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## Contract Law and Christian Conscience

*Val D. Ricks\**

### *What Does God Expect of Contract Law?*

This essay proposes to answer that question. The answer has two parts, both of which are essential. First, the canon of scripture accepted by the Church of Jesus Christ of Latter-day Saints indicates that the only proper role of government is to protect and promote the freedom to obey the commandments of God. True freedom to obey God's commands includes, secondarily but necessarily, freedom to disobey. I refer to freedom that is centered on obedience to God as "salvific freedom." Part III of this paper shows that protection and promotion of salvific freedom is government's theologically proper role and that some kind of contract law belongs to it.

But a theologically proper role for, or doctrine of, the state is only one part of the answer. The doctrine of the state is general and by itself will not resolve specific disputes. Under what circumstances is salvific freedom most fostered in the resolution of an individual case? A focus on the goal of salvific freedom will not itself answer this question without an understanding also of at least the requirements of salvation, the practicalities of meeting them, the diverse ways in which humans might serve God, and a sense of how one party's freedom is best balanced against another's in order to promote the ultimate goal. Sometimes harm to one party's freedom to do right must be balanced against the protection of another party's freedom not to observe God's commandments. All of these other elements are matters of faith, which Paul describes as "the substance of things hoped for, the evidence of things not seen."<sup>1</sup> "[N]ot seen," "hoped for"—he means unproved, at least. And some of these unproved

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\* Professor of Law, South Texas College of Law. Thanks to C. Scott Pryor for comments on an earlier draft, and to Rodney K. Smith for timely discussions of the topic. The views expressed in this Comment do not necessarily reflect the views of the Church of Jesus Christ of Latter-day Saints, the J. Reuben Clark Law School, or the Brigham Young University Law Review.

1. *Heb.* 11:1. References to the Bible are the King James Version, unless otherwise noted.

elements will differ from case to case. In order for the law to serve salvific freedom, therefore, the law must allow some action based on faith in the resolution of individual cases.

This faith-based element of adjudication has in the common law system frequently been called *conscience*. In fact, conscience's role is historically most obvious in contract law cases, where it has been prominent since the birth of the common law. Part I illustrates this point. Medieval English lawyers, formally all Christians, explicitly admitted the role of faith or conscience in contract law adjudication. Acts of conscience were, to them, law.

Has the practice of law since changed so as to preclude a role for conscience in adjudication now? Part II answers "no." Drawing on the jurisprudential writings of A.W.B. Simpson, Phillip Bobbitt, Pierre Schlag, and other legal philosophers, Part II demonstrates that law's post-modern practice shares with its pre-modern structure a role for conscience. Law as part conscience is not a positivist view of law, nor does it suggest that law springs solely from nature. Rather, it freely admits faith's role and encourages the development and education of conscience among those who participate in lawmaking.

By the time the paper turns to Part III, where salvific freedom is discussed, conscience can be seen to fill in the gaps left by the generality of the doctrine of the state. Where published revelation fails to guide, the jurist can learn by study and faith, and by seeking further revelation, to serve the salvific freedom of the human family. Part III ends with the proposal that the faith and conscience of those who participate in law are best educated through the gospel of Jesus Christ; the most righteous, honest, and wise will be the most just. As the consciences of those involved in making contract law are sanctified, so will contract law come to serve its theologically ordained purposes. Salvific freedom and conscience thus answer how contract law might best serve God.

I thank the conference organizers and the BYU Law Review for the opportunity to express this view. Professor Andersen unfortunately omits a Latter-day Saint ("LDS") perspective on contract law from his paper. His primary thesis categorizes promises according to their moral and spiritual content.<sup>2</sup> He suggests that our legal treatment of oaths or marriage vows may be a moral barometer

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2. See generally Eric G. Andersen, *Three Degrees of Promising*, 2003 BYU L. REV. 829.

for our culture.<sup>3</sup> And he argues that the recent legal trend of treating marriage more like a commercial contract suggests that our culture fails to see marriage's moral and spiritual nature.<sup>4</sup> These are comments about culture, not law.

Professor Andersen does talk about law. But he describes laws regarding economic promises, the oath, and marriage largely the way any lawyer would.<sup>5</sup> He describes historical and generally religious perspectives on oaths and marriages themselves.<sup>6</sup> And he suggests that treating marriage covenants similarly to the way we treat economic promises—allowing *laissez faire*—may ascribe to self-interest more value than it deserves.<sup>7</sup> But he offers no prescriptive role for law, and no critique of law, and leaves us wondering whether there is a uniquely LDS perspective on law itself. The negative implication of Professor Andersen's omission is that there is no such perspective.<sup>8</sup> The scriptures, however, clearly show one.<sup>9</sup>

3. *Id.* at 831–32, 850–53, 858–60.

4. *Id.* at 853–58.

5. *Id.* at 833–37 (contract law), 838–41 (oaths and marriage).

6. *Id.* at 842–50.

7. *Id.* at 852–58.

8. Professor Andersen's failure to discuss an LDS perspective on marriage law is a significant omission, given his thesis. On that issue in particular, that omission combined with Professor Andersen's cultural recommendation gives mixed signals. Andersen criticizes the trend toward *laissez faire*. This criticism might imply that some regulation is appropriate. But then he suggests that marriage should be treated more like a "third-degree" promise, a covenant with or before God. "Third-degree" promises, in Andersen's terminology, would function best when completely unregulated. *See id.* at 844 ("Third-degree promises . . . do not create legal rights and duties. They operate in a different sphere."); *Id.* at 859 ("Suppose third-degree promising were treated . . . as mandatory in commercial matters. The result would be a serious imposition on [unbelievers]."). Professor Andersen thus leaves the reader guessing as to what role law should play in marriage.

I for one was hoping for some guidance. The LDS Church's position on the role of the state in marriage is unclear. Joseph Smith performed the marriage of Newel and Lydia Knight before he had a license from the state to perform marriages. He reportedly said, "Our Elders have been wronged and prosecuted for marrying without a license. The Lord God of Israel has given me authority to unite the people in the holy bonds of matrimony. And from this time forth I shall use that privilege and marry whomsoever I see fit." SUSA YOUNG GATES, JUVENILE INSTRUCTOR'S OFFICE, LYDIA KNIGHT'S HISTORY 29–31 (1883). This marriage is also reported in JOSEPH SMITH, 2 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 320 (2d ed., rev. 1976) (1951) [hereinafter HISTORY OF THE CHURCH]. The Prophet's statement indicates that marriage is a "third-degree promise," to employ Professor Andersen's terminology, and that the state need play no role in its making. The completely ecclesiastical regulation of polygamous marriages—marriages that civil law did not recognize—in the late nineteenth century indicates that state regulation may not be theologically necessary in some circumstances. EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN

Recently, some legal academics have expressed a Christian perspective on law.<sup>10</sup> A few have discussed a Christian view of contract law without giving theological underpinnings.<sup>11</sup> Disciples of Christ engaged in making and critiquing law must ask what Christ requires of it. Consistently, some Christians often do not hold with current, academically mainstream justifications for contract law.<sup>12</sup> Consider economic analysis: Professor Andersen notes that contract law “cannot be explained *without*” it.<sup>13</sup> True or not, Christians participating in law need more than an explanation, and economic analysis is insufficient. Contract law in the service of mere economic self-interest (particularly if we already have sufficient resources to do

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THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 322–36 (1988). On the other hand, Church members have recently shown strong support for some regulation of marriage. See *California Bars Gay Marriage*, ABCNEWS.COM, March 7, 2000, at [http://abcnews.go.com/onair/CloserLook/wnt\\_000307\\_CL\\_Prop22\\_feature.html](http://abcnews.go.com/onair/CloserLook/wnt_000307_CL_Prop22_feature.html) (last accessed Sept. 20, 2003) (reporting that Catholics, Mormons, and Evangelicals raised millions in support of California Proposition 22, which provides that the state will only recognize marriages between a man and a woman). The LDS view of the proper role of law in marriage is ripe for delineation.

9. The issue addressed here, as I see it, is what God would ask of law imposed on believers and unbelievers alike. I do not mean to suggest in any way that all or any of God’s commandments should be made the law of the state and imposed on unbelievers. That would destroy the freedom and agency that God has given and promised to all, including unbelievers. See 2 *Nephi* 2:26–30 (Book of Mormon); *Doctrine & Covenants* 101:78; *infra* Part III. Nor do I mean to ask what laws God would impose on a people who have covenanted to serve him. Sources more relevant to that issue include FIRMAGE & MANGRUM, *supra* note 8 (describing at length the efforts of early Church members to resolve all (otherwise legal) disputes by binding arbitration within the Church according to the laws of God), and the *Pentateuch*.

10. Attempts to write about law from a Christian perspective are becoming more common among people of faith. See, e.g., HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); Joseph Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 *FORDHAM URB. L.J.* 997 (2001); Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 *AM. J. JURIS.* 101 (1995); John Copeland Nagle, *Playing Noah*, 82 *MINN. L. REV.* 1171 (1998); Kenneth A. Sprang, *Holistic Jurisprudence: Law Shaped by People of Faith*, 74 *ST. JOHN’S L. REV.* 753 (2000); WILLIAM J. STUNTZ, *Christian Legal Theory*, 116 *HARV. L. REV.* 1707 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra*).

11. See Harold Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 *J.L. & RELIGION* 103 (1986), reprinted in BERMAN, *supra* note 10, at 187; C.M.A. McCauliff, *Historical Perspectives on Anglo-American Contract Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 470. Neither McCauliff nor Berman connect contract law to any general jurisprudence or theology. For a natural law perspective, see HENRY MATHER, *CONTRACT LAW AND MORALITY* (1999).

12. See, e.g., Angela C. Carmella, *A Catholic View of Law and Justice*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 255, 262; *infra* notes 237, 263.

13. Andersen, *supra* note 2, at 833 (emphasis in original).

God's will) equates to serving Mammon and is unacceptable. Professor Andersen claims that justifications focused on respect for personal autonomy are based on a "moral theory of respecting individual choice and commitment."<sup>14</sup> That sounds better than economic self-interest, but consider Charles Fried's explanation of this morality:

Everything must be available to us, for who can deny the human will the title to expand even into the remotest corner of the universe? And when we forbear to bend some external object to our use because of its natural preciousness we use it still, for it is to our judgment of its value that we respond, our own conception of the good that we pursue.<sup>15</sup>

Human will and the self's "own conception" of the good are all that matter here. God plays no role in this theory of collective human hubris. Surely that rationale is insufficient as well.

The revelations of the restored gospel of Jesus Christ justify contract law under quite another purpose, the service of salvific freedom, as discussed in Part III. Part III in particular employs the vocabulary of my own religious practice,<sup>16</sup> but the Christian principles that justify contract law are commonly shared by those of many Christian faiths. Many Christians will also recognize that these principles do not apply themselves, and that the discretion involved in seeking this theologically justifiable end for contract law also ought to be directed by God. This direction is an exercise in faith or conscience, and it first appears in the common law in the medieval period.

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14. *Id.* at 834.

15. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 8 (1981).

16. I am a member of the Church of Jesus Christ of Latter-day Saints, also sometimes called the Mormon or LDS Church. The discussion will therefore use primarily the Holy Bible (the King James Version, unless otherwise noted) and the three other books held as scripture by the Church: the *Book of Mormon*, the *Doctrine & Covenants*, and the *Pearl of Great Price*. But because the Christian principles I discuss are widely shared in the Christian community at large, the uniqueness of the sources I cite in the discussion does not limit the discussion's applicability. I do not speak for the Church and have no authority to speak for any other person or group. I am sure that not all Church members (an extraordinarily diverse and international group) would agree with the positions I take in this Comment, though I believe based upon many years of activity in the Church, that many would agree with the positions taken in Parts III.A & C, those most relevant to the non-legal aspects of this Comment.

I. MEDIEVAL ENGLISH CONTRACT LAW AND CHRISTIAN  
CONSCIENCE*A. Conscience in the Setting of Medieval Contract Law*

A Christian influence made its presence felt everywhere in medieval English law. In fact, England placed the law of marriage formation—the law most relevant to Professor Andersen’s thesis—entirely in the hands of the clergy, in church courts.<sup>17</sup> The church, in turn, through Pope Innocent III, took the position in the twelfth century that a valid marriage formed when the parties gave their present consent,<sup>18</sup> whether done in church or in private. Therefore, a private marriage, one in which neither the state nor the church participated, was a valid marriage.<sup>19</sup> And, in fact, many such marriages occurred.<sup>20</sup>

England’s ecclesiastical courts held such marriages valid even at some spiritual cost, as the church perceived it. That is, the church recognized that a wholly private, non-church marriage was less than spiritually optimal. In fact, church regulations required marriages to occur at church. Church laws also required that the clergyman first give notice to the community, asking any who knew of legal

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17. R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 3 (1974) [hereinafter HELMHOLZ, MARRIAGE LITIGATION] (“There was never [a medieval] English law of marriage apart from that administered by the Church courts.”); Norma Adams & Charles Donahue Jr., *Introduction to SELECT CASES FROM THE ECCLESIASTICAL COURTS OF THE PROVINCE OF CANTERBURY C. 1200–1301*, 95 SELDEN SOC’Y 81–84 (Norma Adams & Charles Donahue Jr. eds., 1978–1979 [1981]); L.R. Poos, *The Heavy-Handed Marriage Counsellor: Regulating Marriage in Some Later-Medieval English Local Ecclesiastical-Court Jurisdictions*, 39 AM. J. LEGAL HIST. 291 (1995).

18. HELMHOLZ, MARRIAGE LITIGATION, *supra* note 17, at 26–27; *see also* Charles J. Reid, Jr., “So It Will Be Found That the Right of Women in Many Cases Is of Diminished Condition”: *Rights and the Legal Equality of Men and Women in Twelfth and Thirteenth-Century Canon Law*, 35 LOY. L.A. L. REV. 471, 491–98 (2002) (discussing the origins and settlement of the canonist rule requiring consent).

19. HELMHOLZ, MARRIAGE LITIGATION, *supra* note 17, at 27; Michael M. Sheehan, *Marriage Theory and Practice in the Conciliar Legislation and Diocesan Statutes of Medieval England*, 40 MEDIAEVAL STUD. 408, 413–14, 429–30 (1978) [hereinafter Sheehan, *Marriage Theory and Practice*] (reporting that the rule “that carnal union, following an agreement to marry, would be regarded as marriage by the Church” was first published in collections of statutes in 1213–1214 and 1217–1219).

20. HELMHOLZ, MARRIAGE LITIGATION, *supra* note 17, at 28; Michael M. Sheehan, *The Formation and Stability of Marriage in Fourteenth-Century England: Evidence of an Ely Register*, 33 MEDIAEVAL STUD. 228, 249–51 (1971).

impediment to the marriage to come forward.<sup>21</sup> But still, church law did not invalidate marriages for breach of these regulations. A wholly private, non-church marriage without notice to the community was nevertheless a valid marriage under church law.

The church's validation of wholly private marriages sometimes occurred at great social cost. In *Ingoly v. Esyngwald*, for instance, Robert and Joan married privately in a garden before witnesses in 1409. No consummation occurred, but in 1411 Robert married another woman, Elena, at church, thereafter living with her as husband and wife. Joan did not object at the time. In 1418 Joan married another man, John, at the parish church. Similarly, Robert did not object, and Joan and John also lived together. Twelve years later, in 1430, Joan sued Robert in the diocese of York to enforce the 1409 marriage. In response to Joan's suit, the court dissolved both Robert's nineteen-year marriage to Elena and Joan's twelve-year marriage to John, declaring Robert and Joan married according to their unconsummated 1409 contract.<sup>22</sup>

Not even the competing interests of the English state in controlling feudal property relationships overstepped this ecclesiastical law. Feudal lords and parents desired to protect feudal tenure and family property relationships by controlling the marriage of their wards and children.<sup>23</sup> Feudal lords were in fact said to have "bodily wardship" (*custodia corporis*) of an heir, which gave the lord control over whom the ward married.<sup>24</sup> But this power was not absolute, because the marriage had to be consensual according to the church.<sup>25</sup> Medieval statutes therefore imposed only a financial penalty on wards who married without their lord's consent: the lord could retain the ward's inheritance for a time after the ward reached the

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21. See Sheehan, *Marriage Theory and Practice*, *supra* note 19, *passim* (relating that the thrust of medieval diocesan statutes was to curtail private marriage, even though the statutes themselves never demanded publicity as a requirement of validity).

22. HELMHOLZ, MARRIAGE LITIGATION, *supra* note 17, at 64–65 (describing the case from the records of the diocesan courts).

23. FLETA, bk. I, ch. 13, at 9, *reprinted in* 72 SELDEN SOC'Y 26 (H.G. Richardson & G.O. Sayles eds. and trans., 1953) (c. 1290); 2 BRACTON [HENRY DE BRATTON], ON THE LAWS AND CUSTOMS OF ENGLAND 89–90 (Samuel E. Thorne trans., 1968) (c. 1240–1260), *available at* <http://bracton.law.cornell.edu/bracton/Common/index.html>.

24. FLETA, *supra* note 23, at 9, *reprinted in* 72 SELDEN SOC'Y 26 (H.G. Richardson & G.O. Sayles eds. and trans., 1953) (c. 1290).

25. *Id.* at 10, *reprinted in* 72 SELDEN SOC'Y 27 (H.G. Richardson & G.O. Sayles eds. and trans., 1953) (c. 1290); 2 BRACTON, *supra* note 23, at 89–90.



age of majority.<sup>26</sup> In medieval marriage, “freedom of contract” prevailed, mandated by the church and conceded by the state.

England’s church also made its presence felt in mundane, commercial contracts. The church itself, through its courts, handled a great deal of contract litigation<sup>27</sup> despite royal court procedures designed to prohibit such ecclesiastical intrusion.<sup>28</sup> And religion also pervasively influenced the common law outside the church courts. Officers in England’s government were Christians. England’s chancellor, the kingdom’s chief legal officer, was in all but a few rare instances a bishop or a priest made bishop while chancellor or shortly thereafter.<sup>29</sup> The English chancellor’s office was to look after the king’s and citizens’ souls. The chancellor in fact played a pivotal role in creating the common contract law of England’s royal courts. His influence was exercised primarily in two ways in the royal courts. First, during the medieval era, most suits in the royal courts (and most innovations in actions) originated with a writ issued by the chancellor’s office.<sup>30</sup> Few actions could be brought without the chancellor’s formal approval. Second, the chancellor himself began eventually to grant relief in contract and other cases under the general doctrine of “conscience”;<sup>31</sup> the chancellor’s court was a court of conscience<sup>32</sup> that

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26. Statute of Merton, 20 Hen. 3, c. 6 (1235) (Eng.), reprinted in 1 STATUTES OF THE REALM 3 (photo. reprint 1963) (1810) [hereinafter STATUTES OF THE REALM]; Statute of Westminster I, 3 Edw. 1, c. 22 (1275) (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra*, at 33.

27. See, e.g., Martel c. De Kimble (Canterbury c. 1201), reprinted in 95 SELDEN SOC’Y, A.5, at 15–17 (1978–1979); Adams & Donahue, *supra* note 17, app. 1, at 104–14 (providing a short calendar of selected Canterbury Court documents from the thirteenth century in which numbered items 4, 7, 11, 19, 30, 45, 46, and 88 constitute breach of faith/agreement cases about the time of Hubert Walter (archbishop 1193–1205)); R.H. HELMHOLZ, *Assumpsit and Fidei Laesio*, in CANON LAW AND THE LAW OF ENGLAND 263 (1987) [hereinafter HELMHOLZ, CANON LAW].

28. Charles Donahue, Jr., *Ius Commune, Canon Law, and Common Law in England*, 66 TUL. L. REV. 1745, 1764 (1992); R.H. HELMHOLZ, *The Writ of Prohibition to Court Christian Before 1500*, in HELMHOLZ, CANON LAW, *supra* 27, at 59.

29. See generally 1 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND (John Allan Mallory ed., George W. Smith 1874) (1856) (medieval chancellors).

30. See, e.g., ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348–1381, at 104–07, 296–306 (1993) [hereinafter PALMER, BLACK DEATH].

31. W.T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 150–66 (Paul Vinogradoff ed., Octagon 1974) (1914). Of the nearly sixty petitions for relief set out in Barbour’s appendix, at least fifty appeal to conscience or request “for God and in way of charity.” Many do both. Of those that do neither, three are not verbatim petitions but only notes of reports of petitions. These appeals appear to have been standard fare in the 1400s. See

competed with the royal judiciary and corrected its abuses. One would thus expect the common law generally—not just contract law—to conform to conscience. Indeed, medieval common law records contain numerous explicit references to conscience, as Norman Doe has catalogued.<sup>33</sup> Statutes also were passed prohibiting actions considered contrary to conscience.<sup>34</sup> And judges adapted the law, sometimes contradicting a statute, to conform to conscience.<sup>35</sup>

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*also* PALMER, BLACK DEATH, *supra* note 30, at 107–10 (1993) (tracing the emergence of the chancellor’s court of conscience to around 1370 with the beginnings of it appearing in the 1340s); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 398–99 (1975) [hereinafter SIMPSON, HISTORY]. General relief, not just remedies in contracts cases, was granted under the “conscience” heading. *See, e.g.*, SELECT CASES IN CHANCERY, A.D. 1364 TO 1471, 10 SELDEN SOC’Y *passim* (William Paley Baildon ed., 1896) (listing petitions praying for relief in Chancery from 1383 to 1471; praying for relief “For God and in way of charity” in petition nos. 5, 6, 7; “in way of charity” only in nos. 8, 10–13; “*pur l’amour de Dieu*” in nos. 15, 17–19, 21–29, 31–34, and so on; praying for relief “as . . . conscience demand[s]” in petition nos. 121 (1420–1422) (“law and conscience”), 123 (“reason and conscience”), 136 (“faith and good conscience”), 138 (1441) (“faith, reason, and conscience”), 139–41, 143–47 (1471)).

32. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 114–22 (3d ed. 1990) [hereinafter BAKER, ENGLISH LEGAL HISTORY]; Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 249–68 (1996) (reviewing scholarship on the source and purpose of medieval chancery law and concluding with Baker that conscience was the central element).

33. NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 132–54 (1990).

34. *Id.* at 137–39, 148 (identifying, among others, 33 Hen. 6, c. 3 (1455) (Eng.), and 20 Edw. 3, c. 1 (1346) (Eng.)).

35. *Id.* at 139–46. Doe discusses a number of cases, but one in particular was a leading contract law case: *Shipton [Shepton] v. Dogge*, Y.B. 20 Hen. 6, Trin., pl. 4 (Ex. Ch. 1442) [“Doige’s Case”], *reprinted in* 51 SELDEN SOC’Y 97 (1933). Doige’s Case is also reprinted in J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 391 (1986) [hereinafter B&M]. In *Shepton v. Dogge*, Joan Dogge bargained and sold to William Shepton twenty-eight acres of arable land. Shepton paid in advance in exchange for Dogge’s promise to deliver a deed at a later time. Before that time came, however, Dogge gave a deed to the land to another. Shepton was not sure how to style his complaint, so he alleged deceit and breach of an undertaking. All the judges convened to discuss whether the complaint was allowable. They decided it was. A key argument in their decision was voiced by Newton, C.J.C.P., who said:

Now, when the plaintiff has made a firm bargain with the defendant, the defendant may at once demand her money by a writ of debt; and in conscience and in right the plaintiff ought to have the land, even though the property may not pass to him by law without livery of seisin. It would be amazing law, then, if there should be a perfect [*par fait*] bargain under which one party would be bound by an action of debt but would be without remedy against the other. Therefore the action of deceit clearly lies.

B&M, *supra*, at 393.

Thus, one would expect English royal courts of the time to enforce parties' agreements only if the dictates of conscience were satisfied. Conscience, in fact, explicitly answered many of the hard questions medieval courts faced in contract law adjudication.

In order to demonstrate how conscience provided the resolution of medieval English contract cases, Part II.B outlines the contours of the medieval common law of contract. That law was created by England's royal courts,<sup>36</sup> the first common law courts, in response to plaintiffs' attempts to fit cases within the bounds of the formal writs issued by the chancellor or within prior precedent allowing recovery—in other words, within an allowed “form of action.” Because those courts ruled only in response to the needs of specific litigants, their system of contract enforcement developed piecemeal. It remained a fragmentary system, lacking any apparent overarching structure. Specifically, the courts developed procedural mechanisms to resolve disputes in each form of action. These procedures became the primary mechanism for regulating contracts. The plaintiff's allegations determined which form of action applied, and the form of action determined which rules governed the resolution of the dispute. Perhaps the only thread running through the entire system, through the procedures of every form of action in which contract disputes were resolved, was the courts' reliance on conscience. The system takes some time to describe, but the patient student will see

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The last opinion rendered in the Yearbook report is Paston's, which echoes Newton's:

In your case the contract is good without any specialty. And a good contract must bind both parties. What reason is there, then, why one should have an action of debt and the other should not have an action? (As if to say, there is no reason, since in right he should have the land.)

*Id.* at 395. The decision is “essentially a compromise between law and conscience,” Doe concludes. DOE, *supra* note 33, at 142 n.47.

36. Courts were the lawmakers in medieval England. England had no real Parliament at that time. The king would meet with powerful lords and heads of other powerful institutions, and these people in power would agree to change existing custom, writing out their decisions. This custom of meeting later became the House of Lords. See BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 234–43. But most law resulted when less powerful people sought help from a more powerful person. The more powerful person sat in his (and it was nearly always a man's) “court” to help those to whom he owed responsibility. See, e.g., J.H. BAKER, *The Changing Concept of a Court*, in THE LEGAL PROFESSION AND THE COMMON LAW 153, 153–169 (1986) [hereinafter BAKER, LEGAL PROFESSION]. When the burden of dispensing justice became great, the powerful person appointed ministers as agents to hear pleas. In medieval England, the most powerful person was the king. The king's ministers to hear pleas were called *justiciars* or justices. The justices could receive pleas even when the king was not present, but the king was said to be “in court” where his justices sat. Eventually, the justices sat at Westminster, near London, the largest city in England. The practices of these justices in response to pleas and to writs from the king's chancellor became law.

conscience appear at every turn. Part I.B addresses each form of action individually.

*B. Conscience in the Medieval Common Law of Contracts*

*I. Covenant*

A plaintiff might allege a contractual wrong in several ways. One was to allege that the defendant promised or agreed to do something and had not done it.<sup>37</sup> If the plaintiff alleged this or the chancellor's writ required relief in such a case, the justices called the case one of *conventiones*, which we roughly translate as *covenant*. *Conventiones* meant no more than agreement,<sup>38</sup> however, and had no limitations with regard to subject matter.<sup>39</sup> England's chancellor began issuing writs for the enforcement of covenants by at least the 1160s.<sup>40</sup>

The justices enforced the writs, but only after disputed issues raised by the writ were resolved by a jury.<sup>41</sup> These issues might have included questions about the existence of the agreement, its contents, its breach, and resulting damages. The jury had free rein when an issue was sent to it. The jury operated without instructions on the law. It was told only the issue it had to decide.

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37. See C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 255–67 (Greenwood Press 1970) (1949) (giving examples of a writ and of various cases reported).

38. DAVID J. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 22 (1999); SIMPSON, *HISTORY*, *supra* note 31, at 16, 18–19.

39. *E.g.*, Statute of Wales, 12 Edw. 1, c. 10 (1284) (Eng.), *reprinted in* 1 *STATUTES OF THE REALM*, *supra* note 26, at 66 (“And for that Contracts in Covenants are infinite, it would be difficult to make mention of each in particular; but according to the Nature of each Covenant . . . [they shall be enforced].”); IBBETSON, *supra* note 38, at 22; Morris S. Arnold, *Towards an Ideology of the Early English Law of Obligations*, 5 *LAW & HIST. REV.* 505, 509–11 (1987).

40. ROBERT C. PALMER, *THE COUNTY COURTS OF MEDIEVAL ENGLAND, 1150–1350*, at 205 (1982) [hereinafter PALMER, *COUNTY COURTS*]. See also *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL*, bk. 10, chs. 1–4, at 116–18 (G.D.G. Hall ed. & trans., 1993) (c. 1187–89) [hereinafter GLANVILL]. *Glanvill* omits discussion of covenant and instead stresses that the royal courts do not meddle in private agreements. Historians are unsure whether royal courts actually heard covenant cases prior to 1200.

41. Joseph Biancalana, *Actions of Covenant, 1200–1330*, 20 *LAW & HIST. REV.* 1, 18–27 (2002) (reporting that wager of law was available in covenant until the late 1200s, after which it declined and thereafter trial was by jury).

The jury was allowed such latitude for a couple of reasons. First, the jury was thought to be the most knowledgeable forum for resolving all disputes about the agreement in question. Trial was held in a county where the jurors themselves would know something related to the transaction. At least the jurors would know the “constancy . . . and repute of the witnesses.”<sup>42</sup> And the jury usually knew local customs because jurors were all somewhat wealthy, landed men.<sup>43</sup> Hunger and poverty were thought to make jurors more susceptible to subornation, thereby offending their consciences,<sup>44</sup> so the law required a certain amount of wealth.<sup>45</sup>

Second, the jury would tell the truth because the jury swore an oath to God that it would give a correct verdict: “To do in this matter as God will give you grace, according to the evidence and your conscience.”<sup>46</sup> *Juror* stems from the Latin *iuro*, meaning to swear an oath. A draconian punishment called *attaint* could be imposed on jurors who were proved to have lied in their verdict,<sup>47</sup> but the severity of this measure precluded its frequent use.<sup>48</sup>

42. JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 40 (Chrimes & Lockwood trans., Cambridge Univ. Press 1997) (1471). Fortescue was Chief Justice of the Court of King’s Bench from 1442 until his political loyalties interrupted his service during the War of the Roses in the early 1460s.

43. *Id.* at 37–38; J.H. Baker, *Introduction* to 2 THE REPORTS OF SIR JOHN SPELMAN, 94 SELDEN SOC’Y 107 (J.H. Baker ed., 1978) [hereinafter Baker, *Introduction* to REPORTS OF JOHN SPELMAN].

44. *See, e.g.*, 2 Hen. 5, Stat. 2, c. 3 (1414) (Eng.), *reprinted in* 2 STATUTES OF THE REALM, *supra* note 26, at 188 (“whereby they offend their Consciencs the more” [“*point ils le plus legierment offendent leur conscience*”]) (discussed in DOE, *supra* note 33, at 146 & n.66).

45. FORTESCUE, *supra* note 42, at 37–38 (“They shall . . . have lands or rents to a competent value at the discretion of the justices, otherwise they shall not be sworn, lest through their hunger and poverty they may be easily corrupted or suborned.”); Baker, *Introduction* to REPORTS OF JOHN SPELMAN, *supra* note 43, at 107 n.1 (“The usual qualification was 40s. in value.”).

46. Baker, *Introduction* to REPORTS OF JOHN SPELMAN, *supra* note 43, at 112; *see* FORTESCUE, *supra* note 42, at 39.

47. Fortescue describes the punishment:

[T]he bodies of those jurors shall be committed to the prison . . . ; their goods confiscated, and all their possessions seized into the king’s hand; their houses and buildings demolished, their woods cut down, their meadows ploughed up, and they themselves shall henceforth be infamous, and their testimony as to the truth shall nowhere be accepted.

FORTESCUE, *supra* note 42, at 39.

48. BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 156. The opportunity to plead mistake or lack of intent to lie undoubtedly combined with the draconian penalty to reduce prosecutions for attaint. Bracton reports, “There are others who speak a falsehood, but by swearing do not perjure themselves, since they do not lie nor go against their understanding,

Primarily, the juror's obligations to God<sup>49</sup> and the juror's reputation buttressed the juror's obligation to give a true verdict. Furthermore, Parliament prohibited those it considered to be without conscience from serving as jurors.<sup>50</sup>

Nearly all significant issues in a case of covenant were left to the jury to resolve on their consciences. The jury's decision was recorded merely as a verdict for the plaintiff or defendant, with an amount of damages if sought. The terseness of the jury's decision reflected that little if any of it was reviewable in a court of appeals.<sup>51</sup> So, for example, as a remedy for breach of covenant, the court would order specific performance or award damages as set by the jury.<sup>52</sup> Medieval law considered the amount of damages itself to be a question of fact within the jury's province.<sup>53</sup> But all we know of damage awards and how they were determined in the medieval period is the amounts given in verdicts. The legal records contain no other information. In Baker's words, "there were as yet no legal principles governing the measure . . . of damages" for breach of an agreement.<sup>54</sup> The law

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since they believe it to be so, according to conscience, though the matter is actually otherwise. . . ." 3 BRACTON, *supra* note 23, at 337.

49. DOE, *supra* note 33, at 146–48. The jurors' oath bound them so that they might even be thought to police themselves. In 1329, Justice Cambridge told a group of jurors, "We charge you upon your oaths that if any of you is of the affinity of the plaintiff he is to challenge himself." Anon. [3], 3–4 Edw. 3 (Eyre of Northamptonshire 1329), *reprinted in* 97 SELDEN SOC'Y 350 (1981).

50. 1 Edw. 4, c. 2 (1461) (Eng.); 11 Hen. 6, c. 1 (1433) (Eng.); 8 Hen. 6, c. 29 (1429) (Eng.); *cf.* DOE, *supra* note 33, at 146–57 (discussing these and other medieval statutes).

51. The jury would hold for either plaintiff or defendant. If the jury held for the plaintiff, the jury's decision established the plaintiff's allegations. These allegations became the basis for any appeal after trial. If the jury held for the defendant, the plaintiff was held to take nothing because his allegations were not established. The court's procedure provided no formal mechanism for a court of appeals to look behind the plaintiff's allegations at the proof itself.

52. Many early cases ask that the defendant "keep the agreement." *E.g.*, Benedict v. Kersebroc, *Curia Regis Rolls* XII, pl. 495 (1225), *reprinted in* B&M, *supra* note 35, at 278 ("keep the covenant"); Cadigan v. Say (Eyre of Shropshire 1256), *reprinted in* 96 SELDEN SOC'Y 48–49, pl. 119 (1980) ("keep the covenant"); *see also* Arnold, *supra* note 39, at 511–14. Later cases ask for damages. *See, e.g.*, Corbet v. Scurye (Eyre of Shropshire 1292), *reprinted in* B&M, *supra* note 35, at 282; Welshe v. Hoper (K.B. 1533), *reprinted in* B&M, *supra* note 35, at 286–87 (awarding damages); PALMER, BLACK DEATH, *supra* note 30, at 66–68 (reporting specific performance as the goal of judgment, with damages awarded only for the period of non-performance, prior to 1350).

53. Baker, *Introduction to Reports of John Spelman*, *supra* note 43, at 114.

54. *Id.*; *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 330–31 (2d ed. 1981) [hereinafter MILSOM, FOUNDATIONS].

assumed that jurors decided issues in accord with conscience, as their oath required, and this sufficed. What the jury decided in conscience was itself law to the parties.

The covenant action might have become the general law of contracts, except that the royal courts hinted in the thirteenth century, and held generally by 1350, that the promise or agreement, to warrant recovery, must be in a sealed writing.<sup>55</sup> The promulgation of this rule was one of the few judicial intrusions on the jury's role. Non-royal or non-common-law courts might have continued to grant relief in covenant on an unwritten promise,<sup>56</sup> but not the royal courts. The reason for the requirement of a sealed writing is uncertain,<sup>57</sup> but some judges opined sensibly enough that the purpose of the sealed writing, also called a *specialty* or *deed*, was to

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55. See, e.g., BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 363–65; IBBETSON, *supra* note 38, at 24–28; Anon., Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 286 (1969) (Herle, J.) (“Covenant is none other than the assent of the parties that lies in specialty.”). Before the requirement was in place, if the plaintiff had no sealed writing then the defendant could wage law. See, e.g., William Son of Benedict v. Kersebroc, *reprinted in* B&M, *supra* note 35, at 278.

56. Unwritten agreements were probably enforceable in the Chancery, BARBOUR, *supra* note 31, at 16, at canon law, HELMHOLZ, CANON LAW, *supra* note 27, at 263–90, and in the borough, fair, and other mercantile courts. See *Welshe v. Hoper* (K.B. 1533), *reprinted in* B&M, *supra* note 35, at 286; 1 BOROUGH CUSTOMS, 18 SELDEN SOC'Y 207–14 (Mary Bateson ed., 1904); PALMER, BLACK DEATH, *supra* note 30, at 65 & n.6, 169–213; J.H. BAKER, *The Law Merchant and the Common Law Before 1700*, in BAKER, LEGAL PROFESSION, *supra* note 36, at 341; Mary Bateson, *Introduction to 2 BOROUGH CUSTOMS*, 21 SELDEN SOC'Y, at lxxix–lxxxii (Mary Bateson ed., 1906); David J. Ibbetson, *Sale of Goods in the Fourteenth Century*, 107 LAW Q. REV. 481 (1991). Some other formality may have been required, such as a handshake, drink, earnest money, or other token. See *id.* Eventually, at least by around 1400, unwritten agreements for the sale of goods became enforceable at common law in cases in which the parties set a day for payment, see *infra* note 71, and perhaps such agreements were enforceable by 1321 if the buyer paid earnest money. See Ibbetson, *supra*, at 489–99.

57. Compare PALMER, COUNTY COURTS, *supra* note 40, at 198–215 (arguing that covenant was limited to cases of sealed writing because (i) the Chancery required that standard of proof in the county courts in actions begun by *justices* writs of covenant, (ii) the royal justices would have been familiar with that requirement because of appeals from county court, and (iii) the justices simply adopted the requirement over by habit when the *praecipe* writ of covenant, which originated litigation in the royal courts, became prominent in the late thirteenth century), and Robert C. Palmer, *Covenant, Justices Writs, and Reasonable Showings*, 31 AM. J. LEGAL HIST. 97 (1987), with David J. Ibbetson, *Words and Deeds: The Action of Covenant in the Reign of Edward I*, 4 LAW & HIST. REV. 71 (1986) (disagreeing with Palmer's thesis and finding a genesis partly in Roman law and partly in the practice of writing and sealing leases), and with Biancalana, *supra* note 41 (arguing that English officials adopted a writing requirement as part of a general change in modes of proof away from wager of law and a general change in the relationship between royal and local courts).

show the will or assent of the party.<sup>58</sup> The parties were precluded from testifying in their own cases, on the ground of bias.<sup>59</sup> A written agreement sealed by the party in breach was more reliable evidence of a promise than were non-party witnesses. At any rate, the requirement of a sealed writing doomed the covenant action in the royal courts.<sup>60</sup> After the 1350s, the action declined as a general action for breach of promise.<sup>61</sup> The requirement of a deed, combined with the pragmatic judgment of most plaintiffs' counsel that an action seeking a liquidated sum promised in a deed was more effectively prosecuted in the form of action called *debt* rather than covenant, forced covenant into obscurity. The debt action bore the load of late medieval contract litigation.

## 2. *Debt sur contract*

If a plaintiff alleged merely that the defendant owed (*debet*) the plaintiff, the king's justices called it a case of debt.<sup>62</sup> One kind of debt action, debt on a contract, arose seemingly from a combination of two elements: agreement and transactional form—both were necessary. Transactions on which a legal remedy was predicated appear to have been reciprocity-centered, almost proprietary: if a transaction occurred which indebted the defendant to the plaintiff, the plaintiff could go to court to get the defendant to hand over

58. *Coleman v. Marham*, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 353, 353 (1969) (Burton for the defendant: "the will of another can only be averred by a deed"); *Anon.*, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 286 (1969), *also reprinted in* B&M, *supra* note 35, at 286 (Herle, J.) ("Covenant is none other than the assent of the parties, which lies in specialty."); BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 363 n.12; IBBETSON *supra* note 38, at 26 & n.9.

59. BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 107–08.

60. IBBETSON, *supra* note 38, at 28; PALMER, BLACK DEATH, *supra* note 30, at 68–69.

61. PALMER, BLACK DEATH, *supra* note 30, at 68–69.

62. *See, e.g.*, FIFOOT, *supra* note 37, at 217–54; GLANVILL, *supra* note 40, bk. 10, chs. 1–4, at 116–118. *Glanvill* gives an example of a debt writ reporting the allegation:

The king to the sheriff, greeting. Command N. to render to R., justly and without delay, one hundred marks which he alleges that he owes him and which, he complains, he is unjustly withholding from him. And if he does not do so, summon him by good summoners to be before me or my justices at Westminster on the third Sunday after Easter, to show why he has not done so. And have there the summoners and this writ. Witness, etc.

*Id.* bk. 10, ch. 2, at 116–17.



what was owed, almost as if it were the plaintiff's property.<sup>63</sup> Debt's requirement that the sum sought be liquidated contributes to the impression that the action sought a specific item.<sup>64</sup> Debt's reliance on both agreement and reciprocity is reflected in *Glanvill's* list of transactions in which an indebtedness would arise (*contracts*, as the word was used in the medieval English, were limited to these transactions): a purchase and sale in which the goods had been delivered, a loan for consumption of the item loaned or for the use of it, a lease, or a deposit.<sup>65</sup> Performance of requested services also qualified.<sup>66</sup> After such a loan, sale, lease, or deposit, an item of property—or in the case of performance of services, the services themselves—had been given or granted to the defendant. The debt plaintiff merely sought either the return of the item itself or what was supposedly granted in exchange for that item.<sup>67</sup> Debt's reliance on

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63. The debt writ reflected proprietary concepts in that it asked for money the defendant "is unjustly withholding from" the plaintiff. See GLANVILL, *supra* note 40, bk. 10, ch. 2, at 116. On debt's proprietary nature, see IBBETSON, *supra* note 38, at 18–19; SIMPSON, HISTORY, *supra* note 31, at 75–80. On debt's grounding in assent, see, for example, Somer v. Sapurton, Y.B. 7 Hen. 6, fol. 5, Mich., pl. 9 (Ex. Ch. 1428), *reprinted in* 51 SELDEN SOC'Y 38, 42 (1933), *also reprinted in* B&M, *supra* note 35, at 234, 235 (Vampage, apprentice: "for [debt] begins by contract and consent of the parties, and the demand is an indebtedness, and the basis of the action is an indebtedness.").

