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Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior

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SUBVERTING THE RULE OF LAW: THE JUDICIARY'S ROLE IN FOSTERING UNETHICAL BEHAVIOR

RICHARD LAVOIE*

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I. INTRODUCTION

An ethical crisis is raging in corporate America.¹ The last two decades saw some dramatic instances of corporate malfeasance,² but the new millennium started out with a veritable

1. See David Gergen, *Time to Step Up to the Plate*, U.S. NEWS & WORLD REP., July 29, 2002, at 64. See also John A. Byrne, *Restoring Trust in Corporate America*, BUS. WK., June 24, 2002, at 30.

2. Wall Street was rocked in the late 1980s by a spate of high profile insider trading abuses. See generally JAMES B. STEWART, DEN OF THIEVES (1991); Dennis B. Levine, *The Inside Story of An Inside Trader*, FORTUNE, May 21, 1990, at 80; *The Insider-Trading Case's Cast of Characters*, WASH. POST, Sept. 8, 1988, at E4. This period saw the dramatic rise and fall of Drexel Burnham Lambert, attributable largely to Michael Milken's junk bond innovations which also helped to bankrupt a large segment of corporate America. See Larry Light & Leah J. Nathans, *The Junk-Bond Time Bombs Could Go Off*, BUS. WK., Apr. 9, 1990, at 68; BENJAMIN J. STEIN, A LICENSE TO STEAL: THE UNTOLD STORY OF MICHAEL MILKEN AND THE CONSPIRACY TO BILK THE NATION (1992). Beech-Nut's baby-food division became embroiled in one of the largest consumer fraud cases ever seen. See Chris Welles, *What Led Beech-Nut Down the Road to Disgrace*, BUS. WK., Feb. 22, 1988, at 124. Prudential-Bache Securities systematically funneled billions of dollars of retirement funds into high-risk investments without disclosing the risk level, its conflicts of interest, or the past criminal convictions of the investment promoters. See KURT EICHENWALD, SERPENT ON THE ROCK (1995); Chuck Hawkins & Leah Nathans Spiro, *The Mess at Pru-Bache: Questions About the Broker's Dealings Could Cause Long Term Damage, Investigations*, BUS. WK., Mar. 4, 1991, at 66; Stanley Angrist, *A Mountain of Fraud*, WALL ST. J., Aug. 22, 1995, at A8. Salomon Brothers engaged in a pattern of submitting false bids at Treasury securities auctions. See *The Activities of Salomon Brothers, Inc. in Treasury Bond Auctions: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urb. Aff.*, 102d Cong. (1991). Defense contractors repeatedly ran amuck despite adopting ethical codes. See Rick Atkinson & Fred Hiatt, *The Arms Makers' Ethics: New Codes Emerge From Scandals*, WASH. POST, Sept. 15, 1985, at A1; Jim Schachter & Douglas Jehl, *Latest Scandal Leads to Intense Self-Scrutiny by Defense Firms*, L.A. TIMES, Aug. 21, 1988, § 4, at 1. Charles Keating, Jr. of Lincoln Savings and Loan Company defrauded over 23,000 investors. See Thomas McCarroll, *Who's Counting?*, TIME, April 13, 1992, at 48.

orgy of ethical lapses.³ Although it may be comforting to blame a small cadre of unscrupulous executives, corporate America's ethical abuses cannot be dismissed as merely the acts of a few immoral individuals.⁴ While greed, personal ambition, and unrelenting pressure to improve stock performance are typically ascribed as the reasons behind unethical corporate behavior,⁵ a large measure of the blame rests with the alteration of legal and moral norms which previously constrained unethical behavior.⁶ In particular, the judiciary's shift toward strict statutory construction has unintentionally created a legal environment that fosters unethical behavior.

Without appropriate deterrents, individuals will act unethically if they perceive such behavior to be in their best interest.⁷ The legal and moral norms of our society are two of the most crucial factors constraining such behavior. While law and morality represent different forms of social control, they are inextricably linked in a delicate feedback loop that keeps them

3. The list includes: WorldCom (\$3.8 billion in hidden expenses); ImClone (blatant insider trading); Enron (accounting gimmicks used to hide \$1 billion in debt); Arthur Andersen (document destruction and obstruction of justice regarding Enron investigation); Tyco (accounting issues and CEO indicted for evading \$1 million in sales tax on artwork purchased with company funds); Global Crossing (accounting irregularities overstating revenues); Adelphia (billions of dollars in hidden loans to the company's founders); Qwest (accounting irregularities); Rite Aid (fraudulently pumped up earnings by \$1.6 billion); Xerox (false reporting of about \$3 billion in sales). See generally Richard T. Pienciak, *Wall St. Scandals Rocking Investors*, NEW YORK DAILY NEWS, June 30, 2002, at 4; The Wall Street Journal Online, *Corporate Accountability* (July 11, 2002), at <http://online.wsj.com/article/0,,SB1024537971438596080,00.html?mod=article-outset-box> (listing over twenty companies whose accounting has been questioned).

4. See Paula Dwyer & Richard S. Dunham, *Too Many Rotten Apples*, BUS. WK., July 15, 2002, at 32. See also Nancy Gibbs, *Summer of Mistrust*, TIME, July 22, 2002, at 16; David Wessel, *Why the Bad Guys of the Boardroom Emerged en Masse*, WALL ST. J., June 20, 2002, at A1.

5. Marjorie Kelly, *The Next Step for CSR: Economic Democracy*, 16 BUS. ETHICS CORP. SOC. RESP. REP. 10 (2002), available at <http://www.businessethics.com/NextStepforCSR.htm>; Daniel Kadlec, *Remedies: Here's How To Restore Corporate Credibility and Help Reinvigorate the Stock Market*, TIME, June 17, 2002, at 51; Joseph Nocera, *System Failure*, FORTUNE, June 24, 2002, at 62; Spuma M. Rao & J. Brooke Hamilton III, *The Effect of Published Reports of Unethical Conduct on Stock Prices*, 15 J. BUS. ETHICS 1321 (1996) (noting that unethical behavior is actually unprofitable).

6. See discussion *infra* Part III.B. There will always be those for whom societal constraints are insufficient to constrain behavior that society views as unethical. The focus of this article is on how to best minimize such occurrences. Nothing herein should be interpreted as relieving those violating society's moral precepts from responsibility for their actions.

7. See discussion *infra* Part II.

functioning in tandem as efficient regulators of individual behavior. The law is created within the context of a particular society and must reflect the moral values of that society if it is to be obeyed and respected. Similarly, what is considered moral by a society is influenced by what is legally permitted. If the law consciously rejects society's cultural feedback, then unacceptable levels of unethical behavior will result.

Strict statutory construction, as advanced by Justice Scalia and other Justices of the Supreme Court (referred to hereinafter as "New Textualism"⁸), is premised on a flawed perception of the Rule of Law that ignores the law's cultural connection. Growing acceptance of New Textualism within the judiciary has resulted in our society's laws becoming increasingly detached from our morals. Individuals are freer to pursue actions offending our collective morality than in the recent past, because the legal constraints on such actions are no longer permitted to draw strength from the moral constraints. New Textualism is therefore unintentionally fostering unethical behavior in American society.⁹

New Textualism's impact can be seen in corporate America's ethical crisis. Managers able to justify their actions with a patina of legality are freer to act against moral norms that otherwise might restrain their actions. Lawyers, accountants, and other professional advisors are foreclosed from dissuading morally suspect actions in the face of a judiciary that elevates form over substance and requires the law to be read without regard to societal context. Consequently, any serious attempt to address systemic lapses in business ethics requires altering the legal environment in which business decisions are made.

The Enron situation represents a vivid example of such behavior. Enron's executives consciously sought to walk the

8. The phrase "New Textualism" was first used to describe Justice Scalia's approach to statutory interpretation by Professor William Eskridge. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

9. This article focuses on the adverse ethical impact of strictly construing *statutory* language, as opposed to *constitutional* provisions. While judges and commentators typically apply the same interpretive approach regardless of whether statutory or constitutional provisions are involved, the appropriateness of not distinguishing between these two types of provisions has recently been called into question. See Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1 (2004). Consequently, while the ethical critique of strict statutory construction set forth in this article may well have some bearing in determining the proper mode of Constitutional interpretation, that is a topic beyond the scope and objective of this article.

edge of the law in their business affairs. They undertook numerous highly structured transactions, with the help of scores of professional advisors, aimed at exploiting aggressive accounting and tax law interpretations.¹⁰ While such transactions were crafted to be technically legal, they were nevertheless immoral and had grave consequences for Enron's shareholders and employees.¹¹ In an extensive three-volume report on the tax aspects of Enron's transactions, the Joint Committee on Taxation concluded that Enron's activities "demonstrate the need for strong anti-avoidance rules to combat tax-motivated transactions that might satisfy the technical requirements of the tax statutes and administrative rules, but that serve little or no purpose other than to generate income tax or financial statement benefits."¹² In short, Enron's unethical behavior was seemingly promoted by a legal system that the company perceived to be constrained to a literal interpretation of the law.¹³

10. STAFF OF JOINT COMM. ON TAX'N, 108TH CONG., REPORT OF INVESTIGATION OF ENRON CORPORATION AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS (Comm. Print 2003).

