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Connections: Interpretive Perspectives and Social Attitudes

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CONNECTIONS: INTERPRETIVE PERSPECTIVES AND SOCIAL ATTITUDES

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I. INTRODUCTION

Objectivism in the interpretation of rules of law hinges on the perception that meaning exists apart from or outside of the mind of the person engaged in the interpretive enterprise.[1]

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[1] Thus, it has been written about the Langdellians that: "The rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability." KARL LLEWELLYN, THE COMMON LAW TRADITION 38 (1960).

Subjectivism, in contradistinction, rests on the notion that meaning cannot be separated or removed from the mind of the person called upon to construe the rules at issue.[2] In recent years, debate over which of these two approaches is most accurate has proceeded under a variety of different labels.[3] Little time and attention, however, has been devoted to fundamental questions like the possibility that differing interpretive perspectives may be connected with specific social attitudes.[4] Taking up that theme, this

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See also Duncan Kennedy, *Toward an Historical Understand of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, in* 3 RES. L. & SOC. 3, 21 (S. Spitzer, ed., 1980) (arguing that legal rules, like principles of science, dictate certain results).

2 *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 339 (1979) ("'Subjective'. . . contrasts with 'corresponding to what is out there,' and thus means something like 'a product only of what is in here'"). *See also* STANLEY E. FISH, *Introduction: Going Down the Anti-Formalist Road in* DOING WHAT COMES NATURALLY 4 (1989). Fish stated:

> There is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation.

Id.

3 On originalism v. interpretivism generally, see M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 32 (1982) (criticizing originalism); William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Edmond Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); Ronald M. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

On certainty v. indeterminacy, see Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1989); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

On rules v. standards, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

On foundationalism v. anti-foundationalism, see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 892-917 (1989).

For some recent literature on the topic of interpretation, see J.M. Balkin, *Transcendental Deconstruction, Transcendental Justice*, 92 MICH. L. REV. 1131 (1994); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993).

4 *See generally* Rex J. Zedalis, *On First Considering Whether Law Binds*, 69 IND. L.J. 137

essay's thesis is that there is some good reason to believe objectivism in interpretation is less likely than subjectivism to evidence a social attitude in which concern is present for the individual plight of each member of the citizenry. This thesis is related to, yet clearly distinct from, the one put forward by Duncan Kennedy in the late 1970s[5] regarding the resemblance between the terminology and imagery of a rule-oriented system and autonomy, on the one hand, and that of a standards-oriented system and altruism, on the other.[6]

My effort to go beyond resemblance and suggest the existence of circumstances linking objectivism with a lesser degree of concern than manifested by subjectivism for the plight of each member of society, proceeds by briefly identifying in Part II the precise features of both individualism and community. The suggestion emerging is that individualism's focus is on each discrete self as a free-standing and separate part of the societal unit, while the focus of community is on the interindividual relationships between the selves comprising the larger grouping.

Parts III and IV then pick up the essentials of my thesis. Objectivism is tied to individualism, and subjectivism to community. This is done by taking up objectivism in Part III and showing: how its key characteristics have much in common with, and contribute to, an individualist view of the world; how its employment in the interpretation of law results in decisions tilted toward individualism; and how a certain parallelism exists between periods of judicial preference for objectivism and socio-political theory of an individualist sort. Part IV then turns its attention to subjectivism, showing: a strong correspondence between its principle attributes and the central features of community; the fact that court decisions utilizing a subjectivist approach in the construction of legal rules resonate with a sense of community; how subjectivism nourishes or sustains a community-minded vision of social life; and how periods of court predelicition toward opinions based on its interpretive perspective track historical periods dominated by community-favoring socio-political developments.

Part V of this essay concludes with some observations on the current state of tension between individualism and community in

(1993) (exploring the possibility that law is not inherently obligatory, thereby rendering questions of interpretative perspective merely academic).

[5] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-76 (1976).

[6] *See* Schlag, *supra* note 3, at 418-22.

the context of public decisionmaking generally, and it suggests the desirability of moving in the direction of reconciliation with others.

II. Of the Individual and the Community

Prior to expounding on the basic features of individualism and community, it is important to observe that when I indicate that an objectivist approach to construction is more likely than a subjectivist approach to lead to diminished concern for the individual situation of each citizen, I mean it focuses on promoting the individual as an autonomous being more than as a member of a community. That is not to say objectivism is not concerned with the condition of the community; it is as interested in the collective condition as is any other interpretive theory.

The notion of community, however, has two dimensions.[7] One dimension involves the larger unit created by the conjoining of several individual components. This is the common conception of community that exists in day-to-day understanding. The other dimension of community involves not the product or result of the conjoining, but the relationships between the individual components conjoined. The one is a notion of community as a collective, where the focus is on the larger unit as a unit. The other is a more difficult notion of community as the quality and character of inter-individual contacts between those who comprise the larger unit. The focus is on what exists between the components that together make up that corporate body. It is in this second sense that community is used here. This point cannot be stressed enough.[8] What

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[7] For some recent writings on the idea of community, see Ronald M. Dworkin, Law's Empire 167-75, 206-24 (1986) (discussing community as a concept that gives integrity to law). *See also* Michael J. Sandel, Liberalism and the Limits of Justice (1982) (discussing community as a concept that can undermine liberalism) and Liberalism and Its Critics (1984); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989) (examining modern republicanism and the concept of community); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 Mich. L. Rev. 983 (1990) (examining whether the new republicanism incorporates notions of communalism).

[8] It is not enough to leave it at that, for one might arrive at some erroneous conclusions from what I have suggested. Therefore, let me reiterate that objectivism is very much concerned with the general condition of the community, while also being concerned with the individual as an autonomous being. These two concerns are not inconsistent. The belief of objectivism is that the interest of the community as a unit is best advanced by the promotion of the individual as an autonomous being. As a rational entity living in contact with others, however, the individual appreciates that it can best advance its own interests by pursuing actions that also advance the interests of the community. This seems a particularly Smithian notion. *See generally* Adam Smith, Wealth of Nations (1776). What focuses on individual autonomy consequently focuses on the community unit as well. Objectivism's regard for the commu-

I suggest is that objectivism is not aimed at promoting, and indeed is more likely than subjectivism to foster a lesser degree of concern for, interpersonal relationships which serve to generate action regarding the plight of the individual citizenry.[9]

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nity, however, is one that, again, attends to the bottom line, the product that results from the relationships between the individuals that constitute the larger unit.

As for subjectivism, its focus on the quality and character of what relationships exist between the individuals making up the community unit is not a focus that ignores the individual or community either. The basic idea is the improvement of the overall health of the larger group, the collective or corporate body. In the estimation of subjectivism this is best accomplished through giving close attention to the inter-individual relationships between each discrete citizen making up the community unit. Of necessity, therefore, the individual cannot be ignored. The attention the individual receives, however, is attention aimed not at stressing the autonomy of each member of the community, but attention aimed at stressing each individual's duality. As thinking social beings brought into existence by others of like nature, we all face the ever-present tension or pull between the individual as an independent agent and the individual as part of a community. Through emphasis on the relationships extant among the members of the community unit, this duality is affirmed and an inescapable condition of individuality is given deserved consideration.

9 Before discussing the basic features I see manifested by both the notion of the individual and that of the community as described above, conscience compels me to state one important thing. A short time ago I could not have written what I am now about to write. I say this because some of the beliefs and intuitions which follow cannot help but be pregnant with information I have always considered sensitive and closely guarded; information which bears my heart and soul and exposes me to all sorts of depredations by those who pride themselves on possessing something they can lord over another. The passing years, however, have thinned the armor I have long worn to protect myself from vulnerability. The primary cause for this has been the battles fought in my own mind over the perennial questions associated with the meaningful and important things in life. Fear of ridicule now pales before incessant curiosity, leaving me much more incautious than I once was. Many of the ideas I have tried out have proved incapable of satiating the longing I feel for self-realization, wholeness, and unity.

As hard as it is for me to admit it, I suspect I have gone unsatisfied because of "estrangement" from my fellow man and woman. This is not the sort of estrangement that has to do with my admitted neglect in working social contacts. It is an estrangement that has to do with deep-seated emotions that I feel have served to separate me from others. I use estrangement here in the same psychological sense in which Freud originally used the notion of "oceanic feeling" in his famous work *Civilization and Its Discontents*. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 11-12 (J. Strachey trans., 1961). The idea is one of some unremitting inner turmoil, a constant nagging of the mind. On the relationship to liberal legal theory of Freud's theory about the origins of law, see generally Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

Some might argue that the perennial questions with which I have struggled are simply the product of misguided thinking initiated about more than 2,000 years ago by the ancient Greeks. They might further suggest that people have needlessly struggled since that time with a variety of diverse implications from the thoughts of the Greeks and their successors, and that we would all be better off to jettison this philosophical heritage and look for life's actual meaning and importance in the life we create for ourselves and others. The questions which have plagued thinkers for over two centuries are based on nothing more than an inadvertent turn of mind pursued

A. *Internalness/Outwardness*

In its most general sense, individualism is typified by attention to the self, whether one's own or another's. The self is the yardstick by which the approbation or dissatisfaction with all things is measured. The general condition of the society is linked to the self's understanding of its own position vis-a-vis the positions of others.[10] This preoccupation with self leads to concentration on the situation that exists in the internal sphere of each person as a distinct and separate entity. Obviously, such concentration tends to feed the general belief that the individual is the center of all and thereby perpetuates the basic focus.[11]

While it is true that concentration on the situation extant in the internal sphere of each individual may result in attention being drawn to the well-being of others, it is just as true that the internal or inward focus provides the opportunity of connecting well-being

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by others in a vain attempt to develop satisfactory answers. Though much in this line of thought strikes me as convincing, one matter that I find difficult to accept concerns the suggestion that questions about the meaningful and important things in life trouble us because of what the Greeks began long ago, and proper education has perpetuated.

I cannot help but feel that some of the fundamental questions by which any reflective person happens to be troubled have more to do with natural, instinctive drives and urges than with the thoughts of Greek philosophers or riveting humanities teachers. As living beings we all have need for air, water, and food. Even if the Greeks had never uttered a word about distribution of essential resources, human sharing and compassion, I suspect that simply because we have the capacity to be aware of the significance and importance of our own individual need for air, water, and food, we would eventually stumble on those same matters. My current view is that instinctive or innate facts of nature exist; even if their existence is the result of an act of some uncreated creating force (in which I believe), too many troublesome points (e.g., the deliberateness of the act; how deliberateness implies obligation rather than intent; how obligation in nature implies moral obligation) present themselves to think that the facts form the basis for an external grounding for law. Nonetheless, such facts do suggest the availability of a pragmatic grounding. Bounded by certain discretion affecting realities, whether societal or natural, judge-made law operates without the constraint of external verities. The existence of these discretion affecting realities prevent the absence of an external grounding for law from leading to total nominalist chaos. I sometimes believe it is the fear that we will slip into chaos which prevents the objectivist from entertaining the thought of an ungrounded *weltanschauung.* Conversely, I often believe it is the fear of crusading self-righteousness which scares the uncertain subjectivist from the thought of transcendent verities. The entire history of civilization suggests the legitimacy of the latter fear. As I see it, the fact that most all of us daily act pragmatically suggests the fear of chaos is significantly overblown. The inescapable societal and natural realities of life counteract any movement in that direction.

10 On formation of self concept, see generally MORRIS ROSENBERG, CONCEIVING THE SELF (1979).

11 On the ego, see generally MUZAFER SHERIF & HADLEY CANTRIL, THE PSYCHOLOGY OF EGO-INVOLVEMENT (1947).

with the actions or inactions of the self. If one considers her own situation to be attractive, it is easy enough to attribute its coming about to personal labor and industry. If one sees others in situations considered less than attractive, it is just as easy to point to the lack of hard work and sloth to explain one's status.[12] In a sense, the internalness of individualism makes possible the claim that "people are responsible for their own condition."[13]

Internalness clearly affects one's perception of the world. Centering on the individual produces, to state it pejoratively, a bottom-line disposition. What becomes preoccupying is the situation in which the self is found. Such heightened emphasis on a result or end product gives insufficient regard to the process involved in getting to that bottom-line. The exchanges, understandings, accommodations, commitments, and carefully put together relationships needed to effect a particular situation for the individual self receive less consideration than merited by the essential roles these things play. The important agent of process is relegated to inattention by the consuming interest in the bottom line.[14]

In contrast to the internalness of individualism stands the outwardness of community.[15] The self is not ignored, but viewed from the vantage of what is exogenous to and yet supportive of the self. This new twist focuses on the interindividual associations, the actions or operations conducing to some particular end, the

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[12] This is akin to arguments on self-reliance. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 119-22 (Ogden ed., 1931) (providing similar statements on self-reliance or initiative); *see also* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17-20 (T. Peardon ed., 1952) (examining concepts of labor giving one a claim to property). *See generally* F. HAYEK, THE CONSTITUTION OF LIBERTY (1960); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915 (1956) (discussing traditional notions of individual initiative in American society).

[13] *See* 2 SELECTED CRITICAL WRITINGS OF GEORGE SANTAYANA 61 (N. Henfrey ed., 1968) (proferring that American individualism believes every person should "stand on his own legs"). On individual responsibility and accountability, see generally Rex J. Zedalis, *On First Considering Whether Law Binds*, *supra* note 4. For an account of responsibility, among other things, in the context of punishment, see generally Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992).

[14] *See* FREUD, *supra* note 9, at 49-55 (discussing how eros, the libidinal love instinct, involves a tension between needs of the individual and needs of the larger unit); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 192-98 (Mentor 1956) (discussing his perceptions regarding the internal focus of individualism and how Americans have used free political institutions to address problems associated therewith). On the importance of relationships generally, see Jean Bethke Elshtain, *Feminism, Family, and Community*, 29 DISSENT 442 (1982); CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEG. ED. 39, 40-44 (1988).

[15] *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 11-15 (1985) (discussing benevolence as outward-looking and contrasting it with ethical egotism).

processes connected with the accomplishment of some goal or objective. The self is seen as the beneficiary, or victim, depending on the circumstances, of the results springing from the relationships between people. There is cognizance of the connection between these relationships and the self. However, it is the actual relationships, the real-life associations, not the situations of the individuals involved, the bottom-line, if you will, that is the overriding concern.[16]

This shift from the self to the interpersonal relationships between selves expands the factors one might view as important in regard to responsibility. Concomitantly, one may be able to understand one's own personal situation, or the situations of others, as related to individual diligence *and* general social conditions with which the self may have to cope. The position of individual initiative is not pushed aside, it is set in the context of the ambient social environment. The central concern is the relationships between the individuals that produce that environment. The self is important as the object of the environment that derives from the relationships. However, while it may be suggested that the relationships focused on by community are capable of being seen as having an impact on the self, it would be inaccurate to conclude that all the self eventually becomes is the result of those relationships alone.[17]

B. Circumscribed/Inclusive

As alluded to, the individualist perspective is quite able to allow consideration of others. The consideration, though, is to the self of other persons. Moreover, the individualist perspective can find it easy to explain the position of other selves in terms of personal responsibility. As a consequence, the entire attention of individualism is clearly circumscribed. Everything is evaluated in terms of the internalness of self. This understanding that significant consideration is limited and confined plays a major role in the development of stratagems for dealing with the difficulties of day-to-day life. Each mechanism or device employed to address those difficulties revolves around the concept of self. Factors external to the individual are viewed as superfluous irrelevancies.

The circumscription of focus implicit in individualism suggests

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16 *See* IRENAUS EIBL-EIBESFELDT, LOVE AND HATE (1971) (arguing that there is preprogramming towards some altruistic behavior).