64. The *debt sur contract* plaintiff could not proceed unless the item or the amount of damages claimed was certain, or liquidated. *E.g.*, Anon., Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 334–35 (1969); see IBBETSON, *supra* note 38, at 31; SIMPSON, HISTORY *supra* note 31, at 61–70. This was no difficulty if the parties had set the amount of damages clearly in their agreement or if the amount could be established easily by some calculation or reference to a government regulation or even clear custom. IBBETSON, *supra* note 38, at 31 (giving precedent that settled these circumstances in favor of recovery). But the case of the worker who charged only a reasonable price was more difficult. Simpson supposes that this rule was only a pleading rule and not fatal. The worker might allege as a "sum certain" what he thought was a reasonable price. Historians have found that if the worker reached the jury and could convince them to agree with him, no rule that said he could not succeed. SIMPSON, HISTORY, *supra* note 31, at 65. In that case the requirement of a sum certain appears somewhat fictional. More common, however, would be for the defendant to defend such a suit by waging law. Occasionally judges departed from the declared damages, to the surprise of reporters. *E.g.*, Anon., Y.B. 12 Edw. 2, Pasch., pl. 53 (1319), *reprinted in* 81 SELDEN SOC'Y 45 (1964) ("BEREFORD, C.J. awarded that he should recover his debt and his damages of sixty pounds more than what he counted—which was astonishing . . ."); Anon., Y.B. 12 Edw. 2, Trin., pl. 14 (1319), *reprinted in* 81 SELDEN SOC'Y 85 (1964) (reporting that the judge cut the plaintiff's damages for equitable reasons).

65. GLANVILL, *supra* note 40, bk. 10, chs. 3–18, at 117–32.

66. See, *e.g.*, Anon., Y.B. 11 & 12 Edw. 3, Rolls Series 587 (1338), *reprinted in* B&M, *supra* note 35, at 228–29 (debt for an attorney's retainer).

67. See *id.*

the reciprocity concept grew stronger throughout the medieval period, becoming embodied in the phrase *quid pro quo*.<sup>68</sup> But *Glanvill*'s early list (c. 1189) was open-ended. Exactly which other transactions would raise a debt remained uncertain.<sup>69</sup> Milsom suggested that local customs may have differed as to the circumstances that caused indebtedness.<sup>70</sup> Indeed, these customs later dealt quite flexibly even with the reciprocity requirement. Medieval courts eventually held that a sale of goods would be enforceable even if nothing had yet changed hands, if the parties had agreed on a specific day for payment.<sup>71</sup> And an employee could bring an action in debt for wages without having performed, if he had been ready and willing.<sup>72</sup> But the reciprocal character of the debt allegation distinguished it from cases of covenant, which rested merely on the defendant's agreement.<sup>73</sup>

68. IBBETSON, *supra* note 38, at 80–83; John Barton, *The Medieval Contract, in TOWARDS A GENERAL LAW OF CONTRACT 15* (John Barton ed., 1990).

69. See Barton, *supra* note 68, at 15. A promise of marriage money might raise a debt, *Fransseys' Case*, Y.B. 21 & 22 Edw. 1, Rolls Series 599 (Eyre of Middlesex c. 1294), *reprinted in* B&M, *supra* note 35, at 227–28 (suggesting an action might lie), or it might not, *Anon.*, Y.B. 37 Hen. 6, fol. 8, Mich., pl. 18 (C.P. 1458), *reprinted in* B&M, *supra* note 35, at 236–39 (recording the conflicting opinions of several judges on whether debt lies for marriage money, with Prysot, Ashton, and Danby saying no, and Danvers and Moyle saying yes, but adjourning without decision).

70. MILSOM, FOUNDATIONS, *supra* note 54; S.F.C. MILSOM, *Law and Fact in Legal Development* [hereinafter MILSOM, *Law and Fact*], *in* STUDIES IN THE HISTORY OF THE COMMON LAW 171, 175 (1985) [hereinafter MILSOM, STUDIES]. The basis of custom for an action of debt is evident in *Anon.*, Y.B. 43 Edw. 3, fol. 11, Pasch, pl. 1 (1369), *reprinted in* B&M, *supra* note 35, at 229–30 (custom of London that debtor has a duty to recompense his surety who has paid the debtor's debts, even though the debtor has made no written, sealed promise to repay); *Anon.*, 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), *reprinted in* 98 SELDEN SOC'Y 637–38 (1982) (debt based on a custom of Northamptonshire regarding how a decedent's assets would be divided up among his children by executors); *Anon.*, 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), 98 SELDEN SOC'Y 638–39 (1982) (debt based on intent of a testator with respect to estate assets).

71. See *Veer v. York*, Y.B. 49 Hen. 6, Hil., pl. 4 (1470), *reprinted in* 47 SELDEN SOC'Y 163–65 (1930); *Stoughton v. Love* (1397), *reprinted in* 100 SELDEN SOC'Y 177–79 (1984); see also 1 Dyer 29b–30a, 73 Eng. Rep. 65, 66 (“And this diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue.”).

72. IBBETSON, *supra* note 38, at 75.

73. For instance, *Glanvill* notes with respect to sales,

A purchase and sale is effectively complete when the contracting parties have agreed on the price, *provided that this is followed by delivery of the thing purchased and sold*,

The debt action was also resolved on conscience, though not always exercised by a jury. Trial of a case of *debt sur contract* was by jury or wager of law,<sup>74</sup> as the defendant might elect.<sup>75</sup> A defendant waged his law by (a) swearing an oath that he was not indebted to the plaintiff—that he owed nothing<sup>76</sup>—and (b) producing eleven other “compurgators” or oath-helpers to swear to the defendant’s credibility.<sup>77</sup> If the defendant could swear and find eleven others to swear with him, he could go free and no one would ever examine the evidence against him. Thus *debt sur contract* cases could be resolved on the oath of the defendant and his compurgators.

It was thus possible to lie one’s way out of a debt. But in practice such deceit probably did not happen often.<sup>78</sup> The medieval mind took oaths seriously.<sup>79</sup> Conscience mattered. Wager of law was

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*or by payment of the whole or part of the price, or at least by the giving and receipt of earnest.*

GLANVILL, *supra* note 40, bk. 10, ch. 14, at 129 (emphasis added). Completeness depends on part performance, and enforceability depends on completeness, as *Glanvill* negatively implies in the next sentence: “In the first two cases neither contracting party may at will withdraw from the contract, unless for some just and reasonable cause . . .” *Id.*

74. Wager of law had been available in covenant actions until the courts began to require the plaintiff to show a writing sealed (a deed) by the defendant. *See supra* text accompanying notes 55–60. The deed was a public act, however, and wager of law was not available to disprove a deed. *See Aubrey v. Flory*, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC’Y 235, 237 (1969) (“HERLE, J. When a covenant begins with a specialty it would be marvellous (for the defendant) to be admitted to make his law, therefore bear in mind that your answer amounts to no more than that you have kept your covenant, and that naturally is matter for the country.”).

75. *See* Anon., Y.B. 2 Edw. 2 (c. 1292–1297), *reprinted in* 19 SELDEN SOC’Y app. 1, pl. 3, at 195 (1904), B&M, *supra* note 35, at 210; Anon., Y.B. 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), *reprinted in* 98 SELDEN SOC’Y 744 (1982) (opting to wage law).

76. Anon. [2], Y.B. 12 Edw. 2, Mich., pl. 19 (1318), *reprinted in* 65 SELDEN SOC’Y 24 (1946), reports the oath’s substantive assertion: “[I] do not owe ten marks to [X], nor any penny alleged to have been borrowed by [me] from him on such and such a day . . .”

77. On the wager of law procedure generally, see BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 87–88; SIMPSON, HISTORY, *supra* note 31, at 137–40.

78. *See generally* BAKER, LEGAL PROFESSION, *supra* note 36, at 424–26. Defendants ill or in prison could not wage their law. SIMPSON, HISTORY, *supra* note 31, at 139.

79. IBBETSON, *supra* note 38, at 32. Ibbetson reports the fifteenth-century case *Ocle v. Clypesby*, for instance, in which A had been imprisoned by B, who was claiming A as his villein, until A had sworn “an oath on the gospels that he would arrange for third parties to enter an obligation on his behalf.” *Id.* at 72–73. After B released A, A procured the obligation, then requested that the chancellor declare it cancelled. *Id.* at 73. A chose to keep his oath and seek to undo the resulting harm rather than break his oath.

The much later case *Dampport v. Simpson*, Cro. Eliz. 520, 78 Eng. Rep. 769 (Q.B. 1596), makes explicit the common law’s assumption that what was spoken under oath was true:

appropriate because the activities that formed the contract were done in secret.<sup>80</sup> “In secret things,” Francis Bacon later argued, “the trial of them is . . . *Deum et partem* [God and the party], as in wager of law.”<sup>81</sup> The theory, according to Bacon, was that “*Deus veritas est* [God is truth]” and, quoting *Hebrews* 6:16, that “an oath . . . is . . . an end to all strife.”<sup>82</sup> But the wagerer’s soul became legally important. Thus, defendants’ counsel can be found in medieval case reports asking the judges whether their clients could in good conscience swear that no debt existed.<sup>83</sup> “As Hankford JCP

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[T]he law intends the oath of every man to be true; and therefore until [1487] . . . there was not any punishment for any false oath of any witness at the common law; and now there is a form of punishment for perjury provided by the statute of [1562–63] . . . [A]t the common law there was not any course in law to punish perjury; but yet before the statute of [1487] the King’s Council used to assemble, and punished such perjuries at their discretion. . . . And it appears . . . that at the common law there was no punishment for perjury but in case of attain; but in the Spiritual Court *pro laesione fidei* in cases spiritual they used to punish them . . . this oath, which is secret, . . . cannot be tried . . .

*Id.* at 521, 78 Eng. Rep. at 769.

The Eyre of London in 1321 presents numerous examples of medieval judicial reliance on oaths. A major percentage of judicial action rested on an oath-bound recommendation from a jury or other inquest or group of officials. See generally 1–2 EYRE OF LONDON, 14 EDWARD II, A.D. 1321, in 85–86 SELDEN SOC’Y (Helen M. Cam ed., 1968–69); *Rules for the Conduct of the Citizens During an Eyre*, in 85 SELDEN SOC’Y 5, Nos. XIII–XVI, at 8–9 (describing wager of law for clearing oneself of crimes); *The Third Day*, in 85 SELDEN SOC’Y at 18 (swearing of Eyre officials); *The Fourth Day*, in 85 SELDEN SOC’Y at 21 (swearing of officials designated to establish set prices for food during the Eyre); *The Sixth Day*, in 85 SELDEN SOC’Y at 26–27 (swearing an investigative jury); *The Tenth Day*, in 85 SELDEN SOC’Y at 28–30 (swearing an inquest to determine whether the city’s poulterers’ businesses would survive the prices set by the designated food officials).

80. *A Lecture on Wager of Law (15th century)*, in B&M, *supra* note 35, at 214–15 [hereinafter *Lecture on Wager of Law*]. The fact that wager was to protect debtors against fraud in previously informal, unrecorded transactions explains why debt could not be brought against executors for the testator’s debts if the testator could have waged law. See, e.g., Anon. [2], Y.B. 14 Edw. 2 (Eyre of London 1321), reprinted in 86 SELDEN SOC’Y 346 (1969); Wakefield v. Prioress of Hampole, Y.B. 12 Edw. 2, Mich., pl. 38 (1318), reprinted in 65 SELDEN SOC’Y 53, 54–55 (1946). The executors knew nothing about the transaction. An abbot was also liable for his monks’ debts but was unable to wage law for a monk since the abbot knew nothing of the transaction. Anon., Y.B. 12 Edw. 2, Hil., pl. 39 (1319), reprinted in 70 SELDEN SOC’Y 89 (1951). Therefore, the abbot or prior was not liable unless the plaintiff could show that the monk was obligated by deed. *Frome v. Prior of Witham & Thyk*, Y.B. 10 Edw. 2, Mich., pl. 35 (1316), reprinted in 52 SELDEN SOC’Y 102 (1934).

81. BAKER, LEGAL PROFESSION, *supra* note 36, at 401.

82. *Id.* (reporting arguments from *Slade’s Case* (1602), in which Bacon cited *Hebrews* 6:16 (King James): “*finis omnis controversie est iuramentum*” in support of wager of law).

83. DOE, *supra* note 33, at 150–53 & n.89; see also IBBETSON, *supra* note 38, at 32; S.F.C. Milsom, *Sale of Goods in the Fifteenth Century*, 77 LAW Q. REV. 257, 267–68 (1961).

succinctly pointed out . . . , ‘he [the defendant] can have his law, if the truth be such in conscience.’”<sup>84</sup> And the oath’s sacredness was why wager might not be accepted if the defendant appeared to hesitate or changed the oath’s words.<sup>85</sup> Conscience also occasionally stopped eleven compurgators from joining the defendant.<sup>86</sup> Wager thus resolved cases according to the conscience of the defendant and his compurgators. Their act of conscience became the law for that case.

Reputational interests also ensured that wager was not sworn lightly. The population of medieval England was small, at most not more than 6.5 million people just prior to the Black Plague.<sup>87</sup> In many cases, waging one’s law must have been, in Ibbetson’s words, “tantamount to admitting liability and refusing to pay the debt due.”<sup>88</sup> Reputation and the financial consequences flowing from a public admission of this sort deterred abuse.<sup>89</sup>

When reinforced by conscience and reputational interests, wager of law was effective to protect honest defendants from fraudulent claims. Suits in which wager of law was available—suits on an unsealed, often unwritten, contractual agreement—normally involved relatively small debts.<sup>90</sup> Such debts usually resulted from private contracts between individuals, and such contracts would have been difficult to prove or disprove,<sup>91</sup> especially given that the parties themselves were not allowed to testify. The defendant may never

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84. DOE, *supra* note 33, at 150 & n.87 (quoting Y.B. 11 Hen. 4, 50, 27 (1410): “*il puit aver son ley, si le verity soit tiel en conscience*”).

85. PALMER, COUNTY COURTS, *supra* note 40, at 224.

86. PALMER, BLACK DEATH, *supra* note 30, at 70.

87. See J.L. BOLTON, THE MEDIEVAL ENGLISH ECONOMY, 1150–1500, at 45–81 (1980) (discussing J.C. RUSSELL, BRITISH MEDIEVAL POPULATION (1948), which reached a smaller number based on less persuasive assumptions about who was listed in medieval tax records and the size of the household).

88. David Ibbetson, *Sixteenth Century Contract Law: Slade’s Case in Context*, 4 OXFORD J. LEGAL STUD. 295, 313 (1984) [hereinafter Ibbetson, *Sixteenth Century Contract Law*].

89. See *id.*; PALMER, BLACK DEATH, *supra* note 30, at 70.

90. BAKER, LEGAL PROFESSION, *supra* note 36, at 425.

91. See, e.g., Anon., Y.B. 14 Edw. 2, Mich., pl. 25 (1320), reprinted in 104 SELDEN SOC’Y 86–87 (1988) (granting wager of law as against a sealed tally “because the writing on the tally can be erased and the notches can be added to and reduced in number as anyone pleases”); *Lecture on Wager of Law*, *supra* note 80, at 214 (“But they may [wage law] in a writ of debt brought on a simple contract, because it does not lie in the knowledge of the country.”).

have made a binding contract (under general or more local customs) or already paid the debt in private, facts only God and the parties would know.<sup>92</sup> In such a case, if the defendant could not wage his law, he may have had to pay unjustly or perhaps twice. Business proceeded at too fast a pace for the law to require certain documentary evidence of every debt and payment.<sup>93</sup> Besides, if a creditor wished to avoid wager of law, the creditor could always demand a sealed writing from the debtor. Rather than forcing honest debtors to document everything, the law accommodated them with wager of law. This was only possible because of the trusted role that conscience played in these transactions and dispute resolution procedures.

Finally, wager of law premised on conscience may have been a reasonable alternative to a trial by jury. At this time jury trials were quick<sup>94</sup> and risky for the parties (they are still risky). The parties could not testify, and witnesses may or may not have been reliable or available. A politically powerful party could influence witnesses or the composition of the jury, or suborn the jurors to perjury.<sup>95</sup> In some cases, the chief difference between wager and a jury trial may have been that the defendant rather than the sheriff chose those who

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92. BAKER, LEGAL PROFESSION, *supra* note 36, at 425–26; Ibbetson, *Sixteenth Century Contract Law*, *supra* note 88, at 312.

93. BAKER, LEGAL PROFESSION, *supra* note 36, at 425. Baker cites Justice Owen for this proposition. Owen was speaking of conditions near the close of the sixteenth century, however. Evidence of financial transactions from that time period supports Owen's assessment. *See, e.g.*, CRAIG MULDREW, *THE ECONOMY OF OBLIGATION* (1998).

94. Ibbetson, *Sixteenth Century Contract Law*, *supra* note 88, at 312.

95. In *Usque v. Bawe*, a Chancery case filed after 1397, David Usque pleaded to the chancellor that William Bawe "is so rich and so strong in friends in the country where he dwelleth, that the said David will never recover from him at common law, if he have not aid from your most gracious Lordship." *Reprinted in* 10 SELDEN SOC'Y 34, 35 (1896); *see also* [Hamelyn v. Isbury] (Ch. 1392), *reprinted in* 10 SELDEN SOC'Y 48 (1896) (alleging that "the said John and Thomas [Isbury] are so great in their country in kinsmen, alliances and friends, that the said suppliant cannot have right against them by any suit at Common Law"); [Badwell v. Clopton] (Ch. c. 1413–1417), *reprinted in* 10 SELDEN SOC'Y 111, 112 (1896) (alleging that "howsoever the said suppliant would sue against the said William Clopton at common law, he can never come to his purpose, because of the great maintenance of the said William in those parts"). Sometimes the defendant might threaten the plaintiff sufficiently that he dared not sue, as in [Palet v. Skipwith] (Ch. 1397), *reprinted in* 10 SELDEN SOC'Y 33 (1896), in which Palet alleged that he, "by threats and for fear of the said John Skipwith, . . . did not, and yet doth not, dare to sue his right thereof." Palet was not the only one Skipwith, the county sheriff, frightened. *See, e.g.*, [Rouseby v. Skipwith] (Ch. 1397), *reprinted in* 10 SELDEN SOC'Y 30 (1896).

would exercise conscience.<sup>96</sup> Moreover, for some debt claims wager of law was not available.<sup>97</sup> In theory, it was not available when the facts would be well-known by prospective jurors.<sup>98</sup> The most prominent of these instances was debt brought on a written, sealed bond,<sup>99</sup> or *debt sur obligacion*, examined in Part I.B.4. Even when wager was available, the defendant could choose to waive his right to wager and go to the jury. Either way, the consciences of twelve individuals established the law of the case.

### 3. *Detinue*

If the plaintiff alleged that the defendant owed the plaintiff as in debt, but the plaintiff sought a chattel, the courts considered this a case of *detinue*.<sup>100</sup> *Detinue* began as a species of debt<sup>101</sup> but developed

96. Defendants did offer to “aver by a jury,” for example, as opposed to swearing twelve-handed. *E.g.*, *Andeburgh v. Anon.* Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC’Y 344, 345 (1969) (“aver by a jury” [*“averer par pays”*]).

97. Wager was unavailable when debt was brought by a common laborer compelled to work when requested under the Statute and Ordinance of Laborers, 23 Edw. 3 (1349) (Eng.); 25 Edw. 3, Stat. 2 (1350–51) (Eng.); 34 Edw. 3, cc. 9–11 (1360–61) (Eng.); *Sloufort’s Case*, Y.B. 3 Hen. 6, fol. 42, Pasch., pl. 13 (1425), *reprinted in* B&M, *supra* note 35, at 215; *Anon.*, Y.B. 39 Hen. 6, fol. 18, Mich., pl. 24 (1460), *reprinted in* B&M, *supra* note 35, at 217. Wager was also not available in cases of debt for arrears of rent. *Baker v. Anon.*, Y.B. 11 Hen. 4, fol. 79, Trin., pl. 21 (1410), *reprinted in* B&M, *supra* note 35, at 232 (dicta); *FLETA*, *supra* note 23, bk. 2, ch. 63, at 136, *reprinted in* 72 SELDEN SOC’Y 209 (H.G. Richardson & G.O. Sayles eds. and trans., 1953) (c. 1290).

98. *See, e.g.*, *Anon.*, Y.B. 2 Edw. 2 (c. 1310), *reprinted in* 19 SELDEN SOC’Y app. 1, pl. 4, at 196 (1904), *also reprinted in* B&M, *supra* note 35, at 265 (“BEREFORD [CJ]. Now God forbid that he should get to his law about a matter of which the country can have knowledge, for then with a dozen or half-a-dozen rogues he might swear an honest man out of his goods.”); *Galewey v. Margerye*, Y.B. 1 Hen. 6, pl. 3 (1422), *reprinted in* 50 SELDEN SOC’Y 12, 13 (1933) (“*Rolfé* [for the plaintiff]: if a man declares, and it appears by his declaration that the country had notice, [wager of] law does not lie.”); *Lecture on Wager of Law*, *supra* note 80, at 214. The theory of wager at various times allowed its usage outside of any action. For example, wager could be available to show that a defendant was “not summoned according to the law of the land.” *Saltere v. Toltham*, 3–4 Edw. 3 (Eyre of Northamptonshire 1329), *reprinted in* 97 SELDEN SOC’Y 425 (1981); *Anon.*, Y.B. 5 Edw. 2 (1311), *reprinted in* 63 SELDEN SOC’Y add. cases, pl. 93, at 273 (1944); *Anon.*, Y.B. 5 Edw. 2 (1311), *reprinted in* 63 SELDEN SOC’Y add. cases, pl. 94, at 273 (1944).

99. Wager was not available in debt on a sealed bond because the bond was a public act that could be reviewed by a jury. *See supra* note 74. The same was true in covenant after a deed was required. *Id.*

100. *See* BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 441.

