REDUCTIONISM IN LEGAL THOUGHT

*Steven D. Smith**

This Article advances the modest proposition that the institutions of law perform multiple functions and that the law, in performing its different functions, must work in different ways. That proposition seems so obvious, and so singularly unexciting, that it may be advisable to explain why the Article cannot just announce its thesis and then rest its case: However obvious, the law's functional multiplicity, as well as the jurisprudential implications of that multiplicity, are regularly overlooked. Because lawyers, judges, and even (or especially) legal scholars often seem afflicted with a compelling need to reduce law to a unitary image or theory, legal theory—and law—suffer. Consequently, it is useful to elaborate upon the multiple functions that law serves, to consider why none of these functions can be subordinated to or collapsed into any of the others, and to examine the unfortunate consequences that ensue when law's essential multiplicity is neglected.

Part I depicts three different accounts of law, here called the dispute resolution, coordination, and meliorative accounts. Rather than beginning and perhaps remaining in the realm of the highly abstract, the accounts described here are more anchored in pragmatic, real world imperatives. Each account begins by assigning law a particular practical function that may be regarded as essential in the maintenance of a civil society. The dispute resolution account sees law's function as the adjudication of particular grievances or conflicts; the coordination account assigns law the task of providing a general, stable framework for human interaction; and the meliorative account holds that law's responsibility is to promote social justice and to improve the social order. These functions in turn generate distinctive views of what legal discourse should be like and of the essential institutional form in which law should be embodied. Thus, each account has three elements or aspects, which might be regarded as descriptions of law's social function, its intellectual content, and its principal institutional form.

The Article then discusses the ways in which these accounts interact, sometimes complementing and sometimes conflicting with each other. When visions of law conflict, lawyers and theorists must find ways to cope with the conflicts. One common strategy, discussed in Part II, is reductionist. This strategy seeks to eliminate conflicts by collapsing competing views into a single theory of law. Despite its attractions, however, the reductionist response leads to distortions in the

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* Professor of Law, University of Colorado. Hiroshi Motomura, Bob Nagel, Gene Nichol, and Pierre Schlag offered valuable criticism of earlier drafts of this Article. Chris Mueller proved that supererogation is possible by reading and commenting on two earlier drafts. I have profited immensely, although probably not sufficiently, from this criticism.

14. Proclamation No. 3945, Nov. 28, 1969, 34 F.R. 19017, "Random Selection for Military Service." The order depended on a man's birthday. The days of the year were picked at random, ranked from 1 to 365, and men were drafted in that order.

understanding of law and to practical deficiencies in the actual operation of law.

Part III suggests a nonreductionist strategy that is at once less tidy yet less debilitating than the reductionist strategy. The analysis seeks to show that nonreductionist but nonetheless rational thinking is a familiar, everyday phenomenon, and that ethical thinkers such as John Finnis and Martha Nussbaum have usefully explored this approach. Applied to law, moreover, a nonreductionist approach need not be completely ad hoc; indeed, as is apparent in the mature work of some of this century's leading legal theorists, including Karl Llewellyn and Lon Fuller, a nonreductionist approach can at least propose tentative guidelines for resolving conflicts among competing legal visions. Hence, the analysis in Part III suggests that a nonreductionist approach to law is both viable and attractive.

I. Three Faces of Law

The following depiction of three accounts of law is admittedly artificial in several ways. Because law and legal thought are varied and complex, lawyers and theorists cannot neatly and comfortably be assigned to three distinct camps. Moreover, if we inevitably must classify, there is nothing sacrosanct about the three-part scheme suggested here; other legal scholars no doubt would find different classificatory schemes more helpful. Finally, my depiction cannot do full justice to the interrelationships and tensions among the accounts, although some of those interrelationships and tensions are considered as the Article proceeds.

Despite the inescapable artificiality of the depiction, however, the accounts described here do provide a useful way of organizing and understanding some pervasive themes and elements in law and legal thought, and of appreciating the potential for conflict among those themes and elements. The three accounts thus offer a valid approach to the basic issue of reductionism in legal thought.

