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## **“THAT MAN IS YOU!” THE JURISTIC PERSON AND FAITHFUL LOVE**

*Scott FitzGibbon<sup>1</sup>*

Late one afternoon, David rose from his couch and strolled on the roof of the royal palace; and from the roof he saw a woman bathing. The woman was very beautiful, and the king sent someone to make inquiries about the woman. He reported, “She is Bathsheba daughter of Eliam [and] wife of Uriah the Hittite.” David sent messengers to fetch her; she came to him and he lay with her ....

\* \* \*

David wrote a letter to Joab, which he sent with Uriah. He wrote in the letter as follows: “Place Uriah in the front line where the fighting is fiercest; then fall back so that he may be killed.” So ... Joab ... stationed Uriah at the point where he knew that there were able warriors. The men of the city sallied out and attacked.... Uriah the Hittite was among those who died.

\* \* \*

But the LORD was displeased with what David had done, and the LORD sent Nathan to David. He came to him and said, “There were two men in the same city, one rich and one poor. The rich man had very large flocks and herds, but the poor man had only one little ewe lamb that he had bought. He tended it and it grew up together with him and his children: it used to share his morsel of bread, drink from his cup, and nestle in his bosom; it was like a daughter to him. One day, a traveler came to the rich man, but he was loath to take anything from his own flocks or herds to prepare a meal for the guest who had come to him; so he took the poor man’s lamb and prepared it for the man who had come to him.”

David flew into a rage against the man, and said to Nathan, “As the LORD lives, the man who did this deserves to die! He shall pay for the lamb four times over, because he did such a thing and showed no pity.” And Nathan said to David, “That man is you!” (2 Samuel 11:2–12:7<sup>2</sup>)

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<sup>1</sup> J.D., Harvard University; B.C.L., University of Oxford. Professor, Boston College Law School. Copyright 2011 by Scott FitzGibbon, all rights reserved.

<sup>2</sup> THE JEWISH STUDY BIBLE 636–38 (Adele Berlin & Marc Zvi Brettler, eds., 2004) (Jewish Publication Society, Tanakh translation) (hereinafter JSB). The word *and* between brackets is present, bracketed, in this translation.

## I. INTRODUCTION

“The science of law,” it has been said, “must be drawn from man’s inmost nature.”<sup>3</sup>The science of obligation—the dimension of jurisprudence that concerns duties—must be founded upon the experiences of humanity. It should draw upon insight into human flourishing, and it should base its conclusion upon the basic goods involved in human life. Similar recommendations might be suggested for the “science,” if it is one, of love. This paper aims to pursue those projects.

The story of David, Bathsheba, and Nathan sheds much light on man’s inmost nature, and on obligation, love, and law. Nathan’s comments must have given David much food for thought. Nathan reminded David of his duty. Of course the Torah forbids adultery, and David had committed it. Nathan’s comments surely led David to reflect about obligation and to ponder the Law.

Nathan’s comments likely led David also to reflect upon *himself*: to consider where he stood in relation to the Law, and to consider where anyone governed by law must stand. Nathan’s observations further invite the hearer to deliberate about himself, and perhaps about people in general. Such is the force of his statement: “That man is you!”<sup>4</sup>

Part II of this article considers duty. It proposes that thought, belief, and character develop along certain lines in a person who accepts obligation. It commends what it terms the “juristic person.” It discusses what might be called the “anthropology of the juristic person”: the relationship between obligation and character. It describes several goods involved in being a juristic person and in acting upon obligation. It proposes that the juristic person is best suited to governance by the law.

David’s situation also involved love. Nathan, describing the poor man and his lamb, referred to Uriah’s love for Bathsheba. David also loved Bathsheba, at least erotically.<sup>5</sup> Torah has much to say about love. When Nathan states,

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<sup>3</sup> John Paul II, “God Himself is the Author of Marriage,” address to the Tribunal of the Roman Rota, February 1, 2001, ¶ 6, *L’OSSERVATORE ROMANO* 3 (Eng. weekly ed., February 7, 2001) (attributing the phrase to MARCUS TULLIUS CICERO, *DE LEGIBUS* II).

<sup>4</sup>See generally URIEL SIMON, *READING PROPHETIC NARRATIVES* (Lenn J. Schramm, trans., 1997).

<sup>5</sup>*But see* H. Hirsch Cohen, *David and Bathsheba*, 33 *J. AM. ACAD. RELIGION* 142 (1965). (“David was never in love with Bathsheba. A careful reading of II Sam. 11:1–5 fails to reveal the slightest allusion to any such love.... David emerges as a man engaged in a life and death struggle with his waning years. A tragic figure who is allowed no alternative, he violates the taboo of adultery in a desperate effort to preserve the core of his being.”)

“That man is you!” he may invite consideration of the meaning and value of various kinds of love.<sup>6</sup>

Part III of this paper explores love and its relation to obligation. Some kinds of erotic love lead to the repudiation of obligation, Part III observes, but other forms of love support it. Devoted, faithful love displays a strong affinity for obligation, and in many ways even resembles it. This paper proposes that the juristic person is best suited to love, and that the person who loves, in the higher sense of that term, participates especially well in the goods of obligation. It proposes that the obligation-bearing, obligation-accepting man or woman resembles a lover.

Part IV of this paper sketches some implications for the law. David’s anger at the rich man, and his hasty demand for capital punishment, display his shortcomings as a judge.

## II. THE JURISTIC PERSON<sup>7</sup>

How blessed is anyone who delights in the commandments!  
His uprightness stands firm forever. (Psalm 112)<sup>8</sup>

This part introduces, commends, and praises a sort of person, here called the “juristic person.” It is here proposed that it is a good thing to be a person of a type that it is today fashionable to denigrate: that is, a person who is

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<sup>6</sup> See generally MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996); MAGGIE GALLAGHER, *ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT* (1989); Lynn D. Wardle, *All You Need is Love?*, 14 S. CAL REV. L. & WOMEN’S STUD. 51 (2004).

<sup>7</sup> Parts II through IV of this article develop points that are sketched in Scott FitzGibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41 (2002), portions of which are here reiterated with modification.

<sup>8</sup>This is derived with some changes from THE NEW JERUSALEM BIBLE 930 (1985) (hereinafter NJB). (“How blessed is anyone who fears Yahweh/who delights in his commandments!/His descendants shall be powerful on earth/the race of the honest shall receive blessings: /Riches and wealth for his family; /his uprightness stands firm forever ... .” David wrote the Psalms, according to Jewish and Catholic tradition, and might therefore be identified through them as possessing and praising the juristic traits. After a period of characteristic twentieth-century derogation, it is now accepted by scholars that David was at least involved in the composition and development of the Psalms. See generally THE BOOK OF PSALMS: COMPOSITION AND RECEPTION (Peter W. Flint & Patrick D. Miller, eds., with the assistance of Aaron Brunell & Ryan Roberts, 2005); JAMES L. CRENSHAW, *THE PSALMS: AN INTRODUCTION* 5–6 (2001).

judgmental, critical, self-critical, and mindful and even appreciative of duty. That is the sort of person here identified as “juristic.”

To praise and admire such a person, we have to develop a warm and even celebratory account of the goods of duty, and this Part II undertakes this task.

Many modern accounts of duty found them on grounds that make them difficult to admire and perhaps even easy to fear. This Part II takes up first, in order to dismiss them as inadequate, the two accounts which are today the most frequently articulated.

### *A. Two Unsatisfactory Accounts*

#### 1. The Sanctions-Based Account

One prominent account defines obligation based on threat of harm. Austin’s *Lectures on Jurisprudence*, for example, states that “the essence of duty is liability to a Sanction.”<sup>9</sup> This reflects the positivist project of severing obligation from ethics, a project that allows as obligations norms with which it would be wrong to comply, precepts that demand actions which it would be wrong to perform, and provisions that forbid actions which it would be right to perform. Your baby is hungry and cold and no one can know that but you. You would have no obligation to care for her if obligation depended on sanction. I threaten to lash you with a wet noodle if you feed or clothe her. You would have an obligation *not* to care for her. Those are the preposterous implications.

The positivist project, in any event, is of little interest here because this article is about ethics. It aims here in Part II to depict the goods involved in obligation.

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<sup>9</sup>JOHN AUSTIN, *LECTURES OF JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW* 199 (Robert Campbell, ed., 1913; reprint ed. 1977):

A party lying under a duty is liable to evil or inconvenience (to be inflicted by sovereign authority) if he disobeys the Command. This conditional evil is the *Sanction* which enforces the duty; and the party bound or obliged, *is* bound or obliged, *because* he is liable to this evil, if he disobeys the command. That bond, *vinculum*, or *ligamen*, which is of the *essence* of *duty*, is, simply or merely, liability to a *Sanction*.

