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TOWARD A JURISPRUDENCE OF SOCIAL VALUES

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INTRODUCTION

Legal theory wrestles perennially with a variety of seemingly intractable problems. I include among them questions about what we are doing when we interpret legal texts, the distinctions between hard and easy cases and between rules and standards, and the meaning of the rule of law.

It is quite possible that the apparent intractability of these problems reflects nothing more than that they involve the use of "essentially contested concepts."[1] However, I argue in this Article that we can, in fact, make substantial progress toward clarifying these problems and making them much more intelligible. We can do this by keeping in mind the role that social values play in law. And that role is fundamental: social values constitute the law.

By "social values" I mean those things that are widely thought to be important in a community.[2] Law shapes a community by mediating private

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1. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y, NEW SERIES, 167, 167–98 (1956).

2. For a discussion of the meaning of "community" in this Article, see *infra* note 3 and accompanying text.

disputes, facilitating private transactions, regulating public behavior, and authorizing the exercise of coercive power by the government, as well as by identifying limits on that power. Therefore, the fundamental question for law is what kind of community its members want to live in. That question is a question of social values: it is a question that requires them to decide what they care about as a community. Social values can, accordingly, reflect moral values widely held within the community or instrumental public policies widely thought to be critical to the community's well-being. But social values are not to be strictly identified with morality or public policy or any other particular category of concerns. A community's social values just are those things that the community, in fact, cares about.

Of course, to understate the matter, members of a community do not necessarily agree about social values. We care about many different things, and we also care about the same things to different degrees. These heterogeneous concerns are often in tension, and the resulting conflicts over social values are reflected in the community's treatment of controversial legal issues (abortion and affirmative action come readily to mind). So if my assertion that social values are widely shared concerns of the community is correct, we need to understand what that means with respect to values lacking community consensus.

Moreover, what a community cares about and how that is reflected in law will change over time. For example, the landscape of civil rights law looks very different in twenty-first-century America than it did at the end of the nineteenth century. Thus, we need to understand how the contingency of social values relates to the stability that we generally think important for law.

I address both of these considerations in Part I, which sketches a jurisprudential framework for thinking about the relationship of social values to law. Then, in Part II, I aim to suggest the utility of that framework by showing how it casts new and revealing light on the important jurisprudential puzzles with which I began this Article puzzles about interpretation, hard and easy cases, rules and standards, and the rule of law.

What follows is not the result of sociological investigation; I present no empirical data to support my argument that social values constitute law. Nor is it analytical; it is not a claim that the role of social values emerges from rigorous thinking about the concept of law. The argument in this Article should, rather, be regarded as a thought experiment. My thesis is that if we think about the relationship of social values to law in the way

that I suggest, a variety of important jurisprudential issues become more comprehensible.

I. THE FRAMEWORK

To get some purchase on my claim that social values constitute the law, I want to start with the familiar idea of a "field of law" and argue that a field of law (torts, contracts, criminal law, corporate law, civil procedure, etc.) is defined by a discourse whose subject matter is the governance of a certain kind of human activity—that is, it is defined by conversations designed to identify what is required, permitted, and prohibited with respect to that activity. Put another way: fields of law emerge from community discourse about what human activities ought to be subject to governance and how they should be governed.

By "governance" I mean that the requirements, permissions, and prohibitions that emerge from this community discourse are enforceable by coercive power. By "community" I mean those whose perceived mutual interest in governing one another's activities leads to discourse on that subject.[3] Through these descriptions I mean to suggest that law and communities are mutually constituting: to be a community means (perhaps among many other things) to be a collection of persons who perceive a mutual need to govern certain kinds of human activity, and the parameters of governance, as I noted, emerge from that discourse.

What distinguishes law from, say, the rules of a sport or the bylaws of an organization is not the source of coercive power (e.g., the sovereign)[4] or the justification of coercion (e.g., rules of recognition,[5] the basic norm,[6] natural law[7]). Law differs from other systems of coercive norms in its pervasiveness. That is, fields of law can potentially address any type of human activity within the community. Thus, Major League Baseball's

3. While the field-defining discourses are routinely carried out by those who have official responsibilities for employing the community's coercive power (executives, legislators, judges, administrators, law enforcement officials, etc.), participation by the general public—i.e., by anyone subject to the community's coercive power—is commonplace.

4. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 191–200 (1832). Among the implications of rejecting Austin's definition of law as the general commands of the sovereign is to blur, if not erase, his distinction between municipal law, which consists of laws "properly so called," *id.* at 4, and international law, which Austin identified as a branch of "positive morality," *id.* at 132. Thinking about law in terms of social values opens up the possibility of properly regarding international law as law.

5. *See* H.L.A. HART, THE CONCEPT OF LAW 97–107 (1961).

6. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115–22 (A. Wedberg trans. 1945).

7. *See* AQUINAS, SUMMA THEOLOGICA I-II.95.2 (Anton C. Pegis ed., 1948).

governance of professional baseball players is limited to the professional baseball-related activities of those players, team owners, umpires, etc., associated with the sport;[8] the American Medical Association's governance of its members is limited to the activities of those members associated with the aims of the organization, including the practice of medicine. The "law" of Pennsylvania, on the other hand, can regulate potentially any activity of members of the Pennsylvania community (including baseball and the practice of medicine), and any substantive limits on legal governance[9] are either self-imposed,[10] or imposed by the law of a superior governing community.[11] Again, law differs from other systems of governance within a community in its pervasiveness, and a *field* of law, like contracts, torts, criminal law, and so forth, picks out one particular category of human activity among the panoply of human activities that are subject to governance by law.

The discourses that define various fields of law are constituted by social values. A field of law will govern a particular category of human activity because the community believes regulation of that activity to be important, and the scope and details of that regulation will emerge from conversations within the community about why and in what way it is important to regulate the activity. These issues of what is important—what the community cares about—are what I mean by "social values." The social values that traditionally constitute the field of criminal law, for example, include, among others, retribution and various utilitarian values such as deterrence.[12] This definition of values is intentionally broad. What we care about includes goals, interests, policies, principles, and so forth;

8. Even when MLB regulates players' conduct that does not seem directly related to baseball (e.g., marijuana use, domestic abuse), the justification focuses on the impact of such activity on the integrity and well-being of the professional sport.

9. E.g., exclusion of the regulation of religion.

10. E.g., through ratification of state and federal constitutions.

11. E.g., state law limits on local law.

12. *See* WAYNE R. LAFAVE, CRIMINAL LAW 26–36 (5th ed. 2010). To be more precise, the things that the community cares about when reflecting on "why and in what way it is important to regulate the activity" covered by a particular field of law operate on different levels. This first level is the "why?" and when we reflect on the "why?" we must first focus on the overall point of the field. In the case of criminal law its point is to structure punishment for certain behavior. Asking the "why?" question—Why do we punish?—generates the traditional list of retributive and utilitarian values noted in the text. By then reflecting on those first-level values, we can identify a second level of values: values that address the question "in what way?" In the case of criminal law, reflection on the first-level values yields second-level values, like proportionality and fair warning, which reveal what we care about when we are deciding whom to punish and how. For simplicity the references to values in this article are generally to first-level values.

moreover, what we care about can touch on economic, moral, political, aesthetic, religious, and other concerns.

