decisions to act taken by those whom the law is aimed at regulating. See *supra* text accompanying note 176.

178. For an interesting example of skepticism regarding classic approaches to the use of law to solve social problems, see DERRICK BELL, *AND WE ARE NOT SAVED* (1987) (see especially part III, "Divining A Nation's Salvation," which seems to advocate a view and use of law that emphasizes the development in society of matters that are so basic they cut across all lines and improve the condition of society generally).



responsibility and accountability, with the latter given significantly greater emphasis than they have received in the past and, in time, than that given to law. In combination, responsibility and accountability on the one hand, and law on the other, can provide for stability with creativity, order with inventiveness, structure with real and beneficial change. Those deciding to act, as well as those evaluating the lawfulness of the action taken by others, can then be free to see that law is the servant of society rather than its master. In this, perhaps law's original role can be recaptured and society's faith in its capacity to improve the human condition justified.

Beyond the rules versus discretion tension, however, the fact that potential actors make decisions which are evaluated by nonlegislative authorities, who themselves have their evaluations subjected to evaluation, moves us to perhaps one of the most essential points herein. Decisions taken in full exercise of personal responsibility and individual accountability can lead to varying assessments regarding whether the values they promote order society's affairs so as to advance the human condition. Higher authority may view the situation entirely differently from nonlegislative decision-makers involved in the initial assessment of the appropriateness of a specific actor's behavior. Indeed, there is the distinct possibility that even two potential actors may see things in a different light. The fact that differing assessments can be advanced indicates the centrality of values in determining whether one's own or another's action or judgment of action reflects a decision that is truly responsible and accountable. The only way of getting close to knowing if a decision captures personal responsibility and individual accountability, the measure by which, I maintain, all conduct and thought should be judged, is to look at the values it seeks and then endeavor to ascertain whether those values are consistent with the progress of humankind. That law is not binding leaves one free to pursue what is determined to be in the best interest of humanity. Yet true responsibility and accountability, by their very nature, require not only that determinations genuinely reflect a conscience-rending attempt to openly consider all available approaches, avoiding arbitrary exclusion or discounting of any, but also that those who make them own up to sanctions flowing from decisions of official bodies who may simply rely on "the law," or actually see the matter differently after in-depth consideration of the values involved.

## CONCLUSION

The opening pages of this Article suggested that edifying exchanges on several important and controversial topics of law and jurisprudence have appeared in the literature serving the legal profession.<sup>179</sup> Exchanges regarded as theoretical scholarship have surveyed jurisdiction to invalidate legal directives, the determinacy of law, the process of legal reasoning, and the subject of interpretivism generally.<sup>180</sup> Those exemplified by judicial

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179. See *supra* INTRODUCTION.

180. See *supra* notes 6-12 and accompanying text.

precedent have focused on departure from the plain language of private contractual commitments, common law principles, statutory provisions, or constitutional texts.<sup>181</sup> Exchanges on practical concerns have resulted in the articulation of positions on civil disobedience, the contravention of law by governmental officials, lawyer-to-client advice on the morality of law violation, judicial departure from well-settled standards, and jury nullifications.<sup>182</sup> In each case, however, discussion has invariably proceeded from the perspective that law binds. Elaborate and ingenious arguments have been advanced to persuade one of the wisdom of the writer's view, all the while leaving aside the more fundamental question of the status of law and legal standards.

On this point, it was suggested in Part I of this Article that neither observable facts nor practical considerations, constraining externalities nor intellectual constructs, possess what is essential in order to give law the force to bind. To be sure, those who contravene law's dictates are subject to whatever sanctions the body overseeing the law may deem appropriate. But the question of whether the law, apart from the likelihood of sanctions, has the inherent capacity to require observance must be answered in the negative. Theories of obligation based on observable facts, practical considerations, constraining externalities, and intellectual constructs fail to supply a persuasive explanation for why law should be regarded as binding.