(As can be seen, the excerpt in the text of this article omits certain elision marks that canons of quotation would require, and uses roman typeface where the original has italics.) Accord JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 22 (1832; Wilfred E. Rumble, ed., 1995). (“Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.”)

## 2. Contractual Accounts

Another approach bases obligation on consent, promise, and contract. This approach is somewhat promising, since obligations are often instituted through contract. It seems, however, that some obligations arise without contract, promise, or even choice on the part of the obligor. Children, we apprehend, have obligations to parents, citizens to country, and mankind to God. Prior to entering into the contract, negotiating parties have duties to one another—so at least concludes the common law: for example, duties to deal in good faith and not to lie. Parties to exchanges that never ripen into contracts have obligations to one another, it appears: for example, to return funds paid by mistake. Even complete strangers have duties to one another: for example, to drive carefully and to pay damages when their carelessness causes accidents.

Many affiliations that are not contractual in the normal, commercial-deal-type meaning of the term are rich fields of obligation: guardianships, trusts, and marriage, for example.<sup>10</sup> Many of these obligations go unmentioned in any formal avowal. Even where comprehensive promises have been made, the obligations between closely affiliated persons seem to have some deeper, subpromissory basis. Husbands and wives have obligations not mentioned in the wedding vows. The groom does not swear to live with his spouse or to support her materially or to help with the babies. No one would think he had an excuse for adultery if he re-examined his wedding vows some years later and discovered that they had omitted the part about “forsaking all others.”<sup>11</sup>

A final point is that the contractarian account achieves no more than to attach all (other) obligations to one particular kind of obligation. We are left asking what the good of that type may be: we ask why contract, promise, and consent obligate. We find ourselves back at square one, commencing the search for the basic goods of obligation.

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<sup>10</sup> See Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 201 (1997). (“[T]he existence of a relationship that one has reason to value is itself the source of special responsibilities and those responsibilities arise whether or not the participants actually value [or have agreed to] the relationship.”)

<sup>11</sup> Imagine a couple whose wedding was the illusionary trick of some Genie. If this couple lives and thinks as though man and wife for many years, only now to discover the illusory nature of their vows, have they significant ties to one another? You may deny that they are married, but if you conclude that their relationship has generated obligations then you believe that express contract and promise is not the entire story.

### *B. Goods of Action*

Section B explores the goods involved in action. It proposes four of them: direct consequential good, reflexive good, fulfilling good, and attesting good.<sup>12</sup> The next section applies the latter three of these goods to obligation.

#### 1. Direct Consequential Good

Direct consequential good is the most obvious sort. It rests the good on the results achieved. To explain how an action is good or valuable, the most straightforward approach looks to its direct consequences. Surgery is good because it heals the patient.

A similar but more complex project is to explain why an *obligation to act* (rather than just an action) might be good. The direct consequentialist will look to the action that is proposed to be obligatory and to its direct consequences. To justify the proposition, “the surgeon must complete the operation,” he considers, first, the surgery and the health of the patient. Next he inquires about the good of, so to speak, “attaching” the action in one way or another to a potential actor. He may consider whether the firm attachment of obligation is more useful than the weaker attachment of inclination; whether the obliged person produces more results sooner than the loosely committed person. He may calculate whether the ineluctable demand, and the endorsement or acceptance of that demand by the potential actor, are more

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<sup>12</sup> Aristotle draws attention to some important dimensions of the goods related to action:

As we say that some people who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either unwillingly or owing to ignorance or for some other reason and not for the sake of the acts themselves (though to be sure, they do what they should . . .), so is it, it seems, that in order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.

NICHOMACHEAN ETHICS 1144a-14–20 (W. D. Ross, trans., revised by J. O. Urmson), in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1807 (Jonathan Barnes, ed. 1984) (hereinafter *Nichomachean Ethics* (Ross)).

[F]or actions in accord with the virtues to be done temperately or justly it does not suffice that they themselves have the right qualities. Rather, the agent must also be in the right state when he does them. First, he must know [that he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and, third, he must do them from a firm and unchanging state.

ARISTOTLE, NICHOMACHEAN ETHICS 1105a-28–35 (Terence Irwin, trans., 2d ed., 1999, at 22) (hereinafter *Nichomachean Ethics* (Irwin)). The bracketed words are interpolations by Irwin.

useful than some more suggestive attachment and some more tentative endorsement.<sup>13</sup> (Indeed they likely would be, since obligation and its acceptance often induce determination and persistence.)<sup>14</sup> Direct consequentialism produces an instrumentalist account of the good of obligation.

## 2. Beyond Direct Consequential Good

If direct consequentialism were the entire story, we might be expected to display a “parsimoniousness of the spirit” and to take towards all obligations the same bored, “it just has to be done” attitude that we take towards filling out the tax return or showing up at work on time. In fact, however, there seem to be some demanding responsibilities, especially of a familial, patriotic, or religious nature, which elicit enthusiasm and a true outpouring of the spirit. Thus the Psalms repeatedly refer to “delight” in the Law,<sup>15</sup> and Psalm 119 states:

I run the way of your commandments, for you have given me freedom of heart.<sup>16</sup>

Further, consider the lives led by those who, owing to wealth, are free of the most obvious consequentialist compulsions. Perusing the biographies of the rich and famous discloses two basic types. The first—Andrew Carnegie is an example—develops obligations and embraces duties beyond what circumstances require.<sup>17</sup> The second—J.P. Getty is an instance—lives a life of unusual eccentricity and disconnectedness (he purchased one of Henry VIII’s former residences and lived there with several mistresses simultaneously, tyrant of a private kingdom).<sup>18</sup> People seem for some reason to need obligation. Unless it is thrust upon them, they invent it or they deteriorate.

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<sup>13</sup> See generally HENRY SIDGWICK, *THE METHODS OF ETHICS*, ch. 5, § 4 (7th ed., 1907). (“[The] distinction between Excellence and Strict Duty does not seem properly admissible in Utilitarianism. ... For a Utilitarian must hold that it is always wrong for a man knowingly to do anything other than what he believes to be most conducive to Universal Happiness.”) (The full text of this book is available at <http://www.la.utexas.edu/methsidg/me>).

<sup>14</sup> Furthermore, the acceptance of obligation warrants training and other preparation. Acceptance of obligation forms a basis for disclosure to affected parties, and thus encourages preparations that mitigate burdens and enhance benefits.

<sup>15</sup> *E.g.*, Psalm 119, ll. 35–36, NJB (“Guide me in the way of your commandments, for my delight is there”).

<sup>16</sup> *Id.*, ll. 32–33.

<sup>17</sup> ANDREW CARNEGIE, *THE AUTOBIOGRAPHY OF ANDREW CARNEGIE* (1920).

<sup>18</sup> RUSSELL MILLER, *THE LIFE OF GETTY* (1985).



Further still, imagine a world in which there is no direct consequentialist justification for obligation. Imagine that in this world, all the good direct consequences at which an action might aim—beauty, health, pleasure, whatever—could be as well served without obligation as with it. Perhaps they have all been perfectly achieved already, or perhaps the world is populated entirely by persons who do just as much—and just as well and just as efficiently—in the service of those goods without obligation as with it. They are perfectly efficient and skillful in all the arts and crafts from the moment each sets his hand to the task. So the training-related efficiencies of long-term commitment are not needed. The recipients of their services need make no accommodations to receive them and perfectly foresee the time and manner in which services will be rendered, so the reliance-supporting effects of obligation are not needed.

If you are an unmitigated direct consequentialist you find no reason for imposing, recognizing, or accepting obligation in this world. You see no point in burdening yourself with duties. You might, of course, perform various good actions. But you would proceed according to no firm order or demand. You might accept some order, but only one held weakly in place by suggestive norms rather than firm mandates, which allowed that the action it recommended might just as well be performed instead by someone else. Your children's hunger implies little for you and no more for anyone else; just that feeding them would be nice, pretty good, not quite a total waste of time. Suppose that murder is to be avoided, in pretty much the same way as boring speech.

