OBLIGATION AND THE LAW

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"... that is my duty to do which I am liable to be punished according to law if I do not do."

BENTHAM

"... the blow of the rod does not inflict infamy, but the cause whereof he has deserved to be punished."

BRACTON

I. INTRODUCTION

Regardless of how the discipline [1] of jurisprudence is defined, [2] it is reasonable to suppose that its function is to enable the men of the law "to see the coherence and the relevance of the more specialized studies in which they are engaged." [3] It is difficult to meet this requirement more fully than by examining the concept of obligation, for to inquire into this topic is to search for what has been called the "rational basis of law." [4]

The search for that basis of law is complicated by the need to distinguish philosophically among the various ways in which the term "obligation" is used and to untangle it from the notions of sanction, duty and motive. When this has been done, however, practicing lawyers will have been provided with ways of better understanding the more specific uses of the term employed by legal theorists in their considerations of, for example, the binding force of contracts [5] or of liabilities arising from tortious conduct. [6] All one need do to see that this is so is to glance at some of

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[1] Whether jurisprudence is thought to be a science probably depends upon the purpose of the one doing it and his understanding of the term "science." See Campbell, *A Note on the Word 'Jurisprudence,'* 58 L.Q.R. 334 (1942). *Cf.* J. WU, CASES AND MATERIALS ON JURISPRUDENCE 5-14 (1958). The distinction often made between "general" and "particular" jurisprudence complicates the matter. See W. BUCKLAND, SOME REFLECTIONS ON JURISPRUDENCE 70-72 (1949); C. ALLEN, LEGAL DUTIES 1-27, esp. 5-11 (1931).

[2] See 1 R. POUND, JURISPRUDENCE 7-23 (1959) where the views of the major writers are considered.

[3] King, *The Concept, the Idea, and the Morality of Law — An Essay in Jurisprudence,* [1966] CAMB. L.J. 106. *Cf.* Walden, *A Twentieth Century Curriculum for the Small Law School,* 20 J. LEGAL ED. 97, at 104 (1967).

[4] Ç. FRIEDRICH, MAN AND HIS GOVERNMENT 268-269 (1963).

[5] SALMOND ON JURISPRUDENCE 452 (P. Fitzgerald ed. 1966): "The first and most important class of obligations consists of those ... created by contract." *Cf.* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, at 425-26, 429-30, 78 L. Ed. 413, at 421-22, 424 (1934). *See generally* R. POUND & F. PLUCKNETT, HISTORY AND SYSTEM OF THE COMMON LAW 580-610 (1927).

[6] "Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally...." WINFIELD ON TORT 2 (J. Jolowicz & T. Lewis ed. 1967). *Cf.* Coleman v. California Yearly Meeting of Friends Church, 27 Cal. App.2d 579, at 582, 81 P.2d 469, at 470 (1938); Enyeart v. City of Lincoln, 136 Neb. 146, at 152, 285 N.W. 314, at 318 (1939).

the questions theorists ask about contracts and torts and then to ask whether these can be answered rationally without an understanding of obligation in its broad sense. In the case of contract law, for example, they might want to know whether a contract is any self-limitation of freedom, promissory or non-promissory—as Marshall held in the *Dartmouth* case,[7] or whether it is an enforceable promise as Anglo-American Realists are prone to hold. Involved in speculating about tortious conduct, on the other hand, is the philosophical problem of causation, which emerges when one attempts to determine whether it should be true to say "No liability without fault." Hidden within such problems is the question of what constitutes—or ideally ought to constitute—an obligation.

The central question to be dealt with in this paper is, then, "What is the reason men ought to obey laws?" The word "reason" is ambiguous, however, and its ambiguity infects the whole sentence. In the section that follows, therefore, I shall attempt to distinguish the various meanings the question could have and then point out the one I intend to work with. First, though, a note about method must be made. Throughout this paper references will be made to court cases. The inference to be drawn from this is simply that I have assumed that if a philosopher of law hopes to make any statements of a theoretical nature that can shed any light on the problems dealt with by lawyers in the less abstract studies in which they are engaged, he should accept as his framework the meanings of fundamental terms actually used in the working of the law. Unless this assumption is made, difficulties arise. To give but one example, it was until very recently commonplace in certain circles for philosophers to assert as if it were somehow self-evident that an unjust law is no law. This is, of course, a philosophical notion, and there is a sense in which it may well be true; but that sense has little or no relation to the practice of law. The citations given in this paper are meant to make such relations explicit wherever possible; they are not, on the other hand, meant to serve as arguments from authority.

II. Reasons

As we begin to clarify the meaning of our question, "What is the reason men ought to obey laws?" by distinguishing the different uses the term "reason" can have in the sentence itself, we can note first of all that there are two ways of using the word that do not touch the meaning we are after. These are displayed in the following sentences: (1) What is *X*'s own private reason for obeying laws? (2) What is *a* reason for obeying laws? In the first, "reason" is used to refer to *X*'s motive for obedience —to, for example, his fear of punishment. The reason here is, again, a private one. In the second sentence, "reason" refers to any sort of prudential or expediential justification or support that could with at least surface plausibility be given for obeying a law. "To escape a sanction" is such a reason; so is "in order not to bring about a social situation in which life is 'nasty, brutish, and short.'" Either of these reasons could,

[7] Dartmouth College v Woodward, 4 Wheat. 518, 4 L Ed. 629 (1819)

of course, also be someone's motive for obeying a law and in such cases the two senses of "reason" would overlap. Nevertheless, the two types of reasons (motive and expedience) are not the same. *X* could meaningfully say that *a* reason for obeying laws is to prevent life from becoming nasty and brutish while at the same time deny that that is *his* reason for obeying them, that his reason is to avoid punishment. Neither "reason" in the sense of motive nor "reason" in the sense of expediential justification, however, fits the meaning I am after when I ask, "What is the reason men ought to obey laws?"

Sometimes the term "reason" is used in the question to get at the moral reason for obeying them. All I mean by a "moral reason" is one that, in contrast to mere expediency, is made up of judgments as to what is just or right in itself.[8] "Moral" is thus being contrasted here with "prudential," [9] and a moral reason is the kind one looks for when, ignoring men's motives and by-passing the expediential reasons that can be given for obeying laws, he seeks to know what might be called the "right" reason why laws ought to be obeyed. Using this sense of "reason" the question, "What is the reason men ought to obey laws?" means, "Why ought men to obey them?" Thus, for example, Austin said that, assuming laws to be valid (that is, made by proper authorities), men ought to obey them because of their utility, because of the useful social results men can achieve by obeying them. He mentions other reasons that have been put forward for obeying laws, such as "doing so 'pleases . . . God,' " [10] but such reasons, we may assume, are thought by him to be expediential ones. "So as not to offend God" is, within Austin's context, *a* reason but not *the* reason for obeying them. Motives, on the other hand, he said, are a type of "wish," [11] and can constitute only a completely subjective reason—that is, *X*'s reason—for obeying them. For even if one should "wish" utility, it is the utility and not the wish for it, he thought, that justifies the obligation.