11. Jeffrey Weiss, *Corporate Ethics: An Unending Fight*, DALLAS MORNING NEWS, July 15, 2002, at 8A ("Enron is an interesting case because what happened was immoral but may not have been illegal.").

12. STAFF OF JOINT COMM. ON TAX'N, *supra* note 10, at 17.

13. Obviously, many factors contributed to the ethical abuses at Enron, including the inherent conflict of interest created by having its independent auditor provide it with a variety of consulting and other services. Congress has addressed a number of these issues in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. While an analysis of the Sarbanes-Oxley Act is beyond the scope of this article, it is relevant to note that the prime focus of that act is on creating greater internal review of corporate actions (*e.g.*, through increased oversight of certain corporate actions by outside directors and required officer certifications) and addressing some of the inherent conflicts of interest raised by the self-regulation of financial auditing firms. *See, e.g.*, Marianne M. Jennings, *A Primer on Enron: Lessons From A Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163, 243-44 (2003):

The key elements of this legislation are: (1) an accounting oversight Board; (2) regulations on the independence of auditors; (3) corporate responsibility and governance issues including the structure of audit committees, certification of financial statements, forfeiture of bonuses and options, codes of ethics for senior financial officers, and professional responsibility rules for attorneys working with companies on certification of financial statements; (4) analysts' conflicts of interest; and (5) increased criminal penalties for fraud in financial reporting.

(citations omitted). However, the Sarbanes-Oxley Act does little to directly dissuade corporations from undertaking questionable transactions. Lawrence Cun-

The remainder of this article explores these themes in more detail and illustrates them in the context of corporate tax shelter activity. Part II examines the nature of morality and demonstrates that unethical behavior is attributable to situational factors, rather than to intrinsic character. This portion of the article lays the philosophical and social science foundation required to understand why New Textualism's focus on strict statutory construction has such a significant adverse impact on ethical behavior. Part III examines New Textualism's reliance on promoting the Rule of Law as the justification for insisting on strict statutory interpretation. This part demonstrates that strict statutory interpretation in fact harms the Rule of Law because it severs the symbiotic relationship between a society's laws and its values and results in heightened unethical behavior. Conversely, it is shown that a more inclusive interpretive approach would satisfy New Textualism's Rule of Law requirements while still maintaining close links to societal beliefs and promoting ethical behavior. Part IV reviews these concepts in the context of corporate tax shelter activity and demonstrates how a move toward literal interpretations of the tax laws has led to increased levels of unethical

ningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 920 (2003) ("[T]he Act makes no direct effort to exhort, encourage or command superior accounting or corporate governance."); Patricia A. McCoy, *Realigning Auditors' Incentives*, 35 CONN. L. REV. 989, 1008 (2003) ("Nothing in the Act addresses the two major causes of accounting lapses in the late 1990s, *i.e.*, GAAP's susceptibility to manipulation and the employment tie to management."). Instead, the Act implicitly assumes that heightened internal review coupled with increased criminal sanctions for improper disclosure will cause the most aggressive transactions to be avoided or properly disclosed to the public. Despite its recent vintage, a large number of articles exist discussing the Sarbanes-Oxley Act in great depth. *See, e.g.*, Brian Kim, *Recent Development: Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235 (2003); Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123 (2003); Jeffrey Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley*, 35 CONN. L. REV. 1125 (2003); Larry Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002); William Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002). As will be seen from the discussion in this article, merely ensuring that an aggressive transaction is considered by a company's managers, by itself, is no guarantee that the company will not proceed with the transaction. As long as an argument can be made that the transaction is legally permissible, companies are likely to proceed even though the transaction may be considered unethical. *See* discussion *infra* Part III.B.

behavior. This part also appraises the efficacy of various techniques that could be used to dissuade such unethical behavior in light of the philosophical and social science considerations discussed in Part II. Part V concludes that the attitudes of the judiciary and the bar regarding statutory interpretation have a significant impact on the level of unethical behavior. As a consequence of the recent ascendance of strict statutory construction,¹⁴ moral and legal norms have begun to diverge in a manner that fosters unethical behavior. Consequently, corporate America's ethical crisis should be addressed by narrowing the gap between moral and legal norms and by altering the situational considerations of corporate managers. This requires judicial rejection of strict statutory construction and utilization of professional advisors to promote ethical client behavior.

II. THE INTERPLAY OF MORAL PHILOSOPHY AND SOCIAL PSYCHOLOGY

This article argues that strict statutory interpretation has a significant negative impact on ethical behavior. To understand the philosophical and social science underpinnings for this position, it is necessary to provide the reader with a brief survey of these fields as they bear on the question of why people act ethically.¹⁵ As discussed more fully below, this article demonstrates that morality is essentially a relative concept reflecting the norms of the society endorsing those particular moral precepts. As a corollary of this view, the primary motivators of individual behavior are the situational constraints faced by the individual. That is, a person's internal character has little to do with whether she behaves ethically, but external factors, like her perception of the risk of having her unethi-

14. New Textualism's growing strength can be seen in the declining use of legislative history in Supreme Court decisions since Justice Scalia has been elevated to the Court. See, e.g., Eskridge, *supra* note 8, at 623; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994).

15. These topics are discussed in a general manner only to facilitate the accessibility of this article to the general legal reader. Those interested in a more in-depth understanding of the philosophical positions and the social psychology theories discussed are encouraged to consult the extensive literature in these fields in addition to the sources cited in this summary.

cal behavior discovered and censured, have a marked effect on her behavior. Once this premise is established in this part, the unethical effects of the judiciary elevating strict technical compliance over a law's purpose can fruitfully be explored in Part III.

A. *Of Absolutism, Virtue Ethics, and Relativism*

What is the foundation of moral behavior? Are there absolute moral truths that govern our actions, or are we products of our particular culture? Are our actions influenced primarily by our personal character traits, or by the peculiarities of the specific situation at hand? The nature of morality is a central question in moral philosophy, and one on which there is still disagreement.¹⁶ One's beliefs on the topic strongly influence one's views regarding the roots of unethical behavior. If a person believes that moral absolutes exist or that intrinsic virtues govern individual action, then moral lapses by an individual reflect an evil nature or a poorly developed character. However, if a person believes that moral norms reflect cultural beliefs, then violations of society's moral norms can be understood as a rational rejection of such norms based on different cultural perspectives or insufficient societal penalties. For purposes of illustration, this article will briefly contrast three generalized philosophical approaches (absolutism, virtue ethics, and relativism) to understanding the nature of morality and why individuals might undertake immoral acts.

As used in this article, absolutism refers to the belief that morality derives from certain absolute duties or inherent moral imperatives that have universal application.¹⁷ Absolutism faces severe challenges in explaining the fact that individuals frequently disregard their supposedly absolute moral duties.¹⁸

16. GILBERT HARMAN, *EXPLAINING VALUE AND OTHER ESSAYS IN MORAL PHILOSOPHY* 78 (2000).

17. *Id.* at 39.

18. It should be noted that absolutism as referred to in this article is not intended to encompass those who believe that an ideal moral code could be developed or exist. Rather, absolutism as used herein refers to the position that certain universal moral precepts actually exist, all rational beings from any culture in fact ought to obey such precepts, and a failure to do so is immoral. If the moral precepts are indeed universal, individuals should have sufficient reasons to obey the moral code and desire that others obey the code, even if they come from different cultures. Considered in this light, the absolutist position maintains that there

For instance, when an Islamic hijacker steers a passenger plane into a crowded office building, Western culture sees an act of irrefutable immorality. But did the hijacker see his act as immoral? Assuming he did not, how was he able to ignore the supposedly universal norm of not killing others? One explanation is that the hijacker might not have fully understood the moral duty placed on him. However, this seems disingenuous because the predicate of absolutism is that universal moral standards are inherent in all human beings, and therefore no rational individual could fail to understand his moral duty.¹⁹ Alternatively, assuming the hijacker was cognizant of his immoral behavior, he may have proceeded due to his evil character. That is, if he understood his moral obligations and still acted immorally, then a flaw in his intrinsic personality must have caused his action.

