
Book Review: Legal Obligation, by J. C. Smith

Joseph M. Steiner

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Book Review

Citation Information

Steiner, Joseph M.. "Book Review: Legal Obligation, by J. C. Smith." *Osgoode Hall Law Journal* 15.1 (1977) : 275-288.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol15/iss1/10>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

LEGAL OBLIGATION, J. C. SMITH, Toronto: University of Toronto Press. 1976. Pp. 256. \$17.50 (hard cover).

A. INTRODUCTION

Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'¹

This book offers another approach to that question. But it is not simply one more salvo in the continuing battle between the various schools of legal theorists. Nor is it a facile synthesis of elements indiscriminately drawn from diverse streams of thought and forcibly blended to form a single substance. Methodologically this is a work in the tradition of analytical jurisprudence, but the conceptions to which it gives rise are more than reminiscent of natural law.

Smith builds his legal theory around the concept of 'legal obligation', and sets out to develop a theory of legal obligation which will:

. . . provide a meaning for the binding force of obligation independently of the content of the law . . . enable us to distinguish between having an obligation and being obliged to do something . . . [and] provide a basis for the 'ought' of the law. Further it should ideally furnish the foundation for a theory of law which would: (i) enable us to conceive of law in terms of a system, the parts of which may be subjected to rigorous analysis; (ii) enable us to distinguish between what is and what is not law and allow for the law to be stated with a high degree of 'certainty'; (iii) provide a model of decision-making which does not require the black box of discretion to deal with hard cases; (iv) enable us to relate the legal system to teleological considerations; (v) allow law to be related to reason, rather than to the will; (vi) allow us to distinguish clearly between legal and moral obligations; (vii) carry implications for political theory which should favour a free and democratic political system.²

That would appear to be quite a tall order, particularly when the only engine of construction is what Smith terms 'ordinary language analysis'. Ordinary language analysis involves an examination of the manner in which certain words of strategic importance are used and a consideration of the logic inherent in that use. It then proceeds by means of pure deductive reasoning to show that the logic of these key concepts imposes substantive, and not merely formal, constraints on the contexts in which they can be used. Smith's work is a model of how such a project should be carried out. He commences with the most basic concepts and builds on them, so that each stage of the argument flows neatly into the next.

How far can such an analysis of 'legal obligation' and companion concepts carry us in completing Smith's agenda? An answer to this question requires an extended exposition of Smith's argument.

B. 'OUGHT' AND 'OBLIGATION'

Smith begins with an analysis of the use of the word 'ought'. When 'ought' is used in a statement prescribing conduct, it is always appropriate to

¹ H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 1.

² J. C. Smith, *Legal Obligation* (Toronto: University of Toronto Press, 1976) at 21.

ask why the conduct is being directed. The reply must set out good reasons for the conduct required.

These reasons are teleological by nature in that they involve a cause-effect relationship between the directed action and a state of affairs, and they are evaluative in that it is assumed that the state of affairs is a valued one.³

This teleological-evaluative function of ought-statements (hereinafter abbreviated as 'evaluative' function) can also be performed by obligation-statements. The question 'Why?' in response to the statement, 'You have an obligation to do X,' can be answered appropriately by reference to the social practice (e.g. promising, rule making or debt creation) whereby the obligation to do X allegedly arose.

In regard to every obligation-creating practice, however, there is a clear assumption that the practice itself may be justified in terms of cause-effect relationships between participating in the practice and a desired state of affairs. Otherwise such practices would be pointless.⁴

It follows that the content of an obligation will be relevant to its justification where compliance would bring about a state of affairs in conflict with the teleology of the practice.

Obligations will arise from participation in commitment practices (e.g. promising, contracting) which are constituted and governed by rules specifying the performative utterance or act upon the doing of which obligation will be predicated.

Such practices are justified in terms of stability of expectations and reliance. Reciprocity practices, such as debt creation and tort, also give rise to obligations. Rules too, Smith tells us, can give rise to obligations, but only if they can be appropriately justified.