17 For a discussion of behavior generally, see ARTHUR COOMBS & DONALD SNYGG, INDIVIDUAL BEHAVIOR (1949).

prime emphasis be put on the development of an attitude of self-reliance. As it is the self that got one into the predicament now faced, any extrication must be the product of self. But because extrication to be successful must, by definition, be the result of individual initiative and persistence, those cognizant of the misery of others should stand aside as much as possible and do little beyond offering encouragement. For those attempting to pull themselves up, this message can be double-edged; it can serve to empower them to control their own destinies while threatening them with abject disconsolation.[18]

Focusing on the relationships between people, as is done by the notion of community, enlarges the scope of consideration over what is relevant from an individualist view. The self continues to be as important as it was in the context of the contrast of internalness and outwardness. The inclusiveness of community does not deny the place of the individual. It does, however, suggest it is not enough to center on the self and exclude reference to interpersonal relationships.[19] Generally, such inclusiveness is a corollary of community's outwardness. In calling for awareness of what lies beyond the self, that which concerns the dealings between selves is raised. Those dealings then become the object of curiosity and investigation. Upon discovery of the fact that the dealings between individuals, the relationships between selves, play a part in the development of each separate self, an awareness arises regarding the importance of such interactions.

The recognition of the importance of the relationships of selves to each other is significant for the implication it can have on visions of the world. While the circumscribed gaze of individualism leads one to see the conditions around them as the creations of separate actors in control of their own destinies, from the inclusive view of community what exists is the product of the self as affected by the relationships between all those who comprise the particular society involved. Community brings within its ambit consideration of both the self and the interindividual interchanges that follow from the coming together in political union. The health and vigor of those relationships are as much a concern of community as the condition in which the self is found.

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[18] One author dealt with the basic idea of self-satisfaction, arguing that it is implicit in individualism's circumscribed or limited perception. *See* THOMAS HOBBES, LEVIATHAN 104-09 (Liberal Arts Press 1958) (arguing that self-satisfaction is a natural condition).

[19] On the altruism of community's inclusive perspective, see M. RICHTER, THE POLITICS OF CONSCIENCE, T.H. GREEN AND HIS AGE 267-91 (1964).

C. *Hands Off/Attending To Externals*

A third attribute manifested by the individualist view follows from both internalism and circumscription. These two set the pattern for what individualism considers important. Obviously, it all revolves around the limited realm of the self. When it comes to what lies outside of or beyond the self, little if any time and effort need be expended. Because the essential matter is the self, it seems inexplicable that time be exhausted on meaningless undertakings. Progress on all fronts will proceed when everyone concentrates on self-development.[20] This need not mean that other people be ignored. One can demonstrate fidelity to the individualist vision and show concern for the selves of others. The prime consideration connected with the attention accorded to other selves, however, should be that of stirring them to realize they have control over their destinies.[21]

This last point is important. It is true that in directing attention to the selves of others something external of one's own self is considered. That would seem insufficient to suggest the individualist view takes not an approach of hands-off, but one of involvement when it comes to what exists outside the self. Concern can be shown for others without concern for the relationships that serve to hold those others together. The fact that concern for others is simply a concern for the selves of others illustrates the commitment of individualism to internalness and circumscription. Others are not focused on because a recognition that exists between one's self and others is of significance. The idea of individualism considers others only because they, too, are selves,[22] and through the self, progress is made.[23]

In contrast to the individualist approach of hands-off externals, the approach endorsed in the idea of community is one of

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20 The gospel of self-reliance is clearly evidenced in Ralph Waldo Emerson, *Self-Reliance in* ESSAYS, FIRST SERIES 37 (1847); *see also* HERBERT SPENSER, JUSTICE (1891).

21 Early economic writings have captured the theme of self-reliance. *See, e.g.*, BENTHAM, *supra* note 12. There are also contemporary analysts of the politics of this message. *See generally* EUGENE V. ROSTOW, PLANNING FOR FREEDOM (1959); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). *See also generally* A. OKUN, EQUALITY AND EFFICIENCY, THE BIG TRADEOFF (1975) (providing a contemporary economic assessment of individualism and the notion of "hands off").

22 *See generally* THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970) (discussing the question of whether one can really ever act out of pure concern for others).

23 *See generally* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (discussing the social inclinations and disinclinations of human beings).

attending to externals. As community is characterized by both outwardness and inclusiveness, attending to externals suggests caring for, and seeking to help strengthen, interindividual associations that arise from societal life. The whole notion of community revolves around the ties that bind one self to another. These ties are to be watched, nurtured, urged to grow and flourish. Watching implies oversight to constantly observe their condition, as well as circumspection in the conduct of one's own life to assure nothing untoward is done to short-change relationships. Nurturing the ties with others implies the taking of affirmative and protective measures to secure the health of interpersonal connections.

By attending to the relationships between the individual members of a given society, not only is the society better able to guarantee its continuation by strengthening the bonds of community, but each distinct self also comes to experience a new understanding of the parameters, the complete dimensions, of the self. What in the conception of the individualist is seen in the limited and internal sense of an essence existing separate, apart, free from others, comes to be seen as the device capable of moving us in the direction of an awareness of our similarities and commonalities. The self benefits from attending to the relationships between individuals. Those benefits accrue as a consequence of heeding the call for care to the ties that bind each of us to one another. This points up that the relationships consist not of the mere personal courtesies involved in social etiquette, but of the deep and abiding, difficult to liberate, desire for affinity and friendship which pangs us all.

D. Expressive/Receptive

From what has been said so far, it seems clear that the individualist conception is one that is inward and focused on the self. The communalist conception, on the other hand, is outward and focused on others. It is therefore natural that individualism should be typified by expressiveness and community by receptiveness. These opposed manifestations, however, can be thought about in distinct ways. For instance, expressiveness might be thought of as connected with a need to persuade or, alternatively, with a need to simply let others know how one sees things. Receptiveness might be thought of as connected with introspection or, alternatively, with a desire to be good at listening to what is said by others.[24] In this section, I am concerned only with the contrast between letting

[24] Listening or receptiveness has been addressed as an aspect of compassion. *See* Paper presented by The Most Reverend Edmond L. Browning, Presiding Bishop, The

others know how one person sees things and being good at listening to what others say about how they see things. The issue of persuasion versus introspection is taken up later.

The natural linkage of individualism and expressiveness—again, the latter used here as meaning the need to communicate to others one's own perception of things—seems obvious in light of the fact both center on the self. Expressiveness revolves around a particular assessment of the importance of one's understanding of things. The idea being that what I happen to think or feel is valuable. As such, my thoughts and feelings merit passing to others. The preoccupying character of one's own thoughts and feelings tends to result in those had by others receiving little attention. Thus develops the limited and circumscribed vision typical of the individualist conception. Only the self is important. All that exists beyond the self is to be left alone and ignored. Within this hands-off attitude resides tremendous freedom for each person. While other selves exist, the task is to stress their self-reliance, not to encourage the erroneous and misguided belief of some interconnection.

The receptive quality of community stands in contradistinction. Receptiveness as listening includes both an openness to sharing time, as well as an interest in the perceptions others have of the listener's views. Openness to sharing time involves the small act of putting daily existence on hold when others communicate what they think and feel. This has the effect of implying that what one desires to communicate is of value. The result is to nurture esteem of the individual who is communicating, and suggest that others care about the regard one has for one's self, thereby strengthening the bonds that link us to each other. The act of listening also suggests to the one expressing one's self that the views of others should be considered in the context of formulating what one maintains as one's own position. It also serves to ease apprehensions about revealing one's view on any particular matter. Without openness, shared commonalities cannot be recognized and empathy cannot be experienced.

Receptiveness as an interest in perceptions others have about the listener's views is the second aspect of willingness to listen. Of the two, this may be the more difficult. One may condition one's self to allow another to say what is on their mind. If what one has to say concerns the listener, it may be hard to receive the observa-

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Episcopal Church, *The Ministry of Compassion* (April 25, 1993), *in* THE RITA & WILLIAM H. BELL LECTURE PAPERS, THE UNIVERSITY OF TULSA (1993).

tions, or resist reacting in a combative and hostile way. To rise above such inclinations clearly taxes the limits of human tolerance; it also allows others to witness the flexibility and sympathetic nature of the listener. Few more powerful messages exist than receiving criticism, showing concern for what led to its being voiced, and demonstrating a willingness to make changes for the sake of a relationship. Such a capacity embodies the essence of outwardness. Attention to the self is eclipsed. The interest in securing ties between individuals is elevated to preeminence.

E. Advocative/Self-Examining

As intimated, the expressive nature of the individualist position can mean a desire to tell others what one happens to think and feel. Alternatively, it can mean telling others with the objective of attempting to persuade them. This form of communication, which I term advocacy, is what we now consider. Though associated with expressiveness, advocacy is distinct in that it seeks as its end persuasion, rather than imparting information. As a consequence, advocacy could be understood as comprised of certainty in the correctness of one's own position and pursuit of divergent ideas with the aim of proving them so unfounded that others come to accept instead the advocate's position.

The feature of advocacy that has to do with self-assurance in the accuracy of one's position typifies the individualist conception. Centered on the self, it is easy to arrive at the conclusion that the view of the world developed within reflects reality. Confirmation comes from the fact that one avoids looking beyond the narrow and circumscribed limits of what they themselves happen to consider relevant. All this is supported by the belief that one should be allowed to formulate ideas and develop generally without interference from others. Thus, certainty about the correctness of the positions one holds seems a logical correlative of individualism.

Attacking divergent ideas with an eye towards disabusing others of the notion that such ideas can be sustained, and with a desire of convincing them of the cogency of the views the advocate holds dear, is also a correlative. This effort at persuasion reveals a tension inherent in the individualist conception. The tension arises because the drive to persuade is at odds with individualism's hands-off approach. The tension might be side-stepped, however, by confining the scope of noninterference to everything but ideology. If the hands-off approach leaves relationships alone and concentrates on the development of the individual, efforts to convince

other selves of the attractiveness of some particular position square nicely with the basics of the individualist agenda. But irrespective of how the tension is dealt with, advocacy involves persuasion, and persuasion entails undermining conflicting positions and cajoling or browbeating others until they embrace what the advocate deems appropriate.

In contrast to the advocacy of individualism stands the self-examining or introspective nature of community. As advocacy is a corollary of the expressiveness of the individualist conception, so self-examination or introspection is a corollary of community's receptive or listening quality. As noted earlier, receptiveness can be taken to mean either a willingness to listen to the views of others, or it can be taken to mean a willingness to open and revisit one's own thoughts and feelings.[25] When community is exemplified by self-examination or introspection, it is this latter sort of receptiveness which is involved. Self-examination is a possibility because community is outward looking, inclusive in focus, and committed to attending to externals. Self-examination depends on flexibility with regard to certainty about the accuracy of one's own understandings. Community provides this by permitting consideration of decisional factors from an array of sources, while placing relationships between selves on a more elevated level than occupied by each self as a freestanding entity.

The essence of introspection is openness and pliancy. It involves a humility regarding one's self and a sensitivity for others. Humility consists of an absence of arrogance. This connotes a capacity for seeing one's own views as in a state of potential evolution and change, always ready to transform to reflect new knowledge or perspectives. Resistance to altering beliefs does not appear, because the certitude surrounding individualism is lacking. This is not to suggest that humility equates to an absence of conviction, but rather that it evidences a willingness to subject positions held to re-examination. The essence of re-examination is study of one's convictions on the basis of previously unconsidered information. This is how the notion of sensitivity for others becomes relevant. Through our relationships we gain an awareness of considerations which may have the capacity to affect the way things are perceived.

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25 *See generally* W. LANGLAND, PIERS THE PLOUGHMAN (1370) (J.F. Goodridge, trans., Penguin Classics 1959) (providing a late-14th-century example of an account involving life-long re-examination in search of the meaning of existence and truth); *see also* HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 432 (Sentry ed., 1961) (criticizing introspection as drowning in the reflection of one's own thought).

F. Doctrinaire/Accommodative

Another aspect of the individualist view is it tends to result in adherents being doctrinaire. Because an attribute of individualism is advocacy, and advocacy involves persuasion, it is natural for the individualism to be linked with strict insistence on a certain position. An interest in persuasion seldom results from ambivalence, uncertainty, or a desire to rethink ideas. Doctrinaire behavior is typified by absolute assurance that what one thinks and feels is correct. Little tolerance exists for reconsidering thoughts and feelings. Self-examination, introspection and re-evaluation result in time wasted, no matter that what one maintains as true proves incapable of squaring with new information or perspectives. Having settled on some particular understanding, it would be an affront to the self to do anything less than attempt to fit all that comes before us into our own visualization of reality.

In one manner of speaking, the doctrinaire attribute of individualism captures the purest form of commitment and fidelity. It also holds the potential for intransigence. Community embodies, in the alternative, the idea of accommodation.[26] From the vantage of the critic, the accommodative nature of community may signify the absence of resolve. A more hospitable commentator might suggest that accommodative means a friendly, amiable tolerance of divergent views in order to better inform one's own opinions and strengthen the affinities within the community.

Regardless of one's posture, accommodation is an outgrowth of community's receptive and self-examining nature. These attributes lead to the accumulation and internalization of information. As self-examination is manifested through openness and pliancy, associating accommodation with community is thus natural. Having unconsidered information at hand, and conscious of the need to attend to interindividual relations, thoughts and feelings can be revisited and restructured to comport with enhancing the closeness of relationships between society's members. Openness allows for the entrance of the information, pliancy for re-examination of beliefs. It is the attentiveness to interindividual associations, however, that facilitates the move to redoing thoughts and feelings. This interest in a matter external to any independent self kindles a flexibility founded on compassion, thereby softening otherwise rigid positions.

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26 *See generally* Dworkin, *supra* note 7 (setting forth the idea of compromise as an aspect of integrity in a system of law); *see also* Hobbes, *supra* note 18, at 125.

G. Detached/Empathetic

Though more could be listed and discussed, the final feature of individualism I will address is detachment. By that I mean to refer to its ability to decouple itself from others and view things from its own separate vantage. As with the previously mentioned attributes comprising the individualist understanding, the feature of detachment follows from many of the other features—most prominently, internalness, circumscription, and hands-off externals. Decoupling from others is a natural consequence of individualism's preoccupation with the self, and a technique thought to impart greater neutrality to decisions.

To detach one's self means to move to a position in which thought and emotion are conjured without regard to what is taking place beyond one's limited, internal sphere. Detachment of this sort serves to slight the relationships extant within any collective body. What exists outside the self is regarded with suspicion. The end result may be an increase in the perception that decisions and thoughts are arrived at dispassionately and neutrally. In disconnecting from what lies beyond, however, detachment presents difficulties for interpersonal relationships. The principal difficulty has to do with concentration on individual independence resulting in a paucity of attention to interdependence between individuals making up society. The result is that it becomes hard to stay abreast of the concerns of others, extremely arduous to place one's self in their position, and next to impossible to allow for change in one's own view of things.

The empathy of community contrasts starkly with the detachment of individualism.[27] As the term suggests, it involves bonding rather than separation, unity rather than disconnection. Yet empathy implies more. It implies adaptability, for after all, to have one self join with others suggests change and the absence of resistance. The roots of adaptability probably reside in community's receptiveness and accommodativeness. The former speaks of the capacity to listen, and the latter to a willingness to be flexible. Empathy is nourished by these and adds the willingness to adopt change capable of furthering union between selves. Thus, empathy suggests adaptability centered on relationships.

However, if empathy's adaptability is focused on relationships, its very meaning must also imply more. Adaptability could be con-

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[27] *See* Dworkin, *supra* note 7, at 208-15 (describing three models of community and discussing them in the context of universal empathy).

cerned only with change that remakes the self in some different and purer form, a higher level of individualism. To avoid such, adaptability must also mean the capacity of putting one's self in the position of another. This requires a letting go of preconceptions, and an embrace of the totality of the context in which other selves make their decisions and formulate their thoughts. Empathy thus involves courage to venture where the risks of confronting perspectives shattering one's most fundamental notions are likely to be extremely high. It involves the integration of these new perspectives into the understanding one has of others and why they do as they do, think as they think, feel as they feel. Empathy is elevated outwardness. It results in relationships being treated with the utmost care and attention. It understands the self as the servant, not the object of all consuming attention.