101. The debt writ quoted above, *supra* note 62, required an allegation that the defendant owes (*debet*) and unjustly detains (“*iniuste deforciat*”), *GLANVILL*, *supra* note 40, bk. 10, ch. 2, at 116, or “*injuste detinet*,” Statute of Wales, 12 Edw. 1, c. 6, sec. 6 (1284)

its own characteristics that caused later generations to classify it separately.<sup>102</sup> Detinue came to be used in place of *debt sur contract* for transactions in which one party agreed to convey a specific chattel, such as a horse<sup>103</sup> or a specific lot of wool or grain,<sup>104</sup> or to hold bonds in escrow,<sup>105</sup> or otherwise retain and then return certain legal documents.<sup>106</sup> Otherwise, the action was the same as other species of debt: the item sought was to be named, and the action was subject to wager of law in some cases and not in others, as with cases of debt on a contract.<sup>107</sup> When the action was not subject to wager of law, the defendant would go to the jury.<sup>108</sup> Thus, as in cases of *debt sur contract*, disputes in detinue were resolved by the consciences of either the defendant and compurgators or the jury.

#### 4. *Debt sur obligacion*

When a plaintiff pleaded that the defendant was indebted to the plaintiff as the result of a written bond which the defendant had sealed (called a *specialty* or *deed*), the king's justices called this a case of *debt sur obligacion*. Wager of law was, in principle, not appropriate in *debt sur obligacion* because the defendant's deed publicly resolved

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(Eng.). In the detinue version of the writ, the plaintiff alleged only that the defendant unjustly detains (*iniuste detinet*) a specific chattel.

102. See MILSOM, FOUNDATIONS, *supra* note 54, at 262–65.

103. Clifford v. John, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 351 (1969).

104. See, e.g., Statute of Wales, 12 Ed. 1, c. 6, sec. 6 (1284) (Eng.) (sacks of wool). Anon., Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 345, 346 (1969) (holding that a complaint for two acres of wheat should have been brought in detinue), explains that debt lies only for fungible things “which can be numbered, such as money, or weighed, such as wool; or measured, such as a quarter of wheat and such like.”

105. Bonds held in escrow would be considered a bailment. E.g., Somerville v. Anon., Y.B. 11 Hen. 4, fol. 50, Hil., pl. 27 (C.P. 1410), *reprinted in* B&M, *supra* note 35, at 269.

106. Note, Y.B. 10 Edw. 4, Pasch. 21 (1470), *reprinted in* 47 SELDEN SOC'Y 79 (N. Nielson ed., 1930 [1931]) (detinue for a deed wrongfully retained).

107. Compare FIFOOT, *supra* note 37, at 28–30, with *supra* text accompanying notes 97–99.

108. See, e.g., Tunstal v. Dore, 3–4 Edw. 3 (Eyre of Northamptonshire 1329), *reprinted in* 97 SELDEN SOC'Y 404 (1981) (detinue of charters, to the jury); Anon., Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 349 (1969) (detinue of chattels, to wager of law); Hungrye v. Drake, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 350 (1969); London v. Garton, Y.B. 14 Edw. 2, rep. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 140–41 (1969), also *reprinted in* B&M, *supra* note 35, at 266–67.



all doubts as to the defendant's indebtedness.<sup>109</sup> As in all debt cases, damages still had to be liquidated, so not all contractual promises were directly remediable through this form of action. But from the mid-1300s,<sup>110</sup> *debt sur obligacion* became the form of action of choice for the enforcement of formal promises. This occurred when the courts endorsed recovery in *debt sur obligacion* of penalties promised in a sealed, conditional bond called a penal bond. In a penal bond, the promisor promised to pay a certain penalty unless he completed a certain performance desired by the promisee. Any kind of performance could become the condition of a penal bond. A.W.B. Simpson gives the following example:

Suppose Hugo proposes to lend Robert £100. Robert will execute a bond in favour of Hugo for a larger sum, normally twice the sum lent, thus binding himself to pay Hugo £200 on a fixed day; the bond will be made subject to a condition of defeasance, which provides that if he pays £100 before the day the bond is to be void.<sup>111</sup>

The bond stated clearly that the defendant owed the plaintiff the penalty sum of £200;<sup>112</sup> the bond was an admission of indebtedness. Usually the condition was written (endorsed) on the back of the bond.<sup>113</sup> Hugo would deliver the money and Robert would deliver the bond to Hugo. If Robert did not pay the £100 on the day appointed, Hugo would sue him in *debt sur obligacion* for £200. Though the bond in this example involved what would otherwise be a contractual promise to pay money disguised as a condition of the bond, a promise for any kind of performance (to convey land, to perform a service, to build, etc.) could become the bond's condition. Therefore, all kinds of formal contractual promises could, with some forethought, become enforceable in *debt sur obligacion* by means of this kind of bond. Although theoretically a deed could form the

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109. *Lecture on Wager of Law*, *supra* note 80, at 214.

110. *See, e.g.*, PALMER, BLACK DEATH, *supra* note 30, at 69–91.

111. A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 114 (1987) [hereinafter SIMPSON, LEGAL THEORY].

112. *E.g.*, SIMPSON, HISTORY, *supra* note 31, at 88 (transcribing an example from 1510, which uses the words “*teneri et firmiter obligari*”).

113. *Id.*; PALMER, BLACK DEATH, *supra* note 30, at 79–89 (describing the legal developments in the 1350s and 60s that led to the widespread use of penal bonds).

ground for an action of covenant, the debt action offered procedural advantages not relevant here.<sup>114</sup>

Thus, the debt form of action of one kind or another dominated the contract enforcement landscape of medieval English law: *debt sur contract* for informal promises and *debt sur obligacion* for formal promises. After penal bonds became generally enforceable in the fourteenth century, their popularity grew. In late medieval and Tudor Renaissance England they provided the basis for more contractual litigation in the royal courts than any other form of contract.<sup>115</sup> As a consequence, *debt sur obligacion* became the most common contractual action.

Part of *debt sur obligacion*'s popularity resulted from the defendant's lack of effective defenses. The defendant might try to show that the deed was itself invalid—not a deed at all, or not delivered, or invalid because the condition had been performed,<sup>116</sup> or a forgery, or “that he had been tricked into executing it because he was illiterate and the contents had been misread to him.”<sup>117</sup> The deed could also be invalidated for duress, but this defense was limited to cases of “imprisonment and threats of serious personal injury.”<sup>118</sup>

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114. In covenant, the plaintiff had to plead the defendant's breach. In debt, the defendant had to plead performance of the condition as a defense. If default was shown, the debt plaintiff could have judgment for the liquidated sum pleaded as the debt, but the covenant plaintiff would then have to prove damages to the jury. Additionally, some improvements in procedure, which applied to debt and not to covenant, were introduced into personal actions in 1352. In covenant, the jury may have credited the defendant's substantial performance of the condition, but in debt the liquidated amount was due in full unless the condition had been fully performed. IBBETSON, *supra* note 38, at 29–30 & n.24; *see also* SIMPSON, HISTORY, *supra* note 31, at 117, 134; PALMER, BLACK DEATH, *supra* note 30, at 64–72.

115. SIMPSON, HISTORY, *supra* note 31, at 112; BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 368.

116. *See, e.g.*, *Langeleye v. Hameldon*, Y.B. 12 Edw. 2, Pasch., pl. 8 (1319), *reprinted in* 70 SELDEN SOC'Y 120, 120–23 (1951) (holding that performance of the condition was a valid defense, if it could be proved before a jury, to an action on a conditional deed in which the condition was to return a law book that the defendant had borrowed).

117. BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 369; SIMPSON, HISTORY, *supra* note 31, at 98–99. On being tricked, *see Prior of Dunstable v. Smyth*, Y.B. 1 Hen. 6, Mich., pl. 7 (1422), *reprinted in* 50 SELDEN SOC'Y 23 (1933) (holding that defendant's plea that (i) “he is a layman and does not know how to read” and (ii) what was read to him is not what the deed now presented by the plaintiff says was a good plea). The defendant in *Kent v. Trailly*, Y.B. 12 Edw. 2, Hil. 11, *reprinted in* 70 SELDEN SOC'Y 23 (1951), successfully took to a jury the question of the deed's validity by alleging that he was a minor when he had signed it.

118. IBBETSON, *supra* note 38, at 72–73; SIMPSON, HISTORY, *supra* note 31, at 99.

Lack of capacity was also an invalidating defense, if, for example, the defendant was a married woman or a monk.<sup>119</sup> But if the deed was valid—a proper question for a jury<sup>120</sup>—then the deed could not be contradicted and the defendant had to pay.<sup>121</sup> For example, in *Glaston v. Abbot of Crowland*,<sup>122</sup> a 1330 case illustrating the strength of a valid deed, the defendant gave the plaintiff an unconditional bond. Later, the defendant paid the obligation in exchange for the plaintiff's giving the bond back. Afterward, the plaintiff stole the bond from the defendant and sued the defendant on the bond. The court allowed the plaintiff's suit to continue notwithstanding the defense of prior payment and that the plaintiff had stolen the bond back.<sup>123</sup> The valid deed itself in the plaintiff's hands was the obligation.<sup>124</sup> The formal deed was thus considered to resolve all litigable issues in advance. Later jurists justified this conclusion on the ground that the deed's formality forced its maker to deliberate before consenting to it.<sup>125</sup> The result was that disputes common in

119. SIMPSON, HISTORY, *supra* note 31, at 98.

120. *See, e.g.*, *Clarel v. Aldewynce*, 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), *reprinted in* 98 SELDEN SOC'Y 568, 570 (1981) (jury called in response to the plaintiff's plea that an acquittance was "not our deed"); *Neville v. Botereux*, 3–4 Edw. 3 (Eyre of Northamptonshire 1329), *reprinted in* 97 SELDEN SOC'Y 498 (1981) (acquittance deed's validity determined by a jury).

121. In *William Basset's Executors v. Prior of the Hospitallers*, 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), *reprinted in* 98 SELDEN SOC'Y 582 (1981), for instance, the acquittance showed that £30 had been paid in satisfaction of a debt of £100. The court gave judgment to the defendant, therefore, because the plaintiff was not allowed to contradict his deed.

122. 3–4 Edw. 3, Hil. (Eyre of Northamptonshire 1330), *reprinted in* 98 SELDEN SOC'Y 665 (1981), *also reprinted in* B&M, *supra* note 35, at 252.

123. *Id.*

124. IBBETSON, *supra* note 38, at 21 (reporting from a fifteenth-century notebook: "*Ista verba in scripto, obligatum esse, faciunt scriptum esse pro causa rei obligate*," which Ibbetson translates as, "if the words of obligation are used in the writing, then the writing itself is the cause of the obligation"); SIMPSON, HISTORY, *supra* note 31, at 95 ("the instrument *was* the obligation").

125. Deeds were rationalized this way in the early modern period. *E.g.*, *Sharington v. Strotton*, Plowden 298, 309, 75 Eng. Rep. 454, 470 (Q.B. 1565), *reprinted in* B&M, *supra* note 35, at 488, 491. In this case, Bromley and Plowden argued for the defendants:

[W]ords . . . pass from men lightly. But where the agreement is made by deed there is more stay. For when a man passes something by deed there is first the determination of the mind to do it, and thereupon to cause it to be written, and that is one part of the deliberation, and then to put his seal to it, and that is another part of the deliberation, and thirdly he delivers the writing as his deed, and that is a consummation of his resolution. And by the delivery of the deed from him who made it to him to whom it is made, he gives his assent that he parts willingly with

other forms of action did not arise in *debt sur obligacion*. When disputes did arise, they went to the jury to be resolved on conscience.

### 5. *Account*

*Account* was also a prominent action.<sup>126</sup> In account, auditors—selected by the parties if they could agree or by the court if they could not—examined the transactions of the parties to determine whether one owed the other. During the first part of the late medieval period, auditors were formal, official, and had authority to commit the party found owing in an account to debtors' prison.<sup>127</sup> Though many actions for an account involved parties in feudal relationships rather than contractual ones—a manorial lord and his bailiff, or an infant and his guardian in socage<sup>128</sup>—the parties might also have been merchants and their receivers, in which case the action was more contractual.<sup>129</sup> If the accounting was formal, or the

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the thing contained in the deed to him to whom he delivers the deed; and this delivery is like a ceremony in law, plainly signifying his good will that the thing in the deed should pass from him to the other. Thus there is great thought and deliberation in the making of deeds, and therefore we receive them as a final tie of the party and adjudge them to bind the party without thinking what cause . . . there was for making it.

126. See B&M, *supra* note 35, at 289–95 (listing leading cases); MILSOM, FOUNDATIONS, *supra* note 54, at 275–82.

127. Statute of Westminster II, 13 Edw. 1, c. 11 (1285) (Eng.); S.F.C. MILSOM, *Account Stated in the Action of Debt*, in STUDIES, *supra* note 70, at 133–44.

128. MILSOM, FOUNDATIONS, *supra* note 54, at 278–80.

129. See, e.g., Anon., Y.B. 11 Edw. 2, Hil., pl. 41 (1318), *reprinted in* 61 SELDEN SOC'Y 264 (1942), *also reprinted in* B&M, *supra* note 35, at 289, 290 (requiring that the plaintiff aver that the defendant received money from the plaintiff “for our common profit, to trade or to spend, or [as] . . . [his] common receiver”); Anon. v. Richard, Y.B. 12 Edw. 2, Trin., pl. 3 (1319), *reprinted in* 81 SELDEN SOC'Y 57 (1964) (employing a definition of receiver that included one who had collected money from a purchaser on behalf of a seller of goods, and rejecting the suggestion that debt was the proper action); MILSOM, FOUNDATIONS, *supra* note 54, at 280–81. The account action could also remedy what might be called a breach of trust or unjust enrichment. In *Taillour v. Atte Medwe*, Y.B. 14 Edw. 2, Mich., pl. 12 (1320), *reprinted in* 104 SELDEN SOC'Y 39 (1988), the plaintiff alleged that a testator left him money but that because plaintiff was underage the executors had given the money to the defendant to keep for the plaintiff. An account action was held appropriate, even though no status-based relationship or agreement existed between the parties, because “otherwise [the defendant] would be answerable to nobody and this would be against the law.” *Id.*, *reprinted in* 104 SELDEN SOC'Y 39, 41 (1988) (Stonore, J.). The defendant was not allowed wager of law because the money had been given him by a non-party, so a witness was available to testify to its receipt. *Id.*

receivership had been created by deed,<sup>130</sup> there was no general way to plead a defense to an action for an accounting.<sup>131</sup> One could not plead “no accounting” and then wage law in that case. But if the plaintiff alleged that the receivership was created in private, the receiver might allege that he was not the receiver and wage law on this issue.<sup>132</sup> For this reason, plaintiffs conventionally alleged that the receivership had been publicly created at the hand of a non-party in order to force the issue to a jury.<sup>133</sup>

An accounting, if it occurred, might show that one party owed the other. The auditors would resolve disputes of fact on the same principles as the court: by wager of law for things done in secret<sup>134</sup> and by finding facts themselves for things that could be known.<sup>135</sup> If the auditors found an amount owing, they would commit the debtor to prison until the debt was paid. Wager of law was unavailable in

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130. *E.g.*, *Coleman v. Marham*, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 353 (1969) (requiring a defendant receiver to answer when it was shown that the receivership was created by the defendant's deed).

131. MILSOM, FOUNDATIONS, *supra* note 54, at 281.

132. *Anon.*, Y.B. 14 Edw. 2 (Eyre of London 1321), *reprinted in* 86 SELDEN SOC'Y 147, 148 (1969); *Braund v. Friday*, Y.B. 7 Edw. 2, Pasch., pl. 6 (1314), *reprinted in* 39 SELDEN SOC'Y 104 (1922); *Lecture on Wager of Law*, *supra* note 80, at 214 (“For instance, in a writ of account brought against a man supposing that he was his receiver by his own hands, he may wage his law.”); S.J. Stoljar & L.J. Downer, *Commentary on Selected Cases*, in 104 SELDEN SOC'Y, at xi–xiv (S.L. Stoljar & L.J. Downer eds., 1988).

133. *See, e.g.*, *Taillour*, 104 SELDEN SOC'Y at 39 (discussed *supra* note 129); *Beaumont v. Kydale*, Y.B. 12 Edw. 2, Pasch., pl. 18 (1319), *reprinted in* 70 SELDEN SOC'Y 146, 146 (1951) (“*Malberthorpe*. We demand the account in respect of the moneys that you received by the hand of others; so we cannot be a party to the wager of law etc., since we were not a party to the contract.”); *see also* *Bastenthwayt v. Lenebane*, Y.B. 12 Edw. 2, Pasch., pl. 62 (1319), *reprinted in* 70 SELDEN SOC'Y 53, 53–54 (1951) (sending to the jury the issue of whether defendant was plaintiff's receiver regarding money he had received from a third party); *Lovekyn v. Weston*, Y.B. 12 Edw. 2, Pasch., pl. 54 (1319), *reprinted in* 70 SELDEN SOC'Y 45–47 (1951) (sending to a jury the issue of whether defendant was plaintiff's bailiff); *Oxford v. Baillard*, Y.B. 12 Edw. 2, Mich., pl. 6 (1318), *reprinted in* 65 SELDEN SOC'Y 7, 7–8 (1946); *Perton v. Tumby*, Y.B. 10 Edw. 2, Pasch., pl. 15 (C.P. 1317), *reprinted in* 54 SELDEN SOC'Y 109 (1935), *also reprinted in* B&M, *supra* note 35, at 289; MILSOM, FOUNDATIONS, *supra* note 54, at 281–82.

134. *E.g.*, *Beaumont*, 70 SELDEN SOC'Y at 147. In this case, Bereford, C.J., wrote, “If he demanded the account against you as his bailiff, could you wage your law that you did not receive the profits of his manor? (He implied that he could not.) Nor can you here, for the main point of this matter is that you were his receiver, and that is an office as much as bailiffship, and is open to the cognisance of the country. And when you come before the auditors you will then be able to answer as you do now, and discharge yourself.”

135. MILSOM, FOUNDATIONS, *supra* note 54, at 275–76.

that case as to the debts themselves, because the auditors' formal decision was a matter of public record.<sup>136</sup> But if the accounting was informal and the auditors not official, as was the case in the later medieval period, the accounting resulted in a viable action in debt, and the debtor could call on a jury<sup>137</sup> or wage law.<sup>138</sup> In any event, all decisions in the action of account and resulting debt action were made by the parties' choices, by the auditors' or jury's factual findings, and by wager of law. Disputes were resolved according to the consciences of the parties, the auditors, the jury, or the defendant and his compurgators.

#### 6. *Assumpsit*

An alternative existed to the forms of action noted thus far. Breach of promise might have been tortious, especially in cases where the promisor performed his promise so badly that the promisee was harmed by the promisor's misconduct. That seemed to medieval jurists to be a trespass, or a wrong in the sense of *Matthew* 6:14: "[F]orgive men their trespasses." During the medieval period the chancery issued writs to remedy such mis-performance of contractual duties, though these writs were at first limited to contracts made by those in certain kinds of occupations.<sup>139</sup> The allegation in the writ came to be that the defendant had *undertaken* to perform certain things and then had done them badly. In the sixteenth century, the Latin word for "undertook," *assumpsit*, became the name for this new action grounded on undertakings. *Assumpsit* seemed naturally to cover breach of promise because one could undertake to do a thing by promising to do it.

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136. See *Baker v. Anon.*, Y.B. 11 Hen. 4, fol. 79, Trin., pl. 21 (1410), reprinted in B&M, *supra* note 35, at 232 ("When he was found in arrears before duly appointed auditors, he was debtor as it were of record against which he could not wage his law."); *Lecture on Wager of Law*, *supra* note 80, at 214; MILSOM, FOUNDATIONS, *supra* note 54, at 277.

137. [*Launcher v. London*], Coram Rege Roll, m. 72, Mich., No. 566 (K.B. 1402), reprinted in 88 SELDEN SOC'Y 128 (1971) (following such a procedure), *rev'd on other grounds*, 88 SELDEN SOC'Y at 130 (1971).

138. STUDIES, *supra* note 70, at 133–34.

139. See, e.g., [*Asser v. Bradmor*], Coram Rege Roll, m. 48, Trin., No. 577 (K.B. 1405), reprinted in 88 SELDEN SOC'Y 162 (1971) (suit against a leech); [*Birchester v. Lewis the Leech*], Coram Rege Roll, m. 53, Hil., No. 515 (K.B. 1390), reprinted in 88 SELDEN SOC'Y 63 (1971); PALMER, BLACK DEATH, *supra* note 30, at 169–213 (citing *assumpsit* writs issuing from Chancery 1350–1382 against carriers, builders, doctors, shepherds, clothworkers, and laborers); IBBETSON, *supra* note 38, at 43–56 (listing cases from 1303 onward in which this was attempted).

In order for assumpsit to become a more general contractual remedy, it would have to remedy pure non-performance as well as mis-performance. In fact, the fourteenth century chancery began to issue writs ordering (and pleaders began to plead for) a remedy for non-performance of a promise.<sup>140</sup> These writs, though at first surely successful, were later rejected by the royal courts on the ground that mere non-feasance of a promised performance was not a tort.<sup>141</sup> It was, rather, a breach of covenant<sup>142</sup> and had to be proved by specialty—a written, sealed agreement.<sup>143</sup> Still, these writs continued to issue throughout the end of the medieval period.<sup>144</sup> It stands to reason that litigants would not have paid for chancery to issue them if they were not effective in some way. Most likely the writs' very issuance persuaded some litigants to settle, but the medieval holding that non-feasance was not a tort stopped the assumpsit action from coming to remedy breach of promise in general. So though some breaches of promises at this time were remedied or at least forced to settlement by means of assumpsit, most were not. Those that were began as a writ issued by the chancellor as a matter of conscience and, if disputed, were, like all trespass cases, resolved by a jury according to conscience.

