

LEGAL OBLIGATION AND THE NATURAL LAW

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Ever since the speeches of Callicles in the *Gorgias*¹ and Thrasymachus in the *Republic*,² the problem of legal obligation has continued to obtrude itself into our jurisprudence. By definition, we are legally bound to obey the commands of the law. But to what extent, if any, does this legal obligation correspond to or reflect any moral obligation to obey?³ The thesis of this Article is that the search for a moral justification for legal obligation cannot remain a narrow, discretely cabined inquiry. As it turns out, the question of legal obligation cannot be answered without raising the question of how to identify a just polity, or the features of a government worthy of obedience. But the question of the just political society itself raises broader questions concerning the nature of moral reasoning and of moral justification in general. This Article recognizes that it is possible for us to pronounce the problem of justifying legal obligation to be insoluble. To abandon the search, however, would be to grant that as among the regimes of Jefferson, Stalin, Pol Pot, and George Bush, no real differences exist in the moral status of each regime's demand for obedience. One's obligation to obey each regime would be simply a matter of morally arbitrary convention, and one's choice to obey or not to obey an expression of convention or mere arbitrary preference or taste.

This Article will for the most part assume, however, that we cur-

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¹ PLATO, *GORGIAS* 50-52 (W. Helmhold trans. 1952).

² PLATO, *REPUBLIC* 15-21 (F. Cornford ed. 1945).

³ That there is at least a coherent conceptual distinction between bare institutional legal obligation and a moral obligation to do things such as obey the law seems well-established. See, e.g., Beehler, *The Concept of Law and the Obligation to Obey*, 23 *AM. J. JURIS.* 120, 120 (1978).

rently have at least an arbitrary preference to avoid such a result, if possible. But again, no narrowly circumscribed solution to the problem of justifying legal obligation seems possible. Rather, the narrowest possible affirmative solution to the problem of the moral character of legal obligation involves recourse to what is recognizably a natural law approach. Not just any recognizably natural law approach will suffice, however. If we are to solve the problem of legal obligation in an affirmative way, we are led inevitably to a single possible solution involving a distinctively, unmistakably, theistic version of the natural law. It is something of an understatement to suggest that proving such a solution works is a task beyond the scope of this Article. But some effort will be expended on showing not merely that the choice really is as stark as we have supposed, but that the theistic natural law approach is susceptible of progressive development and not without contemporary plausibility and intellectual appeal.

I. LEGAL OBLIGATION AND THE STATE OF CONTEMPORARY THEORY

A review of contemporary writing on the problem of legal obligation leaves one with the impression not so much of pluralism, but of disarray and of uncontrolled disintegration. From the time of Plato's *Crito*⁴ at least until recently, the search for a moral obligation to obey the law was thought to be a meaningful, intelligible question even if it put into question the moral soundness of an institution or of an established social practice of conventional obedience.⁵ Sometimes, the question was thought to call for a generally negative, or philosophically anarchistic answer.⁶ More typically, though, at least a prima facie general obligation of obedience has been thought to be derivable on one or more of several theories. The most popular of these arguments have been distinguished by Professor Greenawalt as promise, benefit, or need-based theories.⁷

⁴ This is not to suggest that any of the possible justifications for legal obligation found within the *Crito* have been found generally persuasive. See Weinrib, *Obedience To the Law in Plato's Crito*, 27 AM. J. JURIS. 85, 86 (1982).

⁵ See Gewirth, *Obligation: Political, Legal, Moral*, 12 NOMOS: POL. AND LEGAL OBLIGATION 55, 60-61 & n.6 (1970).

⁶ See generally R. WOLFF, IN DEFENSE OF ANARCHISM (1970). *Contra* J. REIMAN, IN DEFENSE OF POLITICAL PHILOSOPHY (1972).

⁷ See Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 GA. L.

Promise-based, contractual, or consent-based theories of legal obligation take on their most familiar form in the writings of John Locke.⁸ Roughly, one is morally obligated to obey the law because one has in some sense voluntarily agreed to do so. Benefit- or gratitude-based theories, in contrast, view the moral obligation of obedience to the law as springing from the gratitude we feel, or ought to feel, for benefits conferred on us by the state or by our fellow citizens acting through the state.⁹ Need- or utility-based theories, finally, argue that general obedience to the law is morally binding at least where it is of great social value, or where it makes possible the good of a recognizable social and political life.¹⁰

It is natural to ask whether any of these theories work, or is correct in some objective sense, or, on the evidence, is a more reasonable or justified theory than the others. To borrow a phrase from John Stuart Mill, can "considerations . . . be presented capable of determining the intellect . . . to give . . . its assent."¹¹ in favor of any of the theories? The answer, as it turns out, is "no." The vast relevant literature cannot be briefly summarized. But it seems clear that each theory referred to above fails in the sense that objectors can inevitably make just as rational an argument for rejecting the proffered theory of legal obligation. If it is the goal of the proponents to establish their own theory as uniquely reasonable, or as more justified and therefore more worthy of belief than its rivals, then each theory fails in ways that seem irreparable in principle.

It is of course impossible within this Article's compass to state the major arguments for and against each of the theories of legal obligation noted above, let alone evaluate the cogency of each objection in particularized fashion. The tenor of the most familiar arguments can at least be illustrated, however. As against contractual theories of legal obligation, for example, it is often suggested

REV. 727 (1984) (Jurisprudence Symposium).

⁸ See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslet ed. 1967).

⁹ See Walker, *Political Obligation and the Argument From Gratitude*, 17 *PHIL. & PUB. AFF.* 191, 192 (1988).

¹⁰ See, e.g., R. FLATHMAN, *POLITICAL OBLIGATION* 257 (1972). For a contemporary emphasis on need-fulfillment as a coherent and often practical moral criterion, see generally D. BRAYBROOKE, *MEETING NEEDS* (1987).

¹¹ J.S. MILL, *UTILITARIANISM*, in *MILL'S ETHICAL WRITINGS* 279 (J. Schneewind ed. 1965), quoted in Frankena, *Is Morality Logically Dependent on Religion?*, in *RELIGION AND MORALITY: A COLLECTION OF ESSAYS* 295, 315 (G. Outka & J. Reeder, Jr. eds. 1973).

that such theories result in far too few persons being morally bound to obey the law,¹² even in liberal democracies.¹³ Contract theory is criticized as an abstract ideological construct of dubious relevance to social life as it is.¹⁴

Benefit- or gratitude-based theories of legal obligation have fared no better. Professor Greenawalt has observed, for example, that "the relevance of gratitude to the relations between citizen and state is doubtful and the scope of any duty derived from gratitude would be highly uncertain."¹⁵ It seems that the most significant benefits government confers upon us are conferred on us involuntarily¹⁶ or are perhaps antecedently owed to us as moral rights. Even if gratitude is the response morally called for in such cases, it is unclear why the form in which our gratitude should be manifested must include a generalized obligation of obedience.¹⁷ Even if Frankenstein's monster can rationally feel gratitude for being created, it is hardly clear why he owes his creator, Dr. Frankenstein, even a *prima facie* duty of obedience if the latter is demented. While it is perhaps sensible to feel gratitude toward an abstract institution,¹⁸ even a person who has benefitted from the laws may reasonably feel that the government, as opposed to a university, perhaps, is of purely instrumental value, or that the benefits received from the government have been at least equalled by one's contributions or one's recompense in forms other than gratitude-based obedience. Finally, even a net beneficiary of the laws might feel that she was nonetheless cheated, that the government hypocritically delivered less than it had somehow promised, thus

¹² See R. FLATHMAN, *supra* note 10, at 209 (remarking that "[o]ne of the standard embarrassments of consent and contractarian theories of political obligation is that accepting them seems to lead to the conclusion that very few people have or have ever had political obligations"); Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 961 (1973) (criticizing on these grounds the Lockean doctrine of tacit consent). At least one consent theorist has opted simply to accept this dismaying conclusion. See J. TUSSMAN, *OBLIGATION AND THE BODY POLITIC* 37 (1960). For criticism of Tussman's theory in particular, see Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990, 997-99 (1965).

