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Law Asks for Trust

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LAW ASKS FOR TRUST

NATHAN S. CHAPMAN

INTRODUCTION

What does trust have to do with law? Consider the following assurances given nearly two thousand years apart to the subjects of very different sovereigns.

For surely I know the plans I have for you, says the LORD, plans for your welfare and not for harm, to give you a future with hope.¹

I know the good disposition of the ministry towards you . . . I know there is no disposition, either in the King, the ministry, or the Parliament, to oppress America in any shape.²

Power, and a claim to rule, ask for trust on the part of the would-be subject. The author of the book of Jeremiah knew this in the sixth century B.C.E. no less than the British publicist knew this at the dawn of the American Revolution. Yet this relationship remains neglected in legal theory.³ This Article explores the relationship between trust and law through a close reading of the first two chapters of the book of Genesis.

² All scriptural citations are to the New Revised Standard Version.
³ BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 149 (1967) (alteration in original) (internal quotation marks omitted) (quoting Letter from William Strahan to David Hall (Nov. 10, 1768), in Historical Society of Pennsylvania, Correspondence Between William Strahan and David Hall, 1763–1777, PA. MAG. HIST. & BIOGRAPHY 1886, at 461, 464 (1886) (statement attributed to a British publicist)).
³ But see SCOTT J. SHAPIRO, LEGALITY 309–13 (2011), discussed further infra note 83.
Why Scripture? Why Genesis? In particular, why chapters 1 and 2—the pre-lapsarian Genesis, before temptation, disobedience, and death have entered the picture? As the reading offered here suggests, the creation accounts in chapters 1 and 2 present a useful (albeit limited) state of nature for analyzing law. The text presents many conditions of law—such as sovereignty, authority, and a command backed by a threat of punishment—in a concise narrative that allows the reader to focus on the effect of law on the relationship between ruler and subject.

To be sure, the nature of the command in Genesis 2 is troubling. God essentially forbids the man and woman from obtaining moral knowledge, from obtaining the ability to make the kind of moral judgments usually reserved for God. What sort of God is this? Why foreclose from human beings something so obviously desirable? Genesis 1 and 2 suggest that law—even a single rule from what appears to be a benevolent ruler—inherently asks for trust.

The time is ripe to review Genesis from the perspective of legal theory. Few legal theorists have considered the early chapters of Genesis since John Locke,4 and his analysis is a bit

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dated. At the same time, however, Genesis has received renewed scrutiny by political philosophers, and close readings of Scripture (though not necessarily of Genesis) have recently been employed by Christian theologians writing political theory. And of course, religious communities continue to rely on Genesis 1 and 2 in their moral and legal reasoning. In addition to adding to the scholarship on law and trust, this Article hopes to prompt scholars to reflect further on whether and how to read Scripture for legal theory.

Based on an imaginative reading of chapters 1 and 2 of the book of Genesis, this Article contends that law inherently asks for trust. The lawmaker cannot be benevolent enough, the

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8 Although the relationship between law and trust remains relatively under-theorized, there is a burgeoning social science literature on trust in interpersonal and institutional relationships, and testing theories of trust in laboratory and field studies. A number of studies explore the relationship between governments, or particular governmental institutions, and trust. See generally, e.g., Karen S. Cook et al., Cooperation Without Trust (2005); Russell Sage Found., Distrust (Russell Hardin ed., 2004) [hereinafter Distrust]; Russell Sage Found., Whom Can We Trust?: How Groups, Networks, and Institutions Make Trust Possible (Karen S. Cook et al. eds., 2009) [hereinafter Whom Can We Trust?];
subject pure enough, the constitutional checks and balances rigorous enough, nor the law perfect enough to avoid the questions put to the subject: Do you trust the lawmaker? Should you interpret the law and its claim on your actions with trust or distrust? The text of Genesis suggests that the nature of words and speech leave a gap of knowledge between the lawmaker and the subject, the sheer fact of a command and power to punish can appear arbitrary, and the lawmaker inevitably lacks some goods shared by the subjects. Even in a world unmarred by sin, the law still asks for trust. Indeed, trust may be less a problem in law than an inherent aspect of a legal relationship.

This Article offers a reading of chapters 1 and 2 of the book of Genesis, informed by concerns for the social effects of law. Part I considers the implications of God's method of creating the world by speech in the first chapter of Genesis. Part II turns to God's prohibition against eating the fruit of the tree of the knowledge of good and evil. The content of the prohibition and the nature of the threatened penalty suggest that the prohibition is a rule against disobedience generally, paradigmatic of a general claim by God to be the ruler. With the creation of the woman out of the side of the man, the story gains social

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RUSSELL SAGE FOUND., TRUST AND GOVERNANCE (Margaret Levi & Valerie Braithwaite eds., 1998) [hereinafter TRUST AND GOVERNANCE].