Similar conclusions are reached when morality is explained using a virtue ethics theory. While a large number of variations on virtue ethics exist,²⁰ Aristotle is the progenitor of all such systems and his theory of virtue ethics will be used here as a representative approach. In Aristotle's view, individuals undertake virtuous actions due to the existence of a firm and fixed character developed in their formative years, rather than from external or transitory motives.²¹ Virtuous action proceeds from the existence of a virtuous character.²² Morality is universally defined by what a truly virtuous person would do in a particular situation.²³ Aristotle believed each virtue lies at the mean of two related vices.²⁴ For instance, the virtue of courage would be developed to counter a person's fears (*i.e.*, to avoid the vice of cowardice); but if one's fear is suppressed too much, then the virtue of courage can transmute into the vice of rashness. Once the virtue is established in a

are certain universal moral demands which all persons have sufficient reasons to obey. *See id.* at 83–85. Consequently, situations where the universal moral rules are ignored by individuals present a predictive quandary for absolutism.

19. Of course an individual could be suffering from a mental illness, but we will assume that our hijacker was not mentally unbalanced.

20. *See generally* VIRTUE ETHICS, (Roger Crisp & Michael Slote, eds., 1997); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

21. *See* WILHELM WUNDT, ETHICAL SYSTEMS 17–24 (Margaret F. Wasburn trans., 1897).

22. *Id.*

23. *See id.* at 18.

24. *See id.* at 21.

person, the trait is difficult to change and provides the individual with a fixed guide to govern his future behavior such that external inducements to non-virtuous behavior can readily be resisted.²⁵

Returning to our hijacker hypothetical, we see that the virtue ethics analysis reaches the same conclusion as the absolutist position. Either the hijacker was mentally deranged and unable to comprehend the immorality of his action, or he lacked the virtue to resist undertaking it. In either case, the root cause of the immoral behavior lies within the individual.²⁶ Since the ideally virtuous person would not have elevated the virtue of "just resentment" to the vice of "spitefulness," the hijacker's immoral actions must be attributable to his flawed character. Similarly, persons who support the hijacker's actions must also be lacking in virtue. Finally, as in the absolutist paradigm, the ideally virtuous person serving as the standard for judging behavior is a universal constant, unaffected by the cultural differences between various societies.

While an actor's intrinsic character forms the theoretical explanation for moral lapses under both absolutism and virtue ethics, these approaches present several problems. First, as discussed below, there is substantial research indicating that individuals simply do not possess well-defined character traits of the type required by both virtue ethics and absolutism.²⁷ Second, while attributing a malevolent nature to a particular individual might appear reasonable in isolation, this explanation becomes untenable when the individual's actions are widely endorsed by others. For instance, if a significant seg-

25. Similarly, religious training often implicitly relies on a virtue ethics paradigm to guide parishioner behavior. So a Christian might consider "What would Jesus do?" in resolving an ethical dilemma. See, e.g., Mike Burke, *Little Reminders of Faith Teens Can't Get Enough of WWJD Paraphernalia*, CHICAGO DAILY HERALD, March 1, 1998, at Neighbor 1 ("A glance at the [WWJD] bracelet can help guide youths to be like Christ when they are faced with temptations such as whether to use drugs.").

26. See generally GREG PENCE, *Virtue Theory*, in A COMPANION TO ETHICS 249 (Peter Singer ed., 1991).

27. See discussion *infra* Part II.B. As will be discussed below, character traits refer to virtues or vices supposedly possessed by an individual that are expected to be exhibited by that individual across a variety of different factual situations. Honesty, courage, and malevolence would be examples of such character traits. However, this is not to deny that individuals may have predispositions to certain temperaments. Thus, a child may be predisposed to being basically a happy or sad person.

ment of the Islamic world endorses the terrorist actions of hijackers as morally defensible, then any explanation of such actions based on the intrinsically evil character of the actors will necessarily be strained by the sheer number of persons to whom the character flaw must be ascribed.²⁸ To say one man is inherently evil is consistent with the existence of a universal, intrinsic moral belief system, but to say an entire population or culture is morally deficient by nature or training smacks more of xenophobia than a defensible moral philosophy.²⁹

In contrast to absolutism and virtue ethics, moral relativism is the belief that morality depends on the cultural context of the actor.³⁰ Therefore, two or more conflicting moral judgments about a single action can *both* be correct from different cultural perspectives.³¹ If morality is relative, then the hijacker and members of his cultural subgroup could find his actions morally justifiable under their common belief system. At the same time, Western society could legitimately proclaim the act horrifically immoral.

28. See, e.g., *Attacks Draw Mixed Response in Mideast*, CNN, Sept. 12, 2001, at <http://www.cnn.com/2001/WORLD/europe/09/12/mideast.reaction/index.html>; Michael Elliott, *Don't Make a Martyr of Him*, TIME, Dec. 3, 2001, at 86; Edmund Blair, *Rising Anger, Anti-U.S. Sentiment Overrides Sympathy in Mideast*, NAT'L POST, Sept. 12, 2002, at A15; Stanley Reed, *Will the Arab World Ever Change?*, BUS. WK., Feb. 11, 2002, at 56. While the members of a terrorist organization might well self-select participants based on similar evil beliefs, positing that a significant portion of mankind is malevolent by nature would seem to contradict the basic concept of absolutism—that human beings share certain universal moral precepts.

29. This is not to say that such an extreme application of absolutism or virtue ethics would be completely untenable as an intellectual matter. See, e.g., DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996) (asserting that the Holocaust was enthusiastically supported and willingly implemented by the German populous due to the vehemently anti-Semitic character of most Germans). On the other hand, Goldhagen's thesis has been roundly rejected in the academic scholarship. See, e.g., NORMAN G. FINKELSTEIN AND RUTH BETTINA BIRN, *A NATION ON TRIAL: THE GOLDHAGEN THESIS AND HISTORICAL TRUTH* (1998); GEORGE VICTOR, *HITLER: THE PATHOLOGY OF EVIL* (1998); RON ROSENBAUM, *EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL* (1998); FRITZ REDLICH, *HITLER: DIAGNOSIS OF A DESTRUCTIVE PROPHET* (1998). For a more balanced relativistic approach to the German people, see MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* (2000) (detailing the situational factors leading the German people to embrace the Nazi movement).

30. See generally GILBERT HARMAN & JUDITH JARVIS THOMSON, *MORAL RELATIVISM AND MORAL OBJECTIVITY* 17 (1996).

31. *Id.* at 17–18.

Recognizing the relativistic nature of morality does not invalidate Western outrage, change the appraisal of such an act as immoral, or prevent the West from using its own moral standards to judge the event to be an act of terrorism. Nor does it absolve the attacker from responsibility for his actions. Relativism merely acknowledges that the Western moral assessment of the event derives from a particular cultural context that might not be shared by other cultures. Consequently, attempts to convince those from other cultural backgrounds that the West is correct in its moral evaluations may be futile or require arguments based on more than mere appeals to allegedly universal moral imperatives.³²

Under moral relativism, then, adherence to moral precepts depends in part on the individual's perception of the consequences of non-compliance.³³ Ultimately, however, individuals only obey a society's moral precepts if they are culturally invested in such strictures.³⁴ Thus, social constraints and situational factors act as the prime determinants of individual behavior, not inherent or learned character traits.³⁵ This premise is in direct contrast to absolutism and virtue ethics, which predicate compliance with social norms on the individual's intrinsic character.

The proper societal response to unethical behavior depends on which view is correct. Under absolutism and virtue ethics, unethical behavior results from a failure to appreciate the moral imperatives involved, or from the actor's poor character. Therefore, unethical behavior is properly addressed by inculcating ethical standards in an attempt to build good character.³⁶ Under relativism, unethical behavior results from a fail-

32. For an interesting analogous discussion of the moral aspects of terrorism, see Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227 (2002) (reaching similar conclusions regarding the difficulty of addressing international terrorism based on conventional moral theories and then advocating that such activity be addressed using the construct of his evolutionary approach to morality).

33. GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* 93 (1977) [hereinafter *NATURE OF MORALITY*].

34. HARMAN, *supra* note 16, at 46-47.

35. See generally JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2002).

36. Kenneth J. Gergen, *Social Construction and Moral Action*, in *SOCIAL DISCOURSE AND MORAL JUDGMENT* 26 (Daniel N. Robinson ed., 1992) ("Traditional approaches to moral action have attempted to establish an abstract and universal canon of virtues, and then to worry about their installation in the minds

ure of society to craft effective situational constraints, or from a cultural rejection of the moral precept. Society must address unethical behavior by developing more effective curbs on such actions and by encouraging any rejecting culture to accept the broader society's moral beliefs. The relativist response to ethical lapses is therefore focused on societal factors rather than on developing virtuous individuals.

The radical difference in these two approaches derives from divergent views regarding the existence of stable, long-term character traits. If individuals possess such traits, then the absolutist/virtue ethics approach of developing good character could be effective in minimizing unethical behavior. However, if such character traits do not exist, then the societal approach suggested by relativism is sounder. Consequently, determining whether fixed character traits exist is central to determining the proper approach for deterring unethical behavior.

