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THE ECONOMY OF TRUST

In Chapter 1, I argued that fundamental questions about legal interpretation—what I am now calling issues of meta-interpretation—can be answered only by first determining the nature of law. If we want to know how to interpret the Eighth Amendment, the New York Statute of Wills, or any other legal text, we must know which facts ultimately determine the content of law, for only by using these can we adjudicate disputes between rival interpretive methodologies. Correct theories about the nature of law provide us with this information: they tell us what necessarily follows from the fact that something is law. To know how to interpret the law, then, we must answer the Implication Question.

In this chapter, I use our answer to the Identity Question to develop a theory of meta-interpretation. As I try to show, the Planning Theory entails that the attitudes of trust and distrust presupposed by the law are central to the choice of interpretive methodology. Roughly speaking, the Planning Theory demands that the more trustworthy a person is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed. Attitudes of trust are central to the meta-interpretation of law, I argue, because they are central to the meta-interpretation of *plans*—and laws are plans, or planlike norms.

Indeed, seasoned legal participants such as judges, litigators, and legal academics—whom I will refer to collectively as “lawyers”—have at least implicitly recognized the law as a practice of social planning and have demonstrated this precisely through their greater sensitivity to issues of trust. They routinely justify their choice between free and constrained interpretation by adverting to the degree to which certain people can be trusted to act competently and in good faith. However, this lawyerly

attention to trust is strikingly missing from philosophical discussions of interpretation. Legal philosophers have simply not recognized the importance of competence and character for assessing interpretive methodology. Dworkin's theory of meta-interpretation, of course, is a dramatic example of this neglect.

To acknowledge that lawyers understand the importance of trust is not, of course, to say that lawyers have nothing to learn from philosophical discussions about the nature of law. Quite the contrary: although I believe that lawyers tacitly accept the idea that legal activity is, at bottom, a practice of social planning and are accordingly more alert to the ways in which issues of trust affect meta-interpretation, this insight remains untheorized, and its implications for meta-interpretive practice misunderstood. Thus, in the second half of this chapter I argue that lawyers fail to fully appreciate the role of trust in answering meta-interpretive questions because they fail to recognize the importance of the conceptual concerns they are often so quick to dismiss. In other words, while philosophers have examined questions of legal interpretation within an *institutional* vacuum, lawyers have typically engaged such issues within a *philosophical* vacuum—with similarly detrimental results.

Plans and Trust

As I intend to show, the Planning Theory entails that attitudes of trust and distrust presupposed by the law are central to the determination of interpretive methodology. Trust matters in the interpretation of law because trust matters in the interpretation of plans. Let us begin, therefore, by reflecting on simple plans that are adopted outside of a legal context.

Plan's End

Suppose a financial advisor develops an investment plan for one of her clients. Having figured out the best course of action, the advisor drafts a document setting out the plan and presents it to the client. If the advisor does her job well, of course, doubts about the proper interpretation of the document will rarely arise. The requirements of the plan will be obvious. Nevertheless, we can ask the meta-interpretive question about this plan: which methodology is the proper one to use when interpreting the document? For example, should the client follow the text literally or,

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alternatively, construe its meaning so that it always leads him to make the correct financial choice?

It is tempting to answer as follows: since the point of planning is to achieve certain ends, texts that set out plans should always be interpreted solely in the light of those ends. Otherwise, the interpreter would be acting counterproductively and irrationally. Thus, if following the literal text of the financial advisor's plan would lead the client to do something financially detrimental, then he must not interpret it to require this action.

The flaw in this response is not hard to spot. Allowing someone to interpret an investment plan solely in accordance with the end of making money would defeat the point of having a plan. The client has sought out financial advice precisely because he does not *know* which means are best suited to his financial goals. The plan is supposed to help compensate for his ignorance. If the client must interpret the plan so that it best achieves the desired financial result, then the plan will be doing no work.

This point may be made more vivid by filling out the story. Suppose the client is completely clueless about financial matters and seeks out the advisor for extensive help. Consequently, the advisor prepares an extremely comprehensive investment plan. The document specifies in great detail every stock that the client should buy, the dates on which he should purchase them, and the target prices at which to sell. It leaves virtually nothing to the client's discretion. The document does not say: "Sell IBM when the price stabilizes;" rather, it says: "Sell IBM at 90."

The detailed nature of the document reveals the plan's *modus operandi*. The plan aims to enable the client to achieve his financial goals precisely by denying him all but the smallest degree of freedom to pursue these goals directly. It allocates decision-making authority between the plan and the client in such a way that the *plan*—not the client—settles most questions about which means are best suited to the end of making money. This distribution of authority is itself based on an underlying distribution of trust. Because the advisor does not trust the client, she judges that the best allocation accords the lion's share of decision-making authority to the plan, while reserving a tiny remainder for the client.

Interpreting the investment plan exclusively in terms of its financial purpose, therefore, would frustrate its point. The plan allocates decision-making authority so as to compensate for the client's lack of competence.

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An uncompromising purposive approach to interpretation, however, defeats this compensatory function by redistributing decision-making authority. It allocates a degree of power to the client that would be appropriate only in a more trusting environment.

Managing Trust and Distrust

As we have seen, the investment plan attempts to compensate for the client's lack of competence in financial matters. It does so by claiming the bulk of the decision-making authority for itself. The plan's comprehensive nature, as well as its use of concepts that require little judgment to apply, leave virtually no room for the client to deliberate about the best means to achieve his end.

Plans do not merely allow planners to compensate for their lack of trust in others; they also enable them to *capitalize* on such trust where it exists. Suppose the advisor prepares an investment plan for a client in whom she places significantly more trust. As a result, she drafts a far less detailed document. For example, the text recommends that the client purchase various kinds of stocks (blue-chip, biotech, start-up telecom, oil, and so forth) and gives examples of each category. But it does not take any firm stands. It merely instructs the client to invest in each kind of company based on the best information that the client has available to him. Furthermore, unlike its more comprehensive cousin, this plan establishes target ranges for each stock listed, rather than an exact price at which to sell. Because the advisor places greater trust in this second client, she drafts a plan that accords him greater discretion. Such a plan will enable the client to take greater advantage of information that might arise in the future. A more detailed plan would constrain him too much: it would deny him the discretion he needs to best promote his financial goals.

Plans, we have seen, are sophisticated devices for managing trust and distrust: they allow people to capitalize on the faith they have in others or compensate for its absence. In our first investment scenario, we saw two ways in which plans cope with distrust: through detailed provisions and through the use of nonevaluative concepts that require little discretion to apply. In our Cooking Club story in Chapter 5 we saw another way, namely, by denying important roles to those who lack the competence or character to perform the requisite tasks.

In our second investment scenario, we saw how the use of more general directions and evaluative concepts enables a financial planner to

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make the most of the trust she holds in the client. Shared plans also enable planners to capitalize on their trust in others, either by shifting important functions to those who can be relied upon to handle such matters, or by empowering these individuals with planning power via authorizations.

In most instances, of course, particular plans aim both to compensate for the lack of trust *and* to capitalize on its presence. A plan may be used to help cope with a degree of distrust, but the distrust may not run so deep that the plan need be very detailed. A shared plan may allocate important tasks to those trusted to handle them, while denying them to those who cannot be so trusted. An authorization may empower an individual in a certain domain, but accompanying instructions may limit the exercise of that power, and additional directives may require the power holder to exercise it in certain ways.

Respecting the Economy of Trust

As we have seen, plans are sophisticated tools for managing trust and distrust. Plans can play this management role because they can have any content, can come in different varieties and sizes, and can be combined to form complex networks. Some plans direct, while others authorize; some are dense, others are spare; some use evaluative concepts, others do not; some withhold power, while others confer it; and some are free-standing, while others are embedded within a large set of plans regulating their use.

Let us call the distribution of trust upon which a plan is predicated the plan's "economy of trust." The first investment plan has an economy of trust that is stingy to the client but generous to the advisor; the second plan's economy of trust, by contrast, is more egalitarian, in that it bestows much greater faith on the client. Our previous discussion suggested that plans can play their role in trust management only if the interpretive methodology respects their economy of trust. In other words, the interpretive methodology must not allocate decision-making power in a manner inconsistent with the attitudes of trust presupposed by the plan.

Although we will refine this formulation as we proceed, we can say generally that the more generous a plan's economy of trust, the more discretion the applier should have to depart from the literal meaning of the text in the name of the plan's purpose; conversely, a more distrustful set of attitudes should lead to a more restrictive methodology, demanding

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greater adherence to the text or to the planner's specific intentions or expectations. Thus, it would not be consonant with the first investment plan's economy of trust to accord the client a great deal of freedom to depart from the plan's literal language. The plan, after all, presupposes a lack of faith in the client's competence—this is why it exists and takes its specific form. To allow the client to depart from the detailed text whenever he thought that following it would lead to a financial loss would undo the very point of having such a plan.

Conversely, a radically textualist approach to the second investment plan would be inconsistent with its economy of trust. Departures from literal interpretation, at least under some circumstances, would accord with the trust attitudes that motivated the formulation and adoption of the plan. Suppose the client stumbles on inside information suggesting that some biotech company whose stock he owns will be bought out by a big pharmaceutical house. To interpret the plan so that he must sell the biotech company simply because the price of its stock falls within the target range set by the plan, even though he has good reason to anticipate a future increase in that price, would not be consistent with the judgments of competence that motivated the formulation and adoption of the plan.

Law and Trust

We can now see why attitudes of trust are normally important for the meta-interpretation of plans. Insofar as the aim of a plan is to capitalize on trust and compensate for distrust, the proper way to interpret the plan must not frustrate this function. It must not, in other words, permit interpreters to exercise competences and other character traits that the plan denies they have and for whose absence it seeks to compensate; nor may it refuse them the use of capacities that the plan assumes they possess and on whose possession it wishes to capitalize. The only way to respect a plan's trust management function is to defer to its economy of trust, namely, the attitudes of trust and distrust that motivated its creation.

Let us now consider meta-interpretation in law. I claim that the choice of methodology to interpret legal texts should be determined in a similar manner, namely, by deferring to economies of trust. A distrustful system requires a constraining methodology, such as textualism, whereas a more trusting system demands one according greater interpretive discretion. This relationship holds, I will now show, because one of the main roles

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the law plays is to manage trust and distrust, and the only way to respect this function is through fidelity to these attitudes.

Law and the Management of Trust

Recall that in the circumstances of legality, moral problems are numerous and serious, and their solutions complex, contentious, and arbitrary. As we saw in Chapter 6, members of a community in the circumstances of legality would face grave difficulties solving these moral problems by themselves. The complexity of the problems would severely tax their competence. Many would simply not know what to do; some might not know what to do but, tragically, think that they do; and some who might know what to do would need to expend significant time and energy figuring it out and convincing others to act likewise. Complexity would also provide those who lack good character with a pretext to evade their responsibilities. Even if they knew how to behave appropriately, they could still credibly feign ignorance or assert that they were required to do very little. The contentiousness of these problems would ensure that convergence on solutions would be difficult, costly, and sometimes impossible. And the arbitrariness of the solutions would thwart the ability of the community to capitalize on any faith they might have in one another in order to do what they morally ought to do.

Even if members of the community should miraculously agree on a set of solutions, difficulties would nevertheless arise when the opportunity for implementing these solutions arrived. Since people are usually bad judges when they have an interest at stake, disputes about how to apply these agreed-upon principles to concrete cases can be expensive, difficult to resolve, and liable to create further dissension. Even when everyone agreed about what ought to be done in particular situations, there would still be the danger that those who lack good character would renege on their responsibilities. This concern would be compounded by the mere *perception* that some lack the appropriate character to act fairly and responsibly. Without a method for assuring trustworthy actors that their participation and forbearance won't be exploited, this distrust could be corrosive and thwart the possibility of cooperation.

As we can see, the problems of the circumstances of legality are largely (although not exclusively) problems of trust: either members of the community cannot be trusted to do what they ought to do, can be trusted but need help realizing their potential, or do not trust each other enough

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to engage in the social cooperation necessary to solve the serious and numerous problems that can arise. According to the Planning Theory, the fundamental aim of the law is to rectify these deficiencies; moreover, the law pursues this aim by managing trust: it compensates for and capitalizes on the trust and distrust that its officials hold toward members of the community, as well as the trust and distrust that members of the community feel toward one another.

The law manages trust through social planning. Legislators are supposed to identify those who are trustworthy and assign them tasks that take advantage of their trustworthiness; conversely, they are to identify those who are less reliable, plan out their behavior in greater detail, and deny them the ability to abuse or exploit their power. Judges, in turn, are supposed to resolve disputes over these rights and responsibilities fairly and efficiently. Finally, law enforcement personnel may be required to impose sanctions on those who break the rules. In such ways, those who do not know how to solve existing moral problems, or falsely think they do, will be given the appropriate guidance; those who would have discovered the solutions only in a costly manner will now be able to do so cheaply; those who lack good character and wish to evade responsibilities will be subjected to standards by which their behavior can be monitored; those who disagree about the proper resolution to moral problems, or who are faced with a choice among arbitrary solutions, will be given a common blueprint off of which act; those who might engage in self-deception will have their disputes adjudicated before a neutral arbiter; those who are tempted to free ride will have incentives to cooperate; and those worried that others will free ride will be given assurances to the contrary.

To be sure, the law must solve moral problems without creating new ones in the process. Thus, power must not be granted to those who cannot be trusted to use it properly. The task of institutional design, therefore, is to capitalize on trust while simultaneously compensating for distrust: to allocate enough power so that problems may be solved, but not so much that this power can be abused and exploited. This tension was the focus of the story we told in the last chapter. The framers sought to economize on virtue by selecting those with enough talent and integrity to act in the public spirit, while checking their natural proclivity toward self-aggrandizement through diffusions of power and bureaucratic competition.

It should be noted that not every legal problem is an issue of trust. Political conflict does not always arise because of a lack of competence or

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character. Questions about how to allocate resources, or how to choose between conflicting but equally valid visions of the good life, can be disputed between similarly trustworthy parties. Social planning overcomes these potentially dangerous disputes by settling the matter: it determines which of these alternative courses of action are to be followed. However, it must not be forgotten that even when the law must resolve disputes, questions of trust are still relevant. For legal authorities must still determine whether the parties need detailed guidance on how to implement the winning vision, or whether the losing party needs to be monitored so that it does not evade the terms of the settlement.

Undoing the Law

Once we recognize that the law seeks to rectify the moral deficiencies of the circumstances of legality principally by compensating for lack of trust and capitalizing on its existence, we see that the interpretation of the plans created by the law must be consistent with the legal system's economy of trust. A simple example will help make this point. Suppose that the designers of a particular legal system strongly distrust the competence and character of community members. This outlook is enshrined in the system's institutional design: authority is widely dispersed throughout the system, executive and judicial officers are forbidden from legislating, lengthy waiting times are set up before legislation can be passed, there are severe sanctions for abuse of discretion, statutes are set out in detailed codes with few open-ended standards, and so on.