The content of the rule is, however, only indirectly relevant to the justification of the obligation. The justification of an obligation arising from a specific rule must be made out in terms of the cause-effect relationship between the prescribed act and the ends of the system of rules conceived as a whole.⁵

As laws are a species of rules,

The binding force of a particular law arises from the fact that compliance with the content of the law is assumed to have a cause-effect relationship to ends which justify the legal system.⁶

How is the legal system itself to be justified?

The nature of the concept of obligation itself requires a moral justification for any systems of rules which are conceived as giving rise to obligations. . . . The ends of a moral order and a legal order are therefore the same; the common good of each, in a community of the whole, to be sought through the minimization of conflicting interests and the maximization of common or shared interests.⁷

³ *Id.* at 41.

⁴ *Id.* at 47.

⁵ *Id.* at 65.

⁶ *Id.* at 66.

⁷ *Id.* at 70.

This is not to say that there is an *a priori* restriction on the types of goals which a legal system can be used to promote, but:

. . . if 'obligation'-statements serving an evaluative function are made about a particular law or legal system, such statements predicate the ends of the moral order to the law. Whether or not it in fact has such ends is another matter.⁸

Obligation-creating practices (including commitment and reciprocity practices as well as rule-making in the forms of legislation and judicial decision-making subject to precedent) are said by Smith to be justified in terms of stability of expectations and reciprocity, which are in turn justified as being necessary for the existence and well-being of the community. The institutions of morality and law within which these social practices function are similarly justified.

The basis of the binding force of obligation therefore is the necessity of stability of expectations, reciprocity, and a rational rule-guided public order for the existence and well-being of the community and the social life within it.⁹

One must not conclude, however, that 'being legally obligated' is the same as 'having a moral obligation to obey the law'.

No obligation institution or practice needs an external moral obligation to give it an evaluative force. The 'ought' of the institution or practice is derived internally from the justification of the institution or practice itself. . . . We must not make the error of thinking that because the justification of the institution or practice is a moral one that the binding force of the obligation is derived from a higher order moral obligation. The justification of all true obligation institutions or practices is a moral one in the sense that the justification is in terms of community wide interests or the interests of others which are of a reciprocal nature. . . . But this relationship [to morality] is quite different from the type of relationship which would exist if the binding force of their obligations was not derived in terms of justification of the practice, but rather in terms of a moral obligation to comply with other obligations.¹⁰

In summary, Smith argues that a particular rule of law imposes no effective obligation when it bears no cause-effect relationship to the goals of the legal system as a whole or when those goals are themselves unjustifiable.

C. LOGICAL CONSTRAINTS ON THE CONTENTS OF LAWS

Because an obligation-statement, used in an evaluative rather than a purely descriptive sense, functions as a particular type of ought-statement, Smith asserts that judgments regarding legal obligations are universalizable just as are ought-judgments in a moral context.¹¹ Universalizability is a logical requirement of moral judgments arising from the simple requirement that the words describing the subject and circumstances of a moral injunction be used consistently. Thus.

What is right for A must be right for B, granted relevantly similar circumstances.¹²

⁸ *Id.* at 71.

⁹ *Id.* at 74.

¹⁰ *Id.* at 86-87.

¹¹ On the universalizability of moral judgments see R. M. Hare, *Freedom and Reason* (London: Oxford University Press, 1965).

¹² Smith, *op. cit.* note 2 at 89.

Smith reformulates this principle in the legal context as the *principle of formal justice*:

Any judgment made in regard to a particular situation, that a particular person is or is not legally obligated to do a particular act, logically entails that the judgment *instances* a rule of law such that anyone in a relevantly similar situation is or is not legally obligated to do the same act.¹³

There is a notion of reciprocity which flows from the principle of formal justice, for it would be logically inconsistent to claim one's rights while denying one's duties when both arise from legal rules preceded by a universally quantified variable such as 'all persons' or 'everyone who . . .'. By the same token, officials who demand adherence to legal rules are themselves logically committed to adherence. Thus the principle of formal justice is the basis for 'the rule of law' and 'due process of law'. It is also immediately apparent that the principle is the foundation of the doctrine of precedent.

The principle of formal justice also entails impartiality in the application of legal rules in the sense that only *relevant* factors may be considered in determining whether a rule of law applies. The principle does not, however, furnish criteria of relevancy. To deal with that issue we must embark on a consideration of the structure of legal rules.