A. *The Dispute Resolution Account*

One function performed by law is the authoritative resolution of disputes.[1] In any real society, disputes will arise among individuals or groups within the society. These disputes may grow out of factual disagreements ("Did Jones in fact promise to provide as many widgets as Garcia's business requires?"), or normative disagreements ("Do parents have an obligation to obtain medical treatment for their children when their religious faith forbids treatment?"), or they may involve a range of interrelated factual and normative disagreements. The resolution of these disputes may seem a modest function for law to perform;

1. See P. Devlin, The Judge 3 (1979).

but however unglamorous, this function is essential to the maintenance of the civil peace that a viable society requires.[2]

The law's dispute resolution function receives little recognition, at least on the level of legal philosophy. Neglect of the dispute resolution function may reflect the fact that the function is simply taken for granted. Alternatively, some scholars may regard dispute resolution as a peripheral or less important function of law.[3] In addition, the observation that law serves to resolve disputes, though accurate enough, offers little help in answering the recurring and troublesome questions that lawyers and legal theorists face—questions about *how* the law should resolve disputes.

Theorists occasionally find it useful, however, to emphasize law's dispute resolution function as a way of criticizing legal theories or attitudes that ignore or deviate from that account. For example, Karl Llewellyn called attention to the dispute resolution function as a way of resisting a rigidly rule-oriented conception of law:

> This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*
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> . . . And *rules*, in all of this, are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. *That is all their importance, except as pretty playthings.*[4]

This statement may have been a deliberate exaggeration, calculated not to offer a general definition of law, but merely, as Llewellyn's student and biographer suggests, "to make forcefully and vividly to intending private practitioners of law the elementary point that rules are not everything in law."[5] Whatever its intent, Llewellyn's assertion provides a powerful expression of the dispute resolution conception of law.

More recently, Grant Gilmore has underscored law's dispute resolution function in an effort to combat the competing view that this Article refers to as the meliorative account:

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2. Simon Roberts observes that "a degree of order and regularity *must* be maintained in any human group if the basic processes of life are to be maintained . . . . [Q]uarrels will inevitably arise, and . . . these may disrupt that order if they are not resolved or at least contained." S. Roberts, Order and Dispute: An Introduction to Legal Anthropology 13–14 (1979).

3. See, e.g., B. Ackerman, Reconstructing American Law 35–36 (1984) (discussed infra note 71 and accompanying text); Fiss, The Supreme Court, 1978 Term: Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 29 (1979) (discussed infra text accompanying note 40).

4. K. Llewellyn, The Bramble Bush 12, 14 (3d ed. 1960) (final emphasis added).

5. W. Twining, Karl Llewellyn and the Realist Movement 150 (1973). For a more complete discussion of Llewellyn's mature views on this point, see infra notes 171–191 and accompanying text.

> As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.[6]

Despite its apparent modesty, the dispute resolution view of law is hardly barren of theoretical implications; the view generates a conception of what legal discourse should be like and of the institutional form that law should take. Legal discourse, according to the dispute resolution account, is best understood as a distinctive kind of rhetoric.[7] If the function of law is to provide solutions that permit contending parties to end their quarrels and to get on with their lives, then the efficacy of a legal decision depends on how persuasive it is in convincing the contestants, and the community, that the dispute has been satisfactorily addressed and decided. The essential task of legal discourse, in short, is to persuade. Judge Patrick Devlin has described the nature of this kind of legal discourse: "The judicial function is not just to render a decision. It is also to explain it, wherever explanation is possible, in words which will carry the conviction of its rightness to the reasonable man whom in his mind the judge should always be addressing."[8]

For similar reasons, the dispute resolution account recognizes the essential institutional form of law as the judicial decision.[9] Unlike a statute, for example, the typical judicial decision directly addresses itself to a discrete dispute involving named contending parties.[10] Also unlike a statute, the judicial decision ideally does not just pronounce; it does not merely declare a result. Instead, it seeks to persuade the parties and the community that its result is correct,[11] and to that end, it marshals all the rich resources of legal rhetoric to justify its conclusion.

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6. G. Gilmore, The Ages of American Law 109 (1977).