### *C. Summary: Conscience as Law*

When all was said and done in the fragmented medieval contract law dispute resolution system, someone's conscience became the law. The judges enforced agreements, whether by specific performance (covenant), damages (covenant, debt, detinue, and assumpsit), or by

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140. PALMER, BLACK DEATH, *supra* note 30, at 178 & n.24 (carriers), 181 n.1 (builders from 1303), 183 & n.8 (builders), 207 nn.50–51 (bakers).

141. See B&M, *supra* note 35, at 378–401; Baker, *Introduction to REPORTS OF JOHN SPELMAN*, *supra* note 43, at 262–75; SIMPSON, HISTORY, *supra* note 31, at 250–64; MILSOM, FOUNDATIONS, *supra* note 54, at 323–28; S.F.C. Milsom, *Not Doing Is No Trespass: A View of the Boundaries of Case*, 1954 CAMBRIDGE L.J. 105–17, *reprinted in* STUDIES, *supra* note 70, at 91.

142. In fact, courts sometimes referred to assumpsit writs as covenant. *E.g.*, Stratton v. Swanlond, Y.B. 48 Edw. 3, fol. 6, Hil., pl. 11 (1374) (Cavendish, J.), *reprinted in* B&M, *supra* note 35, at 360, 361.

143. Baker, *Introduction to REPORTS OF JOHN SPELMAN*, *supra* note 43, at 262–63.

144. MILSOM, FOUNDATIONS, *supra* note 54, at 324; S.F.C. MILSOM, *Reason in the Development of the Common Law*, *in* STUDIES, *supra* note 70, at 149, 160–61.

committing the debtor to prison (early account).<sup>145</sup> If enforcement could rest squarely on the promisor's assent to enforcement (as in late covenant and *debt sur obligacion*), no dispute arose. In such a case, "agreement prevails over the law," as the author of *Glanvill* wrote,<sup>146</sup> and no law was necessary. But when disputes made law necessary, enforcement depended on conscience. Then either the oaths taken by the defendant and his compurgators or the decision made by the jury according to the customs of the people and in agreement with the jurors' oaths would end the litigation (as in early covenant, debt, detinue, account, and assumpsit). Thus, all factual and many of what we would today call legal questions were resolved by an oath sworn to God. Either the juror's act of conscience or the defendant's and his compurgators' act of conscience became law for the dispute. The litigants preferred this resolution to allowing the judges to create substantive rules. If a difficult legal issue arose when the lawyers were discussing the plaintiff's debt claim for the first time, the defendant would opt to wage his law or go to a jury—go to conscience—rather than risk a judicial decision against him; lawyers opted not to force the courts to decide legal questions.<sup>147</sup>

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145. Under the Statute of Merchants, 13 Edw. 1 (1285) (Eng.), merchants' debtors who defaulted on an officially recorded debt could be imprisoned immediately and made to pay the debt while in prison by sale of their chattels or lands.

146. GLANVILL, *supra* note 40, bk. 10, ch. 14, at 129 ("*conuentio legem uincit*").

147. This kind of "tentative pleading" (this is Maitland's term, F.W. Maitland, *Introduction to 20 SELDEN SOC'Y*, at lxvii (F.W. Maitland ed., 1905)) is the subject of most Yearbook reports. The purpose of medieval pleading, which was done orally, was to reach an issue that could be sent to trial. In the course of the pleading discussions, counsel would suggest pleas that might have ended the litigation had the judges ruled on them. But the judges declined to rule and instead warned counsel that his argument was probably not well taken. Then counsel would back off and try something else. Finally, if the judges gave him no help, counsel would fall back on some sure plea that he knew would get him to trial, in contract law either wager of law or the jury.

For instance, in *Dunman v. Weldon*, 3–4 Edw. 3 (Eyre of Northamptonshire 1329), reprinted in 97 SELDEN SOC'Y 476 (1981), also reprinted in B&M, *supra* note 35, at 210, Dunman brought debt for grain worth 100s against Weldon, alleging that the defendant refused to make delivery. Elmdon, counsel for Weldon, answered in response that Weldon did not sell any grain and does not withhold any, and elected to wage his law. Justice Scrop, in response, warned, "If you were to be received to wage your law in this case, it would have to be upon the receipt of the money, for the receipt is the cause of the indebtedness. . . . Therefore take heed, at your peril, whether you wish that as your answer." B&M, *supra* note 35, at 211. When Elmdon again answered this way, Scrop questioned him again, "Do you want the averment?" *Id.*

Essentially, Justice Scrop was suggesting that Elmdon do something else: aver some specific fact that would undercut the debt claim rather than state as he had and rest on his



Greater particularity in rules of contract did not develop during this period largely because, when difficult questions arose, someone would swear, and the swearing ended the matter.

Little if any remedy existed for breach of the oath, given attain't's ineffectiveness in controlling juries and the lack of any general crime of or remedy for perjury.<sup>148</sup> "Perjury" stems from Latin *peiero*, "to swear falsely." Perjury, like marriage law, fell within the jurisdiction of the ecclesiastical courts. So, if one wanted to contest a decision of conscience in common law contract litigation, one might end up in the church courts, though a common law court would have prohibited that transfer of jurisdiction if a defendant purchased from the chancery and prosecuted a writ of prohibition to that effect.<sup>149</sup> If one was dissatisfied with the common law's dependence on oaths in the late medieval period, one could always begin contract litigation in the church court in the first place, where much of it actually took place then,<sup>150</sup> or in the chancery, where contract litigation was also

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election to wage law. Then the Yearbook reporter says, "*Elmdon* did not dare to abide by wager of law, and put forward the averment that he sold the plaintiff no grain and received no money . . ." Then Justice Scrop explained where *Elmdon*'s mistake would have led had *Elmdon* insisted on making it. Scrop saw a denial of the sale and a denial of withholding the grain as inconsistent, because there was no need to deny withholding unless the plaintiff had a right to some grain. If *Elmdon* denied withholding the grain, then the court would "take the sale of the grain and receipt of the money as conceded," *id.*, a finding that would warrant judgment for the plaintiff in this case in which only damages were sought. But rather than let *Elmdon* harm his client's case thus, the court instead drove him to deny only the sale and receipt of money and instead go to a jury. The court took his pleading as tentative. That meant, of course, that the court never ruled on whether *Elmdon*'s tentative plea actually doomed his client's case. Justice Scrop thought it would, and wise counsel would probably take that warning into account in the future when pleading, but there is no definite ruling. Because the tentative plea was withdrawn by counsel, the plea never made it into the record of the case or further discussions by the judges. One consequence is that there was no opportunity to discuss further the substantive point at issue—why the court thought a defense based on non-withholding was inconsistent with and should trump a defense based on non-sale of the grain and why the non-withholding defense was ineffective. A jury could perhaps examine whether goods were withheld (they were either visible to the public or they were not), but could never know for sure whether *Dunman* had paid. Possibly this decision rests on Justice Scrop's preference for jury trial over wager. We will never know, because *Elmdon*'s escape foreclosed any need to discuss the matter further.

148. There was no common law of perjury. A statute passed in 1487, 3 Hen. 7, c.1 (Eng.), reprinted in 2 STATUTES OF THE REALM, *supra* note 26, at 509, gave power to the Star Chamber to examine and punish perjuries. A later statute, 5 Eliz., c. 9 (1562–63) (Eng.), reprinted in 4 STATUTES OF THE REALM, *supra* note 26, at 436–37, first made perjury a crime.

149. Baker, *Introduction* to REPORTS OF JOHN SPELMAN, *supra* note 43, at 66–67 & n.8.

150. See, e.g., HELMHOLZ, CANON LAW, *supra* note 27.

conducted under the nose of the Episcopal Chancellor.<sup>151</sup> Either way, a decision would have been rendered consistently with what the ecclesiastical judges or the chancellor thought conscience demanded. There was no way to avoid conscience as law.

## II. THE CONSEQUENCES OF CONSCIENCE AS LAW

To the historian, one of the most obvious consequences of the litigation-stopping oath was that what resolved the medieval contracts cases is never made explicit in the legal record. The conclusion that some legal historians draw from this—now as a truism—is that there was no law, or as Ibbetson says, putting it more mildly, the law was “fuzzy.”<sup>152</sup> Ibbetson’s teacher, Baker, complains,

Systems of justice which depended on general oaths . . . had no need of pleading in any refined sense; God could not be interrogated. God would choose between the parties, but He could not be told the rules to apply or asked to reveal His reasons. Divine intervention by its nature stopped short of finding facts or making law.<sup>153</sup>

. . . .

. . . [I]n actions of debt on a contract, defendants invariably pleaded the general issue and often waged their law; for centuries this unchanging procedure prevented questions about the law of contract from being asked. The medieval law of debt was a law of procedure and little more, because it was a survival of the ancient pattern of lawsuit.<sup>154</sup>

And Baker’s teacher, Milsom, disparaged medieval jurisprudence:

[T]he persistence of wager in the action of debt was not just a symptom of social backwardness: it seems also to have been a cause of the retarded intellectual growth of that branch of the law. The legal historian trying to reconstruct the substantive law finds many elementary questions that he cannot answer, and the reason turns out to be because the facts raising them would not be specially pleaded but subsumed under *Nil debet* [the general plea in defense,

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151. See, e.g., BARBOUR, *supra* note 31, *passim*.

152. IBBETSON, *supra* note 38, at 12.

153. BAKER, ENGLISH LEGAL HISTORY, *supra* note 32, at 84.

154. *Id.* at 96; see also *id.* at 367.

“I owe nothing,” after pleading which the defendant could wage his law]. If the defendant wages his law, it was in his conscience that the rule sought actually operated. And when the historian has realized this he ought to ask—and one at least must confess that he has not always done so—how far a rule on the matter could have had definite existence. . . . [W]ithin this framework, the matter would emerge into the light of legal discussion only if an opinion were sought on the propriety in conscience of waging.<sup>155</sup>

Milsom’s point is vividly illustrated by the variety of rules that our law has expressed but which medieval law did not: rules for requiring objective from subjective assent, what is an offer or acceptance, when an offer can no longer be accepted, what to do when material terms are omitted, whether the offeree must know of the offer, standards for acceptance, when acceptance can be by mail, how contracts are entered by form (U.C.C. § 2-207), the effectiveness of part payment in settlement of debts,<sup>156</sup> illusory promises, frustration of purpose, mistake, unconscionability, good faith as a condition of performance, anticipatory breach, and damages. Reliance on the oath, with other influences, stopped medieval contract law from developing explicit rules for these issues.

But Milsom’s criticism is a criticism only if one has a certain conception of law.<sup>157</sup> To a large extent it is a positivist conception: that the law must be (a) posited and (b) recognizable as law because of something other than its content.<sup>158</sup> Simpson persuasively argues that this view of the common law is incorrect. First, he claims that the common law is recognizable as law because of its content—not as a result of some other rule or factor.<sup>159</sup>

The doctrine of consideration is a good example of Simpson’s point.<sup>160</sup> It became law in the Tudor period. If the historian traces consideration back, the original reason for its existence appears to be that defense counsel in a case in 1539 objected to the plaintiff’s

155. MILSOM, *Law and Fact*, *supra* note 70, at 171, 174.

156. *See generally* MILSOM, *FOUNDATIONS*, *supra* note 54, at 256.

157. Milsom in fact implies that law might exist but not as an intellectual system. *See* MILSOM, *Law and Fact*, *supra* note 70, at 188 (discussing “law as an intellectual system”).

158. A.W.B. Simpson, *The Common Law and Legal Theory*, reprinted in SIMPSON, *LEGAL THEORY*, *supra* note 111, at 359, 362–64. Simpson was arguing not with Milsom, but rather with Austin, Hart, and Kelsen. Simpson’s criticisms hold as to Milsom’s comment as well.

159. *Id.*, reprinted in SIMPSON, *LEGAL THEORY*, *supra* note 111, at 366–68.

160. Simpson uses the parole evidence rule similarly. *Id.*, reprinted in SIMPSON, *LEGAL THEORY*, *supra* note 111, at 368.

bringing a debt case in assumpsit grounded on the defendant's other, later promise to pay the debt. (Of course, the case could have been brought in debt, but the plaintiff preferred assumpsit.) The subsequent promise was an undertaking, but it was also a mere promise, and nowhere in the forms of action was a mere informal oral promise enforceable. Alleging a cause or consideration for the subsequent promise would have defeated that entirely formal objection, allowing the plaintiff to continue to bring the debt case in assumpsit.<sup>161</sup> From there the allegation of a consideration in assumpsit was later generalized. But courts quickly forgot the original, formal reason for the requirement. No court remembers it today. And no court requires a consideration today simply because the requirement was laid down in the time of Henry VIII, or even because its state reception act requires that English common law be followed. The consideration requirement remains law because of its content, in spite of its spurious history. It is the primary guard against enforcing mere gift promises. Alternately, the primary ground for enforcing promises may actually be reciprocal exchange. This law is law because of its substance, not because it was once recognized as law.

But the law need not even be posited. Eventually something must be left unspoken in the law and its practice. Simpson refers to rules

governing the proper use of authority and the reverence due it. One moment the House of Lords or the Court of Criminal Appeal is absolutely bound by its own decisions, and the next moment it is not. . . . And what is the authoritarian pecking order between a decision of the American Supreme Court, dicta by the late Scrutton L.J., and an article by Pollock? There are no rules to deal with conundrums of this sort.<sup>162</sup>

But the law resolves such conundrums anyway, and practitioners act despite the absence of guiding rules. What guides them is not written—not proved to be law. Lawyers so guided are thus moved by a kind of faith, a “substance of things hoped for,” in Paul's words.

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161. See, e.g., J.H. BAKER, *Origins of the “Doctrine” of Consideration, 1535–1585*, in BAKER, *LEGAL PROFESSION*, *supra* note 36, at 369, 371–74; Ibbetson, *Sixteenth Century Contract Law*, *supra* note 88, at 143.

162. SIMPSON, *LEGAL THEORY*, *supra* note 111, at 369.

Philip Bobbitt addresses the same difficulty in contemporary jurisprudence.<sup>163</sup> Bobbitt's first book, *Constitutional Fate*, described modes of argument—textual, historical, structural, doctrinal, prudential, and ethical—that the American practice of constitutional law recognizes as legitimate.<sup>164</sup> The use of these forms of argument legitimates constitutional positions taken by the U.S. Supreme Court.<sup>165</sup> Bobbitt's thesis focuses on constitutional law, but the modality method he describes is only a variation of the common law method of practice, as Dennis Patterson has shown.<sup>166</sup> Bobbitt's description of legal practice, however, came with an inherent difficulty (a criticism Bobbitt later acknowledged):<sup>167</sup> “*Constitutional Fate* . . . does not remotely offer a way of choosing among the six legal-grammatical modalities that Bobbitt discusses . . . . When, for example, one concludes that history and doctrine, or text and prudence lead to conflicting results, Bobbitt does not in fact present a hierarchy that allows resolution.”<sup>168</sup>

This criticism is the same positivist assertion Simpson argued against: that the law—that which guides the judge—must all be posited. Against Bobbitt's description of legal practice, the criticism takes the form that the legitimating modes of argument themselves contradict each other. No scale or metric exists to guide choice between the modes of argument; they are incommensurable.<sup>169</sup> So judges are left without guidance.

Both Simpson and Patterson<sup>170</sup> resort to custom to solve this problem of incommensurability. “We need,” Simpson writes, “to conceive of the common law as a system of customary law, and

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163. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) [hereinafter, BOBBITT, *INTERPRETATION*].

164. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982).

165. BOBBITT, *INTERPRETATION*, *supra* note 163, at 6–22.

166. DENNIS PATTERSON, *LAW AND TRUTH* 128–82 (1996) (demonstrating that the common law considers four modes of argument legitimate: textual, historical, doctrinal, and prudential; the specific categories of argument are not as vital as the common law's modal nature).

167. BOBBITT, *INTERPRETATION*, *supra* note 163, at xiv.

168. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 398 (1992).

169. See, e.g., Matthew Adler, *Law and Incommensurability: An Introduction*, 146 U. PA. L. REV. 1169 (1998) (defining “incommensurability” thus).

170. See PATTERSON, *supra* note 166, at 163–82. Patterson moves out beyond the forms of argument to the beliefs and assumptions that support them, but he maintains that “normativity arises from linguistic practices.” *Id.* at 179 (emphasis added).

recognize that such systems may embrace complex theoretical notions which both serve to explain and justify past practice . . . and provide a guide to future conduct in these matters.”<sup>171</sup> He emphasizes the system as custom because he sees law as including the practice of law, as opposed to mere propositions of law or propositions about it. In this way, Simpson avoids the positivist critique. Simpson relatedly claims that part of law practice is never spoken (not positive), even as a form of argument. In a passage reminiscent of Wittgenstein, Simpson implies that the common law doctrines and Bobbitt’s forms of argument are subordinate to the practice itself:

Formulations of the common law are to be conceived of as similar to grammarians’ rules, which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes.<sup>172</sup>

. . . .

When there is disagreement within a customary system there must, if the system is to function, be some way of settling at a practical level which view should be acted upon . . . . This problem is solved by procedures . . . . If agreement and consensus actually exist, no such rules are needed . . . .<sup>173</sup>

Under this description, legal rules themselves, and the forms of argument, are mere grammar to encourage those within the legal practice to do what they ought. That means by implication that parts of legal practice exist beyond the legal rules and forms of argument.<sup>174</sup> In fact, practitioners know that such practice exists, because some of these meaningful but unspoken practices are

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171. SIMPSON, *LEGAL THEORY*, *supra* note 111, at 375–76.

172. *Id.* at 376.

173. *Id.* at 380.

174. On this point, Patterson’s book waffles. Patterson suggests that agreement stops what would otherwise be an infinite regress of argument. PATTERSON, *supra* note 166, at 174. And he agrees with Simpson that “persuasion . . . drives choice,” *id.* at 145, as if being persuaded ended argument also. But Patterson never explains what happens when a person is not persuaded.

occasionally given voice. For instance, lawyers often simply take for granted a kind of taxonomy of law that remains unstated: “Divorce is not a tort”; “Breach of contract is not a crime”; “The government cannot tell you whom to marry.” Moreover, the response to some pro se litigants’ arguments is often to speak the previously unspoken. Non-lawyers make shocking arguments in court. Judges rejecting those arguments often state reasoning they have never heard stated anywhere but with which all or most lawyers would agree.<sup>175</sup> A third example includes claims lawyers decide not to bring and arguments they decide not to make. Unmade arguments are absurd sometimes not because of any specific written law but because the lawyer simply knows that no judge would allow them. These discarded arguments reflect the unspoken practice of law. And even these statements, once spoken, are not absolute law in any realist sense. A decent lawyer could easily think of a situation in which “divorce is not a tort” might be contested and held (or rejected) by our highest courts. But the practice itself would survive even though the propositions, one by one, all changed. In a very real sense, legal practice—the lawyer’s form of life—is *a priori* of any specific, speakable rule, including any interpretation of or obedience to them.<sup>176</sup>

But the unspoken part of the lawyer’s form of life cannot be merely custom, particularly for the Christian lawyer. Custom is morally neutral with regard to itself. It cannot judge itself good or ill. If the law is to serve God’s purposes, movement toward that end must come from somewhere besides the custom of lawyers.

Simpson suggests that the law might improve internally. Certainly, Simpson notes, common lawyers believed that “if only the matter was considered long enough and with sufficient care a uniquely correct answer could be distilled for every problem.”<sup>177</sup> The

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175. Occasionally, judges just reject them out of hand. *See, e.g.*, May v. Kennard Indep. Sch. Dist., 1996 WL 768039 (Report and Recommendation of the United States Magistrate Judge, Nov. 22, 1996) (rejecting some of a pro se litigant’s pleadings as “largely incoherent, conclusory, ambiguous, and reflect[ing] no comprehension of the limited and actual jurisdiction of the federal courts”). But sometimes basic misunderstandings about the pro se litigant’s rights must be corrected. *Id.* (“Plaintiff asks the court to perform legal research for his benefit on a designated issue of state law. This motion should be denied because the court is not a dispensary of free legal research for litigants.”).

176. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 201–202 (G.E.M. Anscombe trans., 3d ed. 1958).

177. SIMPSON, LEGAL THEORY, *supra* note 111, at 377–78. This belief is reflected in the words of Coke, who called the common law an

common law was also committed to rationality. In the small, closed-off group of common lawyers, the “common reason of the profession” was *the* source of law, or it was the law itself.<sup>178</sup> This belief of common lawyers was overly optimistic if taken only as Simpson describes it. Nothing in this common reason or procedure guarantees either rationality or improvement in the law. Agreement stops debate, rational or not.<sup>179</sup> No other method or resource Simpson describes tests the assumption that a uniquely correct answer can actually be distilled. When the practice does not solve the problem, and the procedures reveal disagreement about basic ideas and values, how does one test new practices and procedures? And what is a judge to do—how is the individual judge to decide what to do—in a situation where a procedure such as majority rule is supposed to solve the problem facing the court? Simpson never answers this question, probably because he is concerned primarily with responding to positivist criticisms of the common law, and positivism itself never addresses the normative question the lawmaker must face.<sup>180</sup> Thus, the difficulty with Simpson’s account is that one is not sure what will count as an improvement or worsening of the common law, or how this is to come about. Had Simpson written a full account, he surely would have included the role that conscience played in the common law. When a difficult problem presented itself, the medieval judges in fact often declined to resolve it. Instead, they left the problem to the conscience of the litigant or sent it to a jury

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artificial perfection of reason, . . . by many successions of ages . . . fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule maybe justly verified of it . . . : No man out of his own private reason ought to be wiser than the law, which is the perfection of reason.