Law is nevertheless a vehicle for ordering the affairs of society. In this respect, whether made by legislative or nonlegislative officials, law evidences the value preferences of the community. To contend that law lacks the force to bind does not mean that a disordered and valueless society is either preferred or unavoidable. As Part II pointed out, order and values can be preserved by commitment to unremitting and serious emphasis on developing in all people, from the very moment they acquire moral awareness, a sense of individual responsibility and personal accountability. Responsibility and accountability not just in acting, thinking, and talking in a fashion that reflects an almost brooding sensitivity to the need to be conscientious, open to all suggestions, skeptical about each, and caring toward every inhabitant of our world. Nor just responsibility and the accountability in resignation to punishment that might follow some form of irresponsibility found in submission to whim, a closed mind, ideological self-assuredness, or egocentrism. The kind of responsibility and accountability to which attention has been directed was conceived broadly, to appreciate that each of us contributes by our action or inaction, not simply to our own discrete condition, but to the very nature of all that we see around us. In a real and concrete sense, we all share in responsibility for every aspect of the society in which we live. Emphasizing responsibility and accountability places the focus on the values which actions that are said to be responsible happen to promote. Since the objective of law is to order society's affairs so as to allow the pursuit of

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181. See *supra* notes 13-17 and accompanying text.

182. See *supra* notes 18-22 and accompanying text.

values deemed sufficiently important to be desired, the task confronted when seeking to determine whether an action is to be designated "lawful" is not one that revolves around consistency of the action with the words of the rule, but around consistency with the values society holds dear.

Now there can be no denying that the possibility exists of different actors or decision-makers arriving at differing conclusions with regard to the matter of lawfulness. A conclusion can be affected by inflexible commitment to the plain language of the rule, or simply by a different vision concerning the values implicated in the situation at hand. You may assess a situation differently from me, John Paul Stevens differently from Sandra Day O'Connor, and clearly, Mother Theresa differently from Muammar Khadafi. True responsibility, however, acknowledges the very real likelihood of divergent assessments. But it also goes much further. True responsibility involves a willing acceptance of the consequences (that is, sanctions) of a determination by the community that action taken on a decision was unlawful. The very fact of divergent assessments of the values involved seems to be an unavoidable reality. In all the uncertainty of a social system designed to focus on the allocation and assessment of values, nevertheless, there lies the seed of genuine legal creativity. When responsibility and accountability augment the order wrought by law, while at the same time directing attention to what really matters, that is, all that resides within the veneer which legal rules encapsulate, the opportunities for improving the human condition are vastly enhanced and the chances of society's faith in law having some degree of validity are made increasingly meritorious.

I would be remiss not to acknowledge that the notion of responsibility and accountability so ardently advocated herein may well lack the force to suggest even itself as obligatory. Obviously the point has not been explored. However, if there is nothing about law which gives it the force to bind, there may be nothing about responsibility and accountability which indicate they must be honored. A reason for this paper advancing these two virtues has more to do with defending against suggestions that if law does not obligate then chaos must be preferred. Yet taking that explanation as given, it seems perfectly sensible to inquire whether responsibility and accountability are themselves obligatory. While admittedly they may be useful in producing an orderly society, is there anything about them or their usefulness which indicates one must not choose to act irresponsibly and with a sense of impunity?

Beyond this concern, there is yet a second which I must disclose. No exegesis which draws attention to the fact that officially endorsed societal standards called law are designed to facilitate the pursuit of values seen as important would be complete without an exploration of the identity, attributes, and comparability of values generally. Without some feel for what should be considered values, the character and aspects of each, and the weight and relationship they bare to each other, it would seem impossible for an adherent to the position that law does not obligate, but rather arranges the affairs of society so as to allow the promotion of desired values, to arrive at an informed conclusion regarding the lawfulness of particular conduct. Obvious-

