

Legal Consciousness and Contractual Obligations

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ABSTRACT

The Article on “Legal Consciousness and Contractual Obligations” will explore and offer an explanation of the origins of the moral foundations for contractual obligations beyond conventional analysis. Building on themes and threads across many disciplines and theories, it seeks to identify and locate certain unities and common elements that explain human consciousness in exchange relations across cultures. The term contract is used in its non-technical and most inclusive sense to cover agreements, promises, undertakings and other forms of consensus whether or not supported by consideration. Viewed within this broad conceptual framework, where do human beings get the idea that they must keep their word or perform their promises? Is it, as utilitarian theorists might suggest, simply a matter of careful calculation of individual benefits and burdens for breach? Or, might our consciousness in contractual obligations have deep roots in some normative system derived from our group or collectivity? On the other hand, is our legal consciousness in contractual obligations located in our deepest interior which allows us to make commitments for events yet to unfold based on our faith and trust? But commitments based on faith speak to the phenomenon of human spirituality. In this sense legal consciousness in contractual obligations might have its roots in spirituality, religion, theology or the centrality of the supernatural in the ordering of human social organizations. In the specific case of Judeo-Christian religions, might the sources of contractual obligation be located in the “Covenant with God”? But the origins of contractual obligations might be less a question of religion but more a question of evolved species-typical social instincts and norms of reciprocity, collaboration and cooperation. In a world of “*efficient breach*” and shifting moods in international relations, the investigation of this question is both timely and important.

I. INTRODUCTION

The question of why we keep our promises is an age old question that has engaged the attention of moral philosophers, theologians, jurists and Talmudic sages dating back to the antiquities and beyond. In ancient Greece, Aristotle confronted the question of why we keep our promises in his book on ethics.¹ He saw the issue of promise keeping as serving some moral ends: commutative justice, distributive justice and liberality.² In the medieval era, Aristotle's work became the backbone for Thomas Aquinas's theological discussion of the same issue³. Indeed, in the view of commentators, Aristotle, although born several centuries before Christ was baptized into Christendom by Aquinas who, through a synthesis and adaptation, introduced and infused Aristotle's ideas into Christianity.⁴ In particular, Aquinas borrowed heavily from Aristotle in his discussion of promise keeping.⁵ But neither the Greeks nor Christian philosophers enjoyed an exclusive dominion or monopoly over the intellectual exertion on the question of why we keep our promises. Rabbinic and Talmudic discussions of Jewish oral commentaries also confronted the topic of promise keeping.⁶ In more recent times the topic of promise keeping and the moral foundations of contract have again attracted the attention of legal philosophers.⁷ In particular, James

1. ARISTOTLE, NICOMACHEAN ETHICS,(Penguin Classics 2004 Revised Ed.)(hereafter ARISTOTLE, ETHICS)

2. *Id.* at 1127a-1127b(discussing commutative and distributive justice and, 1119b-1120b(discussing liberality.)

3. THOMAS AQUINAS, SUMMA THEOLOGIAE (1963)(AQUINA,S, SUMMA THEOLOGICAE)

4. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE, 3 (1991)(hereafter, GORDLEY, PHILOSOPHICAL ORIGINS)(discussing the influence of Aristotle on Aquinas on the topic of promise and the subsequent infiltration of Aristotelean philosophy into canon law through Aquinas.)

5. As explained by Gordley, Aquinas relied not only Aristotle's analytical structure but also on the substantive content of his book on ethics. *See, id.* chap. 2 (devoted to the influence of Aristotle on Aquinas.)

6. Rabbinic commentaries on the Talmud are so extensive and complex that one only make a passing comment on them in a discussion of this topic. The Talmud comes in two parts: the Babylonian Talmud and the Palestinian Talmud. According to Jacob Neusner, a leading Jewish scholar, the vastness of only the Babylonian Talmud has been compared to the "ocean." *See, JACOB NEUSNER, INVITATION TO THE TALMUD 167 (1984), THE MISHNAH: A NEW TRANSLATION (1988)*(offering in an introduction some important insights on the structure, language, purpose and modern utility of the Mishnah), *THE MISHNAH: AN INTRODUCTION 61-118 (1989)*(discussing the social vision, means of production, market and wealth including abstract concepts such as household of the Mishnah; this is the context within which transactional promise keeping might be viewed and constructed); For brief survey of the structure and essential elements of the Talmud, *see ABRAHAM COHEN, EVERYMAN'S TALMUD, (1949)*; Rabbi Adin Steinsaltz has provided us with a window into the vastness of Talmudic commentaries that have been accumulated over the last millennium in a list of sources that spans many regions and time periods. ADIN STEINSALTZ, *THE TALMUD: THE STEINSALTZ EDITION VOL.III 255-256 (1990)*(Chapter Four of this work deals with the acquisition of movable property and verbal agreements between buyers and sellers); for anthologies *see, C.G.MONTEFIORE & H. LOEWE, A RABBINIC ANTHOLOGY, (1963)*(discussing topics such as law, divine mercy, hope and faith.); EUGENE J. LIPMAN, *THE MISHNAH: ORAL TRADITIONS OF JUDAISM (1976)*(explaining the six divisions of the Mishnah.) For what has been described as an overblown presentation of Judaism, *see, GEORGE FOOT MOORE, JUDAISM: THE AGE OF THE TANNAIM, (1927)* and EPHRAIM E. URBACH, *THE SAGES: BELIEFS AND OPINIONS (1969)*.

7. For a collection of essays on modern moral foundations of contracts *see, THE THEORY OF CONTRACT LAW (Peter Benson Ed.2001)*(hereafter *THEORY OF CONTRACT LAW*)(discussing in the introduction the waves of contract theory starting with Fuller's expectation damages, its later explication and successive waves of theories trying to explain the nature contract.) In this book the following essays are indicative of some of the modern theoretical writings on the subject. Richard Craswell, *Two Economic Theories of Enforcing Promises*, at 19(explaining the economic conceptual approach to contract); Melvin A. Eisenberg, *The Theory of Contracts*, at 206 (explaining the different categories of contract); James Gordley, *Contract Law in the Aristotelian Tradition*, at 265 (explaining that under the Aristotelian tradition promises are enforced if they serve certain human ends

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Gordley has explored the topic extensively with a careful and comparative analysis of Aristotle and Aquinas.⁸ Indeed, Gordley has tried to frame anthropological, other ethical discussions of promising keeping and related topics within the context of Aristotelian and Thomist philosophical ideals of commutative and distributive justice.⁹ However, the sophistry that is the necessary underpinning of a philosophical argument tends to ignore human emotions and moral sentiments as relevant considerations. In a most illuminating work on how we make decisions Warren Lehman wondered whether human decision making is not beyond the immediate consciousness.¹⁰ Naturally, the question of why we keep our promises is general to humanity and could benefit from a broader discussion of other philosophical ideas particularly those from the East. However, time and space limitations will not allow us to explore those philosophical insights at this time.¹¹

Notwithstanding its antiquity the issue of legal consciousness in contractual obligations has remained enigmatic and the answer persistently elusive throughout the ages. To students of moral philosophy, the study of the sources of legal consciousness in contractual obligations might be seen as necessarily demanding a plunge into the depths of the antiquities.¹² The goal of such delving into the past would be not only to be sensitized to the complex nature of the subject but also to identify meaningful common themes, patterns and conclusions reached at different times. Common and recurring patterns over time might suggest something basic and universal about human consciousness in contractual obligations. Naturally, the subject of legal consciousness is psychoanalytic in that it evokes and invites a journey not only into the human psyche but, perhaps even more so, into human religiosity which conditions our spiritual relations with the unknown, the super natural and our relations with our neighbors.

Aristotle and Aquinas both hinted at the issue of the inner consciousness that lies within human spirituality but beyond rationality in their discussion of

such as the virtue of liberality, commutative and distributive justice); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION. (981)(suggesting the promise principle as the moral foundation of contract); One of the leading scholars of the modern economic approach to the law of contract is Richard A. Posner who has written extensively on the subject. See for example, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 5th Ed. (1998)(hereafter, POSNER, ECONOMIC ANALYSIS OF LAW); *Utilitarianism, Economic And Legal Theory*, 9 J. LEG ED. 103 (1979)(hereafter *Utilitarianism, Economic And Legal Theory*); KOJO YELPAALA, TOWARD THE THEORY OF AN ORGANIC CONTRACT (MELLEN PRESS 2006 forthcoming)(hereafter, KOJO, ORGANIC CONTRACT)(arguing for a contracting format that is totally flexible and responsive to the vulnerabilities of the parties and adjusting the structure and substantive provisions to address distributive equities.)

8. GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 4; James Gordley, *The Moral foundations of Private Law*, 47 AM. J. JURIS 1,1-4 (2002)(hereafter, Gordley, *Moral foundations of Private Law*) (tracing and contrasting the philosophical ideas of Aristotle with Aquinas.)

9. James Gordley, *Contract In Pre-Commercial Societies and in Western History*, in International Encyclopedia of Comparative Law, (1997)(arguing rather boldly that the contract and other exchange transactions in pre-literate pre-capitalist societies can be explained in terms of Aristotelian commutative and distributive justice.)

10. Warren Lehman, *How We Make Decisions*, University of Wisconsin,-Madison, Institute of Legal Studies, Working Papers, Seris 1, 1986, at 52.(hereafter Lehman, *How We Make Decisions*)(explaining the illusions we may have of conscious control over our decisions making process.)

11. We are conscious of the variety of philosophical ideas under the law of contracts that might be examined. It would interesting to pursue the topic for instance under Confucius philosophy. Buddhist thought, or under some other eastern philosophical ideas but time and space consideration would not permit such an inquiry at this time.

12. HAROLD J. BERMAN, LAW AND REVOLUTION 245-250(1983)(offering an analysis of the Canon Law of Contracts); GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 4.

promise keeping. Aristotle traces promise keeping, truthfulness and keeping faith to one's agreements to the character of a person.¹³ Following a similar pattern, Aquinas sees promise keeping as a matter of fidelity and honesty. To him, by natural law promises are binding.¹⁴ If faith, fidelity and honesty define the character of a person and also constitute the source of promise keeping, they also speak directly to the inner consciousness or the spiritual self which is beyond rationality. Thus, might the making and keeping of promises be a question of faith and our inner consciousness that permits us to commit to the unknown and the uncertainties of the future?

Given that the question of human religiosity has remained persistently difficult in spite of the best efforts of some of the best minds in philosophy and theology, the consciousness that makes us keep our word or promises to others seems to have a significant temporal variant. However, the fact that the question of our consciousness in contractual obligations has, from the days of antiquity, remained elusive and somewhat unanswerable to the satisfaction of many, suggests that the question may lack a temporal element. Human consciousness in contractual obligations might be in a *constant present state* of morality, impervious to the whims and rhythms of the changing seasons in time. Put differently, might it be that the reason why we keep our promises is affected by and impregnated with a *constant*, something beyond the rationality of time but within the eternity of time? As such the eternity of time is mystified in human spirituality and therefore a divine concept which in the Judeo-Christian context is tied to the "Word." The spoken word such as a promise is not an isolated inconsequential event. It is tied to the power of creation and possesses a bonding spiritual relationship among humans and between humans and their God, often referred to as the Covenant with God. Biblical text speaks of the "*Beginning*" capturing, as it were, the eternity of time and ties it to the "*Spoken Word*". Such is the picture suggested in the creation myth in the Book of Genesis.¹⁵

Recent studies in behavioral sciences, evolutionary biology and others of similar vein, speak of universal human genetic predispositions, proclivities, and species-typical characteristic conduct that are pervasive throughout all cultures.¹⁶ However, such scientific theories do not answer the fundamental question of the origins of the ethical order of the universe of which humanity is only a part. Nor do they explain why the human genetic system is impregnated with such predispositions and proclivities towards such deep rooted universal moral sentiments.

However, in view of the apparent constant temporal sphere within which human consciousness deals with promises to others, it seems that a chronology of the intellectual struggles with the subject would shed some light on why the

13. ARISTOTLE, ETHICS, *supra* note 1, at 1127a-1127b.(He links faithfulness to truthfulness in these terms: ..the truthful man, ...we are talking of the man who keeps faith in his agreements in matters in which nothing of this sort is at stake is true both in life because his character is such.)

14. AQUINAS, SUMMA THEOLOGIAE, II-II, *supra*, note 3, at q. 88. For a discussion of the comparison of Aristotle's arguments with those of Aquinas, see, GORDLEY, PHILOSOPHICAL ORIGINS *supra* note 4, at 10-11.

15. References to the Bible are references to King James Version of the Bible.

16. *Infra*, notes 163-177, text and notes discussing the recent studies new Darwinian biologists, evolutionary psychologists and others about species-typical characteristics of human nature manifest themselves across cultures, races and societies.

question of why we keep our promises continues to be elusive even today. To students of historical psychology the topic might best be approached by tracing the dominant intellectual currents from the days of the antiquities till now. However, such an approach might keep us entrapped in the dusty archives of ancient scholars and we might emerge eventually but too tired to make the study immediately relevant to today's world. To minimize that risk, we shall tackle the question in a reverse chronological order; that is, we shall start with more recent modern Benthamite utilitarian thought and economic theories of the moral foundations of contract and work our way backwards into the distant past. In so doing we shall immediately challenge the current theories of consciousness in contractual obligations and demonstrate why a retrospect look into history might be beneficial even if our ultimate conclusions are not based on or derived entirely from earlier studies.

By its very nature, the task at hand demands a survey and synthesis of the critical and relevant elements of different subject areas. The reader may ask why? Three basic reasons may be offered in explanation. It is difficult to demonstrate the pervasiveness of the themes of consciousness by simply concentrating on an in-depth analysis of one area. Moreover, focusing on one area might merely suggest curiosity and limited utility of the results. However, demonstrating pervasiveness in the theme of consciousness across disciplines would tend to capture the persistent patterns across different theories and cultures, which is the central focus of this Article.

Consistent with the approach taken, this Article proceeds from the introduction to Part II with a critical examination of modern utilitarian thought as the basis for keeping promises. It questions the validity of the claim that contractual obligations are rooted in individual utility maximization and suggests a general group or collectivist normative system as an alternative. In Part III we confront the issue of the validity of the neo-classical rational choice theory as the basis of legal consciousness in contractual obligations. Part IV is devoted to a critique of efficiency as the source of legal consciousness. Efficiency appears to be afflicted by the same malady as the rational choice theory. In Part V we explore the issue of legal consciousness from the work of social anthropologists, focusing on the relationship between reciprocity, altruism, cooperation and alliances and promise keeping. The link between anthropology and behavioral science is explored in Part VI. We examine the work of the new Darwinian evolutionary biologists and evolutionary psychologists relating to human biological or species-typical predispositions. We seek a link between their scientific findings and those of anthropologists in connection with human decision making and promise keeping. Part VII moves the exploration to the spiritual realm where we examine the relationship between human spirituality and legal consciousness in contractual obligations. Contractual commitments are often about future acts the performance of which is not guaranteed. Commitments to such future events involves some leap of faith which lies in the spiritual realm. The final section, Part VIII, is devoted to a conclusion and a summary of the approach taken in this Article.

II. UTILITY AND LEGAL CONSCIOUSNESS

Modern utilitarian thought and sophisticated theories in the now fashionable and all powerful and pervasive Law and Economics literature seem to suggest that they have the answer to the age old question of why we keep our promises. Put simply, some theorists maintain that we keep our promises if and when we *can* personally, in some way or the other, benefit from such an act. The underlining benefit motive may be to attain happiness, maximize wealth, or to minimize the transaction cost associated with our promises and their related transactions.¹⁷ These theories seek to remove the issue of the moral foundations for the law of contract from the realm of any moral sentiments or human religiosity to that of pure human utilitarian rationality that measures the reasons for human conduct based on certain desirable individual beneficial outcomes. They reduced the complex moral, ethical, and sociological phenomenon of promising keeping into a set of clear and *amoral* principles that are captivation to the philosopher.¹⁸ Yet, the seductive nature of the these theories and the power of their deductive rationalist and philosophist arguments seem to leave us in no better place than many of the earlier inquires into the question. Indeed, it seems that the “*whys*” of promising keeping is so fundamental to human social and cultural political organization that it lies beyond the reach of the pure rationalist and sophisticated mathematical models which seem to occupy the attention of modern Law and Economics scholars.¹⁹ It appears

17. The literature on Law and Economics is so extensive and varied that it would be pointless if not impossible to cite all of them. Suffice to mention a few of the leading authors in the field as an illustration. Law and Economics probably was given birth to by Ronald Coase. See, Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), reprinted in WILLIAM BREIR & HAROLD HOCHMAN, READINGS IN MICROECONOMICS 484 (2d ed. 1971). Following Coase, one of the leading proponents of law and economics is Richard A. Posner who has almost single-handedly brought this subject to the forefront and the high level of debate that it continues to receive. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981). Others using the law and economics do not necessarily agree with Posner's methods or theories about the economic analysis of law. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter *Property Rules, Liability Rules*]. For other contributions to the field, see also: R. W. ANDERSON, *THE ECONOMICS OF CRIME* (1976); WERNER HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* (1979); LLAD PHILLIPS & HAROLD VOTEY, *THE ECONOMICS OF CRIME CONTROL* (1981). For an interesting review of many books, see Robert Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 U.C.L.A. L. REV. 1260 (1982); Frank Michelman, *Pollution as a Tort: A Non-Accident Perspective on Calabresi's Costs*, 80 YALE L. J. 647 (1971); Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980); Donald Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427 (1972); John Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Charles Goetz & Robert Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977). This list is by no means a complete or exhaustive of the literature in a field that is still growing. See for example Richard Posner,

18. Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 Nw.U.L.Rev. 805, 807 (2000) (arguing that the building blocks of the classical contract were defective. They based on axiomatic principles, deductive reasoning, presuppositions and presumptions all of which were neither empirically well founded nor based on reality.); YELPAALA, *ORGANIC CONTRACT*, *supra* note 7 (arguing that contract principles built on axioms, deductive and philosophical reasoning are invitations to the willing for pre-contractual and post-contractual opportunism, and other forms of exploitations of the vulnerabilities in the contract.)

19. The problems of relying on rationality as explaining human decision making process is brought to us in less conventional way by Warren Lehman when he suggested claims of self-control might no more than illusions. See, Lehman, *How We Make Decisions*, *supra* note 10, at 51-55.

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that locating contractual obligations in some utilitarian, efficiency, transaction cost or wealth maximization moral foundations is a recent manifestation of the search for the moral foundations of contracts.²⁰ It is unclear whether these rationalist explanations drive the legal consciousness in contractual obligations or whether they merely undermine such obligations and only work as self-fulfilling prophecies. It will be argued that utilitarian thought and their Law and Economics variants instead of creating or discovering the moral foundations of contracts actually work to undermine promise keeping and evoke elements in the human psyche not conducive to organized society. Indeed, they do not answer the question of the sources of legal consciousness in contractual obligations. Rather they are essentially *false prophets* with powerful, intoxicating and additive rhetorical rationalizations that lead their followers into dark alleys from which they cannot easily retrace their steps.

A code of moral principles derived from and driven mostly by selfish and egocentric motivations if pursued with the relentless rigor and unrestrained dedication to the self suggested by the utilitarian theories would lead, at least, to speculation, instability and perhaps to some decay in the moral underpinnings of human social and economic relations. Gordley seems to make this point in his criticism of the Law and Economics literature in his work on the moral foundations of contract law.²¹ Behavioral scientists and more specifically evolutionary biologists suggest that the genetic make up of human beings does not encourage egocentric or selfish pursuit of individual goals and objectives.²² The species would not survive if the genes encouraged such fissiparous tendencies. In view of the criticisms we level against the moral foundations suggested by the modern utilitarian thinkers and their Law and Economics cousins, it seems useful to start our discussion with the current theories and from them march backwards into the antiquities.

A. Bentham and Utility

Any discussion of utilitarian principles within the context of legal consciousness and contractual obligations must start with Jerome Bentham and Benthamite individualistic moral philosophers of the 19th century. Bentham who was a strong advocate for legislated legal reform in England insisted that law reform must be approached as a science. According to Bentham all laws must be measured against some fixed general principle based on the characteristic attributes of human nature. The general principle that best captured human nature was the

20. See, THEORY OF CONTRACT LAW, *supra* note. 7.

21. See, Gordley, *Moral foundations of Private Law*, *supra*, note 8, at 5-6 (explaining why various definitions of efficiency, for example Kaldor-Hicks or wealth maximization lack any guiding normative principle such as commutative justice in the Aristotelian sense.) Gordley makes a similar argument in his chapter on *Contract Law in the Aristotelian Tradition* in THEORY OF CONTRACT LAW, *supra* note 7, at 291-294 (arguing that no normative significance can be attached to efficiency concepts, Pareto optimality and others.)

22. See, Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1172(2001)(hereafter Jones, *Time-Shifted Rationality*)(arguing that as specialized organ, the brain was not designed to function for selfish ends of individuals); Owen D. Jones and Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COL. L. REV. 405, 449 (2005)(hereafter Jones & Goldsmith, *Law and Behavioral Biology*)(arguing that the brain was not designed to maximize individual utility).

principle of utility.²³ That is, the approval or disapproval of every action must depend on the extent to which it augments or diminishes the happiness of the person concerned. Bentham provided an explicit and determinate definition of utility in the following words: “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or what is the same thing in other words, to promote or to oppose that happiness.”²⁴ Given that the state of happiness as the purpose and measure of human existence, Bentham argued that the right aim of every legislation is to carry out the principle of utility.²⁵ Put differently, the end of every law is the promotion of the greatest happiness for the greatest number.²⁶

The attainment of happiness is a complex and culturally affected phenomenon and the search for it through the law is likely to be nothing short of pure speculation. As such the view has been maintained that Bentham’s utility principle was not concerned with individual happiness but rather with whole classes of persons and numbers. Individual happiness and the context for attaining it were too complex and interconnected to be isolated and addressed separately. According to Dicey, Bentham’s phraseology that a good law is one that produces the greatest happiness for the greatest number only called for the creation of the conditions most conducive to the attainment of prosperity and human happiness.²⁷ That Bentham’s utility principle was not focused on the happiness of a specific individual does not in any way suggest that the liberal Benthamite was not advocating individualism. On the contrary, the Benthamite utilitarian embraced the concept of *laissez-faire* under which all restrictions or shackles on individual freedom by the law, not supported by the principle of utility, must be eliminated. As explained by Dicey, one of the central principles distilled from Bentham’s utility theory stated as follows: “Every person is in the main and as a general rule, the best judge of his own happiness. Hence, legislation should aim at the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours”²⁸ Based on this and other principles, Benthamite utilitarians mounted an all out assault on all

23. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (Prometheus Books, 1988)(hereafter BENTHAM, *MORALS AND LEGISLATION*)

24. *Id.* at 2. It is instructive to not that Aristotle had a different conception of happiness. As suggested and explained by Jonathan Barnes, Aristotle’s conception of happiness appeared to show a remarkable indifference to the impact of the actions of a good man on the welfare of his fellows. Happiness is rather individual happiness. Note however Barnes admits some other conclusions is possible. *See*, ARISTOTLE, *ETHICS*, *supra* note 1, at xxix-xxxv. Utilitarianism comes in different forms. However, according to the classical form of utilitarianism captured in the formulation by Henry Sidgwick in *THE METHODS OF ETHICS* 7TH Ed. 1907). According to John Rawls, this classical formulation states as follows: “Society is rightly ordered and therefore just when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all individuals belonging to it.” JOHN RAWLS, *A THEORY OF JUSTICE* 22(1971); John Stuart Mill defines utility or the greatest happiness principle as holding that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By “happiness” is intended pleasure, and the absence of pain; by “unhappiness,” pain, and the privation of pleasure.” JOHN STUART MILL, *UTILITARIANISM* 16-17 (Prometheus Books 1987).