There are innumerable reasons and ways to read Scripture. The approach here is probably best categorized as literary. See generally, e.g., K.E. GREEN-MCCREIGHT, AD LITTERAM: HOW AUGUSTINE, CALVIN, AND BARTH READ THE “PLAIN SENSE” OF GENESIS 1–3 (1999). The seeming inconsistencies in the text—for example, the difference between the creation accounts in chapters 1 and 2—raise interesting and important questions about the history and origin(s) of the text, but they are not the focus here. See generally BILL T. ARNOLD, GENESIS 12 (2009); HERMANN GUNKEL, CREATION AND CHAOS IN THE PRIMEVAL ERA AND THE ESCHATON: A RELIGIO-HISTORICAL STUDY OF GENESIS 1 AND REVELATION 12 (K. William Whitney, Jr. trans., William B. Eerdmans Publ'g Co. 2006) (1895); GERHARD VON RAD, GENESIS: A COMMENTARY (John H. Marks trans., 1972) (1949); CLAUS WESTERMANN, GENESIS 1–11: A COMMENTARY (John J. Scullion S.J. trans., Ausburg Publ'g House 1984) (1974).

complexity with important implications for the role of trust. Part III considers the intimacy between God and the man suggested by the creation of the woman. At the same time, the woman became for the man—and vice versa—a new locus of trust, one who shared something with him that they did not share with God—humanity. Part IV explores the implications of this reading of Genesis for the effects of law on social relationships. In particular, this Article argues that Genesis suggests that law always entails a request from the lawmaker to the subject for trust.

I. WORDS AND SPEECH, MEANING AND MYSTERY

The first chapter of Genesis tells the story of God’s creation of “the heavens and the earth” in six days.10 “[H]umankind,” “male and female,” are created “in the image of God” on the sixth day, and God rests on the seventh.11 The narrative shows God’s power displayed in a particular way: God speaks into being all that is. The second chapter focuses on the creation of the man and the woman. Humans speak for the first time, naming the animals that God has created.12 A comparison of God’s speech and the man’s speech highlights the differences between their respective powers and freedoms.

A. God’s Speech (Genesis 1:1–2:4)

In the beginning when God created the heavens and the earth, the earth was a formless void and darkness covered the face of the deep, while a wind from God swept over the face of the waters. Then God said ‘Let there be light’; and there was light. And God saw that the light was good; and God separated the light from the darkness. God called the light Day, and the darkness he called Night. And there was evening and there was morning, the first day.13

The first chapter of Genesis presents a powerful God who creates through speech all that exists. In classical midrash, rabbis sometimes referred to God by the name mi sheamar vehaya haolam, or the One Who spoke and brought the world

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10 Genesis 1:1.
11 Id. at 1:27–31, 2:2–3.
12 See id. at 2:19–20.
13 Id. at 1:1–5.
into being. God's speech literally acts. The first six days of creation each begin with God saying, "Let there be...," and without fail, there is. God's speech creates and shapes the world. By putting action into God's mouth, as it were, the text suggests a unique relationship between God's power and God's speech. A brief reflection on the nature and the limits of words and speech raises implications for understanding God, creation, and the social ramifications of law.

Words are the starting point of an analysis of God's speech because they precede speech. A word is a unit of thought, a label for a concept. Moreover, a word refers or corresponds to a specific concept; it signifies this or that and not something else. By words one divides and subdivides concepts—words order thought.

Just as a word means something (this and not that) it may be ambiguous; it may mean this or that (but not something else). Words gain meaning through syntax. The lawyer's canon is true: words get their meaning from neighboring words. Sentences determine a word's meaning as much as the word itself, and perhaps more. Words are in this way like the proteins in a strand of DNA; it is the combination of words, the way they are woven into a sentence or even a paragraph, that give them meaning.

Words also gain meaning from social context. It is the Passover meal that gives meaning to Jesus's words "Take, eat; this is my body." Otherwise, this would be, as some early critics of Christianity charged, an invitation to cannibalism. Social context matters for words in more mundane ways too. "The blues" might refer to a style of music, melancholy, a hockey team, or a handful of crayons, all depending on social context. So we see that words have a meaning; they mean this or that and not something else. But their meaning is often determined by syntax and social context.

15 See Genesis 1:3–26.
17 Matthew 26:26.
Speech makes words public. An utterance bears a thought into a world of listeners—even if the only listener is the speaker. When another, a listener or an interpreter, gives attention to speech, the listener or interpreter’s thoughts are forever altered. Those thoughts absorb the other’s speech and are different for it. Similarly, the speaker is affected by her own speech; words convey a thought and circle back to rest, or to prod the speaker to reconsider.

Likewise, speech may fail to convey the speaker’s intended meaning, because the language is inherently ambiguous or because it is misunderstood by the listener. Just as words derive meaning from social context, they may lose their meaning or have it blurred by social context. This is communication: back and forth, question and answer, openness and learning. The ambiguity of words and speech in social context does not render communication impossible, but it does make it laborious. There is always a chance of misunderstanding.

God’s speech is paradigmatic. God’s words mean this and not that. Unlike a great deal of human speech, God’s speech is unambiguous because it does what it signifies. Put differently, because God’s words do this or that—and not something else—we know that they mean this or that. Speech and action unite, and God’s words are given their content by what they do. God speaks into being this world, the world of the waters above and below, of the day and the night, of “every living creature that moves,” and not another world.