Other, and more recent, moral reasons why men ought to obey laws are not difficult to find. John Rawls, for example, thinks such an obligation derives from the moral duty of "fair play" [12] whereas J. R. Pennock and Richard Taylor state that men's obligation to obey laws is entailed by the need to secure and support "the ends of the state" [13] or, the "common

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[8] What Devlin, ENFORCEMENT OF MORALS (1965), calls "quasi-criminal crimes" lack moral content. This sense of "moral" in "moral content" is what I mean in question 3.

[9] Unlike "moral," "prudential" can be taken to mean simply "circumspect in action, or in determining any line of conduct." Tureen v. Peoples Motorbus Co., 97 S.W.2d 847, at 848 (Mo. 1936). *Cf.* G.R. GRICE, THE GROUNDS OF MORAL JUDGMENT 13-43, 166 (1967).

[10] 1 LECTURES ON JURISPRUDENCE 128 (R. Campbell ed. 1873).

[11] *Id.* at 428. A motive is a wish that causes or precedes a "volition."

[12] *Legal Obligation and the Duty of Fair Play,* in LAW AND PHILOSOPHY 3 (S. Hook ed. 1964).

[13] Pennock, *The Obligation to Obey the Law and the Ends of the State,* in LAW AND PHILOSOPHY 77, at 79 (S. Hook ed. 1964).

goods" of the community [14]—goods such as security, liberty, justice and welfare. Finally, Russell Grice rests the obligation to obey laws on an hypothetical social contract, asserting that the proposition "It is in everyone's interest to make a contract with everyone else to do *X*" (class of actions) implies that actions of this class are "obligatory in that society." [15]

So far I have attempted to distinguish three different uses of the term "reason," all of which can be employed in the sentence, "What is the reason men ought to obey laws?" None of these is of direct interest to me, however, but because certain theorists have at least appeared to confuse them with the usage I am directly interested in, and which shall be examined next, I shall return to them later.

This next way of using the term "reason" in the question, "What is the reason men ought to obey laws?" is adopted by one who wishes to work toward clarifying the concept of obligation itself and to move from there to an explanation of the difference between saying, "It is a matter of indifference whether men obey laws" and "Men ought to obey them." In other words, in this case the term "reason" is used for the purpose of focusing attention upon the word "ought" in such a way as to make it clear that, even discounting men's motives and moral and expediential reasons for conforming to laws, they can be shown to be bound to obey them and thus not in every sense free to disobey them.

A moment's reflection at this point, however, uncovers a new cluster of problems that call for attention before this use of the question can be employed. One of these, caused by the vagueness of the phrase, "bound and not in every sense free" can be dealt with only through an analysis of the concept of obligation itself. Because of this it makes sense to leave it alone for the moment and face up instead to the fact that one's intention in asking the question, "Why ought men obey laws?" will be obscured by the realization that laws have not only a source but content as well. Because they do, they can be looked at from either standpoint by anyone seeking to account for their binding force. [16] Hobbes, for example, focused on the source of law—in the sense of its sovereign-maker—to the exclusion of content in his analysis of this matter. On the other hand, the content of law has nowhere more emphatically been made the sole criterion for obligation than, if I rightly understand him, in the writings of Maurice Hauriou. [17] The radically different conclusions these men reached about why men ought to obey laws provide sufficient warning that unless one can make it clear whether he intends to look at legal obligation in terms of sources or content his attempt to explain why men ought to obey laws will be hopelessly muddled.

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[14] Taylor, *Justice and the Common Good*, in LAW AND PHILOSOPHY 86 (S. Hook ed. 1964).

[15] THE GROUNDS OF MORAL JUDGMENT, *supra* note 9, at 95, 89.

[16] *Cf.* Christie, *The Notion of Validity in Modern Jurisprudence*, 48 MINN. L. REV. 1049, at 1050, 1057 (1964).

[17] *Cf.* Jennings, *The Institutional Theory*, in MODERN THEORIES OF LAW 68 (1933).

If, then, the question, "What is the reason men ought to obey laws?" means, as it normally does to a practicing lawyer, "What is the source of the validity that gives them their binding force?" the answer will be that laws are binding because they are parts of a legal system: they have the state backing them up, administering them. They ought to be obeyed because they have entered the legal system through the portals of legislation and adjudication. These are the sources of laws and of men's obligation to obey them. [18] Here, then, we have the fourth way of giving meaning to our central question.

If, on the other hand, (and here is the fifth interpretation) the question, "What is the reason men ought to obey laws?" is framed in order to determine whether the laws' content can supply a basis for the reason men ought to obey them, considerations of the sources of law become unimportant; it will be assumed that the laws being referred to are legally valid. And then what one should like to know is whether he can set aside the facts about who made the laws and when and focus his attention exclusively upon their substance, upon what they require men to do, in order to find the reason why men are under an obligation to obey them. Because the distinction between these two different inquiries has often been ignored, the perennial question whether men's obligation to obey laws is generated by their creation or by the justice of their content has had an unhappy history. It has split lawyers and philosophers since at least the days of Coke and Hobbes [19] and has caused other writers, such as Bodin and Blackstone, to say some things about the nature of law and obligation that have appeared to give rise to inconsistencies within their works. [20]

If the distinction between sources and content is kept in mind it is possible to assume that the formal aspects of laws, such as their authorative creation according to prescribed rules, do in giving them validity provide a basis for justifying the statement that men have an obligation to obey them and are not in every sense free to disobey them. I am not primarily concerned with defending this assumption, however, for in a democratic society, at least, it is not the assumption but its opposite that stands in need of rational support. My interest, rather, lies in determining whether a reason can be given in terms of the contents of laws for saying that men have an obligation to obey them. But before deciding this matter,

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[18] The term "sources" can of course refer not only to the men who make the law but to customs and records (*e.g.*, the Year Books of 1272-1509) as well. On the uses of the terms "legal" and historical sources, see H.L.A. HART, THE CONCEPT OF LAW 246 n.98 (1961) [hereinafter referred to as CONCEPT].

[19] For Coke the content of law, in the sense of what is "reasonable," was the foundation for its validity. 1 A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 15 (J. Thomas ed. 1818). Hobbes, however, thought validity to rest upon the sovereign's command. See 6 WORKS 24-26 (W. Molesworth ed. 1840) where this is shown and Coke criticized.