25. BENTHAM, *MORALS AND LEGISLATION*, *supra*, note 23, at 170.

26. A. V. DICEY, *LAW & PUBLIC OPINION IN ENGLAND*, 133-138 (1905)(hereafter DICEY, *LAW & PUBLIC OPINION*)(Dicey provides a synthesis of Bentham’s goals and objectives for law reform in England in a series of lectures published in this book).

27. *Id.* at 137.

28. *Id.* at 145

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restrictions by the law on individual freedom not justified by some definite and discernible utility goal. Other utilitarian moral philosophers, particularly John Stuart Mill, expanded the liberal creed beyond the law to include an attack against all restrictions on individual liberties by social habits and institutions.²⁹

The natural and logical progression in the utilitarian thought was its extension to the freedom of contract and party autonomy.³⁰ If, as the utilitarians argued, every man was the best judge of his interest, it followed that no person should be hindered by the law in the pursuit of that interest through contractual obligations. Thus, consistent with the principle of utility, it was urged that contractual obligations entered into voluntarily and without fraud must be enforced. Unfettered party autonomy was advocated even if, under certain circumstances, its exercise would occasionally result in injury to the parties. The question of great interest to us is the relationship between Bentham's utility and the legal consciousness in contractual obligations. Where would a Benthamite utilitarian place the sources of contractual obligations?

B. Group Dynamics and Individual Legal Consciousness

Given the discussion of Bentham's utility principles, one would have thought that the answer to the question posed above would be obvious, but it is not. As noted above, Bentham argued that the end of every law is to promote the greatest happiness for the greatest number. Framed in this form, Bentham seemed to be concerned ultimately with the happiness or the welfare of the community.³¹ It might then be argued that why we keep our promises in the exercise of our freedom of contract is to promote the happiness of the community. Thus, even when a particular transaction leads to our displeasure that transaction might still satisfy the utilitarian principle if it promotes community welfare. However, Bentham was concerned with the happiness of the community not as a collectivity or an organized group but rather with the community viewed distributively as an aggregation of individuals.³² As a collectivity, the community differed from and was greater than the sum of its parts. Nevertheless, the goal of community happiness was achievable distributively through the sum of the happiness of its constituent members. Bentham and the other utilitarian thinkers fell into the trap, not unique to that era, of treating the community as a fictitious entity rather than an organic real phenomenon with an *eigen* dynamics characteristic of organized

29. JOHN STUART MILL, ON LIBERTY (Pelican ed. 1971) Mill denounced vehemently any restraints on the action of individuals imposed by social habits and custom. He argued that human perception, judgment, discriminative feeling and others including moral preferences are exercised only in the making of a choice. He who does anything because of custom makes no choice. Mill further compares such inability to make a choice with actions of animals such as apes and cattle. PRINCIPLES OF POLITICAL ECONOMY (Kelly ed. 1987) (espousing liberalism, freedom of contract and *laissez faire*.) To get a better sense of who John Stuart Mill was, see, BRUCE MAZLISH, JAMES AND JOHN STUART MILL, (1975); BERNARD SEMMEL, JOHN STUART MILL AND THE PURSUIT OF VIRTUE, (1984).

30. DICEY, LAW & PUBLIC OPINION, *supra* note 26, at 145-147.

31. BENTHAM, MORALS AND LEGISLATION, *supra* note 23, at 3-4.

32. *Id.* at 3.

groups.³³ The reality and organic character of organized groups has long been recognized by jurists of the realist school of thought such as Otto Gierke in Continental Europe and Pollock and Dicey in England, to mention a few.³⁴

As a real and organic phenomenon, a collectivity has certain characteristics that tend to interfere with the freedom and egocentric selfish pursuits advocated by Benthamite utilitarians. First, a collectivity often acquires a combined power that is greater than that wielded by each of its members individually. This power affects how members behave and make choices. Second, a collectivity has a certain *esprit de corps* which constitutes a real and powerful sentiment that drives its individual members to act below or above normal moral standards. A collectivity therefore creates its own group culture and dynamics which exist independent of its constituent members. Third, as members of the group, individuals are affected by the culture of the group, its operating norms and ideology.³⁵ In this context members of a collectivity are willing to surrender certain individual liberties and freedoms cherished and advocated for by Benthamite utilitarians. Studies on group behavior have adequately demonstrated that individuals within a group exhibit the desire and the urge to conform to group expectations and norms.³⁶ This urge which is real and persistent tends to alter and control the conduct of members as individuals. In the setting of the group the standard of behavior is set and measured by some group goals or normative standards. It seems obvious that these characteristics of the collectivity challenge the belief that its individual constituent members would necessarily be engaged solely in the pursuit of their individual selfish interest which may translate into some aggregate benefit to society. Members of a collectivity are more likely to conduct their affairs and make decisions to advance some group ideology or goals rather than their own. The benefit to the community is not therefore derivatively nor distributively advanced but rather directly pursued and achieved. But the fact that the interest of the community is directly advanced does not exclude the pursuit of individual self-interest. However, individual choices and self-interests do not necessarily dominate the motives to the extent suggested by Benthamite utilitarians.

Thus, within a Benthamite world, the consciousness that drives promise keeping and contractual obligations would seem to be much more complex and embody sometimes the pursuit of multiple and commingled goals and objectives. However, if in the ultimate, there is some conflict between the interest of the individual and those of the group the group norm or ideology trumps that of the

33. *Id* at 3 (in discussing the interest of the community, Bentham describe the community as a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*.) (emphasis original).

34. OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (Translated with an introduction by Frederic William Maitland(1900)(explaining the corporation as no fiction, no symbol, no piece of the state's machinery but a living organism);Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporation?* L. Q. REV. 219 (1911)(explaining that the methods of common law do not easily lend themselves to the recognition of the fiction theory.) A.V. Dicey, *The Combination Laws as Illustrating the Relation between Law and Opinion in England During the Nineteenth Century*, 17 HARV. L. REV. 511, 513 (1904)(hereafter Dicey, *Combination Law*)(explaining the nature and impact of groups on individual behavior.)

35. *Id.* Dicey provides these examples of how group dynamics affect individual conduct.

36. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 107-115 (2003)(summarizing the literature and findings on the psychological analysis of groups.)

individual. One might therefore argue that the consciousness that drives promise keeping or contractual obligations is some group normative standard or some group ideology. To the extent that this is the case, how is Bentham's claim that his utility principle is fixed and based on human nature supported?

Bentham arrived at his distributive theory of community welfare by treating the community as a legal fiction.³⁷ However, by so doing, Bentham falsified reality and sidestepped the need for the establishment of a general universal *supra* individual ethical principle that would demand conformity by individuals for the happiness of the community as a collectivity. But viewing the community as a collectivity would have threatened the basic tenets of the moral creed relentlessly advocated by Benthamite utilitarians. The institution of a community ethical or moral standard against which promise keeping or contractual obligations had to be measured would have undermined the persistent demand that individual freedom of action be liberated from all social conventions and institutions. Thus, a distributive theory of happiness *seemed* deliberate and not an oversight.

If the happiness of the community as a collectivity was the ultimate goal of Bentham's utility principle a distributive and derivative approach to it was not the most effective way to achieving that goal. For one might ask why each individual in the pursuit of his selfish and egocentric interest should be concerned about the resulting happiness of the community without some urging or coaxing? But if the community interest and welfare are important enough for us to take them into account in keeping our promises, the consciousness that derives our contractual obligations might then have an external source and its location might be in the collective. Yet, since the days of Bentham and individualistic moral philosophy, individual liberties and freedom of action are values that seem irreversibly entrenched in the fabric of modern democratic and capitalist societies.³⁸ The notion of individual self-determination and personal freedom of action including making and keeping promises, apart from its historic entrenchment, is so appealing and intoxicating that any challenge of it would be faced with skepticism, if not hostility. To advance the view that some group ideology or some group normative standard might well be the bedrock upon which individualism finds expression might be seen as heresy. Indeed, the comfort we seem to derive from the belief that we are rational beings who control our conduct based on our individual self-interest might be no more than an intoxicating self-fulfilling prophesy that we are unwilling to question. If such a discomfort exists, it does not eliminate the contradiction that seems to exist in the notion that human beings are selfish and egocentric in the pursuit of collective happiness. On the contrary, human nature seems to favor strongly the formation and maintenance of groups and group

37. BENTHAM, MORALS AND LEGISLATION, *supra* note 23, at 3.

38. Modern neo-classical economic theory is rooted on the principles of individual freedom. Much of Posner's work on Law and Economics is based on the principles of individual voluntary choices in the open market. See POSNER, ECONOMIC ANALYSIS OF LAW, *supra*, note 7, F. A. HAYEK, THE ROAD TO SERFDOM (1944 Renewed 1972)(providing a vigorous attack on planned economics and collectivism.)

ideology.³⁹ From the time of birth to death the most dominant theme in our lives is the group which starts with the family quite often as a subset of other groups including the clan, the ethnic group, the church, the state and many others. One might describe this group as the relational group with different levels and textures of interactions, interdependence, commitments and expectations.

The recognition of the central role of groups in the life of individuals does not in any way assign value to groups as such. The goodness or badness of groups is not in their “*groupness*” but rather in their mission or ideology. We are well aware of and familiar with certain groups and their ideologies in the middle of the last century which led to unparalleled and unimaginable human tragedy. Such group driven brutality was only possible if individuals within the group suppressed their individual interests in favor of group ideology. The importance of the controlling impact of group ideology on individuals is best captured in the modern group phenomenon called “Al Qaeda. Now operating as a widely diffused global franchise system, Al Qaeda provides an ideology that guides the activities of its individual cells operating globally.⁴⁰ The violence its individual members are willing to visit on themselves and their victims only confirms the importance of group ideology in suppressing the rational self-interest of its individuals members. The grip of group ideology on its individual members is not a new or modern phenomenon. From time immemorial, group ideology, be it benevolent or malevolent, has always had a strangle hold on members of the group.⁴¹ To the extent that we exist and function in various types of collectivities, it would seem simplistic to suggest that we keep our promises primarily to maximize our individual self interest. The conclusion is therefore inescapable that the roots of our legal consciousness in our contractual obligations lie less in our selfish individual calculated motivations and more in some group normative standard, or some collective belief system be it spiritual or other to which our individual self-interest is ultimately tied.

III. UTILITY MAXIMIZATION AND ECONOMIC THEORY OF TRANSACTIONS

Building on the earlier work of Adam Smith in the *Wealth of Nations*⁴² that individual self-interest is the basis of a successful economy, Bentham and the individualistic moral philosophers of the time argued that man is a selfish self-seeking animal who knows best what is good for him.⁴³ On that account, individuals should, to the greatest extent possible, be left alone. These views inspired neoclassical economists to declare that each economic agent is a rational being with revealed preferences which define his utility.⁴⁴ The pursuit of one’s

39. Matt Ridley and other biologists have demonstrated the importance of the group not only the human beings but also in other species such as ants and bees to mention just a few. *see*, MATT RIDLEY, THE ORIGINS OF VIRTUE, (1996)(hereafter RIDLEY, ORIGINS OF VIRTUE)

40. ROHAN GUNARATNA, INSIDE AL QAEDA, 54 (2002)(offering in a chapter a detailed description of the organisational structure of Al Qaeda and its network and global system of terror)

41. Dicey, *Combination Law*, *supra* note 34..

42. ADAM SMITH THE WEALTH NATIONS (1776)(advocating *laissez faire* and competitive market system.)

43. BENTHAM, MORALS & LEGISLATION, *supra* note 23; Dicey, LAW AND OPINION, *supra* note 26.

44. A statement of the classical neoclassical economic theory is well captured in JULES COLEMAN, MARKETS, MORALS AND THE LAW, 68(1988)hereafter, COLEMAN, MARKETS, MORALS).

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self-interest involves the egocentric maximization of individual utility. Neoclassical economists further assert that the goal of any economic system is the achievement of efficiency through the maximization of individual utility in markets that are perfectly competitive. The combination of the egocentric utility maximizing economic agent with the perfect competitive market system set the stage for the neoclassical treatment of the motives behind transactions. They also formed the basis for various operating assumptions that underlie transactions in the neoclassical world of economics. Neoclassical economists assume that economic agents are rational egocentric utility maximizers with awesome cognitive capabilities.⁴⁵ Such economic agents have the capacity to process complex information during which all the possible alternative choices available to them in any transaction are weighed.⁴⁶ The resulting choices are the best possible self-serving rational decisions the parties could make in a given situation.⁴⁷ Thus, the rational transactor will always make the best self-serving and efficient decisions. Furthermore, given voluntariness in transactions, freedom of contract and the capacity to weigh all the alternatives in any given transaction, every contract or market exchange will not only be efficient but also complete.⁴⁸

45. As usual, the economic assumption of the nature of human beings need not resemble any thing we know about the realities of human beings. Rationality is a matter of definition from which certain deductive reasoning is premised leading to certain logical conclusions about the economic consequences. Rational choices are based on revealed preferences which are themselves based on observed choices made by economic agents. See Amartya K. Sen, *Rational Fools: A Critique of the Behaviourial Foundations of Economic Theory*, in *PHILOSOPHY AND ECONOMIC THEORY* 87 (Frank Hahn and Martin Hollis eds., 1979) [hereinafter *Rational Fools*] (explaining the assumptions of rationality in economic agents and raising questions about their utility and examining the sources of the rational individual in the following words:

“The reduction of man to a self-seeking animal depends in this approach on careful definition. If you are observed to choose *x* rejecting *y*, you are declared to have 'revealed' a preference for *x* over *y*. Your personal utility is then defined as simply a numerical representation of this 'preference', assigning a higher utility to a 'preference' alternative. With this set of definitions you can hardly escape maximizing your own utility, except through inconsistency”).

Id. at 91-92. At the end of his criticism of the concept of the rational economic agent, Sen noted rather jokingly that: “[i]f he (the economic man) shines at all, he shines in comparison-in contrast-with the dominant image of the rational fool.” *Id.* at 109.

The assumptions underlying the Paretian optimality analysis are exacting. See ROWLEY & PEACOCK, *WELFARE ECONOMICS*, *supra* note 183 (outlining some of the Paretian optimality conditions). Similarly the assumptions of the perfect competitive model are very demanding. See HENDERSON & QUANDT, *supra* note 183, at 136-37 (outlining the following conditions for perfective competition:(1) firms produce homogeneous products which ensure anonymity of firms and consumers; (2) both firms and consumers are so numerous that neither of them can influence market prices or output. They are all price takers; (3) all firms and consumers face perfect information about prices, output, quality, tastes, and other relevant market conditions; and (4) there are no entry or exit barriers to any industry, making resources perfectly mobile). These are not conditions that pertain in any real markets. *Id.*

46. Oliver Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, in *ANTITRUST LAW AND ECONOMICS* 48-50(Oliver Williamson ed.1980). (hereafter *Assessing Vertical Market Restrictions*) (discussing the limitations of bounded rationality on economic agents).

47. *Id.*

48. The conclusion that every contract entered into under the conditions outlined above is a necessary result of the deductive reasoning that flows from the assumptions. First we are given rational economic agents with well-defined and immutable system of preferences. Nothing that these agents can do will change the system. By definition, rationality must always lead to a logical end. Then we are told that the rational economic being is motivated by selfish interest and will seek only what maximizes his personal satisfaction. Finally, we are also told that this rational person is in an economic environment of perfect knowledge, total mobility of resources, homogeneous products, where all agents, producers and consumers are numerous and price takers. Under such circumstances a contract would likely be efficient and complete because the parties would have taken every possible information into account before entering into the contract. Moreover, the market condition described

Certain conclusions and inferences would seem to follow naturally from the notion of the hyper-rational economic agent with the ability to assess every information affecting one's self-interest described above. Where, for instance, the contract does not explicitly cover a situation, the logical conclusion must be that the parties implicitly weighed the event and allocated any attendant risk of loss.⁴⁹ Logically speaking, there can be no gaps in any contract. However, if for any reason any gaps should exist, it is presumed that the rational expectations of transactors would be that the gaps in the contract are filled by default contract rules developed in the courts or by the legislature.⁵⁰ A system such as this, where every thing is by assumption accounted for, seems to be what the classical contract contemplated. In the classical contract all the rights and obligations of the parties, present and contingent, are clearly and finally determined at the formation stage through *presentation*.⁵¹ Accordingly, Macneil has argued that the characteristic clarity of the classical contract is manifested at two stages: "sharp in by clear agreement: sharp out by clear performance."⁵² Macaulay has more recently described the classical contract as resembling a water faucet or an electric switch which is either on or off.⁵³ All the rights and obligations flow unambiguously from the moment the contract is concluded. Indeed, the classical contract scheme

above seem to fit discrete transactions where there are no incentives for loyalty or client development. Homogeneity in products, perfect knowledge and price competition will discourage loyalty in repeat purchasers.

49. In the world of imperfect competition and knowledge the parties face different realities. They are neither omniscient nor capable of assessing adequately the probabilities of their actions *ex ante*. Nevertheless, the assumption of the rational person is applied to them. Thus, each transactor is expected to weigh *all the possibilities* in a transaction and choose those maximizing his self-interest. Given the uncertainties of the future they are to make a decision on risk taking and accept only terms consistent with their acceptable risk levels. Intellectuals following this approach argue that the terms of the contract are both obligationally and contingently complete and therefore there should be no adjustments to the terms of a complete contract. See Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 567-571 (1985) [hereinafter *Commercial Rationality*](arguing that it is up to the parties to allocate the risk of loss *ex ante* in a contract and the failure to do so explicitly does not mean that the risk has not been allocated. It means that they intended the risk of loss to lie where it falls; or at least that they will not be compelled to adjust the terms of the contract against their will.) For an opposing view, see Jerry Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 575, 586 (1985).

50. The argument has been made that no contract could be obligationally complete since words used to express legal obligations are always ambiguous, therefore requiring some interpretation and a set of default rules. See David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1819 (1991) [hereinafter *hypothetical bargains*] (discussing the ambiguity in contracts and necessary incompleteness); see also Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 731-732 (1992) [hereinafter *Strategic Contractual Inefficiency*] (discussing different types of incomplete contracts and default rules).

51. See Ian Macneil, *Contracts: Adjustment of the Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 862 (1978) [hereinafter *Relational Contracts*] (discussing the flexibility in relational contracts) Presentation is defined as:

[A] way of looking at things in which a person perceives the effect of the future on the present. It is a recognition that the course of the future is so unalterably bound by present conditions that the future has been brought effectively into the present. Thus, the presentation of a transaction involves restricting its expected future effects to those defined in the present; i.e., at the inception of the transaction.

See also ATIYAH PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, 417-419 (1979) [hereinafter *FREEDOM OF CONTRACT*](explaining the absoluteness of contractual obligations under the classical contract).

52. See Macneil, *Relational Contracts*, *id.*

53. Steward Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U.L. Rev. 775, 783 (2000).

assumes that the parties to a contract would not behave strategically to alter the outcome in the gains from trade in their favor.

If the neo-classical economic man is such a calculating animal that weighs all the pros and cons in every transaction, certain inferences about his legal consciousness seem unavoidable. The consciousness that form the basis of his contractual obligations is not based on any emotional belief but rather on hyper-rationality devoid of any human emotions. Various ethical norms including fairness, justice and altruism seem not to play any role in his decision process. It is obvious that the rationality attributed to the neo-classical economic agent by assumption fits very well with the selfish or self-centered motives which form the center piece of Benthamite utilitarianism. But if selfishness or ego-centric pursuit is the driving force behind transactions, strategic conduct by the parties should be expected if not the norm. Selfishness should breed calculated underhandedness, trickery, opportunism or free-riding that yields an undeserved wealth transfer to the opportunist. Indeed, there is no reason to expect honesty in transactions motivated by selfishness unless we assume self-restraint, honesty, piety, good faith or some other controlling norm that guides the conduct of the parties.

IV. RATIONAL CHOICE THEORY, EFFICIENCY AND LEGAL CONSCIOUSNESS

In the immediately preceding section we sought to provide the general setting for the neo-classical economic theory and its implications on legal consciousness in contractual obligations. In this section, we seek to focus on specific or particularized neo-classical arguments. We however enter a note of caution that this is not the place and time to investigate fully the claims of neo-classical economics. Our task is of a limited nature. That is, to examine the extent to which neo-classical economic theory and Benthamite utilitarian thought explain legal consciousness in contractual obligations. In this regard, two lines of inquiry might be directed at neo-classical economic theory. The first relates to the nature of human rationality and the relevance of the so-called rational choice theory to human motivations in transactions.⁵⁴ The question of great import is the relationship between the rational choice theory and legal consciousness in contractual obligations. The second goes to the use of efficiency as an alternative measurement of general community welfare in the Benthamite sense. Our central focus is on the extent to which efficiency is a dominant theme in human calculations on which promises to keep. Do ordinary rational beings weigh the resulting efficiency impact of contemplated transactions before entering into them? The goal of this section is therefore to investigate the relevance of human rationality and efficiency in the consciousness of the parties to transactions.

54. For a discussion of the rational choice theory, see, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000)(examining the different versions of rational choice theory and its weaknesses)(hereafter *Law and Behavioral Science*); DONALD P. GREEN & IAN SHARPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994)(questioning and attacking the use of the rational choice theory in political science), Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in ENCLYCLOPEDIA OF LAW AD ECONOMICS (Boudwijn Bockaert & Gerrit De Geest eds., 1999); Jon Elster, *When Rationality Fails*, in THE LIMITS OF RATIONALITY 10 (Kare Schweers Cook & Margaret Levi eds., 1990).