B. The Central Issue of Character

Virtue ethics and absolutism maintain that inherent character traits determine individual behavior. For a character trait to viably serve this function, it must (1) consistently come into play in a wide variety of divergent factual situations; (2) recur over time; and (3) significantly influence behavior.³⁷ Character traits displaying these three criteria will be referred to as "robust" character traits.

Since robust character traits, by definition, affect behavior across a wide spectrum of situations, their existence should be

of individuals." In the last decade, William Bennett has been the avatar for inculcating moral values into American youth by publishing over fifteen different character-building books. *See, e.g.*, THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES (William J. Bennett ed., 1993); THE CHILDREN'S BOOK OF VIRTUES (William J. Bennett ed., 1995); THE MORAL COMPASS: STORIES FOR A LIFE'S JOURNEY (William J. Bennett ed., 1995); VIRTUES OF FAMILY LIFE (William J. Bennett ed., 2001); THE CHILDREN'S BOOK OF HOME AND FAMILY (William J. Bennett ed., 2002). It appears, however, that Mr. Bennett's own virtue training was deficient because it failed to teach him that regular high stakes gambling would be considered a significant vice by many Americans. *See* Joshua Green, *The Bookie of Virtue*, WASH. MONTHLY, June 2003, at 8, available at <http://www.washingtonmonthly.com/features/2003/0306.green.html> (noting that Bennett's books fail to list gambling as a vice and he is estimated to have lost more than \$8 million at casinos over a ten-year period).

37. DORIS, *supra* note 35, at 22.

observable in properly crafted experiments.³⁸ If individuals manifest consistent, trait-relevant behavior across a number of divergent situations (“cross-situational consistency”), this would indicate that some non-situational factor (*e.g.*, a robust character trait) internal to the actor must be present. If cross-situational consistency is not exhibited, this implies that guiding character traits do not exist and that, instead, situational factors control individual behavior.³⁹ Numerous experiments undertaken by social psychologists exploring this issue, as discussed below, have repeatedly failed to demonstrate the existence of cross-situational consistency.⁴⁰

1. Social Psychology and the Significance of Situational Factors

Social psychologists have been searching for evidence of the existence of robust character traits since at least the mid-1920s.⁴¹ The overall evaluation of this extensive body of research is that robust character traits simply do not exist.⁴² Recently, a number of moral philosophers have also reviewed the social science data and concluded that robust character traits do not exist despite their centrality to virtue ethics and absolutism.⁴³

A representative experiment will clarify the nature of the research on which this conclusion is based. We start with a

38. *Id.*

39. *Id.* at 23.

40. However, as discussed *infra*, Part II.B, the stability of an individual's response to a specific situation over time is demonstrable. That is, while a person may act honestly in one situation, but not in another (no consistency across divergent situations), that person is likely to respond in the same manner when presented with the same situations at a different time (a stable response to a specific situation).

41. See, *e.g.*, HUGH HARTSHORNE & MARK A. MAY, COLUMBIA UNIVERSITY, STUDIES IN THE NATURE OF CHARACTER, VOLUME I: STUDIES IN DECEIT (1928).

42. See, *e.g.*, WALTER MISCHEL, PERSONALITY AND ASSESSMENT 146 (1968); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

43. DORIS, *supra* note 35; OWEN FLANAGAN, VARIETIES OF MORAL PERSONALITY: ETHICS AND PSYCHOLOGICAL REALISM (1991); Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 315 (1999); Maria Merritt, *Virtue Ethics and Situationist Personality Psychology*, 3 ETHICAL THEORY AND MORAL PRAC. 365 (2000).

Biblical illustration of the character trait of compassion—the parable of the Good Samaritan:

Jesus said: “A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite [a temple assistant], when he came to the place and saw him, passed by on the other side. But a Samaritan [an outcast from mainstream Judaism], as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, took him to an inn and took care of him. The next day he took out two silver coins and gave them to the innkeeper. ‘Look after him,’ he said, ‘and when I return, I will reimburse you for any extra expense you may have.’

“Which of these three do you think was a neighbor to the man who fell into the hands of robbers?”

The expert in the law replied, “The one who had mercy on him.”

Jesus told him, “Go and do likewise.”⁴⁴

In the early 1970s, an experiment was designed to explore the motivation of individuals faced with a Good Samaritan situation.⁴⁵ The researchers asked a group of Princeton theology students to participate in a study of religious education. The study required the students to complete a questionnaire about their moral beliefs and to give a recorded talk. Half of the students were specifically assigned the Good Samaritan parable as the subject for their talk. After completing the questionnaire in one building, each student was directed to proceed to a nearby building to give his or her presentation. Some students were told they were running late and should

44. *Luke* 10:30–37 (New International Version) (verse numbers omitted).

45. JOHN M. DARLEY & C. DANIEL BATSON, “From Jerusalem to Jericho:” A Study of Situational and Dispositional Variables in Helping Behavior, 27 *J. OF PERSONALITY AND SOC. PSYCHOL.* 100 (1973); For discussions of the Good Samaritan experiment, see DORIS, *supra* note 35, at 33–34. See also Harman, *supra* note 43.

hurry, some were told that they were right on schedule, and some were informed that they would be early for their presentation. On the walk to the nearby building, each student encountered a person in physical distress slumped in a doorway along the student's path.

One might suppose that theology students would represent a subset of the population particularly attuned to the moral duty of compassion and that most would stop to help. However, this was not the case. Indeed, stopping to help had no significant correlation with the students' professed moral beliefs or religious background. Similarly, those preparing to give a talk specifically on the Good Samaritan parable were no more sensitive to the plight of the person they encountered than students speaking on other topics. The only significant correlation discovered related to the time pressure the students were under. Sixty-three percent of those told they would be early stopped to help the injured person and forty-five percent of those who believed they were on time stopped. However, only ten percent of those running late paused to help the injured individual. In some cases the hurried students literally stepped over the stricken person as they proceeded to their scheduled presentation.⁴⁶

The results of the experiment can be read to imply that a person's decision to help a stranger is determined primarily by situational factors (*e.g.*, how much of a rush she is in), not on a robust character trait of compassion.⁴⁷ If such a trait existed and served as a prime motivator of behavior, surely the hurried students would have decided that their moral obligation to assist a person in distress justified being a few minutes late for a presentation.

46. DORIS, *supra* note 35, at 34.

47. Similarly, numerous social psychology experiments examining compassionate behavior have demonstrated a correlation between being in a good mood and helping others. *See, e.g.*, DORIS, *supra* note 35, at 30. For instance, subjects finding a dime in a phone booth were more likely to help collect a file of scattered papers dropped by a researcher outside the phone booth. Alice M. Isen & Paula F. Levin, *Effect of Feeling Good on Helping: Cookies and Kindness*, 21 J. OF PERSONALITY AND SOC. PSYCHOL. 384 (1972).

2. Rationalizing Social Psychology with Conventional Perceptions

At first blush, the conclusions of social psychology regarding the lack of robust character traits seem contrary to everyday experience. On any given day, we all repeatedly make judgments regarding the character of others. We use this information in conducting our interpersonal relationships, and often our appraisals appear to be confirmed. Does this daily reality refute the social psychologist's position that robust character traits do not exist? In short, the answer is an emphatic no. The mere fact that "lay psychology" regularly ascribes robust character traits to individuals does not prove the existence of such traits. The evidentiary value of such everyday experiences must be severely discounted due to the existence of the perceptual biases discussed below.⁴⁸

The popular belief in the existence and predictive value of individual character traits arises from a combination of two well-documented perceptual biases:⁴⁹ the fundamental attribution error and the confirmation bias. The fundamental attribution error refers to the tendency of individuals to reach

48. DORIS, *supra* note 35; Harman, *supra* note 43.

49. The existence of the fundamental attribution error is discussed in: Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79–95 (Edward E. Jones et al. eds., 1971); RICHARD E. NISBETT & LEE ROSS, *HUMAN INTERFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); Edward E. Jones, *The Rocky Road from Acts to Dispositions*, 34 *AM. PSYCHOLOGIST* 107 (1979) (Jones used the term "over-attribution effect"); Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 *J. OF EXPERIMENTAL PSYCHOL.* 1 (1967); Arthur G. Miller et al., *The Perceived Value of Constrained Behavior: Pressures Toward Biased Inference in the Attitude Attribution Paradigm*, 47 *SOC. PSYCHOL. Q.* 160 (1984); George A. Quattrone, *Overattribution and Unit Formation: When Behavior Engulfs the Person*, 42 *J. OF PERSONALITY AND SOC. PSYCHOL.* 593 (1982); and ROSS & NISBETT, *supra* note 42. The existence of confirmation bias is discussed in: M.E. GORMAN, *SIMULATING SCIENCE: HEURISTICS, MENTAL MODELS, AND TECHNOSCIENTIFIC THINKING* (1992); P. WASON & P. JOHNSON-LAIRD, *THE PSYCHOLOGY OF REASONING: STRUCTURE AND CONTENT* (1972); Anthony G. Greenwald et al., *Under What Conditions Does Theory Obstruct Research Progress?*, 93 *PSYCHOL. REV.* 216, 216–229 (1986); Clifford R. Mynatt et al., *Consequences of Confirmation and Disconfirmation in a Simulated Research Environment*, 30 *Q. J. OF EXPERIMENTAL PSYCHOL.* 395, 395–406 (1978); and Barry Schwartz, *Reinforcement-Induced Response Stereotypy: How Not to Teach People to Discover Rules*, 111 *J. OF EXPERIMENTAL PSYCHOL.* 23, 23–59 (1982).

generalized conclusions from limited evidence.⁵⁰ Confirmation bias refers to the tendency of individuals to discount information contrary to their pre-existing beliefs while highlighting facts that confirm these beliefs.⁵¹ Applying these to the lay psychologist's "evidence," we see that individuals would strongly believe in the existence of robust character traits even if such traits in fact do not exist.