Given the nature of words, and the fact that God speaks the world into being, it should come as no surprise that God’s speech that creates does so by a process of “separating” the created order into different categories. On the first day, God separates “the light from the darkness”; on the second, the “waters from the waters”; on the third, the waters from “the dry land” and all forms of vegetation from one another; on the fourth, the “two

18 Genesis 1:7.
19 Id. at 1:14–16.
20 Id. at 1:21.
21 See Strauss, supra note 6, at 9.
22 Genesis 1:4.
23 Id. at 1:6.
24 Id. at 1:9.
25 Id. at 1:11–12.
great lights"26 “to separate the day from the night,” “for signs and for seasons and for days and years,” “and to separate the light from the darkness”;27 on the fifth, “every kind” of bird and water animal from one another,28 and on the sixth, every kind of earth animal, and, separately, “humankind,” “male and female,” “in the image of God.”29 Chapter 1 shows God dividing creation over and over by speech. This suits God’s method, for speech necessarily separates an idea from a world of possibilities, to and for a specific world generated by the speaker. Speaking, in this sense, is dividing one concept from another. And for God, dividing one physical thing from another. Thus God articulates creation.

God’s speech also demonstrates how words gain meaning from syntax and social context. “‘Let there be light’; and there was light.”30 What does that mean? What is “light”? It is not whatever the sun produces—the sun is created later in the narrative.31 All the text suggests is that light is not-darkness, and darkness is not-light. We know what light is because we see it; if we were fully blind, there would be no light to name. This Article considers more fully the implications of social context for the meaning—and ambiguity—of God’s speech in view of God’s command to the man and woman.

There is another social aspect of God’s speech that creates to consider—one that is crucial for understanding God and the effects of God’s speech on the man and the woman. Speech expresses only part of the speaker’s thoughts. This means that even when speech is clear on its own terms, understood both in its syntax and its social context, it may not fully convey the speaker’s mind. The speaker could be speaking in code, for instance, so that the terms mean one thing on their own, but also have a secret, private meaning. Or, the speaker could be engaging in implicature or outright falsehood. Speech is merely a selection of the speaker’s thoughts; it thus manifests the speaker’s freedom to choose what to say, how to say it, and what not to disclose. A speaker may deliberately conceal certain thoughts. Or, speech may simply fail to fully express them. The

26 Id. at 1:16.
27 Id. at 1:14, 18.
28 Id. at 1:21.
29 Id. at 1:27.
30 Id. at 1:3.
31 See id. at 1:16.
listener may never know whether speech has fully explicated the speaker’s mind, and if not, whether the communication’s incompleteness was deliberate or negligent.

What does God’s speech reveal about God’s thoughts? What does it hide? As speech has limits, so does creation. Creation is not presented in Genesis 1 as an emanation from God’s mind. Nor as co-terminus with God or with God’s thoughts; it is coterminus with God’s speech and the limits of that speech. The world that God creates in Genesis 1 is, unlike God, limited, not only by chronological necessity (it has a beginning) but also by linguistic necessity, for God creates by words. God speaks and a world springs into being, as intimate with God as a song to a singer.

Even as God’s speech is manifest in the created order, God’s thought remains a mystery. The God who speaks is by implication one who knows, and who shares that knowledge by making those thoughts manifest. That is, by making manifest the thoughts that are embodied by speech—not all thoughts. What God does not say leaves God a mystery. God knows more than God is telling. What is God’s motivation? Why create? Why this world and not another? Why are humans made in the image of God? The text is as silent as God.

Perhaps all we can say in response is that God is radically free. God has no contraints; God neither lacks power to accomplish God’s goals, nor is restrained by anyone else from accomplishing them. We cannot say why God does this instead of that. But, we can speculate. It was inevitable that the man and woman, created in the image of God, would be left to wonder about the motives and plans lurking in God’s vast unspokenness. In this way the limits of speech may be the beginning of distrust.

B. Human Speech (Genesis 2:18–20)

Then the LORD God said, ‘It is not good that the man should be alone; I will make him a helper as his partner.’ So out of the ground the LORD God formed every animal of the field and

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32 For the distinctions between the concepts of positive liberty (freedom to direct oneself) and negative liberty (freedom from restraint), see generally Isaiah Berlin, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 155 (1969). But see Gerald C. MacCallum, Jr., Negative and Positive Freedom, 76 PHILOSOPHICAL REV. 312 (1967) (arguing, against Berlin, that there is really only one concept of freedom).
every bird of the air, and brought them to the man to see what he would call them; and whatever the man called each living creature, that was its name.33

Chapters 1 and 2 present somewhat different accounts of creation. In the first, creation is a six day process culminating with the creation of humans, male and female—presumably at the same time—on the sixth day, followed by a day of rest. The second chapter focuses almost exclusively on creation from the human perspective. In it, God creates the man “from the dust of the ground,” “breathe[s] into his nostrils the breath of life,” and places the man in a garden with a defined geographical location, all before forming the woman.34 God tells the man “to till and keep” the garden, and says that he “may freely eat of every tree of the garden” except one (to which this Article will return shortly).35

After the command comes a remarkable exercise of cooperation between God and the man that illuminates how the man has been made “in the image of God,”36—one of the only details given about the man in the first chapter. To “make [for man] a helper as his partner,” God forms “every animal of the field and every bird of the air, and brought them to the man to see what he would call them.”37 God gives the man the ability and the freedom to create names for the animals, and the freedom to exercise that power by naming them. Thus the full act of creation is shared: God creates living things out of the ground and man creates words for them.