Coke on Litt. 97b (1628).

178. See, e.g., J.H. BAKER, *English Law and the Renaissance*, in BAKER, LEGAL PROFESSION, *supra* note 36, at 461 (explaining the medieval judge’s view of his reasoning process in these terms); Baker, *Introduction* to REPORTS OF JOHN SPELMAN, *supra* note 43, at 159–63 (similarly explaining Renaissance views of judging). The more that sort of common practice breaks down—and it has been breaking down now for several hundred years—the more we turn to authority to establish legal rules. E.g., SIMPSON, LEGAL THEORY, *supra* note 111, at 380.

179. SIMPSON, LEGAL THEORY, *supra* note 111, at 380. Simpson’s way is one way to say this. That rationality has its limits is another. See *generally* PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998) [hereinafter, SCHLAG, ENCHANTMENT].

180. Hart famously said that the judge must make “something in the nature of a choice.” H.L.A. HART, THE CONCEPT OF LAW 127 (2d ed. 1994). Hart considered the moral influences on the judge’s decision to be extra-legal. *Id.* at 155–212.



for resolution according to the jury's conscience. Difficult questions in medieval contract law were questions of conscience, to be resolved by those actors close to the situation and able to see what should be done. Later common law judges undertaking to answer questions formerly left to juries and defendants waging law surely would have recognized that they too were making a decision of conscience.

Perhaps not too surprisingly, when addressing similar contradiction and incommensurability problems in his second book, *Constitutional Interpretation*, Bobbitt reaches much the same conclusion as medieval jurists. Bobbitt answers that contradictions and incommensurabilities are resolved according to conscience.<sup>181</sup> How fitting that a postmodern commentator would adopt the premodern term!<sup>182</sup> Although not particularly unique, Bobbitt's conclusion merits discussion here because he uses the word "conscience" to describe it.

Just what Bobbitt means by "conscience" is not entirely clear at first glance. He does *not* mean a moral or philosophical theory that answers the open-ended questions ahead of time.<sup>183</sup> Such a theory would then replace legal practice, speakable and unspeakable, as the source of legitimation of legal decisions<sup>184</sup> and sacrifice the pluralism that decisions between incommensurables make possible.<sup>185</sup> Conscience must therefore mean something else, a non-theoretical morality: "individual moral sensibility,"<sup>186</sup> "moral choices,"<sup>187</sup> "moral judgment,"<sup>188</sup> and "a mastery of the art of deciding."<sup>189</sup>

Patterson criticizes Bobbitt on this point: "What is missing in Bobbitt's otherwise compelling account of the practice of constitutional law is some description of the practice of persuasion . . ." <sup>190</sup> Stated another way, conscience is private—"a

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181. BOBBITT, *INTERPRETATION*, *supra* note 163, *passim*.

182. But perhaps it is not that unusual. Schlag notes modernity's obsession with reason and posits that reason in the law is itself unsupportable by reason and amounts to mere belief. SCHLAG, *ENCHANTMENT*, *supra* note 179, at 40–125.

183. BOBBITT, *INTERPRETATION*, *supra* note 163, at 142–54.

184. *Id.* at 158–59.

185. Book Note, *Legitimacy and Justice in Constitutional Interpretation*, 106 HARV. L. REV. 1218, 1219–20 (1993).

186. BOBBITT, *INTERPRETATION*, *supra* note 163, at 168.

187. *Id.*

188. *Id.* at 170.

189. *Id.*

190. PATTERSON, *supra* note 166, at 145.

conversation stopper.”<sup>191</sup> But is it? Wittgenstein illustrated the impossibility of private language.<sup>192</sup> Anything truly private about *conscience*, Wittgenstein would say, “has no place in the language-game at all.”<sup>193</sup> Only our social or public practices play a role in the meaning of words. So to criticize conscience as private is to assert that the word has no meaning. Surely that criticism falls of its own weight.

Alternately, Patterson may be claiming that the private aspect of conscience’s grammar may render a judge’s assertion of it immune to criticism. Certainly, we are sometimes hesitant to criticize another’s assertion of conscience. But other words have an equally private dimension: “knowledge,”<sup>194</sup> “pain,”<sup>195</sup> “understanding,”<sup>196</sup> “intention,”<sup>197</sup> “imagination,”<sup>198</sup> and even “persuasion,” the word Patterson finally uses. A grammar of privacy applies to each of these, but that does not mean we cannot evaluate assertions of each of them. In fact, Patterson’s *persuasion* is almost just as indescribable as conscience—full of will, morality, dogma, tradition, and faith as well as reason.<sup>199</sup>

191. Gene R. Nichol, Book Review, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1115–16 (1993); PATTERSON, *supra* note 166, at 144 & n.70.

192. Patterson of course recognizes this rather famous argument of Wittgenstein’s. Dennis Patterson, Book Review, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 303–05 (1993); PATTERSON, *supra* note 166, at 144 n.72.

193. WITTGENSTEIN, *supra* note 176, § 293.

194. *See id.* §§ 148–91.

195. *See id.* §§ 246, 251, 253, 289, 310, 403–09, and pt. II, at 189.

196. *See id.* §§ 138–54, 321, 396, 532.

197. *See id.* §§ 247, 641–50.

198. *Id.* §§ 397–402, 512.

199. The “web” of truth Patterson sees in Quine clearly includes choice, as Quine describes it. PATTERSON, *supra* note 166, at 159 (quoting W.V.O. QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20, 43 (1953)). Patterson tries to reduce choice to *persuasion* to the result of argument: “Conscience does not persuade, nor is it persuaded: only argument can do that.” *Id.* at 146 n.80. I am tempted to say that Patterson cannot have it both ways: Either it is choice, via Quine, or it is forced by argument. But the matter is more complicated than that, as Patterson well knows. That he has set out a grammar of persuasion, quite a persuasive one, still leaves it just a grammar for a practice not wholly contained within it. Though Bobbitt’s “art of deciding” may be objectionably too subjective a term to describe what actually goes on, still some part of persuasion is not argument. Even if we grant that humans as sensory beings may be merely a “blank” with no choice but to be impressed by the die of empirical fact, *id.* at 169, a characterization with which I disagree, still not all argument comes with the force of factual experience, and certainly legal argument does not, especially in the difficult cases Bobbitt is trying to discuss.

Bobbitt understands that conscience is not a conversation stopper and not wholly private, which is why he holds that conscience can be educated<sup>200</sup> as a kind of “art”<sup>201</sup> or “judgment.”<sup>202</sup> It is why conscience may be “corrupt and ill-informed,” “anesthetize[d],” renewed, and cultivated.<sup>203</sup> Bobbitt in fact equates conscience with faith.<sup>204</sup> It is, without much more, a “way of

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It is telltale that Patterson uses *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), as an example of a case in which persuasion supposedly could have solved the issue. Patterson praises Justice Blackmun for combining doctrinal and prudential argument in such a way as to avoid the modality conflict posed in the majority opinion. PATTERSON, *supra* note 166, at 64–67. Patterson also praises Eskridge for reworking statutory interpretation (dynamically) so as to legitimate *Weber* under a modified form of historical argument. *Id.* at 176–79. These are supposed to be instances in which persuasion is at work. But even the judges in *Weber* were not persuaded by Justice Blackmun’s position, which is why it is only a concurrence in which no one else joined. 443 U.S. at 209. It was not persuasive to the very judges to whom it was addressed. Eskridge’s reworking of *Weber* was not published until 1987, long after *Weber* was decided, so it did not help the judges either. Even had it been published, there is no guarantee that it would have convinced the majority any more than Blackmun’s concurrence did. Nor is it any guarantee that courts or anyone else should be persuaded by it now. *See, e.g.*, *In re Hospitality Associates of Laurel*, 212 B.R. 188, 201 n.14 (Bankr. D.N.H. 1997) (rejecting Eskridge’s position). This is empirical evidence that persuasion is not merely the result of argument. Persuasion is not the result of mere choice, either (Quine’s word is also reductive). But persuasion sometimes means both of these. And clearly habits and the art of decision-making may play a role.

But often persuasion contains a good deal of faith, too, in the simple sense of *hope for the as-yet unseen*, as Paul puts it in *Hebrews* 11:1. The unseen may be *that I will not later come to disagree with this decision*, or *that I will not lose the respect of those I respect*, or *that I really have considered every angle*, or *acceptance of the decision by others*, or *that no slippery slope results*, or *that the lower courts do not mangle this*, and so on, and from Quine’s web, *that I am not holding this legal statement “come what may” or that my “adjustments” necessary to make it are not too “drastic.”* PATTERSON, *supra* note 166, at 159 (emphasis added) (quoting QUINE, *supra*, at 43). All of these are unknown, hoped-for unseens when a decision comes down. Giving judgment in such a case is an act of faith, or persuasion and faith, or persuasion and choice. I might describe it in a number of ways. But not everything can be settled when the tough decision must be made. Common usages of *persuade* bear family relationships to many other words. To say that none of these others except *persuade* are proper in describing the work of judges is to depart from ordinary usage and even privilege one rather reductive usage of *persuade* itself.

200. BOBBITT, INTERPRETATION, *supra* note 163, at 179 (“Does this mean we can be educated to do better, make wiser and more just decisions? Yes . . .”); *id.* at 184 (“The cultivation of our constitutional traditions requires . . . the cultivation of our consciences . . .”).

201. *Id.* at 170, 183 (quoting Charles L. Black, who in turn quotes Coke’s name for law: “artificial reason,” *see supra* note 177), 186.

202. *Id.* at 178.

203. *Id.* at 184.

204. *Id.* at 185–86; Philip C. Bobbitt, *Barbara Jordan: Constitutional Conscience*, 5 TEX. J. WOMEN & L. 171, 172–73 (1996) [hereinafter, Bobbitt, *Barbara Jordan*]. Bobbitt talks

living.”<sup>205</sup> Obviously, such a thing is hard to describe, probably impossible to describe. Each description seems to destroy what else it might be or become. But if the meaning of a word is its use in the language<sup>206</sup>— and words must be used by someone in order to have meaning—then the need for the word must be prior to its use and meaning, and something of human life must be in a sense *a priori* of language, even in law. These other non-language or less-language forms of life are meaningful, too. They can be talked about, but they cannot be spoken. They are not done by speaking. Our ability to say how to do them is therefore limited. But the meaning of our language is bound up with them. Our participation in them is what gives our words meaning. Pointing this out is perhaps the now near-truism of the postmodern insight.<sup>207</sup> It is true in law as elsewhere.

This postmodern insight leads us back to the medieval contract law problems left to the jury’s and litigant’s oaths. Both the medieval and the postmodern lawyer are comfortable with a theory that does not answer every question in the law. Neither is concerned that the decisionmaker cannot fully articulate a justification for his decision theoretically. The postmodern lawyer finds such articulation impossible. Both see the need for acting without proof of the path ahead, acting on conscience, acting on “the substance of things hoped for, the evidence of things not seen,” as Paul describes faith.

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about “the still, small voice of conscience.” *Id.* at 172. “It sounds preachy” to talk about conscience. *Id.* at 173. Law with conscience calls “on our devotion.” *Id.* Philip Bobbitt, *Parlor Game*, 12 CONST. COMMENT. 151, 153–54 (1995) (“The success of the American constitutional enterprise . . . needs faith and, if the word is not inappropriate, reverence . . .”). On the connection between Patterson’s *persuasion* and *faith*, see *supra* note 199.

205. Bobbitt, *Barbara Jordan*, *supra* note 204, at 172.

206. WITTGENSTEIN, *supra* note 176, § 43.

207. See, e.g., Stanley Fish, *An Exchange on the Nature of Legal Theory: Theory Minimalism*, 37 SAN DIEGO L. REV. 761, 767 & *passim* (2000); see also SCHLAG, ENCHANTMENT, *supra* note 179, at 68–75 (conveniently listing excerpts from Nietzsche, Gadamer, Foucault, Derrida, Lyotard, and Deleuze and Guattari that make this point); WITTGENSTEIN, *supra* note 176, § 23 (“the *speaking* of language is part of an activity, or of a form of life”), § 206 (“The common behaviour of mankind is the system of reference by means of which we interpret an unknown language.”). With Fish this insight takes the rhetorical form that our practices are contingent and socially constructed:

It may seem counterintuitive, but your awareness, even knowledge, that the routines you are running and the evidentiary procedures you rely on and believe in are features of a contingent and revisable practice, of a practice that is, as they say, “socially constructed,” will in no way erode the confidence with which you run those routines or generate that evidence.

Fish, *supra*, at 767.

For the medieval, the act of conscience on the litigant's or juror's oath is enough; for the postmodern, the act of the judge on conscience is enough.

Of course, to some this assertion is either "intellectually retarded," in Milsom's words, or not "making law," as Baker claims. Both Bracton<sup>208</sup> and Fleta<sup>209</sup> speak poignantly against the first accusation. Neither was intellectually retarded. Nor were the authors of the Yearbooks.<sup>210</sup> Surely some explanation other than intellectual retardation must be given for reliance on conscience. Surely the medievals must have seen the exercise of conscience speak truth, for it to merit such trust.

The second accusation, subversiveness of law itself, can be attributed, remarkably, to Thomas More. More once accused the English judges of cowardice for refusing to impose real law on the populace, preferring instead to place on juries and litigants responsibility for the results of cases.<sup>211</sup> He urged them to take on issues directly and create rules. He trusted the conscience of his fellow highly educated, wealthier judges, but not the conscience of the jury. More's was a Renaissance position, at the end of the age of faith.

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208. BRACTON, *supra* note 23. Samuel E. Thorne, Bracton's most competent and thorough translator to date, opined that Bracton wrote of English law "with the confidence and mastery one would expect of an English justice expounding the law he himself administers." S.E. THORNE, *Henry De Bracton, 1268-1968*, in *ESSAYS IN ENGLISH LEGAL HISTORY* 76, 80 (1985). Thorne called *Bracton* "a great book worthy of careful study." *Id.* at 91.

209. FLETA, *supra* note 23, *reprinted in* 72 SELDEN SOC'Y (H.G. Richardson & G.O. Sayles eds. and trans., 1953) (c. 1290). Thorne called *Fleta* "the poor man's Bracton." THORNE, *supra* note 208, at 78. *Fleta* was to some extent redacted from *Bracton* but also reorganized the material into a coherent arrangement and updated it. G.O. Sayles, *Introduction to FLETA, supra* note 23, bks. 5 & 6, *reprinted in* 99 SELDEN SOC'Y, at xiv-xx (G.O. Sayles ed. and trans., 1983).

210. See, for example, the Yearbooks themselves, published consecutively each year for most of the middle and late medieval period (English translations for some Yearbooks are available from the Selden Society, the Ames Foundation, and in the Rolls Series). The Yearbooks were afforded such respect during the sixteenth century that Edmund Plowden suggested that creating them was official government work. EDMUND PLOWDEN, *THE COMMENTARIES, OR REPORTS OF EDMUND PLOWDEN*, at iv-v (Paternoster-Row 1816) (1571). Plowden's suggestion has been discredited, J.H. Baker, *Records, Reports and the Origins of Case-Law in England*, in *JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW* 23-25 (John H. Baker ed., 1989), but the arguments made by lawyers of Plowden's time (as recorded in Plowden's Reports) reflect the high esteem in which the Yearbooks were held.

211. WILLIAM ROPER, *THE LYFE OF SIR THOMAS MOORE, KNIGHTE* 45 (Elsie Vaughn Hitchcock ed., 1935) (1555).

Similarly, some Renaissance writers sought actually to express the dictates of conscience. Most prominent in England is Saint Germain's *Doctor and Student*,<sup>212</sup> which attempts to reconcile conscience and the common law, or in some cases say where they differ.<sup>213</sup> Saint Germain describes conscience at length<sup>214</sup> as both synderesis (it "*says and imparts knowledge by itself. . . and is not only cognitive also but motive, and inclines the soul to pursue good and eschew evil*")<sup>215</sup> and the application of reason to particular circumstances ("an applyenge or an ordering of any scyence [or knowledge] to some partyculer acte of man").<sup>216</sup> But then Saint Germain explains at length what rules conscience requires.<sup>217</sup> Of course, once Saint Germain expresses the requirements of conscience in rule form, no further act of conscience as he describes it is required with regard to such rules themselves—one can follow the rule rather than one's conscience. Thus, by so

212. *ST. GERMAIN'S DOCTOR AND STUDENT*, reprinted in 91 SELDEN SOC'Y at xi (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530).

213. *Id.*, reprinted in 91 SELDEN SOC'Y at 3 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530) ("*The present dialogue shows what are the principles or grounds of the laws of England, and how conscience ought in many cases to be formed in accordance with those same principles and grounds. It likewise discusses briefly the question of when English law ought to be rejected or not on account of conscience.*").

214. *Id.*, reprinted in 91 SELDEN SOC'Y at 78–95 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530).

215. *Id.*, reprinted in 91 SELDEN SOC'Y at 87 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530).

216. *Id.*, reprinted in 91 SELDEN SOC'Y at 89 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530) (square brackets in original). St. Germain also cites other definitions reminiscent of Bobbitt's description:

And so it should be known that of consyence thus taken Doctoures make many dyscrypcyons/ wherof one doctour (*St. John Damascene*) saythe that consyence is the lawe of oure vnderstandyng. Another that consyence is an habyte of the mynde dyscernyng bytwyxt good and euyll. *Another, that conscience is the assent or belief of the intention to do a thing, confirmed by deliberation of the mind.* Another that consyence is the Jugement of *practical* reason Jugyng on the patyculer actes of man/ all whiche sayenges *when well resolved* agree in one *and the same effecte*/ that is to saye that *they mean* that consyence is an actuall applyenge of any cunnyng or knowlege to such thynges as be done/ wherupon it foloweth that upon the moste parfyte knowlege of any law or cunnyng. And of the moste parfyte and most true applyeng of the same *law or cunning*/ to any partyculer acte of man: foloweth the most parfyte the most pure and the moste beste conscience[.]

*Id.*, reprinted in 91 SELDEN SOC'Y at 89 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530).

217. *E.g., id.*, reprinted in 91 SELDEN SOC'Y at 228–33 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1529–1530) (discussing what the common law, civil law, ecclesiastical law, and conscience require regarding obligations arising from promises).

describing conscience, Saint Germain decreased its relevance. We have long marched down the path Saint Germain trod, until now conscience plays no formal role in legal analysis. A return is in order.

### III. RETURN TO CONSCIENCE

#### *A. The General Christian Jurisprudential Goal: Salvific Freedom*

The scriptures present a structure for law in which the role of faith or conscience is explicitly recognized. At first, only a general, theoretical purpose for law appears. The verses discussed here bring me back to the question that began this essay: What does God expect of contract law? Here the scriptural canon provides some general but limited guidance regarding what God expects of law in general and contract law in particular in a society including non-believers. The clearest statement from the canon follows:

4 And now, verily I say unto you concerning the laws of the land, it is my will that my people should observe to do all things whatsoever I command them.

5 And that law of the land which is constitutional, *supporting that principle of freedom* in maintaining rights and privileges, *belongs to all mankind*, and is justifiable before me.

6 Therefore, I, the Lord, justify you, and your brethren of my church, in befriending that law which is the constitutional law of the land;

7 And as pertaining to law of man, whatsoever is more or less than this, cometh of evil.

8 I, the Lord God, make you free, therefore you are free indeed; and *the law also maketh you free.*<sup>218</sup>

In verse 5, the law that is “justifiable” before the Lord is the law that supports “that principle of freedom.” Verse 4 names the only “principle” with which the passage is concerned: “that my people should observe to do all things whatsoever I command them.” So the law that supports that principle is justifiable and belongs to all

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218. *Doctrine & Covenants* 98:4–8 (emphasis added).

mankind. “Constitution” is here distinguished from “principle.”<sup>219</sup> Moreover, the clause beginning “supporting . . .” modifies “law of the land.” So rights and privileges supporting the principle of freedom that “my people should observe to do all things whatsoever I command them” are justifiable.

Because that law is justifiable, “therefore” the Lord (as stated in verse 6) justifies the Church in befriending “that law.” Both the word “therefore” and the use of the same word “justified” and “justify” in verses 5 and 6 limit our befriending to that law which is both constitutional and supporting of the principle named in verse 4. The reference to “that law” in verse 6 is to “that law” discussed in verse 5. Verse 6 does not justify the Church in befriending all constitutional law. If it had meant to say that, the clause in verse 6 “that law which is” would be redundant.

Substantive legal positions otherwise marked out in theology and history support the limitation of verse 6 to law supporting “that principle of freedom.” Some have said that verse 6 justifies our supporting all constitutional law, but this is not only contrary to the linguistic suggestions of verses 5 and 6 but also takes too broad a substantive position. For instance, the Lord does not justify our befriending constitutional law approving slavery, because slavery would interfere with the principle of freedom named in verse 4, which, as verse 5 states, belongs to all mankind. The Lord also does not justify our befriending constitutional law requiring his people directly to cease to live by his commands. We can abide by the law without befriending it.