[20] Bodin locates the law's validity in both the sovereign's command and in its "rightness" or justice, but at different times. See THE SIX BOOKS OF THE COMMONWEALE at 108, 156 (K. McRae ed. 1962). Blackstone appears to have done the same. See 1 COMMENTARIES 41-54 (1765) [hereinafter cited as COMMENTARIES].

one last clarification is called for, for the phrase "reason . . . in terms of content" is ambiguous. This can be seen in the following way: when one addresses himself to the question of whether the content of laws has any bearing upon men's obligation to obey them one could be asking either what content (if any) places men under an obligation to obey laws or what role (if any) the content of laws plays in placing men under that obligation. These are the two ways of clarifying the ambiguity in what I have called the fifth interpretation of our central question, and the difference between them can be seen by means of an example. An answer to the question, "What content places men under an obligation?" might be as follows: the courts have said that the "object of all law, common and statutory, is the establishment and enforcement of justice" [21] and from this it can be inferred that the content of laws ought to specify the ways of realizing it. On this basis it can be concluded that the reason men have an obligation to obey laws and are not in every sense free to disobey them is because they ought to do what is just—they ought to "render every man his due." [22]

The other question, however, "What role does content play in establishing men's obligation to obey laws?" by-passes the former one about what particular content might suffice to place them under an obligation and asks *whether* the content of laws creates obligation and, if it does, why. This is a more fundamental question than the other for its answer will, it seems to me, reveal the formal structure of obligation itself. It is also a question whose answer will come only on the condition that one clarify the obscurity contained in the phrase "bound and not in every sense free." A moment ago I by-passed it, but I return to it now.

III. The Meaning of Obligation

There is no single fully developed meaning that all philosophers of law have given to the term "obligation." There is, however, a nominal definition accepted by them all which has also been used by the courts: "obligation" means "to tie or bind." [23] This is the root meaning of the

[21] State v. Williams, 18 A. 949, at 950 (Del. 1890). *Cf.* McAllister v. Marshall, 6 Binn. 338, at 350 (Pa. 1814), State v. Wells, 134 Ohio 404, at 410, 17 N.E.2d 658, at 661 (1938).

[22] *See e.g.*, Collier v. Lindley, 203 Cal. 641, at 654, 266 P. 526, at 530 (1928). The distinctions among the various types of justice are many, and, the courts have talked of "natural justice" (Spencer v. Terry's Estate, 133 Mich. 39, at 44-46, 94 N.W. 372, at 374-75 (1903)); and "commutative," "distributive" and "contributive justice" (Mott v. Pennsylvania R.R., 30 Pa. 9, at 35 (1858)). Briefly, the phrase "to render to another his due" can be understood by relating it to "title"—to a sign of some sort that an unique relation exists between some thing and a person. Thus the central meaning of "just" or "what is due" is "respect for one's relation of title." To deal satisfactorily with the question of how this is determined in concrete cases would take us beyond the scope of this paper; suffice it to say that what is just in concrete instances is determined (ideally, at least) by the existence of certain facts. In the case of a contract, for example, what one owes to another is in some way specified

[23] Watkinson v Hollington, [1944] K.B. ., at [illegible] 643, at 645 (1943). Blair v Williams, 4 Littel 34 at 36 (K. [illegible] 1823) The Queen v. Midland Ry., 19 Q.B.D. 540, 56 L.J. 585 (1887) (per Stephen J.). "'obligatory' means 'binding' and binding I suppose means an 'obligation' or 'tie.'"

term and is, clearly, used to describe those situations, whether legal, moral, political, or religious, in which a person's freedom to do as he pleases without qualification is thought to be somehow restricted. It is possible, of course, to say both that a man is under an obligation and that he can do as he pleases, but it is not possible to say both without qualification. Such is the case where what pleases a man is, precisely, fulfilling his obligation, doing what he is bound to do. All this means, however, is that a man wants to do what he has an obligation to do; it does not mean that he has no obligation to do what he wants to do. The qualification, in other words, comes down to this: *provided that* one wants to do what he has an obligation to do, we can intelligibly say both that he is free to do what he pleases and that he is under an obligation to do it.

Because the fact that a man can want to do what he has an obligation to do does not imply that he does not have the obligation to do it—although as Professor Hart has pointed out the fact does indicate that there is a difference between "having an obligation" and "being obliged" [24]—we are forced to say that when he is under an obligation he is not free in every sense to do as he pleases. For to say he is under an obligation to do "*X*" —for example, to obey a law—is to say that he is bound to do it; [25] it is to say that his liberty has in some way been restricted. To say that men have an obligation to obey laws, then, means at least this, that they are under some kind of necessity to obey them, and this is what I meant when I said earlier that when men are under an obligation they are not "in every sense free." All I had to do to show this was to give a nominal definition of obligation. But, on the other hand, a nominal definition is all that I have given, and consequently all we know so far is that to say that men are "under an obligation" to obey laws means that they are "under some kind of necessity" to obey them. What we now need to know is what kind of necessity this is and what brings it about.

IV. Kinds of Necessity

That the kind of necessity men are understood to be under when they are said to be under an obligation to obey laws is not a physical necessity that compels them to act by means of an irresistible physical force has been demonstrated by the courts [26] and can be seen simply by noting as A. R. White has done, that in the case of laws—and, for that matter, in the case of moral rules as well—what men are under an obligation to do is not something they cannot help doing or are unable not to do. [27]

[24] Concept 80-81. A. R. White rejects Hart's way of distinguishing "having an obligation" from "being obliged" but makes it in another way. See *On Being Obliged to Act*, 1 The Human Agent 64 (Royal Institute of Philosophy Lectures 1968).

[25] *Cf.* Gentle v. Frederick, 234 Ala. 184, at 186, 174 So. 606, at 607, (1937). White, *supra* note 24, at 74, says "being obliged" and "being bound" are different: "I can be bound, but not obliged, to succeed or fail..." But he seems to be using "bound" to mean "destined." Surely, however, no one thinks that "having an obligation to do *X* "means" being destined to do *X*."

[26] *See, e.g.*, McCulloch v. Maryland, 4 Wheat. 316, at 412, 4 L. Ed. 579, at 603 (1819).

[27] White, *supra* note 24, at 71, 75.

This is clear enough; for, if men were unable to disobey laws or to deviate from moral rules, we should have to go against the fact and say that a statement such as, "I ought to have obeyed the law but did not" was meaningless. The type of necessity involved in obeying laws and in keeping moral rules is, rather, one that puts men in the position of being unable not to obey them "without incurring certain consequences." [28] It has been referred to in the past as "moral necessity"—an undoubtedly dangerous phrase in our own time when "moral obligation" is normally taken by practicing and academic lawyers alike to imply either "weak" as opposed to "strong"—that is legal—obligation, or else simply, no obligation at all. [29] Be that as it may, its use by the courts in a case like *The Yarkand* [30] can serve remarkably well as a starting point for the attempt to focus upon the peculiar feature of that sort of necessity men are under when they are under an obligation to obey laws.