7. The rhetorical aspect of legal discourse is discussed in a significant body of legal scholarship, although not all scholars understand rhetoric and its function in the same way. See, e.g., Rhetoric and Skepticism, 74 Iowa L. Rev. 755 (1989); Hohmann, The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation, 34 Am. J. Juris. 171 (1989); White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684 (1985). For my own analysis of negligence doctrine as a body of rhetoric for resolving disputes, see Smith, Rhetoric and Rationality in the Law of Negligence, 69 Minn. L. Rev. 277, 285–93 (1984).

8. P. Devlin, supra note 1, at 198. Consistent with this understanding, Judge Devlin also observed that because legal institutions exist to minimize civil disorder by resolving disputes, "their value to the community is to be measured by the extent to which they do this and not by the extent to which their judgments and verdicts are pleasing to the critical eye." Id. at 4.

9. Cf. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

10. See Wachtler, Judicial Lawmaking, 65 N.Y.U. L. Rev. 1, 18 (1990).

11. See Wellington, Common Law Rules and Constitutional Double Standards:

B. *The Coordination Account*

A second function performed by law is the coordination of human interaction.[12] If humans are to live together in an orderly and satisfying fashion, they need to know how others expect them to behave, and how they can expect others to behave. Individuals need to be able to make reliable arrangements with other individuals concerning matters of mutual interest including, for example, commercial affairs, living arrangements, and the upbringing of children. To a large extent, the dependable social environment needed for effective human interaction is provided by unwritten social norms or customs that are not commonly described as "law."[13] Especially in a diverse and dynamic society, however, implicit norms may be uncertain and inadequate for many purposes. In addition, general norms may not speak to more specialized or individual interactions that particular persons may choose to pursue. Law can supplement these deficiencies, creating a framework within which individuals more confidently and freely can formulate and carry out their personal and social projects.

When performing this coordination function, the law typically does not try to tell people what projects they should pursue. Instead, it seeks to create a reliable social environment in which they are free to pursue projects of their choice.[14] Several bodies of law—contract law, property law, family law, trust and estate law—are centrally concerned with facilitating human interactions in this way.

While the dispute resolution account emphasizes the rhetorical nature of legal discourse, the coordination account naturally leads to a conception of law-as-rules.[15] Public, comprehensible rules permit individuals to predict the legal consequences of their actions, and to plan and structure their social interactions. While a number of contemporary scholars defend this perspective,[16] the coordination account of law is perhaps most carefully elaborated in the writings of Lon Fuller. Though he recognized that law cannot be reduced to a single function, Fuller emphasized law's role in coordinating human interactions by

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Some Notes on Adjudication, 83 Yale L.J. 221, 225 (1973) (observing the recognized "obligation of the courts to justify the rules they announce").

12. For a careful statement of this function offered as part of a defense of H.L.A. Hart's "rule of recognition" theory, see Postema, Coordination and Convention at the Foundations of Law, 11 J. Legal Stud. 165, 197–203 (1982).

13. See L. Fuller, Human Interaction and the Law, *in* The Principles of Social Order 212–24 (K. Winston ed. 1981).

14. See Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35, 53 (1981).

15. The association of "law" and "rules" is a common one. For two articulate accounts of that association, see H. Hart, The Concept of Law 78–96 (1961); Schauer, Formalism, 97 Yale L.J. 509, 510 (1988).

16. See, e.g., MacCormick, The Ethics of Legalism, 2 Ratio Juris 184, 188 (1989); Schauer, supra note 15, at 538–44.

"provid[ing] a framework for the citizen within which to live his life."[17] This perspective led him to define law as the "enterprise of subjecting human conduct to the governance of rules,"[18] and to devote considerable attention to elaborating the requirements that the administration of law must satisfy if law is to serve its coordinating function.[19]

The coordination account, with its law-as-rules emphasis, most essentially expresses itself in the form of the statute—particularly in the form of the statutory code, of which the Uniform Commercial Code is a familiar example. Court-developed common law is sometimes viewed as a system of rules,[20] but these rules, if they exist, are often murky and difficult to extract.[21] Within a case law system, Brian Simpson notes,

> if six pundits of the profession, however sound and distinguished, are asked to write down what they conceive to be the rule or rules governing the doctrine of *res ipsa loquitur*, the definition of murder or manslaughter, the principles governing frustration of contract or mistake as to the person, it is in the highest degree unlikely that they will fail to write down six different rules or sets of rules.[22]

By contrast, the statutory code attempts to make available in a clear and coherent form all of the rules upon which interested parties will depend in planning and structuring their affairs.[23]

C. *The Meliorative Account*

A third account assigns to law what may be described as a meliorative function. Law in this view is not content, as it is in the dispute resolution account, to mend rents in the social fabric. Nor does it seek,

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17. L. Fuller, supra note 13, at 234.