A. Rational Choice Theory and Legal Consciousness

The concept of rationality that lies at the heart of the rational choice theory is the neo-classical theory of rationality explained above. According to that theory, every human economic exchange transaction is the product of some deliberate calculation that benefits from a full examination of all the relevant complex facts and possibilities. With such awesome and unlimited cognitive capacity, the neo-classical economic agent has been aptly described by Williamson as a hyper-rational being.⁵⁵ According to the rational choice theory, the neo-classical economic agent is a calculating animal that makes deliberate choices on which promises to keep based on their yield in the maximization of individual selfish ends or self-interest. As such, legal consciousness in contractual obligations is necessarily tied and welded to the rational choice theory. However, the utility of this theory as a prediction of which promises will be kept is critically dependent on the quality and consistency of the meaning of the rational choice theory. Unfortunately, the rational choice theory is blessed with neither the consistency nor a widely acceptable definition to make it very useful for locating legal consciousness. To critics, conceptions of rational choice theory lie within a spectrum of meanings that spans from “thin” to “thick” versions.⁵⁶ At the “thin end of the spectrum the theory is backed by less rigorous assumptions and therefore many decisions are likely to be rational but not easily falsifiable. On the other hand, at the “thick” end of the spectrum, the conception of rational choice theory is much more robust in its behavioral predictions and more easily falsifiable.⁵⁷ Thus, whether a given choice in a transaction is rational or not depends on where on the theoretical spectrum it is located. The same decision might be rational within one version of the theory and not rational within another version of it. A theory of human decision making process that links rationality to consciousness presents serious difficulties for legal consciousness if it gives multiple contradictory answers to the rationality of the same choice.’

Human decision processes whether within or outside the world of transactions are organic and real not plastic. Human beings are not wooden or emotionless computerized machines that churn out certain calculated outputs given a set of inputs. Contrary to what the rational choice theory might hold, human decisions are often influenced by certain established moral and ethical norms which discourage the maximization of selfish or self-interested ends. These moral and ethical norms are rooted not in human rationality but rather in human emotions.⁵⁸ Little wonder then that the rational choice theory has been the subject

55. See OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM, 45 (1985)(hereinafter WILLIAMSON, ECONOMIC INSTITUTIONS).

56. Korobkin, & Ulen, *Law and Behavioral Science*, *supra* note 54, .at 1061.

57. *Id.* at 1060-1066.

58. See, ROBERT H. FRANK, PASSIONS WITH REASON, (1988) (hereafter, FRANK, PASSIONS WITH REASON,)(explaining the role of human emotions in the decision making process); RIDLEY, ORIGINS OF VIRTUE, *supra* note 39, at 133-136 (discussion Franks’s views on the impact of complex human emotions or moral sentiments on human decisions that do fit the rational choice criteria).

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of serious criticism by scholars in many disciplines. These criticisms fall into various categories.

1. Economists Critical View of Rationality

The first line of criticism is by economists who have for long questioned the neoclassical concept of rationality. These economists argue that the rational egocentric economic agent that unambiguously maximizes his utility based on a full, well calculated and informed judgment about which and *all* commitments to enter into does not exist in the real world.⁵⁹ The hyper-rational economic agent is but a fiction that exists only by assumption. If then the rational being exists only by assumption, how could the consciousness of that fictional person on what promises to keep inform the conduct of real people? Moreover, after a careful review of the neoclassical theory of rationality, the Nobel Prize economist, Amartya Sen appropriately concluded that the egocentric utility maximizing individual is a but “*rational fool*.”⁶⁰ For, only a fool would pursue the so-called rational self-centered and short-sighted choices suggested by the utility maximization theory.

The point that the rational individual is a “rational fool” is made clearer by Robert Frank in what he called the commitment problem.⁶¹ According to Frank the rational individual could never enter into any transaction that depended on a commitment from another person. Rational parties in a transaction could not convince each other of their mutual commitments. The fear of defection or post-contractual opportunism and cheating would deter the rational individual from entering into any transaction. The fact that individuals nevertheless enter into transactions means that some other explanation must be given. According to Frank, transactions are driven by irrational commitments which are a product of emotions. By “emotions” Frank is not referring to hysteria or paranoia but rather to some moral sentiment such as trust, leap of faith, guilt or some other emotional sensitivity not based on rational thought or calculation.⁶² The consciousness that drives human contractual obligations therefore seems to be located in some moral or ethical norms that permit commitments and cooperation with others rather than in the neo-classical rationality. But such moral foundations for commitments are the ones that weld and cement every society together.⁶³ They do so by establishing collective normative systems that discourage the pursuit of selfish ends and purely individualistic goals. It stands to reason that the same collective moral sentiments that are essential for welding societies into cohesive and coherent social organisms

59. Milton Friedman, a Nobel Prize Economist from the University of Chicago has provided perhaps the most prominent defense of human rationality in economic theory by arguing that human being act as if they are conforming to the predictions of economic theory even though they cannot make calculations inherent in the economic models. See, Milton Friedman, *The Case of Flexible Exchange Rates*, in *ESSAYS IN POSITIVE ECONOMICS*, 157 (1953); WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 55.

60. Sen, *Rational Fools*, *supra* note 45.

61. FRANK, *PASSIONS WITH REASON*, *supra* note 58, at 4, 46-50 (discussing the commitment problem.); RIDLEY, *ORIGINS OF VIRTUE*, *supra* note 39, at 135 for a discussion of Frank’s commitment problem.

62. RIDLEY, *ORIGINS OF VIRTUE*, *supra* note 39, at 135

63. The excitement that seems to have emerged from the work of the New Darwinian biologists and evolutionary psychologists is the scientific identification of the patterns of the common moral sentiments that hold societies not cultures together irrespective race and genetic differences. See, ROBERT WRIGHT, *THE MORAL ANIMAL* 4-8 (1994)(hereafter WRIGHT, *MORAL ANIMAL*).

would also be equally critical for keeping commitments and promises in every society.

2. Institutional Economists and Rational Choice Theory

The second line of criticism is one pursued by institutional economists, students of psychology and behavioral scientists. The attack on the rational choice theory comes from at least two related fronts. While the first addresses weaknesses in the fundamental assumptions of the rational choice theory the second focuses on empirical evidence from studies of human decision making processes. Such evidence challenges the very foundations of the theory thereby putting it in serious doubt. According to these critics, there is now mounting evidence from numerous studies that individuals often act “irrationally”.⁶⁴ Following the steps of critics such as Sen they argue that the hyper-rational neoclassical individual is a myth. *The only reality about the rational individual is the reality of the assumption.*⁶⁵ Indeed, they note that the evidence from experimental studies suggests rather strongly that human beings frequently act in ways that are inconsistent with the fundamental assumptions of the rational choice theory.⁶⁶ According to Owen D. Jones, the evidence shows that “there is a mismatch between the popular theory of human behavior and human behavior that is popular.”⁶⁷ Given such evidence, the theory of human rationality should be adjusted to accommodate the facts. And the search for legal consciousness in contractual obligations might benefit from a focus on the irrationality of human motivations in transactions.

In this regard, criticisms by institutional economists have therefore focused on challenging the operating assumptions of the rational choice theory.⁶⁸ They have argued that human economic decisions are often affected by “bounded rationality” a term coined by Herbert Simon in 1957 to address limitations in human cognitive competence and analytical abilities.⁶⁹ According to Simon, human beings are not boundless rational beings endowed with the awesome computational and analytical capacities found in the neoclassical economic agent.⁷⁰ Rather, human beings are limited by bounded rationality which prevents them from acting “rationally”. In other words, because of limitations in human cognitive capacities and analytical abilities, human decisions often fail to satisfy the utility maximization prediction suggested by the rational choice theory. Given bounded rationality, human decisions are often influenced by certain aspirations, what is

64. Jones, *Time-Shifted Rationality*, *supra* note 22, at 1141.

65. *Id.*

66. Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 54, at 1055.

67. Jones, *Time-Shifted Rationality*, *supra* note 22, at 1141

68. One of the current leading and influential scholars in institutional economics is Oliver Williamson whose work has been discussed earlier. *See*, WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 55.

69. Between 1955 and 1957 Herbert A. Simon published a series of papers and a book which created the basis for subsequent studies on bounded rationality. *See*, Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955), *Rational Choice and the Structure of the Environment*, 63 PSYCHOLOGICAL REV. 129 (1956) and *MODELS OF MAN* (1957). For a discussion of the complexities of bounded rationality in human decision making process, *see* also James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 BELL J. ECON. 587, 591-593 (1978) (hereafter *Bounded Rationality*) (explaining rationalities that are alternative rationalities to bounded rationality.)

70. *Id.*

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acceptable under the circumstances and intentional satisfying.⁷¹ All of these fall short of utility maximization.

Expanding on the work of Simon, Williamson has argued that human rationality is hampered and limited by serious constraints on human capacity or ability to receive, store, retrieve and process information⁷² to the same extent as the imaginary hyper-rational neoclassical economic agent.⁷³ Williamson therefore argues that human beings are but *intendedly* rational and, even then, only in a limited sense.⁷⁴ He notes that bounded rationality should not be confused with *irrationality* or *nonrational* behavior.⁷⁵ Bounded rationality only means that rational decisions are not the result of a complete analysis of the situation at hand. Rather, decisions are based on imperfect information and a limited competence to process available information and formulate solutions or choices.⁷⁶ Indeed, it is often the case that boundedly rational economic agents are overwhelmed by even the small amount of information they receive.⁷⁷

From academic scholarship devoted to the topic, the reasons for bounded rationality appear to go beyond the computational competence and related incapacities. In a survey of the literature on bounded rationality, John Conlisk offered some other reasons why bounded rationality is employed by economic agents.⁷⁸ He notes, that as a general matter, economic agents are capable of a wide and substantial variety of reasoning errors in their economic decisions. Conlisk reviewed studies by psychologists and experimental economists in which the subjects were given simple decision tasks with objectively correct answers based on economic theory. Not only did the subjects fail to make the objectively correct answers but also often made systematic reasoning errors.⁷⁹ It is important to point out that the reasons for the errors were not necessarily based on computational incapacity. Rather, as explained by psychologists, the decision errors were made because the subjects used decision heuristics (decision biases) or rules of thumb which failed to take into account the full logic of the decisions in question.⁸⁰ It is argued that heuristic biases or rules of thumb appear to be techniques for avoiding the complex task of decision making either because it is the least costly and/or

71. *id.* In a more recent work Simon reviewed the literature and his own work on the concept of rational choice. See, Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AMER. ECON. REV. 493, 503 (1979)(explaining the role of aspirations and satisficing in human decision process.)

72. See Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 553 (1981)([hereinafter Williamson, *The Economics of Organization*].)

73. WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 55, at 45.

74. *Id.*

75. Williamson has provided an explanation of the assumptions of bounded rationality and opportunism in varying degrees of detail. It would appear that one would have to read a few of his writings to get a fuller picture. See Williamson, *Assessing Vertical Market Restrictions*, *supra* note., at 48. Note particularly his explanation of the bounded rationality in which he states: "Put differently, it (bounded rationality) refers to rationality in the ordinary, dictionary sense of the term--"agreeable to reason; not absurd, preposterous, extravagant, foolish, fanciful, or the like; intelligent, sensible--rather than in the hyper rational sense in which it is commonly used in microeconomics textbooks." *Id.*

76. Williamson, *The Economics of Organization*, *supra* note 72, at 553.

77. *Id.*; see also, Williamson, *Assessing Vertical Market Restrictions*, *supra* note 158 at 48.

78. See, John Conlisk, *Why Bounded Rationality?* 34 J. ECON. LIT. 669 (1996).

79. *Id.* at 670.

80. *Id.*

because of inertia.⁸¹ However, as shown below, biologists might attribute heuristic biases to the design features of the brain.

3. Behavioral Scientists and Rational Choice Theory

Given the basic mission of bounded rationality, it merely hints at but does not confront directly the sources of human consciousness in contractual relations. In other words, even if we were to accept the limitations on human cognitive capacities, we would still have to look elsewhere for the sources of legal consciousness in contractual obligations. It is submitted that the starting point of that search should be the work of evolutionary biologists, behavioral scientists and psychologists as they relate to the functioning of the human brain. According to Jones and Goldsmith, any theory about human decisions must start with biology and in particular with an understanding of the human brain.⁸² Consciousness and human decision processes have their roots in the functioning of the brain. The question therefore is whether consciousness is a function of, and therefore limited by, bounded rationality. The argument advanced by Jones and Goldsmith, is that conventional treatment of bounded rationality which focuses substantially on the cognitive limitations of the brain is misleading because it does not confront the biological characteristics of the brain.⁸³ Any limitations on our consciousness attributable to bounded rationality might therefore be questionable.

The brain, it is argued, is a specialized context-specific evolved information processing organ better suited for some tasks but not for others.⁸⁴ As such, the limitations and flaws attributed to the brain by the bounded rationality theory may not be limitations. Rather, they may in fact result from certain finely tuned features of the brain.⁸⁵ Indeed, the argument is that, in its current stage of evolution, the human brain is not designed for the task assigned to it by the rational choice theory. According to Jones and Goldsmith, the evolutionary logic is that the brain was not designed to maximize individual utility.⁸⁶ Besides, the information the brain is required to process does not fit into its current evolved design features. So, the limitations of the brain are not necessarily about its incapacities but rather about its design features and evolved predispositions.⁸⁷ Thus, while bounded rationality sensitizes us to the realities of human decision processes it is the relevant evolved *predispositions* of the brain that might shed some light on our discussion of legal consciousness in contractual obligations. These predispositions might fruitfully be examined through the work of evolutionary scientists.

The insight evolutionary biologists offer to this inquiry is the relevance of species-typical predispositions of human beings and the functioning of the brain. We are told that human beings across all cultures exhibit certain universal or species-typical characteristics and predispositions which allow them to act and

81. *id.* at 671.

82. Jones & Goldsmith, *Law and Behavioral Biology*, *supra* note 22, at 422.

83. *Id.*

84. *Id.* at 448

85. *Id.*

86. *Id.* at 447

87. *Id.* at 449, Jones, *Time-Shifted Rationality*, *supra* note 22, at 1172.

make decisions in ways most conducive to the survival of the species.⁸⁸ One of these predispositions is the tendency towards cooperating, forming and functioning within groups.⁸⁹ Generally, we are born into a family. But we may also simultaneously be a member of a church, a mosque, a synagogue, a state, or some other collectivity. Such groups cannot exist as socially cohesive units without cooperation and commitment to some collective ideology, some belief or normative system. Our fate appears to be inextricably tied to that of our groups. As such we tend to put the interest of the group ahead of ours.⁹⁰ And the evolved characteristic of the brain ensures that. This point is made clearer by the argument that the brain was not designed to maximize individual utility.⁹¹ Moral sentiments such as reciprocity, altruism, justice, fairness and others permit us to suppress our individual selfish interest and to make commitments for the interest of the group.⁹² These sentiments, when deeply internalized, permit us to act spontaneously against our apparent self-interest. Taken all together, our consciousness in transactional relations is *not primarily* about us and *only secondarily* about our community as suggested by Bentham and the rational choice theory. The reverse is the case.

However, criticisms of the rational choice theory go beyond issues of bounded rationality. Other studies by evolutionary biologists confirm the diminished role of individual self-interest in human decision processes. These studies suggest rather strongly that all human beings across cultures share the belief that selfishness inhibits the pursuit of the greater good.⁹³ Either consciously or unconsciously human beings praise selflessness and decry selfishness. As Matt Ridley describes it, selfishness is almost by definition a vice. All human beings share the fascinating taboo against selfishness. Virtue, is almost by definition, the greater good of the group. The conspicuous things we all praise—cooperation, altruism, generosity, sympathy, kindness, selflessness—are all unambiguously concerned with the welfare of others.⁹⁴ These studies also fly in the face of the Benthamite utilitarian principles and the rational choice theory.

4. Social Norms and Rational Decisions

Some critics of the rational choice theory focus on the role of social norms in human conduct. To them, the rational human being seems to exist in a social and ethical vacuum, outside of groups or impervious to group pressure and influences. That is why he is able to make such cold hearted rational self-interested decisions

88. Returning to Darwin's theories of natural selection, three biologists since the 1960's led the way in suggesting that human beings are genetically structured to be survival machines. See for example, RICHARD DAWKINS, *THE SELFISH GENE* (1976) (arguing that human behavior is essentially programmed for the benefit of the genes.), GEORGE C. WILLIAMS, *ADAPTATION AND NATURAL SELECTION: A CRITIQUE OF SOME CURRENT EVOLUTIONARY THOUGHT* (1966) (suggesting that the genes have programmed obsolescence), see also, William D. Hamilton, *The Genetic Evolution of Social Behaviour*, 7 J. THEORETICAL BIOL. 1 (1964).

89. RIDLEY, *ORIGINS OF VIRTUE*, *supra* note 39, at 39 (explaining the tendency of humans towards forming groups.)

90. Ridley explains this human trait in the following words: "If a creature puts the greater good ahead of its individual interests, it is because its fate is inextricably tied to that of the group: it shares the group's fate." *id.*

91. Jones & Goldsmith, *Law and Behavioral Biology*, *supra* note 22, at 447.

92. RIDLEY, *ORIGINS OF VIRTUE*, *supra* note. at 39.

93. *Id.* at 38.

94. *Id.*

to the exclusions of all others. Yet, the rational individual is a member of at least one community or collectivity the existence of which presupposes the existence of some community identity, some *collective consciousness* or ideology. Around this group, a group welfare normative system is built. Such a collective normative system, described by others as social norms, influences human decisions in directions inconsistent with the rational choice theory.⁹⁵ Critics point to evidence of tips by traveling or non-repeat customers in restaurants, farmers that take care of their neighbors' wondering cattle at their own expense and similar conduct as evidence of social norms shaping human conduct and choices.⁹⁶ In all such cases, the conduct involved bears little, if any, relationship to the predictions of the rational choice theory. Thus, any community welfare achieved by these decisions is not done distributively as suggested by Benthamite utilitarian principles but rather through established group normative principles.

However, it seems useful to enter a note of caution here. The argument is not that the central role played by some community normative system in individual decisions completely eliminates self-interest in human decisions. It is rather the immediacy and unambiguous pursuit of that self-interest that is at issue. The point that needs to be emphasized is that the pursuit of self-interest need not be immediate or non speculative. Nor should self-interest be confused with selfishness. Selfishness involves the deliberate or direct ego-centric pursuit of individual interest. The benefits sought in self-interest might be the by-product of conduct not directly or immediately calculated for personal gain. Such benefits may lie in the distant future and to such an extent are therefore speculative. In this context, individual self-interest is tied to that of the community. Sustaining the community through individual choices ensures the potential for achieving individual self-interest at some future date. In conclusion, the sources of our legal consciousness is found in some collective normative system to which our long term self-interest is inextricably tied.

If the rational choice theory holds true, each party to a transaction would maximize his gains from trade without regard to the emotional context or the fairness of the outcome. Nor would spite, malevolence, personal vendetta, or retaliation prevent such an individual from maximizing his utility in that transaction. Such a rational individual would resist the temptation for and

95. See, Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 54, at 1127.

96. *Id.* at 1129. See also, Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986), ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). In an illuminating book, Richard H. Thaler developed a catalogue of economic anomalies that are indeed contradictions of the rational choice theory and its predictions. In response to the question how selfish people are, Thaler offered the following narrative about drivers in Ithaca New York to disprove the prediction of selfishness. The narrative goes:

"There is a creek that runs behind Cornell University. The two-way road that crosses this creek is served by a one-lane bridge. At busy times of the day, there can be several cars waiting to cross the bridge in either direction. What happens? Most of the time, four of five cars will cross the bridge in one direction, then the next car in line will stop and let a few cars go across the bridge in the other direction. This is a traffic plan which will not work in New York City or in an economic model. In New York City a bridge operating under these rules would, in effect, become one-way, the direction determined by the historical accident of the direction being traveled by the first car to arrive at the bridge! In economic models, people are assumed to be like New Yorkers than like Ithacans. Is this assumption valid? Fortunately, the cooperative behavior by the Ithaca drivers is not unique." RICHARD H. THALER, THE WINNER'S CURSE, 3 (1992) (hereinafter, THALER, THE WINNER'S CURSE).

satisfaction of absorbing some sunk cost even if foregoing the benefits would be morally or emotionally gratifying. Only a “rational fool” would do so. Put more directly, the rational being is totally devoid of all and such emotions in his economic calculations. However, there is mounting evidence from numerous studies devoted to human decision making that have found a significant relationship between emotions and human decision processes. As pointed out by Frank in the discussion above, the success of every transaction between the so-called rational beings depends on some commitment.⁹⁷ Commitments however involve irrational, emotional and moral sentiments such as trust, altruism, reciprocity or generosity.⁹⁸ Not being rationally based, these sentiments do not conform to the predictions of the rational choice theory. It is this inconsistency or the perception of it that has induced a series of studies by psychologists, game theorists and behavioral scientists designed to locate the actual motivations behind human decisions.

5. *Game Theory, Experimental Studies and Rationality*

The evidence from studies on human decision making seems to suggest rather strongly that various moral sentiments matter significantly. For instance, studies by game theorists point to how a pervasive desire for cooperation and reciprocity influence human decisions. When faced with the choice of a competitive and ego-centric maximization of gains from a decision, human beings consistently opt for cooperation that yields lower returns than those predicted by the rational choice theory.⁹⁹ The prediction of selfishness turned out to be wrong. And, this conclusion was supported by one of the earliest game theory experiments on human decisions. Two sophisticated academicians not unfamiliar with the ego-centric utility model were the subjects of a game theory experiment.¹⁰⁰ They played the game 100 times for small sums of money. Given their sophistication and theoretical background, they were the perfect candidates for testing the extent to which individual decisions under such circumstances are motivated by competitive ego-centric utility maximization. Contrary to expectations, they seemed eager to cooperate to capture the resulting mutual benefits.¹⁰¹ The experiments from game theory also showed that when the game is played repeatedly and indefinitely between two people the prevailing atmosphere was one of cooperation and niceness rather than competitiveness or nastiness.¹⁰² However, the evidence of cooperation and reciprocity was not unique to the settings of these experiments. Cooperation and reciprocity appear to be not only pervasive across cultures but also to be species-typical.

If cooperation under such human conditions were affected by irrational emotions, the experiments sought to remove the human element by pitching

97. FRANK, *PASSION WITHIN REASON*, *supra* note 58, at 46-50(explaining the irrationality of emotions); for a discussion of Frank’s commitment problem, see RIDLEY, *ORIGINS OF VIRTUE*, *supra* note 39, at 132-135.

98. RIDLEY, *ORIGINS OF VIRTUE*, *Id.*

99. *Id.* at 60.

100. *Id.* at 59.