Now imagine that this distrustful system is combined with an interpretive methodology according officials a great deal of discretion. This methodology does not require them to hew too closely to the plain meaning of legal texts, but rather allows them to deviate from the plain meaning when they think that the texts have been poorly drafted or will produce unreasonable results. When reading statutes, officials in this system tend to interpret grants of power broadly and constraints narrowly, ignore legislative texts that give a result with which they mildly disagree, refuse to defer to the interpretation of regulations by the appropriate administrative agencies, and so forth. All of this is permitted according to the system's interpretive methodology.

The obvious problem with applying this methodology to a legal system informed by distrust of its participants, however, is that such an interpretive methodology grants officials too much freedom from the point

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of view of the system designers. By according officials a large degree of interpretive discretion, it provides them with opportunities to expand their powers, reduce restrictions, and further increase their discretion beyond the level contemplated by the designers. The methodology frustrates the compensatory aim of the rules: it denies incompetent actors some of the guidance they need to solve moral problems; it denies members of the community some of the means to monitor the unscrupulous and hold them accountable; it denies the self-deceived some of the protection they need to keep themselves honest; and it denies those who worry about free riding some of the assurances they require to induce cooperation. The resulting distribution of power and authority, in other words, is incompatible with the distrustful views of the regime. The interpretive methodology requires that officials exercise capacities that the institutional design denies they possess and whose absence it seeks to offset.

Likewise, a system that takes a more optimistic attitude toward human nature and cognition would be ill-served by a highly restrictive interpretive methodology. While such a methodology protects the law from exploitation by the unscrupulous, it also prevents members of the community from capitalizing on the faith invested in them by the rules. By curtailing the officials' interpretive discretion, it precludes them from pursuing the objectives they were entrusted to serve.

To be sure, the argument just presented is incomplete, in that it does not tell us how to ascertain a system's economy of trust, or how interpretive methodology ought to track it. The limited point being made here is that systemic attitudes of trust (conceived in some plausible way) must play an important role in meta-interpretation if legal systems are to manage issues of trust. If the proper interpretive methodology for a particular legal system fails to harmonize with its economy of trust, the system will be unable to compensate for lack of trustworthiness and to capitalize on its existence. Indeed, as I will now argue, not only must trust matter in meta-interpretation if the law is to plan effectively, but lawyers are normally aware of this.

Lawyers and Trust

Even a cursory glance at what lawyers say about legal interpretation reveals that issues of trust lie at the very heart of their concerns. Consider, for example, the following statements:

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And if [legislators] are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.—Plowden¹

Relieve the judges from the rigour of text law, and permit them, with praetorian discretion, to wander into it's [sic] equity, and the whole legal system becomes uncertain.—Thomas Jefferson²

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.—Joseph Story³

Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.—Stanley Reed⁴

[The court] should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.—Henry Hart and Albert Sacks⁵

The number of judges living at one time who can, with plausible claim to accuracy, “think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,” may be counted on one hand.—Frank Easterbrook⁶

[T]he United States Code is not the work of a single omniscient intellect.—Richard Posner⁷

A society that adopts a bill of rights is skeptical that “evolving standards of decency” always “mark progress,” and that societies always “mature,” as opposed to rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.—Antonin Scalia⁸

Enlightenment statesmen were very unlikely to think that their own views represented the last word in moral progress. If they really were worried that future generations would protect rights less vigorously than they themselves did, they would have made plain that they intended to create a dated provision.—Ronald Dworkin⁹

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As these quotes demonstrate, issues of trust play a prominent role in debates about legal interpretation. Some of the writers cited above argue that since judges can be trusted with discretion—either because they are “sages of the law” (Plowden) or because “a lively appreciation of the dangers” of discretion is enough to protect them from wayward action (Reed)—they should engage in purposive interpretation. Others argue that any type of discretion is dangerous since judges cannot be so trusted—either because their judgment is “praetorian” (Jefferson) or because imagining what legislators would have done is so difficult that those with such ability “may be counted on one hand” (Easterbrook). Some believe that judges must have interpretive flexibility because legislators are not “omniscient” (Posner), while others believe that judges should defer to legislative purpose insofar as legislators are “reasonable persons pursuing reasonable purposes reasonably” (Hart and Sacks). Some claim that the framers were concerned with moral “rot” and would have wanted judges to stick closely to the text of constitutional provisions (Scalia), while others respond that the framers believed in “moral progress” and would have trusted future generations to interpret the Constitution in accordance with moral values (Dworkin).

Even when questions of trust are not directly broached in discussions of legal interpretation, they often lie just below the surface. For example, when Coke writes, “The wisdom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law,” he is not so subtly implying that legislators cannot be trusted with the power to override rules made by more learned judges.¹⁰

That lawyers take trust seriously in meta-interpretation further confirms the claim that attitudes of trust bear directly on the question of proper interpretive methodology. In fact, this supporting evidence is not unrelated to the earlier argument about the implications of the Planning Theory. Insofar as lawyers are legal participants par excellence, they are apt to have deep appreciation for the planning nature of law. And awareness of the law as a planning activity inexorably leads one to grasp that trust is central to meta-interpretation.

Determining the Economy of Trust

As we have seen, many seasoned legal practitioners believe that judgments of competence and character ought to play a central role in determining interpretive methodology. Generally speaking, it is thought that

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the more trustworthy interpreters are judged to be, the more interpretive discretion they should be given. Lawyers are not, however, always of the same mind about *whose* judgments should be authoritative. In this section, I would like to compare two well-known meta-interpretive arguments and show how each assesses the trustworthiness of interpreters from a different point of view.

Two Points of View

In *A Matter of Interpretation*, Antonin Scalia argues that constitutional provisions ought to be interpreted in accordance with the original meaning of the text, rather than with an “evolving sense of decency.” A judge living today should not, for example, interpret the Eighth Amendment according to the meaning that she assigns to the term “cruel” if that meaning diverges from the late eighteenth-century understanding, for such evolutionary methodologies flout the fundamental function of constitutions. “It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.”¹¹

On Scalia’s view, the purpose of a constitution is to prevent untrustworthy future generations from rescinding rights that the present generation feels should be protected. But, he argues, granting judges the power to interpret the constitutional text in accordance with changing conceptions of morality would, in effect, permit future generations to change the constitution and thereby defeat its *raison d’être*.

Now consider Richard Posner’s defense of what he calls “pragmatic adjudication.” Posner claims that it is proper to accord courts the discretion to decide cases in accordance with their judgments of the general welfare because judges are generally trustworthy. Insofar as they are routinely chosen from the intellectual elite of American society, judges will normally have the competence to wield such power responsibly. He writes:

Judges of the higher American courts are generally picked from the upper tail of the population distribution in terms of age, education, intelligence, disinterest, and sobriety. They are not tops in all these departments but they are well above average, at least in the federal courts because of the

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elaborate pre-appointment screening of candidates for federal judgeships. Judges are schooled in a profession that sets a high value on listening to both sides of an issue before making up one's mind, on sifting truth from falsehood, and on exercising a detached judgment. Their decisions are anchored in the facts of concrete disputes between real people. Members of the legal profession have played a central role in the political history of the United States, and the profession's institutions and usages reflect the fundamental political values that have emerged from that history. Appellate judges in nonroutine cases are expected to express as best they can the reasons for their decision in signed, public documents (the published decisions of these courts); this practice creates accountability and fosters a certain reflectiveness and self-discipline. None of these things guarantees wisdom, especially since the reasons given for a decision are not always the real reasons behind it. But at their best, American appellate courts are councils of wise elders and it is not completely insane to entrust them with responsibility for deciding cases in a way that will produce the best results in the circumstances rather than just deciding cases in accordance with rules created by other organs of government or in accordance with their own previous decisions, although that is what they will be doing most of the time."¹²

Both Scalia's and Posner's arguments are meta-interpretive in nature. Each argues for (or against) a specific methodology as the proper way to read legal texts in the American legal system. Moreover, each grounds his meta-interpretive argument on an assessment of the trustworthiness of legal actors. Scalia thinks that judges ought to be denied the discretion to appeal to current views of morality based on skepticism about the moral character of future generations; Posner believes judges should be accorded such discretion based on confidence in their expertise.

A closer look, however, reveals an important difference in the structure of their arguments. While both look to judgments of trustworthiness in selecting an interpretive methodology, only Posner appeals to his own judgments. Posner seeks to accord judges discretion in interpretation because *Posner* deems them to be sufficiently trustworthy. By contrast, Scalia aims to curtail judicial discretion based not on his personal skepticism, but rather on the fact that the *designers* of the American legal system were insufficiently confident in the trustworthiness of future generations.

Accordingly, we can distinguish between two different meta-interpretive procedures. Let us call Posner's argument an instance of the "God's-eye"

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method. The God's-eye method pegs proper interpretive methodology to *actual* competence and character. A meta-interpreter seeking to determine which methodology she ought to use would, on this account, be directed to evaluate her own trustworthiness. If she thought highly of herself, she should accord herself great discretion in interpretation; conversely, if she were less confident, she should constrain herself to a greater degree.

Scalia's argument, on the other hand, is an instance of what I will call the "Planners" method. According to this approach, a meta-interpreter should not assess her own trustworthiness, but rather defer to the views of the system's planners regarding her competence and character. Her task is to extract the planners' attitudes of trust as they are embodied by the plans of the legal system, and then to use these attitudes to determine how much discretion to accord herself. Planners' confidence in competence and character should yield significant levels of interpretive discretion; doubt and suspicion ought to issue in low levels of discretion. Insofar as the Planners method requires meta-interpreters to defer to *imputed*, rather than actual, competence and character, its recommendations may diverge from the God's-eye approach whenever the legal system is founded on false beliefs about the abilities and dispositions of actors.

To make the contrast between the God's-eye and Planners methods more concrete, consider an argument advanced by Daryl Levinson regarding the psychological foundations of American constitutionalism. As Levinson points out, federalism and separation of powers presuppose that government officials are "empire builders."¹³ But, he argues, this assumption is mistaken. Unlike dictators, democratic representatives do not personally benefit from increases in the power of the institutions of which they are members. Moreover, in a minimally functioning democracy, officials who act in an imperialist or avaricious manner will be punished by their constituents. Levinson concludes that "the kind of agency-driven empire-building feared by the Framers should be a much less significant concern than contemporary constitutional law credits."¹⁴

Let us assume that Levinson is correct. Should any of this affect meta-interpretation? This depends on whether one embraces the God's-eye or Planners perspective. Levinson's finding might lead a supporter of the God's-eye view to accord government officials greater discretion in interpretation. After all, officials are not in fact empire builders, and hence the dangers of unfettered discretion are not nearly as great as the framers believed. On the Planners view, however, nothing has changed. The fact

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that the framers were wrong about empire building is immaterial—what matters is that they thought they were right.

It should be pointed out that the Planners method is not the same as “originalism.”¹⁵ Originalism is usually understood to be a specific interpretive methodology: it dictates that legal texts be interpreted in accordance with the intent of those who enacted them. The Planners method, by contrast, describes an approach to meta-interpretation, that is, a way to select interpretive methodologies: it requires that proper interpretive methodology be a function of the attitudes of trust of those who designed various aspects of the legal system in question. Now, where the planners assume a high level of distrust toward group members, it may indeed follow from such trust attitudes that an interpreter should cabin discretion when construing certain textual provisions, and that the best way to cabin discretion is through privileging original intent. In such a case, the Planners approach would justify the use of original intent methodology. But it is also possible that attending to the trust attitudes of legal planners might actually demand the rejection of original intent methodology.¹⁶

Playing God

Lawyers rarely offer meta-interpretive arguments. In most instances, they simply use a particular interpretive methodology without stating that they are using it or attempting to justify their choice. Of course, as we have seen, lawyers are sometimes self-conscious about their interpretive behavior and proffer arguments supporting their pick. Posner and Scalia are notable examples. But even when volunteering such justifications, jurists are almost never explicit about their underlying meta-interpretive theory. They simply make meta-interpretive arguments, hoping that the criteria to which they appeal are accepted by their interlocutor as the proper determinants of interpretive methodology.

Recently, however, legal academics have become more reflective regarding meta-interpretive practice. Although no one has developed anything close to a theory, several theorists have nevertheless sought to identify explicitly some meta-interpretive criteria. Such musings have, naturally, led them to appreciate the importance of trust in determining interpretive methodology. Interestingly, though, when these theorists have considered the precise role that trust ought to play in meta-interpretation, by and large they have opted for the God’s-eye approach.¹⁷

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Unfortunately, while these theorists openly advocate the God's-eye method, they fail to provide any basis for their preference.¹⁸ In fact, for all their emphasis on the importance of institutional competence, they never explain why such considerations are crucial in the selection of interpretive methodologies. They treat the relevance of competence as self-evident, a claim so obvious as not to need explanation.

No doubt, the God's-eye view has its intuitive appeal. After all, who would be in favor of heeding ideas one believes to be false? Nevertheless, I think that this approach to legal meta-interpretation is inconsistent with the logic of planning and, as such, frustrates the ability of the law to achieve its fundamental aim.

This point can best be made by returning to the example of the distrustful legal system encountered earlier in the chapter. In that system, the planners hold a very distrustful view of the competence and character of officials and, as a result, they aim to develop a certain legal framework for coping with such problems: they attempt to diffuse authority through the system, forbid executive and judicial officers from legislating, set up lengthy waiting times before legislation can be passed, enforce sanctions for abuse of discretion, and so on. Accordingly, they draft a constitution that sets out these rights and duties in very clear, detailed, and precise language.

Let us imagine, by contrast, that legal officials operating in such a system think of themselves as eminently trustful. As a result, they believe that the contemplated constraints are unnecessary and, in fact, impede their valuable work. In keeping with the God's-eye view, they use their charitable views about their own trustworthiness and assume large degrees of discretion in interpretation: they read grants of power broadly, interpret constraints narrowly, ignore statutes when these texts give a result with which they mildly disagree, refuse to defer to the interpretation of regulations by the appropriate administrative agencies, and so forth.

The obvious difficulty with this mode of proceeding, however, is that the very aim of the designers in creating the constitution is frustrated. The designers wanted to compensate for their distrust of officials by severely constraining their discretion; yet by following the God's-eye view, the officials are able (wittingly or unwittingly) to defeat this aim. Those deemed to be incompetent are encouraged by this meta-interpretive approach to judge themselves competent; those regarded as unscrupulous are given the latitude to evade their responsibilities; those feared to be self-deceiving are freed to deceive themselves; and those who worried about free riding are left without assurances.

