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Figuring The Law: Holism and Tropological Inference in Legal Interpretation

Scott Brewer

The recent jurisprudential "turn to interpretation" reflects a growing awareness that if law is a seem-less web, the act of interpretive judgment is its filament. Scholars have offered a variety of explanatory models of the process of legal interpretation. The key concepts in the more influential theories—"interpretive strategies," "interpretive communities," "fit," "value," "chain novels," and "disciplining rules"—are, to be sure, tools useful for the study of legal interpretation. But these theories remain at a relatively general level of analysis, not attempting to break down the interpretive process into small constituent analytic elements, and thus they sometimes miss important features of the interpretive process.

The central goal of this Note is to identify the operations of "tropological inference," a special type of inference unique to the process of inter-

2. To note just three of these theories: Stanley Fish's model explains interpretation as the process in which "interpretive communities" deploy conventionally created and accepted "interpretive strategies" to interpret texts. See S. Fish, Is There a Text in This Class? (1980). In Ronald Dworkin's model, judges are seen as being engaged in the common enterprise of writing a "chain novel" of legal doctrine, rendering interpretive judgments about which reading of a legal text both "fits" it and shows the text to have the best political morality it can have. See Dworkin, Law as Interpretation, in The Politics of Interpretation, supra note 1, at 249. Owen Fiss develops a model whose key claims are that legal interpretation is a conventional practice in which an interpreter reads texts in accord with the "disciplining rules" authorized by his or her interpretive community. See Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982); Fiss, Conventionalism, 58 S. CAL. L. REV. 177 (1985).
pretation—including legal interpretation—which bears limited but significant similarities to other types of inference. To explore the operations of tropological inference, the Note will present systematically a model of legal interpretation in which tropological inference plays its explanatory role. This model is intended to supplement, and in some instances to correct, other, less detailed models.

The principal contribution the Note seeks to make is to develop a rigorous "microanalytic" account of the inferential processes involved in legal interpretation. The tropological model may also be applied to a variety of pressing jurisprudential issues. Its application to one such issue—the role of political morality in legal interpretation—will be briefly outlined after the model has been presented.

I. THE RELATIONAL STRUCTURE OF INTERPRETIVE JUDGMENT

To begin building the "tropological" model of interpretive judgment it will be useful to develop some special terminology.

Inscriptional Text. An inscriptional text is one that can be identified solely by the shape and order of its letters and spaces; its identity criteria are solely orthographic. This term allows us to speak precisely of the object of interpretation—typically, in law, a statutory, regulatory, or constitutional provision, or a judicial opinion.

Interpretation as Paraphrase. Consider the poet who, upon being asked to state the meaning of his poem, repeated it. Whatever its value as humor, this tiny tale reminds us of a fact that is of central importance to a theory of interpretation: To interpret a text, any text, is to "paraphrase" it, i.e., to put it in terms other than those of the text itself. Put slightly differently, to interpret a text is always to generate another text which, the interpreter claims, provides the meaning (or part of the meaning) of the interpreted text. Acknowledging that interpretation is paraphrase in this sense is the only way to account for the distinction between interpreting a text and repeating it.

3. The "microanalytic" method both identifies epistemological elements of the interpretive process and shows how these elements interact in inferential judgments. The methodological inspiration for this type of microanalysis comes from such diverse sources as I. Scheffler, Beyond the Letter: A Philosophical Inquiry into Ambiguity, Vagueness and Metaphor in Language (1979); W. Quine, Word and Object (1960); W. Quine, From a Logical Point of View (1953) [hereinafter W. Quine, From a Logical Point of View]; Davidson, On the Very Idea of a Conceptual Scheme, 47 Proc. & Addresses Am. Phil. A. 18 (1973) [hereinafter Davidson, Conceptual Scheme]; Davidson, Radical Interpretation, 27 Dialectica 313 (1973); and Grice, Logic and Conversation, in Syntax and Semantics 3: Speech Acts (P. Cole & J. Morgan eds. 1975).

4. The idea of the inscriptional text is derived from I. Scheffler, supra note 3, at 8-9, 132 n.12.

5. S. Cavell, Must We Mean What We Say? 76 (1969) ("[O]ne response would be: 'Oh, I can tell you exactly what the Ode means,' and then read the ode aloud.").

6. In recent literary theory this point was made most clearly and insistently by Cleanth Brooks. In one of the landmark essays of New Critical methodology, Brooks diagnosed an illness that he thought afflicted literary critics. This illness consisted in believing it possible to say what a poem means in terms other than the poem itself—i.e., in Brooks' terms, to paraphrase it. C. Brooks, The Heresy of
Interpretans and Interpretandum. Two additional terms provide convenient abbreviations for the two types of text that are involved in every act of interpretive paraphrase. One text is the object of interpretation, called the interpretandum. The other is the interpreter’s paraphrastic statement of that text’s meaning, called the interpretans. Both interpretandum and interpretans can be inscriptional, i.e., identified solely by the shape and order of their letters and spaces. The interpretandum can be any inscriptional text, however small, that is capable of being meaningful.

Interpretive Judgment. An interpretive judgment is an assertion that a given inscriptional interpretans is the meaning of a given inscriptional interpretandum; that is, that one inscriptional text is the interpretans of another inscriptional text, an interpretandum.

The Meaning-Relation. The logical underpinning for every interpretive judgment is a claim that two types of inscriptional text, the interpretans and the interpretandum, stand in a special relation, called the “meaning-relation.” By analyzing an interpretive judgment into a relational predicate in this way, we offer a formal representation of such judgments. Like all relations, the meaning-relation has specific formal properties, of which two are worth noting here. First, it is a first-order relation. Second, it is a triadic relation among an interpretandum, an interpretans.

Paraphrase, in THE WELL-WROUGHT URN 201 (1947).

7. This is the Latin passive participle meaning “thing to be interpreted.” The plural is interpretanda.
8. This is the Latin present participle meaning “interpreting thing.” The plural is interpretantia. Familiar examples of written legal interpretantia are judicial opinions, which interpret such interpretanda as statutory or constitutional texts, or other judicial opinions, or contract or will provisions. There are also more evanescent interpretantia, such as those offered during oral argument, or even those simply thought to oneself. All of these are texts inscriptionally non-identical to the texts whose meaning they nevertheless purport to state.
9. Not all inscriptional texts are capable of being meaningful; thus, in the terminology developed here, not all inscriptional texts are interpretanda. Not even all linguistic inscriptional texts are meaningful. Philosophers have long recognized that the smallest inscriptional text capable of being meaningful is the sentence—and not, for example, the word (although there are one-word sentences, such as “Fire!”). See W. ALSTON, PHILOSOPHY OF LANGUAGE 33 (1964).
10. Relational predicates are quite familiar parts of language. For example, all comparative adjectives (“shorter,” “taller,” “faster,” etc.) are used in relational predicates. Most transitive verbs are used in relational predicates, such as “loves” (the verb “to love” relates a lover and the object of her love), “promotes,” and “judges.” One of the clearest, most thorough, and most accessible accounts of the logic of relations is to be found in A. TARSKI, INTRODUCTION TO LOGIC AND TO THE METHODOLOGY OF DEDUCTIVE SCIENCES 87-116 (3d ed. 1965).
11. A first-order relation is a relation among individuals, which are known as arguments of the relation. For example, in the greater-than relation familiar in algebra, individual numbers are the arguments of the relation. First-order relations differ from relations of higher order, such as second-order relations, which obtain among either classes or relations of the first order.
12. A triadic relation is a relation among three types of individuals. In formal terms, the relation “takes” three arguments. Relations are categorized according to the number of individuals they relate. For example, the greater-than and less-than relations take only two arguments (in this case two individual numbers) and so are called dyadic (or sometimes “binary”) relations. Other relations take more than two arguments. Any verb that takes both a direct and an indirect object (e.g., the verb “to hand to,” as in handing a book to someone) has this tripartite relational structure, and is called a triadic relation.
and an interpreter.\textsuperscript{13} As with all triadic relations, the three arguments of the meaning-relation may be treated as an \textit{ordered triple}\textsuperscript{14} of interpretandum, interpretants, and interpreter.\textsuperscript{15}