Accordingly, fields of law will differ because the particular constellation of social values that constitutes one field-defining discourse will differ from the particular constellations that constitute other field-defining discourses. That is, the difference between torts and contracts is not, in the first instance, that one field governs some activity called torts and the other some activity called contracts. Rather, we conceptualize torts and contracts differently because different social values generate different principles for governing those activities. Thus, a field of law exists if and only if the community discourse defining it is constituted by a unique set of things the community cares about. For this reason, I will often refer to the field itself as being constituted by a unique set of social values.[13]

While each field is constituted by a unique set of values, different fields of law can share certain values. For example, individual autonomy is a fundamental concern in the fields of both tort and contract law, and community safety is a fundamental concern in the fields of both criminal procedure and food-and-drug regulation. Moreover, transcendent "law values" identify concerns that are important (albeit to varying degrees) in all fields of law. These include justice (achieving the overall "best" answer to a legal question within a field), administrability (the efficient and effective functioning of each field), libertarian values (concerned with reducing the law's interference with individual autonomy), and the rule of law (with its core concerns of equal protection, certainty, and placing identifiable constraints on the power of officials).[14]

Here again we need to employ the idea of "mutually constituting." Fields of law are constituted by discourses about specific social values, but just what the values constituting a particular field are and what they mean (including how they apply), emerge from the discourse. That is, a community's collective and ongoing conversations about important questions that arise within the field will tend to converge on widely shared understandings of the identity and meaning of the relevant social values. Thus, the values that traditionally constitute criminal law are not the product of legislative enactment. Their importance has emerged from the

13. From this point on all references to "values" will mean "social values," unless the context indicates otherwise.

14. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989). These three do not necessarily exhaust the universe of such "law values." For example, law-and-economics theorists would add wealth maximization to the list. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011).

use of criminal law and debate over issues raised by criminal law over the course of centuries. Because society changes, there is no reason to believe that the identity or meaning of these social values is fixed. Hence, whether retribution is very important or important at all to criminal law and policy (as well as what retribution means) is a contingent fact, which, again, emerges from our conversations about it, and those conversations potentially change over time.

The widely shared social values that constitute fields of law are not only contingent, they are also multiple. In a complex and diverse society we care about different things, and the social values that define a field will, therefore, be multiple. For instance, tort law is shaped by a collection of values that include imposition of liability on individuals who cause harm, imposition of liability on individuals whose conduct is blameworthy, and compensation of innocent victims.[15] To take another example, criminal law, as observed above, is defined by values that include retribution and various utilitarian values such as deterrence, incapacitation, and rehabilitation.

A quick examination of these two examples shows further that the social values that define a legal field are heterogeneous. Compensation, fault, and harm causation cannot be reduced to one another, nor can they be subsumed under a single, broader rubric; that is, they are *different* things that we care about when we converse about tort law. The same is true of the values that constitute criminal law. Being heterogeneous, these multiple social values are potentially in tension and can even conflict.

The community's field-constituting social values are, as mentioned earlier, contingent and thus subject to change. At the same time, these values are not normally volatile; that is, the identity and the meaning of the social values that constitute a field of law will not vary wildly from moment to moment. But why is that so? Given the contingency, multiplicity, and heterogeneity of social values in a diverse society, why do the community's conversations tend to converge on widely shared and largely stable understandings of the identity and meaning of the social values that constitute fields of law? There are at least two reasons.

One explanation begins with the functions of law, which include, as mentioned above, facilitating private transactions, mediating private disputes, regulating public behavior, and structuring and limiting coercion by public officials. These functions require predictability, which in turn requires stability in the meaning and application of legal provisions. To

15. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).

make this point in reverse: as a community, we will tend to converge on stable, shared understandings of the social values constitutive of legal fields because it is important to us to have law—to have social practices that facilitate private transactions, mediate private disputes, regulate public behavior, and that structure and limit coercion by public officials.

I can illustrate this point by considering the interpretation of traffic signs. These legal texts are, in principle, subject to any number of interpretations—especially since so much of their meaning is not literally provided in the signs themselves. For example, the typical speed limit sign does not explicitly indicate whether it establishes an upper or lower limit. But we all know what the various traffic signs mean. We have to. The function of the signs is to provide safe regulation of traffic by enabling each driver to accurately anticipate what other drivers will do. In addition, each driver has an interest in avoiding punishment. None of this would be possible if we (including both drivers and law enforcement officials) did not all easily understand the meaning of traffic signs in the same way. So our individual interpretations of traffic signs converge on shared meanings, which enable the signs to serve their function and our interests.[16]

A second explanation for the community's convergence on widely shared and stable understandings of a field's values is expressive. If a legal field is constituted by social values—the things we care about—then identifying those values and their meanings through its law is a way in which the community publicly announces what it stands for. Just as an individual defines what she stands for through actions that express her values, so a community defines itself through the way in which it facilitates private transactions, mediates private disputes, regulates public behavior, and structures and limits coercion by public officials. And just as an individual's integrity depends on the consistency with which she expresses her values through action, so the integrity of a community depends on the consistency of its laws and their enforcement. The possibility of such a consistency depends on stable, widely shared understandings of the social values that constitute fields of law. To be more precise: the identity of a community—what distinguishes countries, states, localities, etc. from one another—is bound up with what it stands for. Differences among the things that different communities care about distinguish them from one another. The tort law of Arizona differs from that of New Hampshire because of differences in what Arizona and New

16. This convergence is facilitated by education, experience, and so forth.

Hampshire stand for as communities, which is to say, because of differences in social values. Thus, the convergence on widely shared and stable understandings of a field of law is driven not just by a community's desire for legal integrity, but by its desire to express consistently through action—including legal action—what the community stands for at the deepest levels of values.[17]

These two explanations for the community's convergence on widely shared and stable understandings of a field's values reflect that the account of law offered in this article is rooted in pragmatism and existentialism. Its pragmatist dimension lies in the notion that the content of law emerges from public activity: the community grapples with day-to-day social problems that raise questions about the governance of human activity by engaging with important questions within fields of law and by using provisions of law to address these problems.[18] Its existential dimension lies in the notion that this law-creating public activity is one especially important way that the community gives definition, value, and meaning to its existence.

A corollary to the claim that a field of law is constituted by a unique set of contingent, multiple, and heterogeneous social values—the particular things the community cares about when engaging with important questions that arise within the field—is this further claim: in order to function successfully within a given field of law, a specific provision of law (a definition, a rule, a standard, a doctrine, etc.) must promote one or more of the social values from among the universe of those that define the field. Accordingly, I define a provision's "aptness" as its tendency to further one or more of these relevant values.[19]

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17. For a thorough discussion of expressive theory and its application to law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

18. It is important to note that from the pragmatist perspective that there is no available test for objectivity that is independent of the community's judgment about how best to understand and make effective use of the thing in question—in this case, law. That means that the community's judgment about such issues as what values constitute a field of law cannot be submitted to some independent test that could demonstrate that this judgment is "objectively" wrong. This lack of an independent test for objective truth extends to the question whether a particular provision of law is apt, which is defined in the next paragraph, and to questions of interpretation, which are discussed in Part II, *infra.* Of course, all community judgments are, from a pragmatist perspective, provisional, and one can make arguments that the community's determination is incorrect. If in time the community comes to widely accept those arguments and thus changes its mind, then its new determination will be taken to be objectively correct and the old determination objectively wrong. (Courts often reflect this when overruling earlier decisions. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* [*v. Hardwick*] was not correct when it was decided, and it is not correct today.")).

19. The idea of aptness was first developed in *Defining Income*, *supra* note ∗, at 325–33.

Just as social values emerge from the discourse that defines a particular field, so it is that the aptness of a provision emerges from that discourse. That is, whether a particular provision promotes one or more of the things the community cares about when engaging with important questions within the field is determined by the community through that engagement. Put another way, aptness is not an inherent feature of a provision. Like values, aptness is contingent on its relationship to an ongoing and changing social discourse; hence, a provision that is taken to be apt at one point in time might be taken to be inapt at another point in time, and vice versa.

Aptness is closely aligned with the idea of legitimacy in the subjective or descriptive sense (what Max Weber called "Legitimitätsglaube").[20] Legitimacy in this sense refers to the community's belief that an action by a government official is proper and justified.[21] A provision is apt just insofar as it reflects one or more of the social values that define the provision's field. And since those values are what the community cares about, an apt provision will align with the community's social values and be perceived as legitimate. Of course, since the values that define the field are multiple and heterogeneous, an apt provision might reflect some values but conflict with others. Since individual members of the community may well prioritize those values differently, an apt provision will not necessarily be perceived as the best instantiation of the law by everyone.[22] Nonetheless, to the extent that even those who disagree with the provision recognize that the provision reflects at least some widely held social values within the community, the legitimacy of the provision (if not its universal popularity) can be acknowledged.

I will argue in Part II that an apt provision, when applied, tends to generate predominantly noncontroversial cases. But I note here that a provision that lacks aptness is unstable because it is inapt. Consider the example of the Jacksonville, Florida vagrancy ordinance struck down by the Supreme Court of the United States as unconstitutionally vague in its 1972 decision, *Papachristou v. City of Jacksonville.*[23] According to the

20. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 382 (Talcott Parsons ed., Free Press 1964).