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Troubles arise here because the officials share a view about themselves that differs dramatically from those shared by the system's designers. Matters will likely be worse when no such consensus among officials exists. In these cases, which are bound to be the norm, coordination will be hard to secure and disagreements will be costly to resolve, precisely the sort of difficulties that institutional design is supposed to alleviate. Last, even if implementers are finally able to settle their doubts and disagreements, valuable resources will have been spent in the exercise, resources that could have been used to advance the goals of the system.

Put slightly differently, the core problem with the God's-eye view is that it violates the General Logic of Planning principle. It does so because it requires officials to determine the existence of those facts that their law aimed to resolve. The constitutional plan, in other words, is supposed to settle the question "Who should be trusted to do what?" Yet this is the very question that the God's-eye approach directs meta-interpreters to answer. It demands that meta-interpreters determine their own trustworthiness, and hence unsettles what has been settled.

By violating GLOP, the God's-eye approach recreates, at least partially, the deficiencies of the circumstances of legality. The law aims to cure these deficiencies, in large part, by managing trust: its plans should compensate for distrust and capitalize on trust. However, by requiring those who are regulated by the plans to determine how trustworthy they themselves are, the God's-eye approach reopens Pandora's Box. Those who are untrustworthy can use their untrustworthiness to arrive at different solutions than the ones determined by the law; the trustworthy can fail to exercise their competence and character and hence not utilize those strengths that the law seeks to exploit; those who disagree about trustworthiness will end up disagreeing about what ought to be done and hence act at cross-purposes; and those who fear free riding will lose some of the required assurances.

It is important to emphasize that this objection is not an empirical one. The claim is not that legal officials who follow the God's-eye approach are less likely to solve moral problems than those who defer to the system planners. The point, rather, is conceptual: given that the law aims to solve moral problems through social planning, it cannot do what it is supposed to do when the logic of planning is violated. To be sure, approaches like the God's-eye one will, on some occasions, manage to solve moral problems. But it is crucial to see that when this is so, the success is a legal accident. The problems have not been solved in the way

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that the law is supposed to solve them: they have not been solved by plan-based reasoning.

Notice that the Planners method of meta-interpretation does not violate GLOP. Because it preaches fidelity to the designers' conception of trust, it does not require the meta-interpreters to answer the question "Who should be trusted to do what?" It takes their answer as correct for the purposes of determining interpretive methodology, and hence does not frustrate the trust management function of the law.

Legitimacy

Thus far, I have described the infirmities of the God's-eye point of view in purely instrumental terms: if the law is to fulfill its aim, then the logic of planning demands that questions of competence and character not be decided by the meta-interpreter. As we will now see, the God's-eye approach suffers from another, related problem: it violates the rights of those who have moral authority to rule.

On the Planning Theory, to rule is to engage in social planning; thus, to have the moral right to rule is to have the moral right to engage in social planning. Anything, therefore, that prevents legitimate rulers from engaging in social planning effectively deprives them of their moral right to rule. Since the argument of the previous section showed that the God's-eye view frustrates the aim of social planning, it follows that the God's-eye approach violates the moral rights of legitimate authorities.

Suppose, for example, that the distrustful legal system we just discussed has a good democratic pedigree. Its constitution was ratified by an overwhelming majority of adults in the political community after a full and fair debate. Because the God's-eye view does not require deference to the trust attitudes of those who ratified the constitution, it does not permit the democratic majorities the right to rule themselves. For if the side that distrusts human nature wins the debate, those taking a more hopeful attitude toward human nature in meta-interpretation sabotage the democratic process. They undo what the majority had the right to do.

This problem with the God's-eye approach, of course, does not arise because of some quirky feature of democratic theory. The same difficulties will crop up for any nonanarchist theory of political legitimacy. For any such theory will suppose that some persons have the moral right to plan for the community. Because these planners are the legitimate ones, the theory must deny all others the right to interfere with their social

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planning. Such a theory, therefore, must require that all others not take the God's-eye point of view. Otherwise, not only will the law not be able to do what it is supposed to do, but the legitimate authorities (whoever they may be) will not be able to do what they have the *right* to do.

Authority and Opportunistic Systems

Having argued that the God's-eye approach to meta-interpretation violates the logic of planning while the Planners method does not, should we infer that the Planners method is the correct approach to meta-interpretation? I think not. I would like to suggest that the correct approach to meta-interpretation depends on the legal system. In many instances, the Planners approach is appropriate, but not in every case.

To know whose attitudes of trust and distrust to privilege, it is important to know *why* the current participants of the legal system accept, or at least purport to accept, the system as designed by its planners. Is the participants' acceptance predicated on their belief that the plans were designed by those having superior authority or judgment? Or, rather, do they believe that these plans are well suited to solve those moral problems that the law should solve, even if the reasons why they think the plans are good are different from the reasons for which they were created?

Let's distinguish between two ideal types of legal systems. In an "authority" system, the reason why the bulk of legal officials accept, or purport to accept, the rules of the system is that these rules were created by those having superior moral authority or judgment. The authoritative provenance of these rules, in other words, is deemed to be of paramount moral importance. In an "opportunistic" system, by contrast, the origins of most of these rules are deemed morally irrelevant. Officials in these regimes accept them because they recognize, or purport to recognize, that these rules are morally good and hence further the fundamental aim of law.

The Planners method is appropriate for authority systems. Because officials attribute moral legitimacy or expertise to the authorities of the system, and since authorities are social planners, it follows that they attribute moral legitimacy or expertise to their activity of social planning. Any view that attributes moral legitimacy or expertise to their activity is committed to imputing moral legitimacy or expertise to their aim of trust management. Attributing moral legitimacy or expertise to the trust

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management aim of a set of planners would commit one to interpreting the plans created in a way that does not frustrate their aim. Since the Planners method respects the trust management aim of a set of planners, attributing moral legitimacy or expertise to a set of planners commits one to using the Planners method of meta-interpretation. The economy of trust in such a system, therefore, would be constituted by the attitudes of trust and distrust shared by the system's planners.

Officials in opportunistic systems, on the other hand, do not accord any special moral status to the planners of their system. They accept, or purport to accept, the rules because they judge them to be morally good, not because they have a morally legitimate or expert source. Put in terms of the Planning Theory, they think that the plans of the system just so happen to manage trust and distrust correctly; they do not care whether the planners who created them aimed to accomplish this task. In such a case, the economy of trust would be the attitudes of trust shared by the bulk of the current participants of the system, rather than the attitudes of the planners who originally created them. Call this the Participants method of meta-interpretation.

It is an empirical question, of course, whether a specific legal system more closely resembles an authority system or an opportunistic system. For example, do legal participants in the United States accept, or purport to accept, the U.S. Constitution because it was framed by the Founding Fathers and ratified in 1789? Or do they accept it, or purport to accept it, because they think that the scheme of governance that it sets out is a good one regardless of its origin? If the first description is more accurate, then the framer's Whiggish attitudes about human nature are relevant to the question of meta-interpretation; if the second better describes social reality, then the Constitution would truly be a living document, insofar as the attitudes of trust that determine interpretive methodology would be those held by the bulk of the current participants in the American legal practice.

For what it's worth, I believe that the United States legal system strongly resembles an authority system. The reverence in which the "Founding Fathers" are held, the privileging of democracy to the exclusion of all other modes of political legitimization, the political impossibility of criticizing the Constitution, and the veneration with which the text is treated all bespeak a belief that the authority of the Constitution stems from its special provenance. As Hendrik Hertzberg has aptly observed:

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[I]n the public square the Constitution is beyond criticism. The American civic religion affords it Biblical or Koranic status, even to the point of seeing it as divinely inspired. It's the flag in prose. It's something to be venerated. It's something to be preserved, protected, and defended, as the President swears by God to do. In the proper place (a marble temple in Washington), at the proper times (the first Monday in October, *et seq.*), and by the proper people (nine men and women in priestly robes), it is to be interpreted, like the entrails of a goat.¹⁹

Because legal participants in the United States accord the Constitution an authoritative source, those who interpret it must be sensitive to the attitudes of trust held by those who designed it. But as we will see in the next chapter, this privileging of the attitudes of constitutional designers does not entail that originalism is the proper methodology for constitutional interpretation; nor does it mean that only the framers' attitudes matter. The entrails of a legal system are messy and evolving, and their interpretation no simple matter.

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THE INTERPRETATION OF PLANS

Textualism vs. Purposivism

Meta-interpretive debates cover a wide range of topics, including whether to rely on parliamentary intent and legislative history, defer to administrative agencies, follow judicial precedent in constitutional and statutory interpretation, recognize evolving social mores, accept the authority of treatise writers, and so on. But the principal disagreement over interpretive methodology has always been between those who favor stricter forms of interpretation versus those who prefer looser ones. Advocates of textualism insist that the plain meaning of legal texts be followed. For them, the letter of the law controls. By contrast, those who favor some form of purposivism maintain that it is proper in some instances for interpreters to bypass the literal reading of an authoritative text. When the text recommends a course of action that is contrary to the purpose for which it was enacted, purposivists believe it a dereliction of duty to follow the letter of the law.

Nonlawyers are often perplexed by this debate. Some think it obvious that legal texts ought to be construed strictly. If the law says “No vehicles are permitted in the park,” then no vehicles are permitted in the park—end of story. A judge who, in order to best serve the spirit of the law, interprets the statute to permit an ambulance to go through the park is not *really* interpreting the statute—she is changing it.

Others take the opposite tack. They cannot see the point of sticking to the letter of the law when doing so would be counterproductive. The function of the law, to them, is to make our lives better off. What justification could there possibly be, on this view, for not letting an ambulance go through a park if that is the quickest route to the hospital? From this perspective, textualism appears to confirm the layman’s worst suspicions about lawyers and the law.

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Unfortunately, both of these views are misinformed. As to the first, the debate between the textualism and purposivism is not *whether* judges should follow the law; the dispute concerns, rather, *how* to follow the law. The textualist believes that judges follow the law only when they heed it to the letter. The purposivist, on the other hand, denies that the literal interpretation of the text is the law. Judges follows the law only when they interpret legal texts purposively, not literally.

Consider, for example, Plowden's famous description of purposivism:

[I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law . . . And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive.¹

Plowden, thus, denies that the text of the law is the law. It is simply the shell, which must be discarded in favor of the purposive core that ultimately determines proper legal interpretation.

As for the contrary reaction that the only rational interpretive methodology is a purposivist one, it should now be clear why a meta-interpreter might be tempted toward stricter forms of construction. As we saw in the last chapter, the Planning Theory suggests that attitudes of trust are central to the choice of interpretive methodology. If those regulated by the law are greatly distrusted, then they should not be accorded the discretion necessary to bring the interpretation of a text in line with its purpose. Constraining an untrustworthy interpreter to follow the text strictly might actually achieve a better result than allowing the interpreter to pursue the targeted goals or values directly.

By the same token, if the legal system places greater trust in certain members of the legal community, it might be appropriate for interpreters to look past the literal wording of a legal text in order to act in accordance with its purpose. The point of planning, after all, is to further

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some goal or realize some value. It would thus be self-defeating for a faithful agent to interpret a law in a way that impeded the aim the law is meant to serve.

The debate between textualists and purposivists, therefore, cannot be resolved a priori. In order to know whether interpreters should have discretion to depart from the text when doing so furthers the purpose of the text in question, one must look to the system in which the text is situated and determine its economy of trust. Indeed, in many instances, it is possible to interpret this meta-interpretive debate precisely as a dispute about the economy of trust of particular legal systems. The textualist maintains that the economy of trust of a given legal system does not support the level of trust necessary for purposive interpretation. The purposivist, on the other hand, sees the judgments of competence and character underlying the plans of the system as sufficiently approving to sanction departures from the text in appropriate circumstances.

In this chapter, I develop a theory of meta-interpretation in some detail, using the Planning Theory as my guide. My aim in doing so is not simply to set out a method that lawyers can use to improve their meta-interpretive arguments. I also try to demonstrate that many of the meta-interpretive arguments that lawyers have actually made conform, albeit in an inchoate and unreflective manner, to the process of meta-interpretation that the Planning Theory recommends.

The Planning Theory of Meta-interpretation

Before I begin this discussion, however, I would like to formally introduce the cast of characters who will play important roles in the account I will develop. Although we have already encountered these individuals, it will be helpful to explain in detail who they are and how they are related.

Who's Who in Meta-interpretation

The four most important groups that play a role in meta-interpretation are the officials, actors, planners, and, of course, meta-interpreters. By "officials" I refer to those who occupy offices in a particular legal system. They include judges, senators, administrative officials, ambassadors, police officers, county clerks, city comptrollers, bailiffs, and so on. By "actors" I mean those persons who are delegated legal rights and responsibilities

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so that they may contribute in some way to the political goals of the system. Actors include not only officials, but ordinary citizens as well. They exclude, however, infants and the severely mentally challenged insofar as the law does not rely on them to further its objectives.

By “planners” (or as I will sometimes say “designers”) I refer to those actors who have created, modified, or extinguished the institutions of a particular legal system, or affected the relationships between institutions. In the American system, for example, legal planners ordinarily include legislatures, courts, administrative agencies, and executive officials, but also constitutional conventions and the electorate itself.

Because legal systems always contain mechanisms for revision, the planners change as the structure of the system changes. The designers of the present American system include not only the framers and ratifiers of the Constitution of 1787, but the numerous agents who have changed the complexion of the system over the past two hundred years. The framers and ratifiers of the Fourteenth Amendment are as much the designers of the current regime as the framers and ratifiers of the original Constitution. Insofar as the meta-interpreter focuses on the current system, the relevant set of planners for meta-interpretation is the current one, namely, those whose planning has not yet been modified or extinguished by subsequent planners.

Last, by “meta-interpreters” I mean those persons who attempt to discover which interpretive methodology is appropriate for an actor in a given legal system to use. Planners, nonplanning actors, and even nonactors can be meta-interpreters. For example, a federal judge who attempts to ascertain what method she should use to interpret the United States Constitution is a meta-interpreter who also happens to be a planner; an American law professor who writes an article critiquing such a judge is a nonplanner (but actor) meta-interpreter; and a French law professor critiquing his American colleague is a nonactor meta-interpreter.

Meta-interpretation can be either “self-regarding” or “other-regarding.” A self-regarding meta-interpreter attempts to determine which interpretive methodology is appropriate for her to use, for example, a Supreme Court justice arguing that a certain method of statutory interpretation is appropriate for her to follow. An other-regarding meta-interpreter seeks to select a methodology for other actors to apply, for example, a citizen who considers how judges should read statutes. For the sake of simplicity, however, I will assume in what follows that meta-interpreters are always legal actors, and that meta-interpretation is always self-regarding.