In *The Yarkand* action was brought by the insurer of a Russian ship to recover possession after it had been sold by her master while stranded. For our purposes it is not directly important that the court decided that the master's sale was justified, but the reasoning is of interest. It is based upon the premise that in such cases a master's authority to sell his ship "rests upon necessity solely," a necessity that is "neither a logical necessity nor a physical necessity, but a moral necessity." What we want to know, of course, is the meaning of "moral necessity," and the court, quoting Mr. Justice Story, [31] provides an explanation: " 'Moral necessity' ," it said, "arises where there is a duty incumbent upon a rational being to perform, which he ought at the time to perform. It presupposes a power of volition and action under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming, superior force." Aside from wishing that Story had made it clear that when a man is compelled by overwhelming physical force he does not act but is acted upon, I have no quarrel with his description of the kind of necessity men are under when they are under an obligation to obey laws. That necessity is a moral, or as I should prefer to say, a rational one; it is not physical compulsion. What we now need to know is, what places men under this sort of necessity. To answer this question is to understand why men have an obligation to obey laws.

By making reference to Mr. Justice Story I have indicated a rejection of the notion that the reason men are under an obligation to obey laws is because they are somehow compelled to do so by the threat or application of physical force. I shall enlarge upon this point after attempting to show, in an admittedly cursory way, that men's motives have nothing to do with creating obligation. The notion that they do has, in a certain form at least, the best chance of all the alternate theories of obligation of destroying the position I am trying to elaborate in this paper—that the law's content specifies ways of acting necessary for the attainment of desired ends.

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[28] *Id.* at 71.

[29] *See, e.g.*, Blair v. Williams, *supra* note 23; Balmer v. Long, 104 Kan. 408, at 409, 179 P. 371, at 372 (1919).

[30] The Yarkand, 117, F. 336 at 341 (S.D. Ala. 1902).

[31] The Fortitude, 9 F. Cas. 479, at 486, 3 Sumner 228 (C.C. Mass. 1838).

V. MOTIVES

Perhaps the most sophisticated attempt to explain men's obligation to obey laws in terms of motives has been made by Karl Olivecrona, who has developed his legal theory in such a way that the reason men ought to obey laws becomes identical with their reason for obeying them. It was not an oversight or confusion of thought that has led him to this point. He was driven there, rather, by his belief that laws are "means of working suggestion" utilized by those in a society having the actual, if not the legal political power to "train" or "condition" the citizens to behave in certain ways. [32] He states that if this is what laws are, then, although it can still be held that they actually do have a "firm grip over us" [33] it cannot be maintained that they possess a "binding force." [34] They will be unable, in other words, to provide the basis for the reason why they ought to be obeyed. "The words 'ought' and the like," Olivecrona asserts, "are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality . . . ." [35] The idea of the binding force of law is "superstitious." [36]

This point can be put another way. Should someone ask Olivecrona why men have an obligation to obey laws he would reply that the question is improperly phrased. What should be asked, indeed the only meaningful thing that can be asked, is, "Why do men feel they ought to obey them?"—for strictly speaking, men do not *have* an obligation at all; all that they have is a psychic need to *feel* bound by laws, and this need is fulfilled by the very forms of the laws themselves. [37] "Obligation to obey" has been reduced to "motive for obeying."

As Olivecrona himself points out, this view of the binding force of law strikes at the heart of theories that seek to find a genuinely objective reason why men have an obligation to obey laws—which, of course, is the aim of this paper. Yet, he charges, anyone who sets this goal will inevitably find himself searching for something mystical or supernatural. He levels this charge because he has supposed that men are conditioned in such a way by those in the state who actually wield power that they cannot distinguish between ideology and statements of fact. This conditioning, he states, leads them to feel that the binding force of law is real. Thus have men's minds been shut off in every direction except that pointed out by the power-brokers. [38] The plausibility of this statement depends upon the fact that because men are born under legal systems that antedate them they grow up habitually accepting them, questioning neither

[32] *The Imperative Element in the Law*, 18 RUTGERS L. REV. 794 at 801-2 (1964); LAW AS FACT 10 (1939) [hereinafter referred to as LAW AS FACT]. *Cf.* R. DIAS, JURISPRUDENCE 215-16 (2d ed. 1964).

[33] LAW AS FACT 11.

[34] *Law as Fact*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, 543, at 544 (P Sayre ed. 1947). LAW AS FACT 17

[35] LAW AS FACT 21 33 34

[36] *Id.* at 51 55.

[37] Christie, *The Notion of Validity in Modern Jurisprudence*, 48 MINN. L. REV. 049 at 1058 (1964)

[38] LAW AS FACT 54.

their content nor their validity. As a result they make no distinction between "ideology and objective reality." [39]

Surely, however, it is self-defeating even to say this kind of thing, and the wider Olivecrona extends this thesis—so as to include in the category of superstition or pure magic not only the law but also such institutions as marriage and the Queen's coronation, but not, oddly enough the act whereby two banks write off mutual claims [40]—the more difficult it becomes to accept it. Perhaps Olivecrona might have seen this had he come to grips with a question that he raises but then explicitly refuses to treat, that concerning "the part played by moral ideas in the formulation of new rules added to the already existing body of rules of law." [41] For in analyzing only the influence of the legal machinery and its rules on men's moral ideas he is trapped into holding the mistaken notion that the relation between the formulation of law and the social institutions it is designed to control is a one way street.

Finally, I think it is obvious to anyone who reads Olivecrona's *Law as Fact* that his theory of legal obligation depends directly upon "the peculiar dogmatic insistence," as Professor Hart calls it, "that if a statement cannot be analysed as a statement of fact or expression of feeling it must be 'metaphysical' " [42]—that is, mystical or meaningless. Aside from Olivecrona's atomistic assumption that objective reality is the sum-total of self-contained entities existing in time and space, [43] upon which this insistence is based, this is the most basic of all the presuppositions underlying his entire legal theory. For again, it forces him to choose between saying either that the binding force of law is imaginary or that it is metaphysical—between explaining it either in terms of men's motives conditioned by society's power-brokers or in terms of some supernatural *Ought* existing outside the world of time and space (which, he says, is the option Hans Kelsen accepts). If these were the only alternatives open to him I could at least understand why he chose as he did, but the selection appears to be somewhat larger. By being pressured from the outset by his philosophical presuppositions to assume that it is not, Olivecrona makes, I think, a false start in his search for the reason men have an obligation to obey laws.