A rule, Smith tells us, is made up of three components: the subject, which is the class of entities to which the rule may apply; the condition or conditions under which the rule is to apply to members of that class; and the consequent, which is the act or result prescribed. Rules are created to achieve certain goals. This teleology determines the domain of the rules, for the class of subject must be such as to encompass all those, and only those, entities to which the consequent is desired to apply. The conditions specified in the rule must not disrupt the teleology of the rule and must be relevant to it.

This requires that the class of the subject be specifiable independently of the set of conditions. Otherwise the class of the subject becomes arbitrarily diminished or enlarged by addition or subtraction of certain conditions, with the consequence that the original goal for which the domain of the rule was delineated may be missed.¹⁴

It follows, Smith argues, that not all properties of the entities which are the subject of the rule may function as conditions of the rule. Furthermore,

. . . no property can function as a condition which, although in itself not limiting the domain of a rule, defines a class which has a contingent identity with a class definable in terms of a property which does limit the domain, provided that the contingent identity between the two classes remains.¹⁵

If the domain of rules is 'all persons', then the only properties which are logically excluded from functioning as conditions of rules are properties which are knowable at birth and unchangeable thereafter. Such properties, but *only* such properties, necessarily cut down the domain which has already been

¹³ *Id.* (emphasis added).

¹⁴ *Id.* at 119.

¹⁵ *Id.* at 126.

specified to be *all* persons. The existence or occurrence of any other property with respect to a given living individual is merely contingent, and, therefore, specifying such a property as a condition of a rule does not, *a priori*, preclude the application of the rule to any person.

Can it be demonstrated that the domain of rules of legal obligation *must* be the class of all persons?

The context of obligation specifies the subject of the rule as 'persons' because only persons have obligations. The principle of universalizability specifies the extent of the class of the subject by requiring that the rule be preceded by a universal quantifier such as 'all' or 'every'. The principle of formal justice¹⁶ [which is a restatement of the principle of universalizability in the legal obligation context] thus specifies the domain for rules of obligation as the class of all persons . . .¹⁷

Thus we derive the *principle of equality before the law* which provides that legal rules which purport to create obligations must not differentiate among persons on the basis of properties which are knowable at birth and not subject to change thereafter. Laws which apply differentially to women and men or to members of different races would contravene this principle.

The principle of equality *before* the law does not proscribe discrimination on the basis of socio-economic class or the assumption or acquisition of a certain status (e.g. spouse), even if a necessary condition of that status is a property which is knowable at birth and unchanging (e.g. the status of 'husband' or 'wife'). It is not violated by discrimination on the basis of colour or hair or height or weight or IQ. Whether such properties may function as conditions of rules is a matter of *relevancy*, the criteria of relevancy being supplied by the teleology of the legal system. The principle of equality *under* the law, which is an obvious corollary of the principle of formal justice, provides that the conditions of legal rules must be relevant.

D. JUDICIAL DECISION-MAKING

The teleology of legal rules and of the legal system as a whole plays a major role in Smith's model of judicial decision making. He points out that analysis of the judicial process in terms of statutes and decided cases alone is inadequate and he rejects attempts to fill the gap by means of "a black box mechanism of judicial discretion"¹⁸ as antithetical to the concept of law as a system of knowable rules.

Statutes and decided cases fail to give a full account of adjudication when contradictory rules appear to apply to a given case and where, despite the absence of such contradiction, courts decline to give effect to the apparently applicable rule. Smith insists that such decisions are indeed rule-governed, as the law embodies a class of second-order rules which are applied to resolve

¹⁶ *Supra*, text at note 13.

¹⁷ Smith, *op. cit.* note 2 at 127.