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Thus, I ignore cases where the meta-interpreter is a nonactor, or where an actor attempts to determine how some other actor should read legal texts. Nothing of consequence hinges on this simplifying restriction.

The Economy of Trust

In the last chapter, I argued that proper meta-interpretation is always faithful to the attitudes of trust and distrust presupposed by the rules of the system. The meta-interpreter extracts these attitudes and uses them to determine how much discretion to accord interpreters. A proper meta-interpretive theory, in other words, should always respect a system's economy of trust. An interpretive methodology that requires a high degree of discretion for its implementation is appropriate only for a system whose economy of trust is rather generous. Conversely, a highly restrictive technique befits a system whose economy is significantly more miserly.

In contrast to Dworkin's model, this theory does not demand that interpretive methodologies be justified from the moral point of view. The meta-interpreter need not know why citizens should obey the law, the relation of justice to fairness, or the proper demands of community. He may have no opinions about how trustworthy members of his community really are. On this account, interpretive methodology is pegged not to the truth of any abstract philosophical or social-scientific theory, but rather to the law's presuppositions concerning the trustworthiness of legal actors.

Because this account is significantly more modest than Dworkin's account, it will be compatible with a much larger set of trust attitudes. One need not have an especially rosy picture of human nature to believe that individuals can effectively defer to the attitudes of others. Moreover, unlike the God's-eye method, this account necessarily respects the law's trust management function. Because its prime directive is to defer to the trust attitudes presupposed by the rules, the planner's method will never license interpretive methodologies that are inconsistent with the system's distribution of trust and distrust.

As I argued at the end of the last chapter, the proper way to determine a system's economy of trust is to determine the reasons why legal officials accept, or purport to accept, the rules of the system. In an authority system, where the bulk of the officials credit the system's designers with superior authority or judgment, the attitudes of these designers will determine the system's economy of trust. In an opportunistic system, by contrast, the attitudes of current officials will determine its economy of

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trust. For simplicity's sake, we will concentrate on authority systems. To adjust for opportunistic systems, it will usually suffice to replace "official" for "planner" in the discussion that follows. How meta-interpretation should proceed in customary legal systems will be addressed at the end of this chapter.

The Importance of Role

Thus far, I have proposed the following meta-interpretive principle: interpreters should be given as much discretion in interpretation as they are otherwise accorded in their system's economy of trust. Notice that this principle has the following implication: because economies of trust are rarely egalitarian—certain groups will be trusted more than other groups with respect to certain domains—it would be surprising if one methodology were appropriate for every subgroup in the system. It is entirely likely that a highly discretionary methodology will be fitting for certain officials, a highly constraining one will suit others, and some third method will be appropriate for the citizenry. Strictly speaking, therefore, there is no such thing as the correct interpretation of a legal text. Legal interpretation is always *actor-relative*: a text is interpreted correctly only in relation to an actor and her particular place within the system's economy of trust. Consequently, the meta-interpreter must always be careful to keep her position in the system in full view, and to tailor her interpretive method so as to harmonize with the degree of trust accorded to her.

While the meta-interpretive principle I introduced has certain virtues—for example, it takes the trust attitudes of all planners seriously—it is nonetheless too crude. As formulated, the principle selects methodologies based on the amount of interpretive discretion they confer, not the type. But since different methodologies may grant interpreters similar degrees of discretion, simply deferring to the system's trust economy may not yield a unique interpretive methodology. For example, as I show later on, certain types of textualism confer roughly the same degree of discretion on interpreters as some purposive ones. The principle I proposed cannot inform the choice between such methodologies.

A more powerful principle is therefore needed. Recall that, according to the Planning Theory, legal systems are enterprises for solving moral problems. Legal planners assign roles to actors with the understanding that their contributions will advance the fundamental aim of the law. I

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suggest proper interpretive methodology is determined not only by the level of trust accorded actors, but by their roles as well. An interpretive methodology is proper for an interpreter in a given legal system just in case it best furthers the objectives actors are entrusted with advancing, on the supposition that the actors have the competence and character imputed to them by the designers of their system.

On the Planning Theory, the meta-interpreter must complete three tasks. First, she must ascertain the basic properties of various interpretive methodologies. She must attempt to discover, for example, whether certain methodologies require a great deal of expertise to implement or comparatively little, and whether they are easy to abuse or hard to manipulate. Second, the meta-interpreter must attempt to extract certain information from the institutional structure of the legal system in question: the planners' attitudes regarding the competence and character of certain actors, as well as the objectives that they are entrusted to promote. Finally, the meta-interpreter should apply the information culled from the first two tasks in order to determine the proper interpretive methodology. She must ascertain which interpretive methodologies best further the extracted objectives in light of the extracted attitudes of trust.

Corresponding to these three tasks are three basic stages of meta-interpretation, which I will call "specification," "extraction," and "evaluation." In each stage, the meta-interpreter attempts to answer the following questions:

1. *Specification*—What competence and character are needed to implement different sorts of interpretive procedures?
2. *Extraction*—(a) What competence and character that the planners believed actors possess led them to entrust actors with the task that they did? (b) Which systemic objectives did the planners intend various actors to further and realize?
3. *Evaluation*—Which procedure best furthers and realizes the systemic objectives that the actors were intended to further and realize, assuming that they have the extracted competence and character?

Specification

Meta-interpretation can only proceed on the supposition that there are nontrivial differences between at least some interpretive methodologies.

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The Planning Theory locates these distinguishing characteristics, in large part, in the diverse intellectual and moral demands that methodologies place on interpreters. Different interpretive procedures require for their implementation different types of competence and character, or require the same capacities but to a lesser or greater extent.²

In attempting to isolate the prerequisites of any methodology, the meta-interpreter must draw on his judgments about the knowledge, skill, talent, temperament, and personality demanded by certain intellectual operations. Questions that meta-interpreters must ask themselves include: what type and level of expertise are needed to successfully implement a given procedure, how difficult is it for others to detect mistakes or abuse, and which methodologies create the appearances of improprieties even where none exist. In answering these questions, the meta-interpreter must always keep the institutional context in view. An interpretive methodology that would require a great deal of probity to implement successfully in one context might, in another context, require very little. Thus, the meta-interpreter might predict that even an untrustworthy person would scrupulously follow a highly discretionary methodology in the presence of mechanisms that seek to check and control abuses of discretion.³

Meta-interpretive battles are often fought and won at the specification stage. Insofar as it is easier to justify a less demanding methodology, advocates of particular hermeneutical styles tend to minimize, while critics emphasize, the degree of competence and character needed for successful implementation. Purposivists, for example, have consistently played down the risk of manipulation and self-deception associated with the search for legislative intent. Justice Reed went so far as to claim that the “lively appreciation of the danger” that interpretation “will be unconsciously influenced by the judges’ own views”⁴ would significantly reduce such a threat. In other cases they have recognized the dangers posed by liberal construction and have advocated the use of additional evidence of intent, most notably legislative history, in order to constrain judicial discretion. Requiring courts to justify their interpretations by reference to the hard facts of legislative history, they argued, would prevent judges from dressing up their own policy views in the garb of legislative intent. “Strong judges are always with us,” James Landis, an early proponent of legislative history, admitted. “But the effort should be to restrain their tendencies, not to give them free rein. . . .”⁵

Modern textualists, by contrast, have mocked these judgments as psychologically and politically naive. According to Easterbrook, “The num-

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ber of judges living at one time who can, with plausible claim to accuracy, ‘think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the bar,’ may be counted on one hand.”⁶ The use of legislative history as a constraining device has also been subject to scathing criticism. Textualists believe that, rather than constraining judges, legislative history merely gives judges another avenue by which to confirm their own subjective political preferences. As Justice Scalia has expressed this view: “[T]he manipulability of legislative history has not *replaced* the manipulabilities of these other techniques; it has *augmented* them.”⁷

Extraction

Extraction as Explanation

Once the intellectual and ethical prerequisites of various interpretive methodologies have been ascertained, the meta-interpreter must assess whether, from the system’s point of view, interpreters and other actors have the competence and character needed to implement these methodologies effectively. According to the Planning Theory, the systemic view of trust is determined by the attitudes of trust held by the current legal planners. Consequently, the meta-interpreter must seek to unearth the attitudes about appropriate trust embedded within the system’s institutional arrangements.

Extraction, on this model, is essentially an explanatory process. The meta-interpreter attempts to show that a system’s particular institutional structure is due, in part, to the fact that those who designed it had certain views about the trustworthiness of the actors in question and therefore entrusted actors with certain rights and responsibilities. The views extracted through this practice are those that best explain the construction and adoption of the *texts* that guide the practice, for it is these actions that create the rules. The Planning Theory thus contrasts markedly with Dworkinian meta-interpretation, in that it makes no attempt to justify morally the principles derived from the legal texts. It is enough to show that they explain the shape that the practice currently takes.

The term “extraction” itself is meant to highlight a crucial fact about the relevance of designers’ attitudes: their views on the trustworthiness of actors are legally significant only insofar as they played a causal role

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in the actual design and adoption of the authoritative texts. Not every judgment about appropriate trust that the planners of a system harbor, therefore, is relevant to meta-interpretation. The mere fact that the designers are trusting souls is immaterial—if these judgments do not embed themselves within the institutional structure of the system through the formulation and adoption of the authoritative texts, they are, legally speaking, irrelevant.

Before we proceed, several qualifications are in order. Recall that legal activity is the activity of social planning, and that the results of social planning are normally publicly accessible. It follows, then, that if the content of the law is to be determined ultimately by designers' judgments, these judgments must themselves be publicly accessible. Purely private thoughts, therefore, cannot count as meta-interpretive determinants.

Judgments of trust can be made publicly accessible in many ways. The most obvious manner is through explicit expression. The designer might have made a statement that the measure will be, is, or was supported for thus-and-so reason. Expression can also be implicit, as when a designer votes for a measure containing a statement about the justifications for the regulation. Or the designer's judgments of competence and character might be revealed simply by voting for a certain measure, much as one's desire for a beer is revealed in the act of ordering a beer at a bar. Thus, drafting or voting for a bill that is extremely comprehensive and detailed, containing directives with few moral concepts and whose violation is met with severe sanctions, would bespeak a distrustful attitude on the part of legislators. Similarly, the act of framing and ratifying a centralized constitution with broad grants of power to actors who will engage in top-down social planning indicates a trusting attitude on the part of constitutional designers toward those authorized to act.

It should also be noted that during extraction the meta-interpreter always seeks to uncover *common* attitudes of trust. Insofar as legal design is often the product of shared agency, it is unlikely that each participating designer will hold precisely the same attitudes about the trustworthiness of actors. It seems reasonable to assume, for example, that the framers did not all come to their Radical Whiggism for the same reasons. Some distrusted human nature due to personal experience,⁸ others because of their Calvinist background,⁹ and still others because it was the orthodoxy of the day.¹⁰ What matters in meta-interpretation, however, is that they all held attitudes of distrust, although for different reasons, and that these attitudes were causally responsible for their official actions.¹¹

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The meta-interpreter must be alert to the possibility, however, that the designers of a legal system shared no common vision of trust, or that the vision that they shared is so general that it rules out only the most bizarre interpretive methodologies. In such cases, a meta-interpretive theory has little to say so far as questions of trust are concerned. Fortunately, trust is not the only meta-interpretive determinant and, as we will see later on, a meta-interpretive theory might still issue in a unique recommendation even though issues of trust do not play a role.

Absolute vs. Relative Judgments

During extraction, it is crucial for the meta-interpreter to differentiate between several types of judgments about actor trustworthiness. The most important distinction is between absolute and relative judgments. An “absolute” judgment of trustworthiness concerns an individual’s level of confidence in the competence or character of another. A “relative” judgment of trustworthiness, on the other hand, concerns the level of confidence in the competence or character of another *as compared to* some third person. Negative absolute judgments about someone’s abilities are thus compatible with positive relative judgments about those abilities when assessed against another, less capable individual. I have very little confidence in my ability to hit a home run against a major league pitcher. But I have much greater confidence in my ability to hit a home run against a major league pitcher when compared to my three-year-old daughter’s chances of doing the same.

When the designers of a system allocate authority to an individual based on positive absolute judgments of that person’s trustworthiness, I will say that the system places a “high absolute trust” in that individual. Allocations that are premised on negative absolute judgments place “low absolute trust” in that individual. Similarly, when designers of a system allocate significantly more (less) authority to one individual than another, we will say that the system places a high (low) relative trust in that individual as compared to the other.

When examining a legal system, the meta-interpreter should be careful not to infer that the system places high absolute trust in certain individuals from the simple fact that they are the recipients of broad grants of power. The grant might simply indicate a significantly higher degree of confidence in the grantee relative to other actors in the system. That the federal government was given great powers in the Constitution, for

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example, did not indicate that the founders held especially positive absolute judgments of human nature. Rather, it manifested precisely the opposite: because the electorate was distrusted, it was thought that authority should be transferred from the main locus of their power, that is, the state governments, and distributed to a different set of institutions. To some extent, the federal government was accorded a higher relative trust than the states, in part because it was thought that the national government would be manned by a higher caliber of politician. However, the marginal confidence in elites was not immense, as evidenced by the numerous limitations and safeguards placed on federal power by the framers. The moral here is that high relative trust is compatible with low absolute trust and vice versa.

General vs. Particular Judgments

The meta-interpreter must also distinguish between general and particular judgments about trustworthiness. General judgments about trustworthiness relate to the basic psychological nature of individuals: their intelligence, drives, character, and so forth. Particular judgments, by contrast, concern particular actions in particular settings. Positive general judgments are compatible with negative particular judgments. Someone might believe that judges are in general very smart and honorable, but that they are not particularly good economists. Likewise, someone can trust another with respect to one action in one setting, but distrust him with respect to some other action in the same or in another setting. The head of the FDA might be trusted to oversee the testing of pharmaceuticals, but not to allocate the electromagnetic spectrum for communication purposes.