What sort of life would you lead? Perhaps you would act seldom, and after only brief deliberation. Perhaps you would live *ad libetem*, "practicing random acts of kindness," as the bumper stickers advise, guided only by habit and the rhythms of the emotions. You might cultivate goodness and beauty only in the spontaneous way in which Wordsworthian breezes freshen and gentle showers cultivate the daffodils. Perhaps you would resemble the man described by Plato:

[H]e ... lives along day by day, gratifying the desire that occurs to him, at one time drinking and listening to the flute, at another downing water and reducing; now practicing gymnastic, and again idling and neglecting everything; and sometimes spending his time as though he were occupied with philosophy. Often he engages in politics and, jumping up, says and does whatever chances to come to him; and if he ever admires any soldiers, he turns in that direction; and if it's money-makers, in that one. And there is neither order nor necessity

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in his life, but calling this life sweet, free, and blessed he follows it throughout.<sup>19</sup>

He displays a contempt for the “necessary”:

[F]or the sake of a newly-found lady friend and unnecessary concubine such a man will strike his old friend and necessary mother ... [and] for the sake of a newly-found and unnecessary boy friend, in the bloom of youth, he will strike his elderly and necessary father ... .<sup>20</sup>

*Necessary—*anagkaion**—here is used in a special sense. It does not refer to what you need to keep yourself alive, such as food and water, nor does it refer to what you must do to avoid trouble. That man no longer finds his mother and father necessary for purposes like those. Rather, the term refers to a bond or tie within a friendship or a family. The root of *anagkaion* may be *agkon*—elbow or arm—so perhaps your “necessary” people are those who link elbows with you or grip you by the arm, obliging you to honor their wishes and to help them when they are in distress.<sup>21</sup> (Another sense of *anagkaion* makes it refer to that which is morally compulsory.<sup>22</sup> An excellent person recognizes more things as morally binding than ordinary people might do, but a debased person, it appears, will acknowledge fewer.)

The man described in the *Republic* is unsteady. He is inconstant. His soul is “tender”<sup>23</sup> and abhors restraint. His actions are episodic. Obligation-free man is “human being lite.”<sup>24</sup>

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<sup>19</sup> PLATO, *THE REPUBLIC* 561c–d (Alan Bloom, trans., 2d ed., 1968, at pp. 239–240) (hereinafter *Republic*). Here and throughout passages are attributed to Plato although he attributes them to Socrates.

<sup>20</sup> *Id.* at 574 b–c (255). This assertion is actually posited as a question by Socrates (“is it your opinion that ...?”). But it is clear in context that Socrates expects to receive an affirmative answer and that he approves of it once he receives it.

<sup>21</sup> Or perhaps it refers to those whom you have grasped or embraced. See 1 CESLAS SPICQ, O.P., *THEOLOGICAL LEXICON OF THE NEW TESTAMENT* (James D. Ernst, trans., 1994) (hereinafter *Theological Lexicon*.) Pages 97–100 are relevant to the discussion in the text and page 98 n.10 contains a discussion of the etymology of *anagkaion*.

<sup>22</sup> Cf. DAVID WIGGINS, *NEEDS, VALUES, TRUTH* 26 (3d ed., “amended,” 2002) (discussing Aristotle’s treatment of the term in *METAPHYSICS* V). In another passage, close to those quoted above from the *Republic*, Socrates discusses the necessary and unnecessary desires and proposes two kinds of “necessary” desires: “those we aren’t able to turn aside” and “those whose satisfaction benefits us. ... The desire for bread ... is presumably necessary on both counts, in that it is beneficial and in that it is capable of putting an end to life.” *Republic*, *supra* note 19, at 558d–559d.

<sup>23</sup> *Republic*, *supra* note 19, at 563d.

Extend the thought experiment to social and political things: imagine a family or a city. Again, circumstances undermine the direct consequentialist case for obligation. The city has no enemies. The houses have no mortgages. The citizens experience no temptation to lie. If you are an unmitigated direct consequentialist, you may find little reason to support civil law or family rules or filial loyalty. If everyone thinks as you do then the positive order will recognize no obligations of those sorts. This will make for a world strikingly different from our own, because nations and families here in the real world are obligation-rich environments.

What sort of political or social situation will emerge? Probably one like that in the “Beautiful City” described by Plato:

[There is] license in it to do whatever one wants<sup>25</sup>... . And where there’s license, it’s plain that each man would organize his life in it privately just as it pleases him.

...[T]he absence of any compulsion to rule in this city ... even if you are competent to rule, or again to be ruled if you don’t want to be, or to make war when the others are making war, or to keep peace when the others are keeping it, if you don’t desire peace; and, if some law prevents you from ruling or being a judge, the absence of any compulsion keeping you from ruling or being a judge anyhow, if you long to do so—isn’t such a way of passing the time divinely sweet for the moment?...

And ... isn’t the gentleness toward some of the condemned exquisite? Or, in such a regime, haven’t you yet seen men who have been sentenced to death or exile, nevertheless staying and carrying on right in the middle of things; as though no one cared or saw, stalking the land like a hero?...

And [this regime]... spatters with mud those who are obedient, alleging that they are willing slaves of the rulers and nothings ... while it praises and honors ... the rulers who are like the ruled and the ruled who are like the rulers. ... [A] father ... habituates himself to be like his child and fear his sons, and a son habituates himself to be like his father and to have no shame before or fear of his parents. ...and metic is on an equal level with townsman and townsman with metic, and similarly with the foreigner. ... [T]he teacher ... is frightened of the pupils and fawns on them, so the students make light of their teachers.... [T]he old come down to the level of the young; imitating the young, they are overflowing with facility and charm, and that’s so that they won’t seem to be unpleasant or despotic.

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<sup>24</sup> Whereas, by way of contrast, people who embrace obligations in a fulsome way seem to be the “bigger,” more epic figures of history. Odysseus remaining true to Penelope and she to him. Lincoln returning the penny. Horton hatching the egg.

<sup>25</sup> This is actually in the form of a question in the original (“And isn’t there license in it to do whatever one wants?”). But it is clear from the context that Socrates expects an affirmative answer. He receives one and builds on it.

Then, summing up all of these things together ... do you notice how tender they make the citizens' soul, so that if someone proposes anything that smacks in any way of slavery, they are irritated and can't stand it? And they end up, as you well know, by paying no attention to the laws, written or unwritten, in order that they may avoid having any master at all.<sup>26</sup>

Plato characterizes it as a city of "license." Professor Arlene Saxenhouse characterizes it as a city of "blurring of form" and "forgetfulness of form."<sup>27</sup> It is a Woodstock of a city.

There is something amiss here; some loss of *gravitas*, some weakness of focus. If our own country descended into such a condition it would not be the nation we belong to today but instead a "United States lite." The same for your family or your university. Something would be lacking; something unknown to the direct consequentialist.

Obligation seems to have a strong personalist element. It is integrated into our lives in a way that is responsive to who we are and who we wish to become. As with a rope, so with an obligation: it, so to speak, "pulls on you," and it may damage you if you try to pull away. And it changes you, much for the better, if you accept and fulfill it.<sup>28</sup> To be obliged, it appears, is a part of what makes us what we are.

### 3. Reflexive Good

Actions affect belief and character. They lead to the development (or deterioration) of the acting person, disposing him towards the goods at which the deed is aimed or, perhaps, the evils which it inflicts. This feature of action and decision might be called the "reflexive" aspect.

Cognitive dissonance psychologists report that "[a]fter making difficult decisions, individuals value the chosen alternative and devalue the rejected alternative more than they did prior to the decision."<sup>29</sup> Having made a

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<sup>26</sup> This quotation is collated from *Republic*, *supra* note 19, at 557b–563d. The excerpts here quoted appear in the same sequence as in the original, but with several long elisions. Dots identify the elisions even where the usual canons of style would call for asterisks.

<sup>27</sup> *Democracy, Equality, and Eide: A Radical View from Book 8 of Plato's Republic*, 92 AM. POL. SCI. REV. 272, 280 (1998).

<sup>28</sup> As symbolized by the installation ceremonies for many offices, which involve shedding one's garments and donning new ones. See "Of Installation Ceremonies," (presidential address), 1967 PROCEEDINGS OF THE ROYAL ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN AND IRELAND 5–20 (1967).

<sup>29</sup> Eddie Harmon-Jones & Cindy Harmon-Jones, *Cognitive Dissonance Theory after 50 Years of Development*, 38 ZEITSCHRIFT FÜR SOZIALPSYCHOLOGIE 7, 11 (2007) (available at [www.socialemotiveneuroscience.org/pubs/ehj2007](http://www.socialemotiveneuroscience.org/pubs/ehj2007)). See *id.* at 8, reporting a finding

decision and taken an action, an actor is led to endorse the opinions and attitudes that support it, and to denigrate or set aside the opinions and attitudes that might have led down a different road. The reason for this, according to one explanation, is that dissonance “has the potential to interfere with effective and unconflicted action.”<sup>30</sup>

Doubtless many other motives lead people to avoid cognitive dissonance. One is a commitment to true belief. Someone who acts on conflicting opinions must, after all, have endorsed at least one false proposition. A somewhat similar motive is based in a commitment to moral integrity. Someone who undermines in some exigencies the goods he supports in other circumstances has reason to fear that he lacks consistency, firmness, or courage. The term *dissonance* can be another word for the pangs of con-science. For reasons such as these, every thoughtful person, throughout his life, re-examines beliefs that are discordant with one another or with his actions, and reconsiders or revises projects that conflict with his beliefs. Dissonance invites reflection, reconsideration, and repentance.