101. *Id.*

102. *Id.*

several computer software programs against one another in a prisoner's dilemma game setting. It was hoped that these cold hearted machines, lacking all human emotions, would make their calculations mechanically and based on their selfish interests. No cooperation or acts of reciprocity was expected. Thus, one would have expected that programs with a nasty or mean streak would fare better in this setting. Surprisingly, the programs that were the nicest performed better than those that were nasty and aggressive. Indeed, the shortest and nicest program called Tit-for-tat won the contest by using a cooperative strategy. It started with cooperating and would only use retaliatory and reciprocal acts to respond to the previous actions of other programs.¹⁰³ This contest tended to prove that even cold hearted machines would cooperate for mutual benefit; giving meaning to the old adage that "One good turn deserves another."

The experience with the Tit-for-tat program encouraged the use of the same format for a game of the survival of the fittest between various simulated computer software programs with different degrees of niceness and nastiness.¹⁰⁴ Again, the goal was to find out how much selfishness would be exhibited by these programs in the pursuit of their individual survival. Similarly, it was the nicest programs that won the contest. The nasty programs destroyed one another with retaliatory attacks while the nice programs rewarded reciprocity with reciprocity. However, the successful programs combined reciprocity with retaliatory conduct to encourage cooperation and discourage defection.¹⁰⁵ One might question the utility of computer simulated programs in determining actual human conduct. However, the fact that these artificial and emotionless mechanical devices successfully adopted the strategy of cooperation clearly magnifies the significance of the pervasiveness of similar findings among humans across cultures.

Other studies on human decisions have focused on the significance of fairness as a motivating factor.¹⁰⁶ Several experimental studies using the ultimate game format involving a wide range of experiments have been conducted over several years in diverse countries and across cultures to observe the nature of human decision making.¹⁰⁷ These experiments which involved the distribution of free sums of money between the subjects confirmed the centrality of fairness in human decisions everywhere. If the subjects were motivated by the rational choice theory they would have accepted any amount no matter how small since that would

103. *Id.* at 60.

104. *Id.* at 60-61.

105. *Id.* at 61.

106. See, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and Assumptions of Economics*, 59 J. BUS. S285 (1986), Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimate Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982), Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators, and Managers*, 9 J. ECON. PERSP. 209 (1995) and Vesna Prasnikar & Alvin E. Roth, *Consideration of Fairness and Strategy: Experimental Data from Sequential Games*, 107. Q. J. ECON. 865 (1992).

107. See, Werner Guth, Rolf Schnmittberger and Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367(1982)(hereafter, Guth et al. *Ultimatum Bargaining*)(this was one several studies of the ultimate bargaining experiment in they authors provided an elegant example of the ultimate bargaining in which 50/50 distribution was the most common among the participants.); FRANK, *PASSIONS WITH MORALS*, *supra* note 58, at 167-174; Alvin E. Roth, *Bargaining Experiments*, 282(in THE HANDBOOK OF EXPERIMENTAL ECONOMICS (JOHN H. KAGEL & ALVIN E. ROTH, 1995); THALER, *THE WINNER'S CURSE*, *supra* note 96, at 22-25(summarizing the results of many experimental studies as being inconsistent with the prediction of the theory.)

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make them better off than receiving nothing. Yet, the results showed a predominant preoccupation of the subjects with the fairness in the distribution rather than with their individual utility maximization.¹⁰⁸ It appeared that the mutual desire to be treated fairly induced deviations from selfish or self-interested behavior. For, the most common distribution between players was a 50/50 split.¹⁰⁹ Indeed, the results showed that subjects were not out to maximize their utility as predicted by the rational choice theory.

Perhaps even more revealing were the results of other experiments involving anonymous subjects.¹¹⁰ Even though the players did not know one another, they were still motivated by the desire to be fair. However, in these experiments people refused to accept small amounts considered to be unfair just to register their disapproval of the offer. They were willing to forego the benefits and even absorb some sunk cost just to register their discontent.¹¹¹ They were spiteful to those who treated them unfairly and more likely to be generous to those who treated them fairly. Thus, fairness seemed to beget reciprocal generosity and unfairness was rewarded with spite.¹¹² The apparent lesson from these studies is that reciprocal kindness and reciprocal spite seem to operate simultaneously in human decision process.¹¹³

Certainly, experimental studies have serious limitations in their interpretative powers. Being mostly simulations with little or nothing significant at stake, they often lack the reality of actual transactions in which the stakes could be quite high. Although one must caution against putting much stock in the value of these experimental studies there is nevertheless something undeniable about them. They confirm the results of several non-experimental studies that have identified the same human moral sentiments as forming the core value systems that influence promise keeping. Across continents and cultures, moral sentiments rooted in human emotions such as trust, fairness, cooperation, altruism and reciprocity have consistently formed the basis of contractual obligations. In ancient classical Aristotelian terms the operating normative system would have been distributive or

108. RIDLEY, ORIGINS OF VIRTUE, *supra* note 39, at 139.

109. See, Guth et al. *Ultimatum Bargaining*, *supra* note 107, at 380, 383-385; FRANK, PASSIONS WITH MORALS, *supra* note 58, at 167-174; THALER, THE WINNER'S CURSE, *supra* note 96, at 35; but see, L. G. Tesler, *The Ultimatum game and the Law of Demand*, 105 ECON. J. 1519 (1995)(arguing that the results of the ultimatum game are not necessarily inconsistent with traditional economic theory of demand.); Tilman Slembeck, *Reputations and fairness in Bargaining Experimental Evidence from a Repeated Ultimatum Game with Fixed Opponents*, University of St Gallen, March 1999 Discussion Paper No. 9904(1999)(challenging the results of the conventional ultimatum game experiment results.); Robert Forsythe, John Kennan and Barry Sopher, *An Experimental Analysis of Strikes in Bargaining with One-Sided Private Information*, 81 AMER. ECON. REV. 253 (1991).

110. Christine Jolls, Cass R. Sustein and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471.(1997-1998)(hereafter Jolls, Sustein & Thaler, *Behavioral Approach*)(interestingly enough the subjects of this study were MBA students from MIT, MBA and Law students from University of Chicago.)

111. *Id.* at 1490. In a survey and comparison of experimental results Werner Guth and Reinhard Tietz made the following interesting observation about the response to greed in the ultimatum game setting: "What we have found is that people are willing to sacrifice considerable monetary amounts in order to punish someone who has been greedy and that they do so even if it will not be of any help for them in the future." Werner Guth and Reinhard Tietz, *Ultimatum Bargaining Behavior, A survey and Comparison of Experimental Results*, 11 J. ECON. PSYCH. 417, 447 (1990).

112. *Id.* at 1493-1494.

113. Matthew Rabin, *Incorporating Fairness Into Game Theory and economics*, 83 AM. ECON. REV. 1281, 1282 (1993)(providing a framework for analyzing fairness in Game Theory).

commutative justice.¹¹⁴ What then these computer software programs and experimental studies demonstrate is how deeply rooted our legal consciousness in contractual obligations is in some universal and collective human moral sentiments.

6. Summary

In summary, the evidence that is mounting in quantity and quality points to certain conclusions. First among these is that the drive and rhythm of human consciousness in contractual obligations have deep emotional origins. Second, community or collective moral codes which serve as the glue or cement that holds societies together have their foundations in moral sentiments which in turn are rooted in human emotions. So, community expectations and human predispositions which affect decisions and promise keeping are similarly influenced. Third, the notion of the rugged individual single-mindedly pursuing his goals to the exclusion of all others exists but only in the fertile imagination of the theorist. Such, mental acuity notwithstanding, what the evidence shows is the individual craving for his group in the form of cooperation or approval of his decisions. Finally, the evidence also show that the existence of a community normative system does not mean the destruction of individual autonomy. Rather, individuals see cooperation, reciprocity, altruism and other moral sentiments as necessary for creating and sustaining a stable normative system on which they rely when the need arises. Thus, the point made several times already is that the fundamental basis for legal consciousness in human contractual obligations seems to be located in some community or collective norms that influence decisions and promise keeping.

V. EFFICIENCY AND LEGAL CONSCIOUSNESS

We now turn to the relationship between efficiency and legal consciousness in contractual obligations. The fundamental inquiry is whether legal consciousness is efficiency driven. In other words, do we keep our promises because of certain efficiency benefits to be gained thereby? Given the mission of the task at hand and space considerations, the discussion of this topic will be limited and brief. We understand the complexity of the subject of efficiency but cannot engage it fully here.

We may start by noting that any difficulties presented by the rational choice theory in the explanation of legal consciousness in contractual obligations seem to pale in comparison to those faced by the concept of efficiency. Even the most ardent supporters or advocates of efficiency would probably admit that the concept of efficiency does not provide an easy instrument for determining why we enter into various transactional relations and which promises we keep. For at the very outset there are philosophical difficulties faced in trying to marry efficiency to the concept of obligation. Contractual obligations are generally, if not always,

114. Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW*, *supra* note 7, at 266-267.

rooted in some bilaterality of duties and rights. Legal consciousness in contractual obligations as such is hardly about us individually nor purely about our unilateral calculations of what gains and burdens a transaction imposes on us individually. Duty as described by David Hume in his celebrated treatise on human nature connotes some burden, some discomfort, or some displeasure which nevertheless is carried out as a matter of obligation.¹¹⁵ In this sense of the term, a bilateral obligation cannot, nor should it, easily and unilaterally be rationalized away by some selfish or self-serving calculus. So, to the extent that efficiency is concerned with some ego-centric calculations about maximizing individual gains from a transaction contrary to those established in the agreement, it would tend to rationalize away the discomfort associated with the obligation. By so doing, it replaces any discomfort with the pleasure of the greater gains. Under such circumstances, efficiency would undermine legal consciousness in contractual obligations because it stands as an external rationalizing normative standard that might have no role in the initial transaction. Such rationalization is evident in the concept of efficient breach.¹¹⁶ However, whether or not efficiency operates to liberate us unilaterally from our contractual obligations is seriously hinged upon the nature and scope of the concept of efficiency.

As a concept, efficiency does not enjoy a single or unified meaning in the literature. It is afflicted by the same malady of multiple meanings as is the case the of the rational choice theory discussed above.¹¹⁷ Assuming therefore that the concept of efficiency could be applied to evaluate the sources of legal consciousness in contractual obligations, we would still face the almost insurmountable difficulty of determining which meaning of efficiency applies and which is controlling in the event of contradictory outcomes. For the purposes of this discussion, efficiency can be used in at least four different senses: (1) Productive efficiency, (2) Pareto optimality, (3) Kaldor-Hicks efficiency, and (4) Minimization of transaction cost under the Coase theorem.¹¹⁸

115. DAVID HUME, A TREATISE OF HUMAN NATURE (1888)(Reprinted, Oxford University Press 1968). This how Hume describes the nature of obligation: All morality depends upon our sentiments; and when any action, or quality of the mind, pleases us *after a certain manner*, we say it is virtuous; and when the neglect, or non-performance of it, displeases us *after a certain like manner*, we say that we lie under an obligation to perform it. (Emphasis original) at 517.

116. For a discussion of efficient breach, see, A. MITCHELL POLINSKY, INTRODUCTION TO LAW AND ECONOMICS 25-36(1983)(hereafter, POLINSKY)(discussing breach and efficient breach of contract.)

117. For a fuller discussion of the issues raised by efficiency in the law of contracts, see. YELPAALA, ORGANIC CONTRACT, *supra* note 7 (discussing in greater detail the issues raised by the concept of efficiency in the law of contracts.)

118. Not included in the number efficiency concepts is "wealth maximization" advanced by Posner. In a number of articles, Posner developed his theory of law and economics. One of these articles appeared in 1979. See, *Utilitarianism, Economics and Legal Theory*, *supra* note 7(distinguishing economic theory from utilitarianism to describe the use of economic efficiency in the law). Posner stated:

"The great difference between utilitarian and economic morality, and the source I believe of the "monstrosity" of the former, is that the utilitarian, despite his professed concern with *social* welfare, must logically ascribe value to all sorts of asocial behavior, such as envy and sadism, because these are common sources of personal satisfaction and hence of utility. In contrast, lawfully obtained wealth is created only by doing things for other people - offering them advantageous trades. The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefitting others as well as himself. Since (to repeat once again a central point in this paper) the social product of the productive individual in a market economy will exceed his earnings, such an individual cannot help creating more wealth than he takes out of society. There is no such constraint on the pursuit of selfishness in a utilitarian society. *Id.* at 132.

A. Productive Efficiency

Productive efficiency addresses the question of maximization of output given a certain set of inputs.¹¹⁹ In other words, productive efficiency is concerned with the best way to increase the size of the pie with a given set of resources.¹²⁰ At first blush, productive efficiency seems uncontroversial. It is simply a quantitative measurement of output resulting from the use of resources. Contracting parties should be able to make their contractual commitments based upon this simple measurement. However, productive efficiency in actuality tends to mask certain basic and controversial assumptions about the world of production.¹²¹ Productive efficiency tells us nothing about the efficiency of the initial entitlements or assignments of rights to the resources traded. If the goal of productive efficiency is to maximize the size of the pie should we not be concerned about the impact of the initial assignment of rights on our output maximization objective? Is there any reason to believe that initial rights holders will trade those rights away? Should the initial entitlements not be altered if that would result in the most productive use of the available resources? Whether or not we accept the initial assignments as efficient, desirable, or a necessary constraint, there is some underlying value judgment and an implicit statement of our distributional belief system as to who the producers should be.¹²²

What then does productive efficiency have to say about legal consciousness in contractual obligations? Could any of the contracting parties

Posner continued:

[T]he wealth-maximization principle implies, first, an initial distribution of individual rights (to life, liberty, and labor) to their natural owners; second, free markets to enable those rights to be reassigned from time to time to other uses; third, legal rules that simulate the operations of the market when the costs of market transactions are prohibitive; fourth, a system of legal remedies for deterring and redressing invasions of rights; and fifth, a system of personal morality (the "Protestant virtues") that serves to reduce the costs of market transactions." *Id.* at 127.

See also Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487,491-492 (1980)(extending the thesis of Utilitarianism, Economics and Legal Theory.)

119. Knight, *Social Economic Organization*, *supra* note 166 (discussing the difference between different types of efficiency: productive and allocative).

120. POLINSKY, *supra* note 116, at 7.

121. See Knight *supra* note 166, at 8 (arguing that, in a socialized world, the satisfaction of conflicting individual choices cannot be left to the individuals to sort out). A social decision has to be made as to which wants and whose wants should be satisfied. The answer to these questions requires some standards and values which are important in determining production and efficiency. Efficiency is not measured in physical terms but in terms of value and some measurement of value. He defined efficiency in these terms:

"Efficiency is the ratio not between output and input but between useful output and total output or input. Efficiency is meaningless without a measure of usefulness or value. The task of economics is finding some common denominator of things produced and consumed."

Id. at 7. The question is how is the system of values or standards to be determined? What is the best way to make the best use of resources in the most productive way? Reliance is placed on what the owner of resources does. As long as the owner of productive resources seeks self-interested remuneration from their use, those resources will be put to their most productive and therefore efficient use. But this is a value judgment or normative choice made by society that ownership should be a determinant of productive efficiency, because as Knight explains:

"The strongest argument in favor of such a system as ours is the contention that this direct, selfish motive is the only dependable method, or at least the best method, for guaranteeing that productive forces are organized and worked efficiently."

Id. at 8. Thus even productive efficiency involves choices as to who is to produce what using which resources.

122. *Id.*

renege on the contractual obligations on the theory that the transaction does not maximize productive efficiency? As long as efficiency provides an external norm independent of the commitments of the parties such a breach should be expected if not encouraged. However, there is no reason to expect the breaching party to be satisfied with the quality of the productive efficiency results of the next transaction. Indeed, the danger presented by efficiency as an external standard for measuring which promises to keep is that it provides an unstable equilibrium in a world of dynamic transactions. Given bounded rationality and imperfect information markets, most transactions would be incomplete making the resulting productive efficiency outputs questionable. Would the parties then hold out for better productive efficiency gains and if so till when? As discussed in the previous sections, at some point every transaction needs some commitment which would tend to be undermined if the parties are invited to shop around continuously for better efficient deals. In a dynamic world of real transactions, efficiency would be an unstable and unproductive concept for investigating the consciousness that drives promise keeping.

B. Pareto Optimality

The second context in which efficiency may be used is Pareto optimality.¹²³ Under a host of technical, and strict formally assumed conditions, resources are said to be allocated in the Pareto optimality sense if, and only if, no further rearrangements would make at least one person better off without making any other person worse off.¹²⁴ Also, according to the Paretian test, an allocation of resources is said to be "Pareto superior to another if, and only if, no one is made worse off by the distribution and the welfare of at least one is improved."¹²⁵

The Paretian optimality efficiency concept is addressed to the general question of how a society's resources might be allocated to ensure that they are put to their best uses. Accordingly, it is concerned with creating the basic policy and normative framework for encouraging the efficient allocation of the resources of society. Given the highly technical and formalistic operating assumptions of the Paretian optimality principle, what normative principles might society establish in relation to the keeping of promises in contractual relations? Society would be better off insisting that legal consciousness in contractual obligations be strictly tied to the assumption of hyper-rationality, perfect information and all the other conditions upon which the theory is founded. Yet, we know that the real transactions world is governed neither by hyper-rationality nor by perfect information.

123. See COLEMAN, MARKETS, MORALS,)(explaining that different context in which efficiency might be used).

124. The technical conditions for Pareto optimality conditions have been explained in many places. See e.g., CHARLES K. ROWLEY & ALAN T. PEACOCK, WELFARE ECONOMICS 7-23 (1975) (For example, the concern of economics is the welfare of all members of society. Each individual is the best judge of his own welfare, changes in allocation must increase the welfare of at least one person without decreasing the welfare of any other individual). See also JAMES M. HENDERSON & RICHARD E. QUANDT, MICROECONOMIC THEORY, 289-293 (1980) (discussing the optimality conditions); MICHAEL D. INTRILIGATOR, MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY 258 (1971) (devoting a chapter to welfare economics).

125. COLEMAN, MARKETS, MORALS, *supra* note 123, at 72.

Allocative efficiency is a highly stylized theoretical end point that exists only if the assumed conditions of the theory pertain. How could a theorized hypothetical result constitute the basis upon which real transactional parties could order their promise keeping? Moreover, a casual examination of the welfare economic analysis of the contract lense in the famous Edgeworth Box shows clearly that even under the best of the theorized conditions an infinite number of efficiency outcomes lie within the contract lense. There is not a single efficiency point that could guide the parties with respect to their decisions. Under such circumstances, allocative efficiency could hardly form the basis for legal consciousness in contractual obligations. The parties might arrive at different efficiency points with different individual beneficial outcomes although society as a whole might benefit. But the benefit to society is not unambiguous and uniform. Each of the countless efficiency points within the contract lense produce differential impact on society, some better than others. Without an additional ordinal normative system contractual obligations would not necessarily produce the most beneficial impact on society. Clearly, such a concept is hardly a suitable standard for establishing the legal consciousness of the parties in real transactions.

C. Kaldor-Hicks Efficiency

Hampered by the strictness of the formal conditions required by the Pareto optimality test, some economists prefer the Kaldor-Hicks efficiency test which seeks to modify the Pareto test. According to the Kaldor-Hicks efficiency test, a resource allocation is efficient in relation to another if, and only if, the resulting welfare gains would be high enough for the winners to compensate the losers and still enjoy a net welfare gain.¹²⁶ By focusing on the size of the winnings, the Kaldor-Hicks efficiency test resembles that of the productive efficiency.

Like the other definitions of efficiency, the Kaldor-Hicks efficiency concept suffers from its own infirmities. It only requires that the gains be sufficient for winners to compensate losers without requiring actual compensation.¹²⁷ Accordingly, it provides no criteria for the distribution of the gains nor does it tell us who the winners and losers might be. It neither requires nor contemplates any allocation negotiations between the winners and losers. As such, the Kaldor-Hicks efficiency standard explicitly endorses an unequal distribution of gains from trade raising serious questions about how it may advance fairness. If fairness is not inherent in every transaction why would the losers accept the deal.

A welfare normative standard that is explicitly premised on inequality is hardly an attractive standard for ordering legal obligations in contracts. First, it encourages the abusive exploitation of bargaining power and opportunism to increase the gains from trade. Second, since no moral condemnation is attached to the outcome and there is no re-distributive requirement there would be no incentive for moral self restraint or fairness in transactions. Thus, in addition to all the problems efficiency presents as a source of legal consciousness in contractual

126. For a discussion of efficiency concepts including Kaldor-Hicks *see* COLEMAN, *MARKETS, MORALS*, *supra* note 123, at 84.

127. *Id.*

obligations, the Kaldor-Hicks principle adds its own burdensome dimensions. We have seen from our discussion above that human contractual relations are motivated by a host of moral sentiments including fairness. The Kaldor-Hicks efficiency standard seems explicitly to undermine this deeply entrenched human predisposition.

D. Allocative Efficiency under the Coase Theorem

Coase saw the issue of allocative efficiency as a matter of minimizing transaction costs. According to Coase, whether a particular allocation of resources is efficient or not depends on the initial entitlements to those resources and the conditions surrounding their transfer.¹²⁸ Coase posited two states of the world in which transactions might occur. In the first, there are zero transaction costs associated with the transfer of resources. In the second, transactions costs are substantial. In the world of zero transaction costs, the initial legal entitlements to resources will have no impact on the efficient utilization of resources. In other words, irrespective who holds the legal rights to the resources and in an environment of freedom of contract, the parties will costlessly bargain for their efficient utilization. However, in a world of substantial transaction costs the initial entitlements to those resources will have an impact on their efficient utilization. Under such circumstances, efficiency can be attained by minimizing transaction costs. We shall examine the implications of these two conditions for legal consciousness in contractual obligations.

Coase assumed that in a world of zero transaction costs and voluntariness in transactions the parties will always reach an efficient bargain. Efficiency turns on the absence of transaction costs and an agreement backed by contractual commitments. However, we have argued above that an external norm such as efficiency or transaction cost that focuses on individual calculations is insufficient for the making and keeping of promises. As argued by Frank, the commitment problem that lies at the heart of contractual obligations is not resolved by the absence of transaction costs. Commitment is a human emotional response induced by certain moral sentiments not necessarily controlled by the rational calculations of costs. Moreover, as further argued by Robert Cooter, Coase also seemed to assume that in a world of zero transaction costs the parties will always reach an agreement.¹²⁹ Yet, the absence of transaction costs might indeed induce an indefinite hold-out or strategic conduct by the parties yielding no agreement. With no cost or penalties attached to hold-outs or strategic conduct there should be every incentive to engage in such conduct. It would therefore appear that even in a world of zero transaction cost the consciousness that drives contractual obligations will remain rooted in human emotions or moral sentiments discussed above.