¹³ See Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 819 (1984) (suggesting that "[e]ven modern liberal democratic governments do not enjoy the consent of the governed").

¹⁴ See, e.g., C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* 177 (1979).

¹⁵ Greenawalt, *supra* note 7, at 754.

¹⁶ See Smith, *supra* note 12, at 953.

¹⁷ *Id.*

¹⁸ See Walker, *supra* note 9, at 197-98.

negating any gratitude-based obligation to obey.

Finally, need-based or utilitarian theories of legal obligation suffer, partly because of their calculating quality, from the defect of generating at most an uncomfortably narrow or uncertain obligation to obey.¹⁹ Utilitarian theories of legal obligation do not explain why we ordinarily view deliberate violations of law as more serious than other failures to maximize utility, such as the failure to send money to a worthy charity.²⁰ Far more serious, though, is the widespread sense, on various grounds, of the inevitable implausibility of any form of utilitarianism as a general moral norm.²¹ We do not convict or acquit criminal defendants because it will maximize net average social utility to do so. Even where utilitarianism reaches satisfactory results, it seems to do so for the wrong reasons.²²

Increasingly, it has seemed that these diverse attempts to solve the problem of legal obligation represent not the healthy, creative ferment of unconstrained inquiry, but some sort of methodological breakdown. Some sense of this breakdown is conveyed by Professor Kurt Baier's discussion²³ of the limits of a contract-based solution to the problem of legal obligation. Professor Baier notes that an enforceable contract between competent adults undoubtedly establishes a sort of internal institutional, conventional, positivistic "bindingness."²⁴ But this internal institutional bindingness does not by itself establish any moral duty to carry out one's merely institutional obligation.²⁵ Other normative premises, in need themselves of appropriate support or "proof," are needed.²⁶ Whether we

¹⁹ See Smith, *supra* note 12, at 967.

²⁰ See Greenawalt, *supra* note 7, at 754.

²¹ See, e.g., J. RAWLS, *A THEORY OF JUSTICE* 167-92 (1971); J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973); and, more broadly, Grisez, *Against Consequentialism*, 23 *AM. J. JURIS.* 21 (1978) and Grisez, Boyle & Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99 (1987). For a range of approaches to John Stuart Mill's version of utilitarianism, see J.S. MILL, *UTILITARIANISM WITH CRITICAL ESSAYS* (S. Gorovitz ed. 1971) (including in particular a reprinting of Wasserstrom, *The Obligation to Obey the Law*, 10 *UCLA L. REV.* 780 (1963), at 285-305).

²² See, e.g., Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *supra* note 21, at 77-150.

²³ Baier, *Obligation: Political and Moral*, 12 *NOMOS: POL. AND LEGAL OBLIGATION* 116 (1970).

²⁴ *Id.* at 133.

²⁵ *Id.*

²⁶ *Id.* at 133 & n.14.

choose a contractual, a benefit-based, or a utilitarian approach to legal obligation, we are thus led inexorably toward the gulf between factual premises and moral conclusions. Rightly or not, David Hume is often credited with recognizing the nonderivability of moral conclusions, such as a moral obligation to obey the law, from any combination of factual premises.²⁷ While the matter has been widely debated, especially in the 1960's, it seems clear that the is-ought gap has not been bridged with consensually persuasive success.²⁸

However, one can reasonably derive an ought from another ought. One common approach, therefore, has been to superficially solve the problem of legal obligation by building powerful normative assumptions into one's premises. Legal obligation then becomes a "second-order" moral problem, with the real work, and the real controversy, simply being pushed back one stage, to the level of the premises from which the morally charged legal obligation is derived.

For example, Professor David Richards argues that "[t]he moral obligation to obey the law turns on basic justice and free acceptance of benefits."²⁹ Professor John Rawls' approach similarly focuses on the obviously second-order moral requirement that we "comply with and do our share in just institutions when they exist and apply to us."³⁰ Professor Smith's theory relies upon, among other things, a prior distinction between acts wrong in themselves, and acts not wrong in themselves.³¹ On such views, the stage of deriving the obligation to obey the law is no longer itself of great

²⁷ See D. HUME, A TREATISE OF HUMAN NATURE 455-76 (1896).

²⁸ For a mere sampling of a large body of literature, see Donagan, *The Scholastic Theory of Moral Law in the Modern World*, in AQUINAS: A COLLECTION OF CRITICAL ESSAYS 325, 326 (A. Kenny ed. 1969); Flew, *On Not Deriving "Ought" From "Is"*, 24 ANALYSIS 25-32 (1964); Hudson, *The "Is-Ought" Controversy*, 25 ANALYSIS 191-95 (1965); Searle, *How To Derive "Ought" From "Is"*, 73 PHIL. REV. 43-58 (1964); Thomson & Thomson, *How Not To Derive "Ought" From "Is"*, 73 PHIL. REV. 512-16 (1964); Veatch, *The Defense of Natural Law in the Context of Contemporary Analytic Philosophy*, 14 AM. J. JURIS. 54, 58-60 (1969).

²⁹ Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 788 (1984). See also *id.* at 786 (describing justice, and hence legal obligation, as dependent upon, among other requirements, "distributive equality in basic goods of self-respect"). For a more thorough statement of Richards' approach to the general problem of the just legal order, see D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

³⁰ J. RAWLS, *supra* note 21, at 334.

³¹ See Smith, *supra* note 12, at 950.

interest, at least in comparison with the stage at which it is somehow determined that the government or society is basically just.

Recognizing this, Professor Joseph Raz went a natural step further. He reasoned that if we are to assume that the state is just, there is no important independent logical work left to be done by any purported general obligation to obey the law. In a just state, the obligation to obey "is at best a mere shadow of other moral duties. It adds nothing to them."³² A redundant duty to obey is a nonexistent duty to obey. This extreme conclusion is itself controversial,³³ but it seems plain that the problem of legal obligation has led ineluctably to broader problems of the just or good society. Solving the problem of legal obligation in any substantive sense requires ascertaining at least the general features of the just society.

Despite a recent burst of philosophical enthusiasm for the attempt, no contemporary effort to identify the basic contours of the just society has been an acknowledged success. Even the most widely admired attempt, that of John Rawls, has been mired in controversial assumptions³⁴ and dubious results.³⁵ The critical literature is massive and implacable.³⁶ Perhaps in response, or by

³² Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 139, 140 (1984). See also J. RAZ, *THE AUTHORITY OF LAW* 233-39 (1979) (denying even a prima facie obligation to obey the law, even in a just society).

³³ One might argue, for example, that a prima facie obligation of general obedience still has some role to play even in a generally just society in which it is assumed that there are independent moral reasons for obeying various laws "on the merits." Such an obligation, for example, might tend to reduce the arguably bad net consequences flowing from each actor's attempts to undeferentially measure the precise moral balance involved in generally obeying any particular rule, or the merits of obeying a particular law on a particular occasion. Accurately assessing the long-term consequences, the exemplary or demonstration effects, or the coordination problems engendered by disobedience may require, in Professor Dworkin's parlance, a moral Hercules. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 166 (1982).