God and man have very different roles, of course. God forms “every animal of the field and every bird of the air” and the man “call[s]” each of the “living creature[s]” something, and “that was its name.”38 God’s act is pure knowledge, freedom, and power acting in unrestrained concert. The man, too, exercises a kind of knowledge, freedom, and power. In the course of naming each animal, the man’s reason—his intellect, will, and memory—work together to analyze the animal, classify it with similar

33 Genesis 2:18–19.
34 Id. 2:7–8.
35 Id. 2:15–17; see infra Part II.
36 Id. at 1:26–27.
37 Id. at 2:18–19.
38 Id. at 2:19.
animals, distinguish it from others, and create a word for it. God, the One Who spoke the world into being, works from word to object; the man works from object to word.

The man has power appropriate to him. The man’s power to classify and name the animals is a way those created “in the image of God” are meant to “have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.” In the first instance, then, we see that the man’s dominion is exercised in learning about the other creatures and creating a name for each to distinguish it from the others. This exploration, analysis, and categorization is the work of encyclopedists, scientists, and historians.

When God brings the animals to the man “to see what he would call them,” God creates space for a kind of freedom that suits the man as a creature. The text implies that the man may call the creatures whatever he wants. The man’s intellect and will are free to interact, exploring and examining distinctions between creatures and their relationship to him. He is free to create a name that fits each one. God not merely permits, but engages the man’s freedom by parading the animals before him. And God apparently accepts the man’s creativity: “[W]hatever the man called each living creature, that was its name.” Just as God is free to create any world, the man is free to create any word. He is not limited to a list. He is free not only to choose but to create options. God thus includes the man’s own creativity and reason in the process of creation. This kind of creative freedom, a corollary of power, is surely a glimpse of the image of God.

The man’s freedom, though, is the freedom of a creature. He can create merely words. He can only recognize distinctions between the animals; unlike God, he cannot create them. And of

40 Genesis 1:28 (internal quotation marks omitted).
41 Id. at 2:19.
42 Id.
43 See KAHN, supra note 4, at 191 (“Man is an image of God, because he symbolically reproduces all of creation.... God’s speech creates its own truth—and so does man’s. We cannot ask whether a name is true or false. Naming, like creation itself, is a performative utterance.”).
44 In response to Polonius’s question, asking him what he was reading, Hamlet responds “[w]ords, words, words.” WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 2, sc. 2. In the context of the question, Hamlet was acting insane and also expressing ironically the ultimate futility of words to cure his ails by righting the wrongs of his kingdom.
course his freedom to know is bounded at the outermost by the created order. He cannot know what he cannot observe. He observes only creation and God’s speech that creates it. This is a reminder that there is a great deal that God knows—and that the man knows God knows—that the man does not.

God speaks distinctions into the created order; man’s speech identifies those distinctions. God participates in the created world through speech; man participates in the metaphysical world by knowledge. God, apparently all powerful, invites the man to participate in creation and gives him freedom and power appropriate to a creature that will cooperate with God. At the same time, there is a gap in knowledge, freedom, and power. There is an otherness to God—a holiness—irrespective of whether God would issue a command to the man and woman. God is mysteriously knowing, powerful, and free. Can the man be comfortable in the presence of such a God, even after such a collaborative effort? Can the man grow complacent in the presence of such a God? Who knows what God might do next? Trust is already a necessary part of the man’s orientation toward God, like that of a child toward an adult, but it is not yet the trust of a subject, who must be created a subject by a command.

II. FREEDOM AND THE DEMANDS OF LAW

The LORD God took the man and put him in the garden of Eden to till it and keep it. And the LORD God commanded the man, 'You may freely eat of every tree of the garden; but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall die.'

Before God and the man embarked on their cooperative creativity in quest of a helper for the man, God issues an ultimatum. This is not God’s first command, but it is the first command backed by a penalty. Earlier, in chapter 1 of Genesis, God tells both the man and the woman to “[b]e fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.” It is unclear whether this is rightly understood as a command to be obeyed, or

45 *Genesis* 2:15–17.
46 *Id.* at 1:28 (internal quotation marks omitted); see Chaim Saiman, *Jesus’ Legal Theory—A Rabbinc Reading*, 23 J.L. & RELIGION 97, 102 (2007) (this command has priority in rabbinic tradition).
a blessing, a sure thing, another act of creation by God through speech. The text suggests the latter, for immediately after the blessing or command is the observation that “it was so. God saw everything that he had made, and indeed, it was very good. And there was evening and there was morning, the sixth day.” In any case, the prohibition against eating the fruit differs in one significant respect (for the purposes of this Article) from the command to be fruitful: to the former God attaches a penalty for disobedience, and a stiff one at that.

Since John Austin, a command backed by the threat of a sovereign has been the paradigmatic expression of law. Legal positivists have endeavored to fill out this description to include rules that create possibilities for human freedom (such as contract law) as well as secondary rules to determine who the sovereign is, or who has authority to create law. For the purposes of this Article, it is sufficient to note that God, according to the spare facts presented by the text, undeniably has authority to issue a command; God has spoken all of creation into being, including the man and the prohibited fruit. And the command with a prohibition is a rule that, under many theories, would be in the heartland of a valid law. This highlights one value of looking to the pre-lapsarian biblical accounts. They allow the reader to consider the social ramifications of the formal characteristics of law without being distracted by the contingent cultural, historical, and institutional facts in which laws are inevitably embedded. They thus offer a control room for analyzing law.