21. *See generally* Fabienne Peter, *Political Legitimacy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., spring 2014), http://plato.stanford.edu/archives/spr2014/entries/legitimacy/ (last visited July 1, 2014).

22. This is why widespread agreement does not require unanimity and why judges deciding cases can rationally disagree about the outcome of the case (in dissenting opinions) and the rationale for the decision (in concurring opinions).

23. 405 U.S. 156 (1972).

Court, the language of the ordinance failed "to give notice of conduct to be avoided"[24] and thereby placed "unfettered discretion . . . in the hands of the . . . police,"[25] transforming all sorts of ordinary conduct into potential violations of the law, depending on whether the police wished to respect the autonomy of the individual or saw the individual as a threat to the social order. And the reason for this defect is identified in a single paragraph early in the Court's opinion, where it notes that the statute was "derived from early English law" designed to address "labor shortages" caused by the "breakup of feudal estates," and subsequently "became criminal aspects of the poor laws."[26] Thus, the language might have been apt in the historical context of its origin, but those specific goals and values no longer applied in late twentieth-century Florida. And the consequence was an altogether inapt provision, whose meaning lacked stability and hence could be used as an instrument of official coercion with few limitations.

In addition to its aptness, a provision of law can be characterized by its degree of "openness" to reflecting the multiple social values that constitute the field and to absorbing changes in the inventory and meaning of those values. Again, an apt provision will reflect one or more of the social values that constitute the field, but one that reflects multiple values equally is different from one that privileges one or a few of those values while subordinating the rest. The concept of openness is designed to capture this difference. A provision reflecting many of the social values that define the field of law to which it belongs displays a high degree of openness; one privileging one or a few displays a low degree of openness.

Consider two examples from tort law. As noted above, tort law is shaped by a set of social values that includes compensation, fault, and harm causation. The duty of ordinary care, central to the sub-field of negligence law, serves those three values in roughly equal measure.[27] Thus, the doctrine is apt (in that it promotes relevant tort values) and it displays a high degree of openness (in that it promotes multiple tort values). By contrast, the doctrine of negligence *per se* demotes the value of fault. It does this by presuming fault, whether it in fact exists or not, in certain easily identifiable contexts (e.g., violation of a statute). Since negligence *per se* continues to vigorously promote compensation and harm

24. *Id.* at 166.
25. *Id.* at 168.
26. *Id.* at 161.
27. For further discussion of this point in the context of rules and standards see *infra* note 58 and accompanying text.

causation, it is apt, and since the set of promoted values has narrowed, the doctrine's degree of openness is lower than that displayed by the duty of ordinary care.

Functionally, values point toward certain facts as relevant when applying a provision. That is, since social values express what the community cares about—what is important to it—a fact becomes relevant in legal analysis when some value shows it to be important to the analysis. Accordingly, a very open provision—one that reflects many values—will tend to make many facts relevant when the provision is applied; conversely, a provision with a low degree of openness—one that reflects only one or a few values or that privileges a particular value over others—will tend to make only a small number of facts relevant. For example, application of the tort standard of ordinary care, with its high degree of openness, normally requires a totality-of-the-circumstances approach to determining whether the duty has been breached; by contrast, application of the negligence *per se* doctrine focuses more narrowly on whether the conduct in question constitutes, say, violation of a statute.

A provision's degree of openness, like the identity and meaning of field-constituting social values and like aptness, will emerge from the community's discourse about the provision in the course of using that provision to serve the functions of law—i.e., to govern human activity within the field. In practical terms, that discourse will determine whether the provision is to be interpreted as a rule or a standard, and I will argue in Part II that the fact that the degree of a provision's openness emerges over time challenges various features of the conventional understanding of rules and standards.

II. FOUR PUZZLES

A. Interpretation

Questions pertaining to the interpretation of legal texts—statutes, judicial opinions, administrative regulations, constitutional provisions, and so forth—have generated no end of commentary. Whether a statute should be interpreted in accordance with the text's plain meaning or its legislative purpose, whether a constitution is to be interpreted according to the intent of its Framers or is to be treated as an organic document whose meaning evolves along with the polity it constitutes—issues like these have long preoccupied lawyers, judges, and scholars.

But just what is the interpretation of legal texts about? This meta-question has received far less attention,[28] yet it seems important. For unless we understand just *what* we are doing when we determine the meaning of statutes, opinions, regulations, and constitutions, it is hard to get a handle on what exactly is at stake with respect to *how* we do it.

In this part, I argue that social values are implicated in every act of legal interpretation and that when we keep that in mind, the meaning of interpretation becomes perspicuous. I will advance this argument in three steps. First, in Part II.A.1, I will offer an account of legal interpretation and then employ it in Part II.A.2 to examine what it means to say that a particular proposition of law is "true" or "correct." In Part II.A.3, I will sharpen the idea of interpretation by contrasting it with two other activities involving the meaning of a legal proposition: exercises of enforcement discretion and disregard of the law.

1. What is Interpretation?

Interpretation is the activity whereby the interpreter gives meaning to the provision. Interpretations can be correct or incorrect. If an interpretation of a legal provision can be said to be "correct," then that interpretation must be apt, in the sense developed in Part I, since a correct interpretation of a provision that does not reflect one or more of the social values that constitute the field in which the provision is located would be oxymoronic. Again, the aptness of a provision is not an intrinsic feature, but a provisional characteristic that emerges from the field-defining discourse within the community that engages with serious questions within the field. Accordingly, the aptness of an interpretation of a provision is contingently determined by that discourse.

But because, as noted in Part I, the social values that constitute the field are multiple and heterogeneous—and thus in tension and potential conflict—multiple, competing interpretations can be anchored in one or more of the relevant values. That is, multiple, competing interpretations can be apt. Consequently, there must be some criterion beyond aptness that distinguishes an interpretation that is correct from one that is incorrect.

If we consider the well-known phenomenon of arguments rooted in doctrinal values being made in dissenting opinions, only to become the

28. Probably the most famous examination of the nature of legal interpretation is Ronald Dworkin's. *See* Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179 (1982); *see generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

core of the majority's ruling some years later, we could take the position that one of the arguments in each such situation is at all times correct.[29] Just such a claim was made by the Supreme Court in its 2003 ruling in *Lawrence v. Texas*, when, in overruling the 1996 decision in *Bowers v. Hardwick*, the Court said, "*Bowers* was not correct when it was decided, and it is not correct today."[30]

I suggest instead that just as the social values constituting a field and the aptness of particular interpretations of provisions emerge from the field-defining discourse, so, too, does the perception of a particular interpretation as "correct." That is, an interpretation that receives widespread approbation as the best interpretation within the community of those who grapple with important questions in the relevant field of law will be perceived as a correct interpretation. If at some future time a different interpretation supplants the earlier in achieving widespread approval as the best, the earlier interpretation will have become incorrect. If, as I argue here, there is no test for the correctness of an interpretation beyond its reception in the community, then a correct interpretation of a legal text is one that is both apt and is widely regarded as best within the community.

The difference, then, between a correct and an incorrect interpretation of a legal provision is that the latter is apt, but not widely accepted within the community as the best interpretation of that provision. On the other hand, a reading of a provision that is not apt—i.e., that cannot be justified in terms of the field's values—is not recognizable as an interpretation at all within the field.

One interesting feature of this definition of a correct interpretation is its resonance with the idea of legitimacy. As noted above, any apt provision may be acknowledged as legitimate, even by those who disagree with it, insofar as it reflects widely held community values. But the legitimacy of a correct interpretation of the provision is even more secure: not only does it reflect values that are widely accepted within the community, but its status as the widely accepted *best* interpretation further insures that its legitimacy will be generally acknowledged.

A further implication of the above definition of a correct interpretation is that a *final* and *authoritative* interpretation does not conclude the issue of correctness. An interpretation of a provision that does not receive widespread approval as best is, for that reason, not correct—even when

29. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (adopting the analysis of Justice Stevens' dissent in *Bowers*).

30. *Id.*

made by a court of last resort. Striking examples are Supreme Court interpretations of the Constitution that are quickly overruled by constitutional amendment.[31] Conversely, a dissenting opinion that resonates strongly within the community may be a correct interpretation—i.e., one that is both apt and widely accepted.