III. LINKING OBJECTIVISM AND INDIVIDUALISM

Having touched upon the principal characteristics of individualism and community, I would like to proceed to the basic task of this essay. As indicated earlier, my belief is that evidence exists to suggest objectivism is more likely than is subjectivism to reveal a social attitude manifesting a lesser degree of concern for the personal plight of each individual citizen. In this section and the next I will endeavor to explain why I hold that belief. Stated simply, however, I see objectivism as linked with individualism, and individualism as an impulse which militates against the kind of inclusive view essential for consideration of others. Conversely, I see subjectivism as linked with community, and the impulse of community as counterbalancing narrow internalness, thereby opening the potential for thoughts about the condition of others to gain access to minds that would otherwise be self-absorbed.[28]

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[28] I also feel that certain natural factors exist which increase the chances we may experience estrangement from others. These factors are sex, power, and wealth. With regard to sex, there is no doubt controversy concerning the role and status of women in society. *See generally* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); MARY RYAN, WOMANHOOD IN AMERICA (2d ed. 1979); ALBIE SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW (1978). My reference here, however, is to the natural tension between the sexes borne out of basic biological drives. *See also generally* SIGMUND FREUD, TOTEM AND TABOO (A. Brill trans., 1918) (discussing the development of social rules in prelegal society by relating it to a theory of a "father horde" in which a father figure, who maintains a horde of females for his own utilization, is overtaken and killed by sons whose own sexual passions are too intense to suppress). These libidinal urges are important, but must be kept under rein if we are to avoid skewing our relations with others. *See* DANTE ALIGHIERI, THE INFERNO, CANTO V at 58-62 (John Ciardi trans.,

1954) (indicating eternal punishment in the second circle of Hell to those who have allowed carnal passion to overtake self-control).

Admittedly, however, even usually temperate people suffer from occasional lapses. *See, e.g.*, IX *Plato's Republic, reprinted in* PLATO, FIVE GREAT DIALOGUES, 217 460 (B. Jowett trans., Classics Club 1942) (noting that even in the "good" man "there is a lawless wild-beast of nature, which peers out in sleep"). What is to be struggled against is objectification of others as pure sexual devices. *See Veritatis Splendor* (John Paul II, Papal Encyclical) at §§ 47-50, *reprinted in* 23 Origins (CNS Documentary Service), No. 18 at 297, 312-13 (Oct. 14, 1993) (arguing that sexuality must maintain the union between the body and soul).

It might be suggested that in negotiating the inconsistencies associated with libidinal drives we can come to partake of the rich complexity and subtle nuances of human sexuality. *See* DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 152-54 (1991) (discussing the concept of welcomed sexual union as openness, rather than imposition). Indeed, such an effort might help us recapture the understanding that all of us are bound together and in need of supportive interaction. *See* CLARISSA PINKOLA ESTES, WOMEN WHO RUN WITH THE WOLVES 124-28 (1992) (arguing that until the libido is dealt with we can never come to fully know others).

On the natural estranging factor of power, this too is one of life's inconsistencies. After all, we are admonished by our elders to be deferential to others, avoid judging people by their station in life, and think about happiness as an internal state of mind immune from the inevitable frustrations of influence seeking. Marcus Aurelius wrote:

> Acquire the contemplative way of seeing how all things change into one another, and constantly attend to it. . . . Such a man has put off the body. . . . [A]s to what any man shall say or think about him or do against him, he never even thinks of it, being himself contented with these two things, with acting justly in what he now does, and being satisfied with what is now assigned to him. . . .

Marcus Aurelius, *Meditations, reprinted in* MARCUS AURELIUS AND HIS TIMES 107 (Classics Club 1945).

At the same time, street smarts suggest awareness of the link between power and a modicum of self-esteem, the ability to meet daily necessities, and insulation from external abuse. Disparities in physical power can be dealt with in a variety of ways. *See* DESMOND MORRIS, THE NAKED APE 75 (1967) (indicating that female primates blunt the superior physical power of male primates through "re-modification"). Unfortunately, in our society, many males are taught that physical power is prized, and should be employed to one's advantage. Kindness, friendship, and concern are seen as feminine. We might all be better off were that not the case.

Institutional power poses more complex problems because it results in two classes: those who run the institutions affecting other peoples lives and those whose lives are affected by the institutions others run. Talent, disposition, inclination, and numerous other factors go into determining in which class one falls. Sadly, we often understand who we are by comparative power status. This frequently results in those within the institutional power hierarchy acting in a covetous and manipulative manner, thereby straining interpersonal relations which depend on giving each other support, comfort, and solace. People begin to perceive each other as pawns in a game to establish their own view of the world as controlling. Those outside the hierarchy become the subjects of someone's social experiment, and those within targets of ridicule, resentment, and calumny. Nothing positive, which strengthens the bonds uniting us with each other, emerges from uses of power aimed solely at imposing one's will on another. Without a commitment to service itself, not dominion through the chance to occupy a position of service, there is a lack of the kind of caring and reassuring attitude able to enhance the ties that hold us together. *See* Hobbes, *supra*

From what has been said in the previous section, it seems clear that one can argue individualism is not attentive to other selves. Its focus is circumscribed and largely myopic, preoccupied with concerns about one's own self.[29] It does not disregard the overall condition of the larger collective group. However, the interest it evidences in such is merely reflective of a deep-seated commitment to the self. Without any particular concern for the interindividual connections which bind the selves forming the collective, it expresses its interest in the larger unit through the belief that, if each individual making up the collective were fully attentive to the product made manifest in their own self, not only would the condition of the larger unit be more tolerable, but each self would achieve greater realization.[30] What exists external to the self is to be left alone and given no attention.[31] Interindividual connections which bind selves together are things which reside external to the self and need not be addressed. What is essential is commitment to see one's beliefs about the self through to the end and to persuade others to fall in step.[32]

On the other hand, the focus of community seems to demonstrate attentiveness to others, more as beings linked to ourselves

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note 18, at 78-80 (speaking highly of affability, generosity, and considerateness in connection with power, wealth, and honor).

On the estranging factor of wealth, money and "things" generally can separate us from one another whenever a stock-taking results in a sense of inferiority or superiority due to one's possessions being paltry or vast by comparison to another's. Often this leads to contempt or envy, or a reluctance to approach those not our economic equals, thus depriving us of the opportunity to interact as mere fellow participants in a life filled with a variety of leveling and equalizing forces. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (New American Library 1956) (stating that Americans in the late 19th-century did not utilize wealth in ways that separated one from the other). As with sex and power, the messages we hear about wealth create inconsistencies.

People should not be judged by the cars they drive, the houses in which they live, or the size of their portfolios. Nonetheless, it is incumbent on all of us to pay appropriate attention to fiscal management and assure that resources enough are obtained to guarantee a chance of success in life. One possible way to address the tensions created thereby, and simultaneously deal with the estrangement flowing from wealth, is by evidencing a spirit of generosity and an understanding of our fellow human beings that reveals an ability to look beyond the external trappings of wealth to the commonalities which unite us all. By focusing on how we share a certain fundamental sameness, we liberate ourselves from the dark influences of covetousness and jealousy and facilitate the chances of communion with others. *See Veritatis Splendor*, *supra* note 28, §§ 16-21, at 303-05 (discussing the willingness to give up worldly goods in order to attain true "perfection").

29 *See supra* notes 7-19 and accompanying text.

30 *See supra* notes 20-23 and accompanying text.

31 *Id.*

32 *See supra* note 25 and accompanying text.

than as autonomous selves comprising a social unit. It is inclusive in its perspective, taking into consideration both the self and the interindividual relations that exist between the selves that comprise any collective unit.[33] Community is also open to alternative perspectives.[34] Further, given community's interest in the ties that bind one individual to another, it evidences willingness to alter conceptions formulated by the self in order to sustain relationships and strengthen bonds.[35] As a consequence of this flexibility, community is well situated to serve as a neutralizing force to the narrow, self-absorbed character of individualism. Community makes it easier to tame self-centeredness and appreciate the value of every individual. It opens the portals leading to concern about the plight of each single person comprising the civic unit.[36] Community does not guarantee the development of interest in the condition of all other individuals, but it certainly dampens the forces that pull in the opposite direction.

A. *The Central Features of Objectivist Interpretation*

As alluded to earlier, the objectivist approach to the interpretation of legal principles is typified by the belief that meaning derives from a source exogenous to the interpreter. The objectivist believes the thing interpreted has an inherent meaning, a meaning which preexists the interpretive enterprise itself. The interpreter is to seek out established significations and proffer them as something which antedates the interpretive act. Though interpretation suggests the idea of meaning bound up with the mind and experiences of the interpreter, interpretation to the objectivist is conceptualized as an act of searching for something unconnected with the interpreter; an act like that undertaken to locate an object one has misplaced. The object of the search has an existence apart from the act of searching. The meaning of what the interpreter seeks to interpret exists apart from the person involved in the act of interpretation.[37]

From this explanation, a couple of characteristics of the objectivist vision can be ascertained. The first is that of correctness, and

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[33] *See supra* notes 7-19 and accompanying text.

[34] *See supra* notes 24-25 and accompanying text.

[35] *See supra* note 26 and accompanying text.

[36] *See supra* notes 20-23, 27 and accompanying text; Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 909-15 (1988) (suggesting the need to move to greater interindividual interactions).

[37] *See* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1211 (1989) (text v. practice).

the second is stability. Clearly, meaning is not bound up with the mind and experiences of the interpreter; it is a notion of something which does not reflect bias, prejudice, and predisposition. The interpreter merely locates or discovers what already exists. Meaning, therefore, must be acknowledged as "correct" whenever found by the interpreter.[38] Owing no part of its existence to the interpreter, meaning is what it is. Meaning exists without being procreated or informed by the one who seeks it.

Related to correctness is the characteristic of stability. If interpretation results in discovering preexistent meaning, at bottom there must be some permanent deep-structure, order, or metaplan present which is partially revealed with each interpretive undertaking. Given that structure or order, there would seem some unshakable permanence or stability inherent in all meaning.[39] While it is possible that human fallibility or deliberateness may result in an interpreter advancing an erroneous meaning, belief in a correct meaning produces a sense of repose, a feeling that there remain unalterable truths which persist throughout time. Mistaken or intentional misinterpretation can in no way change this fact. Meaning remains stable, and humankind lacks the puissance to place that stability in jeopardy.

Another, or third, characteristic of objectivism is the position it accords predictability. Because law is designed to regulate conduct, it is useful for each individual to know in advance what is expected.[40] No more unsatisfactory condition could exist than one in which the legal rules governing behavior happen not to be fixed. Predictability is tied to stability's features of being unchanging, permanent, and unalterable. If the interpreter is to find the one, single meaning capturing the relevant standard in dispute, discharging the duty discloses a part of the permanent deep-structure or order, thereby enhancing the prospects of more accurately predicting how specific behavior will be assessed. In stability lies the capacity of greater predictability. If meaning were insecure, tentative, and unfixed, predictive endeavors would be impossible. One could never know how particular conduct would be

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[38] *See generally* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 36 (1983) (defining knowledge as being "correct"); Schlag, *supra* note 37.

[39] *Id.* (describing a method by which we can "secure firm foundations of knowledge").

[40] *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461-62 (1897) (making point about the importance of prediction).

received.[41]

In the event one is inclined to think of predictability as an impetus for belief in correctness and stability, the same will undoubtedly be thought of the fourth, and final, characteristic of objectivism—specifically, that of security. Objectivism seems the very embodiment of security. In maintaining that meaning exists apart from the interpretive enterprise, the objectivist perspective suggests a longing for security. Correctness, stability, and predictability all share in security's essential impulse for a backstop providing finality, a condition nurturing a sense of peace of mind and refuge. It was earlier noted that stability provides repose, a restfulness allaying apprehensions regarding misguided interpretation. That security is a characteristic of objectivism suggests repose is not simply the product of a belief in the stability of meaning, but the driving force behind objectivism itself. For what is repose, other than a feeling of well-being? And what is it that security generates, other than precisely that same kind of feeling?

B. Connecting the Objectivist Perspective With Individualism

It has been argued that individualism is less tied-in than is community to the relationships between people which typify an environment where each person's individual plight is thought important enough to merit attention.[42] What I propose now is to show how the characteristics of the objectivist perspective translate themselves into individualism. In doing this, it will first be suggested that the characteristics of objectivism—correctness, stability, predictability, and security—foster individualist behavior and atti-

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41 *See generally* Dworkin, *supra* note 7, at 114-50 (1986) (discussing and expressing skepticism about linking prediction with the correctness and stability of meaning). *See also* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 977-78 (1977). Professor Hart described what he named the "Noble Dream" vision of law:

> Like its antithesis the Nightmare, it has many variants, but in all forms it represents the belief, perhaps the faith, that, in spite of superficial appearances to the contrary and in spite even of whole periods of judicial aberrations and mistakes, still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide. And with this goes the belief in the possibility of justifying many other things, such as the form of lawyers' arguments which, entertaining the same expectations, are addressed in courts to the judges as if he were looking for, not creating, the law. . . .

Id. at 978.

42 *See supra* notes 10-17 and accompanying text.

tudes. Secondly, it will be suggested that when one examines the case law from periods during which objectivism heavily influenced judicial interpretation, a distinct flavor of individualism can be detected.

1. Objectivism Fosters Individualism

Several reasons exist for believing the characteristics of objectivism contribute to individualism. At root, objectivism thinks of there being final answers to all questions. This view of interpretation can affect one's attitude about life. In its starkest form, the whole of one's existence can easily become a search for truth in the sense of an unremitting drive to find answers to the questions which daily vie for attention. With truth waiting to be discovered, pressing problems would seem to justify an obsession with searching for answers. Given the import of some of the problems with which we must deal, and the existence of a single solution, it would be easy to rationalize committing nearly every waking moment to searching out that which is available to the inveterate and determined.

Clearly, this overstates the case. It is doubtful even the most reclusive and dedicated men and women of ideas are so absorbed in the interpretive matters presented to them that they ignore all else. Nonetheless, those who take any aspect of their life seriously will struggle to do the best job possible handling difficulties they face. If such a person begins from the point of believing there are final answers, this perspective may shape the nature of their behavior towards others. The labor of discovering the single way to best handle any difficulty commanding attention is likely to be viewed as of preeminent importance. External factors that hamper the process may be seen as intrusions. Believing there are correct answers to problems one confronts, a greater possibility exists that the reaction to external intrusions will not be positive. Such a reaction can be justified as a temporary aberration. With the passage of time, matters unrelated to the search for answers will again receive attention.

But the preoccupation with the search for truth, and that search's understanding of other demands as bothersome inconveniences, is not the only indicia of objectivism's tie to individualism. To the extent finding the correct answers to life's problems becomes sufficiently consuming to leave inadequate opportunities for sustaining and cultivating interindividual bonds of affinity, the plight of each member of the citizenry must necessarily be rele-

gated to the position of a distant concern. Thus enters resentment, in the sense of anger about having to deal with those inconveniences and intrusions living in a social polity thrust upon us all.

This second aspect of objectivism is clearly linked to the belief in discoverable truth. From insistence on right answers can flow a wide range of levels of preoccupation with finding those answers. From such preoccupation can flow an animosity towards those things that interfere with the effort to search out those answers. The consequence of the animosity or resentment is unfortunately directed towards those who are seen as presenting us with life's inconveniences. In short, what occurs is the exact opposite of nurturing interindividual bonds. When the people with whom we have daily association raise what are perceived as intrusions on the effort to find correct answers, they become the outlets for expressions of resentment.

Then there is what happens after those who believe right answers exist think they have found such. Specifically, they tend to act in a way which reveals the esteem in which those truths are held. This third aspect of objectivism further shows its connection with individualism because the actions taken suggest a certain inflexibility. If varying levels of preoccupation with discovering truth, and resentment with external inconveniences, link up with objectivism's belief in "correctness," perhaps this third aspect suggesting a tie between objectivism and individualism links up with objectivism's belief in "stability" and "predictability," features said to stem from "security." Inflexibility bespeaks of a reluctance to be moved from what one is convinced is right. And both stability and predictability imply a certain permanence and lack of movement. But what about actions revealing inflexibility? Why should they exist? And how are they connected with individualism?

The reason for objectivism leading to actions revealing inflexibility has to do with the fact that if one begins any interpretive enterprise from the perspective of the existence of right answers, then once there is a level of confidence regarding the discovery of such, it would be a foolish expenditure of time to reconsider those answers settled upon. What is discovered becomes an immutable foundation. It provides a refuge from the contingencies of life, and a staging ground for other discoveries. As with any unchanging truth, it commands fidelity and intractable loyalty. Though competing conceptions may challenge the truths one has come to know, vigilance must be ever present.