18. L. Fuller, The Morality of Law 96 (rev. ed. 1969).

19. Fuller contended that law must cultivate the following qualities: (1) generality, (2) public accessibility, (3) prospectivity in application, (4) clarity, (5) consistency, (6) possibility of compliance, (7) relative constancy over time, and (8) congruence of official action and declared rules. Id. at 33–91. These requirements, Fuller argued, constitute an "inner morality" with which law must comply if it is to perform its facilitative function; citizens cannot structure their lives within a framework of law that is unknown, unintelligible, internally contradictory, retroactive, or in perpetual flux. Id. at 33–38.

20. See Simpson, The Common Law and Legal Theory, *in* Oxford Essays in Jurisprudence 77, 79 (2d series 1973) (observing and challenging the view that "[t]he predominant conception today is that the common law consists of a system of rules").

21. Cf. L. Fuller, Anatomy of the Law 105 (1968) ("Instead of being compacted in a code that can be held in one hand, [common law] rules are spread out in haphazard order through thousands of volumes . . . .").

22. Simpson, supra note 20, at 89.

23. In this vein, Hessel Yntema listed five virtues of statutory codes over common law: "superior economy in the ascertainment of law, clarity and conciseness in the statement of legal principles, correspondingly increased certainty in the law and reduction of the ex post facto legislation inherent in case-law, facilitation of reform, and diffusion among the people of a more accurate knowledge of their rights and liabilities." Yntema, The Jurisprudence of Codification, *in* David Dudley Field Centenary Essays 251, 257 (A. Reppy ed. 1949). Four of these five virtues implicate a coordination account of law.

as it does in the coordination account, merely to create a framework within which individuals can form their own relationships and carry out their own plans. Instead, law stands in critical judgment upon the social order and, when it finds that order to be deficient or unjust, attempts to move society to a condition of greater goodness or justice.[24] Of course, law is not the only kind of activity that has as its objective the achievement of a good and just society. Education, philanthropy, religion, art, and other activities may share that objective. But law enjoys distinct advantages in the project of amelioration. Most obviously, once it has determined that an existing practice is undesirable or unjust, law need not limit itself to persuading practitioners to change their ways; it can bring to bear the coercive power of the state.

In academic discourse, the meliorative vision is most conspicuous in radical scholarship that would use law to transform the very nature of society and humanity.[25] This vision is prevalent as well in the theorizing of Ronald Dworkin, in whose view the law is engaged in a perpetual, Herculean struggle to make itself, as well as the society it governs, "the best they can be."[26] And the meliorative vision is also apparent, in somewhat less grandiose form, in law-and-economics scholarship that would use law to create a more efficient society in which the goal of wealth maximization can be effectively and rationally pursued.[27] Indeed, a meliorative perspective appears to dominate contemporary legal thought; for many legal scholars, it is virtually impossible to think about law in any other terms.[28]

The legal discourse dedicated to law's meliorative function will not rest content with either rhetoric or with rules. Rhetoric, as its traditional connotations imply, may be persuasive yet at the same time empty, deceitful, or downright false.[29] Rules may be rigid, unfeeling,

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24. Steven Burton expresses this viewpoint when he argues that "[t]he law of a community straightforwardly should be understood as the representation of a possible social world to be brought into empirical being by coordinated human action." Burton, Law as Practical Reason, 62 S. Cal. L. Rev. 747, 784 (1989).

25. See, e.g., Brosnan, Virtue Ethics in a Perfectionist Theory of Law and Justice, 11 Cardozo L. Rev. 335, 337, 344 (1989) (proposing "a long-term project to develop a nonliberal perfectionist theory of justice" whose tenets are that "the central function of law is to make people virtuous" and that "the goal of law is to provide for individual and social well-being and happiness"); see also Powell, The Gospel According to Roberto: A Theological Polemic, 1988 Duke L.J. 1013 (interpreting legal theorizing of Roberto Unger as offering visionary modernist accounts of creation, redemption, church, and salvation).