More commonly, an authoritative ruling that initially achieves widespread acceptance as a correct ruling might over time come to be widely seen to be incorrect as social values change, and a new decision will overrule the former. A famous example is the Court's 1896 ruling in *Plessy v. Ferguson*[32] that "separate but equal" public accommodations satisfy the equal protection clause of the Fourteenth Amendment.[33] In such a case it can be fairly said that different and inconsistent interpretations of a particular legal text may at different points in time all be correct interpretations of the text.

This way of distinguishing between correct and incorrect interpretations has implications for perennial debates over statutory and constitutional interpretation. Different interpretations of a statutory text—reflecting, say, textualist, purposivist, plain meaning, and intentionalist approaches—might be justifiable in terms of *the substantive field* to which the statutory text in question belongs (contract law, for example). In addition, each of these various approaches can be justified in terms of social values defining *the field of statutory interpretation*. That is, each approach can be justified in terms of the things we care about when engaging in the practice of interpreting statutes. These intersecting lines of justification in terms of relevant values can produce a variety of apt interpretations.[34] Again, however, which of these apt interpretations is

31. *E.g.*, Chisolm v. Georgia, 2 U.S. 419 (1793) (overruled in 1794 by the Eleventh Amendment); Oregon v. Mitchell, 400 U.S. 112 (1970) (overruled in 1971 by the Twenty-sixth Amendment). Probably the most dramatic example is the 1857 ruling in Dred Scott v. Sandford, 60 U.S. 393 (1857), holding, *inter alia*, that a slave brought into a state in which slavery was banned was, nonetheless, a slave and, therefore, not a citizen. The decision was overruled by the Thirteenth and Fourteenth Amendments, ratified in 1865 and 1868, respectively. The controversy triggered by the *Dred Scott* decision was immediate and of such intensity that it is credited with contributing to both the economic Panic of 1857, *see* Charles Calomiris and Larry Schweikart, *The Panic of 1857: Origins, Transmission, Containment*, 51 J. ECON. HIST. 807, 816 (1991), and the Civil War, *see, e.g.*, Gregory J. Wallance, *Dred Scott Decision: The Lawsuit That Started the Civil War*, HISTORYNET.COM, http://www.historynet.com/dred-scott (last visited Dec. 31, 2013).

32. 163 U.S. 537 (1886).

33. The reasoning of the case was effectively renounced by the Supreme Court in Brown v. Bd. of Educ., 347 U.S. 483 (1954).

34. Consider, for example, the various opinions in McBoyle v. United States, 43 F.2d 273 (10th Cir. 1930) and McBoyle v. United States, 283 U.S. 25 (1931), in which consideration of various values pertaining to the National Motor Vehicle Theft Act and to the interpretation of federal statutes generate three different but apt interpretations of the relevant law.

correct depends on its reception. Just as the community's discourse about fields of law will converge on stable, shared understandings of the constitutive social values of those fields, so the community's discourse will normally converge provisionally on one of a number of competing interpretations as the correct one.

Similarly, applications of a constitutional provision can generate competing results depending on whether the provision is interpreted through, say, a textualist, originalist, or evolutionary lens. Inasmuch as these three lenses reflect social values concerning what we care about when we interpret the Constitution, each can generate an apt interpretation (as long as the interpretation also reflects one or more social values concerning the substance of the provision in question). And once again, which of these apt interpretations is correct depends on which is widely accepted as the best interpretation. Because our social values concerning the meaning of the Constitution reflect some of the community's most fundamental and defining concerns, disagreements about what interpretation of a provision is correct often persist, even long after the Supreme Court has authoritatively answered the question. In extreme cases, the community's discourse will fail to converge on one of a number of competing interpretations as the correct one. When that happens (as, for example, it has regarding the proper application of the fourteenth amendment's Due Process Clause to the issue of abortion), then there is for the time being no correct interpretation.

2. The Truth Value of Legal Propositions

A proposition of law is a claim about what the law is. What makes a proposition of law true? Western jurisprudence in the nineteenth and first half of the twentieth century offered a spectrum of answers to this question. At one end of the spectrum is the answer posited by legal science: a proposition of law is true if it is the result of the correct application of proper method to the relevant data. For the continental European version, the relevant data were found in the Code: rationally constructed legislation created by democratically elected legislators.[35] In the American version, Christopher Columbus Langdell argued that the relevant data were the appellate decisions of judges.[36] In either of these

35. *See* JOHN HENRY MARRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA, ch. 5 (3d ed. 2007).

36. *See* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, Preface (1871).

variations, any legal question could, in principle, be answered by the more or less mechanical application of legal materials by a skilled jurist.

At the other end of the spectrum the American Legal Realists insisted that the content of law was determined by its use. Thus, a nineteenth-century precursor of Realism, John Chipman Gray, argued that the fundamental data of the legal scientists—the Code, appellate cases—were not law, but were "sources" of law.[37] The actual content of the law was not determined until a judge interpreted and applied these sources to answer actual legal questions.[38] Thus, the truth of a legal proposition must await its determination by a court. Gray's contemporary, Oliver Wendell Holmes, Jr., went one step further, holding that law was the prediction of how courts would resolve cases in the future.[39] Accordingly, a proposition of law was true under Holmes's conception if and only if the proposition proved to accurately anticipate the behavior of judges in deciding cases. This behavior-based understanding of law was foundational for the development of Realism.[40]

I want to offer a dynamic approach to determining the truth of legal propositions. Legal texts—the objects of interpretation, which yields propositions of law—have no intrinsic meaning. Rather, their meaning is determined by their use to resolve legal issues. So far, this sounds very much like Realism. However, my focus in not on the behavior of officials, like judges, but on the community as a whole. This reveals both a normative dimension (a concern for which propositions of law are consistent with the values accepted by the community as defining the relevant field) and a sociological dimension (a concern for which propositions of law are actually accepted by the community as correct).

To explain this approach, I want to begin by defining two types of propositions of law, which I will unimaginatively call Abstract Propositions and Concrete Propositions. An Abstract Proposition is a claim about the abstract meaning of some legal provision; a Concrete Proposition is a claim about the application of an Abstract Proposition to a particular set of facts. Examples of both these types of legal propositions

37. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 118–20 (1909).

38. *See id.* at 115–16.

39. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1896–1897).

40. Holmes' future-oriented conceptualization suggests a different—temporal—way of slicing up ways of understanding what makes a proposition of law true. Some theories of law (e.g., legal positivism and legal science) look to the past (e.g., the commands of the sovereign, appellate court decisions) to determine the content of law, and thus the truth value of propositions of law. Some (e.g., natural law) look to the present (e.g., timeless principle of natural morality). Some (e.g., American Legal Realism) look to the future (e.g., the behavior of judges).

can be found in the majority opinions of many appellate court decisions. For instance, in *Commissioner v. Glenshaw Glass Co.* the Supreme Court of the United States addressed the issue "whether money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income under § 22 (a) of the Internal Revenue Code of 1939."[41] In the course of its opinion, the Court asserted the Abstract Proposition that the term "gross income" includes all "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[42] The Court applied this proposition to the specific instance of a treble-damage judgment received by a successful antitrust plaintiff and concluded not only that the actual compensatory damages are income (a conclusion not disputed by the plaintiff-taxpayer), but that the entire treble-damage award is gross income.[43] These conclusions are Concrete Propositions.

In Part II.A.1, above, I offered an account of what it means for an interpretation to be correct. We can now see that an Abstract Proposition is true if the interpretation of the provision reflected in the claim is correct, and a Concrete Proposition is true if both the interpretation of the provision reflected in the claim is correct and the application of the provision to the statement of facts included in the proposition is logically sound.[44]

Both the Abstract and Concrete Propositions in the Court's *Glenshaw Glass* opinion invoked § 22(a) of the Internal Revenue Code of 1939 ("'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid.").[45] If the Court's interpretation of this provision of the Internal Revenue Code is correct, then the conditions required for the truth of the Abstract Proposition quoted above are satisfied. In the case of the *Glenshaw Glass* Court's Concrete Propositions (the application of the Court's interpretation of the Code to the specific

41. 348 U.S. 426, 427 (1955).

42. *Id.* at 431.