However, Coase admitted that the world of zero transaction costs is only hypothetical and unrealistic. It is therefore the real world of transactions at which

128. Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), reprinted in WILLIAM BREIR & HAROLD HOCHMAN, READINGS IN MICROECONOMICS 484 (2d ed. 1971)(hereafter, Coase, *The Problem of Social Cost*)

129. Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982)(hereafter *Cost of Coase.*)

the theory of transaction cost minimization is directed.¹³⁰ It is nevertheless unclear how this theory would affect legal consciousness in contractual obligation in a way different from the discussion of other efficiency theories. Although the transaction cost theory is aimed at the real world rather than the hypothetical make-believe neoclassical world of transactions it nevertheless establishes an external utilitarian standard against which individual transactions are to be measured. As explained above, any theory of contractual obligations that links such obligations to individual utility maximization or, as in this case, to transaction cost minimization does not explain the commitment problem identified by Frank. Utility maximization and transaction cost minimization both need an agreement which in turn requires some commitment based on some moral sentiments not driven purely by individual calculations of costs and benefits.

The invitation to delve into the realities surrounding transactions has induced institutional economists to investigate the phenomena of bounded rationality and opportunism which affect the real decision process in transactions. As discussed above, bounded rationality relates to the limitations or incapacities of human beings to assess every information relevant to making rational contract decisions. Opportunism speaks to the less saintly human motivations behind transactions which sometimes induce the parties to exploit the vulnerabilities created by the contract by chiseling, skirting or otherwise shirking their contractual obligations. Given these two phenomena. Institutional economists argue that transactions should be planned to minimize their associated transaction costs.

The question that is here raised is the extent to which bounded rationality and opportunism affect the making and keeping of promises. We have already argued above that bounded rationality does not directly confront the sources of legal obligations but rather invites a journey into the design characteristics and functioning of the human brain. If, as it has been demonstrated by evolutionary biologists, the brain is neither by design nor by function an individual utility maximizing organ, it is doubtful whether the brain can nevertheless be an individual transaction cost minimizing calculating machine for whatever purpose. Any transaction motivated by transaction cost minimization would still require some initial commitment. That such a commitment may turn out to be empty, a hollow stock or incomplete does not detract from its relevance in sealing the initial transaction. Ultimately, transaction cost minimization is about managing the failures in the legal consciousness that drives contractual obligations; it is not about creating that consciousness.

The relationship between opportunism and legal consciousness in contractual obligations is even more tenuous. A motive that seeks to entrap or take advantage of another in a transaction through a hold-up, economic coercion or otherwise to alter the obligations of the contract through opportunism is the very antithesis of keeping promises. The consciousness that drives opportunism is also inconsistent with minimizing transaction cost. For, opportunism burdens the victim and extracts an undeserved wealth transfer to the opportunist. Such motives are also inconsistent with the moral sentiments of fairness, reciprocity, cooperation

130. See, Coase, *The Problem of Social Cost*, *supra* note 128, at 496.

and others that induce commitments in transactions. Yet these are the costs the theory suggests we should minimize. But again such transaction cost minimization is only possible if we are willing to make an initial commitment by entering into the transaction.

E. Summary

In conclusion, to the extent that efficiency is a general community normative principle the attainment of which is through individual utility maximization or transaction cost minimization, it has Benthamite characteristics. Recall that Bentham argued that societal welfare would be enhanced through an aggregation of individual happiness. It is however difficult to see how a general community welfare is achievable distributively or in the aggregate unless it is the dominant norm that informs directly individual efficiency calculations. Similar to Bentham's utility principle, efficiency does not necessarily contemplate reliance on community interest as the controlling norm for individual decisions. The dominant theme in the efficiency analysis we have embarked on is that some normative system independent of efficiency influences the making and keeping of promises. That independent normative system is rooted in some community or collective moral sentiments which operate as the cement that welds society together. Therefore, whatever individualistic or selfish calculations the efficiency theories might suggest become subordinate to and influenced by some overarching community moral sentiment or moral code that influences human decision making.

VI. SOCIAL ANTHROPOLOGIST, EVOLUTIONARY BIOLOGISTS
AND LEGAL CONSCIOUSNESS

It is apparent from our discussion of Benthamite utilitarian thought and its application to neo-classical economic theories that the underlining ends of those theories is some community welfare. It is also clear from our discussion above that the community interest is perhaps best achieved not through a distributive or derivative theory. This is particularly the case when community welfare is combined with the perfect competitive economic model. The goal of this section is to explore the role of reciprocity, cooperation, alliances, altruism and similar human traits in the formation and shaping of our legal consciousness in contract. Put differently, we wonder whether persistent human traits such as reciprocity, cooperation and the building of alliances and friendships even between complete strangers, an experience the great Darwin himself had on his expeditions,¹³¹ do not suggest some collectivist normative system as the source of the consciousness for our contractual obligations.¹³² In other words, might the consciousness that drives

131. Darwin described how Fuegians and his expedition team developed friendship after the mutual generosity and the exchange of gifts., Robert Wright citing Darwin, *Voyage*, p.172.

132. Wright describes Darwin's trip to South America and the alliances and friendships formed between the Victorian gentlemen and the natives of the South America which Darwin described as the "savages who practiced cannibalism, infanticide and other deplorable acts only known to the savages. See WRIGHT, MORAL ANIMAL, *supra* note 63.

our calculations in the formation and performance of contracts be one of achieving some collectivist objectives or some group goals rather than some individualistic or ego-centric utilitarian objectives.

The argument is not that in specific cases ego-centric calculations are never made but rather that they are tied to the general normative system that guides our contractual relations for the achievement of some larger community moral objectives, be they distributive justice, fairness or equity. In that context, the ultimate realization of any specific self-interest is highly speculative and not *always* directly linked to the specific transaction or relationship in question. However, the pursuit of transactional relations that keep participants in the collectivist normative system ensures, if not assures, the eventual realization of some self-interest. Framed this way and in a non-trivial manner, we not only invert the order but also challenge the nature of the claimed benefits in the Benthamite utilitarian approach. Recall that the Benthamite utilitarian focuses first on some direct or specific ego-centric utility maximization and only secondly and derivatively on some *aggregate* community welfare. This change in the nature and order of benefits sought has significant implications on how we perceive and conceive of our legal consciousness; it also influences how we might construct the general moral or normative system governing contractual obligations.

In order to explore these issues we think it necessary to start by examining the work and insights of two apparently unrelated categories of researchers: social anthropologists and modern evolutionary biologists. To put it more directly, what do social anthropologists such as Bronislaw Malinowski¹³³ have in common with evolutionary biologists such as Matt Ridley, Williams Hamilton, George Williams and Robert Trivers?¹³⁴ This question is neither frivolous nor intended merely to provoke the reader. To the casual observer Malinowski and evolutionary biologists may be as distant in their research interests and methods as the two poles of the globe. Moreover, in view of the controversy that has engulfed the theories and methods of some anthropologists, one might also question the utility of this exercise.¹³⁵ Yet, it would appear that Malinowski, evolutionary biologists and evolutionary psychologists share insights that are relevant to our inquiry into legal consciousness and contractual obligations.

133. *Infra* notes 194- 196 and accompanying discussion.

134. These authors are cited in different places in this Article. *See*, RIDLEY, ORIGINS OF VIRTUE; *supra* note 39; for Hamilton, *supra* note 88, for Williams *supra* note 88 and for Trivers, *infra* note 163.

135. *See*, The controversy surrounding anthropology as discipline goes back to its very beginning. The earliest studies of the nineteenth centuries were later criticized as mostly philosophical speculations about primitive societies. That these studies and others of a similar type based on travelers diaries were the subject of criticism by E.E. Evans-Pritchard, a Professor of Social Anthropology at Oxford University in a series of lectures. E.E. EVANS-PRITCHARD, SOCIAL ANTHROPOLOGY 21-27 (1954)(hereafter, SOCIAL ANTHROPOLOGY). According to Evans-Pritchard, some the early studies of primitive by people such as Maine were flatly wrong and had to be adjusted later. *id.* at 68. Some of the criticisms of Anthropology were directed at the anthropologists including Malinowski. Adam Kuper has argued that Malinowski ignored the political and colonial institutions in his field work. His anthropological present was therefore not deficient in that regard. *See* ADAM KUPER, ANTHROPOLOGISTS AND ANTHROPOLOGY, 46-50 (19..)hereafter ANTHROPOLOGISTS AND ANTHROPOLOGY). In a collection of essays by a number of contributors criticized the lack of sensitivity of anthropologists to the political dimensions of colonialism and the mischaracterization of societies. *See*, ANTHROPOLOGY & THE COLONIAL ENCOUNTER (Ed. Talal Asad 1973)(ANTHROPOLOGY)

2006/Legal Consciousness and Contractual Obligations

A. Social Anthropologists and Legal Consciousness

Social anthropologists sought to investigate and understand humanity in its true element.¹³⁶ They sought, *inter alia*, a window into the innermost motivations behind human interactions and exchange at their most basic level. The more primitive the system, so they thought, the more it provided opportunities for understanding human nature in its purer and unadulterated form.¹³⁷ Inevitably, the search for the primitive in his natural state was on. And, how could the primitives not be found? So, the earlier anthropologists found the primitives, so they thought, and condescendingly called them the “savages”.¹³⁸ In their preliterate, pre-capitalist state of existence the savages were treated as the lower races beyond moral improvement with a consciousness barely beyond instinctual.¹³⁹ What then would be the moral, ethical and legal consciousness of the *savages* in that purer form of natural existence? And could that consciousness represent human consciousness at its core, unadulterated by civilizing forces? An understanding of the savage mind was then seen as an essential pre-condition to civilizing him; and that was even a doubtful venture. In a critical review, Manilowski summarized the prevailing literature of the times as follows:

“The savage-so runs to-day’s verdict of competent anthropologists-has a deep reverence for tradition and custom, an automatic submission to their biddings. He obeys them ‘savalishly’, unwittingly, ‘spontaneously’, through ‘mental inertia’, combined with the fear of public opinion or of supernatural punishment; or again through a pervading group-sentiment if not group-instinct’¹⁴⁰

136. Evan-Pritchard offered some justifications for why it was necessary to study primitive societies. To nineteenth century anthropologists and philosophers, these societies provided examples of man living in the state of nature and clues to the origins of human institutions. Later anthropologists were interested in studying them because primitive societies displayed institutions in their most primitive forms. See, SOCIAL ANTHROPOLOGY, *id.* at 8.

137. *Id.* at 9 (explaining that because of rapid transformation of primitive societies they had to be studied soon or never.)

138. Even as Malinowski criticized the treatment of primitive societies by other anthropologists he had qualms about calling them *savages*. In his celebrated work on the Argonauts the level of condescension on the natives is illustrated by his statement that the natives were not intellectual enough to devise a sociological theory of what they were doing. They needed the ethnographer to give some universal theory of why they had their systems. See, BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC 83 (1922)(hereafter MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC). Evan-Pritchard offered an apology for the use of the terms primitive societies as being a technical term. As he explained it, “primitive societies have just as a history as our own, and while they less developed than our society in some respects they often more developed in others. This being so, the word was perhaps an unfortunate choice, but it has now been too widely accepted as a technical term to be avoided.” See, SOCIAL ANTHROPOLOGY, *supra* note...at 7. For a critical analysis of anthropological views on preliterate and so-called societies, see, Kojo Yelapaala, *Circular Arguments, Self-fulfilling Definitions: Statelessness and the Dagaaba*, 10 HIST. AFRICA 349 (1983)(hereafter Yelapaala, *Circular Arguments*) (arguing that the anthropologist created the savage, the primitives and the barbarians as the a subject of their intellectual inquiry.)

139. Evan-Pritchard offered a telling description of how the primitives were viewed. “There seems to have been a pendulum swing from extreme in speculations about primitive man. First he was a little more than an animal who lived in poverty, violence, and fear; then he a gentle person who lived in plenty, peace, and security...he was an individualist who preyed on the weak and held what he could; then he was a communist who held lands and goods in common...*id.* at 65.

140. BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY, 9-10 (1926)(hereafter MALINOWSKI, CRIME AND CUSTOM) If by the quoted passage anthropologists sought to draw a distinction between the savages and their own sophisticated societies, it was a distinction without much merit. If by it they meant to

The quoted passage only captures one version of anthropological currents of the time. From this stream of thought the savages had barely anything resembling legal consciousness in the rationalist Benthamite utilitarian sense. They were driven by natural and irresistible impulses to act. Burdened and dominated by tradition, their collectivities and by various supernatural and cosmic forces, the savages could not make any rational ego-centric calculations in their transactional relations. Slavish and automatic responses are the very antithesis of deliberate self-interested calculations.

However, other anthropological currents that saw the savages in the Hobbesian state of lawlessness and self-help¹⁴¹ would tend to suggest that every act was hardly instinctual but rather based on a purer form of self-centered utilitarian calculation without any spill-over derivative community benefits. In the Hobbesian chaos, there is hardly a society to speak of its welfare interests. In the second system of lawlessness and self-help a legal consciousness for contractual obligations is also unlikely to emerge. Legal consciousness and lawlessness are contradictions in terms. The general community values or normative system upon which legal systems are built would not exist nor would the consciousness that welds communities together. In the Hobbesian world, some authoritarian civilizing and law giving force would be essential for legal consciousness to take seed. As is obvious, neither analysis confronts the reality of the intricate web of economic exchange among various preliterate societies. Nor does either line of reasoning recognize the complex consciousness, legal and other, that nurtured and sustained the interconnected social infrastructure within which the exchanges took place. For any society to exist, there must be some consciousness involving some supra individual norms or principles that welds and glues the system together. Norms and principles are as essential in a family or clan as they are in the most sophisticated modern state. In the language of Rawls, one such principle may be justice as fairness¹⁴² and in Benthamite terms it may be utility. In whatever form they come, these “Kelsen-like “grundnorms” are generally driven by some group ideology or some objective of the collectivity, however rationalized or however described *ex post facto*. But the search for the primitives might have blinded the researchers to overlook the possibility of some overarching cross-cultural group normative systems that governed all societies. As such, the use of the label “them” for the primitives and in contradistinction to “us” the sophisticated tended to produce conceptual and analytical anomalies.

indicate that individuals in their own societies enjoyed individual autonomy untrammelled by social norms and customs they were doubly in error. The effort expended in keeping people in line through the criminal law process, the risk and pressure of being tossed into the gallows certainly put breaks on individual autonomy in every action. The entire legal systems of western societies from which the anthropologist came were designed precisely to keep people and their conduct within certain bounds. So what the savages seemed to have achieved through internalization of values the so-called civilized world had to use to rely on the force of law. See, Yelapaala, *Circular Arguments*, *supra* note....

141. For a discussion of the misconceptions surrounding self-help in anthropology, see, Kojo Yelapaala, *Western Anthropological Concepts in Stateless Societies: A retrospective and Introspective Look at the Dagaaba*, 17 DIAL. ANTHROP. 431, 433-438 (1992)(hereafter Yelapaala, *Western Anthropological Concepts*.)

142. JOHN RAWLS, A THEORY OF JUSTICE 3 (1971)(explaining his theory of justice as fairness.)

B. Malinowski, Reciprocity and Legal Consciousness

The motives and techniques of early anthropologists including Malinowski have appropriately attracted severe criticism particularly in more recent times.¹⁴³ The unabashed, blatant, and rampant racism that permeated the work of many anthropologists at the turn of the 20th century should naturally be condemned.¹⁴⁴ However, it should be noted that Malinowski sought to address some of the serious misconceptions of the anthropologists he criticized by suggesting that the economic relations among the savages was hardly an issue of automatic or slavish adherence to some custom.¹⁴⁵ Rather, the exchange relations of the savages were based on some underlining symmetry in the social structures within which reciprocity, mutual obligations, interdependence and the exchange of symmetrical social services took place. Even the critics of Malinowski admit that one of his greatest contributions to social anthropology was his examination of the Argonauts as total human beings; taking into account emotions, motivations, reciprocity and cooperation in their economic and other transactions.¹⁴⁶ But as will be seen later below, these were the same human emotions identified by the new Darwinian biologists to be species-typical human characteristics.

In the system described by Malinowski there was an evolved but dynamic system of pre-existing or pre-established group norms of mutuality and reciprocity, internalized, accepted and enforced. Specific transactions were therefore conducted within and guided by a deeply textured fabric of symmetric social structures which did not always allow for individually motivated or selfish calculations. The social fabric was interlaced with and nurtured by the normative system based on reciprocity and interdependence which provided the collectivity with an insurance against serious defections. It also provided assurances that, in the ultimate, the underlining expectations engendered by the symmetry in the social structure would ensure fairness and redistribution in the performance of obligations. Thus, reciprocity, the building of alliances and interdependence were not aimed merely at

143. The criticisms of Malinowski's work are not recent in nature. The functional approach employed by him froze his subjects in time which allowed him to ignore the dynamic colonial transformation under way under his very eyes. He ignored the social and political institutions at work and had barely a theoretical framework that guided his work. Towards the end Malinowski came to recognize these weaknesses and made some admissions to that effect. For instance, he thought the savage cultures that occupied so much of his attention were indeed colonial cultures undergoing rapid transformation. See, KUPER, ANTHROPOLOGISTS AND ANTHROPOLOGY, 48 (19..)(hereinafter KUPER, ANTHROPOLOGISTS.)

144. Yelapaala, *Circular Arguments*, *supra* note 140; Yelapaala, *Western Anthropological Concepts*, *supra* note 141; Talal Asad, ANTHROPOLOGY, *supra* note 135.

145. MALINOWSKI, CRIME AND CUSTOM, *supra* note 140.

146. Evans-Pritchard described Malinowski's work among the Argonauts of the Western Pacific and the description of the *kula* as a classic notwithstanding certain weakness. See EVANS-PRITCHARD, SOCIAL ANTHROPOLOGY, *supra* note 135, at 93. Kuper argued that it was Malinowski who first showed the way reciprocity might work to bind an individual in his own interest to that of his community. His real greatness was to show the Trobriand man in his full humanity. He also paved the way for the French Anthropologist Levi-Strauss. See KUPER, ANTHROPOLOGISTS AND ANTHROPOLOGY, *supra* note 143, at 49-50. In a preface to Malinowski's work on the Argonauts, Sir James G. Frazer had this to say about Malinowski's methods and attitude. "It is characteristic of Dr. Malinowski's method that he takes full account of the complexity of human nature. He sees man, so to say, in the round and not in the flat. He remembers that man is a creature of emotion at least as much as of reason, and he is constantly at pains to discover the emotional as well as the rational basis of human action." ARGONAUTS OF THE WESTERN PACIFIC, at ix.

the internalization of the group normative system but more importantly at its acceptance as a valuable system for a smooth and coherent society.

The essential role of an internalized normative system for creating and maintaining social infrastructure is best illustrated by the “*Kula*” trading system among the Argonauts of the Western Pacific.¹⁴⁷ As described by Malinowski, the “*Kula*” was a complex trading system based on a well settled calendar, ceremonies and rituals in which several islands populated by different clans, tribes and races participated.¹⁴⁸ As a social institution, the *Kula* was a grand yearly event that required extensive preparation throughout the year.¹⁴⁹ Yet, the actual *Kula* trade involved the exchange of only two articles of little intrinsic economic value. The actual articles exchanged which were long necklaces of red shells called *souwala* and bracelets of white shells called *mwali* were decorative, ornamental or ceremonial in character.¹⁵⁰ Given the social significance of the *Kula* and the extensive preparation for it, it would seem surprising that the trade did not involve anything of significance such as the necessities of life.¹⁵¹ The fact that in the final analysis, nothing of material significance was at stake in this elaborate complex and time consuming social institution might be the significance of the *Kula*. One might ask, why would the natives put in so much time and effort in preparing, taking of the risk of braving the seas and dealing with potentially hostile clans and tribes only to exchange items of ceremonial or ornamental value?

The exchange itself would not have been the reason for the transaction. Nor would the gaining of status and the bragging rights participants acquired in the quality of articles received or the stature of their partners have been sufficient explanation for the *Kula*. Some other objective of greater social significance, some goal larger than the incidental motivations of individual participants would have been the underlining reasons for the *Kula*. At a much more fundamental level, the *Kula* provided the opportunity for cultivating and cementing certain core and essential social infrastructural norms. One core value that seems to underline the insistence on symmetry and equivalence in social infrastructure is fairness. Indeed, one may measure the level of commitment to, or internalization by, a society of its fundamental norms by the degree of observance of those norms in circumstances where nothing of significance is at stake. It can also be argued that the level of sophistication of a society might be measured by the attention it pays to, and creates incentives for, the observance of its basic norms without the coercive force of law as understood in the Austinian model. In short, a moral society may be

147. MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC, *supra* note 138, at 84.

148. *Id.* at 83. In chapter devoted to the essentials of the *kula*, Malinowski describes in detail the preparations, the sailing to distant lands and the methods, ceremonies and rituals connected with the *kula*. *A*

149. *Id.* at 85.

150. *Id.* at 81.

151. The deficiency in the description of the *kula* lies in part in the fact that Malinowski was not focused on describing the facts of the Argonauts as if untouched and did not confront the social and political institutions within which the *kula* had meaning and context. According to Evans-Pritchard Malinowski seldom made abstractions he failed to make the connections between the most significant aspects of *kula* the role of the common rituals in bringing together politically autonomous communities. See, EVANS-PRITCHARD, SOCIAL ANTHROPOLOGY, *supra* note 135, at 95. It appears that to cure this deficiency in his work Malinowski tried to re-frame his detailed descriptions in conceptual terms in his book CRIME AND CUSTOM IN SAVAGE SOCIETY, *supra* note 140.

described as one in which its members can be counted on to behave properly when they could get away with reprehensible conduct or unfairness without detection.

Transactions such as those in the *Kula* which do not involve the exchange of articles that are necessities of life would encourage participation by a wider spectrum of society. The lower the economic value attached to the articles exchanged the greater the number of participants who would subscribe to the fundamental norms of the system. A decision to participate in the *Kula* is a decision to accept its complex network of norms, relationships and expectations. As Malinowski put it, "once in the *Kula* always in the *Kula*."¹⁵² The practice, if not expectation, of participants to outdo one another in generosity merely confirms, at the minimum, the internalization of fairness as an important norm in the exchange. Thus, the insight one ought to gain from social institutions such as the *Kula* is their effectiveness as mechanisms for getting members of the group to buy into the fundamental normative system of the group and correspondingly to *subordinate* their specific individual selfish interests. It is obvious from the discussion above that the consciousness that drives these exchange relations was centered less around the self and more around the collectivity.