Suppose my neighbor Mary buys \$200 worth of Girl Scout cookies from my daughter every year. Due to the fundamental attribution error, I conclude that Mary is a generous person who likes children. I have insufficient facts to know this, but I rely on this generalization in dealing with Mary. Mary's actual motivation for buying the cookies is that she is a compulsive overeater. On the other hand, the fact that Mary rarely leaves her house, never gives money when my spouse is collecting for the United Way, and does not show up for the neighborhood community service event does not alter the favorable impression I have of Mary, due to the confirmation bias.

One day I learn that a homeless woman living in the public park across the street is Mary's daughter. My impression of Mary changes dramatically. Mary must be a miserly person to permit her daughter to live in abject poverty just a few feet from her home. Her apparent generosity to my child is reinterpreted as a guilt reflex attributable to her neglect of her own child. All the other pieces of negative information I have about Mary—previously disregarded—now seemingly fall into place, confirming that she is a callous individual. But what is the reality? Suppose Mary's daughter suffers from a mental illness and has repeatedly refused her mother's help. Suppose Mary lives across from the park because it is the only way she can be near a daughter who refuses to speak to her and runs away if Mary ventures outside her house. Suppose her eating disorder is caused by the trauma of being unable to alleviate her daughter's tragic situation.

Mary's actions are not the result of any robust character trait. My belief that Mary exhibits robust character traits is

50. Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL PSYCHOLOGY* (Leonard Berkowitz ed., 1977).

51. Clifford R. Mynatt et al., *Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference*, 29 *Q. J. OF EXPERIMENTAL PSYCHOL.* 85, 85-95 (1977).

attributable to my perceptual biases. It is only my willingness to make broad generalizations based on insufficient evidence coupled with my bias toward interpreting information in a confirmatory manner that leads to the perception that robust character traits exist. This dynamic pervades all our interpersonal relationships making it unsurprising that lay psychology would take the existence of robust character traits as axiomatic.⁵² Consequently, reasoning that robust character traits exist on the basis of observations drawn from daily life is extremely suspect.

3. Stable Character Traits

The existence of repetitive behavior by individuals also appears, at first, to indicate that robust character traits do exist. Indeed, the relevant social psychology research confirms that individual behavior in similar situations is quite stable.⁵³ Knowing how a person acted in a past situation can be used to predict how that individual will act in a substantially similar future situation.⁵⁴ For instance, a student who successfully cheats on one multiple-choice exam is likely to duplicate that behavior on a similar test given several months later. A person who is shy at one cocktail party is likely to act shy at a subsequent party.⁵⁵

However, the fact that past behavior is a good predictor of future behavior does not affect the conclusion that robust character traits do not exist. The exhibition of stable behaviors in similar situations derives primarily from individuals reacting

52. An additional justification for the tendency of individuals to ascribe labels to a person's behavior based on the knowledge of perhaps only a single event arises from the societal function of the classification. See John Sabini & Maury Silver, *The Moral Dimension in Social Psychology*, in SOCIAL DISCOURSE AND MORAL JUDGMENT 81–82 (Daniel Robinson ed., 1992). That is, to the extent I express my opinion that someone is greedy to others it has the effect of calling attention to the moral precept that has been violated and expressing dissatisfaction over the transgression. Thus, the label is not necessarily indicative of a real belief in the existence of a robust character trait by the person, but is merely a form of social control. *Id.*

53. DORIS, *supra* note 35, at 74–75. However, as discussed below, the fact that individual behavior is stable over time in *similar* situations does not refute the fact that behavior is not stable over time in *different* situations.

54. *Id.*

55. *Id.* at 65–66; ICEK AJZEN, ATTITUDES, PERSONALITY AND BEHAVIOR 99–101 (Anthony S. Manstead ed., 1988).

to the same situational factors that were present in the past. The individual is merely repeating a previously learned strategy for a particular set of situational factors. The key distinction is that the stable behaviors, identified by social psychology research, tend to correlate highly with the degree of similarity between the situations.⁵⁶ As aspects of the situation are altered, so is the correlation to the similar behavior.⁵⁷ Thus, while a student may be likely to repeat his past behavior in cheating on a subsequent multiple-choice exam, the correlation of past cheating on that type of test does not strongly correlate with cheating on written examinations, for example. The behavioral correlations seen in the relevant studies are highly context specific, and relatively minor alterations in the situation result in unpredictable behavior patterns.⁵⁸

While situational stability in individual behavior is consistent with the non-existence of robust character traits, it does compound perceptual biases.⁵⁹ The fundamental attribution error and the confirmation bias encourage the perception that robust character traits exist. Since most of our interpersonal relationships are routine in nature, our erroneous belief in robust character traits is reinforced by the existence of situational stability. Predictions of behavior based on erroneously ascribed character traits often turn out to be correct and validate our reliance on, and belief in, such traits. For instance, I see my neighbor once a week at the grocery store and we always exchange a few pleasantries. The attribution error and confirmation bias I have about my neighbor's genial personality are compounded by the infrequency of our contact and the fact that our behaviors are in fact stable since the situational aspects of our meetings are always the same.⁶⁰

C. Implications for Fostering Ethical Behavior

While individuals have distinct personalities and can be expected to demonstrate predictable behavior in closely related situational patterns, they do not possess robust character traits that regulate their actions across divergent situations. For in-

56. DORIS, *supra* note 35, at 24–25.

57. *Id.*

58. *Id.* at 28.

59. See discussion *supra* Part II.B.2.

60. DORIS, *supra* note 35, at 65–66.

stance, Joe is scrupulously honest in making change when he tends bar, no matter how inebriated his customer. However, that does not mean that Joe will return a lost wallet he finds outside the bar after closing up for the night. He may do so, but his decision will be based on the particular situational factors present, rather than on any broad-based attribute of honesty.

Since robust character traits do not exist in the way required by absolutism and virtue ethics, society should not view unethical activity as limited to a few bad apples or focus inordinate attention on inculcating virtue. While the relativistic nature of morality requires education to maximize the number of individuals accepting society's moral standards, mere acceptance is no guarantee of compliance. In the absence of robust character traits, society must create situational constraints fostering ethical behavior.⁶¹ Laws represent one such situational constraint. Peer censure and public condemnation represent another. Since morality is not absolute, a society must pay close attention to the interaction between its legal system and its less formal means of societal control, if unethical behavior is to be kept in check. The next section will examine the relationship between morality and the law in order to better understand how a society's approach to achieving the Rule of Law can impact society's moral framework and individual adherence to it.

61. The fact that individuals lack robust character traits does not mean that individuals should cease striving to live up to society's moral expectations, or that society should absolve them from responsibility for immoral actions. To the contrary, even in a world without robust character traits, society must still educate its citizens regarding the moral precepts accepted by the society so that individuals are aware of the ethical framework that society will enforce through group censure and other societal constraints. The point is that teaching morality will not give rise to robust character traits prompting ethical behavior. Rather, an individual must be made aware of the relevant moral precepts so that other societal constraints can come into play to prompt compliance with society's wishes. Reliance on moral education alone is simply not supportable based on the experimental evidence regarding the lack of robust character traits. See Gilbert Harman, *No Character or Personality*, 13 BUS. ETHICS Q. 87, 93 (2003). But see Robert C. Solomon, *Victims of Circumstances? A Defense of Virtue Ethics in Business*, 13 BUS. ETHICS Q. 43, 43–44 (2003).

III. HONORING THE RULE OF LAW IDEAL

Part II demonstrated the validity of moral relativism and the significant impact situational factors have on individual behavior.⁶² This part explores the implications of moral relativism for regulating behavior in a society. More specifically, the Rule of Law concept is explored in terms of its moral and societal functions and revealed as a crucial element in effectively using the law as a situational constraint on individual behavior. This part concludes by demonstrating how New Textualism's approach to achieving the Rule of Law undercuts the effectiveness of the law as a viable societal constraint and explains how an alternative approach to realizing the Rule of Law can reinforce the role of the law in fostering ethical behavior.