43. *Id.*

44. The truth of a Concrete Proposition does not depend on the truth of the statement of facts to which a legal provision is applied. A law professor's application of a true Abstract Proposition to a hypothetical (often fictional) set of facts can generate a true Concrete Proposition if the application is logically correct. Similarly, an appeals court can correctly apply a true Abstract Proposition to a set of facts that were incorrectly found to be true by the trial court, thereby producing a true Concrete Proposition.

45. *Id.* at 429.

factual setting), the truth of *those* propositions depends additionally on whether the application of the interpretation of the Code to those facts is consistent with the demands of logic.

3. Interpretation, Disregard, and Prosecutorial Discretion

To anticipate the distinctions I wish to make in this part, here is a story. On June 10, 2014, I was driving south through New England on a stretch of route I-95 with a posted speed limit of sixty-five miles per hour. My cruise control was set to seventy miles per hour. At one point I drove right past a stationary police vehicle. Inside the vehicle a police officer was unmistakably aiming a radar gun at passing cars, including mine. I continued to drive at seventy miles per hour, five miles per hour above the literal posted speed limit. The police vehicle remained stationary, and I received no ticket for speeding.

There are three was of understanding what happened, each of which "fits the facts." The first understanding is that the police officer disregarded the law. That is, I was driving in excess of the legal limit, and the officer failed to act appropriately and issue a ticket. The second understanding is that the officer exercised permissible enforcement discretion. That is, I was driving in excess of the legal limit, but the officer has discretion to overlook minor violations of the law under certain circumstances in order to best deploy limited law-enforcement resources. The third understanding is that the officer acted in accordance with the correct meaning of the law. That is, the speed limit, properly interpreted, permits some leeway (at least five miles per hour) above the literal limit.[46]

As I said, each of these understandings of the officer's conduct fits the facts. But which is correct? This part offers a way of thinking about these distinctions that, again, turns on a consideration of social values.

We might approach that question by turning to a different question of interpretation: What is the correct meaning of the posted speed limit: "SPEED LIMIT 65"? If the correct meaning is restricted to a literal interpretation of the text, then the set of possible characterizations of the officer's conduct is not narrowed. It could still be a disregard of the law or an exercise of enforcement discretion. It could even be characterized as

46. To be clear: The question raised in this paragraph is not about what the police officer *thought* she was doing. Rather, the question is how best to *interpret* what she did. Hence, the officer might have thought that she was exercising permissible enforcement discretion, but we can still conclude that the best understanding of her conduct is that she was really disregarding the law—or that her conduct was consistent with the actual meaning of the law.

interpretation, albeit an incorrect interpretation. On the other hand, if the correct meaning of the posted speed limit includes a permissible leeway for lawful driving above the literal posted speed, then the sensible characterization is that the officer did not ticket me because the officer concluded that my driving seventy miles per hour did not violate the law.

But a question logically prior to whether an interpretation of the speed limit that includes a leeway is correct is whether the officer has the authority to interpret the law at all. In an important sense, of course, the officer cannot avoid interpretation. Every time the officer decides whether the facts justify chasing down a motorist and issuing a ticket for speeding, that decision depends on an interpretation of what the speed limit means. However, those tasked with enforcing laws can operate under severe constraints regarding what they may permissibly do in interpreting those laws.

Consider, for example, the Clerk of the Orphans' Court of Montgomery County, Pennsylvania, who issued marriage licenses to same-sex couples based on his interpretation of the law as rendering unconstitutional a provision of Pennsylvania's "Marriage Laws," which at the time declared it "to be the longstanding public policy of [Pennsylvania] that marriage shall be between one man and one woman".[47] The Commonwealth Court of Pennsylvania ruled that the Clerk "performs only ministerial duties";[48] that as a consequence he has no authority "to exercise any discretion with respect to [the Marriage Law's] provisions";[49] and that "[u]ntil a court has decided that an act is unconstitutional, [the Clerk] must enforce the law as written."[50]

More generally, it is a *legal* question whether an official has interpretive authority and, if so, what the extent of that authority is. As such, the correct answer to that question must, first of all, be apt; that is, the answer must reflect one or more of the values the community widely accepts as relevant to determining questions of interpretive authority. Second, the correct answer must be widely accepted within the community as the best answer to the question.

Similarly, if instead of asking whether the official has interpretive authority, we ask whether the official has the discretion to suspend

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47. 23 PA. CONS. STAT. § 1704 (1983). This provision was ruled unconstitutional in Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014). The ruling was not appealed. *See Pennsylvania governor: I won't appeal court's gay marriage ruling*, THE GUARDIAN (May 21, 2014), *available at* http://www.theguardian.com/world/2014/may/21/pennsylvania-governor-no-appeal-gay-marriage-ruling.

48. Commonwealth v. Haynes, 78 A.2d 676, 683 (Pa. Commw. Ct. 2013).

49. *Id.* at 689.

50. *Id.* at 690.

enforcement of the law under certain circumstances, the correct answer to *that* question involves the same two inquiries. First, is the answer apt? Determining aptness in this context requires consideration of the values widely accepted by the community as relevant to justifying enforcement discretion.[51] Second, is the answer widely accepted within the community as the best answer to the question?

Accordingly, in the case of the police officer who did not ticket me, we interpret the officer's action by asking whether the best answer to the question is that she interpreted the speed limit as permitting a certain leeway above the literal posted limit or that she exercised permissible discretion in not ticketing me for the violation of traveling five miles per hour above the posted limit or that she simply disregarded the law. The correct answer to this interpretive question must itself be apt, which requires us to identify the widely held values that inform our understanding of a police officer's authority to interpret the law and discretion to suspend enforcement under certain circumstances. We might conclude that the answer that a police officer has interpretive authority *and* the answer that a police officer has enforcement discretion are both apt. In that case we would ask which understanding is widely accepted as the best understanding of the officer's conduct. If there is such a widely accepted understanding, then that settles the matter.

But the answer to the question which is the best understanding might not be clear. To the extent that we understand the behavior of highway police officers as making ticketing decisions *ad hoc*, dependent on judgments that are not perspicuous to drivers (about, say, momentary needs regarding resource allocation), that behavior is sensibly understood as the exercise of discretion. On the other hand, to the extent that we believe that ticketing decisions are determined by factors that are knowable by drivers (e.g., traffic conditions, weather conditions, construction work) and by generally known rules of thumb (e.g., that speeds within five miles per hour of the literal limit will not subject drivers to prosecution), that behavior is sensibly understood as interpreting the speed limit law to incorporate some leeway.

Thus, it might be the case that there is no widely accepted best answer to how we should characterize the officer's behavior and that it is, accordingly, a matter of controversy within the community whether the

51. These will typically include the need to pick and choose enforcement to husband limited administrative resources, the need to decline enforcement in a particular case when enforcement would cause injustice, and the need to decline enforcement in a particular case when enforcement would injure the public.

officer in my case was interpreting the law or exercising enforcement discretion. That is, there might be no clearly correct answer to the question although each of the two readings of the situation will be regarded as legitimate (because apt).

And though unlikely, we might conclude that neither understanding is apt—that is, that the relevant social values do not support the conclusion that the officer has interpretive authority or enforcement discretion in this matter. In that case, we would conclude that the officer's failure to ticket me was illegitimate, a dereliction of her duty, a disregard of the law.[52]

However, we should not consider disregard to be a purely negative category: the conclusion that remains when readings of the officer's actions as an exercise of interpretative authority or of enforcement discretion have been eliminated as inapt. On the contrary, it is important to see that disregard of the law is itself a values-based conclusion. For the officer can only sensibly be understood to disregard the law if we believe that police officers are obligated to follow the law. Put another way, if ours was a community that regarded the police as operating without meaningful legal constraints (the examples of the SA, SS, and Gestapo in Nazi Germany come to mind), then the failure of the police officer to ticket me could not correctly be interpreted as a disregard of the law. For that reason a correct interpretation of the officer's conduct as a disregard of the law—like all correct interpretations—must be apt, i.e., anchored in one or more of the social values relevant to judging the conduct of police officers.

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52. The recent IRS scandal regarding alleged increased scrutiny of applications for 501(c)(4) status from conservative groups offers an example. For a summary of the controversy see *2013 IRS controversy*, WIKIPEDIA, http://en.wikipedia.org/wiki/2013_IRS_controversy (last visited July 16, 2014). The public outrage generated by these allegations can be understood in large part as deriving from the fact that no relevant tax values seem to justify this kind of differential treatment on ideological grounds.