VI. SANCTIONS

Another and radically different answer to the question, "What is the reason men are under an obligation to obey laws?" is that given in terms of sanctions. The word sanction has been given many meanings by the courts [44] but the original and still most widely used is "penalty or punishment provided as a means of enforcing obedience to a law." [45] Austin,

[39] *Id.* at 117; *Law as Fact, supra* note 34, at 546-47.

[40] LAW AS FACT 112-115; *Law as Fact, supra* note 34, at 549.

[41] LAW AS FACT 153.

[42] Hart, *Scandanavian Realism,* [1959] CAMB. L.J. 233, at 236.

[43] LAW AS FACT 14, 77, 128; *Law as Fact, supra* note 34, at 554.

[44] People v. Kraft, 148 N.Y. 631, at 635, 43 N.E. 80, at 81 (1896).

[45] EARL JOWITT, DICTIONARY OF ENGLISH LAW 1584 (1959); *cf.* 78 C.J.S. 579 n.36.

of course, used this meaning, too. A sanction, he said, is "an evil, incurred, or to be incurred by disobedience to a command" [46] and after he said it he went on to link the meaning of sanction with that of obligation in a way that continued until very recently to dominate Anglo-American jurisprudence. That is to say, he made "sanction" the hallmark of "obligation": "Obligation is liability to... evil, in the event of disobedience" [47] and, therefore, "a law which wants a sanction... is not binding." [48] Thus, while maintaining that, motives and expediential reasons aside, the right (that is, moral) reason for obeying laws is to be found by looking to the principle of utility, Austin at the same time held that the reason men are under the obligation to obey them in the first place is because they are sanctioned. The courts have put the point this way: "the obligation arising from conscience... [only] influences..., and even its influence operates with various degrees upon different individuals; whereas the legal obligation... is the chain of the law, which binds equally all men, and compels them, by a real necessity, to perform their duties; and it is that necessity which constitutes the true character of an obligation." [49] This entire statement could have been taken straight from Blackstone [50] and correlative to it is the view that "want of right and want of remedy are the same thing" [51]—in the sense that a person has a right only insofar as he has a remedy.

This way of looking at obligation is of course sharply at odds with the view I promised earlier to defend, that obligation is the rational necessity of freely choosing means necessary to a desired end. For although both make room for the belief that men are really under the necessity of obeying laws and not, as Olivecrona insists, only under the illusion that they are, they differ with respect to the way they depict and account for that necessity.

What bestows an initial plausibility upon definitions of obligation in terms of sanction is the fact that, given the inclinations of men to anti-social behaviour, there can be little doubt that legal sancions are a necessity to the enforceability of law. The "vital difference," the courts have said, "between a legal obligation and a moral obligation is that it is practicable to enforce the former and impracticable to enforce the latter." [52] This is true enough but to assume that because sanctions are needed in order to enforce laws that the obligation men are under to obey them can correctly be understood in terms of sanctions is to misunderstand altogether the relations among sanction, obligation, and law. Having an obligation to obey

[46] LECTURES ON JURISPRUDENCE 311 (R. Campbell ed. 1873).

[47] *Id.*

[48] THE PROVINCE OF JURISPRUDENCE DETERMINED 27 (H. Hart ed. 1954). For a discussion of the point that Austin's reference to sanctions as being "annexed" or "appended" to obligations is a "somewhat unhappy choice of words," see Tapper, *Austin on Sanction*, [1955] CAMB. L.J. 271, at 274.

[49] *See, e.g.*, Blair v. Williams, 4 Littel 34, at 41 (Ky. C.A. 1823).

[50] 1 COMMENTARIES 57.

[51] Blakemore v. Cooper, 15 N.D. 5, 106 N.W. 566 (1905). *Cf.* Harrison v. Bush, 119 Eng. Rep. 509, at 512, 25 L.J. 25, at 29 (K.B. 1855).

[52] Westerman v. Mims, 227 S.W. 178, at 180 (Tex. 1921).

a law does not mean being forced to obey it in order to avoid unpleasant consequences, and this can be shown by pointing out first of all as, R.W.M. Dias has done, that "to insist on enforcement or sanction as the criterion of [whether there is a] duty, even in the abstract form 'If *X*, then *Y*,' is to confuse two separate ideas—that of the prescription of behaviour and of ensuring obedience," [53] and then by pointing out that because laws are complete and thus binding even before sanctions are affixed to them, they stand in no need of sanctions in order to create obligations. We "are persuaded," an American court said, "that either the Congress or the Legislature may make a perfectly valid statute a rule of action, without providing any penalty or sanction;" [54] and in *Eastern Distributers, Ltd. v. Coldring (Murphy)*, Devlin asked, "How is the present case affected by the fact that the hire-purchase agreement is unenforceable? If the Act said that it was void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be unenforceable. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced." [55]

In sum, laws place men under the obligation of obeying them as soon as they prescribe ways of acting and regardless of whether or not they have sanctions attached to them. Hence I have concluded that any attempt to explain why men ought to obey laws by defining obligation in terms of sanctions will necessarily fail. To this extent, at least, I concur with Olivecrona, [56] and with A. R. White, who has pointed out that sanctions "are not legal bonds; they are measures employed to strengthen those bonds." [57] As such, they can take the form not only of punishment, through deprivation, [58] but also of rewards—for example, for the arrest and conviction of criminals [59] or as pensions to encourage men to engage in public service. [60] Their function, generally, is to serve as an inducement to men to obey the laws they have the obligation to obey; it is not to create that obligation.

VII. Obligation

We have reached the point now where, having blocked the concepts of sanction and motive off from the notion of obligation, I can more easily present a defence of the thesis that the reason men have an obligation

[53] *The Unenforceable Duty*, 33 Tul. L. Rev. 473, at 475 (1959).

[54] State v. U.S. Express Co., 164 Iowa 112, at 124, 145 N.W. 451, at 456 (1914).

[55] [1957] 2 Q.B. 600, at 614, [1957] 2 All E.R. 525, at 534 (C.A.).

[56] Law as Fact 12-13. We agree for different reasons however. His radically behaviouristic psychology and notion that laws are "independent imperatives" lead him to hold that sanctions are not essential to obligation because, although there is in realty no such thing as the binding force of law, men can be conditioned to think there is and that they ought to yield to it.

[57] *On Being Obliged to Act*, 1 The Human Agent 77 (Royal Institute of Philosophy Lectures 1968).

[58] State v. Cowen, 231 Iowa 1117, at 1121, 1127, 3 N.W.2d 176, at 179, 182 (1942).

[59] Kinn v. First Nat'l Bank, 118 Wis. 537, 95 N.W. 969 (1903).

[60] *In re* Hoag, 227 F. 478 (D.N.Y. 1915).

to obey laws is that the laws' content—that is, their provisions, stipulations, and requirements—specify ways of acting necessary for the attainment of desired ends.