It is in this context that one should read Malinowski's analysis of the underlining reasons for the *Kula*. To him, the complex system of reciprocity, symmetrical interdependence and life-long alliances was not an end but a means to an end; the cultivation of trust and commercial honor.¹⁵³ However, trust and honor were not ends by themselves but means to other ends: the creation and maintenance of collective security obtained by the acceptance and internalization of the fundamental normative system. Thus, norms of reciprocity and the building of alliances did not simply work to cement the fundamental and core values of society such as fairness but also ultimately facilitated the achievement of some larger and fundamental societal objective. As pointed out above, that fundamental objective was the creation and maintenance of pervasive collective security.¹⁵⁴ Trust and honor would tend to reinforce reciprocity, symmetrical interdependence and lasting alliances. Fairness and justice in the system were indispensable in the maintenance of lasting alliances. All of these would also tend to minimize the risk of conflict, reduce warfare and encourage the expansion of inter-familial ties across cultures. But the participants, at some minimally sufficient level, had to subscribe to the basic general and overarching norms governing the social institutions and exchange relations for these ultimate collective social objectives to be achieved. In short, the locus of the consciousness that sustained the exchange relations in the Polynesian societies appeared to be some collective normative system not individual selfish calculation.

The efforts at creating and maintaining the system of reciprocity, alliances, and symmetrical interdependence were not unique to the "savages" of Polynesia. Similar patterns were widespread and observable among divers cultures as

152. MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC, *supra* note 138, at 83.

153. *Id.* at 85-86.

154. *Id.* at 92.

demonstrated the work of Meyer Fortes on the Talensi,¹⁵⁵ Jack Goody on the Dagaaba¹⁵⁶ both of Ghana and Gluckman on the Barotse of Zambia¹⁵⁷ to mention a few. Even the Nuer, who according to Evens-Pritchard, lived in ordered anarchy exhibited similar patterns.¹⁵⁸ What appears dominant in these societies was the importance of kinship bond and familial ties that weld and hold groups together. Therefore, the starting point of alliances and collaborations appeared to be kin or clan based and as such were significantly familial or status dominant. Consciousness, and more specifically legal consciousness, in these clan based systems therefore seemed to be seriously linked to status and derivatively to collective responsibility.¹⁵⁹ Consciousness including legal consciousness is about sustaining the interests of the family as a subset of its larger collectivities: the clan and the ethnic group. But because intra-familial exchanges and transactions evoke certain emotions and are aimed at intragroup goals which often may have little to do with the value of exchange one might treat them as falling outside the classical contract framework. Status based exchanges take place within connected groups—the family, the clan, the secret society or some other collectivity. As shown by many studies, exchange transactions between them are not motivated by competitive individual maximization of selfish ends.¹⁶⁰ Rather, they are driven by fair distributive norms, the cultivation of a sense of duty, trust and reliability to enhance the welfare of the group.¹⁶¹ Status creates comfort zones of trust, fairness and reciprocal sacrifices on which all can rely.

When Maine described *the evolution of progressive society as being from status to contract* he might have captured one element of that evolution but missed another.¹⁶² In that evolution, reciprocal exchanges or alliances forged between strangers were horizontal in nature and not based on prior social infrastructures of hierarchies and fiat. This is what Maine describes as a movement toward contract. However, reciprocal exchanges or alliances forged between strangers seemed to be aimed at replicating the comfort zones of status and group based systems with their interconnected values of fairness and trust. Strangers engaged in exchange transactions would tend to draw on their internalized status-based values which are mostly concerned with commitments, trust, fairness and distributive equities in the

155 See generally, MEYER FORTES, *THE DYNAMICS OF CLANSHIP AMONG THE TALENSI: BEING THE FIRST PART OF AN ANALYSIS OF THE SOCIAL STRUCTURE OF THE TRANS-VOLTA TRIBE*, (1945).

156 See generally, JACK GOODY, *DEATH, PROPERTY AND THE ANCESTOR*, (1962); *Classification of Double Descent Systems*, 2 *CURRENT ANTHROP.* 3 (1961) and *Fields of Social Control among the Dagaaba*, 87 *J. ROYAL ANTHROPOLOGICAL INST* 75 (1957) *SOCIAL CONTROL ORGANIZATION OF THE LOWIILI* (1967).

157 MAX GLUCKMAN, *THE IDEAS OF BAROTSE JURISPRUDENCE* (1965)(hereafter, GLUCKMAN, *BAROTSE JURISPRUDENCE*).

158. E. E. EVANS-PRITCHARD, *THE NUER, THE POLITICAL SYSTEMS OF THE ARNAK OF THE ANGLO-EGYPTIAN SUDAN* 6 (1940).

159 For a discussion of collective responsibility in clan based systems see, Yelapaala, *Western Anthropological Concepts*, *supra* note 141, at 454-459, see also, SALLY F. MOORE, *LAW AS PROCESS, AN ANTHROPOLOGICAL APPROACH* 174-175 (1978), PUAL BOHANNAN, *SOCIAL ANTHROPOLOGY* (1963), Meyer Fortes, *Descent, Filiation and Affinity*, 59 *MAN* 193,207 (1953).

160. Gluckman argues that in Barotse jurisprudence the emphasis on contractual obligations is not rights of the parties but rather on their duties. The parties are encouraged to show generosity rather than seek to maximize their individual gain through attaining the best deal. GLUCKMAN, *BAROTSE JURISPRUDENCE*, *supra* note 157, at 172-175.

161 *Id.*

162 SIR HENRY MAINE, *ANCIENT LAW* (Henry Holt ed. 1899)

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reciprocal gains and sacrifices. Studies by game theorists using *tit-for-tat* and scholars of experimental studies discussed above now seem to confirm that these values are more pervasive across cultures and races than might have been thought.

Within this characterization of Maine's insight, one would also argue that the legal consciousness that drives contractual obligations in evolved progressive societies is not different from that of the primitives and status based systems. The evolution, if there was one, was within the normative value system of status based group social structures and not away from them. The central consciousness in both systems of exchange remained rooted in fairness, justice and reciprocity. And these are species- typical characteristics first nurtured and developed in collectivities with status-based environmental settings. The elimination of hierarchy and power relations in exchange transactions between strangers does not necessarily address the underlining value system on which strangers rely for their commitment in transactions.

VII. NEW DARWINIAN EVOLUTIONARY BIOLOGY, BEHAVIORAL

The dominant theme in this general section is the link between anthropological work on human nature and current research by behavioral scientists on the same topic. Proceeding from different investigative take-off points the work from these disciplines seems to lend itself to some, not too obvious, consensus on human nature across cultures. Modern behavioral scientists, suspicious of the received theory, tackled the study of human nature from the view point of evolutionary biology by taking a fresh look at Darwinian evolutionary theory and evolutionary psychology.¹⁶³ In the process, they succeeded in debunking some of the received theories about human nature but also seemed to confirm some of the findings of earlier anthropologists. It is these areas of overlap, often overlooked, that hold great promise for our topic on legal consciousness in contractual obligations. The goal of this section is to summarize and synthesize the shared insights of anthropology and modern evolutionary or behavioral science about human nature. From this synthesis, we hope to emphasize the dominating impact of human nature on the collective or the group in the formation of moral sentiments and legal consciousness.

The prevailing social model arrived at from years of investigating the various distinct cultures of the world was that human nature was a function of cultural determinism. Advanced by Boas, cultural determinism held that human

¹⁶³ Robert Wright offers an interesting summary of the work of the new Darwinian biologists and psychologist. According to him, between 1963 and 1974 four biologists William Hamilton, George Willaims, Robert Trivers and John Maynard Smith set the stage for was to become a quiet revolution by refining Darwin's theory of natural selection. See. WRIGHT, MORAL ANIMAL, *supra* note 63, at 4. For a sample of their work, see generally, William D. Hamilton, *The Evolution of Altruistic Behavior*, 97 AMER. NATURALIST 354 (1963), *The Genetic Evolution of Social Behavior*, 7 J. THEOR. BIO. 1 (1964); GEORGE C. WILLIAMS, ADAPTATION AND NATURAL SELECTION: A CRITIQUE OF SOME CURRENT EVOLUTIONARY THOUGHT (1974); Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIO. 35 (1971), *Parent Investment and Sexual Selection*, in SEXUAL SELECTION AND THE DESCENT OF MAN (Berbard Campbell ed. 1972), *Parent-Offspring Conflict*, 14 AMER. ZOOLOGY 249 (1974), Robert Trivers & Dan E. Willard, *Natural Selection of Parental Ability to Vary the Sex Ratio of Offsprings*, 179 SCIENCE 90 (1973); see also RIDLEY, ORIGINS OF VIRTUE, *supra* note..at 17-24(discussing the work of these biologists and others relating to the genetic structure and function of humanity).

nature, at its inception, was but a *tabula rasa* to be affected by any thing but culture.¹⁶⁴ According to this theory, human nature was not a product of *nature* and *nurture* ; it was simply empty until filled by some culture. And the quality of the culture determined the quality of human nature. Thus, given the right culture human nature was perfectible. The work once considered as definitive support of Boas' theory of the perfectibility of man was done by his disciple Margaret Mead among the Samoa.¹⁶⁵

The implication of cultural determinism was that there was no single human nature that united all the diverse cultures and societies of the world into a single humanity. Indeed, the view that the primitives were the lower races or the savages, perhaps beyond improvement or perfectibility, tended to gain easy support from the theory of cultural determinism. If all of these held true, the content and quality of human consciousness and in particular legal consciousness would also be culturally determined. Cultural determinism therefore lent easy support to any explanation of the apparent qualitative differences in the moral sentiments and consciousness of the savages and their more sophisticated cousins. In that context, one would hardly have expected exchange relations such as the *kula* among the Polynesian natives described by Malinowski to take place. Nor would one expect the complex set of exchange systems among the Barotse discussed by Gluckman to have existed.¹⁶⁶

It is these conclusions and other competing theories of human nature that, in part, induced a reinvestigation of Darwin's theory of natural selection by a new breed of Darwinian biologists. Scanning the multitude of the world's diverse cultures for a better understanding of human nature, these new Darwinian biologists and psychologists were looking beyond the surface differences in cultures into the basic infrastructural core of humanity for evidence of the defining deeper inner elements of humanity.¹⁶⁷ What makes humans human? Their investigations yielded a new synthesis, a new world view point, so radically different from that of the cultural determinists that it has been aptly described as a paradigm shift.¹⁶⁸ The new Darwinian biologists and psychologists discovered certain stubborn recurrent common themes, common patterns, and indivisible unities in the various social institutions that hold true across the diverse cultures, societies and races of the world.¹⁶⁹ From these common patterns and indivisibilities it became clear that all the diverse cultures of the world were a product of a single human nature responding to varying degrees of environmental conditions.¹⁷⁰ Contrary to the theory of cultural determinism, at its inception, human nature was hardly a *clean slate*. This conclusion was all the more important because Mead's definitive work on cultural determinism and the perfectibility of man proved to be

164. See RIDLEY, ORIGINS OF VIRTUE, *supra* note 39, at 256.

165. See, MARGARET MEAD, COMING OF AGE IN SAMOA (1929).

166. GLUCKMAN, BAROTSE JURISPRUDENCE, *supra* note 157.

167. WRIGHT, MORAL ANIMAL, *supra* note 63, at 8.

168. See, *id.* at 6; THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, (19..) (Referring to the rebellion by the young scientists and their findings as a paradigm shift.

169. WRIGHT, MORAL ANIMAL, *supra* note 63, at 7.

170. *Id.* at 8.

false and was repudiated.¹⁷¹ The more closely the new Darwinian anthropologists looked at the different cultures of the world the more glaringly wrong the theory of cultural determinism appeared. For, in culture after culture, they found an intricate web of human nature by which humanity is bound.¹⁷²

If human nature is neither a *tabula rasa*, nor grounded purely in instinct, nor wholly a network of innate drives what then is its real content? In answer to this question, the Darwinian synthesis holds that the nature and content of human nature is in our genes which come equipped with social instincts.¹⁷³ In other words, the hallmarks of humanity, the things that distinguish humans from the other animals are our species-typical predisposition toward cooperation, reciprocal altruism and other moral sentiments encoded in our genes. Our instinct for cooperation and predisposition toward distinguishing the treacherous from the trustworthy also set us apart from the other animals we call the lower species. To Wright, the tremendous power behind consensual moral codes is rooted in the human impulse for reciprocal altruism.¹⁷⁴ Given these deep seated defining unities in the core elements of humanity, the core elements of human consciousness would likewise have some universal attributes.

Thus, far from being a clean slate to be affected by culture, human nature comes with an intricate web of moral sentiments that affect our decisions. As Wright puts it, across cultures moral sentiments such as trust, friendship, and affection played the role of welding the world's cultures and societies together long before written laws and contracts.¹⁷⁵ It appears that we have taken for granted the emotions that permit us to choose friends, make commitments and trust others. We have also discounted how emotions affect various decisions we make concerning our welfare including our contractual obligations. Although moral sentiments are species-typical, these common elements in human nature manifest themselves differently under various conditions. Wright describes these differences as a product of the fine-tuning of the common elements in response to differing environmental conditions.¹⁷⁶ Thus, reciprocal altruism and other moral sentiments might therefore take different shapes in the multitude of the world's cultures. These differences are however surface differences which do not explain the underlining unities in the core species-typical moral sentiments that find expression in different cultural contexts.

The lesson to be drawn from the evolutionary approach is that human consciousness is universal and rooted in a single human nature that ties humanity together. That universal human consciousness is part of the evolved cross-cultural

171. For about half a century Mead's work stood as definitive proof of the perfectibility of man until challenged by serious field work was conducted by Derek Freeman who lived among the Samoa for an extended period of time and spoke the language. The native informants relied upon by Mead recanted the information they gave her. See, RIDLEY, ORIGINS OF VIRTUE, *supra* note..at 256-257. More directly, Mead's work was questioned and repudiated by Derek Freeman. See, DEREK FREEMAN, MARGARET MEAD AND SAMOA: THE MAKING AND UNMAKING OF AN ANTHROPOLOGICAL MYTH (1983)(hereafter,FREEMAN, MARGARET MEAD AND SAMOA), *The Debate, at Heart, is About Evolution*, in THE CERTAINTY OF DOUBT: TRIBUTES TO PETER MUNZ (eds. M. Fairburn & W.H. Oliver 1995).

172. WRIGHT, MORAL ANIMAL, *supra* note. 63, at 8.

173. RIDLEY, ORIGINS OF VIRTUE, *supra* note 39,249

174. WRIGHT, MORAL ANIMAL, *supra* note. 63, at 212.

175. *Id.* at 198.

176. *Id.* at 9.

moral sentiments that influence what decisions we make and our promise keeping. The persistent unities in the moral sentiments to which humanity are bound is made even clearer in a summary of the evolutionary approach by Ridley when he wrote:

I have argued that there was morality before the Church; trade before the state; exchange before money; social contracts before Hobbes; welfare before the rights of man; culture before Babylon; society before Greece; self-interest before Adam Smith; and greed before capitalism. These things have been expressions of human nature since deep in the hunter-gatherer Pleistocene.¹⁷⁷

From the evolutionary perspective, Ridley offered the quoted passage above in an attempt to nail down what he called some myths about the origins of human cultured habits. In this summary, one can find the temporal elements that tie the past, the present and the future of humanity together into an evolving unity. The constants in the core elements of humanity recognize no differences between the savages and the sophisticated, nor between modern exchange relations and the barter systems that preceded them. The consciousness that drives exchange relations between cultures within time are guided by the same underling moral sentiments of fairness, trust, altruism and reciprocity that define humanity.

It is obvious from the foregoing analysis that the dominant theme in the new Darwinian synthesis is *unity in diversity*. From the scientific perspective, the new synthesis demonstrates how deceptively misleading differences in culture, specific social institutions and in race could be in explaining human nature and human consciousness. For, despite the apparent differences in the multitude of diverse cultures of the world, there is an underlining singularity, some undeniable unity in human nature. That is, the defining characteristics of humanity are the same across cultures and races. Humans everywhere share the same species-typical, genetically encoded predispositions toward cooperation, reciprocal altruism and other moral sentiments that reinforce the indispensable social instincts. The emotions that facilitate the development of friendships, trust and commitments are the same among the Fuegians, the Samoa, the Nuer, the Dagaaba, the Tallensi or the Dons of Oxford. The Scientific or genetic basis for this unity is the same in all these seemingly different cultures and societies. The social instincts that engender that cooperation, interdependence and reciprocity are the same in all cultures although their manifestation may differ in specific cultural settings. And this is why the link between the work of anthropologists such as Malinowski and the new Darwinian biologists and evolutionary psychologists is of such interest to our investigation of human consciousness in general and legal consciousness in contractual obligations in particular.

Admittedly, the work of many anthropologists suffered from many shortcomings. Operating often under cultural biases and various misconceptions of the native polity, many anthropologists were preconditioned to looking for evidence that affirmed their initial preconceptions.¹⁷⁸ Moreover, many of them were operating under language deficiencies that compelled them to rely heavily on

177. RIDLEY, ORIGINS OF VIRTUE, *supra* note 39, 249

178. Yelapaala, *Circular Arguments*, *supra* note 140; *Western Anthropological Concepts*, *supra* note 141.

native informants. The quality of assistance received was such that their findings and conclusions often proved to be misleading if not false. As appropriately pointed out by Maxwell Owusu, one is never sure whether the findings of ethnographers done under such circumstances are about informants, the ethnographers themselves or about their subjects.¹⁷⁹ Yet, some findings tended to capture the unities and core universal elements identified by the new Darwinian biologists. Because, anthropologists seemed to focus on surface differences their interpretation of the findings as it relates to human nature proved to be misleading and often false. This problem was compounded by the unreliability of native informants motivated by various factors including shielding their systems from the prying eyes of “nosy” foreigners. Any reliance on such informants made the conclusions doubly suspect.¹⁸⁰

These differences notwithstanding, it is hardly the case that every ethnographic study or anthropological work was tainted by these problems. Basic findings relating to reciprocity, mutual obligations, the exchange of symmetrical social services as discussed by Malinowski and the system of duties and contractual obligations presented by Gluckman seem to capture the human genetic or biological predispositions toward cooperation and reciprocity found by the new Darwinian biologists and evolutionary psychologists. The anthropological findings of symmetrical social structures that facilitated the exchange of symmetrical social services and the equivalence in economic exchange are supported by the moral sentiments found by the evolutionary biologists to be universal in all cultures and races. It appears that in all societies symmetrical social infrastructural norms form the essential base for reciprocal altruism, cooperation, commitments and fairness in economic exchange relations. Under the evolutionary perspective, social instincts are part of the human genetic predispositions. The Greeks alluded to these social instincts when they maintained that man is essentially a social animal. But the existence of society requires some social infrastructural norms that hold the system together. As part of the system of the moral sentiments discussed in this work, these norms affect general human consciousness and in particular the legal consciousness in our contractual obligations.

In conclusion, the apparent superficiality of anthropological investigations and the misguided search for differences in cultures should not blind us to identifying the unifying themes, and common patterns about human nature shared by anthropological findings with those of the new Darwinian biologists and their other evolutionary cousins. The mischaracterization by anthropologists of the origins and role of various aspects of human social instincts does not deny the fact that they identified the very phenomena which form the basis for human consciousness in contractual obligations.

VIII. HUMAN SPIRITUALITY AND LEGAL CONSCIOUSNESS

179. Maxwell Owusu, *Ethnology of Africa: The Usefulness of the Useless*, 80 AMER. ANTHROP. 310 (1978).

180. See FREEMAN, MARGARET MEAD AND SAMOA, *supra* note 171.

We have so far focused on the influences of the community, our group or collectivity on our consciousness in the province of promises and commitments. In this regard, we have examined the impact of group norms and our desire to fit in, to be part of a coherent unit, on our decision making process. We have also explored rather superficially human nature and its inherent predisposition toward social instincts and the development of some moral sentiments. Members of the group possess shared genetically encoded moral sentiments and social instincts that oil and grease the wheels for the smooth functioning of a collective. The recurrent theme is that moral sentiments such as trust, fairness, altruism and reciprocity, although explained in evolutionary and psycho-biological terms are nevertheless rooted in the ever present collectivity.

In this section we want to turn our attention to something deeper than the collectivity which nevertheless affects and conditions collectivities. We have argued above that in the ultimate, we make and keep our commitments because of some leap of faith, some belief that our trust in the other is not misplaced. But a leap of faith or belief in the future performance based on commitments is not simply an emotional response. It signifies something deeper, something beyond us in which dwells the spiritual realm. Our goal in this section is therefore to turn our attention to that deeper inner core that is beyond the collective. We want to peep into the interiority of humanity that lies beyond the interior. Within that interiority lies human spirituality that illuminates the faith behind commitments. The deeper interior core of humanity is the repository of its spirituality that cannot be captured by the scientific investigation of the genetic makeup of humanity.¹⁸¹ Human spirituality seems to exist independent of the community but radiates through the community normative system. Put differently, might the reason why we keep our promises be spiritual although cloaked, and dressed up, in the secularized and objectivized social instincts and moral sentiments of the community?

At the very outset, it is necessary to draw a distinction between spirituality and religiosity. Religiosity speaks to the collectivity, its structure and hierarchies, its socio-economic and political framework within which a particular faith or belief system is organized. Religiosity therefore refers to the community or the collectivity within which spirituality may find expression. Religiosity is about the framework for establishing and maintaining doctrine, worship and the practice of a particular faith. As such religiosity is more about form than it is about the innermost beliefs of its members, which is the domain of spirituality. It is this innermost belief that connects human beings with some supernatural or divine power, God, and that is the main focus of this inquiry.

By taking the spiritual route, we want to explore promise keeping within the context of a higher ethical order, superior to the community normative system but reflected within it. It may well be that human beings are under the tyranny of their *selfish genes* that control decision making for their benefit. The science of the

181. In a recent book, Dr. Francis Collins, one of the world's leading scientists, a physician and the head of the Human Genome Project takes on the issue of the existence of God from perspective of a scientist. He explains the limitations of scientific facts with respect to the question of faith. See, FRANCIS S. COLLINS, THE LANGUAGE OF GOD, 28, 30 (2006)(hereafter, COLLINS, LANGUAGE OF GOD)(arguing that DNA does not explain altruism nor does science explain the mysteries of God.)

genetic composition of human beings does not explain the source of the apparent power to dominate and moral intelligence of the genes.¹⁸² How could the genes, *sua sponte*, design their own existence and such an intelligent system for creating and sustaining human predispositions toward social instincts, moral sentiments or a community ethical order? The interiority of humanity is not a social construct. It lies beyond the science of its host, the human body. Darwinian evolutionary theory and its more recent synthesis are scientific explanations of humanity and its normative systems. But science is rooted in facts, rationalizations, experience and evidence, which like philosophical reasoning do not and cannot, standing alone, reach existence or experience prior or antecedent to its actualization.¹⁸³ Neither can science or philosophy explain faith or human belief systems by their methods. This gap in science, philosophy and faith might be filled by examining human spirituality. Such a task is a huge undertaking which cannot be handled within the time and space constraints of this study. Moreover, this task is better suited to scholars of religious studies. We shall therefore limit our discussion to human spirituality as expressed in certain texts of the Bible. By this, we do not intend to enter the larger conversation about the relationship between Jewish law and the common law.¹⁸⁴ It is our hope that this limited focus will nevertheless shed some general light on the role of human spirituality in the making and keeping of promises, commitments and contractual obligations. Our discussion of some of the Biblical sources shall focus on the following areas: (1) the Biblical view of the

182. The argument advanced here does not seek to engage the debate on the issue of intelligent design, a term that has acquired multiple meanings over time. For a discussion of the complex nature of the concept of intelligent design, see LANGUAGE OF GOD, *id* at 181 (chapter devoted to the topic.) For a general discussion of the topic, see DEBATING DESIGN: FROM DARWIN TO DNA (W.A. Dembski & K. R. Ruse eds 2004), K. R. MILLER, FINDING DARWIN'S GOD (1999) and W. A. DEMBSKI, THE DESIGN REVOLUTION (2004).