A. *The Relationship Between Morality and the Rule of Law*

As discussed in Part II, situational factors are paramount in determining individual behavior, therefore society must fashion appropriate situational constraints to encourage ethical activity.⁶³ Identification with a cultural group creates one important type of societal constraint. Such groups typically internalize commonly held beliefs and informally enforce them through negative responses to non-conforming behavior.⁶⁴ In-

62. Recognizing that morality is a relative concept, the remainder of this article will use the term "morality" to refer to the overall system of moral precepts accepted by a particular society and intended to be synonymous with that society's "ethics." As such, the concept is divorced from any universal connotation of good versus evil, and merely indicates a particular society's appraisal of right versus wrong. Similarly, statements regarding moral lapses or unethical behavior in the subsequent discussion should be viewed merely as alternative ways of expressing that a societal norm has been violated and do not indicate any hierarchy of social concern based on the relative significance of the particular norms being violated. Finally, unless the context specifically indicates otherwise, discussions regarding ethical lapses refer to violations of broader societal values rather than to transgressions of the formal ethical codes adopted by a particular business or professional group.

63. See discussion *supra* Part II.C.

64. See HARMAN, *supra* note 33, at 93-94. Indeed, the concept that social norms have a marked impact on behavior has a long history in the social science literature. See, e.g., TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951); MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* (1936); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 27 (Talcott Parsons trans., 1958); Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25

dividuals may obey the society's moral precepts to avoid the group censure, loss of reputation, and shame that would result if an unethical act became known.⁶⁵ However, the power of such peer-enforced moral precepts varies based on the degree of an individual's group identification.⁶⁶ Consequently, using a moral code as an effective societal constraint on unethical behavior requires not just a risk of censure, but also some willing

AM. SOC. REV. 161 (1960); Judith Blake & Kingsley Davis, *Norms, Values and Sanctions*, in HANDBOOK OF MODERN SOCIOLOGY 456 (Robert E.L. Faris ed., 1964). For an extensive review of the legal uses and implications of social norms, see Richard McAdams, *The Origin, Development, And Regulation Of Norms*, 96 MICH. L. REV. 338 (1997).

65. Note the difference between this type of internalized belief and the robust character traits discussed in Part II. Under a virtue ethics or absolutist approach, the robust character trait itself prompts ethical action. In contrast, the type of internalized beliefs discussed here merely provide a guide to an individual regarding whether his peers will approve of an action he is considering. Phrased differently, while considering how a virtuous person would react to a difficult situation is unlikely to create robust character traits, such reflection highlights society's preference for what should be done. Consequently, traditional virtue ethics comparisons to a universal ideal remain relevant by providing a shared context in which group censure can operate. See e.g., W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1972 (2001):

The community relies as a criterion for evaluation upon an idealized personality, considered representative and exemplary within a particular society. By propagating hero myths and didactic stories, and by elevating real persons in the eyes of others as bearers of special prestige, the community transmits its norms to the uninitiated through the histories of individuals facing moral challenges.

Consideration of such virtuous ideals helps us to act ethically by illustrating how others accepting that value expect us to behave, not by altering our inner personality. For instance, asking the question "What would Jesus do?" might help someone to act ethically in a particular situation. However, this positive impact is likely caused by concern regarding the reaction of others, rather than from an intrinsic personality trait. Asking "What would Jesus do?" equates to asking "How will my minister, neighbors, and family react if I don't act as they expect?"

66. See, e.g., SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, & RESPONSIBILITY* 141 (1996) ("Since the feeling of exposure is so central to the experience of shame, one can understand [the] assertion that an individual can only experience shame in the context of an emotional relationship with another person, and only when he or she values that other person's opinions."). Continuing with the example in the prior footnote, once I determine how my minister, neighbors and family expect me to act, I still must ask whether I care about their opinion of me anyway. That is, is my identification with the group strong enough that I care about their appraisal of me under their moral code? Essentially this returns us to the basic fact that morality is a relative concept and an actor could rationally decide to reject a particular moral code after considering the consequences of doing so.

acceptance by the members of the society as to the appropriateness of the moral precepts themselves.

However, a society's accepted moral code is not the only influence on ethical behavior. Perhaps the most significant situational constraint on individual behavior is the legal system crafted by the society. The society's laws set forth rules of behavior that are enforced by the formal institutions of government. But in a democratic society, individual obedience to the law requires more than mere fear of punishment for violations. For the law to serve as an effective constraint on behavior, the members of the society must respect the substance of the laws and the process by which they are created and enforced.⁶⁷ This condition of respect will be referred to as the existence of the Rule of Law in a society.

While the Rule of Law is the centerpiece of a democratic society, there is surprisingly little agreement about its exact nature or how to achieve it.⁶⁸ To some, the Rule of Law merely indicates a system where legal rules are uniformly adhered to and equally applied to all citizens.⁶⁹ Individuals are protected from the arbitrary application of the law, but not from the creation of unjust laws. Thus, a dictatorship could exemplify the Rule of Law as long as the dictator's whims are clearly stated and enforced without regard to the violator's social status. Typically however, and as used in this article, the Rule of Law is thought to also safeguard individual liberties from the arbitrary *use* of government power. The laws themselves must be just. The Rule of Law therefore requires that the populace freely accept the law, in addition to requiring that the law be fairly and impartially applied.⁷⁰ In its most basic formulation,

67. Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 790 (1989):

The Rule of Law is grounded not on the bare claim of efficacy of behavioral control, but on the specific political vision of traditional liberalism. Liberty is the core value; over-reaching by Leviathan is the danger on one hand, and disintegration of social cooperation because of the prisoner's dilemma is the danger on the other.

68. Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227 (2002).

69. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979).

70. For a more detailed discussion of the nature of the Rule of Law see LON FULLER, *THE MORALITY OF LAW* 33-94 (1969); JOHN RAWLS, *A THEORY OF JUSTICE* 235-243 (1971); Radin, *supra* note 67; Laurence H. Tribe, *Remark: Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726 (1989); Francis J. Mootz III, *Is the*

the Rule of Law represents a state where the law fairly communicates the will of society and society's members respect the law's expression of that will. Phrased so generally, the concept is not only uncontroversial, but is central to the existence of a democracy.

As discussed in more detail below, New Textualism justifies strict statutory construction on the basis that it is required to promote the Rule of Law.⁷¹ In particular, a legal system is said to exemplify the Rule of Law if it promotes the goals of equality, uniformity, and predictability.⁷² While it is by no means clear that this is the definitive enumeration of the prerequisites or hallmarks of a legal system characterized by the Rule of Law,⁷³ this article will assume for simplicity of analysis that these three elements are in fact necessary requirements of the Rule of Law. However, this article also maintains that the Rule of Law concept requires the law to be closely attuned to the values of the society it serves.

Some might assert that a society's laws should be viewed as distinct and separate from ethical questions. Indeed, it is common for the legal profession itself to view a society's moral constraints as distinct and separate from its legal constraints.⁷⁴

Rule of Law Possible in a Postmodern World?, 68 WASH. L. REV. 249 (1993); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997); Judith Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY? 1 (Allan C. Hutchinson & Patrick Noonan eds., 1987); RONALD DWORKIN, *Political Judges and the Rule of Law*, in A MATTER OF PRINCIPLE 9 (1985); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001) (examining the rule of law in an Anglo American common law system); DAVID DYZENHAUS, *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* 1 (David Dyzenhaus ed., Hart Publishing 1999); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691 (1999).

71. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989).

72. *Id.*

73. See, e.g., Karen Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233 (1997) (listing a number of other factors that contribute to a society viewing its legal system as legitimate).

74. This belief may be attributable to a perception that laws create definite lines dividing the permissible from the illegal, while moral precepts are perceived as more indefinite guidelines. See, e.g., Jerome Bruner, *Psychology, Morality, and the Law*, in SOCIAL DISCOURSE AND MORAL JUDGMENT 100 (Daniel Robinson ed., 1992) ("To my great surprise, most legal scholars, like virtually all lawyers and judges, held the view that there was a profound difference between law on the one side and morality or ethics on the other."); JUDITH N. SHKLAR, *LEGALISM* 2 (1964)

In a classical formulation, the law derives from the government and morality derives from humanity's intrinsic nature.⁷⁵ So conceived, what the law requires is distinct from what is morally correct. Such an artificial dichotomy disregards the basic interrelatedness of morality and the law in both their function and development.⁷⁶

As discussed above, a society's morality and its laws both serve to direct individual action for the benefit of the society as a whole and both require a willing acceptance of their strictures by the members of the society. Thus, a society's laws and moral code are inexorably linked since they both grow out of the values of that society.⁷⁷ When a society's laws become isolated from its values, both the Rule of Law and society's morality are weakened. As a result, undesirable individual behavior becomes more likely.⁷⁸ As demonstrated in Part II, morality is a relative concept. Morality exists because the particular society espousing it created that morality to further society's needs and reinforce its beliefs. If the society evolves in a manner that obviates the collective belief in a particular moral precept, then that precept will cease to be part of the society's moral code. Similarly, laws are created by a society to reflect and enforce its needs and beliefs. If a law is not supported by the society, then it will be repealed or ignored.⁷⁹ As a noted foreign jurist recently commented:

(asserting that the legal profession believes the law is "sealed off from general social history, from general social theory, from politics, and from morality").