ly, if facilitating the pursuit of desired values is the quintessential objective of law, then whether specific conduct is lawful turns on the degree of consistency between the values desired and those advanced by the conduct in question. Just as obviously, for the degree of consistency to be determined between these two, it is absolutely imperative that one be fully sensitive to and knowledgeable about value analysis. This would appear to be the case even in the event, as mentioned before, that there is no such thing as objective truth. After all, one particular conclusion may present itself more appropriately than another, out of consonance with what is desired, rather than out of some natural hierarchical ordering which leaves no other acceptable conclusion. Yet the kind of exploration of values envisioned is not to be found in the foregoing, as it would undoubtedly take at least as many pages as have already been filled to begin to scratch the surface of that extraordinarily complex matter. To this extent, what has been offered so far sadly fails for incompleteness.

Notwithstanding this failure, a failure with which in some respects I am sure most thoughtful people can empathize, it is clear that what has been said permits an intelligent reaction to matters like determinacy, legal reasoning, and interpretivism, all raised by theoretical scholarship. It also permits a reaction to judicial precedent on the meaning and application of terms in private contractual commitments, and the resolution of conflicts involving behavior inconsistent with constitutional or legislative text or common law principles, as well as a reaction to practical concerns like civil disobedience, advice to clients on the morality of contemplated conduct, and jury nullification. Those were the matters proffered at the outset of this paper as suggesting the relevancy and importance of inquiring into the question of whether law binds.

The cerebral challenges of theoretical scholarship are substantial, and the inventive genius of those up to the task is frequently quite astounding. It seems, however, that the non-obligatory nature of law suggests that much energy has been mischanneled. Rather than weaving a complex and intricate tapestry on something like whether law has an established meaning, or legal reasoning is arbitrary and non-justifiable, talents could be better used if applied to the task of husbanding in citizens a sense that we all must own up to the way we conduct ourselves. Stratagems equal in creative brilliance to those concocted to prove one's position on such things as determinacy or legal reasoning can be employed. Refocusing theoretical scholarship in this way would allow for integration of lessons about temperance and tolerance, to those inclined to believe in the existence of identifiable, immutable truths, and about restraint and reflection, to those inclined to believe that nothing is certain and that truth is an illusion nowhere to be found. Irrespective of the side of the issue on which one happens to find oneself, by approaching any of the concerns of theoretical scholarship from the perspective that law's lack of obligatoriness is to be coupled with a heightened emphasis on civic conscience, the thrust of such scholarship will be away from the development of ever more abstruse defenses of one's view, and toward a common effort to

elevate humankind well above the level of mere sentient creature. Such a reorientation will not only demonstrate the real-world value of theoretical scholarship, but will also enlist some of the most deft minds in fashioning a social curriculum for enhancing the quality of individual behavior.

A shift away from approaching law as binding, and towards an emphasis on developing a greater sense of the serious obligations attendant to individuality in society, can prove similarly beneficial to the architects of judicial precedent. They no doubt labor agonizingly with cases which pit decisions suggesting themselves as appropriate against what the language of a constitutional or statutory provision, earlier judicial opinion, or private contractual commitment would appear to allow. Proceeding from the proposition that the prime task is to aid the growth and development of the twin virtues of responsibility and accountability, judicial officials can assuage their troubled consciences and pen decisions reflecting an incorporation of that task into the one of giving effect to public or private legal standards. Departure from the words of any legal pronouncement need not be as it might seem to appear. As normative law does not exist apart from society, so it cannot be understood apart from that in which it exists. Therefore, in rendering decisions which are designed to promote sensitivity to the important obligation that we all have to be conscientious, considerate, and committed to ourselves as well as to the community in which we live, a judge performs exactly as is to be expected, and in a manner that captures every aspect of what is truly involved in the law.