183. C. S. LEWIS, MERE CHRISTIANITY (1952) (hereafter MERE CHRISTIANITY) (explaining the functions and limitations of science in the following words: "Science works by experiments. It watches how things behave... But why things come to be there at all, and whether there is anything behind the things science observes—something of a different kind, this is not a scientific question." at 23. See also COLLINS, LANGUAGE OF GOD, *supra* note 181.

184. A growing body of literature is devoted to the influence of Judaism and Jewish law on western legal systems particularly the common law and the U.S. legal system from its very founding days. Because the focus of this Article is not on the influence of Jewish law on western legal systems we shall provide here a sample of the growing literature for the interested reader. See, Moshe Silberg, *Law and Moral in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961-1962) (hereafter, Silberg, *Jewish Law and Morals*.) (comparing and contrasting the religion-based and duty-orientation of Jewish law with the emphasis of the common law on rights.); Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983-1984) (hereafter, Cover, *Nomos and Narrative*.) (describing the architecture of Jewish law as anti-hierarchical, egalitarian, and communitarian and using that as a model for addressing issues of constitutional interpretation in the U.S.); *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION 65 (1987) (arguing that Jewish law places emphasis on duties and reciprocal duties rather than on rights.); Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685 (1990-1991) (arguing that current interpretative debate between originalism and exegesis might benefit from an examination for the interpretative methods of religious text by Jewish Rabbinic sages.); Saul Touster, *The View from the Hilltop*, 33 BUFF L. REV. 571 (1984) (tracing the influence and contribution of Judaism and Jews to certain core legislative, judicial and social justice concepts to the U.S. legal system to its founding days and through different phases of its evolution.); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1992-1993) (hereafter, Stone, *The Jewish Legal Model*) (emphasizing the religious nature of Jewish legal system that creates an interlocking relationship between the interpreter the legal actor and the divine thereby drawing the distinction between the secularized theory of justice in U.S. jurisprudence and that based on the divine under Jewish law.); Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, With Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257 (2006) (exploring the influence and applicability of Jewish law of self-incrimination on American law.)

ethical order of the universe; (2) the relevance of the Biblical creation myth to the keeping of promises; (3) the implications of the Biblical canon of imitation of God and (4) the relationship between the concept of forgiveness and legal consciousness in contractual obligations. These topics will be examined in the order presented.

A. *The Biblical Ethical Order of the Universe*

The starting point of any serious discussion of the biblical ethical order of the universe must start with the Torah and the discussion of its precepts by Rabbinic sages, Talmudic commentators and others dating back to the antiquities.¹⁸⁵ This is an exercise that even the most competent Talmudic commentators that have devoted their lives to the study of the Torah and the Mishnah cannot undertake lightly. For the untutored with original language handicap, the exercise is virtually an impossibility and must be approached with the greatest trepidation and humility. It is therefore with the greatest caution that we proceed with this examination of the Bible as a source of the ethical order of the universe. In doing so, we shall draw on the text itself and those Talmudic commentaries best suited to the task at hand. The Talmud contains very specific and detailed rules pertaining to various transactions.¹⁸⁶ But these rules cannot detain us here. We are interested in the broader and universal ethical order on which the specific transactional rules were deduced. No description by the Rabbinic sages could stand in opposition to the ethical order delivered by God to the universe. They must necessarily be a coherent part of the Law, the Order or system of morals upon which the universe depends.¹⁸⁷

The universe, according to Talmudic commentaries was created by God to be governed by one ethical order delivered to humanity in the Torah. Talmudic scholars have long maintained that the ethical order by which the world was to be governed was created before the universe itself. Wisdom with which the Torah is

185. See, *supra* note 6 (providing sources to Talmudic commentaries.)

186. Chapter Four of the Steinsaltz Edition of the Talmud provides the specific rules relating to the acquisition of movable property and agreements between individuals. It also provides a translation of the Mishnah and the Talmud commentaries on those rules. What should be noted is that these specific rules are based on some specific text of the Torah. In this case the following are relevant: “*And if you sell something to your neighbor, or buy something from your neighbor’s hand, do not oppress one another*” (Leviticus 25:14); “*And you shall not oppress one another, but you shall fear your God, for I am the Lord your God*” (Leviticus 25:17); “*You shall neither vex a stranger nor oppress him, for you were strangers in the land of Egypt*” (Exodus 22:20); “*And if a stranger sojourns with you in your land, you shall not vex him*” (Leviticus 19:33), THE TALMUD, THE STEINSALTZ EDITION, *supra* note 6??, chapter four at 1)

187. The context in which the Talmud was written is illustrative of the view that whatever man could add to the word could not be superior. See, ALAN CORRÉ, THE TALMUD: UNDERSTANDING THE TALMUD (1975)(hereafter, CORRÉ UNDERSTANDING THE TALMUD) . In a forward to this book Alan Corré provided the context and attitudes of the Talmudic sages. First, the supernatural was taken as a given. Belief in the existence of God was natural as the belief in man. Second, the attitude towards knowledge was that learning was a given, external and immutable and man’s educational task was to study the given corpus intimately. However, there was a limit to this learning. Originality was not possible because whatever God said could not be improved upon. This point is made even clearer in Deuteronomy 12:32 which states as follows: “What thing soever I command you, observe to do it: thou shalt not add thereto, nor diminish from it.” state What can man need beyond what God has told him. So, man was left with the task of interpreting and perhaps sometimes manipulating what God has said. at ix-x.

associated was thus created before the universe.¹⁸⁸ The universe was then created in contemplation of the ethical order by which it was to be governed. The Torah provided the world with a moral order and a system of laws for order and social cohesion. The universe had to accept an ethical order, one that was beyond the *self* and the centrality of the *self*. And Israel was the instrument through which this was achieved.¹⁸⁹ The process by which the Torah was delivered is of central importance to our inquiry. It appeared that God did not give Israel a choice in the matter. For it is written that “*God had established a covenant with the works of the Beginning: If Israel accepts the Torah, you will continue to exist; if not, I will bring you back to chaos.*”¹⁹⁰ As explained by Emmanuel Lavinias, thus framed, it was the Torah or Death, Truth or Death and Liberty or Violence for Israel.¹⁹¹ The proposal left Israel with virtually no choice if it wanted to avoid death and destruction. With a rejection of the Torah, mount Sinai itself would have been the graveyard of Israel. The rational response for Israel would have been to demand proof or some evidence before its commitment. With such evidence it would then have engaged in an informed calculation before adherence. Thus, the question presented is whether Israel adhered to God’s command after knowledge or experience. That is, whether the acceptance of the Torah was based on some rational choice, a choice derived from reason or knowledge tested through evidence.

On the other hand, was the acceptance of the Torah a spiritual experience? The spiritual involves reaching what is beyond us but within us. It involves the discovery of our deeper moral core which requires no rationalization. An objectivization of the spiritual would deaden the nerves to the inner most consciousness. And, that is what has been aptly called the temptation of the philosophy. By this is meant the subordination of the ethical order which lies beyond rationality to one premised on pure philosophical argument. This philosophical process of reaching decisions through prior knowledge or experience is what Lavinias described as “The Temptation of Temptation.”¹⁹² By this, Lavinias meant the temptation of knowledge, knowing before doing as opposed to knowing everything without experiencing it.¹⁹³ As he described it, the temptation of philosophy “is the subordination of any act to the knowledge that one may have of that act.”¹⁹⁴ Thus, the temptation of temptation is the priority of knowledge to deeds. According Lavinias, Israel avoided the temptation of philosophical reasoning by trusting the Word of God, accepting it on its own basis and adhering

188. ABRAHAM COHEN, EVERYMAN’S TALMUD, 28 (1949)(discussing the relationship between God, the Torah and wisdom in the creation of the universe.)

189. *Id.* According to Cohen this point is not without controversy. However, he is of the view the teachings of the Torah and the rabbis did not exclude non Jews. at 213. However, *see* also SCRIPTURES OF THE ORAL TORAH (Translated & Ed. Jacob Neusner, 1987) at 2 (arguing that the vision of the given Torah was not only for Israel but all of creation to the outer reaches of the uncharted space and the entirety of humanity. All nations and creatures through the revelation of the Torah come into relationship with God.

190. EMMANUEL LAVINAS, NINE TALMUDIC READINGS, (Translated and with Introduction by, Annette Aronowicz (1990))(hereafter, LAVINAS, NINE TALMUDIC READINGS) at 30, quoting from the Tractate Shabbath, pp 88a and 88b.

191. *Id.* at 37.

192. *Id.* at 34.

193. *Id.*

194. *Id.*

to the Torah prior to free examination. That is, doing before hearing. It is a leap of faith to trust from the start and accept the Law or Order, the content of which was yet to unfold itself in the future.¹⁹⁵ This trust, Lavinias argues should not be described negatively. For, he stated: “The order thus founded extends, after the fact, to the act of foundation, Reason, *once it comes into being*, includes its pre-history.”¹⁹⁶ But it is this adherence prior to knowledge that made the realization of the ethical order of universe possible.

A few pertinent observations ought to be made from the discussion of the Talmudic commentaries of the ethical order of the universe. According to these Rabbinic teachings, God created a covenant with the universe through Israel in the giving and acceptance of the Torah. This covenant with God is, par excellence, the *Contract of all Contracts. It is the first contract and, at that, the ultimate contract.* The basis of this contract was not some rational calculation of utility or some cost and benefits analysis. Rather, the foundation of the first contract was the spiritual relationship between God and humanity. Although God offered his past deeds in support of the offer to Israel to accept the covenant the realization of the nature and content of the covenant was still a future event to unfold. Following this evidence of past deeds, God made the following offer of the covenant: “Now therefore, if ye will obey my voice indeed, and keep my covenant, then ye shall be a peculiar treasure unto me above all people: for all the earth *is* mine:” (Exodus 19:5). God offered additional rewards for accepting the covenant stating: “And ye shall be unto me a kingdom of priests, and an holy nation. (Exodus 19:6) Israel accepted the covenant before the actual knowledge of it and the promised rewards. Acceptance purely on the word of God, without proof or calculation may be properly described as the ultimate demonstration of faith.

One may then argue that from the Biblical point of view, the foundation of the law of contract is in the faith demonstrated in the covenant with God which involved the commitment to doing before hearing. But the corollary to that commitment and trust is the fulfillment of the promises undertaken. For, it is said that when God makes a promise he fulfils it first.¹⁹⁷ Thus, one can deduce from the

195. According to Cohen, “faith was the distinguishing feature in the lives of the heroes of the Bible and also by which they merited the special favour of God. Great is the faith with which Israel believed in Him Who spake and the world came into being....Many of the commands which God gave to Moses for Israel had for their object the instilling of faith into the people.” COHEN, EVERYMAN’S TALMUD. *Supra* note 188, at 79.

196. LAVINAS, NINE TALMUDIC READINGS, *supra* note 190, at 38.

197. EVERY MAN’S TALMUD, *supra*, note 188, at 210 (explaining that God set the Israelites an example of obedience by fulfilling his promises Himself. As proof the following citations from the Bible are given: “Thou shalt rise up before the hoary head, and honour the face of the old man, and thou shalt fear thy God: I am the Lord” (Lev. Xix 32; and “I am He who fulfilled the command of rising up before the hoary head first.” (Lev. R. xxxv. 3) There is a larger point raised here about the supremacy of the rule of law in which God the law giver is himself subject to his own decree. No Talmudic discussion better captures this than famous allegoric narrative concerning the “oven of Aknai. The following discussion of it by Moshe Silberg is illustrative:

“This idea of the Law’s supremacy over its giver found its magnificent allegoric expression in the story of the oven of Aknai. A diversity of opinion arose among the Tannaim regarding a dry question of the Law: whether an oven which instead of being made in one piece was made in a series of separate portions with a layer of sand between each was to be regarded as one structure of mortar liable to the laws of ritual impurity or as an earthenware utensil not subject to these laws. Rabbi Eliezer was of the opinion that the oven was unclean. Rabbi Eliezer looked for ways to convince his colleagues that he was right. And the *Breita* relates:

On that day Rabbi Eliezer brought forward every imaginable argument but they [the Sages] did not accept them. Said he to them, “if the Law agrees with me let this carob tree prove it!” Thereupon the carob tree

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teachings of the Rabbinic sages that the moral basis of the *Contract of all Contracts* is embedded in the goodness of God, in his unwavering trust, compassion and graciousness. However, having provided his performance and graciousness as an example, God expects no less of an equivalent measure from humanity.

So, what has changed in the law of contracts in modern times? Commitments in contracts of lesser import than the covenant with God remain rooted in faith and human spirituality. Contractual commitments still require some leap of faith not dissimilar to that undertaken in the acceptance of the Torah. Although the parties might make some calculations and rationalizations of the cost and benefits from a particular transaction the realization of the expected gains remain a hope and speculative until actual performance. The commitment when made is not therefore based on experience before action. It is adherence based on faith and trust of the actualization of future performance. But this lesser contract between humans is nevertheless governed by the same ethical order established in the delivery and acceptance of the Torah.

The importance of the discussion of the Biblical ethical order of the universe lies in what appears to be a general human phenomenon.¹⁹⁸ The search for some universal ethical order which has its origins or links to the supernatural or some deity is not unique to the Judeo-Christian systems of belief. From time immemorial, the world's systems of religions and human spirituality have always sought to evolve some general belief systems or universal ethical order as a transcendent guide to human behavior including human exchange relations. A survey of the world's religions and belief systems more than adequately supports the existence of a universal ethical order within each system. The evidence shows that from the Babylonian Hymns to Samos to the ancient Egyptian Book of the Dead, from the Chinese Analects to the Stoics and Platonists of ancient Greece,

was torn a hundred cubits out of its place — others affirm, 400 cubits. 'No proof can be brought from a carob tree,' they retorted. Again he said to them, 'If the Law agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards. 'No proof can be brought from a stream of water,' they rejoined. . . . Again he said to them, 'If the Law agrees with me, let it be proved from heaven!' Whereupon a Heavenly Voice cried out, 'Why do ye dispute with Rabbi Eliezer, seeing that in all matters the Law agrees with him!' But Rabbi Joshua arose and exclaimed, 'It is not in heaven' . . . (Deuteronomy 30:12) [since] the Law had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written I the Law at Mount Sinai, 'after the majority must one follow.' (Exodus 23:2).

And the Talmud adds, "Rabbi Nathan met Elijah and asked him 'What did the Holy One, Blessed be He, do in that hour?' — 'He laughed (with joy),' he replied, saying, 'My sons have defeated me, my sons have defeated me!'" Here we find the Rule of Law in the absolute sense of the term: The law ruling the lawgiver; the inclusion of the legislator himself within the framework of legal and decisional relationships created by the laws given by him." Silberg, *Jewish Law and Morality*, *supra* note 184, at 310-311. For some discussion of this allegoric narrative, *see*, Stone, *The Jewish Legal Model*, *supra* note 184, at 840-855. The question then is whether contractual obligations rise from duties imposed by God's divine edicts or are purely of a civil character.

198. The universality of some moral order that guides humanity has been pointed out by one astute student of human culture. *See*, C. S. COLLINS THE ABOLITION OF MAN 85 (1944)(hereafter ABOLITION OF MAN)(In an appendix, Lewis provides several cross cultural examples of universal moral principles covering numerous ethical topics and different time periods of the history of humanity.) C. S. Lewis, CHRISTIAN REFLECTIONS 23 (ed. Walter Hooper 1967)(arguing that human beings find themselves under a moral law they cannot quite forget even if they tried.

from Hinduism to Islam, one finds a stubbornly triumphant and recurring theme of some belief in an ethical order delivered by some deity as a guide to human conduct.¹⁹⁹ Indeed, Plato in his famous book, *The Laws*, argued that not only is the priority of the soul as master established but also that the soul is the source of the spiritual order that is older than all matter.²⁰⁰ From Australian Aborigines to the natives of Africa, from the highly structured state craft of the Ashanti to the highly decentralized social organization of the so-called stateless societies the same common pattern of a divinely inspired universal order does not miss a beat.²⁰¹ Thus, these monotonously recurring themes are found in all societies, primitive and civilized, literate and those based on oral traditions. Concepts such as fairness, equity, justice and good faith wherever they may be found are not entirely devoid of human spirituality. Various spiritually induced ethical orders may be framed in terms of maintaining some coherence between humanity and nature, or may be governed by some relationship between some super natural forces and human beings. The particularization in the Biblical ethical order of the universe and the covenant with God should therefore not confuse us. The general relevance and importance of human spirituality in establishing some universal ethical order governing the making and keeping of promises remain pervasive. This need may be variously expressed or captured in different religious beliefs however expressed.

B. Biblical Creation Myth and the "Word"

The account of creation in the Book of Genesis is highly suggestive of the central role of the spoken Word in the legal consciousness in contractual obligations. The Book of Genesis offers two versions of the creation narrative in the first two chapters. In the first chapter, one version of the creation story is narrated in which the "Word" takes center stage. This chapter starts with a verse that states: "In the beginning, God created the heaven and the earth." (Genesis 1:1) Then, it proceeds to describe how that creation was performed, all through the spoken "Word" of God. The dark, formless, chaotic mass of primeval water was transformed into a coherent orderly universe by no other act than the simple command of God. God only had to say "Let there be" and there was. Successively, God uttered the same command and created light, the firmament, water, the earth, vegetation, animals and others. The significance of the "Word" in the creation story in Genesis is further emphasized in other parts of the Bible. We note that the Gospel of John states that "in the beginning was the "Word" and the "Word" was with God, and the "Word: was God. (John 1:1) God and his awesome powers are manifested in the "Word." The second version of the creation narrated in the

199. COLLINS, LANGUAGE OF GOD *supra* note 238 at 24, citing C. S. Lewis, *The Poison of Subjectivism*; CHRISTIAN REFLECTIONS, *Id.* at 77.

200. PLATO, *THE LAWS* (Penguin Classics 1970) par. 896. Plato was trying to prove the existence of God as a prelude to his laws against impiety.

201. *Id.* See also R. S. RATTRAY, *ASHANTI* (1923) (describing in detail the religious beliefs of the Ashanti and the intricate link between spirituality, law and morality.); *ASHANTI LAW AND CONSTITUTION* (1929) (gives an account of the constitutional framework, the laws and the relationship between structures, institutions and the supernatural.); JACK GOODY, *DEATH, PROPERTY AND ANCESTORS* (1962) (explaining the influence of the supernatural (ancestors, God and other spirits in ethical order by which the Dagaaba society was structured.)

chapter 2 appears to have some inconsistencies with the first version with respect to certain specific details and sequence of events. Whatever the differences and inconsistencies might be, the account is a religious one based on a belief system.²⁰²

However, the Bible does not have monopoly over how the universe was created. There are other creation stories in the cosmogonic traditions of Near East antiquities that share certain characteristics with the account given in chapter 1 of the Book of Genesis.²⁰³ In Babylonian creation literature the ordered cosmos was created from chaos pursuant a struggle between the god of cosmic order (Marduk) and the goddess of cosmic disorder or chaos (Tiamat). The victorious Marduk brought order and created the universe.²⁰⁴ Similarly, Egyptian creation myths also capture the creation process as a transformation of chaos to an ordered cosmos by a deity. However, “The Memphite Theology of Creation”, of the universe best resembles the account rendered in first chapter of Genesis. According to that account, the universe was created by the god Ptah through his tongue, command or speech.²⁰⁵

The role of the supernatural or some deity in the creation of the universe seems dominant in the creation myths of several other cultures across the world. According to Greek mythology, Zeus, the supreme and most powerful of all Greek gods, delegated the creation process to lesser deities. In his influential book: *The Laws*, Plato, in his proof of the existence of god, argued that the earth and all material objects were created by one or more souls (gods) whose existence was antecedent to the creation of all material objects.²⁰⁶ In Rome, Cicero offered an account of creation in which constant changes and revolutions in the heavens preceded the creation of the human race by God in his image.²⁰⁷ African traditional creation myths and cosmogonic beliefs also attribute the creation of the universe to some super natural force or some supreme deity²⁰⁸

Certain common themes and patterns seem to tie together the various creation stories and cosmogonic views of antiquity noted above. Common to all of them is the theme of turning chaos into order. Also common to these narratives is the role of some deity or God in the creation of the universe. But more importantly, in some versions, the very act of creation, the awesome power that turned nothing or a formless mass into something no less than the entire universe and humanity was carried out through the simple spoken “Word” of some deity.

The central point of these creation stories and, in particular, the account given in Genesis is not to provide a scientific account of how the universe came into being. The authors of the Book of Genesis had no such motivation. They

202. PAMELA T. REIS, *READING THE LINES: A FRESH LOOK AT THE HEBREW BIBLE 14-26*(2002)(hereafter, REIS, *READING THE LINES*)(discussing and debating the inconsistencies in the creation narrative in Genesis chapters 1 &2)

203. S.A. NIGOSIAN, *FROM ANCIENT WRITINGS TO SACRED TEXTS*, (2004)(discussing the history and analysis of Penateuch and in particular the creation stories of Near Eastern antiquities.)

204. *Id.* at 32

205. *Id.* at 33.

206. PLATO, *THE LAWS*, (Penguin Books 1970) par. 896 Plato argues that the soul is identical with the original source of the generation and motion all things, past present and future. Being the source of motion, the soul is the *soul is the most ancient thing there is.*

207. CICERO, *DE LEGIBUS* (Loeb Classical Library...)323...

208. RATTRAY, ASHANTI; ASHANTI LAW AND CONSTITUTION, *supra* note 201(explaining the pervasiveness of the Ashanti belief systems and religion the structure and functioning of society and its institutions at all levels.)

simply wanted to emphasize that the entire universe came into existence by the act of God. As appropriately pointed out by Alan Corré, the existence of this powerful God was a given just as much as the existence of man was a reality.²⁰⁹ The debate over the apparent contradictions in the two versions of the creation narrative does not cast doubt on the religious and spiritual belief of the authors in God as the creator of the universe.²¹⁰ The debate over the historical and scientific accuracy of Biblical accounts seems to miss the point. Human spirituality and belief systems are not necessarily in the domain of scientific and philosophical arguments. The other creation narratives of Near East antiquities had similar objectives as the authors of the Book of Genesis. Certainly, the narrative in Genesis elicits some delving into our spirituality, faith and belief rather than a rational examination of the facts and events captured in the narrative.