This model presents the logical product of interpretive relations as a vast complex network whose scope includes all interpreters and all meaningful inscriptional texts, in which some (usually several) interpreters link various interpretanda to various interpretantia.\textsuperscript{16} The locus of interpretive

13. At first sight, it might seem that the meaning-relation obtains only between only two arguments (a "dyadic" relation), the interpreters and an interpretandum. But we are concerned not only with a special relation between texts, but also with the act of judgment which concludes that such a relation exists. Construction of the meaning-relation as a dyadic relation would thus overlook a third element that is critical to the process of interpretation—the interpreter himself. The interpreter should be accounted for in the formal construction of the predicate because his act of judgment is crucial to establishing the link between interpretandum and interpretans.

The role of the interpreter in establishing the link between interpretandum and interpretans is the subject of much debate in current legal and literary theory. Israel Scheffler offers an example of the utility of relativizing interpretation to the interpreter (as well as to other factors) in his analysis of the concept of vagueness:

The impression is sometimes conveyed that vagueness is a property of the term itself, but this is certainly an oversimplification. . . . \textsuperscript{15} [T]aken as an ambivalence in deciding a term's application, vagueness varies with person and time. . . . Generally speaking, vagueness is relative to term, domain, decision task, person, and time. An alteration in any of these factors, holding the rest constant, may in certain cases produce vagueness where none had existed before or eliminate the vagueness that had been present earlier.

I. \textsc{scheffler}, supra note 3, at 49. (For the sake of parsimony, this Note treats the factors Scheffler identifies other than text and interpreter—domain, decision task, and time—as properties of the interpreter, thereby allowing them to be taken into account within the triadic relation.)

Scheffler's argument applies not only to the property of vagueness, but also to every property of language (ambiguity, metaphoricity, etc.). Such properties belong not to an inscriptional text itself but to the ensemble of interpreter, interpretandum, and interpretants. This more general point has been well argued by Stanley Fish against such other interpretive theorists as Owen Fiss. \textit{Compare} S. Fish, \textit{Conventionalism}, supra note 2, at 268-92 \textit{with} Fiss, \textit{Conventionalism}, supra note 2, at 193. Indeed, the very meaningfulness of an inscriptional text is relative in this way; what are unintelligible scribbles to one interpreter (or a large group of interpreters) may be Sanskrit to another.

14. Talk of ordered pairs (in a dyadic relation), ordered triples (in a triadic relation), or ordered \textit{m}-tuples (in an \textit{m}-ary relation) is an alternative way of describing relations. This description treats relations as an ordering of the individuals that may be arguments of the relation. For example, we may treat the dyadic relation "\textit{is the wife of}" as consisting of every pair of arguments \(<x, y>\) such that \(x\) is the wife of \(y\). This description of the relation imposes an order upon its possible arguments. Thus with regard to the "wife-of" relation, two possible arguments, say Nancy and Ron, are not simply a set with no order; instead, if they are to be one of the pairs that make up this relation, they must be ordered: \(<\text{Nancy}, \text{Ron}>\). (Angle brackets indicate the order of the arguments.) One way to see the importance of ordering in a relation is to note that the ordered pair \(<\text{Ron}, \text{Nancy}>\) is not one of the possible pairs of argument that makes up the "wife-of" relation. For a concise discussion of the concept of ordering in the analysis of relations, see H. \textsc{Lerlanc} \& W. \textsc{Wisdom}, \textit{Deductive Logic} 350-51 (2d ed. 1976).

15. The meaning-relation is an ordered triple consisting of all the triples \(<\text{interpreter}, \text{interpretandum}, \text{interpretant}>\) in which interpreter \(x\) adjudges interpretans \(y\) to be the meaning of interpretandum \(z\). Accordingly, a more precise rendering of the predicate for the meaning-relation than "text \(y\) is the meaning of text \(z\)" is "person (or group) \(x\) adjudges text \(y\) to be the meaning of text \(z\)."

16. Legal interpreters rarely claim that the inscriptional interpretants they produce is the \textit{complete} meaning of a given interpretandum. Faced with the task of applying a constitutional, statutory, regulatory or case-law text to a specific situation, the interpreter attempts to provide only a partial interpretation of the inscriptional interpretandum. For example, in interpreting the First Amendment of the Constitution, the Supreme Court offers an interpretans, its written opinion, of the inscriptional interpretandum known as the First Amendment. The Court's interpretans consists of a set of statements about how the First Amendment is to be applied to the fact pattern before it. Clearly such an interpretans does not purport to offer the complete meaning of the interpretandum; indeed, if Donald
disagreement may be understood as a contest over the distribution of interpretantia over interpretanda; i.e., a contest over which interpretanda are to be linked to which interpretantia.

II. TROPOLOGICAL INFERENCE AND INTERPRETIVE NORMS

A. The Principle of Tropological Inference

An interpreter arrives at the interpretans she believes is the meaning of a given interpretandum by making a series of interpretive inferences. These inferences are analogous to inferences made in deductive logical proofs in the following very limited, but nevertheless instructive, respect. Every line of a logical proof is a transformation of previous lines under the warrant of some logical inference rule. Proceeding line by line, inference by inference, the logician transforms one line of the proof into the next until she reaches the proof's conclusion. We may think of logical proof as the transformation of one text, the statement formed from the conjunction of premises of the proof, into another text, its conclusion. Analogously, we may say that the interpreter transforms one text, the interpretandum, into another, the interpretans (or, conversely, that she derives the interpretans from the interpretandum), under the warrant of a "tropological" inference rule.

Since metaphors provide easily grasped examples of tropological inference, and, since, as we shall see, inferences relying on metaphorical reasoning are quite common in legal interpretation, let us use metaphor as the first example of tropological inference. Most readers are likely to treat the interpretandum "Juliet is the sun" as a metaphor. Common to many

Davidson is correct in his suggestion that every text is endlessly paraphrasable, see Davidson, What Metaphors Mean, in ON METAPHOR 44 n.16 (S. Sacks ed. 1979), there may be no such thing as the complete meaning of any text. Logically speaking, a complete interpretans for a given inscriptional interpretandum would be the sum of all inscriptional interpretantia linked to it by all interpreters in all contexts, properly relativized to interpreter and time so as to avoid the apparent contradiction of competing interpretations in the same contexts.

17. There are many significant disanalogies between the two inferential processes. For example, nothing in the process of tropological inference is analogous to validity or completeness in logical inference. Nor does it make sense to talk about tropological inference rules as an uninterpreted formal system. Further, the inference rules one uses in logical proof are fixed at the outset, whereas in tropological inference one is much freer to introduce new rules in the course of interpretation. See infra notes 31, 32 and accompanying text, and Part III(A). In some respects tropological inferences are more like inferences in inductive proof, in which the truth of the premises does not guarantee the truth of the conclusion (as in deductive proof), but only its probable truth. Tropological inference seeks to preserve not truth but meaning, see infra note 25, but some tropological inferences, such as metaphoric inference, are also types of inductive inference. See infra note 26.