¹⁸ *Id.* at 150.

conflicts among first-order rules (rules prescribing conduct). The general form of such second-order rules is termed *anomaly-resolving rule 1*:

When a case, C1, arises which falls clearly under Law 1, but implementation of Law 1, with respect to C1, would clearly tend to interfere with the desired consequences of Law 2, and these consequences of Law 2 are clearly more important to us than the consequences of allowing Law 1 to apply to C1 then Law 1 must lose its aegis over C1, such that C1 now falls only under Law 2.¹⁹

It must be noted that anomaly-resolving rule 1 is not to be seen solely as the general form of a second-order rule. Rather it is a *generative* rule governing the judicial creation of new second-order rules:

Anomaly-resolving Rule 1 would never be found explicitly in the law but particular Second-Order Rules . . . are to be so found. Where new particular second-order rules are required it is the generative capacity of anomaly-resolving Rule 1 which licences their introduction by legal decision-makers.²⁰

Anomaly-resolving Rule 1 can operate only upon an ordered set of goals. These goals and their ordering are to be discovered in the teleology of particular rules, their place in the legal system, and the teleology of the system as a whole. Thus,

[t]he extent to which conflict exists between first-order rules and is resolvable within the law, is the extent to which such hierarchical considerations are integral to the law.²¹

And:

There are two arguments for goals being integral to the law. One is the datum that conflicts which occur between first-order rules are settled within the law and not without it. . . . The second argument is that some of the basic and agreed functions of our legal institutions as a whole are best allowed only if a systematic device of rule change is maintained within the law, rather than without.²²

Moreover, Smith argues, conflict between the goals of simultaneously applicable rules is not the only source of cases whose resolution is inexplicable in terms of primary rules alone. A somewhat similar problem arises when opposing lines of precedent are brought to bear on a case which has features in common with each. Only one line of precedent can be followed, and as a result of the decision, the rule or rules for which the precedents stand will be altered. But how is the decision to be made?

It would be most surprising if there were not within the deep structure of the law a higher-order rule for deciding priorities between opposing but applicable precedents

Since the rule, if it exists, is to be found in the deep structure of the law, it is unlikely that it will be expressly articulated in legal judgments. We must therefore infer its existence, either from expressly stated second-order rules which are derived from it or in terms of consistent patterns of behaviour by courts which reflect the presence of such a rule in the deep structure of the law.²³

¹⁹ *Id.* at 164.

²⁰ *Id.* at 166.

²¹ *Id.* at 163.

²² *Id.* at 172.

²³ *Id.* at 177.

This is, of course, the problem of relevancy which is unresolved by the principle of formal justice, but which must be resolved if that principle is to be of any force. The rule we are seeking is, not surprisingly, quite similar to anomaly-resolving rule 1. Smith calls it the *rule of relevancy*:

When a case C1 arises having some facts identical with some facts in Precedent P1 and other facts identical with some facts in Precedent P2 and the application of P1 would lead to different results from those that would follow the application of P2, C1 will fall under the precedent which, if followed, will, when universalized as a rule of law, bring about, because of the presence of the similar facts, the most desirable consequences in terms of the teleology of the legal system.²⁴

Just as is the case with anomaly-resolving rule 1, the rule of relevancy is a *generative* rule operating upon an ordered set of goals to be found in the teleology of the legal system.

That, in essence, is the model which Smith develops. He goes on to provide a schema for the classification and analysis of rules which would appear to be quite useful, especially for studies in comparative law. Smith also applies his model of legal obligation to make a case for fundamental rights which are immune from legislative interference. I will deal briefly with this latter subject towards the end of this review.

We must now consider whether Smith has produced that which he set out to construct. I shall argue that his model is defective in fundamental ways in that it incorporates and builds upon controversial value judgments while treating them as being matters of logical entailment. Moreover, the very existence and identifiability of the cornerstone of his structure, the teleology of the legal system, is asserted as a matter of fact when, in truth, it involves a leap of faith.

E. JUSTIFICATION OF OUGHT-DIRECTIVES AND OBLIGATIONS

There is a recurring assumption in Smith's work that 'morality' is to be equated with 'the interests of the community' and, therefore, that the good reasons which may always be sought for an ought-directive or assertion of obligation are related to those interests. Thus:

The ends of a moral order and a legal order are therefore the same; the common good of each, in a community of the whole, to be sought through the minimization of conflicting interests and the maximization of common or shared interests.²⁵

When we predicate the obligation conceptual framework to the moral order, we are able to view moral rules and judgments in terms of social relationships necessary for the preservation of the community.²⁶

Only those sets of rules which are considered to be necessary for the preservation and well-being of the community to which they apply will be conceived to give rise to obligations.²⁷

This assumption is objectionable on two counts. First, to insist that good reasons for ought- and obligation-statements must relate to the interests of the

²⁴ *Id.* at 185.