³⁴ See J. RAWLS, *supra* note 21, at 146-47 (listing some basic assumptions underlying his "original position" methodology).

³⁵ See *id.* at 202-03 for perhaps the best-known formulation of Rawls' two principles of justice. A slightly revised formulation appears in Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 53 (S. McMurrin ed. 1982).

³⁶ For the merest sampling of this massive body of literature, see generally B. BARRY, *THE LIBERAL THEORY OF JUSTICE* (1973); *READING RAWLS* (N. Daniels ed. 1974); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); R. WOLFF, *UNDERSTANDING RAWLS* (1977); Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 115, 128-29 (1984) (noting "[T]here are many principles for ordering social life that would not be selected by the self-interested persons in the Original Posi-

way of clarification, Rawls has more recently sought to scale down the ambitions of his theory. For example, Rawls' scaled down theory of the just society simply assumes rather than derives, a modern constitutional democracy.³⁷

Other well-known recent essays into the realm of social justice have certainly fared no better. For example, Robert Nozick has criticized Professor Rawls' theory from an individual rights-based perspective,³⁸ arguing that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)."³⁹ Nozick acknowledges that he "does not present a precise theory of the moral basis of individual rights."⁴⁰ Actually, it would be fair to say that Nozick, perhaps recognizing the hopelessness of the enterprise, simply leaves his spirited assertion of exceptionally controversial individual rights essentially ungrounded, without any supporting argumentation or structure.⁴¹

Another approach, adopted by Professor Bruce Ackerman, is to seek a way of uneasily combining a liberal egalitarianism with the contemporary drift from objectively based morality into relativism and subjectivism. A crucial move in Ackerman's theory⁴² comes at the point in which he asserts that "[n]o reason is a good reason if it requires the power holder to assert . . . that his conception of the good is better than that asserted by any of his fellow citizens."⁴³ Predictably, Ackerman's theory has been cogently challenged.⁴⁴ Other pretenders have achieved similarly limited results.⁴⁵

tion. . . . The Rawlsian theory of fairness . . . rests on nothing more adequate than an appeal to individual 'prudence,' in the sense of cautious self-interest"; Smith, *supra* note 12, at 960 (suggesting that "Rawls' present position lacks intuitive support and . . . is not one which we must now accept, on pain of being unreasonable").

³⁷ See Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 224-25 (1985).

³⁸ See R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

³⁹ *Id.* at ix.

⁴⁰ *Id.* at xiv.

⁴¹ See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1240-41. For a range of responses to Nozick, see *READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA* (J. Paul ed. 1981) (of particular interest is Nagel, *Libertarianism Without Foundations*, at 191).

⁴² See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

⁴³ *Id.* at 11. For a sense of Ackerman's distributional egalitarianism, see *id.* at 63.

⁴⁴ See, e.g., the symposium, *Social Justice in the Liberal State*, 93 ETHICS 328 (1983).

⁴⁵ See, e.g., A. GEWIRTH, *REASON AND MORALITY* (1978) and GEWIRTH'S *ETHICAL RATIONALISM* (E. Regis ed. 1984); D. GAUTHIER, *MORALS BY AGREEMENT* (1986) and the symposium on *Morals By Agreement*, 97 ETHICS 715 (1987), as well as the critical essays in *THE NEW So-*

It is too late in the day to pretend that the project of justifying legal obligation, in either a direct or second-order fashion, requires only the further refinement of communitarian or broadly liberal theory for its success. When it is not engaged in the fruitless quest for such a theory, contemporary philosophy in a different mood has managed to convince itself that it is impossible "to decide rationally between incompatible valuational systems and basic moral principles. In this sense, there can be no justification in ethics."⁴⁶ In such bleak moods, many contemporary philosophers would concede privately that "there are no moral *truths*, . . . there is no moral *knowledge*,"⁴⁷ and that "all that we can ultimately do is to *commit* ourselves, to declare where we stand, to try by persuasion and rhetoric to bring others to share our point of view."⁴⁸ This view of moral conduct as sheer arbitrariness is thought to derive largely from the absence of any convincing, sufficiently substantive is-ought entailment relationship, as discussed above.⁴⁹

The skeptical mood of contemporary philosophers is reflected in the emerging view that the question of why one ought to obey the law is either pointless or self-answering.⁵⁰ Questions within a particular social institution or convention, such as whether something really is the law, are admissible, but questions external to the convention, such as whether one ought not stop one's institutionally sanctioned complicity in mass atrocities, are not.⁵¹ As the philosopher John Mackie bluntly put the matter, "[t]here is . . . no objectively prescriptive obligation to obey the law, for the simple reason that there are no objectively prescriptive obligations at all."⁵² Normative systems, including legal institutions, are thus simply reflec-

CIAL CONTRACT: ESSAYS ON GAUTHIER (E. Paul, F. Miller, J. Paul & J. Ahrens eds. 1988).

⁴⁶ Oppenheim, *Justification in Ethics: Its Limitations*, in 28 NOMOS: JUSTIFICATION 28, 32 (1986).

⁴⁷ Bambrough, *A Proof of the Objectivity of Morals*, 14 AM. J. JURIS. 37, 38 (1969) (emphasis in the original) (not endorsing this view).

⁴⁸ *Id.* (emphasis in the original). This quotation captures something of the flavor of Professor Richard Rorty's influential writings in the area of social theory. See, e.g., R. RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989).

⁴⁹ *Id.* See also *supra* notes 25-28 and accompanying text.

⁵⁰ See T. MCPHERSON, *POLITICAL OBLIGATION* 59 (1967).

⁵¹ For McPherson's view, see *id.* at 61, 64-65. This sort of pernicious conventionalism is also arguably endemic to Professor Richard Rorty's popular theory of liberal pragmatism. See generally R. RORTY, *supra* note 48.

⁵² Mackie, *Obligations To Obey the Law*, 67 VA. L. REV. 143, 143 (1981).

tive of nothing but convention and human will.⁵³

The natural reaction to peering into such a profound philosophical abyss being vertigo, some otherwise illusionless writers draw back from the full implications of this view. Mackie, for example, wrote of the possibility of "inventing" an obligation to obey the law and investing it with varying stringency depending upon the degree to which the legal system is thought to embody or reflect an "invented" norm of justice.⁵⁴ One suspects that, in practice, an "invented" legal obligation will inevitably be recognized as a nonexistent legal obligation, without practical power to guide authoritatively or to bind in any serious sense.⁵⁵

To say that Mackie's pseudo-ethical system is unstable in practice is hardly the end of the matter, however. It is not easy to say what the world would actually look like with all residues of moral thinking wrung out of it. While a Mother Teresa or an Albert Schweitzer would not be possible, it seems apparent that a Hitler, a Stalin, and a Pol Pot also depend, logically and practically, on moral thinking, however deranged. Instead of engaging in unceasing, self-destructive, internecine depredations, a thoroughly demoralized society would perhaps unanimously choose to plug into the closest technologically available approach to a perpetual gratification machine,⁵⁶ on the assumption that such a machine promised a better deal than living out one's life in more familiar fashion.

A world without legal or any other sort of binding obligation would thus probably not be one of ceaseless waves of violent conflict. To our tastes, however, imbued as we are with essentially moral concerns for human dignity, for human and civil rights, and

⁵³ See Leff, *supra* note 41, at 1229-30. For what might be seen as an extended response to Professor Leff's thesis, see Smolin, *The Judaeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345 (1988). See also Neuhaus, *The Moral Delegation of Law*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 51 (1989).