The meta-interpreter must be on guard for the possibility that a change in setting will challenge the relevance to meta-interpretation of particular judgments of trustworthiness. For example, in the late eighteenth and most of the nineteenth century, American courts generally followed the English “no recourse” rule and eschewed legislative history when construing statutes.¹² Because detailed records of legislative procedures were not kept, and because judges were no longer involved in the legislative process, it was thought that they could not be relied upon to use the existing legislative materials. However, when legislatures began keeping extensive records and printing technology improved their accessibility, judges were no longer distrusted in this regard.¹³ A late nineteenth-century meta-interpreter could have justifiably concluded that, given the

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high absolute trust placed in the intelligence and training of judges and the increased availability of dependable records, the particular distrust of courts with regard to legislative history should no longer be credited in meta-interpretation.¹⁴

Scope of Extraction

In order to preserve the modesty of proper meta-interpretation, the Planning Theory does not demand that each meta-interpreter engage in a massive unearthing of the entire institutional structure. Before extraction can begin in earnest, the meta-interpreter must first figure out which parts of a system's trust economy should be targeted for extraction. Unlike Dworkin's account, which requires *every* meta-interpreter to survey the *entire* legal system and determine the *complete* set of moral principles that best fit and justify the system before interpretive methodology can be ascertained, the Planning Theory requires each meta-interpreter to assess initially whether to limit himself to his institutional neighborhood or go substantially beyond his location in the system's trust economy. The scope of extraction is determined by the particular judgments of trust that underlie the meta-interpreter's role: roughly speaking, the greater the trust, the greater the scope of extraction. Thus, it is plausible to claim that police officers should not consider delicate issues of constitutional structure when determining how to interpret the laws they are applying. A police officer usually confronts only a small part of the overall regime and it would not be expected that he fully understand the basic principles animating the system and how such principles interact with his particular role in the practice. For him, issues of trust that touch his particular station, despite their peripheral status, would have greater relevance than core issues with which he has little contact. Federal judges, by contrast, play a central role in the management of the system. They are required to understand how the overall system works and how the various rules relate to one another. For them, the meta-interpretive perspective stretches across the entire institutional landscape.

By using the term "extraction," I do not mean to suggest that the meta-interpreter must derive the designers' views solely by examining the texts that set out the structure of the legal system. In many instances, their views will be obvious. The bailiff knows that the designers of the system trust the judge more than him; he need not (and should not) consult the Constitution or the Federalist Papers for confirmation. But in

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other situations, more detailed historical investigation will be warranted. As I argued in connection with Dworkin's theory, historical evidence confirms what a rational reconstruction of the American system would suggest, namely, that the designers of the early American republic were concerned about the trustworthiness of officials and citizens and fashioned the core constitutional principles so as to reflect these attitudes. In extracting the planners' attitudes about trust, transcripts of public debates, and cultural works that shed light on the zeitgeist usually provide invaluable assistance in reconstructing a system's economy of trust.

Synthesis

There is one sense, though, in which the term "extraction" is apt to mislead. Because legal systems are built and rebuilt over time, usually by the hands of many individuals, it would be extremely surprising to find a coherent set of views about trust underlying the totality of the legal texts. As a general matter, the task of the meta-interpreter is not merely to *recover* these disparate attitudes of trust but also to *synthesize* them into one rational vision. Thus, a system's economy of trust is constructed during meta-interpretation, not simply found. I would therefore like to conclude this section by saying a few words about the principles that should govern this synthesis—although, given space constraints, my discussion will be considerably limited and speculative.

As in ordinary conflict-of-law situations, source is the most important determinant for the ordering of trust judgments. In systems where constitutional law takes precedence over statutory law, judgments of trust that underwrite constitutional provisions trump disparate judgments that underlie statutory texts. In systems such as the American one, then, judges usually need go no further than an examination of the Constitution, for any judgments extracted from these fundamental provisions will take precedence over all others.

Difficulties arise, however, when disparate judgments emerge from sources of the same rank. Consider, for example, the conflict that arises between the Fourteenth Amendment and the preceding amendments to the U.S. Constitution. The first amendments were originally predicated on certain positive relative judgments of trustworthiness of the states vis-à-vis the federal government. The basic idea animating the constitutional structure was that state legislatures are more competent than Congress to promote the general welfare of their citizens, given their better

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access to information and more responsive political base, and are less likely than Congress to infringe basic liberties, given their relative lack of power. As a result, the states were permitted to retain their police power and were exempted from the Bill of Rights. Congress, on the other hand, was empowered to act only in those situations in which collective national action was deemed superior to individual state action, and prohibited from legislating in a way that violated certain basic rights.

The Fourteenth Amendment was based on a different, and conflicting, set of relative judgments. Insofar as traditional attitudes toward the trustworthiness of the state legislatures and their ability to protect basic liberties could no longer be maintained after the Civil War, the Fourteenth Amendment not only imposed substantive limitations on state legislation through the Equal Protection Clause, but also empowered Congress to protect equality and other constitutional rights through federal legislation. The Fourteenth Amendment thus assumes attitudes of trust that are contradicted by the attitudes of trust that underlay the first twelve amendments. How should such conflicts be resolved?

My suggestion is that we approach the synthesis of conflicting trust judgments in roughly the same manner that philosophers of science treat the revision of inconsistent theories.¹⁵ For example, when a scientist faces highly credible evidence that contradicts an accepted theory, she will be forced to adjust her theory in light of the recalcitrant data. The generally accepted method in the philosophical literature for synthesizing these conflicting elements is called “minimal” revision: the scientist ought to give up as little of the theory as possible in order to achieve consistency. Thus, the scientist should attempt to retain the central premises of the theory—the “hard core” in Lakatos’s helpful terminology¹⁶—but jettison more peripheral elements in order to reestablish consistency. It may not, of course, be possible to keep the hard core intact, in which case certain central elements will have to be revised away. But in most situations, such revolutionary change will not be necessary, and adjustment of more marginal elements will ensure a consistent synthesis.

Analogously, we can treat the trust attitudes underlying a system’s institutional arrangements as a “theory of trust.” This theory sets forth various hypotheses concerning the general competence and character of individuals and how particular settings affect their trustworthiness. When a revision of a legal system injects conflicting trust judgments into this “theory,” the meta-interpreter should then engage in minimal revision: she should synthesize judgments of trust by holding the most recent judgments

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fixed and revising the earlier judgments as little as possible so as to render them consistent. Hence, in the above example, the attitudes associated with the Fourteenth Amendment would be held constant, while the judgments associated with the first twelve amendments would be minimally revised so as to ensure consistency. A plausible revision, therefore, would be that the state legislatures are deemed more trustworthy than Congress to provide for the general welfare of their citizens, but not to protect their basic liberties.¹⁷

On this reading, the ratification of the Fourteenth Amendment brought about a major “redistribution” in the American economy of trust. Trust was redistributed from the states to Congress, such that the federal government, not the states, was now entrusted with the responsibility for protecting the people’s basic rights. One might also plausibly argue that the Fourteenth Amendment brought about a fundamental realignment in the trust relations involving Congress and the federal courts. Whereas Congress had previously been seen as the chief threat to liberty, and the courts as the principal bulwark against congressional malfeasance, the new regime accorded equal trust to Congress and the courts to protect basic constitutional liberties. As Doug Laycock has argued, “Congress did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided *Dred Scott v. Sanford*. . . . The amendments vested independent responsibility for enforcing the new rights in both Congress and the courts.”¹⁸ The meta-interpretive upshot of this synthesis would be that, in addition to the Court, Congress has the independent authority to interpret the scope of constitutional liberties through their Section 5 enforcement power. According the Court exclusive authority to interpret the Constitution for the other branches of government would thus be inconsistent with the post-Civil War economy of trust.¹⁹

Objectives

After extracting the trust attitudes of legal designers, meta-interpreters are charged with extracting the objectives that various actors are entrusted with serving. This extraction is accomplished in much the same way as before: the meta-interpreter seeks the best explanation for why legal texts assign certain individuals certain tasks.²⁰ Again, it is not necessary for the meta-interpreter to show that these objectives are morally worthwhile from the God’s-eye point of view—as long as the designers of the system have parceled out rights and responsibilities so that

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individuals will achieve certain ends, those ends are the only ones relevant in determining interpretive methodology.

When the meta-interpreter is a legal official, extraction will focus on her role. She will, in other words, set out to determine what part she has been meant to play in the shared activity of social planning. Sometimes the role of the officials is quite clear. The bailiff is supposed to keep order in the courtroom. Other times, the objectives that an official is meant to serve can be quite controversial. What, for example, is the role of the judge in a democratic society? Is it to implement the will of the people, protect minority rights, promote social justice, collaborate with the legislature, police the legislature to ensure it does not tamper with political representation, enforce interest group bargains, adjudicate disputes, or some combination thereof? Different people answer these questions differently—which, as we will see, has important implications for meta-interpretive debates.

Just as modesty demands that judgments of trust determine the scope for extracting the economy of trust, it likewise demands that they be employed to delimit the boundaries for extracting the objectives that legal actors are required to serve. How deep and wide a meta-interpreter should look when extracting objectives depends on the degree of trust otherwise accorded the interpreter by the system. The prison guard need not understand the ultimate goals that he serves by doing his job, whether it is to punish the wicked, deter crime, implement the democratic will, or enrich those who build prisons. He is trusted to perform only certain limited tasks and therefore should concentrate solely on the relatively specific goals associated with his role, such as to foil escapes and protect prisoners from each other. On the other hand, those accorded greater trust, such as judges, high-ranking executive officials, and legislators, should plumb the constitutional texts and extract the more general and distal goals associated with their powerful positions within the system.

Judgments of trust will have the greatest impact on the scope of extraction for ordinary citizens. For it would clearly exceed the competence of nonprofessionals to consider all of the goals and values that the legal texts regulating their conduct aim to serve and realize. In some cases, of course, the aim of the law is obvious. The rules regulating motor vehicle use are clearly designed to improve safety (although that is not all that they are designed to achieve). In other areas of regulation—taxes, securities regulation, sales law, product liability—the objectives

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are much less transparent, and frequently complicated. Comprehensive extraction of the system's total set of plans by laypersons would, thus, be inconsistent with most economies of trust.

Evaluation

Because the Planning Theory treats legal systems as planning systems that are designed to achieve certain political and moral ends, it ranks interpretive methodologies according to their capacities to advance those ends. In assessing their potential, though, the Planning Theory adds a crucial proviso: it insists that the evaluation of methodologies be conducted against the background of trust extracted from the current institutional arrangements. An interpretive methodology is appropriate for an interpreter just in case it best furthers the goals that legal actors are entrusted with advancing *on the supposition that* the interpreter and certain other actors have the extracted competence and character.

To evaluate interpretive methodologies, the meta-interpreter engages in a thought experiment: for any given methodology, she imagines what the world would be like if the interpreter claimed to be following the methodology when interpreting legal texts *and* possessed the competence and character that the designers attribute to him as well as to others. Worlds where, say, interpreters claimed to be using highly discretionary procedures, but were very untrustworthy, would be ones in which these procedures were usually flouted. Other worlds, where trustworthy interpreters claimed to be using constraining procedures, would be ones where these procedures were routinely and faithfully implemented.

While engaging in this thought experiment, the meta-interpreter grades interpretive methodologies according to their performance in the imagined circumstances. Methodology M ranks above methodology N just in case the goals that legal actors are entrusted with advancing are better served in the imagined circumstances when M is claimed to be followed than when N is claimed to be followed. The interpretive methodology that is ranked highest when all methodologies are considered is the correct one for the particular legal system. In the case of ties, the procedures that rank highest are all deemed correct and, to the extent that they give different results, the law is indeterminate at these conflicting points.

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Relations between Trust and Discretion

The method of evaluation I have just described is completely general: it can be used to evaluate any methodology in any authority system and for any actor within that system. In this section, I would like to explore some of the relations that hold between appropriate methodology and certain subsets of authority systems and legal actors. This will, hopefully, illuminate important connections that obtain between a system's economy of trust and the proper allocation of interpretive discretion.

In general, systems of *low absolute* trust are incompatible with *highly discretionary* interpretive procedures. This relation obtains for the following reason: worlds in which untrustworthy individuals claim to be using highly discretionary interpretive methodologies are ones in which these procedures will not be followed and, hence, will not serve a useful function. This is most clearly true for systems whose goals include the protection of liberty and autonomy. Worlds in which corruptible individuals use manipulable procedures are ones in which they will interpret the law to their own liking. The ends of liberty and autonomy will not be met because the law will be incapable of protecting citizens against abuse by officials.

While regimes of low absolute trust rule out highly discretionary procedures, it should not be assumed that these systems require highly *constraining* interpretive methods. High relative trust, despite low absolute trust, might actually support a significantly discretionary methodology. To show this, I would like to consider John Manning's attempt to demonstrate that textualism was the most appropriate interpretive methodology for the early American constitutional structure. As I will argue, his argument for constraint in interpretation does not succeed, as he focuses on absolute trust at the expense of relative trust.

Manning begins his meta-interpretive argument by pointing out that the American system was constructed on the basis of a sharp separation between legislative and judicial power. The aim in separating powers, according to Manning, was both to increase predictability and decrease official discretion. History had shown the founders that when powers are commingled, legislators could not be trusted to enact clear rules, given their incentive to reserve discretion for the future; nor could they be relied upon to follow those rules that they did enact, given their interest in revising any rule yielding an undesirable consequence. It would make little sense, Manning concludes, to distrust judges with the power to make law

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while at the same time trusting them with the discretion to interpret the law in accordance with their conception of equity and reason.²¹

Although Manning has produced a meta-interpretive argument of the right form—he explicitly links appropriate interpretive method to systemic trust and roles—his conclusion may be doubted for his failure to consider all of the relevant premises. As I have argued, the meta-interpreter must consider judgments of *relative*, as well as *absolute*, trustworthiness in assessing a system's economy of trust. While it is true that the American constitutional order is built on a distrustful view of human nature, it does not follow that everyone is distrusted to the same extent. As the history of the framing of the Constitution shows, the movement toward judicial independence in the late 1780s was precipitated by a sharp increase in the trust awarded judges relative to legislators, inasmuch as judges were seen as having better technical legal skills and as not facing the same pressures from constituents to act in derogation of common law rights. This increase in the relative trust of judges not only resulted in the creation of an independent judiciary but also fueled the greater acceptance of purposive interpretation. Courts were now thought capable of correcting the errors of legislatures, both by narrowing poorly drafted and highly unjust legislation and by extending statutory language to cover unanticipated situations in a small range of cases.²² The New Jersey Supreme Court description of its approach to statutory interpretation was typical: “We do not consider ourselves bound by the strictly grammatical construction of the words of the act. The intention of the legislature should be our guide; or, rather, in a case of this nature, we should not hesitate to adopt a construction which the words will clearly warrant, free from the inconveniences which must flow from other interpretation.”²³

Manning's meta-interpretive mistake thus lies in his concern with absolute trust and disregard of relative trust. While highly discretionary modes of interpretation, such as Dworkinian ones, are ruled out by low absolute trust, it does not follow that highly constraining methods, such as textualist ones, remain the only viable options. Even if all officials are distrusted, law creators may be more distrusted in certain ways than law-apppliers, and thus it will be appropriate to accord the latter significant discretion in interpretation.