My defence of this position rests upon two points. The first is that the overriding aim of laws is to direct its subjects to ends, to function as means of regulating and ordering human conduct. To consider this point in detail would mean going unnecessarily into what Pollock and Maitland have called the "theoretical part of politics" [61] and all I am asking the reader to accept here is the notion, which I hesitate to belabor because of its relative triteness: that laws are rules. That they are does not even admit of demonstration, being simply a statement of the empirical fact that social groups do conduct their affairs according to rules and that when they do they, or at least we, call those rules "laws." Suffice it to say that this point is most explicitly expressed by those who, like Pound, regard laws formally as instruments of social control [62] and by those like Blackstone [63] and Professor Hart [64] whose descriptions of law reflect an emphasis upon guidance. The point is perhaps most deeply hidden—although nevertheless present at least by implication—in descriptions that focus upon the official acts of law-making and adjudication, such as one finds in the writings of the American Realists. [65] The reader is not being asked to accept the complete form of any of these definitions or descriptions, however, but only that aspect which is common to them all: the notion that laws are "rules promulgated by government as a means to an ordered society." [66]

The second point central to the defence of my thesis is that the ends to which laws direct their subjects are desired, that laws are formulated according to the social needs of the people [67] and are something more than "mere will exerted as an act of power." [68] An exhaustive treatment of this topic, too, belongs to the theoretical part of politics but some elaboration at least is called for to prevent the reader from supposing that I am asking him to accept more than in fact I am asking of him. Thus, when I say that laws are rules that direct men to ends whose attainment serves in some way to fill their common social needs, I do not mean to imply that definitions of law that can be extended to cover rules that are legally valid but formally unjust [69] must be ruled out on *logical* grounds. I mean only

[61] 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW xxiii (2d ed. 1898).

[62] *E.g.*, INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1954).

[63] 1 COMMENTARIES 44.

[64] CONCEPT 79.

[65] *E.g.*, C. GREY, THE NATURE AND SOURCES OF THE LAW 103 (1931): laws are rules laid down by judges "according to which they deduce legal consequences from facts."

[66] Miami Laundry v. Florida Dry Cleaning and Laundry Bd., 134 Fla. 1, 183 So. 759, at 764. (1938). *Cf. In re* Baldwin Twp., 103 Pa. Super, 106, 158 A. 316 (1931); 305 Pa. 490, 158 A. 272 (1931).

[67] People v. Brown, 175 Misc. 989, 27 N.Y.S.2d 241 (County Ct. 1941).

[68] Opinion of Justices, 66 N.H. 629, 33 A. 1076, at 1078, *cited in* City of Bangor v. Etna, 140 Me. 85, at 89, 34 A.2d 205, at 208 (1943).

[69] C. GREY, *supra* note 65, at 105-6; *See generally* CONCEPT chs. 8, 9; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, at 600-20.

that (i) in communities whose members are allowed to develop their social institutions through the exercise of free decisions, public policy—by which following the courts I mean "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good" [70]—is operative and that (ii) in those communities what is deemed "injurious to the public" or "against the public good" is determined in light of the "welfare of all the citizens in the society." [71] Were matters not determined in this way, punishment in the case of non-compliance with the rules could not be justified in these communities [72]—nor, it might be remarked, could sense be made of such instruments as the British Promissory Oaths Act, which requires judges and magistrates to swear to "do right to all manner of people after the laws and usages of this realm." [73]

By making use of the two points just introduced it becomes possible to show why although there would be no laws in the first place and thus no rules making certain actions legally obligatory unless they were made by those possessing legitimate authority, that nevertheless the obligation men are under to obey them arises not from any command given by the law-maker that they be obeyed (that is, threat of sanction) but from the fact that what the laws direct men to do is in some sense necessary for the public welfare. My first move toward showing this consists in explaining the meaning of "... in some sense necessary...."

The term "necessary" has various uses and in its construction the courts have said, "the subject, the context, [and] the intention of the person using [it] are all to be taken into view." [74] Radically, though, it means "what cannot not be," and its use in the phrase "in some sense necessary for the public welfare" is intended to make the point that what is merely useful for the attainment or preservation of the public good is not fit matter for the content of laws. [75] At the same time, however, what is necessary can be absolutely or only relatively so, and laws direct men to act in ways that are, with respect to the public welfare, both. A law providing for police surveillance is an example of the first. One providing for the surveillance of foods and drugs is, in Canada, England and America, at any rate, an example of the second. [76]

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[70] Egerton v. Brownlow, 10 Eng. Rep. 359, at 437 (1853).

[71] The phrase "welfare of all the citizens in the society" is one used by the courts to embrace a "variety of interests calling for public care and control." *See* State v. Hutchinson Ice Cream Co., 168 Iowa 1, at 10, 147 7 N.W. 195, at 199 (1914).

[72] *Cf.* Goodhart, *An apology for Jurisprudence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 283, at 291-292 (P. Sayre ed. 1947).

[73] 31 & 32 Vict. c. 72 (1868).

[74] McCullough v. Maryland, 4 Wheat. 316, at 412, 4 L. Ed. 579, at 603 (1819). *Cf.* Bridges v. Charlotte, 221 N.C. 472, at 481, 20 S.E.2d 825, at 831 (1942).

[75] By "merely useful" is meant not even "reasonable, requisite, [or] proper for the accomplishment of the end in view." Butte, A.E. Pacific Ry. v. Montana Ry., 16 Mont. 504, 41 P. 232 *cited in* State v. Dist. Court of Fourth Judicial Dist., 300 P. 916, at 918 (Mont. 1931). What is "merely useful" could of course become necessary under certain conditions—as, *e.g.*, at present, mechanical signal lights on certain road vehicles.

[76] Under certain circumstances surveillance of such items could become absolutely necessary.