⁵⁴ Mackie, *supra* note 52, at 144, 151-58. More generally, see J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977).

⁵⁵ See the critique of Mackie on this point in Marshall, *Inventing the Obligation to Obey the Law*, 67 VA. L. REV. 159, 173-75 (1981). For responses to Mackie's arguments of "queerness" against the objectivity of moral judgments generally, see, e.g., J. FINNIS, *FUNDAMENTALS OF ETHICS* 57 (1983) and Finnis, *Scepticism, Self-Refutation, and the Good of Truth*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 247 (P. Hacker & J. Raz eds. 1977); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1117-36 (1988). See also Goldsworthy, *God or Mackie? The Dilemma of Secular Moral Philosophy*, 30 AM. J. JURIS. 43 (1985).

⁵⁶ See R. Nozick, *supra* note 38, at 42-45.

for the sanctity of fundamental liberties, the appeal of such a world is limited. Yet, at least as the argument has thus far been developed, we may have no intellectually honest choice in the matter. As Professor Leff expressed the point, "[t]here is no way to prove one ethical or legal system superior to any other, unless at some point an evaluator is asserted to have the final . . . word."⁵⁷ Selecting such a final evaluator from among other possible candidates, even if done by consensus, will of course ordinarily be merely one more choice not evidently more reasonable in any objective sense than any other. This Article will argue below, however, that reason holds open the possibility of leading us to a Final Evaluator of such character that looking to that Final Evaluator as a unique source of authentically binding moral and legal obligation becomes itself a uniquely reasonable, nonarbitrary course.

II. THE RANGE OF POSSIBLE NATURAL LAW SOLUTIONS TO THE PROBLEM OF LEGAL OBLIGATION

If the possibility of a natural law-oriented solution to the problem of legal obligation seems alien to us, this can hardly be attributable to any historical insignificance of natural law theorizing. A natural law approach of one sort or another is famously associated with Aristotle⁵⁸ and Thomas Aquinas,⁵⁹ but any number of other ancient and modern writers might be said to fall within the broad tradition.⁶⁰ A representative listing might include Epictetus,⁶¹ Cic-

⁵⁷ Leff, *supra* note 41, at 1240.

⁵⁸ See, e.g., *THE ETHICS OF ARISTOTLE* (J. Thomson trans. 1953).

⁵⁹ Probably the central focus of Aquinas' writings on law and on the natural law in particular would be the First Part of the Second Part of the *Summa Theologica*, Questions 90-95. Among the most convenient and accessible translations are found in *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* (D. Bigongiari ed. 1953) and, more broadly, *AN AQUINAS READER* (M. Clark ed. 1972). The literature is massive. Representative accessible shorter pieces would include F. COPLESTON, *AQUINAS* (1955); R. MCINERNEY, *ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS* (1982); D. O'CONNOR, *AQUINAS AND NATURAL LAW* (1967); Chroust, *The Philosophy of Law of St. Thomas Aquinas: His Fundamental Ideas and Some of His Historical Precursors*, 19 *AM. J. JURIS.* 1 (1974); Damich, *The Essence of Law According to Thomas Aquinas*, 30 *AM. J. JURIS.* 79 (1985); Grisez, *The First Principle of Practical Reason*, 10 *NAT. L.F.* 168 (1965); MacGuigan, *St. Thomas and Legal Obligation*, 35 *NEW SCHOLASTICISM* 281 (1961); May, *The Meaning and Nature of the Natural Law in Thomas Aquinas*, 22 *AM. J. JURIS.* 168 (1977).

⁶⁰ For brief historical surveys and commentary, see, e.g., A. D'ENTREVES, *NATURAL LAW* (2d ed. 1970); Y. SIMON, *THE TRADITION OF NATURAL LAW* (1965); Gerhart, *The Doctrine of Natural Law*, 26 *N.Y.U. L. REV.* 76 (1951). See also the more narrowly focused Rose, *The Law of Nature: An Introduction to American Legal Philosophy*, 13 *OHIO ST. L.J.* 121 (1952).

⁶¹ See *DISCOURSES AND ENCHIRIDION OF EPICTETUS* 230 (T. Higginson trans. et al. ed. 1890)

ero,⁶² Augustine,⁶³ Hobbes,⁶⁴ Locke,⁶⁵ and Montesquieu.⁶⁶ For a time, American constitutional law bore, to some degree, the imprint of natural law theorizing.⁶⁷

The contemporary disdain for natural law theorizing is partially based upon common misconceptions. One can hardly convict natural law theorizing based on the allegedly implausible, but inessential, conclusions of even the most eminent natural law theorists.

(stating in *The Enchiridion* that "every creature is naturally formed to flee and abhor things that appear hurtful and that which causes them; and to pursue and admire those which appear beneficial and that which causes them").

⁶² See CICERO, *ON THE COMMONWEALTH* (G. Sabine & S. Smith trans. 1929) in which Laelius argues that:

There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad.

Id. at 215-16.

It seems evident that Cicero conceives of a natural law utterly distinct from the sense in which, for example, force is related to mass and acceleration of a physical body. Cicero further specifies that God "is the author of this law, its interpreter, and its sponsor." *Id.* at 216.

⁶³ See Chroust, *The Fundamental Ideas in St. Augustine's Philosophy of Law*, 18 AM. J. JURIS. 57 (1973). Convenient translations include *THE POLITICAL WRITINGS OF ST. AUGUSTINE* (H. Paolucci ed. 1962) and, more broadly, *AUGUSTINE, THE CITY OF GOD* (G. Walsh trans. 1958).

⁶⁴ See T. HOBBS, *LEVIATHAN* 100 (Oxford Univ. Press ed. 3d printing 1943) (1651) (positing as the "Fundamentall Law of Nature" that "every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre").

⁶⁵ See J. LOCKE, *TWO TREATISES OF GOVERNMENT*, Second Treatise § 6, at 289 (P. Laslett 2d ed. 1967) (1689). Locke argues that the law of nature is reason, and that:

Reason . . . teaches all Mankind, who will but consult it, that all being equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; all the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure.

Id.

⁶⁶ See 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 4 (T. Nugent trans. Robert Clarke & Co. ed. 1873) (1748) (laws of nature are so called "because they derive their force entirely from our frame and existence"); McArthur, *The Natural Law: A Perennial Problem*, 26 AM. J. JURIS. 1, 9 (1981).

⁶⁷ See generally Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929). For an explicit adoption of natural law theorizing in a judicial context, see the opinion of Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

For example, it is unnecessary for the natural law theorist to claim that an unjust positive law, or a law not in accordance with God's will, is therefore not a law in any sense.⁶⁸ Similarly, a natural law theorist need not infer from the injustice of a particular law that persons subject to such a law are best counseled to therefore disobey the law, whatever the cost in disruption and scandal.⁶⁹

Further, natural law theorizing need not implausibly assume that even the general contents of the natural law are universally apprehended intuitively or innately by every person, or by every rational person.⁷⁰ Nor need the natural law theorist assume some unchanging distinctive essence of humankind, invariant as to time and place,⁷¹ or that persons are usefully conceived of only as isolated asocial individuals,⁷² or that reason is the essence of humankind.⁷³ It is therefore mistaken to assume that natural law theory must require uniform, invariant behavior⁷⁴ at all times and all places.⁷⁵ In this sense, natural law theory is capable of accommodating whatever is of genuine value in modern trends toward subjectivism and moral relativism.