18. For an example of logical inference, see infra note 25.


20. Of course that decision itself is made as the result of a complex inferential process. When confronted with the interpretandum "Juliet is the sun," an interpreter must decide how to make sense of it. Should it be taken as the absurd assertion that a human being is an astronomical entity, or is there some way to read it so that it makes more sense? Interpretation depends on the assumption that authors intend to communicate, not to utter sounds or write scribbles that are gibberish or nonsense, unless gibberish or nonsense is itself a way of communicating and has been signaled as such. (The
otherwise competing definitions and explanations of metaphor is the claim that a metaphor is a trope\footnote{21} in which an assertion of identity ("Juliet is the sun") is made on the basis of perceived similarities ("Juliet is like the sun").\footnote{22} When an interpreter decides to treat an interpretandum as a metaphor, she takes its assertion of identity as an indirect assertion of similarity, and produces an interpretsans that states one or more of those similarities. To read an assertion of identity as an indirect assertion of similarity is to make a metaphoric (tropological) inference. Virtually all of the classically defined tropes may be fit into this model in a similar manner.\footnote{23}

By extending the classical rhetorical concept of the trope,\footnote{24} we may call very absurdity of some texts, such as absurdist literature, is taken to be communicative.) Absent these signals, interpreters generally assume that assertions like "Juliet is the sun" are not to be treated as absurdist, and they search for some other way to make sense of them. (This account relies heavily on Grice's work on the "cooperative principle" and conversational implicature. See Grice, supra note 3.) There is, of course, another way to make sense of it, namely, to treat it as a metaphor.


22. See R. LANHAM, A HANDLIST OF RHETORICAL TERMS 66 (1968) (defining metaphor as assertion of identity rather than likeness). For widely varying explanations of metaphor that share this basic definition, see ON METAPHOR, supra note 16. For discussion of various paraphrases of "Juliet is the sun," see S. CAVELL, supra note 5, at 78–82. Whatever the exact interpretsans an interpreter derives, it will be inscriptionally nonidentical to the interpretandum, but the interpreter offering it claims that it has the same meaning.

23. Metonymy is another example. The trope metonymy is defined as "the substitution of one word for another to which it stands in some close relation," H. SMYTH, GREEK GRAMMAR § 3033 (G. Messing rev. ed. 1956), such as substitution of a term for a given cause for a term for its effect, or a proper name for one of its attributes. R. LANHAM, supra note 22, at 67. How might an interpreter understand the interpretandum "The pen is mightier than the sword"? She might well treat "the pen" as a verbal substitute for the act of political writing and "the sword" as a verbal substitute for military power, producing an interpretsans something like "political writing can overcome military might." If she reads it this way, she would make a metonymic (tropological) inference. With regard to the trope ellipsis, to conclude that everybody's friend is nobody's friend on the basis of the assertion that "everybody's friend is nobody's" is to make an elliptical inference—i.e., to read the quoted text as an ellipsis, and to interpret by supplying what the reader thinks has been elided. To conclude that a person who is hungry will not listen to reason from the assertion that "a hungry stomach hath no ears" is to make a synecdochic inference. The synecdoche "a hungry stomach hath no ears" is also a "twice true" metaphor (as is "No man is an island"). We may refer to this not unusual phenomenon of one trope occurring within another as a nested trope. To conclude that a "blind mouth" is one that speaks ignorantly is to make an catachresic inference. To conclude that the fearful anticipation of death shapes one's consciousness throughout life, from the assertion "'tis death that makes life life," is to make a paradoxic inference. For examples and definitions of the foregoing tropes, see R. LANHAM, supra note 22.

24. Rhetorical theorists have explained the operation of the "trope" differently throughout the Western rhetorical tradition. According to the most consistently used explanation, a trope is a "striking or unusual configuration of words or phrases" that "change[s] the [ordinary] meaning of a word or words, rather than simply arranging them in a pattern of some sort." R. LANHAM, supra note 22, at 52, 101; see also id. at 101–03 (discussing difficulty of finding core definition of trope that covers all rhetorical theories).

The concept of the trope evolved from being only a minor element in rhetorical taxonomy to occupying its current predominant place in Western rhetorical and literary theory. The concept of the trope in Western culture had its origins in the elaborate rhetorical taxonomies of Aristotle, Cicero, Quintilian, and other theorists. The influential Rhetorica ad Herennium distinguished various qualities in the language of a speech—its "taste" (elegantia), "artistic composition" (compositio), and "distinction" (dignitas). See J. MURPHY, RHETORIC IN THE MIDDLE AGES 20 (1974). Dignitas was to be achieved by use of what came to be called "figures of speech" (figura or exornationes), which included what came to be called "tropes." Though in earlier Greek theories of rhetoric the trope played a relatively minor role as a means of achieving dignitas, Ciceronian rhetoric gave it a more prominent place in rhetorical theory. As Ciceronian theory came to dominate Western thinking about
the type of inference rule used in interpretation the *tropological inference rule*, an inference rule that guides the meaning-preserving transformation of an interpretandum into an interpretans, where the two are not inscriptionally identical. We may use this concept to fashion a *principle of tropological inference*: Just as every step in a logical proof proceeds under the warrant of some logical inference rule or other, so every act of interpretive judgment is guided by reliance on some tropological inference rule.  

The political role of the Anglo-American judiciary makes certain types of tropological inference, especially metaphorical inference, quite common in legal interpretation.

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rhetoric, so did its emphasis on the trope (and the closely related figure of speech), so that rhetoric as a discipline has become almost identified with the use of tropes and figures. P. Dixon, *Rhetoric* 36–38 (1971).

25. To use the foregoing terms, whenever inscriptionally nonidentical texts are claimed to stand in the meaning-relation (whenever a text is paraphrased), the claim relies on a tropological inference rule. Logical inference rules seek to insure that each succeeding line of a proof preserves truth. For example, if one assumes that a proposition, call it "P," is true, and that another proposition, "If P then Q," is also true, then by the inference rule of modus ponens one may conclude that Q is true. Tropological inference rules seek to insure the preservation not of truth but of meaning in the process of transforming an interpretandum into an interpretans. Cf. supra note 17.

This use of the term “tropological inference rule” departs from the classical definition of the term “trope” in the following claim about what tropes are and how they operate: A trope is not a text, but a reasoning process in which inscriptionally nonidentical texts are asserted to stand in the “meaning” relation. This point is consonant with and supplements Fish’s argument that tropes such as irony “are not properties of language but are functions of the expectations with which we approach it.” S. Fish, *supra* note 2, at 277. For an interpreter to “expect” an interpretandum to be an irony, for example, is to use the tropological inference rule of irony to transform the interpretandum into an interpretans.

26. Anglo-American judges are politically bound to rely on legislative, constitutional, and precedential authorities as sources of law. This institutional structure makes metaphorical inference, see *supra* notes 20, 22 and accompanying text, one of the most important and frequently used tropological inferences in legal interpretation. Relying on authority—at least as a starting point—requires judges to apply either the general language of statutes or the divined ratio decidendi of precedent to different fact patterns in cases before them. Legal language is thus “irreducibly open textured,” H.L.A. Hart, *The Concept of Law* 125 (1961), and constantly calls on judges to extend the language by analogy. To reason analogically is to treat two distinct entities as the same for purposes of analysis. See, e.g., Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886) (corporations are persons for purposes of Fourteenth Amendment). Similarly, the tropological inference rule of metaphor directs one to transform a claim of identity into a claim of similarity—hence the frequency of that inference rule in legal interpretation. Metaphorical inferences are also central to reasoning about justice. Justice requires that we “treat like cases alike,” H.L.A. Hart, *supra*, at 155, 156, but since “any set of human beings will resemble each other in some respects and not in others,” *id.* at 155, judgments about justice require metaphorical inferences to determine “what resemblances and differences are relevant,” *id.* from a moral point of view.