26. R. Dworkin, Law's Empire vii (1986).

27. See, e.g., R. Posner, The Economics of Justice 88–115 (1981).

28. For a critical discussion of this phenomenon, see Schlag, Normative and Nowhere to Go, 43 Stan. L. Rev. 167 (1990).

29. This view of rhetoric has ancient ancestors. See Plato, Gorgias 459c, *in* The Collected Dialogues of Plato 229, 242 (E. Hamilton & H. Cairns eds. 1961) (statement by Socrates suggesting that the rhetorician "has no need to know the truth about things but merely to discover a technique of persuasion"). Richard Posner suggests a similar understanding in his analysis of Holmes's *Lochner* dissent; despite its shoddy organiza-

and oppressive.[30] The meliorative account instead would cultivate a legal discourse that exalts political and ethical reason. Policy analysis and political and ethical philosophy become the principal tools in law's quest for the good society.[31]

Political and ethical reason may be brought to bear upon any of the law's institutional forms; they may, for example, inform the content of judicial decisions and of legislation. In our legal system, however, the loftiest form in which the meliorative vision can express itself is what Bruce Ackerman describes as the "transformative" constitutional amendment[32]—that is, the constitutional provision that embraces a grand ethical principle[33] and authorizes the relevant institutions of government to take the necessary measures for realizing that principle. Perhaps the most conspicuous example of meliorative law is the fourteenth amendment, which conveys the broad principles of equality, due process of law, and legal protection for life, liberty, and property.[34] The efforts of Congress and the courts to carry out the amendment's broad commission have been the source of the most searching ethical debates in this country's public life during this century, as jurists and citizens have been compelled to address issues such as racial and gender justice and the status and rights of unborn life. While the fourteenth amendment is hardly the only expression of the meliorative vision of law, it may well be the most powerful.

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tion and analysis, Posner contends, Holmes's opinion so masterfully employs tricks of persuasion that it ranks as a "rhetorical masterpiece." Posner, Law and Literature: A Relation Reargued, 72 Va. L. Rev. 1351, 1383 (1986).

30. Lynne Henderson aptly articulates a common criticism:

> The troubling phenomenon produced by fidelity to the Rule of Law in legal theory and practice is . . . [that l]egal decisions and lawmaking frequently have nothing to do with understanding human experiences, affect, suffering—how people *do* live. And *feeling* is denied recognition and legitimacy under the guise of the "rationality" of the Rule of Law.

Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574, 1574–75 (1987) (citation omitted).

31. The use of policy analysis and of political and ethical philosophy in the work of leading legal scholars such as Calabresi, Dworkin, Ackerman, Posner, and Perry is well-known.

32. Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 524 (1989). Ackerman contrasts "transformative" amendments with others, which he calls "superstatutes," that "do not seek to revise any of the deeper principles organizing our higher law." Id. at 522. The fourteenth amendment is a clear example of a "transformative" provision; the twenty-sixth amendment, which lowered the voting age to 18, was a "superstatute." Id. at 522–25.

33. For a critical discussion of the tendency of legal scholars, politicians, and citizens to view the Constitution primarily as "a set of exhilarating affirmations," see Nagel, Forgetting the Constitution, 6 Const. Commentary 289, 289 (1989).

34. As Ackerman observes, the amendment "speaks the language of fundamental principle." Ackerman, supra note 32, at 522.

D. *Complementarity and Conflict*

Each of the preceding three accounts assigns to law a particular function, and that function in turn generates a view of legal discourse and of the characteristic institutional form in which law is most fully embodied. Despite the differences in these accounts, it would be a mistake to suppose that they describe wholly independent legal worlds. In fact, the relationships among the accounts are much more complex.