How does a person change, after reflection, reconsideration, and repentance? His “values” change, the social science literature suggests. His opinions and beliefs about the good stand to be revised. His habitual dispositions towards action change. Putting it the old-fashioned way, he may correct vices. The person who embarks upon a project involving danger will find any streaks of yellow in his character to be disturbing; upon reflection he may seek to develop courage. Thoughtful people conduct, throughout their lives, projects of deepening and developing their characters.

When someone determines upon a good action, for good reasons and in a good way, he enhances the beliefs and character traits that orient him towards

that “[d]issonance caused by a decision can be [and will often be] reduced by viewing the chosen alternative as more attractive and/or viewing the rejected alternative as less attractive.” Cf. John Paul II, *Veritatis Splendor* ¶ 71.2 (Encyclical Letter of August 6, 1993, 85 AAS 1133), in *THE ENCYCLICALS OF JOHN PAUL II* at 674, 732 (J. Michael Miller, C.S.B., ed., Vatican Press, trans., 1996) (emphasis in original):

Human acts ... express and determine the goodness or evil of the individual who performs them. They do not produce a change merely in the state of affairs outside of man but, to the extent that they are deliberate choices, they give moral definition to the very person who performs them, determining his *profound spiritual traits*.

*See id.* at ¶ 72.2 (p. 733). (“If the object of the concrete action is not in harmony with the true good of the person, the choice of that action makes our will and ourselves morally evil... .”)

<sup>30</sup> Eddie Harmon-Jones & Cindy Harmon-Jones, *Cognitive Dissonance Theory after 50 Years of Development*, *supra* note 31, at 11.

the good. If his decision is based on careful deliberation,<sup>31</sup> he comes to know the good better and to establish it more firmly within himself. His knowledge of the good moves beyond abstraction and attains an experiential dimension.<sup>32</sup> He rejects dissonant opinions and tendencies that might have led him to act badly: obliviousness to the good, for example, or weakness of discernment, or a tendency to succumb to temptation. He disposes himself the more firmly towards taking similar actions on subsequent occasions. He makes himself a better person.<sup>33</sup> This describes what might be called the “reflexive good of action.”

#### 4. Fulfillment Good

Action not only develops belief and character, it also *exercises* them. Action brings to fruition the deliberations and dispositions of the acting person. Good action expresses and deploys the actor’s understanding of the good.<sup>34</sup> This can be illustrated by the example of a sculptor: it is good for him to have a sculptor’s talent and training; good to develop it through study and observation; and good in yet a further way actually to practice his art. The

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<sup>31</sup>See ARISTOTLE, EUDEMIAN ETHICS 1226b-7–9 (J. Solomon, trans.), in 2 THE COMPLETE WORKS OF ARISTOTLE 1922, 1942 (Jonathan Barnes, ed., 1982) (hereinafter *Eudemian Ethics*). (“[C]hoice is not simply picking but picking one thing before another; and this is impossible without consideration and deliberation; therefore choice arises out of deliberate opinion.”) Irwin observes, “deliberation about what promotes an end, is necessary for choosing the correct actions for their own sakes (i.e. as part of the conception of happiness that one has reached by deliberation).” “Notes” in *Nicomachean Ethics* (Irwin), *supra* note 12, at 172, 252.

<sup>32</sup>*Cf.* KAROL WOJTYLA, THE ACTING PERSON 155 (Andrzej Potocki, trans., Anna-Teresa Tymieniecka, collaborator, 1979). (“[A]ction serves to approach and crystallize the experience of truth, good, and beauty.”)

<sup>33</sup>See *Nicomachean Ethics* (Irwin), *supra* note 12, at 1105b 9–10(p. 23). (“It is well said, then, that it is by doing just acts that the just man is produced, and by doing temperate acts the temperate man.”) See Karol Wojtyla, *The Person: Subject and Community*, in PERSON AND COMMUNITY: SELECTED ESSAYS 219, 235 (Theresa Sandok, trans., 1993). (“In fulfilling an action, I fulfill myself in it if the action is ‘good,’ which means in accord with my conscience [assuming, of course, that this is a good conscience, a true conscience]. By acting in this way, I myself become good ... .”) See GERMAIN GRIEZ, CHRISTIAN MORAL PRINCIPLES, ch. 9, Question D, at 235 (1983) (in 1 THE WAY OF THE LORD JESUS) (in deciding to do something, “one integrates [its] good ... into one’s moral self.”)

<sup>34</sup>See John Paul II, *Veritatis Splendor* ¶ 71.2 (Encyclical Letter of August 6, 1993, 85 AAS 1133), in THE ENCYCLICALS OF JOHN PAUL II, *supra* note 29, at 674, 732. (“Human acts ... *express* and determine the goodness or evil of the individual who performs them”) (emphasis added).

actions of a good person extend his goodness and, so to speak, “realize” it and fulfill it.<sup>35</sup>

### 5. Attesting Good

Actions reveal belief and character. (As the familiar saying has it, “a tree is known by its fruit.”<sup>36</sup>) Some actions, by attesting to convictions, commend those convictions to other people.

Some actions, revealing and illuminating the character of the acting person, extend his virtues and vices to others. “Modeling”—the development of character through emulation—is recognized by psychologists as a foundation for moral development in children,<sup>37</sup> and there seems to be no reason to deny its efficacy among adults as well. Thus, when a person acts on worthy convictions and displays a good character, a further dimension of good is involved by way of enhancing the merits of those who observe him. For want of a better term, this aspect of the good of action is here described as the “attesting good.”

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<sup>35</sup> See Karol Wojtyła, *supra* note 34, at 219, 235. (“In fulfilling an action, I fulfill myself in it.”)

<sup>36</sup> Luke 6:43–45 (New American Bible, 1986, at 1039):

A good tree does not bear rotten fruit, nor does a rotten tree bear good fruit. For every tree is known by its own fruit. For people do not pick figs from thorn bushes, nor do they gather grapes from brambles.

<sup>37</sup> See Gareth B. Matthews, *Concept Formation and Moral Development*, in PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 175, 185 (James Russell, ed., 1987):

A young child is able to latch onto the moral kind, bravery, or lying, by grasping central paradigms of that kind. ... Moral development is ... something much more complicated than simple concept displacement. It is: enlarging the stock of paradigms ... ; developing better and better definitions of whatever it is that these paradigms exemplify; appreciating better the relation between straightforward instances of the kind and close relatives; and learning to adjudicate competing claims from different moral kinds ... .

See generally A. Bandura, *Social Cognitive Theory: An Agentic Perspective*, 52 ANN. REV. PSYCH. 1 (2001); Lawrence J. Walker, Karl H. Hennig & Tobias Krettenauer, *Parent and Peer Contexts for Children’s Moral Reasoning Development*, 71 CHILD DEV. 1033 (2000):

... psychoanalytic theory emphasizes early parent/child relationships in the development of conscience through the mechanism of identification and consequent internalization of values. Social-learning theory ... emphasizes the power of models and so has also focused on parents’ role in displaying and reinforcing appropriate behaviors. Cognitive development theory ... holds that interactions with peers are more potent ... .

## 6. Good Within Friendship

Within friendship, the goods of action develop special resonance. The reflexive good of action is there enhanced. A friend is like a mirror: one sees oneself through her eyes. One observes, through her eyes, how one's actions "come across": how they may be considered "from the outside." One better assesses one's projects and approaches to life, considering them from a new angle. One supplements one's own judgment with hers. When the actions and projects are good, one embraces more warmly the dispositions of character that have led in the right direction. When the actions must be judged adversely, one repudiates the disagreeable motives more urgently. Dissonant traits not only disquiet but also, within friendship, embarrass. Friendship ennobles.

No doubt the other basic goods of action are promoted in a special way within friendship, as well. It is surely fulfilling in a special way to act well towards a friend. It surely attests in a special way to one's goodness, since a friend better understands and more warmly emulates.

### *C. Goods Involved in Obligatory Action*

When action fulfills obligation, it participates in a special way in the three goods just discussed.

#### 1. Reflexive Good

Obligatory action specially affects belief and character. Where obligation applies, dissonance bites with its sharpest tooth. Where obligation is arduous, the dissonance of conflicting beliefs grates with enhanced intensity. Where apparent obligations conflict, the pangs of a troubled conscience grow severe. Reconciling these dissonances requires clarity of thought. Successful fulfillment of obligation thus leads on to clarity and consistency of belief.<sup>38</sup>

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<sup>38</sup> Obligational understanding has a special dimension, involving not only abstract but also experiential knowledge. You cannot understand a precept fully until you have written it on your heart and put it into practice. Cf. KAROL WOJTYŁA, *THE ACTING PERSON* 166–67 (Andrzej Potocki, trans.; Anna-Teresa Tymieniecka, collaborator, 1979):

[T]he creative role of the conscience consists in the fact that *it shapes the norms into that unique and unparalleled form they acquire within the experience and fulfillment of the person*. The sense of conviction and certitude, whereby the truthfulness of a norm is molded within the personal dimension, are followed by the sense of duty (emphasis in original).