The command and threat are of a piece with God’s creative activities in the first two chapters of Genesis. Here God again creates by speech that separates: a relationship is created through a spoken command that divides the man’s actions into

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48 Id. at 2:17 (“but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall die”).
50 See generally SHAPIRO, supra note 3, at 79–117.
obedience or disobedience. Thus, God creates a relationship of ruler and subject, or at least the terms of a future relationship, depending on how the man will exercise his freedom.

Not only does the form of the command reinforce God's intention to create a relationship of ruler and subject, but it's content does too: the prohibition on obtaining the knowledge of good and evil amounts to a bald order to "obey me." The threatened punishment, especially in light of the obvious power gap between God and the man, also suggests the unavoidability of the ruler-subject relationship for the man. The breadth of the command was bound to amplify the difficult questions about God's motive and purpose raised by the fact of creation. And to raise new questions about the nature of human freedom—is it the freedom to die? How meaningful is that?

The prohibition creates a kind of freedom for the man—the freedom to do either this or that, but not to do neither. Here law creates a binary choice—obey or disobey—with resulting freedom for the man in the simplest sense of a freedom to choose. One of the options may not be terribly attractive, as

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51 God issues the command to the man, before the woman is made (according to the narrative in chapter 2—recall that the two seem to be made simultaneously in chapter 1). Whether the command applies to the woman may be a subtext in chapter 3, where the serpent questions the woman, and not the man, about the bounds of the prohibition and the credibility of God's threat. Genesis 3:1-5. The question is ultimately settled, however, when God punishes both the man and the woman for violating the prohibition. See id. 3:16-19, 22-24. Readers through history have provided a variety of interpretations of the themes of gender and sexuality presented in chapters 2 and 3 of the book of Genesis. See, e.g., ELAINE PAGELS, ADAM, EVE, AND THE SERPENT (1988). Recent biblical scholarship has shed light on the role of women in the Bible and in ancient Israel. For an introduction to this literature, see WOMEN IN SCRIPTURE: A DICTIONARY OF NAMED AND UNNAMED WOMEN IN THE HEBREW BIBLE, THE APOCRYPHAL/DEUTEROCANONICAL BOOKS, AND THE NEW TESTAMENT (Carol Meyers et al. eds., 2000).

52 As Paul Kahn notes, the human freedom to choose, with the implication that choice will shape the world, distinguishes the Judeo-Christian theological tradition from Greek mythology, where, for instance, Oedipus's best efforts were thwarted by fate. KAHN, supra note 4, at 42 ("In the Judeo-Christian tradition, every action, even the mythical first act, is the act of a subject, because every action is the product of a choice between possibilities. Only with the introduction of a free subject can we speak of 'what might have been'.").

53 See Kass, Lessons from the Book of Genesis, supra note 6, at 7 ("But even this threat of punishment [the Noahic law] is made in speech, addressing us as rational beings, free to obey or not, free to choose risking the threatened punishment.... Lawabidingness both presupposes and promotes the possibilities of self-command and self-restraint."). See also PAGELS, supra note 51, at 74 (unlike
will become clear, but man’s power to choose—his will—remains unrestrained. Unlike the freedom to create, analyze, classify, and name, exercised by the man in collaboration with God, which is limited only by the man’s own createdness and the bounds of the created order, the freedom to disobey inheres in the ruler-subject relationship created by the prohibition. It is a kind of freedom created by law.

The focus here on the prohibition and penalty should not obscure the staggering breadth of freedom given to the man. Only one thing is prohibited. “You may freely eat of every tree of the garden,” says God, except “the tree of the knowledge of good and evil.”54 The man and eventually the woman are invited to explore and enjoy all of creation, save for one tree. Anyone familiar with moral philosophy might rightly question what the allure could possibly be of going from moral blindness to sight. After the woman’s exchange with the serpent in the third chapter, the text says that she saw that the fruit of the tree was good to eat and desirable to make one wise.55 But that was after a bit of pointed questioning by the serpent about God’s intentions.56 Until that point, the reader—and more importantly the man and woman—have no reason to gravitate toward the one tree made off-limits, and every reason to revel in the pleasures of a pristine world and the presence of a grand creator. Paradise indeed.

Yet the content of the prohibition and the finality of the penalty attached to it invite a ruler-subject relationship. God commands man not to eat the fruit of a particular kind of tree: the tree of the “knowledge of good and evil.”57 It is, effectively, a command not to acquire the moral knowledge that belongs only to God. In the Hebrew Scriptures, the phrase refers to God’s knowledge of right and wrong; it is the knowledge necessary to make an accurate judgment about whether an action has transgressed God’s boundaries, and it is a property unique to

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54 Genesis 2:16–17.
55 Id. at 3:6 (internal quotation marks omitted).
56 Id. at 3:1–5.
57 Id. at 2:17.
God. Indeed, after the man and woman disobey the command, God acknowledges that "the man has become like one of us, knowing good and evil."

The command does not prohibit what moderns would call practical reasoning, moral knowledge, or even legal knowledge. Instead, it prohibits reaching for the ability, the power, to make the judgment that God would make. By disobeying the command, "[m]an takes upon himself the responsibility of trying apart from God to determine whether something is good for himself or not. . . . Rather, man himself declares what is good. He does what is good in his own eyes rather than what is good in the eyes of God."