Another example of a tropological inference common to legal interpretation is anapodoton, a trope in which a clause is thought to be missing from an inscriptive interpretandum (e.g., “If you only knew . . .” or Caligula’s “If only the Roman people had a single neck . . .”). See R. Lanham, *supra* note 22, at 8. The tropological inference involved in transforming an anapodotonic interpretandum is to supply the missing clause in a way (as always with tropological inference) that preserves meaning. Inference by anapodoton pervades legal interpretation. For example, in Riggs v. Palmer, 115 N.Y. 506 (1889), the majority held that inscriptive interpretandum of a statute of wills was missing a clause, namely, “no man may profit from his own wrongdoing.” The majority was happy to supply the clause; the minority was not. Synecdochic inference is also quite common in legislative and constitutional interpretation. See *infra* note 76 and accompanying text.
B. Normative Direction in Tropological Inference

Legal interpretation takes place within a structured institution whose norms require not only that a text be interpreted, but also that it be interpreted in a justifiable way. To convince members of her institutional group that the interpretans she forwards is "the meaning of" the interpretandum, an interpreter must show that the steps by which she derived the interpretans from the interpretandum preserved the meaning of the interpretandum. Such demonstration requires that she consult interpretive norms, which serve the dual purpose of guiding her choice of tropological inference rules and showing that the choice is justified.

1. Interpretive Norms

As Ronald Dworkin has recently pointed out, interpretive judgments have a complex epistemological structure similar to judgments about scientific truth. This Note seeks to explicate some of the complexities of interpretive judgment by identifying a hierarchy of flexibly and reflectively interacting rules that the interpreter must consult when engaged in that act. While, as noted, tropological inference is analogous to logical inference, its disanalogies also are illuminating. Perhaps the most important disanalogy is this: Whereas in a logical proof the logician has at the start of the proof a clearly fixed list of inference rules that she may use, the tropological inference rules an interpreter may use are not so clearly fixed at the outset of interpretation—they are subject to "holistic" revisability. Indeed, the brilliance of an interpretation sometimes inheres in its ability to persuade members of the institutional interpretive community to use different tropological inference rules on a type of text than the community had hitherto allowed.

27. For a discussion of the kind of "institutionalized normative system" comprised by institutional interpretation, see J. Mackie, Ethics 80-82 (1977); J. Raz, Practical Reason and Norms 123-48 (1975).


29. Dworkin, Please Don't Talk About Objectivity Any More, in The Politics of Interpretation, supra note 1, at 293.

30. See supra note 17.

31. Goodman, Quine, Davidson, and others have explored holistic inference in such areas as scientific reasoning and language comprehension. See, e.g., N. Goodman, Fact, Fiction, and Forecast 67 (1955) ("A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend."); see also infra Part III(A).

32. Consider, for example, the distinction between reading a text according to its "spirit" and
Since an interpreter does not start with a fixed set of tropological inference rules, she must decide which rule she ought to use from among the many she might conceivably use. The set of beliefs about which tropological inference rules ought to be used on a given text (or type of text) may be called an interpreter's interpretive norm.

Let us return to the example of metaphor offered above to explain the operation of interpretive norms. Suppose that our interpreter has chosen to interpret "Juliet is the sun" as a metaphor; that is, she has chosen to treat its assertion of identity as an indirect assertion of similarity and, accordingly, produces an interpretans something like "Juliet is as radiant as the sun." It is likely that the training of most interpreters in the contemporary academy would lead them to choose to use the inference rule of metaphor on the text "Juliet is the sun." It is important to note, however, that ultimately the choice of that rule is dictated largely by the interpreter's desire to gain or maintain institutional stature by not being perceived by her interpretive community to be offering an "off the wall" reading. That fear put aside, she might use a different rule on the interpretans. For example, she might think it more appropriate to treat "Juliet is the sun" as an absurdity (Juliet really is the sun), using the tropological inference rule of enigma. Such an interpreter would treat this interpret-reading according to its "letter"—a distinction that may be traced to Paul's second Corinthian epistle, but was brought most forcefully into American law in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), discussed infra notes 41-52 and accompanying text. Reading the text according to either spirit or letter is simply using one or another of two different types of inference rule on the given text. The reader who made it institutionally justified to disregard the "letter" in favor of the "spirit" thus introduced a new interpretive inference rule into the system of interpretive inference. This may be said of the contemporary practice of "deconstruction." Among a large group of literary theorists and some philosophers, new interpretive inferences—which boil the blood of many traditionalists—are now not only institutionally allowed, but indeed almost sycophantically dictated. A clear example of the new "deconstructive" inferences, brought into the French and American literary-critical academy with considerable cleverness and power by Jacques Derrida, may be found in Miller, The Critic as Host, in DECONSTRUCTION AND CRITICISM 217 (H. Bloom, P. de Man, J. Derrida, G. Hartman & J. Miller eds. 1979).

33. For discussion of metaphor as tropological inference, and of this particular metaphor, see supra note 22 and accompanying text.

34. Reasons for this claim are offered supra note 20.

35. That this is the major force guiding the interpreter to use the rule of metaphor may be a controversial claim, for it seems to assume that interpreters act from an "external attitude" toward texts they interpret, rather than from an internal attitude. See generally H.L.A. HART, supra note 26, at 86-88 (distinguishing external and internal attitudes). Although the point cannot be argued sufficiently here, one might venture to say that interpretive judgments—if not all "internal" judgments—are so deeply shaped, restricted, and enabled by the standards of the interpreter's institutional community that the internal and external attitudes regarding the standards of correct inference merge: an interpreter's internal standards are actually external standards, dictated by the external interpretive community (which applies praise, blame, professional advancement or retardation, accolades or condemnations) and internalized by the interpreter. For an account of this kind of external professional pressure, see Fish, Anti-Professionalism, 7 CARDozo L. Rev. 645 (1986); see also S. Fish, supra note 2, at 356-57 (discussing "off-the-wallness"); J. Raz, supra note 27, at 123-48 (discussing institutionalized systems). Wittgenstein supports this view of rule-following behavior. See L. WITTGENSTEIN, supra note 28, at §§ 84-85, 198-99, 201-02, 206, 217, 219, 240-41.

36. We may reconstruct the ancient trope of enigma, see R. LANHAM, supra note 22, at 41, 68 (enigma as a classical trope), to reflect the judgment that a statement is absurd, as follows. The tropological inference rule of enigma directs an interpreter to transform an interpretandum that ap-
tandum as many readers choose to treat Caligula's assertion that he wanted to possess the moon.\textsuperscript{37}

It should be clear from this simple example that no tropological inference rule can by itself tell the interpreter when it should be used and when abjured. It is a mute formal procedure that gives no guidance regarding its proper use. That kind of guidance must come from elsewhere, namely, from interpretive norms, the set of beliefs regarding which tropological inference rules ought to be used on which texts or types of text.