Wisdom and knowledge about *oneself* are specially implicated by obligation. You have to understand that you are subject to obligation in order to accept and fulfill one. You must set aside narcissism and mutinous self-involvement. Setting aside selfishness and accepting obligation, you come to see yourself in a new light and from a critical vantage point. You become, as Scripture puts it, “witness to yourself.”<sup>39</sup> You witness what Professor Karol Wojtyla referred to “the drama of good and evil enacted on the inner stage of the human person. ... [a drama in which] man has the experience of good and evil simply in himself ... .”<sup>40</sup> Witnessing, you are called upon to appraise and evaluate. You judge yourself by the obligational standard.

Firmness of character stands specially to be enhanced by the acceptance and satisfaction of obligation.<sup>41</sup> Fulfillment of duty, when the appetite pro-

Those lyrical passages from the Psalms that commend the law and knowledge of the law use a Hebrew word for knowledge—*yada*—which refers not only to abstract but also to experiential knowledge. See Benedict XVI, Homily at St. Peter’s, Rome, April 1, 2010, published as “Priestly prayer and examination of conscience for the Church,” *L’OSSERVATORE ROMANO* 4 (Eng. weekly ed., April 7, 2010). (“Knowing, in the language of sacred Scripture, is an interior becoming one with the other”); JOHN PAUL II, *THE THEOLOGY OF THE BODY: HUMAN LOVE IN THE DIVINE PLAN* 99 (1997) (“‘To know’ [*jadaq*] in biblical language does not mean only a purely intellectual knowledge, but also concrete knowledge, such as the experience of suffering [cf Is 53:3], of sin [Wis 3:13], of war and peace [Jgs 3:1; Is 59:8]. From this experience moral judgment also springs: ‘knowledge of good and evil’ [(Gn 2:9–17).]”)

<sup>39</sup> More accurately: “witnesses to yourselves.” Joshua 24:22:

Joshua then said to the people, “You will not be able to serve Yahweh, since he is a holy God, he is a jealous God who will not tolerate either your misdeeds or your sins.” ... The people replied to Joshua, “No! Yahweh is the one we mean to serve.” Joshua then said to the people, “You are witnesses to yourselves that you have chosen Yahweh, to serve him.” They replied, “Witnesses we are!”

*Id.* at 24:19–23 (NJB).

<sup>40</sup>KAROL WOJTYLA, *THE ACTING PERSON*, *supra* note 38, at 49. (The quote continues: “... he thereby experiences himself as the one who is either good or evil.”) See *id.* at 165–70 for a discussion of the participation of obligations in this drama.

<sup>41</sup>See 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II q. 88 art. 6 c. at 1571 (Fathers of the English Dominican Province trans., 1947). (“[A] vow fixes the will on the good immovably and to do anything of a will that is fixed on the good belongs to the perfection of virtue ... , just as to sin with an obstinate mind aggravates the sin ... .”) See *id.* at 1: “the necessity resulting from a vow ... strengthens the will and increases devotion.”

*Nicomachean Ethics* locates self-control and firmness of character at a fundamental level in the virtuous character. It is not enough just to do what is right. Fully good deeds are only those which are performed “as a result of choice and for the sake of the actions themselves.” *Nicomachean Ethics* (Ross), *supra* note 12, at 1144a-19–20 (p. 1807). “Choice involves balanced and mature assessment. Choice involves consideration and

tests and the desires oppose, involves dedication of the will and subordination of the spirit.

Obligation pulls away from inconsistent commitments. It detaches the heart from contrary desires. It turns the obligation-accepting person away from all those dispositions that are deleterious to firm moral commitment and inimical to the steady embrace of the good. Obligation converts:

To repent [or convert] is to change direction in the journey of life: not, however, by means of a small adjustment, but with a true and proper about turn. Conversion means swimming against the tide, where the “tide” is the superficial lifestyle, inconsistent and deceptive, that often sweeps us along, overwhelms us and makes us slaves to evil or at any rate prisoners of moral mediocrity.”<sup>42</sup>

To honor obligation ennobles. It deepens the actor’s understanding of himself. It firms up his dedication to the good. It leads the actor to live “with an eye to [his] life in its entirety.”<sup>43</sup>

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deliberation . . . [and] arises out of deliberate opinion.” *Eudemian Ethics*, *supra* note 31, at 1226b-8-9.

Choice, consideration, and deliberation can only arise from a self-governing, steady character. To act justly and temperately, someone must “be in a certain condition”:

in the first place he must have knowledge, secondly he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character.

*Nicomachean Ethics* (Irwin), *supra* note 12, at 1105a-26–1105b-1 (p. 22).

Only the steady person can fully display and instantiate his virtuous character in all its fullness across the years and consistently through various projects and circumstances. *Cf.* A.W. Price, *Aristotle’s Ethical Holism*, 89 *MIND* (n.s. no. 355) 338, 342 (1980) (“it must take a lifetime to display [‘firm and unchangeable character’] fully”). Only the self-governing, steady person, steadily reflecting and firmly choosing, “is at one mind with himself” when he acts and so to speak puts his entire self behind each action. Not so the wicked, who are “at variance with themselves” and “rent by faction.” *Nicomachean Ethics* (Ross), *supra* note 12, at 1166b-6–7 & 1166b-19 (pp. 1843 & 1844).

<sup>42</sup> Pope Benedict XVI, Catechesis delivered at the Vatican, February 17, 2010, translated in “We are dust yet destined to immortality,” *L’OSSERVATORE ROMANO* 7 (Eng. weekly ed., Feb. 24, 2010). (The words “or convert,” within brackets, are present, within brackets, in the translation. The word “along” in the phrase “sweeps us along” appears as “long” in the published translation and is here corrected.)

<sup>43</sup> A. W. Price, *Aristotle’s Ethical Holism*, 89 *MIND* (n.s. no. 355) 338, 342 (1980) (inferring Aristotle’s “underlying assumption” that “all fully chosen acts (i.e., roughly, all acts by which a mature man is willing to stand) are in fact selected with an eye to a life in its entirety”). *See id.* at 338: “It will be the thesis of this paper that Aristotelian man assesses and pursues his goods with an eye directed at once exclusively and

## 2. Fulfillment Good

Obligatory action extensively deploys the self. Duty firmly engages the norm-respecting, good-appreciating qualities of the actor. If an action is compared to the fruit of a tree, then the obligation to act and its acceptance by the acting person must be compared to the branches and the trunk. Action out of comprehended duty, then, involves “the tree as well as the fruit.”<sup>44</sup> The obligation-endorsing actor brings more of himself into his projects than does the unobliged individual. He brings a wider range of character into his actions, and thus “realizes” or fulfills more of himself.<sup>45</sup>

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comprehensively to the pattern of a lifetime. Its final suggestion will be that such a man can hardly exist.”

<sup>44</sup>*Cf. Summa Theologica* II-II Q. 88 a. 6 c. (Fathers of the English Dominican Province trans. (1947)), vol. 2, at 1571:

[H]e that vows something and does it, subjects himself to God more than he that only does it; for he subjects himself to God not only as to the act, but also as to the power, since in future he cannot do something else. Even so he gives more who gives the tree as well as the fruit, than he who gives the tree only.

<sup>45</sup>*Cf. id.:*

... it is better and more meritorious to do one and the same deed with a vow than without ... because a vow ... is an act of religion which is the chief of the moral virtues. Now the more excellent the virtue the better and more meritorious the deed. Wherefore the act of an inferior virtue is the better and the more meritorious for being commanded by a superior virtue, whose act it becomes.

The insight should not be limited to vows (a term that Aquinas defines as “promise[s] made to God.” *Id.* at 5 c. at 1570. Promises of all sorts invoke the promisor’s commitment to justice and place that commitment behind an action that might otherwise be casually taken, or based upon some limited motive such as to curry temporary favor or to receive something specific in return. Out of nothing more than temperance and a desire to keep his weight down, a person might take less than he might from the serving bowl every evening; but if he promises the other diners to limit his portions he “places more of himself” behind his abstemious practice.