75. DAVID LYONS, *ETHICS AND THE RULE OF LAW* 9 (1984); JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* 9, 87-88 (Isaiah Berlin et al. eds., 1954) (1832).

76. Bruner, *supra* note 74, at 112 ("Public law and private morality . . . become the yin and yang that define the shape of civility.").

77. *See infra* text accompanying notes 105-106.

78. *See infra* text accompanying notes 109-115.

79. Radin, *supra* note 67, at 807 ("A rule would cease to exist if we (the relevant community) stopped apprehending it as a rule and stopped recognizing ourselves and others as acting under it."). The Prohibition Era provides a vivid American example. Long before Prohibition was repealed it was common for otherwise law-abiding citizens to openly frequent speakeasies and for the authorities to largely turn a blind eye to such illegal establishments. *See generally* Sean Dennis Cashman, *PROHIBITION—THE LIE OF THE LAND* 2 (1981) (Prohibition "led to a breakdown of law and order with the connivance of those in authority."); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 *WHITTIER L. REV.* 613, 625 (1994) ("Ultimately, the public broke the law in such large numbers that society became more homogeneous, united in a single pursuit, the drink."). James F. Blumstein has characterized lax health care law enforcement as

Morality and its directives appear as a lake of pure water, while law and its directives can be compared to water lilies immersed in the water, spread across the surface and drawing life and strength from the water. Morality feeds law at the roots and encompasses law. Some of these water lilies give legal force to the moral imperatives; some of the flowers of the water lilies act as concepts that frame law, whose content is filled by the directives of morality, both personal and social.⁸⁰

Despite their interrelatedness, law and morality serve distinct roles in regulating a society. The law's focus is generally on those aspects of the social contract on which there is the broadest societal agreement and on those matters that are fundamental to a smoothly functioning society.⁸¹ Morality often extends to matters less central to the society's orderly operation. Moral precepts are abstract in nature, can be generalized to a wide variety of situations, and often represent different degrees of acceptance by members of the society.⁸² Consequently, law and morality may not always speak to the same issues, but where they overlap, their interaction should reinforce the society's values.

akin to a speakeasy—conduct that is illegal, is rampant and countenanced by law enforcement officials because the law is so out of sync with the conventional norms and realities of the marketplace and because respected leaders of the industry are performing tasks that, while illegal, are desirable in improving the functioning of the market.

James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J. L. & MED. 205, 218 (1996).

80. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 85 (2002) (quoting Justice Michael Cheshin, Israeli Supreme Court).

81. Nevertheless, the law by necessity will ultimately cover topics about which society lacks a uniform opinion. The abortion debate is a perennial case in point. The legislature and the courts must wrestle with whether to permit or ban most abortions despite the fact that the American public remains deeply divided over the issue. See, e.g., Judy Keen & Kathy Kiely, *Bush: USA Isn't Ready For Total Abortion Ban*, USA TODAY, Oct. 29, 2003, at 8A (citing a USA Today/CNN/Gallup Poll finding that 48 percent of Americans identified themselves as "pro-choice" and 45 percent as "pro-life").

82. It is interesting to note the similarity between general moral precepts and standards-based laws. Just as a law setting forth a general standard requires judicial interpretation to determine how the law applies in particular fact patterns, so too it appears that general moral precepts require guidance regarding their application to specific situations. The phenomenon of community gossip is one form of such guidance. Sabini & Silver, *supra* note 52, at 81–82.

The law only has meaning in its societal context.⁸³ Since society is constantly evolving, it is imperative that the institutions of government facilitate the law's adaptation to this changing societal context.⁸⁴ Historically, American society has achieved this by permitting the judiciary to interpret the law in a manner that reflects the values of society. In the last few decades, however, there has been a marked shift away from this traditional understanding of the judiciary's role. New Tex-

83. John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 76 (Northwestern University ed., 1941) ("[L]aw is through and through a social phenomenon; social in origin, in purpose or end, and in application."); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 19, 595 (2d ed. 1985) ("[W]hen we call law 'archaic,' we mean that the power system of its society is morally out of tune. . . . The law, after all, is a mirror held up against life."); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge & Philip P. Frickey eds., Foundation Press 1994) (1958) ("Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . ."); GRANT GILMORE, THE AGES OF AMERICAN LAW 109-10 (1977) ("The function of law . . . is to provide a mechanism for the settlement of disputes in light of broadly conceived principles on whose soundness, it must be assumed, there is general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whim until the social fabric has been stitched together again and a new consensus has emerged.").

84. While generally this requires adjusting the law to fit the changing needs and beliefs of society, the institutions of government are not simply passive instruments of the majority's whims. Occasionally a society's most deeply held beliefs may be contrary to the short-term desires of a tyrannical majority. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The "independence of the judges is equally requisite to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community."); THE FEDERALIST NO. 63, at 425 (James Madison) (Clinton Rossiter ed., 1961) ("[T]here are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament." Therefore the Government must "safeguard against the tyranny of [such] passions."). In these cases the government must act as society's conscience in rejecting or hindering majority actions. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1128 (1993) ("The Court needs to protect both minority viewpoints and the processes that lead to informed public opinion from suppression by passionate public opinion, be it in the form of an elected official, an agency, a statutory act, or an angry mob."). The legitimacy of such endeavors is implicit in the system of checks and balances among the executive, legislative, and judicial branches established by the U.S. Constitution. The Court's school desegregation decisions are a prime example of the Court acting to protect a minority from the wishes of the Southern white majority. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Monroe v. Bd. of Comm'rs*, 391 U.S. 450 (1968).

tualism severely limits the discretion of judges to interpret the law consonantly with the views of society.⁸⁵ The literal text of the statute is thought to have a fixed meaning from which judges are not free to stray. New Textualism's advocacy of strict statutory interpretation as the means to realize the Rule of Law reflects a fundamental misconception of the relationship between the law and society's values. Indeed, New Textualism's approach seems to reflect a distrust of society and fear of its influence on the law.⁸⁶

To understand why reflecting society's values in interpreting the law is integral in achieving the Rule of Law, it is necessary to return again to the teachings of Aristotle. While Part II of this article rejects Aristotle's opinions on virtue ethics, it finds much to commend in his views regarding the Rule of Law.

In *Politics*, Aristotle discusses a monarchy where the ruler has absolute control over his subjects.⁸⁷ Such a state of affairs is fraught with peril for the citizens because even the best ruler may give in to personal passions and desires and act arbitrarily.⁸⁸ In contrast, under the Rule of Law,⁸⁹ human frailties would not prevent the equal treatment of every citizen.⁹⁰ In

85. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999):

[F]ormalism is an attempt to make the law both autonomous, in the particular sense that it does not depend on moral or political values of particular judges, and also deductive, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases. Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law.

86. Indeed, some would maintain that the fears of New Textualism's leading advocate, Justice Scalia, go even deeper, and represent a general distrust of the public's ability to sustain a stable democracy. See, e.g., Richard Pildes, *Democracy in Disorder*, in THE VOTE: BUSH, GORE AND THE SUPREME COURT 140 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Richard Pildes, *Constitutionalizing Democratic Politics*, in A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY 155 (Ronald Dworkin ed., 2002).

87. ARISTOTLE, *Politics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 485 (Benjamin Jowet, trans., Robert Maynard Hutchins ed., William Benton 1952) (n.d.).

88. *Id.* (“[H]e who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.”).

89. *Id.* (“[T]he rule of the law, it is argued, is preferable to that of any individual.”).

90. *Id.* at 486 (“[N]o one doubts that the law would command and decide in the best manner whatever it could.”).

this circumstance, citizens are most likely to respect the law due to its intrinsic fairness and impartiality. The law then strives to be “reason unaffected by desire.”⁹¹ Yet, Aristotle also acknowledges that in the real world the law cannot be devoid of human input and that occasions will exist where the law alone is insufficient to cover particular situations. Therefore, it is necessary to create institutions charged with applying the law and modifying the law as required, to address the needs of the citizenry.⁹² Since the law is best suited to universal concepts, the Rule of Law requires judges to exercise discretion regarding the law’s application to particular cases:

And at this day there are magistrates, for example judges, who have authority to decide some matters which the law is unable to determine. . . . [S]ome things can, and other things cannot, be comprehended under the law. . . . For matters of detail about which men deliberate cannot be included in legislation. Nor does any one deny that the decision of such matters must be left to man.⁹³

In his *Nicomachean Ethics*, Aristotle further explains this concept:

The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so cor-

91. *Id.* at 485.