²⁵ *Id.* at 70.

²⁶ *Id.* at 134.

²⁷ *Id.* at 69.

community is to assert preference, not logic. There is no logical bar to the alternative assertions that good reasons must be related to the Law of God or the demands of the gods or, for that matter, the greater glory of the Fatherland.

Second, it is questionable whether the notion of 'the interests of the community' has sufficient content to provide a guide to conduct. The mere fact of the similarity or identity of the biological requirements of humans gets us nowhere without some ethical postulate as to whose lives are to be protected by the community. Even if we agree that the function of the community is to preserve the lives of all who dwell within it, one doubts whether one could discriminate between social orders as divergent as feudalism and the dictatorship of the proletariat. But to pour enough content into the notion of 'the interests of the community' to make it an effective discriminant, and then to use it so, is to commit the error which Hart ascribed to Devlin,²⁸ namely to identify the 'community' with the status quo. Preservation of the status quo cannot then be justified in terms of the interests of the community, and so resort must be had to some other set of standards which will either be or depend upon matters of taste. Thus the types of values which underlie a system to which the obligation conceptual framework may be predicated are far less constrained than Smith would have us believe.

F. THE PRINCIPLE OF EQUALITY BEFORE THE LAW

There are two problems with Smith's derivation and exposition of the principle of equality before the law. The first and more serious problem is that the derivation is logically incorrect. To see why this is so, let us review the argument briefly. Rules are composed of a subject, conditions, and a consequent. Rules are designed to achieve certain goals. To do so effectively, the subject of a rule must encompass all those, and only those, entities to which the consequent is ever to apply. Therefore the conditions of the rule must be relevant to, and not disruptive of, the teleology of the rule. "*This requires that the class of the subject be specifiable independently of the set of conditions,*"²⁹ as otherwise the class of the subject is arbitrarily enlarged or diminished, by altering the conditions, to the detriment of the goal of the rule. But the principle of formal justice requires that the subject of legal rules be the class of all persons. As properties of human beings which are knowable at birth and unchanging thereafter *necessarily* cut down the class of all persons, such properties are logically excluded from operating as conditions of legal rules.

The logical error occurs at the italicized passage. Smith says that it is a *necessary* condition of what we may call the 'efficient' operation of rules that the conditions of each rule be relevant to and not disruptive of the teleology of the rule. That is undeniable. It does not follow, however, that the class of

²⁸ See H. L. A. Hart, *Law Liberty and Morality* (London: Oxford University Press, 1963); and Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

²⁹ Smith, *op. cit.* note 2 at 119 (emphasis added).

the subject must be specifiable independently of the set of conditions. That may be a *sufficient* condition for the efficient operation of rules, but it is not *necessary*. Indeed, it is readily apparent that the requirement that the conditions of a rule be relevant to and not disruptive of its teleology is itself a necessary *and* sufficient condition of the efficiency which Smith seeks.³⁰

An example may help to clarify the matter. Consider a legal system which has as one of its purposes the maintenance of members of race X in a subordinate and dependent position. A law which states, "all persons who are members of race X are ineligible for admission to the practice of law" cannot be faulted for inefficiency. It zeroes right in on the people whose conduct is to be controlled. In accordance with Smith's theory of legal obligation, we may, of course, argue that such a legal system imposes no obligations (at least on members of race X) because its goals are unjust. We may also argue that race is irrelevant to one's fitness to practise law, but the response to that is that the purpose of the law is not client protection but racial suppression. Suppose this state's highway traffic code contained a provision to the effect that "All drivers who are members of race X shall, when approaching an intersection and facing a green light, nonetheless yield the right of way to drivers of other races facing red lights." Again, Smith's theory permits us to argue that this provision imposes no obligations on members of race X because it is unjust. Or Smith might argue that this provision runs counter to the goals of the highway traffic code as a whole, namely an orderly flow of traffic, and thus imposes no obligation. Or he might argue that the provision runs counter to the teleology of the whole legal system as members of other races are likely to be maimed and injured in the accidents that will necessarily result. This would be an argument to the effect that the condition as to membership in race X is not relevant, relevancy being measured in terms of the teleology of the legal system. What one cannot argue is that the racial condition renders the rule inefficient in the sense of excluding [including] people to whom the rule is [is not] intended to apply. Thus Smith is wrong to conclude that it is *logically* impermissible for rules to discriminate on the basis of race or sex. Such discrimination does, however, raise issues respecting relevance to the goals of rules and justification of the legal system as a whole.