Disobedience of the command, then, would not only be a substitution of the man's judgment for God's judgment about whether or not he ought to eat the fruit, but would represent an attempt to gain the capacity to substitute his judgment for God's more generally. The metaphor of the fruit is transparent: disobedience would be a grab for moral and legal autonomy, a

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58 See W. Malcolm Clark, A Legal Background to the Yahwist's Use of "Good and Evil" in Genesis 2–3, 88 J. BIBLICAL LITERATURE 266, 272 (1969) ("Judgment in the OT is ultimately a matter for God. Man exercises judgment only as the agent of God and to distort this judgment means that one is held responsible before God."). See also Nahum M. Sarna, THE JPS TORAH COMMENTARY: GENESIS 19 (Jewish Publ'n Soc'y trans., 1989) (providing Bible passages and commentary) ("In the present passage, then, it is best to understand 'knowledge of good and bad' as the capacity to make independent judgments concerning human welfare."). Gerhard von Rad, an influential Genesis scholar, contended that "the knowledge of good and evil," like "heaven and earth," is a merismus of two words that represents not only the extremes, but everything in between them. Von Rad, supra note 9, at 81. On that understanding, God prohibited all knowledge, not just the knowledge necessary to make a moral judgment. Id. Clark corrects von Rad's reading by showing that the "knowledge of good and evil" is used throughout the hebrew scriptures to refer specifically to the knowledge necessary to make a divine judgment between right and wrong. See Clark, supra, at 270. Von Rad's interpretation also seems to conflict with the narrative; immediately after God delivers the prohibition, God begins to parade animals before the man, who gets knowledge about them and thereby names them, a story that would make no sense if knowledge in general had been ruled off-limits.

59 Genesis 3:22 (internal quotation marks omitted).

60 But cf. O'Donovan, supra note 7, at 3–30 (discussing the possibilities and limits of human judgment being like God's—without addressing the Genesis 2 prohibition on gaining the knowledge of good and evil).

61 Clark, supra note 58, at 277. See also Creation and Fall, supra note 9, at 66–69; Dietrich Bonhoeffer, God's Love and the Disintegration of the World, in 6 Dietrich Bonhoeffer Works: Ethics 229, 302 (Clifford J. Green ed., Reinhard Krauss et al. trans., 2005) [hereinafter God's Love].
complete rejection of God's claim to rule. The command amounts to "obey me." This underscores the command as a claim by God to rule. In the second chapter God's relationship with the man is framed by this invitation to be subject to God. Why must the divine-human relationship also be one of ruler-subject? Why must God insist on obedience, instead of merely asking for collaboration? Why restrict humans from moral knowledge? These questions are sharpened by the penalty attached to disobedience.

God tells man that "in the day that you eat of [the tree] you shall die." The command is an ultimatum. Its finality is at first glance curious, and may be best framed by the question why God does not say "on the day you eat of it I will kill you"? Is God hiding behind the passive voice? Why not take responsibility for the rule and penalty? How can the God who spoke the entire world into being, who created the man (along with the rule) not take responsibility for what would happen to the man if he broke the rule?

Four possibilities suggest themselves. First, God is avoiding the blame, simple as that. Second, death is not an arbitrary punishment for disobeying this command—grasping for the divine knowledge of good and evil is death, playing the judge is oblivion. The text does not expound on such an identification, but one implication is that there is no distinction between the effect caused by disobedience of a divine command and the punishment for that disobedience. To use a technical theological term untechnically, perhaps punishment for disobedience—at least of this command—is the natural ramification of that course of action. Third, the disobedient subject is one who ignores the ruler altogether. The disobedient man has thus become the ruler, and to him the lawmaker is no more. In this way, God describes the punishment for disobedience from the perspective of the lawless. Because the lawless man has rejected the lawmaker and by implication the judge, he would experience judgment only as pain or unpleasantness, not through the lens of a legal relationship.

62 *Genesis* 2:17 (internal quotation marks omitted).
Thus God tells the one who may be lawless that “you will die” without repeating a claim to rule, a claim that would fall on deaf ears.

The final possibility, the traditional reading of the text, is that the passive voice suggests the man’s ultimate responsibility for the ramifications of his freely chosen course of action. All the effects of exercising that freedom— including and up to the man’s self-destruction—are attributable only to him as a free actor. The freedom to disobey points to the prior fact of God’s rule, which points to perhaps the most convincing reason why death, and not some other punishment, would be the result of the man’s disobedience: man cannot live outside of submission to God. By reaching for autonomous moral and legal judgment, the man would be refusing the ruler-subject relationship, and with it, life.

This last reading rightly directs the point of the prohibition back to human freedom and God’s authority to rule, but it does not answer the questions about God’s motives. God remains powerful and mysterious, even unknowable. And added to God’s inscrutability, as evidenced by the limits of language and creation, is a prohibition against getting a certain kind of knowledge that would in some measure close the gap in knowledge, freedom, and power between God and the man. With it is the threat—or at least the acknowledgment—of annihilation, a reminder of the gap of the man’s creatureliness and his out-of-dustness. Is God a grudging giver, who always reserves a right to take it all back? Will God take it all back? Is the man’s freedom a privilege or an inviolable right, and how can he ever know the difference?