It cannot be stressed too often that the questions of what values constitute a field of law, what those values mean, and how those values apply to particular cases, are empirical questions. At the same time, we routinely make effective use of values without the systematic collection of data regarding social views. For example, properly constituted juries are thought to reflect the community's views on the values relevant to particular litigation and thereby serve as an acceptable proxy for surveying the community as a whole.

In the example discussed in the text, the question of what reading of the officer's conduct is widely regarded as best by the community is similarly an empirical question, and I do not purport to have the relevant empirical data at hand. However, we can probably safely eliminate the "disregard" reading for the reason that the general behavior of drivers suggests a widely held view that one can exceed the literal speed limit to some extent under normal conditions without fear of being ticketed. That is, driver behavior suggests that the community does not regard the failure to prosecute me for driving seventy in a sixty-five mile per hour stretch of highway as lawless.

Like the speed limit sign, the officer's conduct has no intrinsic meaning. We choose a meaning among the available facts-fitting candidates, and the one we choose must be justifiable because it is widely regarded as best and because it is apt in that it reflects widely accepted values applicable to the conduct of police officers.

B. Hard and Easy Cases

The famous debate between H.L.A. Hart and Ronald Dworkin in the second half of the twentieth century centered in significant part on the distinction between hard and easy cases. Hart conceptualized law as a system of rules and depicted each rule as an enclosed figure surrounded by a penumbra. In the figure's interior are the cases to which the rule applies; outside the figure are the cases that do not fall within the rule's extension. The penumbra—the figure's indistinct border—represents the set of hard cases: cases for which it can be argued both that the rule applies and that the rule does not apply. In hard cases, Hart argued, the judge must choose which argument to follow and which result to reach and can permissibly choose either way.[53]

Dworkin argued instead that law consists of principles as well as rules and that in hard cases principles lend relative weight to the different arguments and, accordingly, to the different results that follow from those arguments.[54] Consequently, the judge is not free to choose either result in a hard case; competence requires her to choose the result that follows from the weightiest argument as determined by the relevant principles.[55]

By focusing on social values, we can identify a different way of thinking about the difference between hard and easy cases. As noted previously, a successful provision within a field of law must be apt—that is, it must promote one or more of the social values that define the field. Since the values expressed by an apt provision are multiple and heterogeneous, it is always possible that the provision will be subject to different apt interpretations (both correct and incorrect interpretations), which express different priorities and emphases among those values. We can thus define an easy case as one in which either of two conditions is satisfied: (1) there is a correct (i.e., apt and widely accepted as best) interpretation of the applicable provision that leads to a particular

53. HART, *supra* note 5, at 124–36.

54. *See generally* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

55. *See id.* at 1074–78.

outcome, or (2) all apt interpretations of the applicable provisions lead to the same outcome. Accordingly, we can define a controversial case as one in which there is no correct interpretation and different apt interpretations lead to different outcomes. Put differently, a controversial case is one in which the relevant social values generate opposing arguments because they point in different directions and the various apt interpretations justified by those values lead toward different outcomes. Moreover, since values indicate the relevant facts, the different arguments that are possible in a hard case will make the case controversial in terms of what facts are relevant to its resolution.

What does it mean to say that values "point" toward one outcome or another? It cannot be observed too often that a social value does not have an intrinsic meaning. Insofar as it has meaning, that is a function of convergence on that meaning within a community, i.e., it is a sociological fact. If there is no widespread acceptance of the meaning of a value within the community, then the value has no meaning for purposes of law and cannot, therefore, point in any direction or toward any outcome in a particular case. Conversely, a value that does have a meaning widely accepted within the community (evidenced by the reality of repeatedly successful communication that invokes that value) can point to a particular outcome when invoked in the context of a particular case.

Consider, for instance, the crime of attempt, as defined in the Pennsylvania Crimes Code: "A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime."[56] Application of this provision requires judgment about whether defendant's conduct constitutes a "substantial step" toward the crime's commission. Many cases are easy. If my plan to kill my sworn enemy progresses no further than my thinking through the details of the murder, I am not at that point guilty of attempted murder, even if my thoughts could be proven (as when, for example, I memorialize them in my diary). At the other end of the spectrum, if to carry out a plan to kill my sworn enemy, I legally purchase a firearm, walk to his house, ring the doorbell, and shoot him five times when he answers the door, odds are great that I will be convicted of attempted murder if he survives the attack.

But some cases are hard. Suppose based on a tip, I am arrested while walking to my sworn enemy's house. Have I committed attempted murder

56. 18 PA. CONS. STAT. § 901(a) (1998).

at that point? In doctrinal terms, have I crossed the line that separates "mere preparation" from attempt?[57]

Reference to social values offers a way of accounting for our sense that the first two cases are easy and the last one hard. In easy cases we expect to find either a correct interpretation of the "substantial step" provision that gives us the easy results or a set of values that all point to those results. In the examples above we find that actually both conditions are satisfied.

With respect to the first case (formulating the plan to kill my sworn enemy), a true Abstract Proposition of criminal law is that we do not punish people for their thoughts. Moreover, as noted earlier, it is widely accepted within the community that various retributive and utilitarian values constitute the field of criminal law. If we ask retributive questions, the community will conclude that my plan does not amount to the kind of wrongdoing that justifies punishment. Moreover, the widely held belief that individuals are often tempted by bad thoughts but can be expected to resist them leads to the conclusion that my mere planning does not render me blameworthy as a criminal. In short, the community will not regard me as deserving punishment for privately planning a killing. Similarly, if we ask utilitarian questions, we get the same result. The idea of deterring people from thinking about the death of others would strike most as foolish. Moreover, as long as my "conduct" remains in the realm of thought, it is not at all clear that I need incapacitation or even rehabilitation.

On the other hand, shooting a person with the intent to kill is paradigmatic of an attempted murder, and both retributive and utilitarian values, as widely understood, straightforwardly justify punishing me for shooting my sworn enemy five times. I have acted wrongly and am blameworthy (retributive concerns); moreover, this kind of conduct needs to be deterred, and I have shown myself to be a danger and consequently in need of incapacitation and rehabilitation (utilitarian concerns).

With respect to the case in which I am apprehended while on my way to my sworn enemy's house, the relevant retributive and utilitarian concerns do not point toward a single result. In retributive terms my intention is bad and I have engaged in multiple acts to carry out that intention. At the same time every one of my specific acts (planning the murder, buying the weapon, walking toward my sworn enemy's house) has been lawful, and I still have time to change my mind and conform my

57. *E.g.*, Commonwealth v. Gilliam, 417 A.2d 1203, 1205 (Pa. Super. Ct. 1979).

conduct to the requirements of the law. In utilitarian terms we surely want to deter attempts to murder and to prevent this particular murder, which has progressed through several planned steps, but we also want to encourage individuals to change their mind and pull back from wrongdoing—both because such exercises in law-abiding autonomy support good citizenship values and because it costs society less in terms of law enforcement when individuals police their own behavior. This failure of the relevant social values to point decisively to a particular result makes the case hard and, accordingly, controversial.

C. Rules and Standards

Armed with this way of understanding hard (controversial) and easy (uncontroversial) cases, we are now ready to address the rules-standard distinction. And I begin by returning to Hart's useful invitation to imagine a provision of law as a figure enclosed by a penumbra, with the clear interior and exterior representing easy cases and the penumbra representing hard cases, requiring choice among competing and inconsistent apt interpretations.

It follows from the discussion of openness in Part I that the thickness of the penumbra surrounding a provision will depend on its degree of openness. A provision that reflects a single value within the field or that privileges one value above the others will generate few if any controversial cases since there are either no competing social values to point toward different outcomes or other social values will do so only weakly (since they are subordinated to a single, primary value). Conversely, the more heterogeneous social values a provision reflects equally, the greater the chance that those values will point toward different outcomes in particular applications of the provision and the smaller the chance that those conflicting values will be resolved by a widely accepted correct interpretation—thus, generating a larger number of hard cases.