It is precisely because laws' content specifies ways of acting that *are* necessary (either absolutely or relatively) for the attainment of the public good that men are under an obligation to obey them. The necessity of obeying them, however, does not arise because men desire the attainment or preservation of the public good but because what the laws direct them to do or refrain from doing is necessary (absolutely or relatively) to the fulfillment of their desires. Thus for example, "desiring security" is not the reason why men who have such a desire are under an obligation to obey a law forbidding the carrying of firearms; that reason rests, rather, on the fact that not allowing firearms to be widely carried is necessary to their security. [77] And, it might be remarked, regardless of whether those in authority enact a law prohibiting the carrying of firearms, if not carrying them is necessary to the security they desire, men are under an obligation not to carry them. Their obligation would not be a legal one, of course, but it would be nonetheless real. Nor would it be of a fundamentally different kind. For underlying all types of obligation—moral, legal, religious, and political—is the rational necessity of acting in ways necessary to attain a desired end. [78]

Sometimes it is clearly apparent that the content of laws does indeed specify ways of acting that are necessary for the public welfare, and if the above analysis of obligation be accepted it can easily be seen why men are under the necessity of obeying them. Such, for example, are laws that prohibit murder or treason or that prescribe certain standards for teachers' training. Here the connection between acting in accordance with the laws and attaining or preserving the public good is clear. Sometimes, however, the connections are not so apparent. In what sense, for example, is there a necessary connection between obeying that section of the British Road and Rail Act of 1933 that demands the possession of an "A" licence by citizens who use their vehicles to carry goods for hire or reward and the attainment or preservation of the public good? [79] To cite another example, how can it be said that there is a necessary connection between obeying a speed law directing drivers not to exceed 30 mph in built-up residential areas and securing the public good or safety? Does it not seem rather to be a matter of indifference whether the city officials set the speed at 30 or 28 or 32 mph? And if it is, how can one say that this law ought to be obeyed because its content specifies a way of acting necessary for safety?

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[77] *Cf.* White, *On Being Obliged to Act,* 1 THE HUMAN AGENT 76-77 (Royal Institute of Philosophy Lectures 1968).

[78] In using relationships of means to ends as a model for obligation it is necessary to point out that the word "means" can have various senses. The two extreme senses are displayed in the statements "The 9 a.m. train is a means to Toronto" and, *e.g.,* Aristotle's "Speculation is a means to happiness." For Aristotle speculation *is* happiness; it is the formal constituent without which happiness is impossible. It is, therefore, not "extrinsic" but "intrinsic" to it. The train to Toronto on the other hand, is "extrinsic." "Not carrying firearms" is closer to the former than the latter, insofar as not carrying them is not "extrinsic" to security. One *is* secure in not carrying them. The model itself has to be adjusted this way whenever it is said or implied that obeying a law is a means to an end.

[79] This example is taken from P. DEVLIN, THE ENFORCEMENT OF MORALS 27 (1965).

Examples such as these could easily be multiplied, for there is a wide range of activities called "statutory offenses" [80] from which they could be drawn. These offenses are referred to by the courts and by philosophers of law as *malum prohibitum.* [81] Common to all such activities is the fact that they are understood to be wrong not because they are "evil in themselves" (*malum in se*) but because, although initially "indifferent," they have been made wrong through legal proscription. As such, they seem to fit more smoothly into a theory of obligation such as Austin's, in which all laws are said to be binding because they have been willed by a sovereign, and to defy explanation by a theory such as I am attempting to defend, in which laws are held to be binding because they specify ways of acting necessary for the public welfare. For if an act is "indifferent" how can it be necessary?

In attempting to deal with the difficulties presented by cases of this sort it may prove helpful to return to the speed-law example and, in relation to it, say two things about the notion of "indifference." The first is that it is not a matter of indifference whether such a law be enacted. Some speed limit must be set, for setting one is not the kind of thing it would, under modern-day circumstances, be merely useful to do. The desire to create or to preserve conditions of safety in such circumstances demands that it be done. Secondly, in relation to the law's content, although it may actually be a matter of indifference whether the limit is set at 28 or 30 or 32 mph, this does not imply that the limit finally settled on by the officials is arbitrarily fixed. To say that there is a quality of "indifference" to the content of a law is not to say that the content is indifferently decided upon. Legislation may not be a science, but neither is it an activity that proceeds chaotically, without the aid of factual data. It is an art [82] and in cases such as the one being considered here, laws are normally drawn up on the basis of information given to officials by civil engineers for example. This is not to deny that there is at least some range of speeds within which conditions of safety can be secured, nor consequently, is it to deny that it is a matter of indifference which speed is chosen from among those within the limited range designated by the engineers. It is to say only that the option selected is selected rationally. [83]

Once the option has been written into law it ceases to be a matter of indifference whether drivers exceed 30 mph, for they then come under an obligation not to do so. What we want to know is whether we can gather from this that the reason they have that obligation is because the lawmakers, in choosing to set the limit at 30 mph, have willed them to have it. In order to answer this question all one need do is recall where the element of indifference fits into the law-making process. As I tried to show, it does

[80] *Id.* at 28.

[81] 1 COMMENTARIES 57-58. *Cf.* Coleman v. State, 161 So. 89, 90, (Fla. 1935), People v. Boxer, 24 N.Y.S.2d 628, at 632-33 (Ct. Spec. Sess. 1940).

[82] Even Roman law was understood to be an art concerned with human affairs. In the Middle Ages law-making was said to be a part of prudence, *viz.*, good statesmanship. See AQUINAS, SUMMA THEOLOGIA 2-2, 50, 1.

[83] For an extended treatment of the difficulties inherent in rationally determining the content of laws, see CONCEPT 123-32.

not enter at the point where the existence of the law itself is in question, for some speed limit must be set if the desired conditions of safety are to be secured. Nor does it enter at the point where a rough estimate is being made of the range of speeds from among which a limit can be selected, for it is not a matter of indifference whether that range is extended so as to include speeds between 5 and 80 mph. The first is probably too slow for conditions whereas the second is too fast. The indifference enters, rather, when the officials set out to select a limit from within the range determined by the engineers as being conducive to safety. Thus, although drivers have an obligation to drive at whatever speed is conducive to safety regardless of whether a statute is drawn up, since driving at such a speed is necessary to that desired end, the reason why they have the specific obligation not to exceed 30 mph is because officials possessing the authority to determine what a safe speed is, have set the limit at that point. It would, therefore, be misleading to assert without qualification that the reason men have an obligation not to exceed 30 mph is because officials have willed them not to exceed it. For they have done so because they have decided as rationally as possible that 30 mph is the upper limit beyond which conditions of safety may be jeopardized. To say otherwise is to imply that the limit was arbitrarily set.

In sum, not exceeding 30 mph is what the law's content states because the lawmakers have willed that it do so. Nevertheless that law does not become binding because its makers will it to be obeyed; it binds because its content directs drivers to act in a way necessary for their safety. Here, then, is the principle that applies to all those situations in which the content of laws is indifferent regarding their specific details. Officials who have the authority to make laws do so when they decide that legislation is called for in order to promote the public welfare. Because their decisions to legislate are made on this basis men are not free rationally to disregard the laws they pass. There are only two ways of denying this: either by asserting that those who make laws do not have the authority to do so or by denying that there is a need for legislation in the first place. Normally, in a free society, whenever disputes arise over the binding force of law the onus is thought to be on the citizen to defend the first point, whereas the burden of showing the need for legislation falls upon those having the authority to govern. But if neither the need nor the authority for law-making can be shown to be lacking, men can justifiably be said to be under an obligation to obey the laws that are made accordingly. Their motives for heeding or disregarding this obligation may be good or perverse and if they decide to disregard it they may well be subject to sanctions. As I have tried to show, however, neither motives nor sanctions create it.