Furthermore, this line of thought should not be limited to promises. The recognition and endorsement of obligation may take place even without a promise, as for example if the diner described in the previous paragraph were to pursue his abstemious policy owing to a understanding of the circumstances of the other diners and an intense sympathy with their hunger, and if he were to subscribe to a morality which enjoined him never selfishly to place his own appetites over the acute needs of other people. His obligation, and his acceptance of it, would result in his placing “more of himself”—his commitment to justice—behind his sacrificial eating habits than he would if he refrained—however continuously—without having or endorsing the duty to do so. (*Cf.* the passage from *Summa Theologica*, *supra*, which clearly implies that the thesis can be extended beyond

He realizes or fulfills high aspects of himself—firm and noble ones: the virtues of wisdom and self-control. Aristotle, in an exceptionally celestial characterization, goes so far as to refer in a tentative way to the highest excellences of man as “divine.”<sup>46</sup> As this may suggest, obligation and the acceptance of obligation may bring the obligated person along towards an exalted condition in which, for a time at least, he is almost godlike. The Passion has, in Patristic writing, been said to yield fruit or wine. The Cross has been likened to the tree or to the vine.<sup>47</sup>

### 3. Attesting Good

Obligatory action attests with special vigor to the convictions and character of the actor; more fulsomely than may be the case with action taken for lighter reasons. Impulsive actions, for example, are often flighty and inconsistent, and therefore unreliable evidence of deeper motives.

Action upon obligation not only informs, it often inspires. From those who gave “the last full measure of devotion”—as Lincoln said at Gettysburg—we can “take increased devotion.” Their actions engage the heart, and raise and purify the spirit. Extending the comparison to the tree and the vine, the fruit and the grape, Ambrose introduces the element of wine, and compares the effects of the Passion to those of drinking from the cup.<sup>48</sup>

### 4. Obligation Within Friendship

Selfishness and egotism impair friendship:

Indeed, man is weakened by an intense influence, which wounds his capacity to enter into communion with the other. By nature, he is open to sharing freely,

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matters involving vows: Aquinas adduces parallels to his thesis as follows: “just as the act of faith or hope is better if it be commanded by charity.”

<sup>46</sup> *Nicomachean Ethics* (Ross), *supra* note 12, at 1177a-15 (p. 1860).

<sup>47</sup> See ST. AMBROSE, EXPOSITION OF THE CHRISTIAN FAITH bk. 1 ch. 20 (379), in 10 NICENE AND POST-NICENE FATHERS (2d series) 201, 222 (H. de Romestin, trans., 1896, reprint ed., 1994):

... there is a Cup, wherewith Thou dost use to purify the hidden chambers of the soul ... a new Cup, brought down from heaven to earth, filled with wine pressed from the wondrous cluster, which hung in fleshly form upon the tree of the Cross, even as the Grape hangs upon the vine.

<sup>48</sup> *Id.*

but he finds in his being a strange force of gravity that makes him turn in and affirm himself *above* and *against all others* ....<sup>49</sup>

To act upon obligation is to confront and reject this tendency to self-involvement and thus to balm and heal this wound. Accepted obligation shatters the “illusion of self-sufficiency, the profound state of closure, which is the very origin of injustice.”<sup>50</sup>

Actions upon obligations to a friend deploy much that is noble and benevolent in the actor. They manifest and fulfill his firmness of character and knowledge of the good of friendship; his benevolence and his capacity for love.

### 5. Obligation Under Law

Obligation and its acceptance qualify the person to live well under law, and to participate fully in the goods of law.

To be sure, even Justice Holmes’ “bad man,” who “cares not for the vaguer sanctions of conscience,”<sup>51</sup> may conform his conduct to the legal rules, as he likely will do in order to avoid punishment. A better man, however, who aims to live justly, and to arrive at a just relationship with the legal order under which he lives, requires what might be called the “juristic virtues.” His relationship with the law will be enhanced, and he himself will be more thoroughly just, if he develops the dimensions of understanding and firmness that are identified above as fostered by obligation and action in fulfillment of obligation.<sup>52</sup>

As Aristotle said, “people who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either unwillingly or owing to ignorance.”<sup>53</sup>

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<sup>49</sup> Pope Benedict XVI’s Message for Lent 2010, “Love the greatest justice,” *L’OSSERVATORE ROMANO* 3 (Eng. weekly ed., February 10, 2010).

<sup>50</sup>*Id.*

<sup>51</sup> O. W. Holmes, *The Path of the Law*, 10 *HARVARD LAW REVIEW* 457 (1897).

<sup>52</sup> Portions of this paragraph and the next are taken from Scott FitzGibbon, “Just Like Little Dogs”: The Law Should Speak with Veracity and Respect, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 107, 127–29 (Scott FitzGibbon, Lynn D. Wardle & A. Scott Loveless, eds., 2010).

<sup>53</sup> *Nicomachean Ethics* (Ross) *supra* note 12, at 1144a-14–15 (p. 1807). Here is a fuller quotation:

As we say that some people who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either unwillingly or owing to ignorance or for some other reason and not for the sake of the acts themselves (though, to be sure, they do what they should and all the things that the good man ought), so is it, it seems, that in order to be

Fully meritorious obedience—full justice in relations with the law—cannot be founded mainly in fear or in unconsidered habituation. It cannot be the product of psychological conditioning nor of indoctrination. It cannot be based on ignorance.

The fully just person's actions are taken only after "consideration and deliberation."<sup>54</sup> These projects can progress only if they are based upon knowledge and understanding, bearing fruit in firm conclusions that can be commended as "deliberate opinion."<sup>55</sup> The just person achieves balanced assessments, develops an understanding of how his actions may relate to the basic good,<sup>56</sup> and arrives at decisions:<sup>57</sup> firm decisions, firmly rooted.<sup>58</sup>

good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.

*Id.* at 1144a-14–20. Portions of this passage are revisited, and the translator's selection of the word *choice* is criticized, *infra* note 59.

<sup>54</sup> *Eudemian Ethics*, *supra* note 31, at 1226b-7–9 ("choice is not merely simply picking but picking one thing before another; and this is impossible without consideration and deliberation; therefore choice arises out of deliberate opinion").

<sup>55</sup> *Id.*

<sup>56</sup> Irwin comments, "deliberation about what promotes an end, is necessary for choosing the correct actions for their own sakes (i.e. as part of the conception of happiness that one has reached by deliberation)." "Notes" in *Nicomachean Ethics* (Irwin), *supra* note 12, at 172, 252.

<sup>57</sup> *Id.* at 1144a-18–20 (p. 97). (Commending—as the "type of action in the state that makes [one] a good person"—action taken "because of decision and for the sake of the actions themselves.") *Cf.* the Ross translation "as a result of choice and for the sake of the acts themselves." *Nicomachean Ethics* (Ross) *supra* note 12, at 1144a-18–20 (p. 1807). The word translated as *decision* here is *prohairesis*; Irwin observes: "Many translators use 'choice' to translate it, but this is a misleading rendering, since Aristotle allows choice (*hairesis*) without deliberation or decision, and such choice does not count as *prohairesis*." "Notes," in *id.* at 172, 322.

<sup>58</sup> *See id.* at 1105a-28–34 (p. 22):

[F]or actions in accord with the virtues to be done temperately or justly it does not suffice that they themselves have the right qualities. Rather, the agent must also be in the right state when he does them. First, he must know [that he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and, third, he must do them from a firm and unchanging state.

(The bracketed words are interpolations by Irwin.) Irwin comments:

The value of virtuous actions, as opposed to a craftsman's production ... , is not simply determined by its efficiency in producing a product; it also has its characteristic motive. The value of virtue is intrinsic; virtuous action is not valuable simply as a means to some further result (e.g., acting kindly is not simply a means to making someone feel better). The intrinsic value of virtue reflects the virtuous person's motive.

"Notes," in *id.* at 172, 196.

A just person's decisions to comply with the law—or to support it in other ways—are firmly based upon an appreciation the good of law in general, the justice of the provision of law applicable to the matter at hand, and the good of his actions in compliance.

Thus, the goods of action upon obligation display this juristic dimension. Depth of knowledge—especially self-knowledge—the avoidance of dissonance, and the promotion of harmony, and above all perhaps the development of firmness and consistency of character, specially qualify a person to be fully engaged in his relationship to law.

King David, hearing the story of the rich man and the poor man from Nathan, first thinks of himself as a judge of others, applying the law to condemn the rich person and do justice to the poor. After his conversation with Nathan, David's point of view is drastically altered.

The first alteration is the most obvious: David realizes that he is a miscreant and needs to mend his ways. The second alteration is more fundamental: David sees himself no longer as a judge, seated above the community and imposing law upon it, but as a member of the community. He is brought to identify himself as a rich householder, a man with guests and the duties of a host, a man with neighbors who have their own households and possessions, and as a man who, like other people, is governed by the moral and divine law. This is the import and effect of Nathan's statement: "That man is you!"