It is precisely the sensitivity of natural law theory to historical and social context that accounts, in part, for what is sometimes taken to be the disappointingly broad, even vacuous character of

⁶⁸ See Damich, *supra* note 59, at 79-80. *But see* L. WEINREB, *NATURAL LAW AND JUSTICE* 260-61 (1987) (depicting natural law as allegedly insensitive to the role of convention in determining the law).

⁶⁹ *But cf.* L. WEINREB, *supra* note 68, at 263 (noting existence of established law as brake on disorder). Aquinas, however, seems sensitive to the costs of even righteously inspired social disorder in the First Part of the Second Part of the *Summa Theologica*, Question 96, Fourth Article. See THE POLITICAL IDEAS OF ST. THOMAS AQUINAS, *supra* note 59 (stating unjust laws "do not bind in conscience, except perhaps to avoid scandal or disturbance").

⁷⁰ See May, *supra* note 59, at 175, 185. See also Y. SIMON, *supra* note 60, at 162 (noting "[a]cquaintance with natural law is normally as progressive in mankind as anything else"). Simon cogently adds that the possibility of progress is not the inevitability of progress; our knowledge of and conformance to the dictates of the deontological or teleological aspects of the natural law may decline historically. See *id.*

⁷¹ See Carney, *Outline of a Natural Law Procedure For Christian Ethics*, 47 J. RELIGION 26, 31-32 (1967).

⁷² *Id.* at 33.

⁷³ See Hauerwas, *Natural Law, Tragedy, and Theological Ethics*, 20 AM. J. JURIS. 1, 3 (1975).

⁷⁴ See McInerney, *The Principles of Natural Law*, 25 AM. J. JURIS. 1, 7 (1930) (stating that "the natural law view is precisely the view that there is an all but numberless variety of ways in which men can attain their completeness or perfection as men").

⁷⁵ See Carney, *supra* note 71, at 29; Chroust, *supra* note 59, at 31-32.

the most widely cited purported injunctions of the natural law,⁷⁶ and the alleged absence of appropriate guidance in applying its general injunctions to particular circumstances.⁷⁷ In this, the precepts of the natural law resemble the great constitutional commands of due process, equal protection, freedom of speech, and avoidance of cruel and unusual punishments. Many particular moral decisions will not be logically derived from broad principles of natural law⁷⁸ precisely because of our grossly imperfect, if perhaps haltingly improving, understanding of the morally relevant facts concerning persons and society. We should therefore not be surprised to see natural law theorists reaching contradictory results,⁷⁹ or adopting doubtful⁸⁰ or even embarrassing⁸¹ moral conclusions, even over substantial periods of time.

This is not to suggest that the natural law is, if otherwise sound, always devoid of power to guide and to bind under conditions of imperfect social knowledge. If one takes as one's premise the injunction to love one's neighbor or to do no murder, one may ordinarily infer that one ought not to torture a small child to death merely for the sake of passing amusement, regardless of the social circumstances or our residual ignorance of human physiology and psychology. One can draw this practical inference with more confidence and certainty than could underlie any argument that such an inference leads to moral wrong. We must not oversell the capacity of natural law theorizing to generate determinate moral results, however, whether in terms of right or wrong conduct or good or bad states of affairs. The advantage of natural law theorizing lies not in its character as a prolific generator of satisfying concrete

⁷⁶ See Perkins, *Natural Law in Contemporary Analytic Philosophy*, 17 AM. J. JURIS. 111, 116 (1972).

⁷⁷ See Fortin, *Natural Law and Social Justice*, 30 AM. J. JURIS. 1, 6 (1985) (asserting that "[n]owhere does the New Testament give us any specific rules to live by or any inkling as to how the general rules that it does give us might apply to society at large").

⁷⁸ See Goldberg, *Natural Law: Some Considerations*, 10 MOD. AGE 269, 270 (1966).

⁷⁹ See Constable, *What Good Is Natural Law? A Lawyer's Perspective*, 26 AM. J. JURIS. 66, 70 (1981).

⁸⁰ See, e.g., Constable, *What Does Natural Law Jurisprudence Offer?*, 4 CATH. U.L. REV. 1, 13 (1954) (citing example of "the large competitor driving smaller but more efficient producers out of business"). Presumably, the morally correct response to such alleged activity may become clear only once our economic theory reaches a certain level of sophistication. See P. BAUER, *REALITY AND RHETORIC* 73-79 (1984).

⁸¹ See Gewirth, *The Ontological Basis of Natural Law: A Critique and an Alternative*, 29 AM. J. JURIS. 95, 115 (1984) (noting that Aristotle and Aquinas supported natural slavery).

answers to moral dilemmas. Instead, natural law provides more reasonably justified moral injunctions than do its putative rivals.

Some versions of natural law theorizing are, admittedly, wrecked on the same logical shoals on which the various pretending theories in the previous section foundered. The term "natural law" is used in a variety of senses, some of which are so attenuated as to rise no higher than the various theories of legal and moral obligation discussed above.⁸² Many natural law writers disavow, or disclaim any reliance on, any explicit theist element of the theory. Joseph Tussman, for example, holds that "[t]he fate of natural law as a political doctrine should not be made to depend on the existence of an 'objective order of nature' on the one hand or the existence of a command-giving deity on the other."⁸³ If there has been any general historical trend in this regard, it is evidently in the direction of a less functional or even nonexistent role for God in the natural law.⁸⁴

Natural law theory that discounts the role of God tends, quite understandably, to exalt the role of nature itself. Charles Fried has written, for example, that natural law theory should be understood to focus on the claim that "every entity exhibits a rationally ascertainable nature, by virtue of which it is . . . the very entity which it is and not something else. . . . [I]t is this nature which is normative for that entity."⁸⁵ Normativity is, in such versions of natural law theory, thought to derive from the essence or the very nature, as rationally ascertained, of the being in question.⁸⁶ What humans ought to do, what they are morally bound to do, flows from their distinctive nature.

⁸² Lon Fuller, for example, characterizes his "internal morality of the law" approach, in a sense, as one of natural law, but not in a substantive, let alone theistic, sense. See L. FULLER, *THE MORALITY OF LAW* 96 (1964). Ronald Dworkin, as well, adopts the classification of "natural law" for his own jurisprudence on the assumption that "any theory which makes the content of law sometimes depend on the correct answer to some moral question" can qualify as a natural law theory. Dworkin, *supra* note 33, at 165. In such a view, an aggressive rule-utilitarian, who believes that his morality is correct and at least occasionally determines the content of the law, counts as a natural law theorist.

⁸³ J. TUSSMAN, *supra* note 12, at 129 (1960). This reflects the widespread impression that the binding quality of moral right and wrong is independent of the nature and existence of God. See, e.g., R. ADAMS, *THE VIRTUE OF FAITH* 147 (1987).

⁸⁴ See Niemeyer, *What Price "Natural Law"?*, 27 *AM. J. JURIS.* 1, 5 (1982).

⁸⁵ Fried, *Natural Law and the Concept of Justice*, 74 *ETHICS* 237, 241 (1964).

⁸⁶ See, e.g., Gewirth, *supra* note 81, at 96; Machan, *Metaphysics, Epistemology, and Natural Law Theory*, 31 *AM. J. JURIS.* 65, 66 (1986).