2. Higher- and Lower-order Interpretive Norms

We must distinguish two types of norms, the first of which is easily overlooked, although analytical care requires that it not be. Let us call the complex set of beliefs about which tropological inference rules ought to be used on a given text an interpreter's lower-order interpretive norm. These are purely instrumental norms that tell the interpreter that in service of some other goal (to be identified presently) she ought to use a given tropological inference rule on a text or type of text. These norms are almost as unmotivated as tropological inference rules, differing only in that tropological inference rules have no normative force at all, whereas lower-order norms have instrumental normative force. Two interpreters who have different lower-order norms will transform the same inscriptive interpretandum into different interpretantia.\textsuperscript{38}

In deciding which lower-order norm she will use, an interpreter must determine why she should adopt one lower-order norm over another. Lower-order norms, whose function is only to guide the inferential transformation of an interpretandum into interpretans, are not brought into play in the act of interpretive judgment without the help of other norms. These other norms—let us call them higher-order interpretive norms—offer a justification to the interpreter for choosing the particular lower-order norms she does, which she may then offer to others in her institutional setting.\textsuperscript{39} The force of lower-order norms is only instrumental, not justificatory. The higher-order interpretive norm is the goal served by the lower-order instrumental norm. Tropological inference rules and higher- and lower-order interpretive norms stand in a logical hierarchy. The set of tropological inference rules answers the question, “By what mechanical inferential process should I, the interpreter, transform the interpretandum into an interpretans?” The lower-order interpretive norm

\textsuperscript{37} See A. Camus, Caligula and Three Other Plays 7–9, 23, 49 (S. Gilbert trans. 1958) (Caligula asserting and discussing his desire to possess the moon).

\textsuperscript{38} In the example just offered, two different lower-order interpretive norms would produce two readings of “Juliet is the sun”—one taking it as a metaphor, another as an absurdism.

\textsuperscript{39} See supra notes 28, 35 and accompanying text.
answers the question, "Which set of tropological inference rules ought I to use on this (sort of) text?," and the higher-order norm answers the question, "For what reasons ought I to adopt this lower-order norm?""40

*Church of the Holy Trinity v. United States*41 provides a clear example of the interrelation of tropological inference rules and lower- and higher-order interpretive norms. In *Holy Trinity*, the Supreme Court had to decide whether a federal statute42 included within its punitive scope43 a religious corporation that had contracted with an English rector to head its church in the United States. Facialiy, the contract seemed to fall within the scope of the statute's prohibition,44 and that is how Circuit Judge Wallace had read it for the court below, holding that the contract was "within the terms of the act."45

Despite a blemishless statutory face, the Supreme Court held on appeal that the church's contract was not within the statute's prohibitions. Noting both the act's inclusionary phrases and its exceptions, Justice Brewer "conceded that the act of the corporation was within the letter of this section."46 But to remain enclosed within literal space, in the Justice's view, would lead the judicial interpreter to an "absurd result." Seeking to avoid that fate, Justice Brewer looked "outside" the letter of the statute to its "spirit"47 and concluded that the statutory spirit did not prohibit a religious corporation from hiring a foreign minister.

In *Holy Trinity*, Judge Wallace's lower-order norm led him to favor a literal reading of the statute; he concluded that he ought to use the tropo-

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40. The logical hierarchy of rules and norms is one of presupposition. For a useful discussion of the logic of presupposition, expressed in terms of questions and answers, see R. Collingwood, An Essay on Metaphysics 21-48 (1940).

It is analytically important to distinguish lower- from higher-order norms, since two interpreters who make the same instrumental judgment about which norms ought to be used on a given interpretandum—i.e., rely on the same lower-order interpretive norm—may have different justifications for doing so.

41. 143 U.S. 457 (1892).


43. The statute provided that a mandatory $1,000 fine be levied against any corporation that contracted with alien workers to come to work in the United States. *Id.*

44. The statute stated that it was "unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to . . . assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners," with the exception of "professional actors, artists, lecturers, or singers" and "persons employed strictly as domestic servants," "to perform labor or service of any kind." *Id.* at 332-33 (emphasis added).

Apparently, neither the lower court nor the Supreme Court considered placing the rector under the scope of any of the statute's exceptions, though it might have been argued that a rector is a "lecturer" or a "professional servant." Nor did the Court consider the possible First Amendment problems with applying the statute to the church's contract.

45. 36 F. 303 (C.C.S.D.N.Y. 1888). In the terms of this Note, Wallace concluded that the interpretandum "labor or service of any kind" should be treated as broad enough to include the labor or service of a rector.

46. 143 U.S. at 458 (emphasis added).

47. In Justice Brewer's analysis, the spirit was to be found by checking several indicators, including the title of the act, *id.* at 462, 465, the "circumstances surrounding its enactment," *id.* at 459, 465, the "evil which it was designed to remedy," *id.* at 463-64, 465, legislative history, *id.* at 464-65, and plain meaning, *id.* at 465.
logical inference rule of "literality" to derive an interpretans from the statutory interpretandum. Justice Brewer contested Wallace's choice of tropological inference rule. He adopted a rule of "spirituality," according to which one should look "outside" literal language to find the "spirit" of the text, the actual intention of Congress.

What higher-order interpretive norms motivated these competing choices of lower-order norms? Wallace's main concern was with the proper limits of the judicial role in interpreting the language of a coordinate branch of government. He believed that it was not a proper part of the judicial role to alter public expectations about duties and obligations when those expectations are generated by extremely explicit statutory language. Brewer's opposing higher-order norm also was deeply imbricated with a concern about the proper role of courts—a role that he thought included going beyond the letter of clear statutory text when, in the

48. The tropological inference rule of literality directs the interpreter to transform interpretandum into interpretans without using any of the transformations involved in such other rules as ellipsis, metaphor, irony, and metonymy. This construction of the rule of literality is incomplete, but sufficient for present purposes. As stated, it captures the pre-analytic distinction between the literal and the figurative, without making the kind of unsupported claim a truth-conditional semanticist like Davidson makes when he argues that "[l]iteral meaning and literal truth conditions can be assigned to words and sentences apart from particular contexts of use. This is why adverting to them has genuine explanatory power." Davidson, supra note 16, at 31. For an opposing view, see S. Fish, Normal Circumstances and Other Special Cases, in S. Fish, supra note 2, at 268 (all meaning, including literal meaning, is context-dependent).

Recall that any paraphrase of an inscriptive interpretandum is achieved with the use of a tropological inference rule; in this sense literality is no less tropological than the metaphoric inference rule, but is a different type of trope.

49. Where the terms of a statute are plain, unambiguous, and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been . . . the intention of congress. 36 F. at 304. The interpretans Wallace derived from the statutory interpretandum using that rule was something like "a church which hires a foreign rector to come to the United States and work must pay a fine of $1,000."

50. Justice Brewer's reading of what were to his mind the proper "spiritual" indicators, see supra note 47, led him to conclude that the actual intention of Congress did not include prohibiting a religious corporation from hiring a foreign minister. Accordingly, the interpretans the Justice derived from the statutory interpretandum was something like: "Churches which hire foreign ministers are not required to pay a fine of $1,000."

Again, it is worth emphasizing that this is a very simplified and summarized analysis of the tropological inference rules operating in Justice Brewer's derivation. The analysis is especially tricky because he used several subordinate indicators of actual intention to supplement the one main rule of avoiding absurdity. In the traditional jurisprudence of statutory construction, both the rule about avoiding absurd results and all supplementary indicators are treated as separate, independent "rules of construction." See, e.g., K. Llewellyn, The Common Law Tradition 521-35 (1960). As this example shows, tropological analysis cuts the interpretive pie very differently than does the statutory-canonical tradition.

It is not unusual to find interpreters relying on supplementary indicators when applying a tropological inference rule. For example, a reader might face an interpretandum which she recognizes is not to be taken literally, but she would have to rely on supplementary indicators to decide which nonliteral inference rule to apply to it (e.g., metaphor, absurdity, irony, or hyperbole).