In many ways, the differing accounts of law complement each other. For example, the dispute resolution function emphasizes the rhetorical nature of law. However, a rhetorical conception of legal discourse does not exclude, but rather embraces, the discourses generated by the other accounts. Enacted rules, as well as political and ethical reason, are among the rhetorical resources upon which judicial decisions routinely draw in justifying their results. It is commonplace for judges to explain that a particular party must be held responsible for an injury because she violated a rule,[35] or because her actions were unjust or socially undesirable.[36]

In similar fashion, although the coordination account of law emphasizes the central importance of rules, political and ethical reason, most closely associated with the meliorative account, properly influences the substantive content of those rules. Moreover, rules are of little use if they can be ignored with impunity. Hence, legal rules depend for their efficacy in part upon sanctions—sanctions that the law imposes in the process of resolving the disputes that arise when the rules are violated. And the meliorative function of law is carried out to a large extent by embodying political and ethical values in rules—rules that in turn provide a framework for human interactions and that are enforced, when necessary, through the process of dispute resolution. Thus, while the fourteenth amendment embodies the ethical ideal of equality, that ideal is implemented through civil rights statutes, which are in turn enforced, in large measure, through private lawsuits.

Because the diverse functions of law often complement each other, it is tempting to suppose that the three accounts described above represent different aspects of a single, harmonious whole. Unfortunately, the relations among the accounts of law are not as amicable as the discussion thus far might suggest. Indeed, the accounts of law also can conflict with each other. Rules, for example, are one source of legal rhetoric, but they are not the only source. In some cases, rhetoric that runs counter to a rule may offer the most persuasive way to resolve a dispute. And since the dispute resolution account sees as law's primary

35. Perhaps the clearest example of this is the "negligence per se" doctrine, under which a court imports a rule enacted for purposes other than tort cases to conclude that a party's conduct was "unreasonable" under tort standards. See, e.g., Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920).

36. See Smith, Why Should Courts Obey the Law?, 77 Geo. L.J. 113, 135–37 (1988).

objective the rhetorically persuasive resolution of the particular dispute—not the enforcement of a general rule—the law-as-rhetoric and law-as-rules conceptions at that point will conflict.[37] The long-standing tension between "law" and "equity" is one manifestation of that conflict.[38]

Similarly, although meliorative law may seek to realize a vision of the good and just society by employing the instruments of general rules enforced by judicial decisions, it may find those means to be cumbersome and ineffective on other occasions. Indeed, since the basic objective of meliorative law is to improve and purify existing social practices, it is inherently likely that this conception of law will sometimes condemn prevailing rules and patterns of rhetoric that, in their current condition, citizens find persuasive. Whether the social vision is that of the "law-and-order" conservative or the romantic communitarian, the constraints of Rule of Law and "due process" may sometimes impede the achievement of a virtuous society.[39]

These conflicts create a problem for legal officials and legal theorists. As long as the differing accounts of law are mutually supporting, a legislator, judge, or theorist does not have to choose from among them; she can, like the candidate for public office, simply applaud them all. But when the accounts conflict, choices become inevitable. The remainder of this Article addresses how these choices are to be made.

II. The Reductionist Strategy

Perhaps the most obvious way to avoid or resolve conflicts in competing visions of law is to determine that one vision is primary and the others are subordinate. The cleanest way to achieve this result would be to show that two of the visions are actually derivative of the third. In this way, the three accounts might be collapsed into one, and conflicts among the accounts might be avoided.

A. *From Trinity to Unity*

A reduction of the three accounts into one seems achievable, at least on a theoretical level. For example, under what currently seems the most likely form of reductionism, one might assert that the meliora-

37. See id. at 138, 142–45.

38. The tension was recognized by theorists at least as early as Aristotle. See Aristotle, Nicomachean Ethics, Bk. V, ch. 10, *in* Introduction to Aristotle 338, 458–59 (R. McKeon 2d ed. 1973); see also Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 15 (1989) ("This divergence between the optimal rule and the optimal result in the particular case is a familiar theme in political and moral theory.").

39. See Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 394, 409–10 (1989); cf. McBride, An Overview of Future Possibilities: Law Unlimited?, *in* NOMOS XV: The Limits of Law 28, 33 (J.R. Pennock & J. Chapman eds. 1974) (observing that "a vigilante group can often be more effective in doing away with suspected criminals swiftly and decisively than legal procedures ever could be").