Verse 7 limits the justification only to law supporting that principle of freedom: “whatsoever is more or less than this, cometh of evil.” Verse 7 makes sense theologically because human law is violence or force against other humans. The Lord would not condone our committing violence or force generally. Therefore the law needs some justifying principle, which is why verses 5 and 6 talk in terms of justification.<sup>220</sup> Verse 4 names the principle of freedom and verse 7 limits the justification to that: law in the service of freedom. The maintenance of freedom to serve God—or to decide

219. The passage in *Doctrine & Covenants* 98:5–6 stands in contrast to *Doctrine & Covenants* 109:54, in which the Constitution is spoken of as a principle or set of principles.

220. See also *Doctrine & Covenants* 98:22–32 (especially verses 23, 25, 26, and 30–31, which recommend peace as a reaction to violence but justify protection of life and to a lesser extent liberty).



not to serve him—in all things is consistent with what a God of love working only for the salvation of his children would recommend. The law “maketh you free.”<sup>221</sup> Any violence God condoned beyond that would be forced salvation, a contradiction. And God cannot mean the violence of the state to serve anything other than our salvation, because he has said he does nothing but for our benefit.<sup>222</sup> It follows then that law is to serve freedom to do the will of God in all things and, subordinately but necessarily, to decline to serve God. I call this freedom *salvific freedom*. It is a precondition of salvation, including the greater salvation for those who are sanctified and overcome all things.

Several other passages in scripture<sup>223</sup> and in the writings of the prophets<sup>224</sup> make this same point about human law. Probably most poetically, Paul wrote:

221. *Id.* at 98:8.

222. *See* 2 *Nephi* 26:22 (Book of Mormon); *Moses* 1:39 (Pearl of Great Price).

223. *Doctrine & Covenants* 101:77–80; *Mosiah* 27:1–4 (Book of Mormon); *Alma* 30:7–8 (Book of Mormon). The rhetoric of the Christian people in the *Book of Mormon* (the “Nephites”) about government centered around peace and equality. The purpose of both was often described as maintaining salvific freedom. *See* Val D. Ricks, *Abortion and Latter-day Saint Experience with Children and Law*, 2001 MARGINS 523, at 550–52 & nn.84–90 (discussing more fully these and other passages from the canon).

224. *See, e.g.*, 2 HISTORY OF THE CHURCH, *supra* note 8, at 7 (“The laws of men may guarantee to a people protection in the honorable pursuits of this life, and the temporal happiness arising from a protection against unjust insults and injuries: and when this is said, all is said, that can be in truth, of the power, extent, and influence of the laws of men, exclusive of the law of God.”); Brigham Young, *The Kingdom of God (July 8, 1855)*, in 2 JOURNAL OF DISCOURSES 309, 313 (photo. reprint 1956) (1854–1886) (“What is the foundation of the rights of man? The Lord Almighty has organized man . . . and has given him his individual agency. Man is made in the likeness of his Creator, . . . who bestowed upon him the principles of eternity, . . . and leav[es] him at liberty to act in the way that seemeth good unto him, to choose or refuse for himself.”); Marion G. Romney, *America’s Fate and Ultimate Destiny* (May 2, 1976), in 1 CLASSIC SPEECHES 255, 265 (1994) (“To this generation [God] has given [his laws] anew through his prophet Joseph Smith, Jr. The giving of these laws, however, would have been abortive without a civil government that would guarantee men the untrammelled exercise of their God-given free agency.”); Ezra Taft Benson, *Address at the 138th Annual General Conference of the Church of Jesus Christ of Latter-day Saints* (April 6, 1968), in 138 CONF. REP., Apr. 1968, at 49 (“The function of government is to protect life, liberty, and property, and anything more or less than this is usurpation and oppression.”); BRUCE R. MCCONKIE, *Inalienable Rights*, in MORMON DOCTRINE 377 (2d ed. 1966) (“As a natural and automatic inheritance from their Creator, all men are born into the world with certain *inalienable rights*, rights which cannot be surrendered, transferred, or alienated. The DECLARATION OF INDEPENDENCE lists *life, liberty*, and the *pursuit of happiness* as among these. In the full sense they include every natural and inherent right necessary for the working out of one’s salvation in the kingdom of God. Freedom of thought and of worship, freedom of speech and of preaching the gospel, freedom to investigate the truth, to worship God

I urge, then, first of all, that requests, prayers, intercession and thanksgiving be made for everyone—

2 For kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness.

3 This is good, and pleases God our Savior,

4 Who wants all men to be saved and to come to a knowledge of the truth.<sup>225</sup>

Verse 2 gives a reason to pray for kings: that Christians may seek salvation. Verses 3 and 4 give another reason: that all men might be saved and come to a knowledge of the truth. Every person should have the freedom to accept Christ's gospel and be sanctified by it.<sup>226</sup>

Most relevant to Professor Andersen's thesis, law conforming to this prescription would keep us free to make and keep the highest promises of our faith: the covenants we make with God, and the covenants we make at the altar with God and those we marry.<sup>227</sup> Such law would also preserve and promote our freedom to keep with honor our primarily economic promises, as N. Eldon Tanner suggested,<sup>228</sup> even when bankruptcy law might legally discharge our obligations.

For jurisprudence generally, the most defining aspect of salvific freedom is the limitation in *Doctrine & Covenants* 98:7 quoted previously: "As pertaining to the law of man, whatsoever is more or less than this, cometh of evil." This passage makes salvific freedom

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according to the dictates of one's own conscience, to earn a temporal livelihood—these are among our inalienable rights."); Dallin H. Oaks, *The Divinely Inspired Constitution* (July 5, 1987), in *THE SPIRIT OF AMERICA* 11, 20–21 (1998) (Elder Oaks quotes *Doctrine & Covenants* 101:78–80 and then explains, "In other words, the most desirable condition for the effective exercise of God-given moral agency is a condition of maximum freedom and [personal] responsibility.").

225. 1 *Tim.* 2:1–4 (New International).

226. I read the passage in *Romans* 13 as consistent with this purpose. The passage in *Romans* provides its own limitation: The ruler is "the minister of God *to do good*." *Rom.* 13:4. The ruler only does good if he acts for the purpose set forth in 1 *Timothy*. For a more general discussion of the *Romans* passage, see Ricks, *supra* note 223, at 547 n.78.

227. See Andersen, *supra* note 2, at 842–44.

228. See *id.* at 829–30 (quoting N. Eldon Tanner, Address at the 136th Semi-Annual General Conference of the Church of Jesus Christ of Latter-day Saints (Oct. 1, 1966), in *OFFICIAL REPORT OF THE 136TH SEMI-ANNUAL GENERAL CONFERENCE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 97, 99 (1966)).

the overruling theory for Church members' thought about law. If it is, then the scriptures mandate a kind of value monism with an accompanying maximization principle. Just like efficiency is the end of law and economics, salvific freedom is the end of law and salvation. This value monism should not surprise us. The canon also posits that God himself follows in this world a single purpose—the immortality and eternal life of humankind<sup>229</sup>—and gave his life for its maximization.<sup>230</sup> In the decisions of life, salvation is the monistic value that, in theory, resolves the incommensurables. Salvific freedom, at least in theory, resolves the legal incommensurables.

As a general matter, salvific freedom as a goal is not controversial in the greater Christian community. Pope John Paul II wrote in 1991 to explain why the Catholic Church supports a long list of human rights: “In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one’s faith and in conformity with one’s transcendent dignity as a person.”<sup>231</sup> And elsewhere: “freedom attains its full development only by accepting the truth. . . . The Christian upholds freedom and serves it, constantly offering to others the truth which he has known . . . , in accordance with the missionary nature of his vocation.”<sup>232</sup> But the insight remains general: the Pontiff refrains from directing a preference for any institutional solution to the problem of how to bring this freedom about.<sup>233</sup> The church’s “contribution to the political order,” he writes, “is precisely her vision of the dignity of the person revealed in all its fulness in the mystery of the Incarnate Word.”<sup>234</sup>

And Professor Michael McConnell, a Protestant, recently wrote to affirm that classical liberalism’s roots are connected with Christian belief in the “ineradicable nature of sin,” the freedom of the church

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229. See *Moses* 1:39 (Pearl of Great Price) (“For behold, this is my work and my glory—to bring to pass the immortality and eternal life of man.”).

230. See 2 *Nephi* 26:24 (Book of Mormon) (“He doeth not anything save it be for the benefit of the world; for he loveth the world, even that he layeth down his own life that he may draw all men unto him.”).

231. Pope John Paul II, *Centesimus Annus*, Encyclical Letter on the Hundredth Anniversary of *Rerum Novarum*, May 1, 1991, at No. 47, available at [http://www.vatican.va/holy\\_father/john\\_paul-ii/encyclicals/documents/hf-jp-ii\\_enc\\_01051991](http://www.vatican.va/holy_father/john_paul-ii/encyclicals/documents/hf-jp-ii_enc_01051991).

232. *Id.* at No. 46.

233. *Id.* at No. 47.

234. *Id.*; see also Carmella, *supra* note 12, at 255, 267 (characterizing the state’s limited role as protection of freedom consistently with other facets of Catholic social justice).

from a limited government, and what McConnell calls “primacy of conscience”—the view that “faith, to be valid and acceptable to God, must be uncoerced.”<sup>235</sup> Moreover, writes McConnell, “[t]o the extent that God’s will affects all of life, then the principle of freedom must apply to all of life.”<sup>236</sup> Of course, liberalism has strayed from these roots. The modern liberal state rejects uncoerced faith in God as a ground for freedom,<sup>237</sup> because the liberal state sees the individual self as the goal. Promoting freedom to serve God, on the other hand, seeks instead “connection to other humans and, ultimately, to a transcendent God.”<sup>238</sup> But liberalism’s promise of freedom in matters of faith in part prompts McConnell to proclaim: “Liberalism properly understood is the form of government most consistent with the gospel, and most conducive to living in harmony with God and our neighbors. We should take it back.”<sup>239</sup>

Identifying salvific freedom as a goal is but a beginning, however, and necessarily only that. Salvific freedom can do some work. But pretending that this very abstract idea can resolve all the difficulties in advance of actual problems is asking too much of it. An abstraction is just that—it necessarily leaves out details, and its task in language is usually to explain and compare, not to govern. The postmodern insight is that the words alone will not solve all the problems. This is true in other parts of our lives as it is in our legal life. The hope of salvation does not in this life resolve all difficult individual moral and spiritual questions, nor do theology and doctrine. Revelation through the Holy Spirit is necessary!<sup>240</sup> We must

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235. Michael McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 5, 7–13.

236. *Id.* at 14.

237. See, e.g., Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 25; Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 54.

238. Carter, *supra* note 237, at 47–49.

239. McConnell, *supra* note 235, at 24.

240. *John* 14–17; *Articles of Faith* 9 (Pearl of Great Price). One might expect the postmodern explicitly to mention the possibility of revelation. And indeed Stanley Fish does refer to revelation. See, e.g., Stanley Fish, *Response: Interpretation Is Not a Theoretical Issue*, 11 YALE J.L. & HUMAN. 509, 511 (1999) (“Or, one can think of intentions as the result of the Holy Spirit working within you, and believe, as Jeremiah and St. Paul did, that when they speak it is as the vehicle and sounding board of a higher power (‘Not me, but my master in me’).”). So does Schlag. See, e.g., SCHLAG, ENCHANTMENT, *supra* note 179, at 26 (discussing,

learn by study and by faith.<sup>241</sup> Likewise the hope and theory of salvific freedom do not resolve all difficult questions. The danger is that, all too human, we will try to resolve in advance what cannot be resolved in advance. In a legal system based solely on reason, the attempt to resolve in advance, by system, what cannot be resolved makes reason look like an empty faith. But if salvific freedom is taken as the *guide* and we attempt to make unmakeable decisions in advance, the same movement will render our faith false. And why should God reveal in advance how to resolve individual cases? Where would be the opportunity to employ faith in the exercise of our moral agency? The parties themselves may yet reach agreement, obviating the need for revelation of more law. In short, the incommensurables remain despite the general imperative. Besides, we are not likely to find much agreement on the content of salvation, let alone salvific freedom. Disputes about both have led to religious wars. The disagreement is probably endemic to the human condition; one's view of the content of salvation even varies with individual sanctification.<sup>242</sup>

Thus, the Christian seeking to protect and promote salvific freedom in a specific dispute will often have to proceed without guidance in the form of rules and without proof that the application of the principle of salvific freedom is correct. The Christian will have to exercise faith with regard to an understanding of the requirements of salvation, the practicalities of meeting them, the needs of life, the diverse ways in which humans might serve God, and a sense of how one party's freedom is best balanced against another's in order to promote the ultimate goal. In other words, the Christian will have to exercise conscience.

### *B. A Christian Jurisprudence of Contract Law*

Those engaged in protecting and promoting salvific freedom and involved in writing and critiquing contract law must ask how salvific freedom as a principle helps their task. Certain other passages of scripture develop the notion of salvific freedom by implying a role for contract law. But the revelations themselves are of limited help. I

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in the process of showing that reason is supported only by reflexive belief in itself, reason's rhetorically casting itself as superior to revelation).

241. *Doctrine & Covenants* 88:118.

242. *See id.* at 93:27–28.

wish to stress again that the task here is freedom, not forcing others to do good works or even to refrain from evil. Although scripture outlines fairly clearly which approach a disciple of Christ should take in economic matters,<sup>243</sup> the scriptures never mandate that human law should impose this righteousness on anyone. Freedom to disobey God by actions that do not infringe inappropriately on others' freedom to obey him is necessary if any real freedom is to exist. Laws are ordained, God said, "that every man may act in doctrine and principle pertaining to futurity, according to the moral agency which I have given him, that every man may be accountable for his own sins in the day of judgment."<sup>244</sup> The law is to preserve freedom to do good *and* evil. Here, as elsewhere, freedom to serve God or decline to serve him is the goal.

But there are hints that some contract law is necessary within law's ordained role. This is a necessity derived, in one way of looking at it, from the more clearly established requirement of private control of some property. In fact, some control of private property is theologically necessary. Quite simply, God said, "it is not given that one man should possess that which is above another, wherefore the world lieth in sin."<sup>245</sup> This sort of equality of property is not possible unless the Lord's children are able to give freely to each other because, otherwise, initial differences in resource potential, be that natural talent or fertile ground, will exclude equality as such differences are actualized. And to give freely and know when giving would be appropriate, one must freely control and be able to convey to others. Moreover, consecration of that property to God is possible only with stewardship under him,<sup>246</sup> and stewardship of property entails possession and some free control of it. To make the righteousness of consecration both significant and possible legally,

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243. On this issue, see, for instance, 3 *Nephi* 26:19 (Book of Mormon); 4 *Nephi* 1:3 (Book of Mormon); *Doctrine & Covenants* 49:20; *Acts* 2:44, 4:32; *Leviticus*, *Deuteronomy*; Hugh Nibley, *Work We Must, But the Lunch Is Free*, in *APPROACHING ZION*, 9 THE COLLECTED WORKS OF HUGH NIBLEY 203 (Don E. Norton ed., 1989).

244. *Doctrine & Covenants* 101:78.

245. *Id.* at 49:20; see also *Moses* 7:18 (Pearl of Great Price) ("And the Lord called his people ZION, because they were of one heart and one mind, and dwelt in righteousness; and there was no poor among them."); *supra* sources cited note 243.

246. We, the human family, are stewards of the earth. God's words to Adam and Eve so indicate: "subdue [the earth], and have dominion . . . over every living thing that moveth upon the earth." *Gen.* 1:28. We hold the earth under God, its creator, and are accountable to him for its use.

some large percentage of property necessary for people's needs must be in private control. Furthermore, the side benefits of private property also persuade that it is necessary. Controlling the earth's resources allows one to learn not just consecration<sup>247</sup> but also work and planning<sup>248</sup> and the overcoming of greed and covetousness,<sup>249</sup> which are really forms of idolatry.<sup>250</sup> These opportunities to give for the kingdom of God and lay up treasures in heaven<sup>251</sup> sanctify those who take advantage of them.<sup>252</sup>

On the other hand, the freedom to give property to God would be illusory without the freedom to reject him and use the property for selfish or other ends. Direct accountability to God for these activities makes sanctification or its opposite, condemnation, possible.<sup>253</sup> The ability to use property for righteous or selfish ends, accountable to God alone, *is* salvific freedom with respect to property. So when Professor Andersen correctly points out that contract law takes as its paradigm the selfish promise,<sup>254</sup> this might mean that our law appropriately ensures the right to do some evil, so

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247. As to tithing, see, for example, *Gen.* 28:22 (Jacob's promising the Lord that "of all that thou shalt give me I will surely give the tenth unto thee"); *Lev.* 27:30; *Mal.* 3:8-12 (expounding the commandment to tithe); *Doctrine & Covenants* 68:23; *Doctrine & Covenants* 119:4. As to consecration, see, for example, *Acts* 4:32-37, 5:1-11; *2 Cor.* 8:9-15; *Mosiah* 4:21 (Book of Mormon); *Alma* 1:27 (Book of Mormon); *4 Nephi* 1:3, 25 (Book of Mormon); *Doctrine & Covenants* 19:26 ("I command thee that thou shalt not covet thine own property . . ."), 42:30, 49:20, 51:3, 78:5-6, 105:5; *Moses* 7:18 (Pearl of Great Price).

248. The Lord said to Adam, "[C]ursed *is* the ground *for thy sake.*" *Gen.* 3:17 (second emphasis added).

249. *Exod.* 20:17; *Deut.* 5:21; *Rom.* 7:7-12, 13:9 (New International) ("Do not covet."); *Mosiah* 13:24 (Book of Mormon); *Doctrine & Covenants* 19:25, 88:123.

250. *Col.* 3:5.

251. See *Matt.* 6:19-21 ("Lay not up for yourselves treasures upon earth, where moth and rust doth corrupt, and where thieves break through and steal: But lay up for yourselves treasures in heaven, where neither moth nor rust doth corrupt, and where thieves do not break through and steal: For where your treasure is, there will your heart be also."), 19:21; *Mark* 10:21, 12:41-44; *Luke* 12:33-34, 18:22; *Helaman* 5:8 (Book of Mormon); *3 Nephi* 13:19-21 (Book of Mormon).

252. *Doctrine & Covenants* 78:5-7.

253. See *Doctrine & Covenants* 104:13-17 ("[I]t is expedient that I, the Lord, should make every man accountable, as a steward over earthly blessings, which I have made and prepared for my creatures. I, the Lord, stretched out the heavens, and built the earth, my very handiwork; and all things therein are mine. . . . For the earth is full, and there is enough and to spare; yea, I prepared all things, and have given unto the children of men to be agents unto themselves."). This revelation is addressed to the Church members of the time, but these quoted verses 13, 14, and 17 contain a more universal message.

254. Andersen, *supra* note 2, at 829-30, 832-38, 859-60.

long as one does not act unconscionably, which should in this descriptive scheme mean something like depriving another of salvific freedom.

The scriptures also directly support the view that some right to control property should exist. Section 134 of the *Doctrine & Covenants* declares: “We believe that no government can exist in peace, except such laws are framed and held inviolate as will secure to each individual . . . the right and control of property.”<sup>255</sup> The section also identifies theft as a crime to be punished by civil government.<sup>256</sup> Israelite government also prohibited theft.<sup>257</sup> And God has instructed even that those in the Church who steal are to be “delivered up unto the law of the land.”<sup>258</sup> Even when God described the relatively complete law of consecration,<sup>259</sup> he still directed that each member have complete control over his own stewardship.<sup>260</sup> Additionally, scriptures that discuss the millennial or post-millennial earth contain descriptions of property distribution that sound much like private, individual control of the earth’s resources. For example, Isaiah describes the millennial “new earth”:

They will build houses and dwell in them; they will plant vineyards and eat their fruit. No longer will they build houses and others live in them, or plant and others eat. For as the days of a tree, so will be the days of my people; my chosen ones will long enjoy the works of

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255. *Doctrine & Covenants* 134:2.

256. *Id.* at 134:8.

257. *See Exod.* 20:15 (“Thou shalt not steal.”); *Lev.* 19:11 (“Ye shall not steal . . .”); *Deut.* 5:19. Nephite government likewise prohibited theft. *Alma* 1:18 (Book of Mormon) (prohibiting both robbery and theft); *Alma* 30:10 (Book of Mormon) (prohibiting both robbery and theft). “Nephite” refers to the Book of Mormon people who identify themselves both as a branch of Israel and as Christians.

258. *Doctrine & Covenants* 42:85.

259. *See, e.g., id.* at 42, 51, 57, 58, 70, 72, 78, 82, 83, 85, 104, 119. Under the more complete law, Church members were required initially to convey their property to the Church and then received back from the Church as their own property a stewardship which they then maintained for their support.