51. See supra note 49.
judge's opinion, application of that text leads to "injustice, oppression, or an absurd consequence."^52

There are systematic reasons for which, as Holy Trinity suggests, the higher-order norms that ultimately guide interpretation belong to the realm of political morality. Important arguments have shown that actions made in the name of the law, including judicial defense of those actions, require "full-fledged moral justification."^53 Since legal actions stand in such urgent need of justification, the norms that serve as the final arbiter of legal interpretation must be drawn from the gen(i)us of morality, or, more specifically, political morality. Other examples of higher-order norms abound in the writings of scholars and the opinions of judges concerning, for example, "countermajoritarianism,"^55 judicial restraint, and the norms that dictate adherence to the structure and relation of constitutional government or to the history surrounding the adoption of a statu-

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52. See 143 U.S. at 461 (quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868)).
53. For example, John Lyons argues that:

People who act in the name of the law do things which would require justification if they were not done in the name of the law—they use coercion and force, they kill and maim, they deprive people of liberty and valued goods. . . . Judicial decisions, like other things, stand in need of full-fledged moral justification.

Lyons, supra note 28, at 761-62; see also Cohen, The Ethical Basis of Legal Criticism, 41 YALE L.J. 201, 220 (1931) ("Law is just as much a part of the domain of morality as any other phase of human custom and conduct."); R. Dworkin, A Matter of Principle 160 (1985) (quoted infra note 54); see also supra note 28. Nowhere has the point about the need for moral justification of legal interpretation been made with more power than by Robert Cover:

Legal interpretation takes place on a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.

54. See R. Dworkin, supra note 53, at 160 ("Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving individual and social disputes, or securing justice between citizens and between them and their government, or some combination of these.").
55. The concern about "countermajoritarianism" in judicial review is motivated by a fear that a judge will employ norms that she herself favors as a matter of partisan political predilection. Professor Shapiro's analysis of Justice Rehnquist's first four and one-half years on the Court provides an excellent example of grounds for such a fear. Professor Shapiro found that "the unyielding character of [Rehnquist's] ideology" enabled one to predict his votes when the contest was between government and individual (government wins), or state and federal authority (state wins). Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293, 293-94 (1976). The Public Citizen Litigation Group did a similar analysis of Judge Robert Bork, with quite similar results. See Public Citizen Litigation Group, The Judicial Record of Judge Robert H. Bork, 9 CARDOZO L. REV. 297 (1987).
Although the fear of partisanship is justified, Sanford Levinson and Paul Brest, following an important article by Robert Dahl, have raised important questions about how serious a problem countermajoritarianism is given the fact that courts are usually aligned with what Dahl calls the "dominant lawmaking majorities." See P. Brest & S. Levinson, Processes of Constitutional Decisionmaking 889-901 (2d ed. 1983); Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957).
56. See, e.g., Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1014 (1984) (The "school of thought that emphasizes the importance of judicial restraint" has "[t]ime and again . . . taught lawyers to resist the temptation to reject long-standing constitutional doctrine whenever they find it in conflict with their personal political philosophies.").
Another school argues that judges are politically biased in their choice of norms, that they are trained to accept only certain very limited norms, and that instead of dissembling in the name of a false dichotomy between legality and political ideology judges should openly adopt interpretive norms that have been developed by "a method that differs in no essential way from the loose form of criticism, justification, and discovery that is possible within ideological controversy itself."

III. Holism in Legal Interpretation

We have identified an interrelated set of rules and norms that operate in every act of interpretive judgment and stand in a relation of logical hierarchy. From the point of view of politico-moral justification of legal interpretation, the most important of these is the higher-order interpretive norm. Usually more than one such norm helps an interpreter to direct an act of interpretive judgment; unlike the relation among tropological inference rules and interpretive norms, the relation among norms may not be arrayed in a logical hierarchy. Instead, these norms are interrelated in an epistemologically "holistic" manner.

A. Underdetermination, Radical Translation, and Interpretive Holism

Quine's powerful articulation of the claim that scientific theories are "underdetermined" has made holism a commonplace of epistemological analysis. According to Quine, theories are underdetermined in that they assert propositions about the world which are neither directly linked nor directly linkable to the evidence on which they are purportedly based. The propositions which make up a theory are indirectly linked to their evidence, usually by means of entities whose existence the theory posits to explain some bit of physical phenomena. The idea of underdetermination can be explained by reference to the posits a theory offers as part of its explanation: A theory is "underdetermined" in that two theories may...
posit the existence of different entities and yet be equally compatible with all possible evidence, even while being incompatible with one another. It is in this precise sense that evidence underdetermines the theory.63

One consequence of the underdetermination of theory by evidence is that a theorist may always adjust his theory to account for potentially falsifying evidence.64 No theory is directly tied to any particular bit of evidence, and there can be no crucial test that falsifies any particular proposition of the theory,65 because the theorist can always make adjustments elsewhere in the theory to accommodate the evidence.66

The ever possible revisability of a scientific theory in the face of apparently falsifying evidence is thus the flip side of the underdetermination of the theory by its evidence. Theories—conjunctions of propositions—are underdetermined by evidence, and any proposition can be held true or held false if the theorist (and the community whose assent and approbation he seeks) is willing to make enough adjustments to the truth-value of other propositions in the theoretic system. This epistemological account is said to be holistic.

Quine extended his analysis of theory building in physical theory to theory building in the understanding of language as well. He argued that a person coming to understand a language with no prior aid in translating it (so-called “radical translation”) must undergo an epistemological process structurally identical to the process of building explanatory theories. In fact the translation manual that a neophyte language learner constructs is a theory, purporting to explain that part of the world consisting of the linguistic behavior of a particular group of people. In Quine’s analysis, translation manuals, like explanatory theories, are “underdetermined” by the evidence on which they are based.67

63. Quine dramatically emphasized the extent to which theories are underdetermined:
   Physical objects are conceptually imported into the situation as convenient intermediaries—not by definition in terms of experience, but simply as irreducible posits comparable, epistemologically, to the gods of Homer. . . . [I]n point of epistemological footing the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conception only as cultural posits.
   W. Quine, FROM A LOGICAL POINT OF VIEW, supra note 3, at 44 (citation omitted).

64. Speaking in the formal idiom of first-order propositional logic, one may say that a scientific theory consists of the conjunction of a long string of propositions, made up not only of claims about posited objects but also of mathematics, logic, and so on. When a theory makes a prediction, the entire string of propositions forms the antecedent of a conditional in which the proposition being tested is the consequent. If experimentation shows that the consequent is false, then by modus tollens the antecedent, which is the conjunction of propositions, is also false. It is up to the theorist and his community to decide which of the many propositions to declare false and which others will be held true. Any proposition can be held to be true, no matter what the evidence is, assuming that one is willing to make enough adjustments elsewhere in the system.
   W. Quine, FROM A LOGICAL POINT OF VIEW, supra note 3, at 42.

65. See P. Duhem, supra note 61, at 188–90.

66. Quine pointed out, for example, that some theories in quantum physics contemplate no longer holding fixed the logical “law of the excluded middle” to explain the behavior of subatomic particles.
   W. Quine, FROM A LOGICAL POINT OF VIEW, supra note 3, at 42.

67. This claim must be distinguished from Quine’s famous “indeterminacy of translation” argument. The distinction between indeterminacy and underdetermination is very complex, and its careful presentation is beyond the scope of this Note. Suffice it to say that the underdetermination thesis is an
B. Holism and Higher-Order Norms

There is a complex "holistic" interaction among an interpreter's higher-order interpretive norms, so that the satisfaction value of any one norm may be maintained provided sufficient adjustments are made elsewhere in the system that constitutes the interpreter's overall normative approach to interpretation. The holistic interaction of higher-order norms will obviously vary a great deal depending on the given interpretandum, the interpreter, her context, and so on.