Waiving all other possible objections, though, it is clear that this sort of natural law theory cannot bridge the gap between "is" and "ought" any more successfully than the candidates examined above.⁸⁷ Doubtless there may be some linkage between our nature and that to which we may be morally obligated. It is hard to see, for example, how we could be morally obligated to do something which is simply beyond the unalterable limits set by our capacities or our nature.⁸⁸ But beyond this, the choice for acting in accord with, or "fulfilling," one's nature seems either to be utterly inevitable and no moral choice at all, or else to involve sheer question-begging, or an utterly gratuitous choice grounded on reasons no more cogent than those underlying any alternative choice. The question of why we ought to act in accordance with our nature certainly seems like an intelligible, nonself-answering question. There should, it seems, be a substantive answer, but no cogent answer appears. It would seem no less reasonable to determine that the way one is by nature is merely the way one happens to be, and that one's nature is, in this respect, utterly without moral status.⁸⁹ One might coherently go further and announce, on the basis of some set of premises, that one's essential, unalterable nature is actually morally bad, and should morally be resisted, suppressed, or mortified, however futilely. On such a view, the nature of the human person should not be endorsed, or even accommodated, but overcome.⁹⁰

Any number of variations of natural law theory, then, are fatally vulnerable to the is-ought problem, and cannot be established as better grounded in reason, or as somehow more justified, than any of their competitors. Some natural law approaches, however, are "unequivocally God-centered."⁹¹ If the gap between is and ought can be defensibly bridged anywhere, this would seem uniquely possible in distinctively theocentric versions of the natural law.⁹²

⁸⁷ See *supra* notes 27-45 and accompanying text.

⁸⁸ In this sense, "ought" is said to imply "can." See R. HARE, *FREEDOM AND REASON* 51 (1963).

⁸⁹ Thus, Professor Tussman observes in particular that even an assumedly universal human tendency toward self-preservation does not itself imply any moral duty to protect or to preserve oneself. See J. TUSSMAN, *supra* note 12, at 130.

⁹⁰ See F. NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 75 (R. Hollingdale trans. 1969).

⁹¹ See Barrett, *A Lawyer Looks at Natural Law Jurisprudence*, 23 *AM. J. JURIS.* 1, 6 (1978).

⁹² See, e.g., Wilhemsen, *The Natural Law, Religion, and the Crisis of the Twentieth Cen-*

III. A THEISTIC SOLUTION AS THE ONLY POSSIBLE SOLUTION

The physicist Stephen Hawking notes in his popular work, *A Brief History of Time*,⁹³ that some of our most cherished physical law formulations and conceptual distinctions tend to break down in the geographic proximity of a black hole.⁹⁴ This Article analogously suggests that, in plain terms, the fact-value distinction loses its utility in the vicinity of God. It is beyond the scope of this paper to establish precisely which combination of divine attributes makes this so. Assuming for the moment that a God of a familiar sort exists, it becomes decisive for the question of legal obligation that God is not merely an exceptionally knowledgeable, or thoroughly seasoned, decisionmaker, much less that God is merely powerful, with the ability to offer great rewards or impose severe punishments for obedience or disobedience to his commands.

In light of God's assumed qualities, it should be clear that a theistic natural law theory need not trivialize the problem of legal obligation by arbitrarily defining God, or God's commands, roughly as "that which successfully bridges the is-ought gap and is therefore a source of binding legal obligation." Merely defining God as the source of moral bindingness is uninteresting and unnecessary. Theistic natural law theory genuinely can bridge the is-ought gap, unlike, for example, a theory that seeks to derive a morally binding obligation to obey the most powerful single person, in virtue merely of that person's power. Might does not necessarily make right.

There is thus a substantive answer possible to the perfectly sen-

ture, 10 MOD. AGE 146 (1966) (suggesting that natural law theorizing can be efficacious, or motivating, not in its secular versions, but insofar as it draws its normative force ultimately from a God understood in a particular way). Theistic writers have often assumed that some moral arguments are well-justified and binding independent of the existence or nature of God. See, e.g., R. SWINBURNE, FAITH AND REASON 78 (1981). Professor Swinburne is led into arguments supporting a moral obligation to obey God that parallel those of secular ethicists. One such argument is that God is morally entitled to exact general, perpetual obedience from man because God created mankind. *Id.* at 79-80. Another is that we have an obligation to obey and worship God as a distinctively appropriate and required mode of response to the great benefits conferred on us, however independently of our wishes, by God. Unless we take God's unique characteristics into consideration, these arguments are no more rationally convincing than the opposing ones. See *supra* notes 15-18 and accompanying text (discussing the argument from gratitude in context of legal obligation).

⁹³ S. HAWKING, A BRIEF HISTORY OF TIME (1988).

⁹⁴ *Id.* at 61.

sible question of why one reasonably ought to feel morally bound to obey the will of the posited sort of God.⁹⁵ By "morally binding," we need not mean something like "commanded or willed by God." Rather, our approach is that once some subset of the nature, qualities, or attributes of the presumed God are appropriately understood, along with any relevant facts about persons, society, and our factual relationship to God, then a logically satisfactory account of the moral basis of legal obligation can emerge.

Some have argued that unless the problem is simply defined away, no account of God's nature, however supplemented by facts about the world, can suffice to generate a logically satisfactory moral obligation. On such an argument, even if it is asserted that, for example, God knows all that can be known, and is benevolent toward us, we must still test the truth value of such a claim by use of our own independent moral standards. A claim for God's benevolence in a world of universal, permanent, extreme, mind-numbing torment from the moment of birth onward would on such a theory simply be implausible. The case for obeying such a God would be weakened by application of our own independent moral standards.⁹⁶

It has been argued in response that a free, self-sustaining, and omniscient God, whose powers of choice were not relevantly limited and who suffered from no factual weakness or dependency, simply would not choose to issue immoral commands to anyone.⁹⁷ Those who argue for the need for an independently grounded, objective morality apart from God would be left to explain how a God thus described could conceivably commit what would look like a moral mistake.

Even if we must go through an independent process of passing judgment upon the sort of God described or upon His commands, however, this does not establish that there must be some morality

⁹⁵ For an historical expression of doubt on this point, see the brief discussion of Richard Price's view in Frankena, *Is Morality Dependent on Religion?*, in RELIGION AND MORALITY, *supra* note 11, at 295, 302-03.

⁹⁶ See K. NIELSEN, *ETHICS WITHOUT GOD* 14-15 (1973). Such a view seems to flow from the ancient conundrum asking whether God commands us in certain ways because such ways are morally good independent of God's will, or whether such ways are morally good simply because God commands them. For one statement of this rather misleading set of options, see Goldberg, *supra* note 78, at 273.

⁹⁷ See R. SWINBURNE, *THE EXISTENCE OF GOD* 97-98 (1979).

that is both independent of God and that is itself a rationally defensible solution to the is-ought problem. If we are to presume to independently "check up on" God's commands, we can do so on the basis merely of our own intuitions, desires, preferences, and tastes. Even if we happen to find that a particular command of God is distasteful, there is certainly no guarantee that such a revulsion is distinctively moral, let alone a distinctively well-justified and well-grounded moral judgment sufficient to overcome the is-ought problem.⁹⁸ We have reason to believe, in fact, that no such essentially secular morality can in reality be distinctively well-grounded.⁹⁹

Suppose, then, that the requisite sort of God exists and that certain legal requirements and prohibitions can be determined to be in accord with God's will or God's very nature and qualities. Would it not still be reasonable to engage in an admittedly doomed but allegedly heroic Promethean or Nietzschean revolt against the authority of God? Would defiance of God be no less reasonable than obedience? The answer is plainly no. We are assuming at this point that God is benevolent toward us, and that God knows everything that could be relevant to any moral judgment, including our own tastes and personal preferences and the importance each of us may attach to individual human freedom and dignity. All that could be relevant is known to a God who wishes us well, and whose motives, perceptions, and capacity for judgment are at this point assumed to be flawless. What we as humans can know, as well as our capacity to translate our various kinds of knowledge into legitimate action-directing imperatives, is thus inevitably at best only a proper subset of, or inferior to, God's knowledge and capacities. On these assumptions, law that is consonant with God's nature or will is not rationally subject to correction by human judgment.¹⁰⁰ To defy God in this respect is certainly possible, but it is to choose the undeniably lesser rather than the greater, while still pretending to aim at the greater. Such a

⁹⁸ See Adams, *A Modified Divine Command Theory of Ethical Wrongness*, in RELIGION AND MORALITY, *supra* note 11, at 318, 330-31.