260. *See Acts* 4:32 (confirming that each believer retained control of “his possessions,” though she did not call them her own); *Doctrine & Covenants* 42:32 (“a steward over *his own property*, or that which he has received by consecration”) (emphasis added), 51:4–5 (mentioning portion of the stewardship “that is deeded unto” the steward), 83:3 (holding that after a man died, his wife and children “may remain on their inheritances according to the laws of the land,” which would have provided that ownership devolved upon heirs or legatees).



their hands. They will not toil in vain or bear children doomed to misfortune; for they will be a people blessed by the Lord . . . .<sup>261</sup>

Truly, the meek will inherit the earth.<sup>262</sup> They should therefore have a chance to sanctify themselves by consecrating their patch of earth to the Lord now, in preparation. Thus, affirmation of a right to private property has a solid basis in Christian theology.<sup>263</sup>

But first, each must gain a patch of earth. Because we come to earth with nothing, some method for obtaining a stewardship is necessary. In a cohesive, religious society, earthly blessings could be distributed by commandment or by inheritance. This was done in ancient Israel,<sup>264</sup> and among the Nephites to an extent.<sup>265</sup> It could

261. *Isa.* 65:21–23 (New International); *see also id.* 2:4 (“they shall beat their swords into plowshares, and their spears into pruninghooks”), 57:13 (“he that putteth his trust in me shall possess the land, and shall inherit my holy mountain”), 60:21 (“Thy people also . . . shall inherit the land for ever . . .”), 61:4–5 (“And they shall build the old wastes, they shall raise up the former desolations . . . . And strangers shall stand and feed your flocks, and the sons of the alien *shall be* your plowmen and vinedressers.”); *Matt.* 5:5 (“Blessed are the meek; for they shall inherit the earth.”); *Doctrine & Covenants* 38:20 (“[Y]e shall have it for the land of your inheritance, and for the inheritance of your children forever, while the earth shall stand, and ye shall possess it again in eternity.”), 45:58 (“And the earth shall be given unto them for an inheritance . . . .”), 101:101 (“They shall build, and another shall not inherit it; they shall plant vineyards, and they shall eat the fruit thereof.”).

262. *See Pss.* 25:13 (“[H]is seed shall inherit the earth.”), 37:9 (“those that wait upon the Lord . . . shall inherit the earth”); *Matt.* 5:5 (“Blessed are the meek; for they shall inherit the earth.”); 3 *Nephi* 12:5 (Book of Mormon) (same as *Matt.* 5:5); *Doctrine & Covenants* 29:23–25, 59:5–20, 63:19–21, 77:1, 84:100–01, 88:17–20 (“For after [the earth] hath filled the measure of its creation, it shall be crowned with glory, even with the presence of God the Father . . . .”), 88:25–26, 103:7, 130:9. Also notice *Revelation* 21:1–3, wherein John the Beloved wrote:

And I saw a new heaven and a new earth: for the first heaven and the first earth were passed away . . . . And I John saw the holy city, new Jerusalem, coming down from God out of heaven, prepared as a bride adorned for her husband. And I heard a great voice out of heaven saying, Behold, the tabernacle of God is with men, and he will dwell with them, and they shall be his people, and God himself shall be with them, and be their God.

263. Consider also, for instance, the counsel of Pope John Paul II, who writes that “the principle task of the State is to guarantee . . . individual freedom and private property.” Pope John Paul II, *supra* note 231, at No. 48; *see also* George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 10, at 224, 238 (“Catholic social teaching . . . favors private-property rights . . .”).

264. *Num.* 26:52–56 (“And the Lord spake unto Moses, saying, Unto these the land shall be divided for an inheritance . . . .”); *Num.* 34–35 (Moses’ dividing of the land between the tribes); *Deut.* 2:5 (the Lord’s instructing Israel not to meddle with the land of Seir “because I have given mount Seir unto Esau for a possession”); *Josh.* 13 (Joshua’s dividing the land of Canaan among the people at the Lord’s command).

perhaps be done today if humankind were willing to abide by God's commands.<sup>266</sup> But they are not.<sup>267</sup> Moreover, preservation of freedom not to accept the Lord's will requires a method of obtaining property other than by the Lord's command or by inheritance.<sup>268</sup> The need for some other method of obtaining stewardship is, for me, at least one clear reason for some law of contract. Contract is a method of obtaining stewardship consistent with salvific freedom. A law of contract thus augments a stewardship/property regime. Contract law should allow us to barter our natural assets—labor, most obviously—for other things. Also, sometimes the best stewardship of property is to trade it for something the steward can make better use of. And without a law enforcing promises, transaction costs involved in trading labor for other goods may well be too high to make such a transfer profitable enough to meet the stewardship needs of the population. So a law of contract assists and encourages everyone's stewardship.<sup>269</sup> In a sense, it effectively brings the future—one's future labor, for instance—within the stewardship/property regime. (There may be other reasons for contract law consistent with the Lord's general purposes, but these are sufficient for the purpose of this discussion.)

265. See, e.g., 3 *Nephi* 21:22 (Book of Mormon) (the Lord's giving the Nephites land in America "for their inheritance"); *Alma* 27:22 (Book of Mormon).

266. See, e.g., *Doctrine & Covenants* 38:18–20 (the Lord's promising a land of "inheritance" to his disciples in nineteenth-century America).

267. The Latter-day Saints of the mid-nineteenth century were not prepared to accept an inheritance from the Lord because of sin. *Id.* at 101:2–8, 103:4, 103:8. See also Andersen, *supra* note 2, at 859 n.94. The enemies of the Latter-day Saints were also not prepared to let them inherit the land in peace. See, e.g., *Doctrine & Covenants* 103.

268. This technically is why Church ownership of property would not serve the Lord's purpose of securing and maintaining freedom to be sanctified. The Lord's children must be free to reject the Lord, and they could not do this freely if earthly resources were obtained only by inheritance from the Church. The need to choose God for money would then prevent the Lord's children from coming to him for love.

269. Experience in the last century at least has shown that the kind of intricate planning and high-level risk coordination necessary for the best stewardship also requires a law of contract or promise enforcement. See, e.g., Simon Johnson et al., *Courts and Relational Contracts*, SSRN Working Paper No. 4338-02 (Feb. 2, 2002) (concluding with respect to various economies in Eastern Europe and the former Soviet Union that "development of legal institutions . . . brings indirect efficiency gains, by lowering entry barriers, in addition to direct efficiency gains through strengthening confidence in contracts"). Whether this kind of contract law is viewed as promise enforcement, private law, or property in future labor or otherwise does not matter for this theory. Maximization of salvific freedom sees it as control of resources, and any of these labels could be made to work as well as any other.

*C. A Continuing Role for Conscience*

Beyond the limited extent of augmenting a stewardship/property regime, the scriptures seem to be mostly abstract regarding contract law. Absent more explicit direction, the inevitable generality of the goal of salvific freedom brings us back to the necessary role of conscience, which reappears as contract law descends from the general to the specific and contradictions and seeming incommensurables also reappear. Our law places incommensurables differently than did medieval law. In the medieval period they were questions of fact for the parties and jury, to be resolved according to conscience. But the particularity of our common law rules, compared with medieval law, forces a shift of some of these questions away from the parties and jury and asks the judiciary to answer them. Alternatively, this drive for particularity imposes on a legislature a similar task. In contract law, paternalism that protects parties against bargaining weakness or unfairness or hard bargains underlies our doctrine of unconscionability, named thus because it is a direct legal descendant of the English chancellor's jurisdiction in conscience.<sup>270</sup> On the other hand, the desire to facilitate exchange and protect an ethos of self-reliance underscores the notion that bargains should be enforced. When a new case arises on the border between these two paradigms, is it one of unconscionability or of a bargain whose adequacy—or inadequacy—the law chooses not to judge?<sup>271</sup> Cases going either way arise all the time, and various forms of arguments can be used to legitimate a decision either way on such facts. In the end the judge is not compelled to choose either option.

Such borderline cases are of course not limited to unconscionability. They appear in every corner of contract law,<sup>272</sup> and deciding them moves the law in one direction or another. Unfortunately, in these particular cases salvific freedom as an idea is of limited use. Sometimes there is no *a priori* or speakable method of

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270. KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 314–18 (1990).

271. This difficulty in contract law is of course that pointed out by Duncan Kennedy in *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

272. So Professor Andersen notes: “Social conscience manifests itself in numerous ways, such as in the principles and doctrines of unconscionability, illegality, avoidance of forfeiture, and good faith.” Andersen, *supra* note 2, at 852.

determining what we should do. No practice of law guides us, and the issue is truly new. That is a moment of moral agency, as Bobbitt says, and conscience, something unproved, guides us.

Other ways exist to describe where we turn in that moment besides “morality” and “conscience.” Pierre Schlag calls them “theoretical unmentionables,” and makes a list of them: “pragmatism, practical reason, good judgment, discretion, and balancing.”<sup>273</sup> I think they are better called “theoretical indescribables,” and Schlag is right that they all play a similar role in the architecture of legal thinking. Bobbitt at least freely admits the moral component that is surely there or will be there for those who care about doing what is right. Schlag is also right that “nothing positive can be said about them.”<sup>274</sup> They are indefinable. That is their theoretical virtue, but it is also their truth. I would say it this way: In situations in which one would turn to a theoretical unmentionable for answers, the moral agent stands unmediated by legal practice before God and must make a decision. One would not expect it otherwise, in this life. “We are incapable of making something that will obviate (rather than suppress) the requirement for moral decision.”<sup>275</sup> This is merely an agnostic’s restatement of the (also true) converse of *Abraham* 3:25: “We will prove them herewith, to see if they will do all things whatsoever . . . God shall command them.”<sup>276</sup> That is one of the meanings of our existence. So in that moment the honest judge acts out of conscience. There is nothing else to do.

Schlag, probably correctly, notes that few if any will be comfortable with reliance on a not fully speakable conscience or with faith in a God who must be known through continuing revelation. “Just tell me what to do,” most will say. The uncomfortable will try to avoid the uncertainty and the moral decision in a variety of ways:

God is no doubt the all-time champion theoretical unmentionable. . . . [Such] unmentionables will generally work fine until one of three things happens: 1. Somebody actually tries to say something about the structure and content of these theoretical

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273. PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 89 (1996) [hereinafter SCHLAG, LAYING DOWN THE LAW].

274. *Id.*

275. BOBBITT, INTERPRETATION, *supra* note 163, at 186.

276. *Abraham* 3:23 (Pearl of Great Price).

unmentionables, . . . in which case they become theoretically very mentionable. They require a positive content, a structural identity, and thus become subject to the very same contradictions that caused their parent discourse to produce them in the first place. Or, 2. Somebody points out that these theoretical unmentionables really are unmentionable and that accordingly, their explanatory power is, . . . well, somewhat limited. Or, 3. The theoretical unmentionables are renamed and perhaps even reconceptualized in a way that the original purveyors of the terms do not like. Theoretical unmentionables are especially vulnerable to this sort of thing because their internal structure and content is . . . unmentionable.<sup>277</sup>

Bobbitt himself makes a similar but oblique objection to the coupling of God and conscience. The last sentence of Bobbitt's account reads, "Decision according to law is an ideal, but it is also an art and finally it is our piety, our 'service to God.'"<sup>278</sup> Bobbitt puts "service to God" in quotes perhaps because he knows God has so often fallen prey to the sort of moves Schlag describes, and perhaps because he believes God can only do limited service in legal thinking. Tellingly, following the last sentence of his work, Bobbitt cites Nietzsche's preface to the second edition of *The Gay Science*, in which Nietzsche addresses this same problem:

And as for our future, one will hardly find us again on the paths of those Egyptian youths who endanger temples by night, embrace statues, and want by all means to unveil, uncover, and put into a bright light whatever is kept concealed for good reasons. No, this bad taste, this will to truth, to "truth at any price," this youthful madness in the love of truth, have lost their charm for us: for that we are too experienced, too serious, too merry, too burned, too *profound*. We no longer believe that truth remains truth when the veils are withdrawn; we have lived too much to believe this. Today we consider it a matter of decency not to wish to see everything naked, or to be present at everything, or to understand and "know" everything.<sup>279</sup>

Would a God who remains covered, an unrenamed, non-theoretical God who is not an explanation satisfy Bobbitt's piety?

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277. SCHLAG, LAYING DOWN THE LAW, *supra* note 273, at 89-90.

278. BOBBITT, INTERPRETATION, *supra* note 163, at 186.

279. FRIEDRICH NIETZSCHE, THE GAY SCIENCE 38 (Walter Kaufmann trans., Random House 1974) (2d ed. 1887).

This is my hope, because this is the God I know, the God taught to me by the scriptures and by my faith, one who does not fall prey to the difficulties Schlag describes. God is not God because he is a metaphysical, theoretical, or structural necessity—not because he is needed as an explanation. But I know that he is God nonetheless because I have seen heaven with the eyes of faith and love the heavenly King.

The *Book of Mormon* contains a marvelous story in which a godly man known only as “the brother of Jared” has a vision of the premortal Christ.<sup>280</sup> The brother of Jared had brought some stones that he wanted the Lord to bless so that they would give light while his people journeyed in darkened barges. God was speaking to the brother of Jared from within a cloud. The account reports that God reached out to touch the stones, and as he did so

the brother of Jared fell down before the Lord, for he was struck with fear. . . . [A]nd the Lord said unto him: Arise, why hast thou fallen? And he saith unto the Lord: I saw the finger of the Lord, and I feared lest he should smite me; for I knew not that the Lord had flesh and blood.<sup>281</sup>

Of course, the brother of Jared was mistaken: he had seen not flesh and blood but rather the Lord’s spirit. But God appeared to have human form, and that is the aspect of the story which most moves me. What other form was the brother of Jared expecting? He must have expected another form because he lacked the revelation, the actual experience. Rather than continue in uncertainty until he knew the nature of God from actual experience, the brother of Jared had leaped ahead. He had rationalized to himself “something about the structure and content” of God, in Schlag’s words, or thought he had “uncovered” God, in Nietzsche’s. When he learned the truth—that God is not a subject for our rationalizations, our metaphysics, our theories and objectifications about him, that his transcendence does not mean *that*, then the brother of Jared feared because, as faithful as he was, he knew that he did not love and trust God as he might have. In a similar though lesser way, failure to confront the moral decision in adjudication by reliance on the pretense that our

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280. *Ether* 3–4 (Book of Mormon).

281. *Id.* at 3:6–8 (Book of Mormon).

rationalizations, metaphysics, or theories actually resolve each individual case in advance is a failure to trust, a failure of faith.

But then how do we resolve the dispute in adjudication, if neither conscience nor God is structural identity, explanation, or concept, and offers no *analytical* help? “Can’t you just tell me what conscience requires?” most will say, again. I cannot, but the revelations give at least two relevant directions. The first is that those with well-developed, well-educated consciences should be sought for and asked to serve in public office: “Wherefore, honest men and wise men should be sought for diligently, and good men and wise men ye should observe to uphold; otherwise whatsoever is less than these cometh of evil.”<sup>282</sup> It is as if the revelations realize that an explanation, a theory, isn’t enough. The *honest, wise, and good* should be sought out.<sup>283</sup> They will likely make honest, wise, and good decisions. Their decisions will make our law more honest, wise, and good. They are people of conscience.

The necessity of placing people of conscience in public office is worth underscoring. The role of conscience in legal decision-making is larger than even Bobbitt is willing to make it. Patterson, for instance, notes that this sort of opening for conscience occurs not only when the forms of argument conflict but also when one wonders whether a particular form of argument is even appropriate to the legal problem—whether legal practice should be changed in some way.<sup>284</sup> It also occurs when one wonders how to apply a form of argument; doctrinal arguments, for instance, sometimes cut both ways.<sup>285</sup> And the modern judge when finding facts is often subject to the same sorts of difficulties the medieval judges and juries faced, as

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282. *Doctrine & Covenants* 98:10 (recording a revelation given August 6, 1833). The time period in which the revelation was given accounts for its limitation to “men,” I believe. At the time, women were allowed neither to vote nor serve at the bar. I see no need for this limitation now. *See also id.* at 101:80 (giving a similar answer: “I established the Constitution of this land, by the hands of wise men whom I raised up unto this very purpose”).

283. *See, e.g., Phil.* 4:8 (“[W]hatsoever things are true, . . . honest, . . . just, . . . pure, . . . lovely, . . . [or] of good report; if *there be* any virtue, and if *there be* any praise, think on these things.”) (emphasis in original); *see also Articles of Faith* 13 (Pearl of Great Price); C. Scott Pryor, *Mission Impossible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 ST. JOHN’S L. REV. 691, 717–29 (2000) (advocating that Christians take a “multiperspectival approach”).

284. PATTERSON, *supra* note 166, at 174.

285. Bobbitt admits this. BOBBITT, INTERPRETATION, *supra* note 163, at 19 (discussing two plausible yet opposed readings of *Everson v. Board of Educ.*, 330 U.S. 1 (1947), that a judge might apply to a hypothetical proposed by Bobbitt).

is today's jury when fact-finding or engaged in nullification of law. The legislator and the voter in a referendum similarly face the need to rely on conscience in creating legislation. As the forms of argument available outside the typical common law or constitutional legal practice increase, the opportunities for contradiction, paradox, and incommensurability increase. That is where conscience and character—honesty, wisdom, and goodness—become even more important. The result is that if the legal system (assuming there is such an objectification) is to be honest, wise, and good, it will be so because the people in it are honest, wise, and good. In the end, there may be no difference (or distance) between this subject (legal actors) and object (legal system). This means not only that honest, wise, and good people should be involved, if possible, but also that those already involved must become more honest, more wise, and better.

The Christian has an answer to the question of how to achieve this result. That is the second direction the revelations offer. Through sanctification, we can become more honest, wise, and good—we can educate the unspeakable conscience. Sanctification comes by the law of God<sup>286</sup> and his grace.<sup>287</sup> Against the objection that only believers have part in these, my faith at least affirms that unbelievers do have part in the law of God by degrees.<sup>288</sup> The gospel of Christ in its fullest sense encompasses all truth,<sup>289</sup> whether had by Christians or others.<sup>290</sup> The Christian perspective is thus not *wholly* different from that of non-believers, though Christians potentially

286. See, e.g., *Doctrine & Covenants* 43:9, 76, 88:21–42. Pure love fulfills the law. See *Rom.* 13:8–10; *1 Cor.* 13:8 (“Charity never faileth”); *1 John* 2–4; *Helaman* 3:35 (Book of Mormon); *Moroni* 10:32 (Book of Mormon); *Doctrine & Covenants* 20:31.

287. See, e.g., *Doctrine & Covenants* 20:31 (“sanctification through the grace of our Lord and Savior Jesus Christ is just and true, to all those who love and serve God with all their mights, minds, and strength”); *Helaman* 3:35 (Book of Mormon); *Moroni* 10:32 (Book of Mormon); *Doctrine & Covenants* 76:41–43, 76:59–61. Grace also changes hearts and makes the love of God possible, which leads to grace. See, e.g., *Enos* (Book of Mormon) (Enos); *Mosiah* 5:1–6 (Book of Mormon) (King Benjamin’s people); *Mosiah* 27 & *Alma* 36 (Book of Mormon) (Alma the Younger); *Alma* 18:36–43, 19 (Book of Mormon) (Lamoni); *Alma* 22 (Book of Mormon) (Lamoni’s father).

288. *Doctrine & Covenants* 76:75, 76:103–06, 76:111–12, 88:17–37; see also *Alma* 29:8 (Book of Mormon). All those who are saved, to whatever glory, have been sanctified by God’s law to some extent, by what they are willing to receive, and this includes many who as yet have no explicit faith in Christ but will later bow and confess him, such as those mentioned in *Doctrine & Covenants* 43:9, 76:43, 76:81–89, 76:98–112.

289. *1 Thess.* 5:21; *Phil.* 4:8.

290. *Doctrine & Covenants* 84:47–47, 88:36–38, 93:24–30; BRIGHAM YOUNG, DISCOURSES OF BRIGHAM YOUNG 10 (John A. Widtsoe comp., 1954).



have the greater portion of truth that can be learned only by faith in Christ. Sanctification is, among other things, to come to live the truth.<sup>291</sup> Both Christians and non-believers can grow on this score. Christians have the added obligation to teach the truth and share the love of Christ, so that others can learn the joy of their redemption and become more sanctified by the exercise of faith in it. Thus, Gordon B. Hinckley has described the mission of the Church: “To make [the] bad . . . good and good . . . better.”<sup>292</sup>

As workers in the law are sanctified, the law itself will become sanctified.<sup>293</sup> The more that workers in the law become sanctified, the more truth they will live, the closer to truth will be their exercise of conscience or faith in adjudication and legislation, and the more closely law will serve its “true” purpose. In other words, the more closely workers in the law live according to the will of God, the more closely they will see the law come to serve its God-ordained purpose, the protection and promotion of salvific freedom.

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291. See, e.g., sources cited *supra* notes 287–288.

292. Gordon B. Hinckley has said this is the Church’s mission on several occasions. See, e.g., Gordon B. Hinckley, *The International Role of the Church of Jesus Christ of Latter-day Saints*, May 13, 1999, reprinted at the website of the Los Angeles World Affairs Council, at <http://www.lawac.org/speech/hinckley.html> (Mar. 12, 2002); Larry King Live, *Rev. Robert Schuller, Gordon B. Hinckley and Archbishop Desmond Tutu Discuss the Importance of Religion* (Dec. 24, 1999), transcript published at <http://www.ldstoday.com/lkl-dec24.htm> (Mar. 12, 2002).

293. No doubt some modern writer will take shots at this idea of “salvific freedom” or “law by grace.” Once this sort of object has been created, the modern writer and I will become subjects and the distance between the subjects and this object will be portrayed as unbridgeable. Bobbitt himself takes such a modernist potshot, though not that exact one. Bobbitt’s potshot instead objectifies “will to power” and “institutions” and then binds the two together in a forced, democratic equality: the “will to power is equally distributed among all institutions, including religious ones.” Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1909 (1994). That is just the sort of metaphysical, practice-transcendent myth that Bobbitt knows better than to engage in. He does this perhaps because Patterson has made him feel defensive about using a pseudo-religious sort of language to talk about the indescribable. *Id.* at 1910. Perhaps there is an anti-religious language game Bobbitt knows, which I will not engage in, and I am mistaking his refusal actually to join a church for a philosophical error. If so, then I simply disagree with Bobbitt.