We have already seen examples of higher-order norms that typically guide the reasoning of legal decisionmakers. It is almost always true that more than one of these norms will enter into a judge's interpretive act, and quite often they compete against one another, calling for a holistic arrangement in which the interpreter discovers his most dearly held normative views, holds those views fixed, and adjusts other norms to reach the result that satisfies the prized norm.

For example, a judge presented with the task of interpreting and applying a statute or precedent that he finds morally repugnant must adjudicate, as it were, holistically, among the variety of competing norms his experience has led him to adopt. One such norm might be that a sufficiently repugnant statute is not legally enforceable, even if it met the com-

epistemological thesis, concerning the ways in which knowledge is acquired. The indeterminacy thesis is an ontological claim about the types of entities that exist in the world. For complex reasons, Quine believes that a certain type of entity, meanings, do not exist, and he expresses this claim by means of his indeterminacy thesis.

The idea of underdetermination in interpretation has been echoed in the work of other theorists. Donald Davidson, for example, argues that (in the terms offered above) the derivation of an interpretans from an interpretandum is always underdetermined, because an interpreter "cannot take even a first step towards interpretation without knowing or assuming a great deal about the speaker's beliefs," and that therefore "the only possibility at the start is to assume general agreement on beliefs" by "[assigning] to sentences of a speaker conditions of truth that actually obtain (in [the interpreter's] own opinion) just when the speaker holds those sentences true." Davidson, Conceptual Scheme, supra note 3, at 18, 19. This is a clear case of underdetermination because the choice to treat the speaker as being essentially like us in what he or she believes about the world is not dictated by the evidence of a speaker's behavior. It is dictated by the pragmatic necessities that have come to be labelled by philosophers the "principle of charity." Similarly, Paul Grice's work on "conversational implicature" may be taken as an extended analysis of the revisability of interpretations in light of overarching interpretive principles that guide speakers in their interactions with one another. See Grice, supra note 3. Stanley Fish too has offered an analysis of interpretive holism that emphasizes underdetermination and revisability. See S. Fish, supra note 2.

68. See supra notes 55-59 and accompanying text.

69. This process is similar to what Rawls calls "reflective equilibrium." See J. RAWLS, A THEORY OF JUSTICE 20 (1971). Joel Feinberg offers a concise summary of reflective equilibrium and relates it to other "coherentist" epistemological works, some of which also shape the analysis of this Note. See Feinberg, Justice, Fairness and Rationality, 81 YALE L. J. 1004, 1018-21 (1972).

70. See, e.g., R. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 216 (1975) (describing reaction of some judges to Fugitive Slave Acts); see also Watkins v. United States Army, 837 F.2d 1428, 1452 (9th Cir. 1988) (Reinhardt, J., dissenting) ("I am bound . . . as a circuit judge to apply the Constitution as it has been interpreted by the Supreme Court and our own circuit, whether or not I agree with those interpretations. Because of this requirement, I am sometimes compelled to reach a result I believe to be contrary to the proper interpretation of constitutional principles. This is, regrettably, one of those times.").
He might find that norm in tension with another that he is inclined to follow, namely one requiring a judge to accept the will of democratic legislatures, even when he disagrees with the result on moral grounds. Faced with this tension, the judge may adopt one of many strategies for holistic adjustment. If he concludes that he cannot enforce the statute, he might adjust his conception of judicial role to allow for those cases in which moral duty outweighs what he perceives is his judicial duty. Or he might try to preserve both values by constructing a theory that sees the Constitution as embodying the "gravitational pull" of principles which themselves invalidate the statute.

The number of relevant higher-order norms will obviously change from case to case and interpreter to interpreter. But such norms always are the ultimate arbiter of legal meaning. Legal texts have meaning only in virtue of higher-order norms, in the particular holistic array in which a judge places them.

C. Intention as Higher-Order Norm

Legal interpreters almost always make obeisance to the intentions of a statutory, judicial, or constitutional author. Given the wounded but undying claim that legal meaning can, at least for some of our most important legal texts, be found in a factual state of affairs (a state of mind or of aggregated minds), where does "author's intention" fit into the model offered above, in which interpretation is guided not by facts but by the values of higher-order interpretive norms?

Let us call an interpreter whose goal is to derive an interpretans from the inscriptive interpretandum a direct interpreter. Let us call an interpreter whose goal is to derive the interpretans that a (given) direct interpreter would derive an indirect interpreter. An indirect interpreter asks

71. Such a higher-order norm would draw on a theory of natural law. See generally L. Weinreb, Natural Law and Justice (1987).


73. Some of the most important critical examinations of the claim that the meaning of a text is its author's intent are R. Barthes, The Death of the Author, in Image—Music—Text 142 (S. Heath ed. 1977); R. Dworkin, The Forum of Principle, in R. Dworkin, supra note 53, at 33; Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980); Fish, Working on a Chain Gang: Interpretation in the Law and in Literary Criticism, in The Politics of Interpretation, supra note 1, at 271; Foucault, What Is An Author?, in Textual Strategies 141 (J. Harari ed. 1979); Stevenson, On the Reasons that Can Be Given for the Interpretation of a Poem, in Philosophy Looks at the Arts 121 (J. Margolis ed. 1962).

74. For example, a lawyer attempting to determine how a given judge would read a case would be an indirect interpreter, as would a judge attempting to read a constitutional or statutory text in accord with its framers' intent. Because of the politically sensitive, if not precarious, position of American judges, see generally A. Bickel, The Least Dangerous Branch (1962), judges tend to, and are well advised to, claim that they are always indirect interpreters of one sort or another. Indeed, the very concept of the rule of law seems to require them to claim to be indirect interpreters of constitutional, legislative, or precedential will.
about an inscriptive interpretandum not, "What does it mean?," but rather, "What would some other specified reader think that it means?" or "What tropological inference rules would this other reader apply to the text?"

When a reader attempts to interpret in accord with the intention of the inscriptive author (the first person or persons to create and physically produce an inscriptive interpretandum), he chooses to make the inscriptive author its direct interpreter, and himself an indirect interpreter. That is, he makes a guess—which may be more or less educated depending on such indicia as the text, its context, and the information he has about the inscriptive author—about which tropological inference rules the inscriptive author herself would use to transform the interpretandum into an interpretans, and he is choosing to treat this reconstructed intent as the meaning of the interpretandum. The critical point is this: The choice to treat the inscriptive author's reconstructed intent as the meaning of the text is a higher-order normative choice, dictated by considerations of political morality. Even the decision regarding whose direct interpretation to privilege—whether it should be that of the inscriptive author or of someone else—is guided by higher-order norms.

IV. CONCLUDING REMARKS: TOLERATION AND CANDOR IN LEGAL INTERPRETATION

Most of the analysis so far has been devoted to the operation of tropological inference in legal interpretation. In this final section, the Note offers an application of the tropological analysis to the question of the role of judgments of political morality in legal-interpretive inference. The application must be brief, and fuller exposition awaits further research.

Several theorists have in different ways articulated a moral norm whose subject is higher-order interpretive norms themselves. According to this moral norm, there is a rebuttable but strong presumption that a legal interpreter—especially, but not exclusively, one whose interpretive decisions are backed by the power of the state—will openly and self-reflectively

75. Various philosophers have examined the types of assumptions interpreters make about inscriptive authors when trying to discover their intention. The most complete treatment of these assumptions is to be found in Grice's work on implicature and the cooperative principle, work that one may take to be a greater elaboration of the principle of charity discussed by Quine and Davidson. See Grice, supra note 3; see also supra note 20.