III. A COMMUNITY OF SUBJECTS

So the LORD God caused a deep sleep to fall upon the man, and he slept; then he took one of his ribs and closed up its place with flesh. And the rib that the LORD God had taken from the man he made into a woman and brought her to the man. Then the

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64 See, e.g., ETHICS, supra note 61, at 300 (“[Human beings] now know themselves beside and outside of God, which means they now know nothing but themselves, and God not at all. For they can only know God by knowing God alone. The knowledge of good and evil is thus disunion with God. Human beings can know about good and evil only in opposition to God.”).
man said, ‘This at last is bone of my bones and flesh of my flesh; this one shall be called Woman, for out of Man this one was taken.’

God and the man’s remarkable shared creative activity—one forming, the other naming the animals—culminates in the creation of the woman. The story suggests that the questions about God’s motives raised by the knowledge and power gap and the terms of the prohibition do not inexorably lead to distrust. Though the man does not participate in the creation of the physical world other than by naming the divisions in it, he shares intimately in the physical creation of the woman, formed from part of his own body. The text does not hint at whether the man consented to the surgery. Yet after an extraordinarily invasive procedure, the man gives no indication of feeling violated. It may be fair then to impute to the man a certain amount of trust in God, with his body and with his life. Indeed, the text implies a physical intimacy between God, who has already formed the man with God’s own hands and breath, and the man, who donates (as it were) his rib, so God might likewise form the woman.

The man’s response is unambiguous. His first recorded words, one imagines them being sighed, are “[t]his at last.” As with the other living creatures, he names her, but there is a difference between his exercise of dominion over the animals and his naming of the woman. Up to this point, the man has had no proper name, the text referring to him simply as adamah, or earthy one. It is only by naming the woman that he is able to name himself. Her name, ishah, is linguistically linked to his, and vice versa. It is through coming to know the woman that he has come to know himself. The man’s naming of the animals was perhaps in part a pedagogical exercise to enable him to get to

65 Genesis 2:21–23.
66 Id. at 2:18–22.
67 Id. at 2:21–23.
68 Id. at 2:23–25.
69 See SARNA, supra note 58, at 21–23.
70 Genesis 2:23 (internal quotation marks omitted).
71 Id. at 2:23.
72 See SARNA, supra note 5, at 22.
73 See id.: at 23.
know the woman, and himself. Thus all of creation, including the creation of the man, is complete only with the creation of the woman.

The creation of the woman entails the creation of a new relationship of intimacy: humanity, or fleshliness, is shared only by the man and the woman. The text repeatedly presents the pair as two strands inseparably woven. The woman is formed from the man's body; their names are cognates; and "therefore," the text notes, "a man leaves his father and his mother and clings to his wife, and they become one flesh." The Hebrew terms translated as "one flesh" suggest that the man and woman are plural and singular at once, echoing the account of creation in the first chapter, wherein "God created humankind in his image, in the image of God he created them; male and female he created them." The Hebrew word translated as "clings" appears elsewhere in Scripture "to describe human yearning for and devotion to God"; used here it implies a gravity between the man and the woman, an irresistible drawing of the two to one another. In the words of E.E. Cummings, "one's not half two. It's two are halves of one."

They share the breath of life and the image of God, and yet they are "one flesh" quite apart from God. In humanity, in createdness, they share something with one another that neither of them shares with God. They stand together on one side of the gap of knowledge, freedom, and power that distinguishes God from all of creation. They stand together subject to the prohibition imposed by God, as subjects of God. And as the threatened penalty reminds them, they share fleshliness, physicality, limitation, and "thereness," in a fixed time and place where they were set by God.

The separation of the new community of flesh from God is hinted at in the final verse of the second chapter. Just as "a man leaves his father and mother and clings to his wife," so "the man and his wife were naked and were not ashamed." No longer

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74 Genesis 2:24.
75 Id. at 1:27. As the medieval rabbi Rashi put it, "God created him first with two faces, and separated them." ZORNBERG, supra note 9, at 1 (citations omitted) (internal quotation marks omitted).
76 SARNA, supra note 58, at 23.
77 E. E. CUMMINGS, One's Not Half Two; It's Two Are Halves of One; in 1 x 1 [ONE TIMES ONE] 16 (George J. Firmage ed., 2002) (1944).
78 Genesis 2:21.
merely *ishah*, the woman is now referred to as the man's wife. Has the man left his father and mother to cling to the woman? Why was the man so needy without her? Why was he not whole in the presence of God? Now that the man is whole, what role is to be played by God, the One Who spoke the world into being, the one who issued the ultimatum? Can such a lawmaker be known? Trusted?

IV. DISTRUST AND THE LAW

The questions left unanswered by the first two chapters of Genesis suggest that the paradigmatic conditions of a ruler-subject relationship under law inherently ask the subject to trust the ruler. First, God's method of creation—speech—reveals God to be powerful, but hides much of God's knowledge. God's mind, especially God's motives for creating and for prohibiting, remains largely a mystery. God's five- and ten-year plans are opaque. The mysterious mind of the lawmaker dissolves into the subject's speculation, and perhaps suspicion. Second, the law itself only feeds these questions. The command is a prohibition on part of the knowledge that constitutes the gap between God and man. Why restrict something inherently desirable, such as moral knowledge? Made "in the image of God," the humans are prohibited from becoming "like God." Why would a God, who shared dominion with the man and the task of naming creation, now begrudge humans sharing in the task of moral and legal judgment? And, why such a harsh penalty? Why not allow humans to enjoy the learning, solving, and creating that are constitutive of human freedom without imposing a binary choice? The question at bottom, of course, is why does God have to rule?