The distinction between rules and standards can be understood in terms of degrees of openness. Standards are legal provision that have a high or moderate degree of openness; consequently, they will likely have relatively thick penumbras. A substantial number of cases will be controversial, caused by opposing apt arguments based on opposing apt interpretations of the provision. By contrast, rules are provisions that have a low degree of openness and, therefore, thin penumbras, in which few controversial cases can be found. And again, because values indicate what facts are relevant when applying a provision, a rule justified on the basis of a single or few values will require relatively few factual determinations

for its application; by contrast, a provision justified in terms of multiple, heterogeneous values will require something approaching the totality-of-the-circumstances analysis characteristic of standards.

For example, as noted earlier,[58] the tort duty of ordinary care displays a high degree of openness. That is, an analysis to determine whether an individual's conduct has breached the duty of ordinary care requires consideration of a variety of tort values. General experience suggests that our society values these sets of concerns in roughly equal measure. Moreover, the duty applies to an enormous range of everyday interactions among members of the community, and the potential in those interactions for conflict among the duty's constitutive social values is great. The consequence of all this is individualized, totality-of-the-circumstances evaluations of disputes to determine what the duty of ordinary care amounts to in particular situations. In conventional terms, we treat the duty of ordinary care as a standard.

By contrast, a statute of limitation displays a low degree of openness. To be sure, statutes of limitation promote multiple social values.[59] One set of these is procedural in nature. Statutes of limitations promote efficiency and accuracy in civil litigation by barring claims that accrued long in the past. Efficiency is served by keeping the number of claims down, and accuracy is served by eliminating claims supported by stale evidence. Also within the procedural set is the need for sufficient time to evaluate the desirability of filing a lawsuit and to prepare properly to do so. Aside from procedural concerns, society values the ability to move on with one's life, free of potential lawsuits constantly hanging over one's head. Statutes of limitations promote this value, too. Of particular note is the potential conflict between the need for sufficient time to sue, which presses in the direction of allowing a longer limitation period, and the other values, which press in the direction of a shorter period. But in ordinary practice, efficiency occupies a privileged status among the relevant social values, and efficiency strongly supports focusing on a single fact as relevant to the application of a statute of limitation: the amount of time that has elapsed since the right of action accrued, rather than a totality-of-the-circumstances examination of the facts surrounding each filed claim. Hence, statutes of limitations function as rules.

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58. *See supra* note 27 and accompanying text.

59. The values discussed in this paragraph, organized somewhat differently, are summarized in Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73–82 (2005).

This way of understanding rules and standards has four important ramifications. First, applications of an apt provision will always generate predominantly uncontroversial cases, regardless of its degree of openness. That is, both rules and standards generate mostly easy cases. The reasons for this go back to the points made in Part I about why the community's discourse about fields of law will tend to converge on stable, shared understandings of the constitutive social values: (1) the practical point that convergence on interpretations of provisions of law that generate predominately easy cases is necessary to achieve the predictability required for the rule of law, and (2) the existential point that the integrity of a community depends on the stability of its laws and the consistency of their enforcement, a stability and consistency that require convergence on interpretations of provisions of law that generate predominately easy cases. Conversely, an inapt provision, like the Jacksonville vagrancy ordinance discussed in Part I, will be characterized by a vast penumbra and will generate predominately controversial cases.

Second, I have argued throughout this Article that the identity of the social values that define a field and the meaning of those values (including what facts they make relevant in the application of provisions within the field) emerge as a shared understanding from the community's collective and ongoing experience with applying provisions of law to important questions that arise within the field. Similarly, as noted at the end of Part I, the degree of openness that provisions reflecting those values display emerges from that same community engagement. If all that is correct, it challenges a cornerstone of the conventional understanding of rules and standards, which holds that the distinction between rules and standards turns on "whether the law is given content *ex ante* or *ex post*"[60] and that whether a provision of law is a rule or standard is fixed by legislative decision at the time of its creation.[61]

Consider the highway speed limit problem discussed in Part II.A.2. We can reasonably hypothesize that when lawmakers promulgated the first

60. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992). To invoke Kaplow's version of the rule-standard chestnut used in this Article: A rule prohibiting speeds on the highway "in excess of 55 miles per hour" seems to tell us *ex ante* most of what we need to know about what the law requires; a traffic court judge adjudicating a speeding ticket would only have to determine where the alleged offense took place and how fast the alleged offender was driving. By contrast, a standard prohibiting driving at an "excessive speed" on the highway seems less predictable as it appears to leave much of the judgment to the *post hoc* assessment of, say, our traffic court judge. *Id.*

61. *See id.* at 559 ("This Article offers an economic analysis of the extent to which legal commands should be promulgated as rules or standards . . . .").

highway speed limit, they regarded it as a rule: drivers may not drive faster than the literal posted limit and will be subject to punishment for any infraction. Speed limits promote a widely shared social valuing of safety on the roads. At the same time, widely shared libertarian values (identified earlier as one of the transcendent "law values") press toward reduced government regulation of and interference with individual choices, preferring preservation of the autonomy of each driver to determine what speed is safe under the circumstances and the private resolution of any disputes that might arise from driving behavior. For many drivers the desire to make individual judgments about what constitutes safe driving under the specific conditions of the moment leads often to speeds in excess of what is literally specified on the highway sign. At the same time, highway police must decide whether to stop individuals who drive faster than the literal posted limit, and the police often choose not to do so. This may partly be because of resources limitations, e.g., the lack of an adequate number of officers to stop everyone (although a period of strict enforcement might sharply reduce the number of violators). It may also be partly that the inaccuracy of speed detection equipment would generate many disputes and much litigation over trivially excessive speeds. So far, these considerations support our understanding of the failure to prosecute those who drive, say, five miles per hour over the literal posted limit as an exercise of enforcement discretion.

But another reason—perhaps the dominant reason—for not prosecuting may well be that the police treat speed limits primarily as tools for enforcing a general social value of safe driving on the roads. And as long as the "excessive" speed is not causing a manifestly unsafe situation, the highway police tend to let it go. Put another way, speed limits come to be treated over time, through their use by the community, as provisions having a moderate degree of openness. That understanding of speed limits having stabilized, both drivers and law enforcement officials understand that some matters have been resolved *ex ante* (e.g., speeds under the literal posted limit are presumptively legal), while others are resolved *ex post* (e.g., a variety of factors bearing on the value of public safety—traffic flow, day of the week, weather conditions, presence of road maintenance workers, and so forth—will be taken into consideration when judging speeds over the literal posted limit). Understood this way, the failure to prosecute those who drive five miles per hour over the literal posted limit appears as an exercise of interpretive authority, treating the speed limit more as a standard than as a pure rule.

Third, the "law values" identified in Part I tend to push the degree of a provision's openness in different directions. Concerns with

administrability and the rule of law tend to push our interpretation of provisions toward lower degrees of openness, i.e., toward the use of rules. That is because the less open a provision—the fewer social values it brings into play and the fewer factual determinations it requires for its applications—the more fully we can realize the important goals of efficiency, predictability, consistency, and constraining official power. But all that comes at a price. A provision's low degree of openness is achieved by suppressing or subordinating some of the values that constitute the relevant field of law, and that means suppressing or subordinating some of the things we care about when we engage with important questions involving that provision. In short, we risk a sacrifice of justice—of getting the right answer—which is more likely accomplished when we take all relevant social values and the facts they illuminate into account. (This gives rules their characteristic over- and under-inclusiveness.) Thus, the "law value" of justice pushes provisions toward higher degrees of openness, i.e., toward the use of standards. But that, too, comes at a cost: potential inefficiency, unpredictability, inconsistency, and abusive exercises of official power.

The remaining "law value" identified earlier—libertarian values—can push the degree of a provision's openness in different directions. We might generally expect it to press toward a lower degree of openness—toward interpreting provisions as rules—in order to restrict the scope of law and its consequent interference with individual autonomy. But as the example of speed limits discussed above illustrates, libertarian considerations can also push in the direction of more openness. This occurs when treating the provision as a standard increases the range of conduct that fits within what the law defines as permissible behavior, thereby increasing autonomy.