The practical concerns, like civil disobedience, jury nullification, and conduct of government officials, can also prove less wrenching when viewed from the perspective of law lacking the inherent ability to command observance. By a recalibration that focuses on the fact that the real obligation of every person to whom the law speaks is one of thoughtful conscientiousness based on a *selfless* sense of autonomy, the decisions associated with each of these practical concerns become easier. Certainly they are no easier if one considers the level of genuine and searching deliberation involved. The very essence of accountability and responsibility demands attentiveness to this matter. But on the score of decisions incongruous with what the law seems to direct, those faced with taking such decisions can do so with a certain calm appreciation for how their actions comport with law's objective of ordering and enhancing social intercourse.

By rejecting the conventional wisdom regarding law's binding force, those who, confronting any of the complexities mentioned above, repose confidence in responsibility and accountability trust in tried and faithful lights of societal advancement. The role of legal rules is accorded a position befitting the extent to which rules are able to guarantee the successful conclusion of that quest. Those interacting with law continue to speak publicly of it as a set of obligatory social norms. However, at the same time they appreciate its real import. While concerned with proceeding in a measured and cautious fashion—considering all options and discounting none—and prepared to accept the consequences incident to a rejection of the propriety of the course

pursued, those involved regard the existence of a legal rule as but a very weighty factor in deciding what conduct is to be undertaken. The weight of the rules derives from what they appear to say about how society regards the matter at hand, as well as from the mere fact that when seemingly shown disregard, values like predictability and consistency are called into question. Thus having such weight, actions which typify the quintessence of responsibility and accountability must move with the greatest of reluctance to contravene established standards of law. Yet for all the hesitancy which that reluctance engenders, it is nonetheless appreciated as vastly different from a perception of law as sacred and inviolable dogma.

If I may be permitted a concluding observation, perhaps much of the turmoil in modern legal scholarship is nothing more than a microcosmic reflection of a problem that, on the larger level of society itself, has dogged humankind since the beginning of the species—specifically, the desire for certainty, definitiveness, closure, a final answer about what is correct or right. Here exists an unremitting pang that nothing seems able to satiate. This longing for certainty pervades every aspect of our existence. In the law it manifests itself in both the search for the meaning of legal rules and efforts to formulate persuasive explanations of legal obligation. Yet as irrepresive as the desire may be, it is at least possible that it exerts a control that diverts us from the terribly unsettling reality that if we are truly to make a contribution to societal advancement, indeed if we are to experience what life is all about, we must first let go and content ourselves with complete and total uncertainty.<sup>183</sup> Some may say no more foolhardy prescription could be offered for the guidance of the legal system. The very notion of law rings of order, clarity, and explicitness. But perhaps it is of just such things that self-righteousness, inflexibility, cupidity, and insensitivity are born. Perhaps it is just such afflictions that not only prevent us from coming to grips with what must really be done to create a harmonious society, but what must also be done for each one of us as individuals to know an analogous sense of inner peace.

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183. I am reminded of a couple of interesting observations that have relevance at this juncture. In Justice Holmes' 1897 dedication address at the new hall of the Boston University School of Law, he suggested that the legal system seems to reflect the logical form of reasoning. Nonetheless, his long years of experience and perspicuous mind led him to believe that "certainty generally is illusion, and repose is not the destiny of man." See Holmes, *supra* note 169, at 466. Similarly, the writings of Hans-Georg Gadamer, the German hermeneutics philosopher, suggest a theme of learning to live with uncertainty and absence of objectivity. Gadamer argues in *TRUTH AND METHOD* that interpretation of any text is a reflection of the community and tradition in which the interpreter exists. GADAMER, *supra* note 160. And "[t]radition is not simply a *precondition* into which we come, but we produce it ourselves, inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves." *Id.* at 261 (emphasis added). The intimation is that the meaning of any given text is never static, but always changing. Appropriate understanding requires recognition and acceptance of this reality. From the Christian religious tradition derives a comparable admonition to embrace uncertainty. The epistle of *James* 1:17-27 treats its readers to look not to the formal law as a guide to conduct, but to "the perfect law, the *law of liberty*." In complete liberty exists uncertainty. Yet in that, more than in the crystal clear formulations of articulated law, is to be found the soul's salvation.