The second problem, which need not be canvassed if the preceding argument is correct, relates to the notion of a class which has a contingent identity with a class definable in terms of a property knowable at birth and unchanging thereafter.³¹ Smith asserts that discrimination against the former class is logically barred by the principle of equality before the law. The problem is in the meaning of 'contingent identity'. How much non-overlap of the two classes will preclude us from describing them as contingently identical? Note

³⁰ It should also be noted that there is no logical compulsion to confer the status of 'person' on all human beings, though one cannot consistently assert that number of a class of human beings whom one does not count as 'persons' have obligations to persons.

³¹ An example would be a law providing differentials between municipalities in government aid to public school boards where 95 per cent of the inhabitants of the less favourably treated counties happen to be of a particular race. A similar device is the 'grandfather clause' once used in the Southern United States to deny voting rights to blacks without phrasing eligibility requirements in racial terms.

also that advances in medical science have a bearing on this issue. How many sex-change operations are necessary before the principle of equality before the law will cease to proscribe rules discriminating against persons who have the outward equipment associated with one or other sex, while still barring discrimination on the basis of sex at birth?

G. WHY A CONCEPT OF LEGAL OBLIGATION?

When it is drawn to a person's attention that there exists a rule of law which requires him to do, or refrain from doing, a certain act, that person must answer the question, "Ought I to obey?" Smith, asserting that having a legal obligation is different from having a moral obligation to obey the law,³² seems to suggest the following procedure for coming to a decision: First, determine the social practice (in this case, law-making) which gave rise to the alleged obligation. Second, determine whether the social practice is justified in terms of appropriate (I think he would agree that these are *moral*) reasons. Third, determine whether the content of the alleged obligation bears a cause-effect relationship, or is at least consistent with, the ends in terms of which the social practice is justified. Fourth, determine whether the content of the alleged obligation is such that "the moral reasons for not complying with . . . [it] . . . outweigh or are more fundamental than the reasons which justify the practice."³³

On reflection one can see this procedure is based on the not very startling assertion that the binding quality of an alleged obligation arising from a social practice is not a function solely of the moral quality of the act in question, but also of the moral quality of the social practice. Thus a person who is considering disobeying a law which he perceives as unjust or immoral ought also to look at the consequences of his attack on the legal system. But to do that it is unnecessary to determine whether the law concerned fits in with the teleology of the legal system, a necessary condition of legal obligation in Smith's model. The teleology of the legal system, if indeed it exists and is knowable, is relevant in assessing the moral significance of the assault on the legal system which disobedience constitutes. But the relationship of the particular law in question to that teleology is not, *per se*, of significance. What is of significance is the effect on the continued operation of the legal system of disobeying the law in question. That is essentially a socio-psychological issue which is to be resolved empirically and to which the relationship between the particular law and the teleology of the legal system bears only a contingent relationship.

Smith's conception of legal obligation is also of no assistance in assessing one's duties *vis à vis* an ethically neutral law embodied in a thoroughly immoral legal system. It would appear to be an implication of Smith's model that a racially neutral highway traffic code embodied in a legal system whose major object is the maintenance of *apartheid* imposes no *legal* obligations. But surely that is not the end of the discussion of whether one *ought* to enter an intersection against a red light.

³² *Supra*, quotation in text at note 10.

³³ Smith, *op. cit.*, note 2 at 85.

There can be no doubt that a person who considers the justice or injustice of a particular rule in isolation and so governs his conduct is morally myopic. One must consider *all* the ramifications of obedience and disobedience in deciding what one ought to do. A determination of legal obligation is at best an intermediate stage in this process, and one that deflects us from the most direct route to an answer. At worst, it leads us to the wrong answer.