Just as high relative trust will normally sanction a significantly discretionary interpretative methodology, low relative trust normally suggests a highly constraining one. The deference that is normally shown admin-

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istrative agencies in statutory interpretation is justified, at least in part, by the greater experience and expertise of administrative agencies as compared to courts with respect to the underlying issues at stake.²⁴ Provided that courts find an agency interpretation reasonable and based on the relevant considerations, they will inquire no further into its appropriateness and acquiesce. Likewise, juries are required to defer to the interpretation of the law given by trial courts, given the comparative expertise of the court over the lay juror.²⁵

Discretion, Text, and Purpose

In the previous section, I argued that actors who enjoy high relative trust should normally be accorded significant discretion in interpretation. It is important, however, not to conclude from this that high relative trust compels *purposive* interpretation. While purposive interpretation is significantly discretionary, not all significantly discretionary methods of interpretation are purposive. One might plausibly argue, for example, that even if judges are thought to be better lawyers than legislators and more likely to act in the public interest, they should still not look to purpose when interpreting legislative texts. To see why this might be so, I would like to consider the argument made by Frank Easterbrook, who, drawing on the results of public choice theory, has argued for a discretionary, but textualist, interpretive methodology.

According to the familiar public choice story, legislation is a good that is subject to the laws of supply and demand. Legislators will supply legislation to those who are most willing to pay for it, where payment generally takes the form of monetary contributions to reelection campaigns. Given collective action problems, however, the public usually will not demand legislation that is broadly redistributive in nature. The larger the group, the less each individual benefits from such redistribution, and hence the less interest each individual has in paying for such a benefit. Only small interest groups are capable of mobilizing forces to overcome such free riding problems, thus ensuring that they, and not the public at large, will capture the economic rents that come from legislation.

Public choice theory predicts not only that legislators will succumb to the siren song of special interests, but also that legal systems will be designed so as to shield courts from similar pressures. Legislation is valuable to interest groups only if courts enforce it. If courts were subject to political influence by interest groups, however, they would enforce legislation

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only when supportive interest groups were ascendant; as soon as these groups lost power, the benefits of legislative redistribution would vanish. An independent judiciary is essential to interest group politics, on this picture, because independence ensures the durability and hence value of legislation. Courts must be “above politics,” in other words, if politics is to flourish. Indeed, some public choice theorists, such as William Landes and Richard Posner, argue that the best explanation for why the framers drafted Article III, which rendered the judiciary independent through the granting of life tenure and protection against salary reduction, was to provide for predictable long-term enforcement of interest-group bargains, thereby maximizing the value of legislative enactments for these constituencies.²⁶

Although the constitutional structure, on the public choice explanation, is designed to establish the durability of private-interest legislation, it is also meant to reduce the rent seeking that will inevitably take place. According to Easterbrook, for example, the constitutional requirements of bicameralism, presentment, and publication exist in order to constrain Congress by cutting down on the amount of legislation and by driving “bargains into the open where they may be scrutinized.”²⁷

Notice that on this public choice “extraction,” the American economy of trust is quite distrustful of legislators. But the distrust here is directed to their *character*, not their competence: they are taken to be self-interested maximizers, not servants of the public interest. By contrast, the system places a significant degree of confidence in courts, for it entrusts them with the enforcement of interest group bargains. In keeping with this picture of judges, these accounts are often called “faithful” or “honest” agent theories of adjudication.

Easterbrook has argued for textualism on the basis of this public choice construal.²⁸ Purposive interpretation is a nonstarter, he claims, for such methodologies assume the existence of legislative purpose. Although legislators often present legislation as motivated by public-spirited considerations—concerns that could in principle be extrapolated to unanticipated cases—public choice theory predicts that statutes are much more likely to be the result of self-interest bargaining. Gaps in statutes are usually intentional; if the parties had reached an agreement on such cases, they would have included the terms of the bargain in the statute.²⁹ As Easterbrook explains, “Interest-group legislation requires adherence to the terms of the compromise. The court cannot ‘improve’ on a pact that has no content other than the exact bargain among the competing interests, because the pact has no purpose.”³⁰

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Notice that Easterbrook's version of textualism, as opposed to Scalia's, accords judges wide discretion in construing statutes. This discretion rests primarily in the courts' responsibility to distinguish between statutes that were enacted pursuant to interest group bargaining and those that were truly public spirited. Judges are supposed to take a "beady-eyed" approach, scrutinizing statutes for the telltale signs of rent seeking. Legislation that is relatively detailed, erects barriers to entry, subsidizes one group by another, or prohibits private contracting in response to the new statutory entitlements indicates interest group activity. Easterbrook even advocates that courts make extensive inquiries into legislative history, a practice that is anathema to a Scalian textualist. He recommends that judges ask: "Who lobbied for the legislation? What deals were struck in the cloakrooms? Who demanded what and who gave up what?"³¹

Easterbrook opines that the behavior of judges will be "influenced, if not determined"³² by their understanding of the sources and functions of legislation. "A judge who believes with New Dealers that markets are flawed and that 'experts' employed by the government can correct these 'imperfections' will take a path very different from that of a judge who believes that most legislation grows out of a struggle among interest groups to appropriate the benefits produced by other people."³³ The former will treat statutes as normally being premised on purposes that can be extended to unanticipated cases and will interpret them in such light; the latter will assume the worst and will usually stick to the written terms of the legislative contract.

It is hard to know whether Easterbrook means this to be a descriptive or a normative claim. If meant as a descriptive hypothesis, one might wonder how Easterbrook knows why judges actually adopt the interpretive methodologies that they do. Understood as a normative claim, though, it seems that Easterbrook is on surer footing. As I have argued, considerations of appropriate trust and purpose are the sorts of reasons that are proper to use when justifying meta-interpretive choice. If the aim of legislation is to cure market failures, and regulators are deemed to be experts in such matters, then one might conclude that purposive interpretation is proper. On the other hand, if the role of legislators is to capture economic rents and distribute them to those who most demand it, then textualist interpretation may be more appropriate.

Yet, it is important to note that Easterbrook's meta-interpretive claim is incomplete to the extent that he focuses exclusively on the function

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and capacities of legislators and ignores those of judges. If regulators indeed are experts in a certain field and judges are not, then perhaps the latter should not second-guess the texts that the former produce. Expert regulators, after all, are less apt to draft language that yields unreasonable results or that fails to anticipate many possibilities. The greater competence of regulators might then suggest textualism, not purposivism.

Conversely, even if legislators are not experts, but generally act as agents of interest groups, the pull toward textualism might still be resisted. For example, as Jonathan Macey has persuasively argued, the fact that legislators will tend to conceal their rent-seeking behavior behind a public-interest façade is the best reason for judges to take them at their word.³⁴ By interpreting legislation in accordance with the public-spirited purpose on the face of the legislation, courts will frustrate this political subterfuge, thereby forcing legislators to be more honest about their true motivations. The deficiency of legislative character would thus suggest purposivism, not textualism.

Cynical vs. Aspirational Textualism

As I have argued, the textualisms of Scalia and Easterbrook are both based on a cynical reading of the American economy of trust. Strict construction is appropriate, they claim, because certain officials are deemed to be deeply disingenuous. These textualists, however, part company in their assessment of the objects of distrust. For Scalia, the villain is the *willful judge*;³⁵ for Easterbrook it is the *rent-seeking* legislator. Accordingly, Scalia's textualism seeks to cabin judicial discretion; Easterbrook, on the other hand, seeks to increase it.

Not all forms of textualism are quite so cynical. The textualism of Akhil Amar, for example, is aspirational in nature. Amar argues that the function of the United States Constitution is to facilitate public discourse among free and equal citizens. The document is supposed to serve as a democratic "focal point," giving individuals a common language and framework within which to debate pressing political issues. Only an interpretive methodology that places an emphasis on the text, as opposed to technical legal doctrine, can fulfill this democratic mission. "Emphasis on the Constitution's writtenness—its general textuality and its specific textual provisions—has certain democratic virtues. The Constitution is a compact document that most Americans can read. With modest effort, even layfolk can become familiar with its words and basic layout. . . . The

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text of the document itself constitutes a democratic focal point—an open meeting hall, a common language—that can structure the conversation of ordinary Americans as they ponder the most fundamental and sometimes divisive issues in our republic of equal citizens.”³⁶

Amar, like Scalia and Easterbrook, bases his methodology on a certain lack of confidence in members of the community. But these doubts concern the citizenry, not officials, and are related to their competence, not their character. According to Amar, textualism is required because this method does not presuppose professional legal training—it is not “inherently exclusionary.” The assumption here is that citizens will sincerely participate in public deliberation provided that the meaning of the Constitution is rendered sufficiently transparent to them.

These attitudes of trust can be seen to be presupposed by the text of the Constitution. As Amar points out, “[o]ur Constitution is written in remarkably compact prose. The full text, including amendments, runs less than 8000 words—a half-hour’s read for the earnest citizen.”³⁷ The fact that the Constitution is a “compact and concrete document,”³⁸ not a prolix legal code, would seem to imply that its framers deemed such a text appropriate to its readership, namely, “We the People.”

Competition

As we have seen, attitudes of trust are extremely important in meta-interpretive debates. Meta-interpreters routinely inspect a system’s economy of trust in order to determine appropriate interpretive methodology. If the relationship between planners and meta-interpreter is a trusting one, then increased discretion is inferred; the more skeptical it is, the greater constraint is deduced.

Trust attitudes are not, however, the only considerations that must be taken into account. The competitive relationship between social planners is itself a crucial meta-interpretive determinant. This is so because legal plans do not merely manage trust; they manage *conflict* as well. Plans, as we have noted before, are extremely useful tools for settling political disputes. When plans play a conflict-management function, I would now like to argue, the more competitive the planning relationship is, the more constraining the interpretive methodology; conversely, the more collaborative the exercise of social planning, the more interpretive discretion is warranted.

To see this, suppose a city council passes a ban on bringing dogs into restaurants. The regulation is motivated by numerous complaints of

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restaurateurs who think that the practice of bringing animals into food establishments is unsanitary and unappetizing. Since the members of the council agree with the restaurateurs on the merits, they unanimously approve a bill that states: “No dogs are permitted in restaurants.”

Imagine that someone tries to bring his dog into a school cafeteria located in the city. The principal demands that the person leave with the dog, whereupon the dog owner sues the principal for violation of his civil rights. The question arises before the judge as to whether a school cafeteria is a “restaurant” within the meaning of the city regulation. Imagine further that the legal system in question is not a particularly distrustful one, so that there is no trust-based reason for denying judges interpretive discretion. A credible argument might then be made that the judge ought to interpret the regulation purposively. Since the ban was motivated by a belief that bringing dogs into eating establishments is both unsanitary and unappetizing, the purpose of the regulation would best be served by applying it to cover school cafeterias as well.

Now, change the example slightly. Suppose that opinion on the city council is split between those who believe that it is unsanitary and unappetizing to bring dogs into any establishment that sells food, including restaurants, supermarkets, and delis, and dog lovers who think that “Canine-Americans” have rights as well. Imagine further that a compromise is worked out where dogs are banned only from restaurants. In this revised scenario, the application of the prohibition to cafeterias would seem to be problematic. The aim of the regulation was not to improve the sanitary and appetizing conditions of all establishments that sell food. After all, the regulation that sought to serve that end was defeated. The ban, rather, was a compromise between two opposing forces. To apply the ban to school cafeterias would stretch the rule past the negotiated middle ground and hence unsettle the bargain.

Generalizing, we can say that the more competitive the process of social planning, the greater the pull of textualism. There are at least two reasons for this correlation. First, when planners are divided over goals and values, the settlements reached will likely be based on a very thin consensus on objectives. Indeed, the bargain may be grounded in no more than a common need to reach a deal. Without a thick set of purposes with which to work, purposive interpretation becomes unworkable. Second, in the absence of a wide and deep consensus on objectives, social planning cannot take a top-down approach. Lacking the resources to forge agreement on broad social policies, it must content itself with resolving local disputes.

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To extend these local settlements in a more global fashion would therefore undo them. To move up the planning tree would permit one side greater power than it could have secured during social bargaining and hence would defeat the conflict-management function of the law.

In the previous section we saw these kinds of arguments deployed by Easterbrook. Easterbrook distinguished between rent-seeking and public-interest legislation and claimed that textualism is appropriate for the former given the competitive nature of the decision making. Jeremy Waldron has offered an argument in support of textualism for the latter cases as well.³⁹ Even when officials are eminently trustworthy and act for the “right” reasons, Waldron argues, the competitive nature of their deliberations compels a privileging of statutory texts in interpretation.

Waldron premises his arguments on a sophisticated reading of modern democratic legal systems. According to Waldron, democratic decision-making is best characterized as the quest for settlement in the face of pervasive disagreement. Despite widespread conflict concerning questions of justice, rights, and values, political actors must nevertheless decide how to act together. The institutions of democracy are designed to enable the representatives of these opposing positions to deliberate with one another and to forge a local consensus on matters of moral importance.

As Waldron points out, modern legislatures are large, multimembered chambers. They aim to represent a large array of political viewpoints and enable legislators to speak for diverse constituencies on important matters of public policy. And because political deliberation is not an intimate discussion among a small group of like-minded individuals, debates within these chambers are governed by formal rules of parliamentary procedure. These policies structure public deliberation, allowing large-scale discussions to take place. They determine how debates are initiated and concluded, who has the right to speak, who may interrupt, who sets the agenda and how to set it, when and how voting takes place, and so on.

In particular, Waldron emphasizes the role that “textuality” plays in parliamentary debate. In order to engage in a legislative discussion, a motion must be reduced to writing and introduced. A change to the resolution under discussion must be accompanied by a written amendment to the motion and offered up to the chamber for approval. Waldron argues that the textual nature of legislative motions is crucial for organizing large-scale conversations involving diverse viewpoints. Vague proposals may be appropriate for debate among small groups of like-minded individuals

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who understand each other. In the absence of shared understanding about political beliefs and values, however, making one's ideas explicit is crucial. "If any one says, in the rather cozy way that people have who share tacit understandings, 'Come on, you know what I mean,' the answer is likely to be: 'No, I don't know what you mean. You had better spell it out to me.'"⁴⁰

Finally, majority decision making is necessary for any settlement of conflict in the midst of deep disagreement. For a consensus on normative issues is practically unattainable in deliberative environments where many different points of view are represented. As Waldron points out, majority voting is able to settle disputed matters of principle because it is a "content-independent" procedure. The winning proposition is one that is identified by counting heads, not by considering the very merits that formed the basis of the dispute.