Besides, the centrality of the “Word” in the relations between God and humans is captured in countless other places in the Bible. As discussed above, it was through the spoken word that the ethical order of the universe was delivered. The covenant with God was first only in the spoken word, a verbal covenant. In different parts of the Bible, God communicates with humans directly or in the form of Revelations through various prophets, and this is in some form of speech. But the Bible also states that God created man in his *own* image.(Genesis 1:27, 9:6) In this context the “word”, as explained by Jacob Neusner, comes from a voice of silence, thin and sinewy; not in the storm or in fury. It is the voice of God that spoke to Moses.²¹¹ The question of significance to our inquiry is: if human beings were made in the image of God and were given the power of speech, a divine semblance of the power of God, would their spoken words be simply empty words, or would their words carry some potency, some bonding power and responsibility as evident in the words of God himself? Put differently, from the spiritual perspective, human speech in the form of promises and commitments are burdened by responsibility in the same way the words of God himself are. And this is not a philosophical but spiritual argument.

Even if one were to secularize the narrative in the Book of Genesis, the spiritual undertones of the story of Moses and the necessity for the delivered ethical order of the world could not easily be dismissed. The relationship between God and his creatures is woven and knitted together into an intricate tapestry of promise keeping expressed powerfully in the form of the covenant with God. If, as the Bible claims, human beings were made in the image of God with the capacity to speak, that capacity when exercised carries with it responsibilities and burdens.²¹²

C. *The Imitation of God*

209. CORRÉ UNDERSTANDING THE TALMUD, *supra* note 187.

210. See generally, REIS, „READING THE LINES, *supra* note 202..

211. SCRIPTURES OF THE ORAL TORAH, *supra* note...at 3.

212. It is interesting to note that modern jurisprudential and philosophical discussion of Jewish Law stress the duty and reciprocal obligations aspects of the law which takes such a character from divine and religious content and origins. See, Silberg, *Jewish Law and Morals*, *supra* note 184, at 306; Cover, *Nomos and Narrative*, *supra* note 184; ;*A Jewish Jurisprudence*, *supra* note 184, and Stone, *The Jewish Legal Model*, *supra* note 184.

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Equally relevant to our spirituality and consciousness is the connection created between God and His creatures, human beings. According to Cohen, the notion that the human being was created in the image of God lies at the heart of Rabbinic teachings concerning man.²¹³ However the possession of the divine semblance of God carries with it certain implications. The Rabbinic teachings stress that human beings must always keep this divine semblance in mind in their dealings with others. An important basic doctrine of the Torah in support of this is the statement: “Thou shall love thy neighbour as thyself.” (Lev. 19: 18) In addition to this, Talmudic teachings derived from the Torah also stress that to live a moral life human beings must imitate God. The imitation of God involves many issues but most important for our discussion is the making and keeping of promises and commitments. If we heed the command of the Torah to love our neighbors as ourselves, we would keep our commitments to them as we would to ourselves. We would not be thinking about efficient breach of contracts. Moreover, one of the precepts of the Torah is that God fulfils His commands and promises Himself first as an example to humanity.²¹⁴ The imitation of God would then require that promises and contractual obligations be fulfilled and not taken lightly. Assuming clarity of terms, this would also mean that efficient breach would not be in our calculations; nor would the contracting parties be looking for better bargains and exit instruments within the agreement to bail out when an *ex post facto* rationalization of the deal invites such a move. Some Talmudic sages even go to the extent of arguing that contracts in violation of divine law might still be valid.²¹⁵ If so, this puts the obligation to keep our promises in sharper focus.

The notion of the imitation of God to live a moral life is certainly not a simple task for human beings. Human consciousness would have to engage certain attributes of God such as compassion, graciousness, generosity, mercy and truthfulness. All of these attributes, if maintained would facilitate the fulfillment of contractual obligations under even the most trying circumstances. With faith the cost to the parties will become irrelevant in the spiritual calculations.

D. Forgiveness and Legal Consciousness in Contractual Obligations

As is apparent from the discussion above, the ethical order of the universe, the covenant with God captured in the Torah and the commentaries of the Rabbinic sages present direct spiritual elements in human consciousness in contractual obligations. However, any links that one may discern between the concept of forgiveness and the keeping of promises in the Talmudic commentaries are more oblique and opaque than transparent. The spiritual links between forgiveness and promise keeping nevertheless exists but must be teased out from various Biblical

213. COHEN, EVERY MAN'S TALMUD, *supra* note 188, at 67.

214. In Leviticus it is written: “Thou shalt rise up before the hoary head, honor the face of the old man, and thou shalt fear thy God: I am the Lord.” (Lev. 19: 32) and “I am He who fulfilled the command of rising up before the hoary head first.” (Lev. 35: 3).

215. The issue of the validity of an illegal or immoral contract has been the subject of explicit discussion by Talmudic sages. In an instructive discussion of this topic, Moshe Silberg quotes extensively from Talmudic sources. The point worked in those discussions is whether a contractual obligation imposes a religious -moral duty subject punishment as a religious transgression or civil-legal duty governed the rules of damages. *See*, Silberg, *Jewish Law and Moral*, *supra* note 184, at 314-321.

texts and related Talmudic commentaries. But the fact that the links between the concept of forgiveness and consciousness in contractual obligations are not immediately transparent might make them of greater significance to our inquiry. As it has been pointed out by Jacob Neusner, all documents of the Torah, in the end, form components of a single system.²¹⁶ From text to context, from description and analysis to interpretation, there is unity in the text, the society and culture captured in the Torah.²¹⁷ So, to the extent that the Bible talks about forgiveness, the ethical order of the universe and the covenant with God, some connection between forgiveness, human spirituality and legal consciousness should exist. For the purposes of investigating this link, we shall rely on a highly sophisticated and insightful commentary on forgiveness by Emmanuel Lavinias on two Talmudic passages from the Mishnah and the Gemara.²¹⁸ We are conscious of the fact that by its very nature the Talmud invites examination and contextual interpretation from different view points. The light each commentary sheds on the text brings the text to life in a new context. And this new contextual commentary is what is interesting about Lavinias commentary on forgiveness.

The Talmud creates two contexts in which forgiveness plays a role in human spirituality. It draws a distinction between sins against God and sins against our neighbor. In the case of sins against God, the general doctrine is that forgiveness must be sought directly from God. However, for sins against our neighbor the doctrine demands that we first seek forgiveness from our neighbor before we can seek forgiveness from God. In both contexts, Lavinias provides us with two texts from the Mishnah and the Gemara that present two separate but related analytical frameworks for understanding the concept of forgiveness. It is this analytical framework that we would like to examine by first focusing on the concept of forgiveness for sins against God as codified in the following text of the Mishnah:

The transgressions of man toward God are forgiven by him by the Day of Atonement; the transgressions against other people are not forgiven him by the Day of Atonement if he has not first appeased the other person.²¹⁹

What does this text mean in terms of our spiritual relationship with God and how does that impact our general moral conscience and our social morality? The teachings of the Mishnah that our transgressions against God are forgiven on the Day of Atonement is deceptively simple. Forgiveness for our sins against God is totally in our hands and no one else's. The relation between God and human beings is a vertical one; one of superior and inferior, and one of the creator and the creature. It is a relation that requires the marshaling of all one's deepest moral conscience as a sinner to seek forgiveness directly from God, the divine power of

216. JACOB NEUSER, *JUDAISM, THE CLASSICAL STATEMENT*, 1 (1986).

217. *Id.* at xi.

218. LAVINIAS, *NINE TALMUDIC READINGS*, *supra*, note 190, at 12 (In a chapter entitled, *Toward the Other*, Lavinias presents a complex and illuminating discussion of the concept of forgiveness and human spirituality.) The Mishna has been described as the codification of the law established in oral teachings by Rabbi Judah Hanassi toward the end of the second century. The Gemara on the other hand was the commentary on the Mishna to make it complete, thus the designation, *Gemara* (Completion.) For further introductory discussion, *see*, COHEN, *EVERYMAN'S TALMUD*, *supra*, note 188, at xxxix.

219. LAVINIAS, *NINE TALMUDIC COMMENTARIES*, *supra* note 190, at 12 (excerpts of the Talmud taken From the Tractate Yoma, pp85a-85b and translated by Lavinias.)

all powers. How easy is that? For, the fact of transgressions of the prohibitions and the ritual commands of God might suggest certain weaknesses and deficiencies in our inner ethical architecture. It might be indicative of an inner moral and spiritual decay that weakens us and poisons our relations with God. Thus, ritual transgressions might also be indicative of the gravity of the illness of the Soul which must be healed to restore the spiritual connections with God. As Lavinias puts it: “Perhaps the ills that must heal inside the Soul without the help of others are precisely the most profound of ills.”²²⁰ That the Soul suffers from such deep seated ailments raises questions about how easily it can marshal all its moral inner forces to attain the level of contrition and repentance necessary for forgiveness directly from God. And, this is where Lavinias sees, what we believe is, an interesting link between ritual and social morality and the consciousness in contractual obligations.

According to Lavinias, social morality may depend on our deeper moral consciousness which is ritualistic. Lavinias argues that there is a link between one’s moral conscience that lies in one’s deepest inner self or in the marrow and one’s social morals. Ills that must be healed inside the soul are the most profound of ills.²²¹ They are the source of ritual transgressions against God. But ritual transgressions which are offences against God do not only say a lot about our inner moral state but also are the source of our cruelty toward our neighbors.²²² If the moral decay in our inner core prevents us from keeping our direct obligations toward God it would be a lot easier for us to renege on our promises and commitments to our neighbors. Thus, the legal consciousness in contractual obligations seems rooted in our deeper moral conscience that permits a tighter spiritual link with God and our neighbors.

It is hardly surprising that Lavinias sees an interlocking connection between social morality and ritual morality. Those able to avoid ritual transgressions against God are less likely to commit offences against their neighbors and more likely to keep their promises and commitments to others. After all, the ritual commands of God are part of the covenant with God. Ritually and spiritually observant people are also more likely to keep their promises by heeding one of the fundamental principles of the Torah stated as the Golden Rule; “Thou shalt love thy neighbour as thyself.” (Lev.19:18) While the New Testament framed this principle in the positive, Talmudic sages captured and reformulated it in the following negative form: “What is hateful to yourself, do not to your fellow-man.”²²³ Whether framed positively or negatively, the essence of the Golden Rule is love. If we love our neighbors as ourselves we are more likely to keep our commitments and promises to them. Besides, those who have the spiritual fortitude to attain the level of contrition and repentance necessary to seek forgiveness from God are also more likely to seek forgiveness from their neighbors and keep the Golden Rule.

220. *Id.* at 19.

221. *Id.* at 17.

222. *Id.*

223. COHEN, EVERYMAN’S TALMUD, *supra*, note 188, at 214.

In summary, Lavinias' argument is that the moral consciousness that goes to the core of our relations with God is a deeper level of relationships. It is deeper than the social conscience that awakes the command to treat thy neighbor well. The deficiency in our moral conscience that permits us to commit offences against God is the very deficiency that permits cruelty against others. Cruelty is a harsher term but it certainly incorporates all the offenses contractual or otherwise against our neighbors.

The identification of this deeper inner moral core that makes us focus on God and our neighbors is certainly different from the ego-centric Benthamite utilitarian principle. Bentham's utility principle neither recognizes nor awakes this deeper moral consciousness that is about the self and self's relations with a higher spiritual being. It is this moral conscience that forms the basis of our relations toward others. It invites and demands self restraint in those relations which is sometimes the very antithesis of our happiness. For, what makes us happy is not always in concert with our moral conscience.

We shall turn our attention to the text on the issue of transgressions against our neighbors expressed in the Gemara. Although the commentary by Lavinias raises several important points we shall focus on distilling certain salient conclusions that are most relevant to our topic. As discussed above, the Mishnah appears to have codified two autonomous doctrines of forgiveness that seem to form part of a single coherent system. The doctrine that we must seek forgiveness directly from God for our sins against God is connected to the second doctrine of seeking forgiveness from our neighbor first before forgiveness by God. In both circumstances God remains in the picture. The sins against our neighbor for which we must seek forgiveness from him first also constitute some level of transgressions against God. Thus, the Talmud appears to establish a sequence or a chain of forgiveness between neighbors on the same plane which eventually repairs the vertical relations between human beings and God. Besides, sins against our neighbor might indeed be indications of our inner moral poverty which may further suggest a weaker confidence or belief in the ethical order of the universe delivered in the Torah. As discussed above this may be the real source of our sins against our neighbors.

The Gemara seems to impose a higher standard of forgiveness for sins against our neighbors. The text suggests an active process of interaction between the guilty party and the offended. The guilty party must not only recognize the fault but must take active steps to seek forgiveness. Furthermore the Gemara demands that we insist energetically, that we mount an assault on our neighbor and that we open our purse whenever we hurt our neighbor.²²⁴ But one may ask: Why does the Gemara require this?

The emphasis on this active and interactive process of healing the wounds between neighbors serves several very important social purposes. As discussed above, our relations with God is a vertical one; one of hierarchy or superior/subordinate. The one commands and the other obeys. The one is the creator and the other the created. Social coherence is not easily achieved through

224 LAVINAS, NINE TALMUDIC COMMENTARIES, *supra* note 190, at 20.

vertical relations or systems of hierarchy which mirror the command and subordinate structure that exemplifies the relationship between God and his creatures. Hierarchy insulates and isolates the superior from the rest and does not necessarily command the seeking of forgiveness by superior from the subordinate. Absent the doctrine of forgiveness as formulated in the Torah, hierarchy is a phenomenon not easily conducive to social cohesion. However, our relations with *all* our neighbors is a horizontal one which is more conducive to the demands of cultivating social cohesion. The Gemara seems to recognize this need and appears to view forgiveness as an instrument for social weaving and the knitting together of social fragments caused by our transgressions against our neighbors. Forgiveness therefore possesses some integrating and welding powers necessary for building, repairing and sustaining the social cohesion necessary for the observance of the general ethical order of the universe. The Talmud and Rabbinic sages recognized, and correctly so, that chaos, social fragmentation, factionalism and fissiparous tendencies in any society are neither conducive to its very existence nor to its spirituality.

In conclusion, it appears that the insistence in the Gemara that active and vigorous steps be taken to seek forgiveness for sins against our neighbors serves several of the species-typical human characteristics discovered by the new Darwinian evolutionary biologists. The doctrine of forgiveness would permit and enhance the maintenance of the conditions for cooperation, reciprocity and the building of alliances. But all of these are species-typical traits that are pervasive across cultures. In the final analysis, it would appear that human spirituality as a source of legal consciousness may indeed provide the deeper explanation for and motivations behind some of the exchange relations identified as scientific facts.

Finally, Lavinias sees a link between forgiveness and responsibility which extends to the institution of society.²²⁵ Transgressions against our neighbors may take different forms: tortuous or contractual. The passage in the Gemara states that whoever hurts his neighbor even through words must appease him. With respect to contractual obligations the passage further states that: "If you vouch for your neighbor and pledge your word for a stranger, you are trapped by your words. You have fallen into the power of your neighbor." In other words, your words are *not* empty words. They are impregnated and carry with them some bonding and entrapping effects which diminish your freedom and autonomy until the obligations are discharged.

225. *Id.* at 21.

The transgressions against our neighbor suggested in the passage share certain common characteristics. They rise from the spoken word and they cause injuries of a financial or other nature. Given these characteristics, Lavinias poses the following interesting question: What is the lesson to be learnt from them: the identity of the injury or the essence of speech? In response to the question, Lavinias argues that the lesson of this passage is not the identity of the injury but the essence of speech. The original essence of speech is the commitment to another; it is the creation of some bonding and entrapping powers all of which point to an important social institution: responsibility. Speech is then an instrument for creating responsibility without which a functioning society cannot exist. Thus, the essence of speech is about assuming responsibility for what is said: be it a commitment, a promise or some other statement. Lavinias describes the connection between speech, responsibility and society in the following words:

The original function of speech consists not in designating an object in order to communicate with the other in a game with no consequences but in assuming toward someone a responsibility on behalf of someone else. To speak is to engage the interests of men. Responsibility would be the essence of language.²²⁶

By elevating the importance of speech to such a high level, Lavinias may appear to be overstating his case. However, it appears that promises and commitments are some of the instruments for group formation. They tend to facilitate reciprocity, cooperation, the building of alliances all of which have been found to be species-typical and pervasive across all societies and cultures.

If then, as Lavinias argues, forgiveness is about the recognition of responsibility, responsibility has always been the basis upon which societies of all forms are organized. The smooth functioning of society requires effective mechanisms for mediating conflict and for taking responsibility for conduct. Forgiveness for verbal transgressions works to facilitate both of these social institutions. In the end, the Bible sees the link between speech, responsibility, forgiveness and society as a spiritual one.

E. *Summary*

From domestic relations to those of the state, from sins against God to crimes against the state, from civil wrongs to contractual obligations, Christian theology has had a decided influence on western jurisprudence. Claims of the separation of law from morality notwithstanding, the influence of Christian theology continues to operate imperceptibly in the under belly of western jurisprudence like a solution dissolved in a deep and slow moving river. But Christian theology itself has its roots deep in Judaism. However, what Judaism provides is an example of a universal ethical order delivered to humanity by some divine power, God. By this ethical order, God sought to guide humanity in its relations with God and with itself. The ethical order was also to guide the evolution and operation of legal systems together with their various branches of

226. *Id.*

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law including contractual obligations. The ethical order provides a normative standard by which legal systems could be measured. It is therefore hardly surprising that Christian theology with its delivered divine normative standard had such a pervasive influence on western jurisprudence.

With respect to the subject of legal consciousness and contractual obligations the Biblical universal ethical order is of particular significance to scholars of Contracts. For, in the Biblical creation narrative God attached great significance to the making and keeping of promises as part of the ethical order delivered to humanity. According to the Torah, God entered into a covenant with humanity in which Israel agreed to adhere to the ethical order as a matter of faith. The important point to be emphasized about the Biblical narrative is that the belief in a universal ethical order that guides the ordering of human societies is spiritual not scientific. As such, other religions and belief systems across cultures, races and societies have their own versions of the spiritually based ethical order which influence the making and keeping of promises. Thus, the particularity and peculiarities of the Biblical ethical order do not and should not distract us from identifying the common themes in the consciousness that drive contractual obligations across all societies and cultures worldwide,

IX. CONCLUSION

There has been in recent years a resurgence of theoretical discussion of the moral foundations of the law of contracts. Much interesting scholarly efforts have been directed at finding the moral foundations of contracts in philosophical arguments and economic theories such as wealth maximization, economic efficiency or transaction cost minimization. We sought to change the direction of the debate by focusing on human consciousness as evidenced by studies on human nature by behavioral scientists and anthropologists. We also sought to investigate the role of human spirituality in the making and keeping of promises. To achieve these objectives three interrelated areas are critically examined.

First, we argue that the reason why we keep our promises might be more a function of our group or collectivity than it is about maximizing our individual utility or happiness. Because human beings are social animals, we have social instincts and a predisposition toward forming groups. The formation and functioning of groups require some group norms designed for group cohesiveness. But group solidarity and cohesion require trust, faithfulness, reciprocity and similar moral sentiments among its members. These moral sentiments influence human decision making including the making and keeping of promises. Groups and collectivities as we know them would malfunction and dismantle if their members could not keep and honor their commitments to the groups or among themselves. The dominance of this group phenomenon challenges the Benthamite utilitarian thought that contractual obligations are *primarily* about individual utility maximization and *secondarily* about the welfare of the collectivity. Thus, notwithstanding their long standing and frequency of repetition as established

theories, the utility maximization theory and its derivative rational choice theory might be well be false prophets

Second, the tendency toward the formation of groups speaks to some fundamental issues of human nature and human decision making processes. Evidence from new Darwinian evolutionary biologists, evolutionary psychologists and other behavioral scientists suggest that a single nature with particularized manifestations unites the diverse cultures, races and societies of the world. This single human nature manifests itself in certain species-typical attributes, predispositions and moral sentiments upon which all human cultures and societies wherever found are organized. Moral sentiments such as fairness, trust, reciprocity, altruism alliances and cooperation do not only explain the nature and functioning of human societies but also provide a window into human consciousness in decision making particularly in economic exchange. The reasons why human beings keep their commitments and promises are in large measure part of these universal moral sentiments upon which societies are formed. It is of interest to us that the findings of the New Darwinian evolutionary scientists seem to coincide with some of the earlier ethnographic observations by anthropologists on the issue of human nature. Although they approached the question of the nature of human nature from different takeoff points they reached similar conclusions about the role of moral sentiments such reciprocity, fairness and trust in human economic exchange. Although others may not, we discern from these groups of studies some consensus that the consciousness that drives our making and keeping of promises is more about sustaining our groups and collectivities than it is about maximizing our individual utility.

However, every contractual obligation that requires some future conduct or performance requires some initial commitment by the parties to something yet unknown as a fact. Neither the promise nor the commitment is necessarily based on rationality. A commitment to some future conduct of a stranger involves some leap of faith or some trust which is but an emotional response. Thus, even at the individual level the reasons why we keep contractual commitments may have a lot to do with some species-typical moral sentiment and not rooted in rationality as conceived by the rational choice theory.

Finally, we sought to take the debate to what appears to be its logical position. If human contractual commitments are driven by faith or trust, the real source of legal consciousness in contractual obligations might be located in our deep innermost consciousness in which resides human spirituality. In other words, might it be that community norms and human genetic predispositions simply cloak and mask the real basis of our consciousness in contractual obligations which is spiritual? The interiority of our innermost consciousness in which our spirituality resides is impervious to and beyond the rational self.

To focus the discussion of the role of belief and spirituality in our promise keeping, we rely on the example of the Bible and various commentaries on the Torah. From these we hope to deduce some general statements on the subject. In the context of the Bible it appears that promise keeping is linked to the "Word" of God and the general ethical order delivered by God to the universe. In the Biblical narrative of creation the spoken word plays a significant role in the relationship

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between God and human beings. It was through the “Word” spoken and delivered through revelation that God entered into a covenant with human beings. This covenant with God which was the first contract was based on commitment undertaken purely on the “Word” of God. The point made here is not about the scientific or historical truth of the creation narrative. Rather it is about the importance of human belief systems in whatever religion they might be expressed in conditioning how seriously we take our spoken word and commitments to others. The Bible gives us an example of a universal ethical order in which human speech in the form of promises and commitments carries with it responsibility not to be taken lightly.