Yet this reluctance to be open-minded, this inflexibility that clings to the truth as one knows it, affects our relations with others. When those with whom one associates put forward ideas challenging what is believed as truth, intransigence with regard to reconsideration cannot avoid evidencing itself as a form of rebuff. While this alone takes a heavy toll on relations with others, if for no reason besides precipitating reservations about the strength of those relations, it also serves to confirm suspicions that the truth is best followed by maintaining a safe distance from others. The natural consequence could be withdrawal and isolation, and is likely to be at least aloofness in interindividual dealings.[43] No route more deleterious to community, and archetypical of individualism, could be pursued. Inflexibility first locks out ideas and then presents the possibility of locking out others for the ideas they may posit.

Accepting, in the abstract, that there is some reason to believe objectivism is more likely to be manifested in individualism than in community, what does our experience with reference to the interpretation of law actually show? Does it indicate that objectivism is linked with individualism, and that during periods when the former is the prevailing interpretive approach, the latter happens to be the controlling social philosophy? Does our experience indicate that in cases where objectivism has been employed, the resolution reveals an absence of concern for the interindividual bonds between the members of the citizenry? Clearly, the existence of historical periods in which objectivism and individualism parallel each other provides inferential evidence connecting the two. Further, such a connection can also emerge if cases relying on the objectivist approach indicate a lack of appreciation for the bonds connecting people situated like the parties involved in the dispute the cases resolve. What follows presents how objectivism both tracks the high points in individualist socio-political philosophy, and results in decisions in cases which fail to sustain interindividual relations.

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[43] The following quote from Hegel on inflated notions of one's self is especially instructive here:

> Hegel was not particularly keen on this sort of crusading spirit: Imaginary idealities and purposes of that sort fall on the ear as idle phrases, which exalt the heart and leave the reason a blank, which edify but build up nothing that endures: declamations, whose only definite announcement is that the individual who professes to act for such noble ends and indulges in such fine phrases holds himself for a fine creataure: a swollen enlargement which gives itself and others a mighty size of a head, but big from inflation with emptiness.

G. HEGEL, PHENOMINOLOGY OF MIND 409 (J. Baillie trans., 1967).

2. The Case Law

In the private law areas of property, contracts, and torts, there are specific cases that rely upon objectivism in interpretation.[44] Consider, for example *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*[45] in the property law area of free flow of air and light.[46] There, one hotel on Miami Beach sought to prevent another adjoining hotel from constructing a fourteen-story addition which would cast a shadow over the neighboring hotel's cabana, swimming pool, and sunbathing areas during the winter months from two o'clock in the afternoon until sundown.

In denying the request, the court indicated that there was no evidence of a right to free flow of air and light. The statutes in Florida did not provide for such. Nor had the petitioner demonstrated such by express, implied, or prescriptive easement, or by recognition of the English doctrine of "ancient lights."[47] Furthermore, the court observed that the maxim *sic utere tuo ut alienum non laedas* ("use your own property in such a manner as not to injure that of another") did not mean one could never use property in a way that deprived an adjoining owner from enjoyment of its own property. Rather, it meant to prohibit uses which deprived another of "rights" to enjoyment of property. And as there was no basis for finding such "rights," the petitioner's request proved unsuccessful.[48]

In reasoning that no right to air and light had been violated, the court took pains to reference the following insight offered in another decision: "So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction."[49]

The intimation is that each individual is situated in a certain position vis-a-vis the relevant rules of law, and any broader or more enveloping perspective is to be avoided.[50] "[S]ound and salutary"

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44 *See generally* George C. Christie, *Objectivity in Law*, 78 YALE L.J. 1311 (1969).

45 114 So. 2d 357 (Fla. 1959).

46 *See generally* HOMERSHAM COX, THE LAW AND SCIENCE OF ANCIENT LIGHTS (2d ed. 1871); Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CAL. L. REV. 94 (1977).

47 *Fontainebleau.*, 114 So. 2d at 360.

48 *Id.* at 359.

49 *Id.* at 360.

50 For property cases taking this type of approach with regard to prohibiting re-

approaches, aimed at things like the "promotion of justice," are less worthy of pursuit than "rights" incident to one's position.[51] Because implicit in "justice" is a demand for consideration of factors beyond predictability or stability, including factors that concern the quality of interindividual relations, to elevate "rights" to a preeminent position tilts toward preference for the individual and away from the understanding of community employed here.[52]

Contrast the perspective of the *Fontainebleau* court with that of the court in *Prah v. Maretti*.[53] In responding affirmatively to a request by a landowner with a solar-heated residence that an adjoining owner be prevented from undertaking construction which would interfere with the flow of sunlight, the traditional rules were acknowledged as precluding protection.[54] Nonetheless, the court proceeded to comment on the relationship between rules of law, factual circumstances, and social policy. It noted that the circumstances and policies underpinning free flow of air and light were now "obsolete;"[55] the "general welfare"[56] was now conceived differently; the "realities of our society"[57] had changed; and "[c]ourts should not implement obsolete policies that have lost their vigor

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mote grantees from suing for breach of the "present" covenants of seisin, right to convey, and against encumbrances contained in a warranty deed, compare Colonial Capital Corp. v. Smith, 367 So. 2d 490, 491-92 (Ala. Civ. App. 1979); Bridges v. Heimburger, 360 So. 2d 929, 931 (Miss. 1978); Babb v. Weemer, 37 Cal. Rptr. 533, 535-36 (Cal. Ct. App. 1964); Mitchell v. Warner, 5 Conn. 497, 503-04 (1825) with Schofield v. The Iowa Homestead Co., 32 Iowa 317, 321-22 (1871) (holding that it is only appropriate to allow the remote grantee to sue, as it is that party who has suffered the injury). On this matter generally, see W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 126 (3d ed. 1965).

51 This would certainly seem to be the effect of those property law cases in which one who mistakenly occupies another's land later claims adverse possession and finds courts of some jurisdictions unreceptive due to the absence of the requisite "hostility." *See* Predham v. Holfester, 32 N.J. Super 419, 426, 108 A.2d 458, 462 (N.J. App. Div. 1954); Brown v. Hubbard, 259 P.2d 391, 392 (Wash. 1953); Price v. Whisnant, 72 S.E.2d 851, 854 (N.C. 1952). This view of "hostility," however, tends to be a minority position.

52 In an interesting case, the property estate of tenancy by the entirety was held to withstand constitutional challenge under the Fourteenth Amendment's equal protection provision, thereby continuing superiority of the husband's control over property held in such form. *See generally* D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976). The decision focused on the existence of a consensual holding and the enforcement of rights deriving therefrom, notwithstanding that this negatively affects the status from which the wife relates to the husband.

53 321 N.W.2d 182 (Wis. 1982).

54 *Id.* at 187-88.

55 *Id.* at 189.

56 *Id.*

57 *Id.* at 190.

over the course of the years."[58]

Contract law also contains illustrations of the link between objectivism and individualism. The area of satisfaction of preexisting debts provides one such illustration. In discussing the long-standing rule controlling that area, *Levine v. Blumenthal*,[59] a Great Depression era case, states that one owing a sum of money in dispute is not released from having to pay that precise sum, despite the fact that the person to whom the amount is owed has agreed to accept a lesser sum in satisfaction at the same time and place the original obligation was to have been paid.

In *Levine*, a person leased a structure in Paterson, New Jersey, and arranged to pay the lessor a certain annual rental in monthly installments. As a consequence of the ensuing nationwide economic collapse, the lessee and lessor agreed that the original obligation would be discharged by a smaller sum. Upholding the subsequent attempt by the lessor to obtain the difference between what the original contract provided and what the two parties later agreed would be enough, the court acknowledged that criticisms had been leveled against the long-standing rule as not meeting the reasonable needs of business. The court suggested that these criticisms "reject the basic principle [of] consideration."[60] In the estimation of the court, consideration was important enough that "[g]eneral economic adversity, however disastrous it may be in its individual consequences, is never a warrant for judicial abrogation of this primary principle of the law of contracts."[61]

The implication of these statements is that strict adherence to the rules of law is more important than promoting a rational structure within which economically acceptable and perhaps wise agreements are struck.[62] The fact that the needs of the community

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58 *Id.* It must be noted that the court in *Prah* ultimately relied upon the concept of private nuisance to protect the petitioner. However, it seems apparent that the court was not prepared to allow some strict reading of the law of free flow of air and light to interfere with what it thought was a result more beneficial to society as a whole.

59 117 N.J.L. 23, 186 A. 457 (1936).

60 *Id.* at 27, 186 A. at 458.

61 *Id.* at 29, 186 A. at 459. Other interesting contract law cases have involved the strict application of controlling principles, despite what might strike one as extremely unfortunate consequences. *See also* School Trustees of Trenton v. Bennett, 27 N.J.L. 513, 519-20 (1859) (enforcing contract freely entered into even though various acts of nature seem to prevent completion); Hertzog v. Hertzog, 29 Pa. 465, 443-44 (1857) (refusing to find a contract in the absence of a clear "agreement").

62 Indeed, the basic idea is that the judge's role is limited to applying the rules of law. If the application of the rules produces results one might find objectionable, it is for the legislature, not the judiciary, to fashion the appropriate alterations. *See, e.g.*, Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443-44 (N.Y. 1902).

demand that everyone settle for less than they originally exacted, if that community is to sustain itself, must give way to the clarity of law.[63] "Basic" or "primary" principles are too rudimentary to consider departing therefrom.[64]

Frye v. Hubbell,[65] a leading case for the minority perspective on preexisting debts, provides an important point of contrast in its recognition of the fluidity of law. On facts involving enforcement of an agreement to accept a lesser amount in satisfaction of an undisputed mortgage obligation, the Supreme Court of New Hampshire offered that "'[t]here was a time in the history of law, when . . . it was a system of metaphysics and logic, and when the case was decided without the slightest regard to its justice.'"[66] Now, the validity of all law "depends upon its consonance with reason."[67] Thus, "whatever the fact[s] [were] when [a] rule originated," it may now be thought to be "based upon a misconception . . . not founded in reason, and [is not to] be followed without abandoning the greater principle that reason is the life of the law."[68] Given that values beyond those based in individual legal rights can be advanced by agreeing to accept a lesser sum in satisfaction of a greater debt, it was found easy to depart from a strict application of the technical rules of law.

From the tort law area of privity of contract other examples can be found. The famous case of *Winterbottom v. Wright*[69] indicated that a person injured by a vehicle which had not been maintained by the defendant, in accordance with the defendant's promise memorialized in a contract with the plaintiff's employer, did not entitle the injured party to relief. The absence of privity of contract between the plaintiff and the defendant proved fatal.

The court explained: "[I]f the plaintiff can sue, every passenger, or even any person passing along the road . . . might bring a similar action."[70] Continuing, the court insisted that the "operation of such contracts as this [be confined] to the parties who en-

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63 *See generally* James B. Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443 (1909) (discussing the enforcement of contract duties as of right, not as a matter of discretion).

64 *See* Chief Justice Melville W. Fuller, Address in Commemoration of the Inauguration of George Washington (Dec. 11, 1889) (Gov't Printing Office 1890) (discussing the concept of individual autonomy being of fundamental importance to our society).

65 68 A. 325 (N.H. 1907).

66 *Id.* at 330 (quotation omitted).

67 *Id.*

68 *Id.* at 334.

69 152 Eng. Rep. 402 (1842).

70 *Id.* at 405.

tered into them" in order that "absurd and outrageous consequences" be avoided.[71] The end result, of course, was to refuse protection to those outside the contractual framework. The focus was on those within, not those beyond, the formal structure of the contract.[72] The hostility of the court to permitting those who had not been part of the bargain to raise its violation is plain. If the unacceptable situation of a vast array of potential plaintiffs was to be avoided, privity had to be understood as establishing static limits.

Winterbottom's circumscribed approach supports the thought that the narrowness of objectivism reflects the narrowness of individualism.[73] By interpreting privity in a restrictive manner, the court facilitated (some might say accomplished its objective of) concentration on something other than the communal unit. The thrust was internal, not external; exclusive, not inclusive. By way of comparison, *Henningsen v. Bloomfield Motors, Inc.*,[74] involving a suit for injury brought by the wife of an individual who benefited from an implied warranty on a new automobile, found that the absence of privity of contract between the plaintiff and the two defendants—the car dealer and car manufacturer—did not prove insuperable.[75]

The court indicated that "society's interests"[76] could only be protected by envisioning privity differently from how it had traditionally been envisioned. Given that business had come to involve the use of intermediaries by manufacturers in the selling of their goods, coupled with active sales promotion by the manufacturers themselves, the court felt historic conceptions of privity should not

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71 *Id.*

72 In the area of strict liability for defective products, courts for a long time were extremely reluctant to extend liability beyond the consumer who used the product. *See e.g.*, Davidson v. Leadingham, 294 F. Supp. 155, 157 (E.D. Ky. 1968); Hahn v. Ford Motor Co., 126 N.W.2d 350, 353 (Iowa 1964). The first major break with this approach came in *Elmore v. American Motors Company.* Elmore v. American Motors Co., 451 P.2d 84, 88-89 (Cal. 1969).

73 *See* Sheehan v. St. Paul & Duluth Ry. Co., 76 F. 201, 204-05 (7th Cir. 1896) (providing example of one tort law case strictly applying traditional rules in the context of liability of owners and occupiers of land to those who trespass thereon). These traditional rules have been eroded. *See* Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967, 968 (Fla. 1977) (holding that discovered trespasser was due a duty of ordinary care). In application, however, the traditional rule focuses exclusively on individual accountability for taking on the role of a trespasser.

74 32 N.J. 358, 161 A.2d 69 (1960).

75 *See generally* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990) (noting, among other things, the drift of tort law away from the highly moralistic approach of the 19th century).

76 *Henningsen*, 32 N.J. at 379, 161 A.2d at 81.

validating a congressional statute aimed at excluding products of child labor from interstate commerce, and the so-called *Civil Rights Cases*,[87] holding provisions of the Civil Rights Act of 1875 unconstitutional to the extent they attempted to regulate discrimination by private citizens.

Prior to discussing the parallelism between the objectivism of the judiciary during that time and the individualist socio-political climate, we would do well to recall some of the salient points of those cases, for in such the connection between objectivism and individualism is palpable.

In *Coppage*, Justice Pitney's majority opinion, in maintaining the sanctity of freedom of contract, characterized precedent from both earlier Supreme Court decisions[88] and courts at the state level[89] as having already uncovered the controlling legal principle. There was little else to do but apply the principle to the facts. The unconstitutionality of the state law under consideration was further demonstrated by the fact that it interfered with the natural inequalities of fortune in which people find themselves. "[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."[90] Emphasis was on recognition of pre-existing principles and not meddling with the condition of individuals.[91]

Pierce and *Plessy* reflect a similar emphasis on preexisting rules and the position of the individual. Justice Brown's opinion for the Court in *Plessy* makes use of precedent in earlier Supreme Court[92] and state court[93] cases distinguishing political and social equality. The Justice viewed this distinction as controlling the question before him. Playing on individualism, Justice Brown suggested that while the law can do some things about political equality, "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's

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87 109 U.S. 3 (1883).

88 *Id.* at 9-14.

89 *Id.* at 21-26.

90 *Id.* at 17.

91 Other cases are in line with the liberty of contract approach of *Coppage*. *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-51 (1917); Adair v. United States, 208 U.S. 161, 172-74 (1908); Lochner v. New York, 198 U.S. 45, 53 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). All of the above cases emphasized autonomy and individualism.

92 163 U.S. at 547-48.