#### *D. Corresponding Pathologies*

Disavowal or neglect of obligation often involves the actor in disorders which correspond negatively to the goods described above. His perception of his own condition stands to become clouded, owing to the normal human tendency to avoid insights which damage *amour propre*. His attitude towards others changes, as he is tempted to occlude the understandings of those who might regard him in an unflattering light.<sup>59</sup> Failing to achieve full self-control, he may remain immature; inappropriately childlike even when fully grown. Lacking this trait is the major reason why, in Plato's city of license, the man he depicts there is "lite."

Immature and "lite," he is inclined towards hostility towards those who would honor the mature and the obligation-accepting man and, he rightly apprehends, would dishonor the one who neglects his duties:

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<sup>59</sup> These pathologies are suggested in the narrative of David, Bathsheba, and Uriah, and may be symbolized by David's attempt to get Uriah drunk.

[I]f someone says that there are some pleasures belonging to fine and good desires and some belonging to bad desires, and that the ones must be practiced and honored and the others checked and enslaved,... [the resident of this city] throws his head back and says that all are alike and must be honored equally.<sup>60</sup>

### III. LOVE AND THE JURISTIC PERSON

In one of its dimensions, love—a lower form of erotic love—is inimical to duty, discourages the acceptance and fulfillment of obligation, and undermines the juristic goods. In another dimension, love supports the juristic person's obligations and their fulfillment. The juristic goods, in turn, enhance and strengthen love.

#### *A. Erotic Love in Conflict with the Juristic*

*Eros* can involve “furor and agony.”<sup>61</sup> It is a sort of love, but it can be the love “of the wolf for the sheep.”<sup>62</sup> Socrates warns, as reported by Plato:

[K]now that in the friendship of the lover there is no real kindness; he has an appetite and wants to feed upon you: “As wolves love lambs so lovers love their loves.”<sup>63</sup>

*Eros* can lead onto aggression and destruction. It can delight in conquest and humiliation. Thus, again, Socrates:

He who is the victim of his passions and the slave of pleasure will of course desire to make his beloved as agreeable to himself as possible. Now to him who has a mind diseased anything is agreeable which is not opposed to him, but that which is equal or superior is hateful to him, and therefore the lover will not brook any superiority or equality on the part of his beloved; he is always employed in reducing him to inferiority.<sup>64</sup>

*Eros* may chafe under the bonds of obligation. In Plato's account, when a man is dominated by it, *eros* “lives like a tyrant within him in all anarchy and lawlessness,” so that he will “stick at no terrible murder, food, or deed.”<sup>65</sup>

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<sup>60</sup> This is a modified collation of *Republic* 561c, *supra* note 19, and some of the translated passages in Arlene Saxenhouse, *supra* note 27.

<sup>61</sup> 1 *Theological Lexicon*, *supra* note 21, at 9 n.13.

<sup>62</sup> *Id.* at 9 (“the desire of the wolf for the sheep”).

<sup>63</sup> Plato, *Phaedrus* 241, in 1 THE DIALOGUES OF PLATO 233, 246 (B. Jowett trans., 1892).

<sup>64</sup> Plato, *Phaedrus* 238e–239a, *id.* at 243–44.

<sup>65</sup> *Republic*, *supra* note 19, at 574e (p. 255).



## 1. Reflexive Consequences

*Eros* has been identified as “a kind of intoxication.”<sup>66</sup> It may deaden the sense of dissonance. It may dull the faculties of reason, so that inconsistencies no longer appear in sharp focus. It may weaken aspiration to true belief.

*Eros* may distract from the commitment to good action, substituting “irrational desire,” and “overcom[ing] the tendency of opinion towards the right.”<sup>67</sup> It may dull the pangs of conscience. King David is portrayed in ways that suggest this sort of deterioration during the period of his attentions to Bathsheba.<sup>68</sup>

*Eros* may undermine the sort of self-respect that is founded on moral excellence. It may substitute pride—an inauthentic form of self-regard that delights in conquest and domination.

*Eros* may lead to the casting of aspersions upon thoughtful reflection and upon repentance, in the view that they are marks of weakness and the practices of the defeated and the dominated. *Eros* may induce antipathy towards stability of character. It may lead to what Nietzsche referred to as “chaos in oneself” (a condition that he commended as the state in which a man might “give birth to a dancing star”<sup>69</sup>).

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<sup>66</sup> Encyclical Letter *Deus Caritas Est* of the Supreme Pontiff Benedict XVI to the Bishops, Priests, and Deacons, Men and Women Religious, and all the Lay Faithful on Christian Love (December 25, 2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html) (¶ 4). (“The Greeks—not unlike other cultures—considered *eros* principally as a kind of intoxication, the overpowering of reason by a ‘divine madness’ which tears man away from his finite existence and enables him, in the very process of being overwhelmed by divine power, to experience supreme happiness.”)

<sup>67</sup> Thus the definition that Socrates places in the mouth of a persuading lover of a boy:

[T]he irrational desire which overcomes the tendency of opinion towards right, and is led away to the enjoyment of beauty, and especially of personal beauty, by the desires which are her own kindred—that supreme desire, I say, which by leading conquers and by the force of passion is reinforced, from this very force, receiving a name, is called love.

Plato, *Phaedrus* 238, in 1 THE DIALOGUES OF PLATO, *supra* note 63, at 243. A valuable discussion of this passage and of *eros* generally is presented in A. W. PRICE, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE 61 *et seq.* (1989).

<sup>68</sup> See Part IV of this article.

<sup>69</sup> FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE 9 (Adrian del Caro, trans., Adrian del Caro & Robert Pippin, eds., 2006) (excerpt available at [assets.cambridge.org/97805218/41719/excerpt/9780521841719](https://assets.cambridge.org/97805218/41719/excerpt/9780521841719)) (translation of ALSO SPRACH ZARATHUSTRA, 1892). (“I say to you one must still have chaos in oneself to give birth to a dancing star.”)

## 2. Fulfillment Consequences

*Eros* can lead to a loss of self-possession and the debasing of the character, as Pinocchio discovered when he realized that he and his friends were turning into donkeys.<sup>70</sup>

## 3. Attestational Consequences

*Eros* in its more debased forms involves shame. It leads the erotic actors towards concealment rather than public attestation (and it provokes observers to avert their eyes). This withdrawal is an aspect of what Roger Scruton calls “Tristanism”: a condition in which “desire ... has divorced itself from all social norms, all forms of companionship, besides this one, of bodily union in the ‘act of darkness.’”<sup>71</sup>

## 4. Antipathy Towards Obligation

*Eros* can lead on to a condition of antipathy to convention, duty, and law.<sup>72</sup> A fearsome example is afforded Harvard University’s pioneer in nonbehavioral psychology, Professor Henry A. Murray, who embraced the view that “the highest ideal for our time” and the “the very best paradigm” was “sexual love.”<sup>73</sup> He and his lover of more than forty years (1925 to 1967), Christiana Morgan, developed a cult of their relationship. “The whole spiritual course of man will pivot on you,” Henry wrote.<sup>74</sup> “Mutual erotic love, erotic adoration, is the most natural religion.”<sup>75</sup> As to convention and duty, Murray wrote dismissively of:

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<sup>70</sup> See generally HAROLD B. SEGEL, *PINOCCHIO’S PROGENY: PUPPETS, MARIONETTES, AUTOMATONS, AND ROBOTS IN MODERNIST AND AVANT-GARDE DRAMA* (1995) (stating that puppets and marionettes were used as a metaphor by the modernist movement for the helplessness of man under the influence of various powerful forces, including that of *eros*).

<sup>71</sup> ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 171 (1986).

<sup>72</sup> This is emphasized by that passage from the Plato’s *Republic* quoted *supra* note 19, which describes the denizen of the city who is oblivious to the “necessary.”

<sup>73</sup> Quoted in FORREST G. ROBISON, *LOVE’S STORY TOLD: A LIFE OF HENRY A. MURRAY* 381 (1992).

<sup>74</sup> Quoted in *id.* at 170.

<sup>75</sup> Quoted in *id.* at 381 (from a much later period in Henry Murray’s life).

the Church and the great bulk of respectable men and women with their damn rules, customs, formalities, manners, fads, proprieties, pretensions, rites, rituals, decrees, ordinances, laws, taboos, sentiments, beliefs, principles, Catechisms, creeds, and categorical negations.<sup>76</sup>

Melville's *Moby Dick*, Murray wrote, "stood for Christian Society and its God working through conscience against the sexual instinct." Melville was "a forerunner ... of the revolution against sexual oppression" and was "fighting our battle."<sup>77</sup>

### 5. Within Friendship?

Plainly the tendencies of the sort of *eros* discussed above are antithetical to full friendship. *Eros* can be unstable, whereas friend-ship requires fidelity. *Eros* is hostile to obligation, whereas friendship involves the call of duty. *Eros* may seek additional partners, whereas friendship in its stronger forms calls for dedication and devotion, and sometimes exclusivity. *Eros* of this sort may involve shame and thus the avoidance of self-knowledge, whereas a friend is like a mirror. A friend would display to his friend much that others would conceal.