Fourth, because openness is a matter of degree, the thickness of the penumbra and the consequent likelihood of controversial applications of a legal provision will vary by degree. That means that the conventional view of rules and standards as binary opposites is wrong. Indeed, we might well jettison as misleading the whole rhetorical strategy of characterizing provisions as rules or standards. Were we to do that, we might see more clearly that provisions exhibit many gradations of openness. Some are extremely closed provisions with very thin penumbras (e.g., statutes of limitation, the standard deduction in federal income tax law); some moderately open (e.g., highway speed limits); and some very open (e.g., the standard of ordinary care in tort law). Furthermore, we would see that no provision is a pure rule with zero degrees of openness (even the standard deduction can generate an occasional controversial case) and

none is a pure standard (even the standard of ordinary care generates occasional "rules," e.g., negligence *per se* provisions[62]).

D. The Rule of Law[63]

A social value identified in Part I of this Article as one of an open-ended set of transcendent "law values," which are important in all fields of law, is the rule of law. And I suggested in Part II.C that the rule of law tends to push our interpretations of legal provisions in the direction of rules, rather than standards, since rules hold out the promise of realizing the rule-of-law values, which include equal protection, certainty, and placing identifiable constraints on the power of officials. At the same time I noted that these benefits come at a cost: injustice.

We could leave things at that. We could conclude that there are competing social values that we must engage with in choosing whether to promote the rule of law. However, we may get a more nuanced—and more useful—perspective on the rule of law if we press further.

And we can always press further. For if I am correct that the fundamental question for law is what we as a community care about, then the central *technique* of jurisprudential inquiry is to press that question through each layer of answer. That is, law is social values all the way down.

If we ask why we care about the rule of law, we might start by pointing to predictability, consistency, and uniformity in the law. And if we press further and ask why we care about consistency, uniformity, and predictability, our answer might be that we care about equality of treatment, the ability to plan our lives, and placing identifiable constraints on the power of officials.[64] These are, on one level, instrumental goals in that they serve further ends. On another level we can regard them as deontological: components of a community's moral duty to respect and facilitate the autonomy of its members (consistent with libertarian values). Either way, these goals are promoted by determinacy in our interpretation of legal provisions—the kind of determinacy facilitated by rules, with their

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62. An interesting example of this phenomenon is the treatment of choice-of-law in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), which seeks to develop concrete rules through the repeated, *ad hoc* application of multiple, heterogeneous choice-of-law values to particular factual situations. *See generally* Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

63. This part summarizes and refines a more detailed argument set out in Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63 (2005).

64. *See* Scalia, *The Rule of Law as a Law of Rules*, *supra* note 14.

strict prioritization of values and limitations on permissible interpretations of legal provisions.

But the determinacy promoted by rules is fragile. The preceding part argued that what distinguishes rules from standards is the thickness of the penumbra: rules generate proportionately fewer controversial cases than do standards. If we focus on the large universe of non-controversial cases generated by rules, we can identify two features that make the application of rules predictable in the way required by the rule of law: first, the consistent recourse to the social values that define the particular field of which a rule is a part; second, the prioritization of those values in the manner characteristic of rules. However, we can also see that the lack of controversy is contingent. It is contingent because, as I argued in Part I, the social values that define the field of which a particular rule is a part are contingent—both as to their identity and their meaning. Moreover, the prioritization characteristic of rules is similarly contingent. But if those social values and their relative priority are always subject to being reconsidered, then change—whether incremental or radical—is always a possibility. And this constant, ineradicable possibility of change is accompanied by the possibility that a case that was once non-controversial will become deeply contested.

For the rule of law to work, then, change must be kept under control. The identity and meaning of law's values—and, thus, of law itself—cannot vary wildly from moment to moment, but must change, if at all, slowly and incrementally. This, in turn, requires that those charged with interpreting and applying the law (judges, police, administrators, etc.) be committed to aligning their interpretations and applications with decisions made in the past and with the identification, understanding, and prioritization of values on which the community has converged.

What would generate such a commitment? The answer seems to be the practical and existential exigencies discussed in Part I. That is, on the one hand we need law to facilitate private transactions, to mediate private disputes, to regulate public behavior, and to structure and limit coercion by public officials. Law can do that if what it requires, forbids, and permits is knowable, which in turn requires that we converge on consistent interpretations and applications.[65] On the other hand, I identified an expressive value associated with the rule of law. That is, just as an individual's integrity depends on the consistency with which she expresses her values through action, so the integrity of a community depends on the

65. This was the point of the discussion of traffic signs in Part I.

consistency with which it expresses its most important values through action, including through its laws and their enforcement—i.e., through the way in which it uses law to facilitate private transactions, mediate private disputes, regulate public behavior, and structure and limit coercion by public officials. And the possibility of such a consistency depends on stable, widely shared understandings of the social values that constitute fields of law.

Thus, the rule of law can be understood in terms of the consistent and stable expression of the community's shared values. This understanding is reflected in the community's commitment to decisions—legislative, judicial, and administrative—made in the past. That is, the rule of law reflects a desire to render new decisions that are consistent with our past decisions, a desire that has generated the doctrines of *stare decisis*, *res judicata*, legislative supremacy, and law of the case, as well as the various canons of statutory interpretation that tie textual meaning to past intentions regarding legislative goals (purposivism), language choice (the plain meaning rule and other textualist doctrines), and shared understandings regarding meaning (reliance on legislative history).

An interesting feature of this expressive function of the rule of law is that it does not require strict determinacy in the application of law to particular cases. When we talk about what an individual stands for, we do not generally cast that discussion in terms of rules. Rather, we often talk about a person's "principles," and our expectation that a person will act in a *principled* way is fully consistent with the individual's taking a totality-of-the-circumstances approach to decision-making. Similarly, when we speak of a person having "integrity," we do not generally understand that to entail inflexibility. On the contrary, we expect—even celebrate—a person's ability to evolve as she acquires new experiences and tests her principles in real world practice.

Communities are much the same. Our expectation that a community will express what it stands for through its legal decisions is not the expectation of rule-bound inflexibility. Rather, we expect communities, like people, to reflect and reconsider and change. Accordingly, law can be predictable and consistent in the way that serves rule-of-law values, not because it employs a mechanical jurisprudence, but by virtue of its consistent expression of the community's values even as it reflects and reconsiders and even changes those values in the light of ongoing experience. This can be manifested in the reconsideration of law's rules. However, often the more efficient instrument of choice for this kind of integrity is the use of standards.

This understanding of the rule of law as promoting both consistency and principled change can be compared to another transcendent "law value": justice. As noted above, justice pushes us toward increased openness in our interpretation of provisions of law—to take into account as many of the community's values and the facts they illuminate. At the extreme, it pushes us to decide each case from scratch in order to "get it right" without the interference of past decisions. But justice also demands consistency: that we treat like cases alike and reach different results only when the cases are distinguishable in principle.[66]

Thus, both the rule of law and justice permit departures from the past, but at the price of a required explanation. That is, when consistency with the past is not apparent or when we intentionally reject past decisions and strike out in a new direction, those who make, interpret, and apply the law are expected to explain themselves—to explain how the decision is either consistent with established community values or is a justifiable departure from those values.

We can now see that the rule of law is itself contingent on two conditions being satisfied. One is that the community converges on social values that structure what human activities ought to be subject to governance and how they should be governed. Whether such convergence exists is a matter of social fact, and the history of failed states illustrates that communities can fail to converge in this way (which is to say that groups of people can fail to become communities) and that the rule of law can itself consequently fail. The second condition is that those who wield the community's coercive power must be committed to aligning their use of that power with the community's values. Whether such a commitment exists is also a matter of social fact, and the history of tyrannies illustrates that the rule of law can fail in this way, too.

CONCLUSION

I suggested in the Introduction that this Article should be read as a thought experiment, the hypothesis of which is that thinking about the relationship between social values and law in the way outlined in Part I will render more intelligible a variety of important jurisprudential puzzles. The four discussions in Part II are arguments that the experiment may be successful with respect to difficult questions about our understanding of legal interpretation, the distinction between hard and easy cases, the

66. This idea is central to Ronald Dworkin's analysis of judicial decision making in hard cases. *See* Dworkin, *supra* note 54.

distinction between rules and standards, and the meaning of the rule of law.

And if this thought experiment is successful, it will have a practical payoff. Understanding the relationship between social values and law will enable lawyers and judges to be more incisive and perspicuous in their analyses of legal issues. And it will enable legislators and other policy makers to explain more clearly the reasons for change in the law.