⁹⁹ See *supra* notes 27-45 and accompanying text.

¹⁰⁰ In this sense, our relationship to God is unlike that of child to parent, in which it is at least possible that the parent's commands may be subject to morally sound correction by the child, as when the parent is ignorant of something the child knows, or the parent's moral judgment is clouded for some reason.

course of conduct is no more reasonable than asserting that five is less than four within the conventional assumptions of arithmetic.

The logic of this paper has led, then, to the conclusion that if the familiar sort of God exists,¹⁰¹ then He is the sole possible source of obligation. If He does not exist, there can be no rationally binding moral obligation in a legal context. This paper cannot, of course, hope to validate the larger claim that "God is the basis of obligation."¹⁰² But something should be said in response to those who assume that it is impossible to build any kind of reasonable case for the existence of the sort of God described above.

This Article will thus briefly refer to recent scholarship suggesting that despite the obvious historical lack of consensus regarding the existence of God, there is no reason to suppose that all varieties of investigation and reflection on this question must be pointless from the standpoint of rational persuasion.¹⁰³ The probability of God's existence, and hence the reasonableness of belief, is not exclusively a matter of nonrational faith on the one hand¹⁰⁴ or of strict deductive proof on the other.¹⁰⁵

¹⁰¹ Monotheism does seem required for our purposes. If there is a genuine plurality of irreconcilable gods, the possibility of conflicting, mutually incompatible moral directives seems unavoidable.

¹⁰² J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 407 (1980). For general responses to the basic approach taken by Finnis, see R. HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987); George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1988) (reviewing L. WEINREB, *NATURAL LAW AND JUSTICE* (1987) and R. HITTINGER, *supra*).

¹⁰³ See R. SWINBURNE, *supra* note 92, at 64, 83-87 (1981). For the sake of simplicity of exposition, this Article treats any doubts as to the sheer logical coherence of theism as going to the probability of its truth. For discussions of the logical coherence issue, see, e.g., R. SWINBURNE, *THE COHERENCE OF THEISM* (1977); B. MITCHELL, *THE JUSTIFICATION OF RELIGIOUS BELIEF* 7-20 (1973).

¹⁰⁴ For writers such as Kierkegaard, logical thought, science, and philosophy are certainly meritorious and valuable. See S. KIERKEGAARD, *CONCLUDING UNSCIENTIFIC POSTSCRIPT* 46, 54, 135 (D. Swenson & W. Lowrie trans. 1968). But for Kierkegaard, faith is not a matter of reason or evidence in any familiar sense, but is, instead, a matter of intense subjectivity, of the passion of inwardness, of mystery and paradox, *id.* at 33, 172-79, whether rightly directed in an objective sense or not. *Id.* at 179-80. Others have suggested, however, that "faith operates by means of reason, and reason is directed and corrected by faith." J. NEWMAN, *THE IDEA OF A UNIVERSITY* 281 (1927). See generally J. NEWMAN, *A REASON FOR THE HOPE WITHIN* (1985). If there are mysteries inherent within, for example, the Christian faith, they need not be viewed as so decisive and so capricious as to call for a sacrifice of the intellect. See K. RAHNER, *FOUNDATIONS OF CHRISTIAN FAITH* 12 (W. Dych trans. 1978). Nor, it should be pointed out by way of analogy, is our reasonable belief in the capacities of science decisively undermined by science's continuing inability to account, for example, for the mystery of creation. Leaving God to one side does not seem to improve our chances of understanding how matter or energy in the universe got here in the first place, or how it makes sense to say that some form of matter or energy was "always" here. See J. POLKINGHORNE, *SCIENCE AND CREATION* 58-60 (1989).

¹⁰⁵ For a generally critical view of the classical deductive proofs of the existence of God,

Probabilistic or inductive arguments for the existence of God are of course hardly new. Arguments from plausibility or implausibility of a rudimentary sort are common even in writers, such as Pascal,¹⁰⁶ who believe that reason itself cannot lead to or prove first principles.¹⁰⁷ Probabilistic arguments themselves need not refer to the plausibility of particular events in human history,¹⁰⁸ but may refer to matters as broad as the sheer unlikeliness of intelligent life arising from undirected random processes.¹⁰⁹

see generally A. KENNY, *THE FIVE WAYS: SAINT THOMAS AQUINAS' PROOFS OF GOD'S EXISTENCE* (1969). For contemporary attempts at a proof of God's existence not relying on the inductive use of probabilities, see, e.g., D. BRAINE, *THE REALITY OF TIME AND THE EXISTENCE OF GOD* (1988); G. GRISEZ, *BEYOND THE NEW THEISM* (1975). One might in fact reasonably submit that if God's existence were rationally strictly demonstrable, it would be inconsistent with other things we believe about God. First, the existence of a knockdown deductive argument in favor of God's existence would seem to imply that we should expect heaven to be populated disproportionately by logicians, or by those with a talent for abstraction. See S. KIERKEGAARD, *supra* note 104, at 337. More evenhandedly, God could presumably provide an exceptionally powerful, if not decisive, argument for his own existence by spelling out His name with the stars in legible fashion, for example. But we have some reason to believe that such a celestial billboard would be incompatible with human dignity and human choice and would reduce a gradual process of potentially progressive human appreciation of the Creator into a more mechanical, superficial, ultimately less meaningful affair. See R. SWINBURNE, *supra* note 97, at 185-86, 240-41.

¹⁰⁶ See B. PASCAL, *PENSÉES* 125 (A.J. Krailsheimer trans. 1966) (suggesting the implausibility of an apparently pointless, extremely risky, and exceedingly vulnerable twelve-person conspiracy on the part of the Disciples to propagate a concocted story). Pascal's famous wager appeals of course to probabalistic calculations. *Id.* at 149-53.

¹⁰⁷ *Id.* at 58.

¹⁰⁸ For a contemporary example of such an argument, see R. SWINBURNE, *supra* note 97, at 225-26.

¹⁰⁹ Stephen Hawking, for example, notes suggestively that:

The laws of science, as we know them at present, contain many fundamental numbers, like the size of the electric charge of the electron and the ratio of the masses of the proton and the electron. . . . The remarkable fact is that the values of these numbers seem to have been very finely adjusted to make possible the development of life. . . . [I]t seems clear that there are relatively few ranges of values for the numbers that would allow the development of any form of intelligent life.