93 *Id.* at 544-45.

stand in the way of "the demands of social justice."[77] This represents a marked shift towards reconfiguring the rule of privity so as to allow a more inclusive approach.[78]

3. Socio-Political Parallelism

What about evidence that during periods when objectivism seems to have been the predominant interpretive approach, the general socio-political environment tended to reflect individualism? The most well-recognized period of objectivism in American jurisprudence is from the late 1800s to the beginning of the New Deal in the mid-1930s. Mirroring the popular faith in the scientific method so widespread during the six decades split on either side of the turn of the century,[79] much of the judicial decisionmaking during the period reflected a belief in certainty, logical application of existing principles, and "finding" established legal norms.[80] This was the heyday of so-called Langdellian orthodoxy.[81] Undoubtedly, one could point to numerous decisions during that time utilizing something other than an objectivist approach to interpretation. Objectivism, however, proved the predominant method.[82]

Cases like *Coppage v. Kansas*,[83] striking down a state law prohibiting "yellow-dog" contracts (i.e., commitments by employees not to join unions), *Pierce v. Society of Sisters*,[84] sustaining a challenge by private and parochial schools to a state law requiring that all children receive public school education, and *Plessy v. Ferguson*,[85] upholding a state statute requiring separate but equal rail accommodations, are all indicative of the objectivism of the period. That approach also appears in cases like *Hammer v. Dagenhart*,[86] in-

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77 *Id.* at 384, 161 A.2d at 83.

78 *See generally* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Other important cases have moved away from the doctrine of privity. *See e.g.*, Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873, 880-81 (Mich. 1958); Coca-Cola Bottling Works v. Lyons, 111 So. 305, 307 (Miss. 1927); Mazetti v. Armour & Co., 135 P. 633, 634 (Wash. 1913).

79 *See generally* Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979) (discussing the scientific method and judicial analysis).

80 *See generally* Kennedy, *supra* note 1; *see also* Elizabeth Mensch, *The History of Mainstream Legal Thought, reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 18-21 (D. Kairys ed., 1990).

81 *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

82 *See generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

83 236 U.S. 1 (1915).

84 268 U.S. 510 (1925).

85 163 U.S. 537 (1896).

86 247 U.S. 251 (1918).

merits, and a voluntary consent of individuals."[94]

The individual condition of particular members or classes of the citizenry is not the concern of the law. Outside of political rights, law has no role to play in adjusting positions in which individuals are situated.[95] Each of us are what we are, and it is not the role of the law to alter those circumstances.[96] *Pierce* witnesses a similar reliance on rules revealed by earlier decisions[97] and a belief in noninterference with the individual. On the latter, Justice McReynold's opinion for a unanimous Court indicated that children are "not the mere creature[s] of the State,"[98] and it possesses no "general power . . . to standardize"[99] them. It is the parents, "those who nurture [children] and direct [their] destiny [who] have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations."[100]

All humans labor under the impulse to justify their opinions by reference to earlier decisions made by others. This is rooted in a sense of fear of accepting responsibility for what we decide, or perhaps in the calculation that our decisions appear more impartial and likely to be acted upon when explained by rules which antedate the decisions we make.[101] Thus, even during those historical periods when the judiciary has favored subjectivism over objectivism, earlier precedent has been submitted as leading to the results announced. However, something more than reliance on already discovered rules is present in opinions like those in *Coppage*, *Plessy*, and *Pierce*. The objectivist mind-set of the Court resonates from the language chosen to describe the rules in play.

In *Coppage*, the Court spoke of the right to make contracts for the acquisition of a salaried job as being something which

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94 *Id.* at 551.

95 This rings of the statement made by Justice Brewer in his dissent in *Budd v. New York*. Budd v. New York, 143 U.S. 517, 551 (1892). The Justice stated: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government." *Id.* (Brewer, J. dissenting).

96 Other cases have taken a "hands off" approach, as well. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 585-86 (1895) (finding no retribution of wealth in context of federal taxation of state bonds); Civil Rights Cases, 109 U.S. 3, 25 (1883) (stating that "discriminations on account of race or color [are] not regarded as [violative of the 13th amendment]" and thus the courts are not to interfere).

97 268 U.S. at 534-35.

98 *Id.* at 535.

99 *Id.*

100 *Id.*

101 *See* SIR HENRY SUMNER MAINE, ANCIENT LAW, Ch. I, at 1-26 (1931) (discussing the nature of judicial decisionmaking and the role of precedent).

"partak[es] of the nature" of the Fourteenth Amendment's protections of liberty and property.[102] In short, the Court saw the right as inherent in the notion of protected liberty and property; the Court did not view it as something created, but something which preexists, already a part of what the Fourteenth Amendment protects.

The Court in *Plessy* described the Fourteenth Amendment's guarantee of equal protection as a right which, "in the nature of things . . . could not have been intended to abolish [all] distinctions based upon color . . . but only those of a political character."[103] As the Court understood the role of law in society, the Court's interpretation of equal protection was preordained by the realities of any constitutional right. Law exists in the context of certain inescapable facts of life, and those very facts establish the meaning of the rules law sets forth.

In *Pierce*, Justice McReynolds's opinion relies entirely on one of the Justice's earlier decisions which declares that the right to liberty "[w]ithout doubt . . . denotes"[104] not merely the freedom from bodily restraint but also the right to contract, engage in the common occupations of life, acquire knowledge, marry and bring up children, worship God, and many other things as well. There was no question about the Court fashioning a right where none had been present; in striking down the state law in dispute, reliance was placed upon principles intrinsically a part of liberty protected by the Fourteenth Amendment.[105]

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102 *Coppage*, 236 U.S. 1, 14 (1915).

103 *Plessy*, 163 U.S. 537, 544-46 (1896).

104 262 U.S. at 399.

105 Literature of the times indicates that the proper role of the judge is to discover, not to make, the law. *See, e.g.*, J. BEALE, 1 A TREATISE ON THE CONFLICTS OF LAWS 147-49 (1916). *See also*, Mensch, *supra* note 80, at 19, stating the following about the orthodox view:

> Judicial objectivity upon which the classical structure depended was based in turn upon the intersection of constitutional language and an increasingly generalized, rationalized conception of private law. First, jurists pointed out that by enacting the Constitution, the sovereign American people had unequivocally (and wisely) adopted a government premised on private rights and strictly limited public powers. Thus, while it was certainly the exalted function of the judiciary to protect private rights from uncontrolled public passion, this function required merely the application of positive constitutional law—there was no painful choice to be made between positive law and natural rights.
>
> Second, and of prime importance, the objective definition given to rights protected by the Constitution could be found within the common-law tradition, which had been wonderfully cleansed of both messy social particularity and natural-law morality. Classical jurists claimed that as a result of an enlightened, scientific process of rationalization, the common law could now properly be reconceived as based upon a

The objectivist approach of *Hammer* and the *Civil Rights Cases* is also evidenced through similar indicia. Justice Day's opinion in *Hammer* argues that the legislation under review must be invalidated due to the inherent meaning of Congress's power to "regulate" commerce, and the limits of that power revealed by earlier decisions.[106] The fact that the legislation improved the conditions of child laborers and rebalanced the positions of states with industries in competition with each other was insufficient to result in a different outcome. In Day's words, "it may be desirable that such [child labor] laws be uniform, but our Federal Government is one of enumerated powers," and "[t]he Commerce Clause was not intended to give to Congress a general authority to equalize . . . conditions" of competition.[107]

The essence of legal rules is their preexistent and fixed nature. Courts simply discover and apply those rules, not make them up.[108] In a like vein, Justice Bradley's decision in the *Civil Rights Cases* indicated that the Fourteenth Amendment's prohibition on any "state" denial of equal protection, and the Thirteenth Amendment's grant to Congress of power to enforce the prohibition of "slavery" and "involuntary servitude," possessed inherent meaning not encompassing private discrimination.[109] With regard to the latter, Justice Bradley declared that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or

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few general and powerful—but clearly positivised—conceptual categories (like property and free contract), which had also been incorporated into the Constitution as protected rights. All of the specific rules of the common law (at least the "correct" rules) were said to be deduced from those general categories. . . . Those rules could then be applied, rigidly and formally, to any particular social context; in fact, failure to do so would be evidence of judicial irrationality and/or irresponsibility. Moreover, because every rule was based upon the principle of free contract,the logical coherence of contract doctrine, correctly applied, ensured that private contracting was always an expression of pure autonomy. With no small amount of self-congratulation, classical jurists contrasted their conceptualization of private autonomy to Parson's description of contract law as something to be found within numberless particular social relations. In retrospect, Parsons could be viewed as naive and unscientific.

Id. at 19.

106 247 U.S. 251, 269-75 (1918).

107 *Id.* at 273.

108 Another case following *Hammer* also took the approach of striking down federal law aimed at burdening child labor practices. *See* Child Labor Tax Case, 259 U.S. 20, 36-37 (1922).

109 109 U.S. 3, 11, 24 (the 14th and 13th Amendments, respectively).

car."[110] As to the former, "it is State action of a particular character that is prohibited," and "[i]ndividual invasion of individual rights is not the subject matter of the amendment."[111] Further, Justice Bradley suggested that "there must be some stage in the progress of [a former slave] when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws."[112] The intimation is that law is not to meddle in every condition in which the individuals comprising society find themselves.[113]

The foregoing decisions ring of objectivism and individualism. And during the period they were handed down, the prevailing socio-political philosophy, as observed earlier, reflected a similar bent toward individualism.[114] In striking down laws against "yellow dog" contracts, or in finding private discrimination beyond the reach of constitutional power, the Court was integral in developing a milieu which emphasized the autonomy of the individual. In this emphasis, the objectivism of the judiciary paralleled socio-political philosophy.

Though not without challenge, the philosophy which seemed to hold sway in mainstream circles was characterized by Justice Holmes in the famous *Lochner*[115] decision as "Mr. Herbert Spencer's Social Statics." The Spencerian view alluded to by Holmes reflected Charles Darwin's extremely popular concept of "natural selection." Darwin's work on evolution[116] coincided with Spencer's socio-political theory of "survival of the fittest."[117] The thrust of both ideas revolved around the fact that, when left alone, the strongest and most adaptable characteristics of biological or social nature would emerge dominant. Spencer's commitment to noninterference made him an avowed proponent of individualism and

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110 *Id.* at 24.

111 *Id.* at 11.

112 *Id.* at 25.

113 Other cases concerning private discrimination have used judicial reasoning similar to that in the *Civil Rights Cases*. *See* Baldwin v. Franks, 120 U.S. 678, 685 (1887); United States v. Harris, 106 U.S. 629, 638-39 (1882); Virginia v. Rives, 100 U.S. 313, 318 (1879); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

114 Other commentators have considered the matter of traditional conceptions and law during the post-Civil War period. *See generally, e.g.*, ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-96 (1960); TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942).

115 198 U.S. 45 (1905).

116 *See generally* CHARLES DARWIN, ORIGIN OF SPECIES (1859); CHARLES DARWIN, THE DESCENT OF MAN (1871).

117 *See generally* HERBERT SPENSER, MAN VERSUS THE STATE (1892); HERBERT SPENSER, SOCIAL STATICS (1850).

critic of collectivism.[118]

In the United States, Social Darwinism had many influential advocates during the decades immediately preceding and just after the turn of the century. At Yale, the sociologist William Graham Sumner touted its virtues.[119] The renowned political scientist John William Burgess did the same at Columbia, and the respected Harvard trained economist J. Laurence Laughlin, of the newly established University of Chicago, proved Burgess's equal.[120] In the field of history, the well-known interpreter of the American West, Fredric Jackson Turner of Wisconsin, argued the influence of individualism on American development.[121]

In the field of finance and investment, these academics were joined by the likes of industrialist John D. Rockefeller (who is reported to have remarked that "the growth of a large business is merely a survival of the fittest")[122] and railroad magnates James J. Hill (who, it is said, claimed "the fortunes of railroad companies are determined by the law of the survival of the fittest"[123]) and Collis P. Huntington (who once wrote a political agent indicating that even bribery was appropriate if undertaken "to have the right thing done").[124] The suggestion inherent in this no-holds-barred view of the world, a view justified by hard scientific evidence, was that society is better off if the individual is left free to develop with little governmental interference.

Taking this message to heart, the political spoilsmen of the early part of the time period, men like Oakes Ames of Massachusetts, Roscoe Conkling of New York, and James G. Blaine, "the man from Maine," felt no compunction about using their substantial influence to their own financial advantage.[125] These men ruthlessly criticized reformers who challenged the orthodoxy of individualism. Conkling is said to have characterized them as "man milliners," and Blaine as "foolish . . . noisy but not numerous, pharisaical but not practical."[126]

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118 *See* EDWARD MCNALL BURNS & PHILIP LEE RALPH, 2 WORLD CIVILIZATIONS 378 (4th ed. 1969).

119 *See* WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER (1883).

120 *See* CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 340 (1960).

121 *Id.*

122 RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 168 (1948).

123 *Id.*

124 *Id.* at 165.

125 *Id.* at 171-76.

126 *Id.*

Nonetheless, such criticism failed to insulate the orthodoxy from attack. This is evidenced by the assaults of fraternal groups like the rural Grange movement of the 1870s;[127] the urban-worker Knights of Labor of the late 1880s;[128] the American Federation of Labor (A.F. of L.)[129] and Farmer Alliances[130] of the later 1880s and 1890s; the Populist movement of the 1890s;[131] and the Progressive, socialist, and other reform efforts of the decades following the beginning of the new century.[132] The pressures of these groups tempered the more virulent strains of Social Darwinism. However, that socio-political philosophy was far too entrenched to be anything but incrementally worn down. Not until the Great Depression's spawning of the New Deal did the philosophy's credo of individualism begin to lose its dominant grip.

To be sure, changes appeared long before that time. The Interstate Commerce Commission Act of 1887, the Sherman Anti-Trust Act of 1890, the Federal Trade Commission and the Clayton Anti-Trust Acts of 1914 all addressed the abusive consequences of a laissez-faire approach towards business.[133] The popular election of U.S. Senators (17th Amendment of 1913), the adoption of direct primaries, and the single ("Australian") ballot all contributed to opening the political process and striking at "machine" politics.[134] The limited workday,[135] sanitary and safety laws applicable to the workplace,[136] housing codes,[137] the income tax (16th Amendment of 1913),[138] some efforts at industrial workers insurance, railway, longshoremen, and harbor workers legislation,[139] and federal farm loan programs improved poor quality of life for laboring classes.

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127 *See* LOUIS M. HACKER, THE SHAPING OF THE AMERICAN TRADITION 695-96 (Louis M. Hacker & Helene S. Zahler eds., 1947).

128 *Id.* at 697-98.

129 *See* BEARD AND BEARD, *supra* note 120, at 297-99.

130 *See* HACKER, *supra* note 127, at 785.

131 *Id.* at 784-90.

132 *See* BEARD & BEARD, *supra* note 120, at 353-67.

133 Yet Hacker suggested that the ICC and Sherman Acts were not really enforced. HACKER, *supra* note 127, at 782-84. Hofstadter also suggested there is good reason to believe that these acts were really designed to be toothless pieces of legislation aimed at quelling the clamor of reformists. HOFSTADTER, *supra* note 122, at 178.

134 *See* BEARD & BEARD, *supra* note 120, at 356-58.

135 *Id.* at 374.

136 *Id.* at 376.

137 *Id.* at 379-80.

138 *Id.* at 382. Congress adopted an income tax as early as 1894, but it was declared unconstitutional by the Supreme Court. Not until the Wilson administration did the Congress again seek to institute such a tax, and then in the form of a constitutional amendment. Interestingly, Wilson had earlier opposed the idea of such a tax.

139 *Id.* at 418.

The conventional wisdom of individualism still managed to hang on.