H. TELEOLOGY, THE DEEP STRUCTURE OF THE LAW AND JUDICIAL DISCRETION

To make his case for the non-existence of judicial discretion, Smith must establish all of the following three items: (i) the *existence* of a teleology of the legal system in the sense of a well-ordered set of goals which will allow of a unique resolution of every conflict of goals arising in a legal context; (ii) the *knowability* or *identifiability* of those goals and their ordering; and (iii) the *existence* of generative rules (anomaly-resolving rule 1 and the rule of relevancy) within the legal system.

Smith's argument for the existence of an ordered set of goals within the legal system³⁴ is defective. To cite the 'datum' that conflicts between first-order rules are settled within the law and not without it is to beg the question. It is quite true that such conflicts are perceived and resolved by judges as part of the judicial process. But Smith must show not simply that judges do this, but that they are *constrained* to do so, and in a unique fashion, by legal rules which pre-existed the case at bar. To identify the resolution of conflicts *by judges* with the resolution of conflicts *within the law* is to subscribe to the most primitive form of legal realism and so to subvert the whole basis of the legal obligation model.

The more one considers the idea of a well-ordered set of goals integral to the legal system, the more fantastic the notion becomes. What is the 'Invisible Hand' that keeps not only judges in line, but legislatures as well? For if new legislation does not conform to the existing ordering of goals, then that ordering must be in a constant state of upheaval and can hardly be said to exist at all. Certainly it could not serve to constrain judicial decision-making. How can one maintain that a human enterprise like law-making, carried on over hundreds of years, displays such astonishing consistency? To assert that it does is to deny the social and political facts of history. To admit that the ordering is always in flux is to deny that it can function to exclude judicial discretion.

The second argument for the existence of a well-ordered set of goals integral to the legal system, that the functions of our legal institutions would be well served by an internal device for systematic change, also fails. One can no more infer an 'is' from an 'ought' than vice versa.

Even if one were to concede the existence of such an ordering of goals within the legal system at a given point in time, it would be necessary to prove

³⁴ *Supra*, quotation in text at note 22.

that that ordering is so thoroughly revealed in decided cases and statutes as to provide an unerring guide to the existence of inter-rule conflict and its proper resolution. Suffice it to say here that it is demonstrable that the ordering revealed by decided cases and statutes will not dictate a unique solution to a particular case of goal conflict unless that very goal conflict has been the subject of a decided case or statute.³⁵

Even if both the existence and the identifiability of a well-ordered set of goals integral to the legal system are conceded, Smith must still establish the existence of his generative rules if judicial discretion is to be excluded. In considering the existence of these rules and the second-order rules which they are said to generate, we must keep in mind one of the positivist features of Smith's model, namely, that it is objectively determinable whether particular rules are legal rules, the test being "whether or not they are accepted and applied by the courts."³⁶

Let us consider first the argument for the existence of anomaly-resolving rule 1.³⁷ It is immediately evident that the argument is the same as (indeed, part and parcel of) the argument for the existence of the ordered set of goals, and it is similarly defective. Only if we *assume* that goal conflicts are perceived and resolved *within the law* does it follow that anomaly-resolving rule 1 exists. Thus only if we *assume* the absence of judicial discretion can we 'discover' the rule which precludes it. These comments apply equally to the derivation of the rule of relevancy.³⁸

What Smith does is to point to particular second-order rules which, so he says, have been accepted and applied by the courts. He then argues that the enunciation of such rules implies the existence of particular generative rules within the deep structure of the law which 'license' the courts to pronounce new second-order rules. But the implication is there only if we assume the conclusion, that judges do not exercise discretion and judicial decision-making is entirely rule-governed. The existence of generative rules is not entailed by the existence of second-order rules. Such rules can be adequately accounted for as the results of the naked exercise of the power of judicial office.

Indeed, the logical failure of Smith's account begins one step earlier, in the argument for the existence of particular second-order rules. Such rules are rarely spelled out in full in the cases. Rather they appear as maxims. One of these, which Smith treats at length,³⁹ is the maxim 'A man may not profit from his own wrong'. Smith asserts that the maxim is shorthand for a rule which he labels as second-order rule 1:

Where it is the case that, under the existing rules of law, the doing of a wrong

³⁵ I have canvassed this issue at length in my paper, *Judicial Discretion and the Concept of Law* (1976), 35 Cambridge L. J. 135 at 152-57.