Waldron argues that the structure of legislatures and political deliberation realizes a distinctive value of mutual respect. In modern democracies, opposition and conflict are not shoved under the rug. Disputes are aired before votes are cast. Moreover, majoritarian decision procedures do not discredit the losing parties. When a side does not prevail, members can at least take comfort in knowing that their views were accorded equal weight in the political calculus, and that their defeat was not a wholesale repudiation of their arguments and values. They might have lost a political battle, but they will live to fight another day. They can hope to muster better, more persuasive arguments for their position and sway enough to secure victory in the next dispute.

Waldron believes that these considerations strongly militate in favor of textualism. In an environment riven by deep divisions over principles of justice, fairness, and value, it is unlikely that consensus will form on purposes of individual items of legislation. Nontextual modes of interpretation require inputs that modern democracies simply do not and cannot produce. More importantly, to privilege the beliefs, values, intentions, hopes, and expectations of legislators is to ignore the importance that the text plays in settling conflict between opposing viewpoints. The textuality of legislation is necessary to ensure that all participants are on the same page. To depart from the common script is to disrespect the multiplicity of opinion and the techniques that democracies use to respond to that diversity.

Waldron's support for textualism is especially interesting from the perspective of the Planning Theory because he roots his meta-interpretive

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argument in considerations of institutional design. The respect for diversity supports textualist interpretation, in other words, not because it is an important value seen from the God's-eye point of view. Rather, as Waldron shows, textualism is presupposed by the very structure of legislatures and democratic deliberation, namely, in the size of their assemblies, the rules of parliamentary procedure, the textuality of resolutions, and majoritarian decision making.

We might recast Waldron's argument as follows: the rules of democratic institutions aim to settle the question of how we should settle our disputes. They demand that we do so in a respectful manner, by requiring that all views have a hearing, by not assuming that everyone "knows" the question under consideration, and by according everyone an equal say in resolving the dispute. And because the value of respect gives shape to democratic decision making, it must be respected when interpreting the rules made in a democratic fashion. For if we did not respect the textuality of law when interpreting it, the respect generated by the process of legislation itself would be lost or significantly diminished.⁴¹

The Possibility of Theoretical Disagreements

Let us return to Dworkin's challenge regarding theoretical disagreements. Is it really true that no positivistic theory can account for meta-interpretive disputes?

Before addressing this issue, notice that the meta-interpretive theory developed in this chapter shares many similarities with Dworkin's account of meta-interpretation. The Planning Theory concedes that the plain fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper.⁴² The Planning Theory also agrees with Dworkin that when theoretical disagreements abound, ascertaining proper interpretive methodology involves attributing aims and objectives to the law. One cannot understand disagreements over interpretive methodology unless one sees them, at least in part, as disputes about the point of engaging in a particular practice of law. Finally, the Planning Theory maintains, with Dworkin, that in such cases proper interpretive methodology for a particular legal system is primarily a function of which methodology would best further the objectives that the system aims to achieve.

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Here, however, the agreement ends. Although ascertaining interpretive methodology involves attributing purpose to legal practice, the Planning Theory, of course, does not treat this attributive process in a Dworkinian manner, namely, as an exercise in moral and political philosophy. The Planning Theory, rather, seeks *social facts*. That some set of goals and values represents the purposes of a certain legal system is a fact about certain social groups that is ascertainable by empirical, rather than moral, reasoning. Proper interpretive methodology is established by determining which methodology best harmonizes with the objectives set by the planners of the system in light of their judgments of competence and character.

A virtue of this type of proposal is that, insofar as interpretive methodology need not be determined by a specific convention about proper methodology, it is able to account for the possibility of theoretical disagreements. Participants in a practice can disagree over proper interpretive methodology because they disagree about whether their practice is best described as an authority or an opportunistic system, and hence to whose judgments they ought to defer. Even if they agree about the general nature of the practice, they can differ about any of the three steps of meta-interpretation. They might disagree about the demands imposed by particular methodologies, the ideological purposes of the system, its distribution of trust and distrust, or which methodology best harmonizes with such purposes and judgments of competence and character. In fact, this chapter has been filled with these sorts of disagreements.

Note further that this theory is positivistic. Because it takes a regime's animating ideology as its touchstone, this account may end up recommending an interpretive methodology based on a morally questionable set of beliefs and values. The legal system in question, for example, may exist in order to promote racial inequality or religious intolerance; it may embody ridiculous views about human nature and the limits of cognition. Nevertheless, the positivist interpreter takes this ideology as given, and seeks to determine which interpretive methodology best harmonizes with it.

As just mentioned, this account of legal interpretation is positivistic in the most important sense, namely, it roots interpretive methodology in social facts. That a legal system has a certain ideology is a fact about the behavior and attitudes of social groups. The account privileges social facts not out of fanatical desire to save positivism at all cost, but, as mentioned earlier, because the alternative is inconsistent with the logic of planning. Imputing to legal systems judgments of trustworthiness and

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political objectives that are morally justified undercuts the basic division of labor between those whose role it is to settle such matters and those whose role it is to implement such settlements.

It is possible, then, for the positivist to maintain that the grounds of law are determined by social facts *and* to account for theoretical disagreements about those very grounds, Dworkin's contention notwithstanding. The commitment to the social foundations of law, I have tried to show, can be satisfied in the absence of a specific convention about proper interpretive methodology just in case a consensus exists about the factors that ultimately determine interpretive methodology. In authority systems, the law will be grounded in social facts whenever there is a consensus among the bulk of the current officials concerning which texts are legally authoritative, as well as a consensus among those who created and adopted these texts about the competence and character of legal actors and the objectives they ought to pursue. The fact that interpretive methodology is determined by these factors not only renders theoretical disagreements possible but explains why such disagreements are so prevalent. For it is highly likely that meta-interpreters will disagree with one another about the content of the planners' shared understandings and which methodologies are best supported by them.

To be sure, it is a consequence of this approach that, in the absence of the relevant shared understandings, disagreements about proper interpretive methodology will be irresolvable. And even if shared understandings do exist, they may be quite thin and thus will provide neither side much leverage in interpretive debates. I do not think, however, that these implications undermine the solution I am offering to Dworkin's challenge. First, while thin shared understandings may not determine a unique methodology, they might nevertheless rule out certain interpretive stances. There may be no right answer to these disputes, but there are usually *wrong* ones. For example, I have argued that Dworkin's theory of law as integrity is inconsistent with the American economy of trust. I think similar claims could be made about Richard Posner's theory of legal pragmatism.

Second, as we saw in the previous section, extremely thin shared agreements may support particular interpretive methodologies. As Waldron argued, textualism seems appropriate for parties who face deep and pervasive disagreements on principles. For when there is no further purpose to the settlement of a dispute other than settling the dispute, the text will be the only thing they share and the only thing they have to go on when deciding on what to do.

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Third, and more importantly, a theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law. Whether a unique solution to these disputes actually exists is an entirely different, and contingent, matter, and a jurisprudential theory should not, indeed must not, demand one just because participants think that there is one.

The Death Penalty Revisited

In Chapter 1, we noted that the constitutionality of capital punishment is hotly contested in the United States. This legal debate centers on the proper way to interpret the Eighth Amendment's "cruel and unusual" clause. Some believe the provision ought to be read in accordance with the intentions of those who framed it. Since the framers plainly did not regard the death penalty as cruel and unusual, they conclude it is constitutionally permissible. Others believe that the provision ought to be read literally: since "cruel" means cruel, and the death penalty is cruel and unusual, the death penalty is unconstitutional—the framers' intentions notwithstanding.

The Planning Theory helps explain why the interpretation of this clause is legally controversial. Suppose one thinks that the United States has an authority system. Imagine further that one believes that the framers and subsequent constitutional planners had a very distrustful opinion of human beings in general, and judges in particular. These Whiggish planners were skeptical of future generations and of people in positions of power, and designed a system to cabin their discretion. One might conclude from this economy of trust that judges ought to use interpretive methodologies that do not presuppose the very competence and character that the system's economy of trust presupposes they lack. Requiring judges to hew to the original intent of constitutional designers, the thought goes, will minimize the potential for judicial mischief. It will prevent judges from imposing their potentially faulty views on others, as well as restrict their ability to exploit textual vagueness for their own political ends.

Others might claim that the framers did not hold particularly distrustful views of human beings or judges. They might point out that the American system is a democracy that bestows sovereignty on "We the

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People.” Democratic systems place a significant degree of absolute trust in citizens insofar as they grant them ultimate political power. Moreover, the U.S. system is a constitutional democracy that grants life tenure and the power of judicial review to federal courts, an allocation of authority that bespeaks a fairly high degree of trust in judges as compared to the legislature. Finally, they might point out that the clause in question is fairly thin and vague. It is not a detailed and comprehensive list of prohibited punishments, nor does it prohibit those punishments that “we deem to be cruel and unusual.” This high degree of trust placed in the courts relative to legislatures might suggest to them that courts should be permitted a fair degree of discretion when enforcing constitutional rights. When a legislature’s conception of just punishment both is cruel and falls outside the range of accepted opinion, courts should be able to strike down such legislative actions.

These antioriginalists might also challenge the originalist’s contention that the U.S. regime is an authority system. The text of the Constitution, they might point out, has been relatively stable for over two hundred years. Why would those who currently participate in the practice allow themselves to be governed by the “dead hand of the past”? It is more plausible, they might say, that current participants accept the constitutional system because they regard it as independently justifiable. If so, then the conception of cruelty held by those several centuries ago would hold little relevance to current legal decisions. Just as no one thinks that flogging is constitutional, despite the fact that the framers considered it neither cruel nor unusual, antioriginalists might rely on a shared understanding of the moral weight and content of the Eighth Amendment to argue that the death penalty is unconstitutional.

There is much more to say, of course, about the debate between originalist and antioriginalist methods of constitutional interpretation. My intention here has not been to exhaust every argument that either side might muster for their position, but rather to demonstrate that the Planning Theory has the resources to explain why the interpretation of this clause would be legally controversial. In a legal system as complex and old as the U.S. regime, there really is something for everyone. And the fact that decent meta-interpretive arguments can be made by both sides ensures that political controversies will also be expressed, as they so often are in the United States, in legal terms.⁴³

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Customary Legal Systems

Thus far, I have discussed how meta-interpretation should proceed in authority and opportunistic systems, regimes in which plans predominate. Not all laws are plans, however: customary rules, we have seen, are merely planlike. These planlike norms must be analyzed differently than plans, given that they can, and often do, arise unintentionally and hence are not created in order to manage trust. It might be thought, therefore, that legal systems whose rules are not purely the result of design, but often arise through customary means, might not have economies of trust. How, then, should interpretive methodology be determined in what I will call “customary” legal systems, namely, regimes in which customs predominate over self-conscious acts of social planning?

In answering this question, let us begin by reminding ourselves that although the fundamental aim of the law is to solve those problems that cannot be solved as efficiently by custom, tradition, persuasion, consensus, and promise, the law still ought to rely on such nonlegal means when doing so is more efficient than social planning. Thus, when custom furnishes better solutions than planning, or does so at a lower cost, legal systems should prefer to incorporate customary solutions over legislative ones. Accordingly, we can distinguish at least two reasons why custom is said to be superior to planning as a method for solving moral problems.

First, as Friedrich Hayek emphasized in his critique of planned economies, customary rules are often superior because they arise “from below,” in a bottom-up fashion. As such, they are capable of evolving over time and adapting themselves to changed circumstances. Second, as Edmund Burke argued, customary practices are likely to be good practices because they have stood the test of time. The likelihood that generations have been wrong all along, and that some individual or group has finally discovered “the truth,” should be severely discounted, both in theory and in practice.

Based on these justifications, we can define two ideal types of customary legal systems. In a Hayekian system, the bulk of officials believe that the outputs of customary processes ought to be followed because bottom-up decision making can solve moral problems better than top-down social planning. In a Burkean system, the bulk of officials believe that customs should be continued insofar as their persistence is strong evidence of their moral worth.

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Once we focus on the accepted reasons for following legal customs, we can start to see how customary systems can have economies of trust. Hayekian and Burkean systems are distrustful systems, in that both take a jaundiced eye toward social planning. On their view, human beings are just not very good at self-consciously ordering the affairs of others. These suspicious economies of trust, therefore, would be inconsistent with interpretive methodologies, such as Dworkin's law as integrity, that are highly discretionary. To allow judges to interpret the law in accordance with extremely abstract and novel philosophical theories would presuppose the very competencies that Hayekian and Burkean systems disown.

While both of these systems are skeptical, their economies of trust are not identical. Hayekian systems look askance at top-down, centralized forms of social planning, while Burkean systems reject any form of revolutionary regulation. Because the objects of their distrust differ, each system favors different interpretive methodologies. For example, Hayekian systems reject methodologies that treat legal texts as exemplifying general principles and interpret their provisions so as to further the principles exemplified. Given its preference for bottom-up, case-specific forms of reasoning, the Hayekian economy of trust is inconsistent with purposive methodologies that broaden texts so as to further promote high-level legal principles. Burkean systems, on the other hand, favor methodologies that permit interpreters to depart from textual provisions so as to promote and realize principles that are supported either by the strongly rooted traditions of the culture or by other parts of the legal system.

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67. Ibid. 356–357. See Montesquieu, *The Spirit of the Laws*, VIII.16, 132–133 (London: P. Dodesley, 1794).
68. Federalist No. 46 (Madison).
69. Federalist No. 48.
70. Federalist No. 51.
71. On the economy of virtue, see Bruce Ackerman, *We the People: Foundations* 198–199 (Cambridge, MA: Harvard University Press, 1991).
72. Federalist No. 63.
73. James Madison, quoted in *The Records of the Federal Convention of 1787*, vol. 1, ed. Max Farrand, 108 (New Haven, CT: Yale University Press, 1911).
74. LE 176–186. Dworkin mentions federalism, but only to show how this principle is not inconsistent with law as integrity.

12. The Economy of Trust

1. William D. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* 12 (Durham, NC: Duke University Press, 1999).
2. *The Papers of Thomas Jefferson*, vol. 9, ed. Julian P. Boyd, 71 (Princeton: Princeton University Press, 1954). See also Letter of Thomas Jefferson to Edmund Pendleton, Aug. 26, 1776 (“Let mercy be the character of the lawgiver, but let the judge be a mere machine. The mercies of the law will be dispensed equally & impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man.”).
3. Joseph Story, *Commentaries on the Constitution of the United States*, ed. Thomas Cooley, §451 (4th ed. 1873).
4. *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 544 (1940).
5. Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge and Philip P. Frickey, 1378 (Westbury, NY: Foundation Press, 1994).
6. Frank Easterbrook, “Statutes’ Domains,” 50 *University of Chicago Law Review* 550–551 (1983).
7. *In re Wagner*, 808 F.2d 542, 546 (7th Cir. 1986).
8. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann, 40–41 (Princeton: Princeton University Press, 1997).
9. Ibid., 124.
10. Popkin, *Statutes in Court*, 97.
11. Scalia, *A Matter of Interpretation*, 40–41.
12. Richard Posner, “Pragmatic Adjudication,” 18 *Cardozo Law Review* 11–12 (1996).
13. Daryl Levinson, “Empire-Building Government in Constitutional Law,” 118 *Harvard Law Review* 917 (2005).