It is too easy to explain the captivation of the orthodox philosophy of nonintervention during the late 1800s to mid-1930s in terms of Social Darwinism. Laissez-faire individualism reflected the mindset of many, if not most, Americans. Reformist challenges gradually made conversions until, eventually, belief in the Spencerian gospel no longer struck a responsive chord.[140] Were the truth known, the orthodoxy probably amounted to a strange concurrence of thinking between bookish academics, driven entrepreneurs, and megalomaniac politicians. But even within the academic community, no lock-step cadence existed.[141]

As for those within the business and political communities, it could have been that they found in the biological theory of natural selection, and its social variant, a vocabulary to rationalize abuses, or ideas which paralleled fundamental beliefs and values much earlier acquired from family, church, or life experience. The same can be said about the reformist challenges. It may be tempting to view all of them as linked; the later ones being the heirs to earlier movements and each contemporary coordinating its efforts with others. Linkage can be found in the common denominator of altering the prevailing social, economic, or political situation. The specific objectives and goals of each reformist group, however, suggests connection by little other than a desire for change.[142]

One of the striking features of the slow shift, the incremental movement, from the Spencerian to the reformist vision is the absence of purism. Indubitably, the arch-proponents of the status quo, or of change, never wavered. The inveterate dogmatic can always be found. For the great bulk of those on one side or the other, the positions were not always black or white, laissez-faire individualist or bleeding-heart interventionist. The two strands coex-

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140 Louis M. Hacker suggested that not until President Wilson was there a clearly thought out Progressive agenda. HACKER, *supra* note 127, at 781. Nonetheless, it appears that Wilson actually underwent some ideological changes over the years that moved him from more conservative to reformist positions. *See* BEARD AND BEARD, *supra* note 120, at 363-67; HOFSTADTER, *supra* note 122, at 238-82.

141 As academics like Sumner, Burgess, Laughlin, and Turner were extolling individualism, others advocated reform. *See generally* BROOKS ADAMS, THE LAW OF CIVILIZATION AND DECAY (1895); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1907); LESTER WARD, DYNAMIC SOCIOLOGY (1883).

142 One author presents an interesting discussion of the development and evolution of individualism in the context of social and technological innovation. *See* JOHN W. WARD, RED, WHITE AND BLUE: MEN, BOOKS AND IDEAS IN AMERICAN CULTURE 227-66 (1969).

isted, with the former predominating during the early years of the period, and the latter ascending to that position by the time the period came to a close. For most, it was always a matter of degree. Seldom did the logic of Social Darwinism so persuasively assert itself that any thought of reformism was banished, or vice versa.

The coexistence of these seemingly incompatible approaches is evident in the thinking of the more prominent political actors of the time. It is seen in Samuel Gompers's A.F. of L.'s commitment to an association of working groups eschewing government assistance and advocating volunteerism.[143] It is seen in the acceptance speech of the 1896 Democratic presidential nominee, William Jennings Bryan, the undisputed leader of the Populist movement, indicating: "We cannot insure to the vicious the fruits of a virtuous life; we would not invade the home of the provident in order to supply the wants of the spendthrift; we do not propose to transfer the rewards of industry to the lap of indolence."[144]

It also appears in Progressive presidents like Theodore Roosevelt and Woodrow Wilson. The former strongly criticized the abuses of big business, yet stated to Congress in 1902 that "[o]ur aim is not to do away with corporations; on the contrary, these big aggregations are an inevitable development of modern industrialism."[145] And the latter, who denounced government regulation of railways and anti-individualist tendencies of labor unions in the first decade of the 1900s, completely switched positions on these issues upon entering the presidential arena.[146]

But even among those who advocated the orthodoxy of laissez-faire, the same schizophrenia can be found. The three Republican presidents to succeed Wilson supported some and opposed other Progressive reforms. They made no attempt, however, to return to the days of government nonintervention. Coolidge's Secretary of Commerce, Herbert Hoover, expressed support for the inheritance, income, and excess profits taxes adopted earlier.[147] The Republican-controlled Congress extended and supplemented protective farm legislation against fraudulent practices in the shipping and sale of commodities.[148]

In the Colorado River basin, the federal government was in-

143 *See* HACKER, *supra* note 127, at 899-901.

144 *See* HOFSTADTER, *supra* note 122, at 199.

145 *Id.* at 226.

146 *See supra* note 136 and accompanying text.

147 *See* BEARD & BEARD, *supra* note 120, at 414.

148 *Id.* at 416.

volved in the control of power-generating facilities.[149] Coolidge endorsed a failed constitutional amendment to outlaw child labor and signed legislation assisting the railway, longshoremen, and harbor workers.[150] His successor, President Hoover, the archetypical self-made man, signed a new anti-injunction law strengthening the collective bargaining practice of labor.[151] Yet, simultaneous with these Progressive-looking actions, Coolidge refused to support intervention to assist farmers suffering from excess production, preferring to allow things to take their "natural" course.[152] Both Coolidge and Hoover vetoed legislation that would have subjected the Muscle Shoals power facility along the Alabama-Tennessee border to governmental ownership.[153] Hoover, in advocating "rugged individualism," insisted that unemployment insurance be arranged through private carriers, not the government.[154]

Despite the fact that notions of governmental intervention had not managed to subjugate the orthodoxy of individualism during the period between 1870 and the 1930s, it was working in that direction. Against this shift in basic ideology, the Supreme Court remained a conservator of the notions of noninterference. It is interesting to speculate about why this incongruity existed between changing conceptions of the place of government and the positions on the issue taken by the Supreme Court. Over the years, many have asserted that the judiciary tends to be a bastion of the status quo with a preference for agonizingly slow change. Perhaps its use of the objectivist approach to interpretation during a period of conversions to the interventionism of the populist and progressive agendas suggests validity to this charge.

IV. Linking Subjectivism and Community

The picture emerging from section III is of a tie between objectivism and individualism. In the present section, the evidence is said to suggest a comparable connection between subjectivism and community. As above, the argument is not that subjectivism generates a sense of community within the social unit. After all, individual members of a society can freely depart from deep themes embodied in a particular interpretive perspective. Instead, the argument is that subjectivism seems closely allied with a social atti-

149 *Id.* at 415.
150 *Id.* at 418.
151 *Id.*
152 *Id.* at 417.
153 *Id.* at 416.
154 *Id.* at 412.

tude reflecting concern for interindividual relations and, thus, the plight of each member of the citizenry. The utilization of a subjectivist approach is often accompanied by genuine interest in the relations solidifying community.

A. The Central Features of Subjectivist Interpretation

In contrast to the objectivism which dominated from roughly 1870 to the 1930s stands the subjectivist approach. As objectivism contains certain central features—correctness, stability, predictability, and security—so too does subjectivism. These are variability, openness, and resignation. Prior to taking up these three features, a comment from the vantage of subjectivism on the concept of correctness, reflected in the objectivist approach to interpretation, is in order.

In short, unlike the objectivist, there is no belief on the part of the subjectivist in "forms" against which correctness can be evaluated. The objectivist, however, believes in fixed, established, preexisting, and discoverable meanings for all things, including rules to be interpreted. Here, the subjectivist parts company. While both recognize that interpretation can lead to decisions capable of being enforced, and in that sense both believe that the very process of interpretation is acted upon as though it establishes meaning once and for all, subjectivism denies that meaning exists apart from the process of interpretation.

With this in mind, perhaps the most fundamental of the central features of subjectivism is the concept of variability. To the subjectivist, legal rules are seen as changeable, fluid, and evolutionary in nature. The belief is that meaning is never static or fixed. The reality is that interpretive decisions have to be made, and because they are capable of enforcement, these decisions are final. That, however, does not affect meaning in one context nor establish meaning in another. Nor does it suggest anything other than the emergence of meaning from the process of interpretation. Meaning does not antedate the articulation of a term, or the act of interpretation. As context, perspective, and vision change, meaning is transformed. Realistically speaking, though, as interpretation occurs within extant social philosophies, and is undertaken by individuals whose experiences and opportunities for alternative conceptions of the world are finite, the limits of meaning are not unbounded.

The second feature of subjectivism is openness. Openness signifies two things: a willingness to receive and consider alternative

ways of picturing what is being interpreted; and taking advantage of the capacity to refrain from elevating one's own view of a rule's meaning above the views of others. In regard to the fact that the subjectivist acknowledges the need for final decisions, openness's implication of refraining from elevating one's own view means rendering decisions with acknowledgment that there are other ways of seeing things. For the subjectivist, the very process of interpretation evidences this same hesitancy and skepticism in the willingness of the interpreter to reconsider, reassess, or reevaluate intuitive or initial impressions.

As for the idea of openness signifying a willingness to receive and consider alternative ways of picturing what is being interpreted, this involves a receptiveness to what others indicate some rule means, as well as a sensitivity to the insights, perspectives, and circumstances which serve to generate alternative conceptions. Openness involves not only listening to and considering meanings suggested by others, but also involves responsiveness to and respect for all those experiences which shape alternative ways of seeing things.

The final feature of subjectivism mentioned here is resignation. By that is meant acceptance of knowing that meaning never conclusively exists. To be sure, that is a daunting and disconcerting position. The human species thrives on certainty, routine, predictability. Certainty simplifies reasoning; routine regularizes life; predictability calms apprehension. As long as there are well-anchored, immutable, fixed truths, as long as there is a clear, established, unchanging set of verities which submit to diligent and persistent efforts at discovery, thought seems to make sense, and life seems more tolerable.

To the subjectivist, however, certainty spawns inflexibility and isolation. By accepting uncertainty, by coming to an accommodation with the reality that everything is transitory, that what exists about us is ephemeral, elusive, and beyond final comprehension, subjectivism aspires to untroubled well-being, a position of equipoise in which all aspects of life are reconciled. Most deny the reality of uncertainty by trying to impose certainty on a life where none exists, by deceiving themselves with imperfect efforts to simplify life's unavoidable antinomies with rationalizations that suppress inconsistencies known to be true. In resignation the subjectivist finds tranquility and peace.[155]

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155 *See* Zedalis, *supra* note 4, at 214 (discussing uncertainty and resignation to it).

B. Connecting the Subjectivist Perspective With Community

The dominancy of the Supreme Court's objectivist approach, discussed above,[156] persisted during the post-bellum to New Deal era though vacancies on that body were filled no less than twenty-eight times between 1890 and 1935. In fact, during the administration of President Taft, himself appointed to the Court in 1922 by Warren G. Harding, five new Justices (Willis VanDevanter, Horace Lurton, Joseph Lamar, Charles Evans Hughes, and Mahlon Pitney) were named to that body, and another (Edward White) elevated to Chief Justice. Taft's appointments occurred at the end of the first decade of the 1900s and the beginning of the second, after the initiation of the social reform movements that marked the era.[157] Only Justice Hughes was under fifty at the time of appointment, and Justices White and Lurton were sixty-five and sixty-six respectively.[158] With the exception of Justice Hughes, Taft's appointees were conservative or conventionalist in disposition. Taft's objective was to make the Court into a body which would resist legal innovation.[159]

Candidly, President Taft did endorse some of the populist/progressive goals.[160] Nevertheless, like the political parties and the society as a whole, Taft's oppositionist appointments to the Court suggest an internal struggle in which belief in individualism had the upper hand.[161]

In this section of the essay, community will be connected with the interpretative approach of subjectivism. But as the Supreme Court reflected a status quo philosophy from the late 1800s to the mid-1930s, despite support for governmental intervention and turnover on the Court itself, a departure will be made from the sequence of presentation found in the preceding section. Rather than first taking up the topic of how subjectivism nourishes community, the case law evidencing a tie between subjectivist interpretation and community will be considered. Discussion will then turn to subjectivism nourishing community and, finally, socio-polit-

156 *See supra* notes 75-110 and accompanying text.

157 *See* OSCAR T. BARCK, JR. & NELSON M. BLAKE, SINCE 1900: A HISTORY OF THE UNITED STATES IN OUR TIMES 1-78 (1947); ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE 15-138 (1991).

158 *See* GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS App. A, at A-1 (10th ed. 1980).

159 *See generally* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993).

160 *See* BEARD & BEARD, *supra* note 120, at 361-62.

161 *See generally* HENRY F. PRINGLE, I THE LIFE AND TIMES OF WILLIAM HOWARD TAFT, Ch. XXVIII, at 515-37 (1964) (discussing Taft's reforms and Supreme Court appointments).

ical parallels during periods when subjectivism seems the dominant approach.

Initial focus on the case law provides an opportunity to stress a point made above: individualism and community have always struggled, as have objectivism and subjectivism. Socio-politically, community gained the upper hand with the New Deal. Individualism, however, was never entirely extirpated. As to interpretation, during some periods objectivism has held sway, with subjectivism always attempting to make its influence felt. At other times the positions have been reversed, but never with the elimination of the alternative interpretive perspective.

1. The Case Law

The most striking example of coexistence of subjectivism in a period of objectivism is found in the opinions of Justice Holmes.[162] Consider, for example, the *Coppage* case involving "yellow dog" contracts. The Court defended its opinion that state law could not strike down such arrangements and reasoned that this was so because of principles established in earlier cases and because the constitution could not alter natural inequalities.[163]

In Justice Holmes's estimation, however, state law was perfectly entitled to strike down such contracts. Freedom of contract was meaningless without equality of bargaining position. And if it was felt that organization of labor was essential to give meaning to freedom of contract, "that belief, whether right or wrong . . . may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."[164] This rings of Holmes's dissent in an earlier case holding *federal* law against "yellow dog" contracts unconstitutional. There, Justice Holmes insisted that "[w]here there is, or generally is believed to be, an important ground of public policy for restraint [of the sort involved here] the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued."[165]

Similarly, the *Pierce* Court, which invalidated a state law mandating public school education,[166] was supported by the companion case of *Meyer v. Nebraska*.[167] But in *Meyer*'s companion case of

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162 *See supra* note 115 and accompanying text (noting Justice Holmes's dissent in *Lochner*).

163 *See supra* note 88 and accompanying text.

164 *Coppage*, 236 U.S. at 27 (Holmes, J., dissenting).

165 *See* Adair v. United States, 208 U.S. 161, 190-91 (1908) (Holmes, J., dissenting).

166 *See supra* note 84 and accompanying text.

167 262 U.S. 390 (1923).

Bartels v. Iowa,[168] Justice Holmes strongly disagreed with the majority opinion, which struck down state law making it an offense to teach foreign languages in public school. Justice Holmes stated:

> Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar.[169]

The concept of reasonableness was instrumental to decision on constitutional issues. As Justice Holmes so aptly put it in his oft-cited essay *The Path of the Law*,[170] reasonableness is shaped by innumerable factors, including the felt necessities of the time. Those in the majority during Justice Holmes's tenure, however, conceived of reasonableness restrictively. Factors unsettling expectations based on precedent and the inherent essence of specific legal rights were outside consideration. Interpretation of legal rules had nothing to do with changing social or political conceptions.[171]

One of Justice Holmes's most criticized opinions is the "sterilization case," *Buck v. Bell*.[172] There the Justice found constitutional a Virginia statute authorizing sterilization of residents of mental institutions suffering from hereditary mental deficiencies stating that "[t]hree generations of imbeciles are enough."[173] This decision is significant for a couple of reasons. First, as the others, it shows Justice Holmes to have been a subjectivist. Reasoning that if "the public welfare may call upon the best citizens for their lives" then "[i]t would be strange if it could not call upon those who already sap the strength of the State for . . . lesser sacrifices . . . in order to prevent . . . being swamped with incompetence,"[174] Justice Holmes indicated that he was unprepared to view legal rules, like the Fourteenth Amendment involved in the case, as having in-

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168 262 U.S. 404 (1923).

169 *Id.* at 412 (Holmes, J., dissenting).

170 10 HARV. L. REV. 457 (1897).

171 For other interesting dissenting opinions of Holmes, see Adkins v. Children's Hospital, 261 U.S. 525, 567 (1923); Hammer v. Dagenhart, 247 U.S. 251, 281 (1918) ("The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all means at its command.") (Holmes J., dissenting); Adair v. United States, 208 U.S. 161, 190 (1908).

172 274 U.S. 200 (1927).

173 *Id.* at 207.

174 *Id.*

herent, immutable, timeless meaning. As context influenced the meaning of legal rules, changing context could result in decisions considered objectionable by some.