In several ways, the trajectory of the debased form of erotic love is towards destruction and death: destruction of the relationship because of its contradictions and threats; destruction or degradation of the other person out of *lustus dominandi*; destruction of the integrity of the lover himself. David's love for Bathsheba is compared to the predatory appetite of the rich man, who wants to serve the lamb for dinner ("the love of the wolf for the sheep"). Here is another meaning of Nathan's statement, "That man is you!"

#### *B. Erotic Love in Conflict with Itself and Aspiring to the Juristic*

The pain and discontent—the "furor" and the "agony"—that are widely associated with debased eroticism reflect its deeper contradictions. *Eros* of this sort is a drive towards action, and yet it destabilizes the actor, making his projects mutually conflicted and ineffective. It is a drive towards vigorous action, but action that cannot be fulfilling. It is a drive towards domination that makes the actor less capable of governance, either of himself or of someone else.

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<sup>76</sup> *Id.* at 241.

<sup>77</sup> These last three quotes are all from *id.*

*Eros* of this sort is a form of love and thus seeks union, and yet it may lead in directions inimical to the virtues and practices—those of benevolence and mutual knowledge—upon which authentic friendship is always based. In many cases it is a love that fails to escape the gravitational pull of the lover's own needs and fears, and which thus falls short of authentic caring.<sup>78</sup> It is a drive towards a social connection that, like all associations, attests to the nature and traits of the actor, but in this case traits that he might prefer to conceal.

*Eros* may be a love that leads to a craving for the bonds of obligation. A structure of obligations binding an erotic person to the desired person—binding them together—may seem to promise relief from the afflicting furors and agonies.

### *C. Juristic Love*

A higher sort of love has been identified with the term *agape*:

... the most rational kind of love, inasmuch as it involves recognition and judgment of value ... . The verb *agapaō* most often means “value, set great store by, hold in high esteem”; it is a love with deep respect ... which often goes along with admiration and can become adoration. ... Unlike other loves, which can remain hidden in the heart, it is essential to charity to manifest itself, to demonstrate itself, to provide proofs, to put itself on display. ... This affection—unlike *erōs*, which in the literature brings endless suffering and disaster—is accompanied by contentment, since the ordinary meaning of *agapaō* is to be happy, satisfied. But in Christian usage, since it is divine love, coming from heaven (Rom. 5:5), it will be joyful and already a foretaste of blessedness.

... [*A*] *gapē*... is a disinterested and generous love, full of thoughtfulness and concern. It is in this sense that God is *agapē* and loves the world. With those who are indebted, for inferiors, for subjects, this *agapē*, which is first of all consent, welcome, acceptance, is expressed in gratitude; it is the love inspired in turn by generous love...and it is translated into acclaim, applause, tokens of respect, congratulations, praises, and even veneration, so that Christian *agapē* is

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<sup>78</sup> See MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE*, *supra* note 6, at 66:

*Eros* is love—but not selfless, disinterested love. *Eros* is love that is full of need, full of desire, love sustained or enriched by the most powerful human drive: the desire not to be alone in an impersonal imperturbable universe we cannot affect because it does not care.

expressed in liturgy and worship: “To the one who loves us ... to him be the glory and the power forever and ever” (Rev. 1:5–6).<sup>79</sup>

This sort of love is consistent with obligation. The compatibility can be discerned in two dimensions. Love promotes the goods of obligation; and—the second dimension—obligation promotes the development and fulfillment of this sort of love.

*Agape* promotes obligation. Unlike the lower forms of attitude and conduct described above as characteristic of a certain sort of erotic man, the projects of the person who loves in this higher way are directed towards the good of the beloved. Unlike the personality of the debased erotic person, which is unstable and bent upon conquest, domination, and humiliation, the character of the *agapic* lover is steady and giving and self-sacrificing.

*Agapic* love participates in and enhances the goods of obligation. Reflexive good is enhanced: the participant in the *agapic* love knows himself and the good of action better, to the point of achieving a higher and nobler character. Fulfillment good is specially present: the lover acts in ways which express and develop his ennobled traits. Attestation rings out. Love of this sort, more than any other idiom of human life, celebrates its own character. This is manifest in love poetry and love songs, as well as love letters, rings, and wedding ceremonies.

Obligation promotes *agapic* love. At the outset, it demands of a potential lover what later he bestows without demand: attention, care, and beneficence. Reflexively, it purifies the obliged person of those dissonances which would occlude the fulfillment of love. The most marked characteristics of *agapic* love can be discerned where the love is mutual. Friendship, as stated above, is like a mirror; the friendship of *agapic* lovers is like a broad mirror before which both lovers stand, gazing at one another and, almost as though through one another’s eyes, at the scene around them and the people who pass through their lives. They see more, they know more, they realize and understand better, and each knows and understands more—appreciates and loves more—of what is good in himself.

Each lover promotes the reflexive good of action in the other, as well as the fulfillment good of bringing excellences of character into fruition. Each is in a way the vine on which the other’s branches grow and which supplies the nourishment to the fruit the other brings forth.

Close friends, as Aristotle stated, “live together,” not necessarily in the sense that they cohabit, but in that they go through life together and conduct

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<sup>79</sup> *Theological Lexicon*, *supra* note 21, at 13–14 (references omitted).

its important projects by thinking and determining on those projects through the mutuality of thought, belief, and purpose. In a certain important way the actions of one are the actions of both. This helps to explain the renowned Aristotelian passage, logically puzzling but true to life, which asserts that “[t]he excellent person is related to his friend in the same way as he is related to himself,” and that a close friend is “another ... self.”<sup>80</sup>

#### IV. THE JURISTIC PERSON, JURISTIC LOVE, AND DAVID THE JUDGE

Nathan speaks to David in David’s capacity as a judge. The narrative displays David to disadvantage in this capacity. Paralleling suggestions elsewhere in the passage indicating that David is less than fully engaged as a king (though it is the season when “kings go out to battle,” David “remain[s] in Jerusalem”<sup>81</sup>; though it is late afternoon, David arises “from his couch” to stroll on his palace roof),<sup>82</sup> the implication is clear that David is somehow disconnected or perhaps even lazy. Paralleling the portion of the narrative that has David reacting with inappropriate nonchalance to news of casualties in battle (“[t]he sword always takes its toll”<sup>83</sup>), the conclusion is suggested that David does not care as he should about justice or the fate of his people. In the first part of his conversation with Nathan, David displays a willingness, in an angry outburst, to condemn the rich man to death without having held a trial or listened to a defense.

What can Nathan mean by telling David that he “is” the rich man? Several layers of meaning have been suggested already in this article. There are various ways in which David resembles the rich man. He resembles him in that they are both wrongdoers; he resembles the rich man in that they are both Jews and under the Law and members of the same social order, with “neighbors” whose households deserve respect. David resembles the rich man in that his erotic attraction for Bathsheba can be compare to the rich man’s lust for theft and destruction (“the love of the wolf for the sheep”).

Under the surface of the text, there may lie something deeper than resemblance. Nathan’s statement carries an implication that all judges should

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<sup>80</sup> *Nicomachean Ethics* (Irwin) 1170b-7–9 (p. 150). (“The excellent person is related to his friend in the same way as he is related to himself, since a friend is another himself.”)

<sup>81</sup> 2 Samuel 11:1 (JSB). Brackets around the words “to battle” in this translation are here omitted.

<sup>82</sup> *Id.* at 11:2 (JSB). (“Late one afternoon, David rose from his couch and strolled on the roof.”)

<sup>83</sup> *Id.* at 11:25 (JSB). (Perhaps David is not listening carefully: he has just been informed, not that the sword, but that arrows killed his men.)

bear in mind before flying into a rage or in another way acting hastily and judging rashly. Put yourself in the other person's place. Suppose it were you being judged.<sup>84</sup> Perhaps—bound up as we all are with one another—perhaps in a sense it *is* you. If the person being judged were your friend, he would be in a sense—in Aristotle's gripping phrase, "another self."

One of the most important commandments in Torah requires that we love our neighbors as ourselves. We are all supposed to be, if not lovers, then at least close affiliates, close to one another in knowledge and benevolence. Judges and those who develop family law in legislatures and those who develop the jurisprudence of the family in universities need to bear this in mind when we act and write in ways that affect each other person's household, his children, and his marriage. "That man is you!"

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<sup>84</sup>See URIEL SIMON, *READING PROPHETIC NARRATIVES*, *supra* note 4, at 112. ("The juridical parable is ... an allegory in disguise, intended to overcome an individual's bias in his own favor so he can measure himself by the same standard he applies to others.")