S. HAWKING, *supra* note 93, at 125. It is possible to respond to such an argument by replying in essence that since we're here, all those values must of course be that way, else we wouldn't be around to observe them. This is true, but does not make the numbers any less remarkable. See R. SWINBURNE, *supra* note 97, at 137-38. For further discussion of Professor Hawking's reasoning, see Leslie, *How to Draw Conclusions From a Fine-Tuned Cosmos*, in *PHYSICS, PHILOSOPHY, AND THEOLOGY* 297-310 (R. Russell, W. Stoeger & G. Coyne eds. 1988). One might avoid the theistic suggestiveness of the immense improbability of life in the uni-

A number of believers have gone on to build the range and variety of probabilistic arguments into a broader, cumulative case.¹¹⁰ The cumulative case has also been argued to be somehow systematic, or mutually reinforcing among its elements.¹¹¹ In such a cumulative and mutually reinforcing case, the argument itself need not be essentially hierarchical. Instead, the cumulative case could be holistic.¹¹² A belief in proposition *P* may be justified by *P*'s coherence with proposition *Q*, and a belief in proposition *Q* justified in turn because of the way *Q* coheres with *P*.¹¹³ It has been said that "[a]ny belief, moral or factual, is justified only by showing that it coheres well with everything else one believes."¹¹⁴ The trick of course is to avoid narrow, closed, ad hoc cycles of mutual support among propositions.

Some contemporary theorists, such as the philosopher Richard Swinburne, construct their case for the probability of God in an almost mechanical, additive way. They add to or subtract from the

verse by the expedient of claiming that there are in fact an immense number of poorly connected "universes," only a very few of which are hospitable to life. For general discussion, see P. DAVIES, *GOD AND THE NEW PHYSICS* (1983). J. GRIBBIN & M. REES, *COSMIC COINCIDENCES* (1989); H. MONTEFOIRE, *THE PROBABILITY OF GOD* (1985); J. POLKINGHORNE, *supra* note 104.

¹¹⁰ See, e.g., B. MITCHELL, *THE JUSTIFICATION OF RELIGIOUS BELIEF* 39-40 (1981) (maintaining that "[w]hat has been taken to be a series of failures [to establish definitively by separate isolated arguments a rational defense of Christianity] when treated as attempts at purely deductive or inductive argument could well be better understood as contributions to a cumulative case").

¹¹¹ *Id.* at 40; G.K. CHESTERTON, *ORTHODOXY* (1908). Chesterton appreciates that the weight of each separate probabilistic argument may be modest in isolation, *id.* at 143, but he goes on to detect an almost aesthetic rightness, or fitness, or non-arbitrary, non-gratuitous, verisimilitudinous quality, to many religious tenets where one initially might expect otherwise. *Id.* at 81-101. For an analogous argument, see C.S. LEWIS, *MERE CHRISTIANITY* 55-56 (rev. ed. 1952). For a sense, however, of the remarkable fallibility of human beings in even the most mundane uses of induction and probability, see generally *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (D. Kahneman, P. Slovic, & A. Tversky eds. 1982). Note that it is useful for some purposes, including our own, to explore or to assert the probability of God's existence, without suggesting that it is appropriate that anyone's faith, or their trust in God, be based even in part on the evidences of fallible human reason.

¹¹² For a contemporary statement of such an approach, see G. HARMAN, *CHANGE IN VIEW: PRINCIPLES OF REASONING* 32-33 (1986).

¹¹³ *Id.* at 33. For a rejection of coherentism generally, as well as of the more specific claim that coherentism is incompatible with theistic belief, see Plantinga, *Coherentism and the Evidentialist Objection to Belief in God*, in *RATIONALITY, RELIGIOUS BELIEF, AND MORAL COMMITMENT* 109 (R. Audi & W. Wainwright eds. 1986). For a broader context, see generally *THE RATIONALITY OF RELIGIOUS BELIEF* (W. Abraham & S. Holtzer eds. 1987).

¹¹⁴ Moore, *Moral Reality*, 1982 *Wis. L. Rev.* 1061, 1112-13.

overall probability of the existence of God in light of particular arguments that seem to make God's existence more or less probable than it would otherwise be.¹¹⁵ Others, such as the philosopher Alvin Plantinga, maintain that there can be no classically rigorous argument for a "properly basic" belief in God, and further deny that the existence of God is in any sense self-evident. Yet, they continue to argue that beliefs entailing the existence of God can be rational, or reasonable, or right and proper.¹¹⁶ In such a view, inductive reasoning may guide us to the particular necessary and sufficient conditions for a "properly basic" belief in God, and Plantinga continues to hold open the possibility of fairly and neutrally convicting the atheist of some inductive or deductive error in failing to include belief in God within his set of "properly basic" beliefs.¹¹⁷ Belief in God would not, on such an approach, be arbitrary, irrational, or unjustified.¹¹⁸

The elaborate, subtle argumentation of writers such as Richard Swinburne must be evaluated on its own merits, at length. It is cited here not for its truth or for its power to persuade rationally. Rather, it is cited to illustrate that the problem of the existence of the kind of God necessary to ground adequately a moral obligation to obey the law is one on which genuine, constructive progress can be made. We need not, for example, be perennially stuck at the stage of unresolvable disputes over whether any of Aquinas' deductive arguments really work. Traditional obstacles to belief in the requisite sort of God, such as the problem of evil in the world¹¹⁹

¹¹⁵ See R. SWINBURNE, *supra* note 97, at 14, 290-91; Swinburne, *Mackie, Induction, and God*, 19 RELIGIOUS STUD. 385 (1983). See also H. MONTEFIORE, *supra* note 109.

¹¹⁶ See Plantinga, *Reason and Belief in God*, in FAITH AND RATIONALITY 16, 17, 73-91 (1983). See also the briefer discussion by Wolterstorff, *Can Belief in God Be Rational If It Has No Foundations?*, in *id.* at 135, 175.

¹¹⁷ See Plantinga, *supra* note 116, at 77-78.

¹¹⁸ It seems entirely possible that in working out his approach, Plantinga could draw upon some or all of the various sorts of inductive arguments discussed *supra* notes 106-11 and accompanying text. Plantinga's approach has certainly not yet been fully deployed and convincingly used in concrete terms. See A. KENNY, FAITH AND REASON 16 (1983).

¹¹⁹ For a concise, vivid assertion of God's alleged apparent indifference to humans and to their temporal suffering, see Vivas, *Animadversions Upon the Doctrine of Natural Law*, 10 MOD. AGE 149, 154 (1966). For a sophisticated response, emphasizing the importance to human dignity of human choice for good and evil, and of the capacity for gradual human progress, beyond the role of suffering in teaching perspective and discouraging vanity, see, e.g., R. SWINBURNE, *supra* note 97, at 185-87, 199. For further argument, see generally A. PLANTINGA, GOD, FREEDOM AND EVIL (1974); Flemming, *Omnibenevolence and Evil*, 96 ETU-

and the conflict between divine foreknowledge and human freedom and moral responsibility,¹²⁰ admittedly continue to loom large. There is, however, no clear reason to envision all future debate on such controversial matters as a vain, nonprogressive shouting match. To the extent that a rational case for the existence of such a God can be developed, cogently justifying the existence of a moral obligation to obey the law becomes not merely possible, but probable.

ics 261 (1986).

¹²⁰ For such an argument, see A. KENNY, *REASON AND RELIGION: ESSAYS IN PHILOSOPHICAL THEOLOGY* 121-34 (1987). The alleged incompatibility rests on the controversial premise that God's knowledge of our actions can accurately be described as "in time," and specifically antecedent to our act, rather than being outside, or not bounded by time. The conflict is then produced by the controversial assumption that person *A*'s knowledge of, or ability to predict, person *B*'s future action, means that *B*'s action was not free in a sense sufficient to establish moral responsibility on the part of *B*.