79 For a discussion of the man's need, see KAHN, supra note 4, at 106–12.
80 See Roderick M. Kramer, Collective Paranoia: Distrust Between Social Groups, in DISTRUST, supra note 8, at 136, 137 ("Distrust and suspicion arise when individuals attribute such things as lack of credibility to others' claims or commitments and hostile motives or deceptive intentions to their actions, especially in situations in which uncertainty or ambiguity is present regarding the cause of their behavior. Most conceptions of distrust further assume that psychological states such as fear of exploitation, lack of confidence, and low expectations of reciprocity are significant correlates of distrust.") (citations omitted).
81 See Kramer, supra note 80, at 152–54 (the impossibility of changing rulers can give them even greater power over subjects).
82 *Genesis* 1:27.
83 *Id.* at 3:5.
Third, and finally, the "one flesh" shared by the man and the woman but not God has the potential to be another ground for mistrust. A good shared by subjects exclusive of the ruler invites suspicion that the ruler will fail to care for that good. This is the perennial concern of the political minority, the out-of-power, the subject. The man and woman's shared humanness serves as a constant reminder to them that God is fundamentally different, fundamentally other. What does God know about creatureliness? Does God need to eat? Does God know what it is like to have limits, for knowledge to be just beyond reach? To whom is God responsible? These exclusive goods may engender distrust, particularly in a legal relationship.

To these three trust-asking aspects of law could be added another that comes into focus in the third chapter of Genesis: What is the likelihood of enforcement? God seems to be limitlessly powerful, but we have not yet seen God destroy something. Is God's power a one-way ratchet in the direction of life? Or perhaps God would be merciful, lacking the desire or the will to destroy what, up to now, appears to be the crowning achievement of creation. The question of God's power and God's will are quickly raised in the third chapter. The serpent tells the woman that she will not die if she eats the fruit from the tree of the knowledge of good and evil. Rather, she will become "like

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84 The social science literature supports the notion that people often use group membership as a proxy for trustworthiness and distrust outsiders. See, e.g., James Habaryarima et al., Coethnicity and Trust, in WHOM CAN WE TRUST?, supra note 8, at 42, 42 ("people are more likely to trust someone from the same ethnic group"); Kramer, supra note 80, at 138 ("[C]ategorization of individuals into distinct groups can lead individuals to perceive out-group members as less trustworthy, less honest, and less cooperative than other members of their own group, even when those group boundaries are based on arbitrary and transient criteria.").

85 How best to harness political distrust by constitutional design has long been a theme of republican political theory. See THE FEDERALIST No. 10 (James Madison) (even in a republic, "[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people"); DISTRUST, supra note 8, at 140–48; Philip Pettit, Republican Theory and Political Trust, in TRUST AND GOVERNANCE, supra note 9, at 295, 295. Scott Shapiro has recently brought the American founder's distrust to bear on legal positivism. He argues that law is a social plan, partly intended to overcome a society's distrust that some members will fail to properly resolve difficult moral questions. See SHAPIRO, supra note 3, at 309–13. Whereas Shapiro and republican theorists explore the role of distrust as an input to legal systems, this Article focuses on distrust as a potential output, or byproduct, of lawmaking and law.

86 Genesis 3:4.
God, knowing good [from] evil." Would being "like God" put her beyond God's power to destroy? Additionally, God's own response to the pair's disobedience raises questions: they were punished, but were they put to death "in the day" of eating the fruit? Instead, God subjects them to long lives of pain and hard labor, to be followed by death. Is this a sentence of torture followed by death, the primeval equivalent of the punishment reserved in early modern kingdoms for attempted regicide? As the careful reader will perceive, the questions raised in the pre-temptation narrative of chapters 1 and 2 are only amplified in chapter 3 as the serpent gives them voice and the humans put God to the test.

Even before the serpent steals into the garden, however, the fact of law in an idyllic state of nature, the bare existence of a claim to rule—even a claim as justified as God's in chapters 1 and 2 of the book of Genesis—raises questions about the Creator's trustworthiness. Indeed, the gap in knowledge, freedom, and power; the fact of a prohibition; and the community of subjects together seem sufficient to raise yet another question, the question that perhaps underlies this concern about God's trustworthiness: Does God really care about the man and woman?

CONCLUSION

The first two chapters of Genesis tell a story of creation by speech and the first prohibition. The purported ruler is the creator, apparently all-powerful. The would-be-subjects owe that ruler their very existence. Even so, the nature of speech, knowledge, power, and the experience of being a subject all suggest that law inherently asks for trust. Every law bears the lawmakers request of the subject: Will you trust me?

87 Genesis 3:5.
88 Genesis 2:17.
89 Genesis 3:15–19.
90 These questions go to the heart of one of the most difficult questions of theology, the question of theodicy: Why would a good God allow evil to exist? Unsurprisingly, the first few chapters of Genesis have figured importantly into Christian responses to this question, as theologians have attempted to square the Genesis story with the claims of Jesus and his followers. For a history of the Christian doctrine of Creation, see generally COLIN E. GUNTON, THE TRIUNE CREATOR (1998).