The second reason why Justice Holmes's decision in *Buck* is significant is that, through a subjectivist approach to interpretation, it is possible for a person committed to democracy to arrive at decisions which seem decidedly "illiberal" and unsympathetic. While I hesitate to use terms like liberalism and conservatism, there seems a good deal of affinity between subjectivism and the former. Nonetheless, the conjoining of subjectivism and commitment to democracy allows for decisions which give effect to whatever community political sentiment proves dominant. Subjectivism is more capable of accommodating governmental intervention than is objectivism. And as political winds shift, the subjectivist committed to democracy can move from decisions of a liberal stripe to those which appear quite conservative. Only when subjectivism is decoupled from commitment to democracy, or that of the majoritarian sort, is such a phenomenon avoided and subjectivism able to regularly produce decisions liberal in character.[175]

Besides the cases just discussed, there are others which reflect a subjectivist approach and connect that with community. In the context of federal cases after the New Deal, *West Coast Hotel Co. v. Parrish* [176] stands in sharp contrast with the objectivist approach of *Coppage*. In *Parrish*, the Supreme Court was asked to invalidate state law establishing a minimum wage for women on the basis of due process of the Fourteenth Amendment. In a five-to-four decision, Justice Hughes refused to accept the view that the Court was obligated to interpret due process in absolutistic terms which required recognition of natural inequalities.

"In prohibiting that deprivation [of liberty without due process] the Constitution does not recognize an absolute and uncontrollable liberty. . . . the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the peo-

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[175] It may well be that this is what is seen in activists who are prepared to employ the political process to implement their particular social agenda, but also have no compunction against resorting to the courts to block the majority when political canvassing leaves them shorthanded. In such cases, the argument is always that some legal rule has meaning which the political process is not free to ignore. To the extent one is committed to democracy, the argument is likely to be that meaning emerges from the voices of the electorate. To the extent democracy is less important, the argument is likely to be that meaning is inherent, or within the special knowledge of the petitioner.

[176] 300 U.S. 379 (1937).

ple."[177] With regard to how changing economic conditions could affect perceptions of the best way to deal with the evils thus created, Justice Hughes added:

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. . . . We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[178]

From the perspective of Justice Hughes, law is to protect the community. Protection requires looking after the plight of workers, and the economic demands that such attention places on those who contribute to the government's purse. If an employer must incur the burden of assuring workers are compensated at a rate calculated to minimize the risk of evil to the community, then the law must be understood as contemplating such.[179] As Justice Hughes put it: "The community may direct its law-making power to correct abuse which springs from . . . selfish disregard of the public interest."[180]

Then there is the 1954 *Brown v. Board of Education*[181] case, which stands in contrast with *Plessy*. In justifying separate but equal, *Plessy* suggested the equal protection provision of the Fourteenth Amendment required only political equality of facilities and privileges, as no legal principle could eliminate distinctions based upon color or establish affinities where nature ordained none exist. As nature could not be changed, the Fourteenth Amendment had an essential and built-in meaning. Writing in *Brown*, however,

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177 *Id.* at 391.

178 *Id.* at 399.

179 Other cases have taken the approach of approving legislative intervention in private economic affairs. *See e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952) (upholding law requiring employers to allow employees time off to vote); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) (upholding state right to work law); Olsen v. Nebraska, 313 U.S. 236, 246-47 (1941) (upholding law fixing maximum employment agency fees).

180 *West Coast Hotel*, 300 U.S. at 399-400. *Compare* Hughes's approach in *West Coast Hotel with* that of Justice Sutherland, writing in dissent. *See id.* at 401. In Sutherland's words, "the meaning of the Constitution does not change with the ebb and flow of economic events." *Id.* at 402 (Sutherland, J., dissenting).

181 347 U.S. 483 (1954).

Chief Justice Earl Warren observed that in seeking to understand the limits of equal protection, contemporary societal context must be considered. Even in a situation where the educational environment establishes equality of curriculum, staff, salaries, buildings, and other tangible factors, equal protection is denied if the environment is segregated.

"In approaching [the problem of whether equality of facilities and privileges in the context of a segregated educational environment violates equal protection], we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life . . . ."[182] There is no transcendent limit to equal protection. It is capable of changing with changing social and political needs.[183] As those needs reflect both the aspirations of the community and the Court's perception of what social justice dictates, equal protection can come to signify different things at different historical junctures.

Chief Justice Warren saw education as essential to the functioning and growth of every aspect of the community. As the Chief Justice put it: "Segregation of white and colored children in public schools has a detrimental effect upon colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[184] While law may not be capable of establishing affinities where none exist, to allow the law to separate groups based upon race works against the community.[185]

Subjectivism's connection to community is apparent not only in the public law decisions of the Supreme Court, but it can also be found in the private law cases of *Prah*, *Frye*, and *Henningsen*, which were contrasted in an earlier section with the objectivism of *Fontainbleau*, *Levine*, and *Winterbottom*, respectively.[186] Additional examples include cases like *Javins v. First National Realty Corpora-*

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182 *Id.* at 492.

183 Curiously enough, the *Brown* decision may well have involved a situation in which the Court's appreciation of future social and political needs preceded that of the majority of the American populous. In this respect, *Brown* is a stark comparison with the social and economic opinions of the Court during the populist/progressive era.

184 *See Brown*, 347 U.S. at 494.

185 Several cases followed in the steps of the *Brown* holding. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

186 *See* notes *supra* § II B 1 and accompanying text.

tion,[187] in property law, and *Rowland v. Christian*,[188] in tort law. Both involve departures from traditional rules and ways of analysis. They opt for an approach which injects uncertainty into the resolution of disputes; uncertainty associated with resolution based upon consideration of all relevant factors, not just precedent. *Javins* and *Rowland* focus more on building and strengthening community than on the maintenance of individualism and structures that prize autonomy.

Javins considered whether housing code violations without the fault of the tenant affect a tenant's obligation to pay rent. In concluding they do, the court determined that it was appropriate to depart from the long-standing rules of the independence of promises and of caveat emptor. As the opinion explained:

> Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which courts themselves created and developed. As we have said before, "[t]he continued vitality of the common law depends upon its ability to reflect contemporary community values and ethics."[189]

The common law rules otherwise applicable in *Javins* were based on assumptions no longer considered accurate. The decision thus continued that "[i]n order to reach [a result] more in accord with the legitimate expectations of the parties and the standards of the community,"[190] a fundamental reworking of the controlling rules must be set forth. The court rejected any notion of law as a body of static rules protecting preexisting rights. Law is to be constantly reevaluated in light of surrounding circumstances. The circumstances of relevance are not just those precipitated by the individual parties. They consist of the "facts and values of contemporary life," in other words, the totality of the general social milieu. The subjectivist understanding of law in *Javins* sees a tie between legal rules and the larger community. Law as a system of rules designed to further the atomistic, individualistic, autonomous side of interpersonal relations is rejected.[191]

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187 428 F.2d 1071 (D.C. Cir. 1970).

188 443 P.2d 561 (Cal. 1968).

189 *Javins*, 428 F.2d at 1074.

190 *Id.* at 1075.

191 Other property law cases have taken the same tack as *Javins* and have broken away from the individualist notions of law. *See, e.g.*, Skendzel v. Marshall, 301 N.E.2d 641, 650-51 (Ind. 1974) (converting long term installment contract into an "equitable mortgage"); Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797-98 (N.Y. 1938) (recognizing the right of a nontransferee representing owners to sue to enforce a covenant requiring payment of a charge); Davidow v.

In *Rowland*, California's highest court had to determine whether a social guest injured by a cracked faucet handle would be able to recover in negligence for the host's failure to warn. Traditional rules with regard to the duty owed by owners of land for injuries suffered by others turned on whether the injured party was a trespasser, a licensee (social guest), or an invitee (business customer).[192]

Rejecting such, the majority indicated that "[w]hatever may have been the historical justifications for the common law distinctions [between those three categories] . . . [the] distinctions are not justified in the light of our modern society."[193] Factors like the connection between the injury and the defendant's conduct, the conduct's blameworthiness, the policy of preventing future harm, and the prevalence and availability of insurance were all thought more important.[194] On preventing future harm, the court observed that it was important to bear in mind the extent of any burden that fixing duties on property owners would have on "the community" itself.[195]

In acknowledging that policy considerations require reflection on more than just plaintiff and defendant, and the status assigned to them by conventional rules, the court stated: "[L]ife or limb does not become less worthy of protection . . . nor loss less worthy of compensation . . . because [one] has come upon the land of another without permission [as a trespasser] or with permission but without a business purpose [as a licensee]."[196] The majority felt that focusing on the injured party's status as a trespasser, licensee, or invitee "in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mo-

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Inwood North Professional Group-Phase I, 747 S.W.2d 373, 376-77 (Tex. 1988) (allowing a commercial, as opposed to residential, tenant to claim covenant of habitability or fitness).

192 *See generally* Francis H. Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142 (1921) (criticizing such distinctions); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957); Note, *Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee*, 25 VAND. L. REV. 623 (1972). Similarly, cases have drawn on such distinctions. *See, e.g.*, Sheehan v. St. Paul & Duluth Ry. Co., 76 F. 201, 205 (7th Cir. 1896) (dealing with trespassers); Barmore v. Elmore, 403 N.E.2d 1355, 1357 (Ill. App. Ct. 1980) (dealing with licensees); Campbell v. Weathers, 111 P.2d 72, 75-77 (Kan. 1941) (dealing with invitees).

193 *Rowland*, 443 P.2d at 567.

194 *Id.*

195 *Id.*

196 *Id.* at 568.

res and humanitarian values."[197]

Throughout the opinion runs the theme of law as an evolving, ever-changing, necessarily uncertain set of official social rules. Also present is the theme of law as rules which promote not just the interests of the individuals before the court, but those of the larger community as well. The majority insisted that law changes to address the plight of people on the basis of community needs, concerns, and values, and not simply on the basis of status or position.[198] Blameworthiness is important. So too are the ramifications of burdening the land-owning community and of signifying a level of concern for the life and limb of others.

The majority's belief in the subjectivity of legal rules and the connection of that with community is made no more explicit than in the contrasting view of the dissent in *Rowland*.[199] The dissent insisted upon adherence to the traditional rule because it had proved workable and because it "provides . . . stability and predictability so highly prized in the law."[200] In the dissent's estimation, "it is not a proper function of [the] court to overturn the learning, wisdom and experience of the past,"[201] especially if such action would oblige the homeowner "to hover over . . . guests with warnings of possible dangers."[202]

One invited to partake of another's neighborliness "should be obliged to take the premises in the same condition as his host."[203] To base a property owner's duty on any more subjective standard would leave decisionmaking "bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another."[204]

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197 *Id.*

198 A similiar approach is taken in other tort law areas as well. *See* Greeman v. Yuba Power Prod., Inc., 377 P.2d 897, 901 (Cal. 1962) (involving strict product liability on manufacturer who placed good into commerce, rather than injured person, who is powerless to protect himself); Carpenter v. The Double R Cattle Co., Inc., 701 P.2d 222, 229 (Idaho 1985) (Bistline, J., dissenting) (arguing that externalized costs need to be compensated in the nuisance context); Procanik By Procanik v. Cillo, 97 N.J. 339, 353, 478 A.2d 755, 763 (1984) (allowing recovery of extraordinary medical expenses because of the "needs of the living," but denying claim for emotional distress due to birth defects).

199 *See Rowland*, 443 P.2d at 569.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

2. Subjectivism Fosters Community

Surely, if the dissent in *Rowland* expressed concern about stability and predictability, it cannot be accurate to say that the dissent's objectivist approach is any less sensitive to the community than the subjectivist approach of the majority. Implicit in the concern about stability and predictability is a desire to protect every member of the community by assuring that they will not be caught by surprise. Given this, there would seem no reason to believe subjectivism is any more capable of fostering concern for the plight of each individual member of society than is objectivism.

Reference to stability and predictability by those who subscribe to objectivism does not suggest the kind of concern for the condition of each individual person belonging to a social unit that typifies the community-oriented approach of subjectivism. There can be no disputing the fact that stressing a permanency or fixity to law conforms to and reinforces expectations of members of the community.[205] In that such is evidence of attentiveness to the condition of each individual comprising the larger social unit, it at least poses as community, rather than individualism. The reality, however, is that the stability and predictability so prized by the objectivist elevates structure, coherency, and formalism of law above the results it produces.

While stability and predictability help members of the public calculate their actions, they wed the law to the past and impede its ability to change as social conditions change.[206] Discovering how earlier cases have resolved a certain claim becomes more important than developing a resolution meeting present demands. Playing to expectations of the public regarding the consequences of conduct falls short of the kind of concern for the plight of each member of the larger society produced by interpreting legal rules in a way that crafts results to meet evolving social conditions.

The most obvious reason for believing that subjectivism is tied to community has to do with its increased chances of leading to a

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205 *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961) (discussing certainty and predictability). *See also* PHILIP SOPER, A THEORY OF LAW 31-34 (1984) (analyzing predictive theories).

206 Many authors have critiqued objectivism's heavy reliance on rules. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963); KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929); Karl N. Llewellyn, *Some Realism About Realism-Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

more inclusive evaluation of the considerations which bear upon interpretation. Often when subjectivism is mentioned in the context of interpretation, thoughts turn toward constructing meaning out of narrow biases and prejudices. Subjectivism is associated with personal agendas and manipulation. While subjectivism can be approached in this manner, that is not what it is here intended to signify. Subjectivism taken in this way is no different from objectivism; both would give effect to understanding without regard to considerations and perspectives added by others. Subjectivism would do this through meanings which reflect the preferences of the interpreter, and objectivism through meanings the interpreter "knows" to reflect the "true" essence of what is being construed. Neither would display the contingent, open, flexible character which typifies true subjectivism.

As utilized here, subjectivism implies the exact opposite. It connotes uncertainty about the meaning of rules being construed, an attitude of inclusiveness when it comes to reflection about the considerations which bear upon construction, and recognition of the frailties of one's own cerebral processes. Subjectivism is tolerant, introspective, questioning, and amenable to reconsideration. Not being interested in imposing one's own prejudices or insisting one has discovered truth, subjectivism suggests flexibility and belief in the evolutionary nature of social norms. These attributes bespeak of subjectivism's link to community.

That legal rules do not have some preexisting meaning suggests a realization that meaning is constructed out of experiences and context. Importance attaches to consideration of factors and perspectives not jumping to mind. Such an open and inclusive approach leads to seeing things as others do, to empathy with the concerns, needs, and hopes which others claim to hold and value. While the subjectivist must ultimately take the responsibility for ascribing a meaning to what is being construed, the inclination towards empathy invites attentiveness to the plight of individual members of the society. This is not attentiveness born out of the pragmatic realization that, as we all live together, it is difficult for me to fully prosper if you must tolerate abject misery. The attentiveness is born rather out of appreciation for nourishing and supporting the interindividual relationships that exist apart from the selves which define us as autonomous individuals.

The subjectivist and the objectivist may show concern for the condition of each individual member of the larger community. The objectivist's concern, though, is more likely to be motivated by

instrumentalism. In caring about the predicaments of others, one helps the self by blunting criticism and palliating demands. Because of the general empathy which characterizes the subjectivist approach—an attitude that says it is best to genuinely reflect on the widest possible range of perspectives imaginable when interpreting rules—subjectivism shows hints of concern with inter-individual relationships.

If reflection on the widest range of perspectives is genuine, if commitment exists to uncertainty, tolerance, openness, constant questioning, reappraisal, and self-examination, then there seems a good possibility that connecting with others occupies a place of preeminence. An interpreter who manifests an empathy marked by such characteristics is likely to have a deep and abiding interest in the links that exist external to individual selves, yet in their existence act to join us all together. Genuine reflection on the perspectives, observations, views, understandings, and hopes of others, an honest dedication to uncertainty, openness, and constant questioning, grows out of awareness of the importance of relations we have with each other. Commitment to inclusivity, reconsideration, and receptiveness discloses appreciation for nurturing the connections that exist between us all.

Take openness toward the ideas and visions of others. If genuine, it indicates a willingness to scrutinize conclusions and says something about accepting the validity of what others might offer, seeking the less obvious truths in the messages others communicate. Inherent in reconsideration on the basis of alternative perspectives is the message one benefits by listening to others. Different understandings provide enrichment of one's own understandings. Even more important is the implication that the opportunity to share with and engage others is something to be prized. Likewise the general emphasis of subjectivism on inclusiveness and uncertainty. These speak of a desire to see things as others do, and thereby discover truths which lay half-hidden and concealed to those who labor under the fetters of superior judgment.