³⁶ Smith, *op. cit.*, note 2 at 169.

³⁷ *Supra*, quotations in text at notes 19, 20 and 21.

³⁸ *Supra*, quotations in text at notes 23 and 24.

³⁹ Smith, *op. cit.*, note 2 at 153-162.

will allow a person to make a profit and that profit will act as an inducement to do that kind of wrong, then the law shall proceed to remove that inducement.⁴⁰

It is this rule, we are told, which, among other things, prevents a murderer from taking from the estate of his victim.

Suppose we could come up with a counter-instance to this alleged rule of law, a case to which the words of the rule apply, but the profit is not taken away. Take the case (similar but not identical to one dealt with by Smith)⁴¹ of a man who jumps bail to attend at the reading of a will under which he is to receive a large bequest on the condition that he attend at the reading of the will at the testator's house.⁴² No one can doubt that a claim that this man should be deprived of his bequest would meet with an expression of profound disbelief in court. Does that mean that the judge is wrong, or that the rule is wrongly phrased? How can we infer the content of a second-order rule from a string of decided cases unless every case can be rationalized *only* in terms of a particular second-order rule? Do we postulate a variety of alternate rules and then count the number of cases which can be rationalized in terms of each?

The problem is insoluble *in principle*. We cannot say that a case was wrongly decided unless we know the governing rule. But the governing rule is never spelled out in the cases, but must be inferred from them. One need not go far to find the source of this paradox. It is the attempt to engraft the notion of *inferring* the existence of rules onto a system in which the existence of rules is said to be objectively demonstrable by means of their proclamation in legislation or case law.

A similarly peculiar procedure of inferring the existence of legal rules underlies and undermines Smith's argument for the existence of fundamental rights which are those rights,

... which must be presupposed in order to have a system of obligation at all, and the lack of abrogation of which would create an inconsistency with the basic principles or ends of a system of obligation.⁴³

I will deal with only one instance of these fundamental rights by way of example. Smith argues that the right to counsel is inherent in the nature of the judicial process as the adversary system is based on the assumption that truth will emerge from a contest in which there is a degree of balance between the two sides.

Whether or not such a right has been judicially recognized by some court is not decisive as to the question of whether or not the right exists. If the above argument [as to the nature and basis of the adversary process] is sound, the right exists

⁴⁰ *Id.* at 154.

⁴¹ *Id.* at 161.

⁴² Any situation in which a person whose movement is legally restricted stands to win a prize or conclude a profitable contract if he does an act, not otherwise illegal, at a specified place and time will do equally well.

⁴³ Smith, *op. cit.*, note 2 at 240.

irrespective of whether the judge recognizes it and if he fails to recognize it *he is just wrong*.⁴⁴

This is rather startling. It follows from Smith's theory of legal obligation that a legal system which does not recognize the right to counsel can impose no obligations on those who cannot secure, or are denied, adequate representation. But to say that the theory implies the existence of a right to counsel *as a matter of law* is to depart from the notion that what *is* law as a matter of fact is objectively determinable.

I. WHENCE THE COMMON LAW?

Smith's theory of legal obligation, and the model of judicial decision-making based upon it, cannot provide us with an adequate account of the development of the common law. If judicial decision-making is entirely rule-governed, so that judicial discretion does not exist, then it must be true either: (i) that the common law sprang into existence fully armed, like Athene from the head of Zeus, in the sense of embodying a complete ordering of social goals as well as first-order or primary rules and Smith's generative rules; or (ii) that a complete ordering of social goals now exists, and the generative rules have been established by a social practice of law-making, whether judicial or legislative.

The second of these alternatives is preposterous on its face. The first sounds very much like the natural law. Smith has replaced the 'black box' of judicial discretion, which at least had the virtue of visibility, with the fog-shrouded, even mystical, teleology of the law.

JOSEPH M. STEINER*

⁴⁴ *Id.* at 242 (emphasis added).

© Copyright, 1977, Joseph M. Steiner.

* The author is a member of the Ontario Bar, Toronto.