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14. *Ibid.*, 922–923.

15. Scalia, for example, is not an originalist, but he subscribes to the Planners approach to meta-interpretation.

16. This might be the case when planners are particularly trusting of actors and the best way to serve legislative purpose is by overriding the original understanding of legislators.

17. Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, MA: Harvard University Press, 2006); Cass Sunstein, “Must Formalism Be Defended Empirically?” 66 *University of Chicago Law Review* (1999); Richard Posner, “Reply: The Institutional Dimension of Statutory and Constitutional Interpretation,” 101 *Michigan Law Review* 952 (2003); Elizabeth Garrett, “Legal Scholarship in the Age of Legislation,” 34 *Tulsa Law Journal* (1999); and William Eskridge, “Norms, Empiricism and Canons in Statutory Interpretation,” 66 *University of Chicago Law Review* (1999). Whether Hart and Sacks subscribed to what I have called the God’s-eye view is a matter of scholarly controversy. On a plain reading it certainly seems as if they did. Hart and Sacks, for example, famously claimed that legislators ought to be presumed to be “reasonable persons pursuing reasonable purposes reasonably.” Hart and Sacks, *The Legal Process*, 1378. For a summary of the literature on this controversy, see Jonathan Macey, “Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,” 86 *Columbia Law Review* (1986).

18. In part, these theorists are responding to meta-interpretive arguments that appear to invoke empirical premises but offer no empirical proof. For example, when purposivists argue that relying on legislative history will allow judges to discern what the legislature really meant to do, then surely, these theorists argue, purposivists have the burden of showing that judges are in fact competent to accomplish such a task. In a certain sense, of course, the God’s-eye theorists are correct. If purposivists put forward an empirical argument in support of the use of legislative history, but provide no empirical warrant, then they are rationally bound to supply the missing premises. But, it should be noted, even if purposivists do supply the empirical foundation for their argument, this would not prove the appropriateness of purposivism. To show that purposivism is the proper interpretive methodology, purposivists must show why meta-interpretive arguments should be made from the God’s-eye perspective.

19. Hendrik Hertzberg, “Framed Up,” *The New Yorker*, July 29, 2002.

13. The Interpretation of Plans

1. *Eyston v. Studd*, 75 Eng. Rep. 688, 695 (K.B. 1574).

2. It is important to bear in mind that the degree of discretion that an interpretive methodology confers on interpreters is not constant across all legal texts, but is rather a function of the kind of text being interpreted. A textualist

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methodology, for example, significantly limits discretion in the case of detailed rules, but confers substantial discretion in the case of standards.

3. For example, it is one of the main justifications for judicial deference to administrative interpretation of statutes—so-called *Chevron* deference—that administrative agencies are politically accountable in ways that courts are not and hence can be more readily relied upon to act in hermeneutically responsible ways. See *Chevron v. National Resources Defense Council*, 467 U.S. 837, 865–866.

4. *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 544 (1940).

5. James Landis, “A Note on ‘Statutory Interpretation,’” 43 *Harvard Law Review* 891 (1930).

6. Frank Easterbrook, “Statutes’ Domains,” 50 *University of Chicago Law Review* 550–551 (1983).

7. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann, 36 (Princeton: Princeton University Press, 1997). Antitextualists have countered that no interpretive methodology can constrain very willful judges, insofar as every method presupposes a certain degree of honesty and integrity from its users. Textualists cannot discredit nontextualist methods by pointing to the possibility that certain judges might abuse a certain method, for the same possibility is true of textualist methods. See, e.g., Richard Posner, “Statutory Interpretation—in the Classroom and in the Courtroom,” 50 *University of Chicago Law Review* 817 (1983).

8. See, e.g., note 59 to Chapter 11.

9. See Marci Hamilton, “The Paradox of Calvinist Distrust and Hope at the Constitutional Convention,” in *Christian Perspectives on Legal Thought*, ed. Angela Carmella, Robert F. Cochran Jr., and Michael W. McConnell (New Haven, CT: Yale University Press, 2001).

10. See, e.g., note 6 to Chapter 11.

11. The process of extraction described in the text bears an obvious resemblance to the Rawlsian search for an “overlapping consensus.” See, e.g., John Rawls, *Political Liberalism*, 2d ed. (New York: Columbia University Press, 2005). However, the overlapping consensus here relates to attitudes of trust, rather than principles of justice. The above description of legal design also resembles Sunstein’s conception of law as a series of “incompletely theorized agreements.” See, e.g., Cass Sunstein, “Incompletely Theorized Agreements,” 108 *Harvard Law Review* (1995) and Cass Sunstein, *Legal Reasoning and Political Conflict*, chap. 2 (New York: Oxford University Press, 1996).

12. The English rule of “no recourse” to legislative history was first announced in *Millar v. Taylor* [1769] 3 WLR 1032. For the adherence to the “no recourse” rule by American courts, see Hans Baade, “‘Original Intent’ in Historical Perspective: Some Critical Glosses,” 69 *Texas Law Review* (1991).

13. Legislatures began recording verbal transcripts of legislative debates around the middle of the eighteenth century. Government printing of the Con-

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gressional Record started in 1873. Popkin claims that the increased reliability and availability of these records led to the eventual acceptance of legislative history in statutory interpretation. See Popkin, *Statutes in Court*, 122.

14. How a meta-interpreter ought to handle changes in settings might itself depend on the designer's attitudes toward the meta-interpreter. If the system places high absolute trust in the meta-interpreter, then she should have greater leeway to invalidate a particular judgment based on an outdated setting. Similarly, low absolute trust might counsel against such moves.

15. See, e.g., W. V. O. Quine, "Two Dogmas of Empiricism," *The Philosophical Review* 60 (1951); Donald Davidson, "On the Very Idea of a Conceptual Scheme," in his *Inquiries into Truth and Interpretation*, 2nd ed. (Oxford: Oxford University Press, 2001); Isaac Levi, *The Enterprise of Knowledge: An Essay on Knowledge, Credal Possibility, and Chance* (Cambridge, MA: Massachusetts Institute of Technology Press, 1983); Peter Gardenfors, *Knowledge in Flux: Modeling the Dynamics of Epistemic States* (Cambridge, MA: Massachusetts Institute of Technology Press, 1990).

16. Imre Lakatos, *Methodology of Scientific Research Programmes*, ed. John Worrall and Gregory Currie (Cambridge: Cambridge University Press, 1980).

17. Matters are obviously more complicated than this example would suggest. Clearly, the expansion of federal power following the New Deal would suggest a more positive and complex attitude toward Congress with respect to the promotion of the general welfare. The example is intentionally simplistic in order to show how the synthesis of extracted views about trust might proceed.

18. Douglas Laycock, "Conceptual Gulfs in *City of Boerne v. Flores*," 39 *William and Mary Law Review* 765 (1998). Laycock claims that the original understanding of the Fourteenth Amendment supports this view. See 766.

19. The Supreme Court, by a 5–4 vote, rejected this synthesis in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

20. The same qualification mentioned earlier in the section is in order here: designers might claim to assign particular tasks to actors in order to bring about certain goals, even though they privately believe that those tasks will actually bring about different goals. As with the extraction of trust judgments, the Planning Theory requires the meta-interpreter to heed the purported, not actual, objectives.

21. John Manning, "Textualism and the Equity of the Statute," 101 *Columbia Law Review* 70 (2001).

22. As William Eskridge has shown, state courts in the 1780s and 1790s, and federal courts in the 1790s and early 1800s, generally rejected a strict textualist approach and were willing to look beyond the words and heed the "equity" of the statute. See William Eskridge, "All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776–1806," 101 *Columbia*

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Law Review (2001). Eskridge cites *Porter v. Dunn*, 1 S.C.L. (1 Bay) 53 (1787) as the only case he could find that pursued a “follow-the-words-notwithstanding-the-consequences” approach to interpretation. See 1014.

23. *Woodbridge v. Amboy*, 1 N.J.L. 246, 247 (Sup. Ct. 1794).

24. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (“[T]he Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case”) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 865 (1984) (“Judges are not experts in the field”).

25. It is noteworthy that in certain colonies, such as Massachusetts, where distrust of judges ran especially high, jurors were given the power to find the law, not just facts. See William Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830*, 28–30 (Cambridge, MA: Harvard University Press, 1975).

26. See William Landes and Richard Posner, “The Independent Judiciary in an Interest-Group Perspective,” 18 *Journal of Law and Economics* (1975).

27. Frank Easterbrook, “Text, History and Structure in Statutory Interpretation,” 17 *Harvard Journal of Law and Public Policy* 63–64 (1994).

28. See, e.g., Easterbrook, “Foreword: The Court and the Economic System,” 98 *Harvard Law Review* 14–18 (1984) and “Statutes’ Domains,” 50 *University of Chicago Law Review* (1983).

29. Although Easterbrook appears here to be making a classic God’s-eye argument—i.e., since legislators cannot in fact be trusted to act in the public interest, judges should not engage in purposive interpretation—matters are not so clear. For while he believes that public choice theory gives a reasonably good description of legislative behavior, he also thinks the American legal system is more or less based on such a model of human motivation. See, e.g., Easterbrook, “The State of Madison’s Vision of the State: A Public Choice Perspective,” 107 *Harvard Law Review* (1994). For Easterbrook, therefore, the designer and God’s-eye approach essentially coincide. It is noteworthy that Easterbrook often explicitly resorts to constitutional design in his meta-interpretive arguments. For example, he argues against the practice of using legislative history in statutory interpretation by reference to the constitutional requirements of bicameralism, presentment, and publication. As we saw in the text, Easterbrook believes that these devices, which are “an important part of the design,” serve to constrain Congress by reducing the amount of rent seeking and by driving bargains out into the open so that they may be scrutinized. “Enacting a vaporous statute and winking, or putting some stuff in the reports, avoids these constraints—which judges can resist by insisting that words in laws be taken seriously.” Easterbrook, “Text, History and Structure,” 64. In the interest of interpreting him charitably, I have taken Easterbrook to be making a meta-

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interpretive argument of the correct form and have thus read him to be following the designer approach.

30. Easterbrook, “Foreword: The Court and the Economic System,” 51.

31. *Ibid.*, 17.

32. *Ibid.*

33. *Ibid.*

34. Jonathan Macey, “Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model,” 86 *Columbia Law Review* (1986).

35. Although Scalia believes that the American system is skeptical of all individuals (see, e.g., his argument about the Bill of Rights and future generations in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann, 43 (Princeton: Princeton University Press, 1997)), his argument for textualism depends on a skepticism about judges in particular.

36. Akhil Amar, “Intratextualism,” 112 *Harvard Law Review* 796 (1999). See also, Akhil Amar, “Foreword: The Document and the Doctrine,” 114 *Harvard Law Review* 45 (2000).

37. Amar, “Foreword,” 45.

38. *Ibid.*, 46.

39. Jeremy Waldron, *Law and Disagreement*, chap. 4 (Oxford: Oxford University Press, 1999).

40. *Ibid.*, 74.

41. Waldron does not explicitly say that democratic institutions were originally designed to realize the value of respect, or that we follow them now in order to show respect. But it is hard to see how to understand his argument otherwise, for respect can be taken only if it is first given. If respect were not the reason why we have these procedures, then they could not confer respect. And if they could not confer respect, then respecting statutory texts would be far less important than Waldron believes it should be.

42. It should be noted that sometimes courts settle theoretical disagreements. See, e.g., *Edwards v. Canada (Attorney General)* [1930] A.C. 124, where the Privy Council rejected originalism as an appropriate method of constitutional interpretation.

43. In the last chapter, I insisted that meta-interpreters in authority systems should be faithful to planners’ judgments of competence and character, rather than their own. In this chapter, I made the same demand of the choice of objectives. In extraction, the meta-interpreter rejects the God’s-eye point of view, deferring to the judgments of the social planners to determine questions of trust, goals, and values. Whereas the second step in meta-interpretation takes the planner’s perspective, the first and third steps—specification and evaluation—are conducted from the God’s-eye point of view. That is, when ascertaining the properties of various interpretive methodologies and evaluating these methodologies

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in terms of their ability to further objectives in light of extracted competence and character, the meta-interpreter is supposed to draw upon his personal judgment, not that of the planners.

One might worry that by embracing the God’s-eye point of view during specification and evaluation, the Planning Theory violates the Simple Logic of Planning principle. For in order to determine proper interpretive methodology, it seems that the meta-interpreter must settle certain questions that interpretive methodology aims to settle. Presumably, if an interpretive methodology is a plan or set of plans for resolving interpretive disputes, it must settle issues regarding its own efficiency. Yet, according to the Planning Theory, the meta-interpreter will be required to settle these questions, and hence settle precisely what interpretive methodologies are designed to settle.

The proper response to this concern is to recognize that in systems where meta-interpretive disputes are prevalent, proper interpretive methodologies are not plans, or even as planlike as customary norms. Meta-interpretive disputes arise precisely because no one has settled on how legal texts are to be interpreted. Since interpretive methodologies are not plans or planlike norms, SLOP does not apply. Of course, interpretive methodologies are not completely unplanlike either. The important questions of competence, character, goals, and values have been settled by others and are taken as authoritative in the meta-interpretive process. Thus, unlike Dworkin’s account, the Planning Theory’s meta-interpretive procedure does not unsettle what the law aims to settle because it does not require the meta-interpreter to answer questions about trust and objectives from the God’s-eye point of view before he can figure out how to interpret the law.

14. The Value of Legality

1. H. L. A. Hart, *Essays on Bentham* 26 (Oxford: Oxford University Press, 1982).

2. John Finnis, *Natural Law and Natural Rights*, chap. 1 (Oxford: Oxford University Press, 1980). See especially pp. 16–17.

3. *Ibid.*, 11.

4. I am unsure whether Joseph Raz now believes that the law has a constitutive moral aim. In “About Morality and the Nature of Law,” reprinted in Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, 177–178 (Oxford: Oxford University Press, 2009), he writes that “the . . . claim, that law by its nature has a moral task, seems both true and interesting. . . . [This claim] sets a critical perspective for judging [the law]. Just as we do not fully understand what chairs are without knowing that they are meant to sit on, and judged (*inter alia*) by how well they serve that function so, the claim is, we do not fully understand what law is unless we understand that

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