It cannot be denied that a tangible personal gain is reaped. Of real significance, though, are the indications implicit in the consideration of the forces driving others to see things as they do. A subjectivist struggles to get inside the psyche of another because of the belief that all beings have things of importance to share. If an alternative perspective is to be understood, it is imperative that one experience the emotions behind that perspective. In considering the forces driving the understandings of others, the subjectivist

suggests that, whether all else succeeds or fails, the quality of relations between people is of utmost importance. The consideration accorded to one's beliefs and the reasons underpinning such are far more powerful in strengthening the ties that bind us all than efficient functioning of institutions like the legal system.

A second reason for thinking connections exist between subjectivism and community has to do with the fallout its use is capable of producing. In other words, the second reason for thinking that there is an inherent tie is that the use of subjectivism by one person can lead those who have been affected by its empathy to consider being equally empathetic themselves. A person who has witnessed subjectivism's tolerance, openness, inquisitiveness, and concern for others is likely to respond favorably and reassess the way in which they themselves confront matters of interpretation and judgment.

All of us seek completeness or wholeness in our lives, a sense of emotional and psychic well-being. As the subjectivist connects with others through focus on care for relationships, the connection can be understood as generating exactly the kind of unity with others we all seek. Thus, in witnessing subjectivism at work, those involved in the difficulties that it is attempting to settle, or those standing on the outside and observing its functioning, can come to believe that in the employment of subjectivism a satisfying closeness with others can be attained. Though there is many a slip betwixt the cup and the lip, and beliefs may not make the transition to action, the suggestion that subjectivism promises wholeness in one's life can redound to the benefit of community.

3. Socio-Political Parallelism

In what has preceded, we have seen a preference for subjectivism in the period roughly after the beginning of President Roosevelt's New Deal.[207] Further, we have seen that reasons exist for viewing subjectivism as connected with community rather than with individualism. Presently, I will show that during the time period when the preference of the judiciary shifted from objectivism to subjectivism, socio-political trends indicated a similar shift from individualism to community. It may be recalled that basic socio-political trends from the post-Civil War to New Deal period re-

[207] Authors have expounded the general argument that the New Deal period marked a pronounced change in the way courts across the country thought about law and legal disputes. *See generally* Donald H. Gjerdingen, *The Politics of the Coase Theorem and its Relationship to Modern Legal Thought*, 35 BUFF. L. REV. 871, 893-904 (1986).

vealed individualism coexisting with and gradually being overtaken by community-mindedness by the mid-1930s.[208]

After the establishment of Roosevelt's programs for addressing the social and economic problems precipitated by the Great Depression,[209] widespread concern for the plight of each member of society evidenced itself as dominant, yet it did not exist without a competing vision based on individualism. Indeed, in the case of many important and influential political architects of the time, both strands of thought exerted influence on policy.

President Roosevelt, perhaps the most influential architect, has been viewed by many as a patrician who showed concern for society's less fortunate.[210] He has also been characterized as a pragmatic experimenter who lacked any coherent, preformulated blueprint of thoroughgoing reconfiguration of the twentieth-century social and economic order.[211] However, Roosevelt's intervention to advance the interest of the more encompassing community promoted the Progressive movement's commitment to government intervention against individualism.[212]

As Samuel Eliot Morison put it, Roosevelt had a new deal for the "forgotten man."[213] As a speech by the President himself to the Commonwealth Club in San Francisco revealed, the socio-political climate in the country "[called] for a re-appraisal of values . . . . [The] task . . . was the administering [of] resources and plans already in hand . . . of distributing wealth and products more equitably, [and] of adapting existing economic organizations to the service of the people. The day of enlightened administration [had] come . . . ."[214] Roosevelt's vision manifested itself in legislation aimed at economic security against unemployment, poverty, and old age (e.g., the WPA, the CCC, and the Social Security Act of 1935); at relief for the farm community (e.g., the AAA, the Farm Security Act); at federal credit to property owners (e.g., a reinvigorated Reconstruction Finance Corporation, reorganized Farm

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208 *See* notes *supra* § II B 3 and accompanying text.

209 *See generally* MARIO EINAUDI, THE ROOSEVELT REVOLUTION (1959); WILLIAM LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963); ALBERT ROMASCO, THE POLITICS OF RECOVERY: ROOSEVELT'S NEW DEAL (1983); ARTHUR SCHLESINGER, JR., THE COMING OF THE NEW DEAL (1958).

210 *See generally* EDGAR E. ROBINSON, THE ROOSEVELT LEADERSHIP: 1933-1945 (1955).

211 *See generally* H. ZINN, NEW DEAL THOUGHT (1966).

212 *See* BEARD & BEARD, *supra* note 120, at 424 (indicating that Roosevelt and his New Deal brought into focus many lines of "older social meliorism").

213 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 948 (1965).

214 *Quoted in* HOFSTADTER, *supra* note 122, at 330.

Loan Bank, a Home Owners' Loan Corporation, and Housing Act of 1937); at tighter control over banks, the securities industry, and businesses generally (e.g., the NRA, the SEC Act, and the Glass-Steagel Act); and at rights of organized labor (e.g., the Wagner Act of 1935, and the Fair Labor Standards Act of 1938). As one prescient commentator observed, the New Deal legislation "established the principle that the entire community through the agency of the federal government has some responsibility for mass welfare."[215]

The orientation evident in Roosevelt's administration towards caring for the plight of each member of society did not go unchallenged. Morison claimed that some believed the New Deal to be "destroying the historic American pattern of individual responsibility and local initiative by placing the nation's future in the hands of starry-eyed professors and power mad bureaucrats."[216] Individualism had served the nation well and could continue to do so.[217] And it was not just a handful of critics who voiced concerns about intervention in the name of community. Early on, Roosevelt himself was somewhat indecisive in his commitment to labor.[218] The NRA, which contained some labor provisions, was mocked by workers as the "National Run Around,"[219] and the Wagner Act of 1935 was itself not an administration measure. Indeed, it is said that when the latter act was initially described to the President, "it did not particularly appeal to him."[220]

On September 30, 1934, in a famous fireside chat, FDR responded to criticism of his government aid programs by explaining that "the driving power of individual initiative and the incentive of fair profit," must be made in conjunction with "obligations to the public interest [which] must be accepted."[221]

The shift in paradigms facilitated by the Great Depression remained intact during the tenure of Roosevelt's successor, President Truman.[222] While Truman's connections with the Democratic Party's "establishment" resulted in a less freewheeling, less experi-

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215 *Id.* at 340.

216 MORISON, *supra* note 213, at 968.

217 *See generally* DAWLEY, *supra* note 157, at 369 (indicating criticism of New Deal interventionism).

218 *See* JAMES M. BURNS, ROOSEVELT: THE LION AND THE FOX 42 (1956) (noting that early in his political career, Roosevelt opposed boycotts organized by unions and was evasive on workers' compensation).

219 *See* HOFSTADTER, *supra* note 122, at 336.

220 *Id.* at 338.

221 MORISON, *supra* note 213, at 968.

222 *See generally* DONALD R. MCCOY, THE PRESIDENCY OF HARRY S. TRUMAN 41-66, 91-

mental approach than Roosevelt had demonstrated, he was no less committed to the New Deal's policies.[223] With the exception of movement in civil rights,[224] there was little innovation during Truman's administration in the socio-political field.[225] The period appears a time of consolidation. The Republican-controlled 80th Congress even pursued a course suggesting a rollback with its rejections of Social Security extensions and minimum wage legislation, and its adoption of the Taft-Hartley Act, which labor did not favor.[226] The period's posture of holding the line can be attributed to a desire to evaluate success of the earlier reforms, the need to recuperate from the exhausting experiences of the Second World War, and the way East-West tensions came to preoccupy national interest.[227]

With the Korean War,[228] the Marxist insurgencies throughout Southeast Asia,[229] the dispute over Quemoy and Matsu,[230] the Suez Crisis,[231] the revolt in Hungary,[232] and many more international

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114, 163-90 (1984); Alonzo Hamby, *The Vital Center, the Fair Deal, and the Quest for a Liberal Political Economy*, 77 AM. HIST. REV. 653 (1972).

223 *See* Alonzo Hamby, *The Liberals, Truman, and FDR as Symbol and Myth*, J. AM. HIST. (Mar. 1970), *reprinted in* 2 MYTH AND THE AMERICAN EXPERIENCE 298 (N. Cords & P. Gerster eds., 1973) (discussing differences in style, as well as reasons why "New Dealers" left the Truman administration).

224 *See generally* DONALD R. MCCOY & RICHARD T. RUETTER, QUEST AND RESPONSE: MINORITY RIGHTS AND THE TRUMAN ADMINISTRATION (1973); WILLIAM BERMAN, THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION (1970).

225 *See* MORISON, *supra* note 213, at 1052 (Congress and the American public in no mood for more social experimentation).

226 *See* NORMAN CANTOR, WESTERN CIVILIZATION ITS GENESIS AND DESTINY: THE MODERN HERITAGE 1102 (1971).

227 *See* MORISON, *supra* note 213, at 1054-73 (indicating the growing problems with the Communist bloc).

228 *See* ROBERT H. FERRELL, AMERICAN DIPLOMACY: A HISTORY 708-19 (3d ed. 1975). *See also* Alexander L. George, *American Policy-Making and the North Korean Aggression*, *in* 7 WORLD POLITICS 209 (1954-55); LELAND M. GOODRICH, KOREA: A STUDY OF UNITED STATES POLICY IN THE UNITED NATIONS (1956); GLENN D. PAIGE, THE KOREAN DECISION (1968); MATTHEW B. RIDGWAY, THE KOREAN WAR (1967).

229 *See* JOHN LUKACS, A HISTORY OF THE COLD WAR 117-19 (1966). *See also* AMERICA IN THE COLD WAR: TWENTY YEARS OF REVOLUTION AND RESPONSE, 1947-67, 95-117 (W. LaFever ed., 1969) (documents concerning Southeast Asian policy); JOSEPH BUTTINGER, VIETNAM: A DRAGON EMBATTLED, Vols. I & II (1967) (focusing on one country in particular); ELLEN J. HAMMER, THE STRUGGLE FOR INDOCHINA: 1940-1955 (rev. ed., 1966) (covering the region).

230 *See* FERRELL, *supra* note 228, at 691; JOHN SPANIER, GAMES NATIONS PLAY: ANALYZING INTERNATIONAL POLITICS 167-68, 221 (1972).

231 *See* HERMAN FINER, DULLES OVER SUEZ (1964); LOUIS L. GERSON, JOHN FOSTER DULLES (1967); ANTHONY NUTTING, NO END OF A LESSON: THE INSIDE STORY OF THE SUEZ CRISIS (1967); ADAM ULAM, EXPANSION AND COEXISTENCE: SOVIET FOREIGN POLICY 1917-73, 586-89 (2d ed. 1974); GUY WINT & PETER CALVOCORESSI, MIDDLE EAST CRISIS (1957).

difficulties, attention continued towards foreign affairs during the administration of President Eisenhower.[233] Given the configuration of the President's cabinet,[234] though, there is reason to believe misgivings existed about New Deal reforms[235] amounting to "creeping socialism."[236] But there was no effort at reversal of government's commitment to community-mindedness.[237] Individualism did raise its voice, but never to the same level as earlier in the nation's history.[238]

Reinvigoration of the socio-political trends which marked Roosevelt's terms in office, however, was not witnessed until Lyndon Johnson's "Great Society" of the mid-1960s.[239] Johnson's predecessor, President John F. Kennedy, revealed the enthusiasm and turn of mind which characterized Roosevelt's New Deal,[240] but few legislative innovations emerged during the years prior to his assassination.[241] With the Civil Rights and the Economic Opportunity Acts of 1964, the Elementary and Secondary Education and the Voting Rights Acts of 1965, the assistance programs targeted at the disadvantaged throughout Appalachia, and the adoption of Medicare and Medicaid, the push was on once again to expand socio-political reform to an ever-widening community.[242] Over the last quarter-century, the success of government involvement in socio-economic programs has been open to increasing reassessment. Whether this will result in radical change remains to be seen.

V. CONCLUSION

The thesis of this essay has been that an objectivist approach to interpretation is less likely than a subjectivist approach to reveal

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232 *See* ULAM, *supra* note 231, at 594-99; *see also* NATIONAL COMMUNISM AND POPULAR REVOLT IN EASTERN EUROPE: A SELECTION OF DOCUMENTS ON EVENTS IN POLAND AND HUNGARY, FEBRUARY-NOVEMBER 1956 (Paul E. Zinner ed., 1957); GHITA IONESCU, THE BREAK-UP OF THE SOVIET EMPIRE IN EASTERN EUROPE (1965).

233 *See* MORISON, *supra* note 213, at 1089-97.

234 *Id.* at 1080-84 (discussing the key players in Eisenhower's cabinet).

235 *See* MARQUIS CHILDS, EISENHOWER: CAPTIVE HERO 161-87 (1958).

236 *See* CANTOR, *supra* note 226, at 1103.

237 *See* MORISON, *supra* note 213, at 1084-85.

238 On the Eisenhower years, see generally EMMET J. HUGHES, THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS (1963); MERLO J. PUSEY, EISENHOWER THE PRESIDENT (1956).

239 *See* JACK BELL, THE JOHNSON TREATMENT 276-94 (1965); PAUL R. HENGGELER, IN HIS STEPS: LYNDON JOHNSON AND THE KENNEDY MYSTIQUE 115-22 (1991).

240 *See* MORISON, *supra* note 213, at 1112.

241 *See id.* at 1112-16.

242 *See* Mark I. Gelfand, *The War on Poverty in* THE JOHNSON YEARS: FOREIGN POLICY, THE GREAT SOCIETY, AND THE WHITE HOUSE (Robert A. Divine ed., 1987).

concern for the individual plight of each member of the larger society. In short, an approach which turns on the belief that rules have preexisting meanings, that the task of the judge is to discover those meanings and apply them, is an approach which values abstractness, contextual neutrality, and impersonal decisionmaking. An approach based on the notion that meaning is fluid and depends on the perspectives and experiences of the interpreter—that the task of construction is best performed in an environment of inclusiveness and constant reconsideration, endeavoring to unearth essential points lurking beneath the veneer of difference inherent in an alternative vision—is an approach which values involvement, openness, and appreciation for the interindividual ties that bind us to each other.

It has been suggested that any interpretive approach which divorces or separates the interpreter from total context, which conceives of meaning as fixed or established, which is riveted on the single chore of finding the right answer, is likely to be allied with individualism. Any approach emphasizing consideration of alternative ways of perceiving things, which views meaning as uncertain or evolutionary, which delights in the various truths differences can hold, is likely to be allied with community.

It has been contended that inherent in objectivism and subjectivism are manifestations of individualism or community, respectively. Judicial decisions based on objectivism tilt toward individualism, and those based on subjectivism tilt toward community. Further, individualist socio-political trends parallel judicial preference for objectivism, while those of community parallel periods of preference for subjectivism. And finally, the basic features of objectivism mesh well with the features of individualism, and those of subjectivism track and support the notion of community.

If I may be permitted a concluding observation, the present state of judicial decision making and socio-political thinking seems to be at somewhat of a crossroad. Reconciliation between the needs of the community at large and the interests of the individual could well emerge. The tension between these two has always existed, but economic and technological developments, coupled with increased political sophistication and accelerated intercultural contact, has heightened awareness about the tension to a greater extent than at any time since the Depression of the 1930s.

In this country, various forces have conjoined to make any satisfactory reconciliation between the competing tensions difficult to fashion and next to impossible for any of us to accept. In speaking

only for myself, no matter how I try to deny or ignore it, a sense of true connection with others seems absent. Family and friends provide a source of constant sustenance, but unity with the larger groupings—the nameless faces in crowds, whether well-to-do or homeless—is not present. In part, I fear this is because I face the challenge of breaking through humankind's natural predilection towards self, a predilection which much of our heritage seems designed to strengthen and support.

Perhaps in learning to care more about relationships with others, individualism can be reconciled with community. Perhaps in attending to the interindividual ties that bind us to one another, a sense of wholeness can be attained. Perhaps in focusing less on narrow conceptions, abstractness, and right answers, and more on context, perspectives, and openness, our individual differences can be relished while forging a greater sense of the importance we all have to each other.