76. See R. Dworkin, supra note 73, at 43-55; see also E. Morgan, INVENTING THE PEOPLE (1988) (discussing changing views in American constitutional history regarding who was to be counted as part of popular sovereign). The normative decision to treat an inscriptive author as the representative of a group (such as a popular sovereign) relies on synecdochic inference—see supra note 23; see also R. Lanham, supra note 22, at 97 defining synecdoche as "[s]ubstitution of part for whole, genus for species, or vice versa"—as Professor Ackerman has observed. See Ackerman, supra note 56, at 1026-30.

77. See sources cited and quoted supra note 53; cf. O.W. Holmes, The Path of the Law, in COLLECTED LEGAL PAPERS 167 (1920) (discussing law as "incidence of the public force through the instrumentality of the courts").
make clear the higher-order interpretive norms on which his interpretive inferences ultimately rely.

The microanalysis of interpretive inference offers a model in which one can see clearly how this norm relates to other interpretive norms. The moral norm—let us, following Professor Shapiro, call it the principle of interpretive candor—has its origins in arguments offered by a variety of legal scholars and moral philosophers. We find this principle in Professor Dworkin’s argument, for example, that “judicial review . . . forces political debate to include argument over principle” and that while this debate “does not necessarily run very deep, nor is it always very powerful,” nevertheless legal interpreters ought to “work, openly and willingly, so that the national argument of principle that judicial review provides is better argument for our part.”

The principle of interpretive candor does not demand naive declarations about an interpreter’s motives in which interpretive norms (such as “follow the original intent”) are offered as simplistic rationalizations; rather, it fully admits the complexity, competition, and perhaps even contradiction among the norms that may wrestle for supremacy in a given act of interpretive judgment. It does, however, demand that interpreters make clear to themselves and others the moral and ideological bases for their decisions. Because higher-order interpretive norms are the final defense

79. R. DWORKIN, supra note 53, at 70.
80. Id. at 71. Of course, as Professor Dworkin recognizes, there are times when morality demands that a legal interpreter not be candid. His judgment is that there must be a presumption in favor of interpretive candor, which can be rebutted only by extreme moral circumstances. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 326–27 (rev. ed. 1978); see also R. COVER, supra note 70, at 6 (discussing options faced by judge “caught between law and morality”). Similarly, Professor Shapiro argues that “fidelity of judges to law . . . may, on . . . extraordinary occasions, yield to moral duty,” and queries, “[s]urely, there is a ‘hardly ever’ formulation adequate to capture this thought.” Shapiro, supra note 78, at 750. Professor Shapiro comes even closer to the present point about candor in reliance on higher-order interpretive norms when he notes with disapproval that legal interpreters sometimes pass, sotto voce, from one (in this Note’s terms) tropological inference rule to another: “Lawyers in general, and judges in particular, coin or adopt metaphors and then forget that they are only metaphors.” Id. at 733. Further, a “problem of candor may arise when a simile is turned into a metaphor—when the speaker, believing that A is like B, says that A is B, and thus says something he does not believe.” Id. Shapiro’s point to and about lawyers and judges is quite similar to Nietzsche’s point to and about alethophilic philosophers:

What, then, is truth? A mobile army of metaphors, metonyms, and anthropomorphisms—in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.

82. Ronald Dworkin argues that the norms of legal interpretation are inevitably norms of “political theory,” Dworkin, supra note 2, at 249, 265, but the distinction he makes between “political theory” and “personal or partisan politics,” id. at 249, is not supportable. The higher-order norms guiding legal interpretation are partisan norms in that competing factional groups struggle to have those norms prevail in both legal interpretation and political life generally. It is true that these fac-
an interpreter can offer for acts of legal reasoning that are by their nature efforts to justify the conclusions reached in legal interpretation, they should figure much more prominently and reflectively in interpretive disagreements than they now do, especially, but not only, in divisive hard cases.

Candor in interpretive justification requires even more than identifying the norms that motivate choices of interpretive inference rules. One great danger in a system that demands justificatory reasoning is that acts of interpretive judgment regarding familiar texts come to travel too smoothly along grooves cut by tradition and habit, in which what was at some point a live struggle with difficult issues becomes a frozen relief. An interpretation cannot be justified unless it both acknowledges the feasibility of alternative patterns of inference and either accepts new interpretive patterns or actively defends its choice not to do so. Only in this way can an interpreter meet the demands of candor in interpretive justification.

Mill's argument concerning the need for tolerant justification in the sphere of moral belief is instructive regarding the politico-moral practice of legal interpretation. Mill suggested that a moral reasoner must ever be open to beliefs and arguments other than those she has come to prefer. Even if she does decide to remain fixed in an interpretive approach, having actively to defend against alternatives will make her understand better for herself, and justify for others, why she remains fixed. Real justification of an interpretive judgment requires that interpreters constantly alienate themselves from habitual patterns of interpretive inference, that they move from "is" to "ought" in legal interpretation, asking not what a text does mean, but why we ought to use the higher-order norms that make it mean one thing or another.

What is true of the interpretive species of moral judgment is true for the genus of moral judgment as a whole: "[I]f it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth." To meet the demands of candor and justification, the legal interpreter must accept as true only those interpretive beliefs that have "a standing invitation to the whole world to prove them unfounded," and then only after she herself, in the manner of Mill's Cicero, acts as her own devil's advocate in generating challenges to the received, settled, traditional patterns of interpretive inference to which she finds herself drawn. For she knows that "[t]he steady habit of correcting and completing" her accustomed interpretive judgment by "collating it with those national groups are pushed to be more reflective about their interests when they enter the "forum of principle," see Dworkin, supra note 73, at 516–18, and that in such a forum they deploy more ennobling rhetorical resources than in other political arenas, but their interests, however well-considered and well-phrased, still are factional, and partisan.

84. Id. at 22.
85. See id. at 36.
of others," from across the spectra of ideology and political morality, "is the only stable foundation for a just reliance on it . . . ." 86

Legal interpretation is often as much a process of self-discovery as of textual felicity. The principle of interpretive candor demands more than that judges be as candid as their often hurried reflection allows. Given the complexity of holistic normative judgment, judges are sometimes not aware of the norms that guide them. To guard against this oversight, candor calls on all legal interpreters, and especially judges, to undergo the patient work of Socratic self-analysis to identify their guiding norms both for themselves and for others. Given the importance of candor for those interpreters whose judgments "signal and occasion the imposition of violence upon others," 87 failure to undergo this self-examination must be considered willful self-ignorance, and that ignorance is a loss of candor. Most troubling, of course, are cases in which an interpreter willfully ignores the sources of his interpretive motives and proffers other sources thought to be more politically acceptable. The well-known complaint about "formalism" in judicial reasoning 88 is a charge of failed candor, and many patient studies have suggested appropriate targets for the charge. 89

The principle of interpretive candor is a norm that predominates over higher-order norms. It calls on interpreters constantly to alienate themselves from accustomed patterns of interpretive inference, for only by such an interpretive practice can interpreters fulfill the Socratic injunction to lead the examined life, to know themselves, and thereby to open up to high-level critical scrutiny both the institutions that restrain legal meaning and the interpretive values by which they do so.

86. Id. at 21.
87. Cover, supra note 53, at 1601.
88. H.L.A. Hart, supra note 26, at 126 (defining formalism as effort "to disguise and to minimize the need for . . . choice [in the application of general rules to particular cases] once the general rule has been laid down").
89. See Shapiro, supra note 55; Public Citizen Litigation Group, supra note 55.