VIII. Conclusion

The theory of obligation worked out here has been explained on the model of factual relationships of means to ends. Its acceptance over theories based upon the "gunman" model or upon the assumption that the scientific method can be applied to law depends upon whether one is prepared to agree that laws are primarily rules promulgated as means to a rationally

ordered society and only secondarily orders backed by threats. For if laws are essentially rules laid down to guide and direct social activities, the reason men are under the necessity of obeying them will be found by analyzing their directive rather than sanctioning character. Similarly, insofar as they are enacted and administered in order that men might attain social ends, they cannot intelligibly be treated as if they were laws of physical science. The legal theorist is called upon to explain not simply how the functions of making and administering the law are exercised in themselves but how they are exercised in relation to their purposes. [84]

Olivecrona has said that if the binding force of law is a reality it will not be affected by any theories. [85] He means by this that if it is "real" it will "continue to bind, whatever is written about it," and in this sense what he says is correct. On the other hand, however, there is a sense in which what he says is misleading; for certain segments of the law are undergoing changes in ways that may well reshape the criteria for determining the conditions under which laws have legal effect, and the direction these changes take will more than likely be influenced by the jurisprudential preconceptions held either implicitly or explicitly by the lawmakers responsible for making them. This is most clearly true, perhaps, with respect to the law of contracts. [86] By looking briefly into its theory in order to determine why contracts oblige we can show this to be so.

A contract has been defined as "an agreement which creates an obligation or right *in personam* between the parties to it" [87] and normally takes the form of a promise [88]—a "declaration which gives to the person to whom [it is] made a right to expect or claim the performance of some particular thing." [89] What I want to argue is that the way theorists look at contractual obligations depends largely upon the way they conceive obligation in its broad sense, so that, consequently, criticisms of the former depend ultimately upon criticisms of the latter. Thus, for example, and in keeping with the theory of obligation worked out above, I should maintain that men are under the rational necessity of abiding by their contracts because doing so is necessary for the attainment of desired ends. These are, basically, the benefit of the individual contractors themselves and, indirectly, the public welfare of the community. For a contract effects a re-ordering of jural relations between individual persons and if it is not kept this new order will be disrupted, thus detracting from the promisor's own private good. And because this same contractual promise is also a device that provides for such "self-binding operations" that are in fact required for the on-going existence of social groups, not to keep it will also indirectly damage the public welfare by undermining the mutual confidence men must have in one another if they

[84] *Cf.* 1 R. POUND, JURISPRUDENCE 100 (1959).

[85] LAW AS FACT 10.

[86] P. DEVLIN, *supra* note 78, at 58-60; R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 158-59 (1954).

[87] SALMOND ON JURISPRUDENCE 338 (P. Fitzgerald ed. 1966). *Cf.* Buffalo Pressed Steel Co. v. Kirwan, 138 Md. 60, at 64, 113 A. 628, at 630 (1921).

[88] 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1 (1936). *Cf.* SALMOND ON JURISPRUDENCE, *supra* note 85, at 339.

[89] Hoskins v. Black, 190 Ky. 98, at 101, 226 S.W. 384, at 385 (1931).

are going to live together. [90] I should emphasize, however, as I did when discussing obligation in general, that it is not the desire for these ends that places men under the obligation to act so as to promote them but the fact that only by so acting (for example, keeping their promises) can they promote those ends which they desire.

This way of looking at contractual obligation is at variance with theories in which the general meaning of obligation is explained in terms of sanctions. In their extreme form these lead to the view one finds in Holmes, that the making of a contract is not, formally, the making of a "promise to perform" but is rather the assumption of a conditional liability to pay damages. [91] This view, however, not only fails to account for the difference between contracts entered into in order to establish purely commercial relationships and those in which non-commercial obligations play a role, [92] but it also invites a particularized form of one of our earlier criticisms of the attempt to employ the notion of sanction to explain why men have an obligation to obey laws; namely, that to do so is to confuse the prescribing of behaviour with the ensuring of obedience. Applied to Holmes' view that "having a contractual obligation" means "being conditionally liable to damages," this criticism directs attention to the fact that if there is no obligation to perform, refusal to do so cannot be a breach. [93]

Explanations of contractual obligation in terms of motive, on the other hand, normally turn upon the doctrine of consideration—or in Continental systems, of cause [94] or consent—that is, a meeting of wills. These, too, run counter to the view I sketched out above; for whereas I focused upon the promise itself that lies at the heart of contracts in seeking to explain why men have an obligation to keep them, those who employ the doctrines of consideration and "cause" look to something that, in Lord Wright's words, is "extrinsic and evidentiary," [95] namely, the motive men have for entering into a contract in the first place. [96] But just as the attempt to find in men's motives an explanation as to why they have an obligation to obey laws winds up by giving reasons why they obey them rather than why they ought to do so, so the attempt to use the notion of motive to explain why men have an obligation to fulfill contracts ends up by blurring the distinction between their intention to bind themselves legally and their consent to give effect to the exchange of jural relations. [97]

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[90] *Cf.* CONCEPT 192-93.

[91] THE COMMON LAW 300-301 (1882); *The Path of the Law,* 10 HARV. L. REV. 462 (1897); 2 POLLOCK—HOLMES LETTERS 200 (M. Howe ed. 1942).

[92] H. BERMAN, THE NATURE AND FUNCTIONS OF LAW 392 (1958).

[93] See Pollock in 2 POLLOCK—HOLMES LETTERS, *supra* note 90, at 201; *cf.* Buckland, *The Nature of Contractual Obligation,* 8 CAMB. L.J. 247 (1942).

[94] "Cause" is also operative in legal systems derived therefrom, such as those in South America and Scotland.

[95] Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?,* 49 HARV. L. REV. 1225, at 1252 (1936).

[96] *See, e.g.,* Cassinelli v. Stacy, 238 Ky. 827, at 834-35, 38 S.W.2d 980, at 983 (1931). *Cf.* LA. CIV. CODE art. 1896 (1971). QUE. CIV. CODE art. 984 (1966).

[97] Wright, *supra* note 93.

Theories as to why men have an obligation to fulfill contracts thus have a direct bearing upon the development of contract law itself and, consequently, upon the way actual cases are decided.[98] And, as I have tried briefly to show, the way one explains why men have an obligation to keep their contractual promises will, if he is consistent, be determined by the way he explains why they have an obligation to obey laws generally. For this reason there is no question of whether the philosophical concept of obligation is integral to the theory and practice of law. The only question is how it is to be understood.

[98] *See, e.g.*, Conradie v. Russouw, [1919] S. Afr. L.R. 279, at 321 (App. Div.).