92. In the words of Aristotle:

On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. For magistrates there must be, this is admitted. . . . [T]here may indeed be cases which the law seems unable to determine, but in such cases . . . it will be replied, the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgment. Further, it permits them to make any amendment of the existing laws which experience suggests.

Id. Aristotle also advocates that interpretation of the law should be vested in many people whose training suits them for their role:

[I]t is argued that there should be many judges, and not one only. For every ruler who has been trained by the law judges well; and it would surely seem strange that a person should see better with two eyes, or hear better with two ears, or act better with two hands or feet, than many with many

Id. at 486.

93. *Id.* at 486.

rectly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.⁹⁴

Aristotle's statements embody the belief that legislating rules for every human situation is impossible and that the law must be understood in its social context. Therefore, judges must exist to rationally interpret the law in light of society's values and to prevent injustice in particular factual situations. Aristotle recognizes that giving individuals a say in interpreting the law permits opportunities for personal passions to come into play, but he has faith that the law itself can create institutions that will minimize such instances. Thus, while a perfect Rule of Law can never be achieved since humanity must always be intimately involved in the law's formulation and application, by working within the human context to minimize the impact of human frailties, society can achieve a reasonable facsimile of the Rule of Law.⁹⁵

94. ARISTOTLE, *Nicomachean Ethics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 385–86 (W.D. Ross trans., Robert Maynard Hutchins ed., William Benton 1952) (n.d.).

95. While this view represents this article's interpretation, others have interpreted Aristotle to reach the opposite conclusion or to have taken the position that Aristotle's writings on the Rule of Law are conflicting. See, e.g., Scalia, *supra* note 71, at 1182 (using Aristotle to support denying judges discretion in interpreting the law to suit particular situations); Jeremy Waldron, *Is the Rule of Law an*

Essentially Contested Concept (in Florida)?, 21 LAW & PHIL. 137, 141 (2002) (purporting to demonstrate Aristotle's equivocation on the role of men in facilitating the Rule of Law). At this point then, perhaps it is appropriate to reprint the full Rule of Law passage from *Politics* so that the reader can reach her own conclusions regarding what Aristotle's view truly entails:

At this place in the discussion there impends the inquiry respecting the king who acts solely according to his own will; he has now to be considered. The so-called limited monarchy, or kingship according to law, as I have already remarked, is not a distinct form of government, for under all governments, as, for example, in a democracy or aristocracy, there may be a general holding office for life, and one person is often made supreme over the administration of a state. A magistracy of this kind exists at Epidamnus, and also at Opus, but in the latter city has a more limited power. Now, absolute monarchy, or the arbitrary rule of a sovereign over all the citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; it is argued that those who are by nature equals must have the same natural right and worth, and that for unequals to have an equal share, or for equals to have an unequal share, in the offices of state, is as bad as for different bodily constitutions to have the same food and clothing. Wherefore it is thought to be just that among equals every one be ruled as well as rule, and therefore that all should have their turn. We thus arrive at law; for an order of succession implies law. And the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. For magistrates there must be[]—this is admitted; but then men say that to give authority to any one man when all are equal is unjust. Nay, there may indeed be cases which the law seems unable to determine, but in such cases can a man? Nay, it will be replied, the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgment. Further, it permits them to make any amendment of the existing laws which experience suggests. Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire. We are told that a patient should call in a physician; he will not get better if he is doctored out of a book. But the parallel of the arts is clearly not in point; for the physician does nothing contrary to rule from motives of friendship; he only cures a patient and takes a fee; whereas magistrates do many things from spite and partiality. And, indeed, if a man suspected the physician of being in league with his enemies to destroy him for a bribe, he would rather have recourse to the book. But certainly physicians, when they are sick, call in other physicians, and training-masters, when they are in training, other training-masters, as if they could not judge truly about their own case and might be influenced by their feelings. Hence it is evident that in seeking for justice men seek for the mean or neutral, for the law is the mean. Again, customary laws have more weight, and relate to more important matters, than written laws, and a man may be a safer ruler than the written law, but not safer than the customary law.

This section has shown that the Rule of Law is necessary if the law is to serve as an effective constraint on unethical behavior. It has also demonstrated that the Rule of Law requires a close relationship between the law and society's values. The next two sections will analyze how different modes of statutory construction can impact the Rule of Law in a society.

B. New Textualism's Approach to the Rule of Law

New Textualism is premised on the assertion that strict statutory construction is crucial to achieving the Rule of Law.⁹⁶ Justice Antonin Scalia, the chief advocate of New Textualism, identifies three primary requirements for the Rule of Law:

Again, it is by no means easy for one man to superintend many things; he will have to appoint a number of subordinates, and what difference does it make whether these subordinates always existed or were appointed by him because he needed them? If, as I said before, the good man has a right to rule because he is better, still two good men are better than one: this is the old saying[]—

two going together,

and the prayer of Agamemnon[]—

would that I had ten such counsellors! [sic]

And at this day there are magistrates, for example judges, who have authority to decide some matters which the law is unable to determine, since no one doubts that the law would command and decide in the best manner whatever it could. But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does any one deny that the decision of such matters must be left to man, but it is argued that there should be many judges, and not one only. For every ruler who has been trained by the law judges well; and it would surely seem strange that a person should see better with two eyes, or hear better with two ears, or act better with two hands or feet, than many with many; indeed, it is already the practice of kings to make to themselves many eyes and ears and hands and feet. For they make colleagues of those who are the friends of themselves and their governments. They must be friends of the monarch and of his government; if not his friends, they will not do what he wants; but friendship implies likeness and equality; and, therefore, if he thinks that his friends ought to rule, he must think that those who are equal to himself and like himself ought to rule equally with himself. These are the principal controversies relating to monarchy.

ARISTOTLE, *supra* note 87, at 485–86 (citations omitted).

96. Scalia, *supra* note 71, at 1187.

equality, uniformity, and predictability. He claims that these features are best achieved by severely limiting the ability of judges to interpret the law.⁹⁷ A judge is not to interfere with clearly drawn legislative directives, even if following the literal language results in injustice. Examining these three central requirements of the Rule of Law will elucidate this position.

The first requirement of the Rule of Law is equal treatment. Applying the law equally to all citizens demonstrates the fairness and impartiality of the legal system. Since the system is not subject to manipulation by the rich and powerful, average citizens are more inclined to respect and obey the law themselves. According to Justice Scalia, strict interpretation of a rule is to be preferred because it promotes equality by providing clarity. A premium is placed on the public being able to *perceive* that the law is being applied equally to all.⁹⁸ It is generally accepted that judges should “[t]reat like cases alike and different cases differently.”⁹⁹ However, in Scalia’s view even cases with legally distinguishable facts do not warrant different conclusions unless the legal significance of the factual differences can be easily justified to the public.¹⁰⁰ The harm to the Rule of Law from the public perception that different results were obtained in similar cases, outweighs the harm to the parties from not having their distinct case decided differently.

The second component of the Rule of Law is uniformity. Agreement among different judges regarding the meaning of a particular law promotes the public’s belief in the law’s rationality and encourages public reliance on the fixed meaning. Conversely, judicial disagreement regarding a statute’s meaning instantly generates unequal treatment between similarly situ-

97. *Id.*

98. *Id.* at 1179.

99. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961); *see also* David Lyons, *Formal Justice and Judicial Precedent*, 38 *VAND. L. REV.* 495 (1985).

100. Scalia, *supra* note 71, at 1178:

When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one’s sense of justice to say: “Well, that earlier case had nine factors, this one has nine plus one.” Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.

ated persons and delays arriving at a settled interpretation of the law. The existence of different courts of appeals for each geographic region of the United States creates the risk of severe uniformity problems. If the circuit courts split over the law's interpretation, then the law may mean different things depending on the state in which a citizen lives. Since the Supreme Court can resolve only a small fraction of these disputes, Justice Scalia believes it is necessary to minimize the potential for judges to reach divergent conclusions regarding the application of particular statutes.¹⁰¹ Such uniformity is imposed by requiring judges to consider and obey only the literal words of the statute.

The third characteristic of the Rule of Law is predictability. Predictability encourages citizens to plan their affairs in conformity with the law to society's benefit. If citizen reliance on the law is frustrated by unanticipated judicial interpretations, then faith in and respect for the law is diminished. The use of strict statutory construction arguably creates an environment in which both the judiciary and the public can more quickly understand the import of statutory language. In Justice Scalia's view, a clearly announced and understood rule, even one that achieves an improper result, is preferable to a situation where judges are in disagreement about a statute's meaning and the public is left without clear guidance.¹⁰²

101. *Id.* at 1178–79:

The common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the supreme court [sic] can review only an insignificant proportion of the decided cases. The idyllic notion of “the court” gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent—that notion simply cannot be applied to a court that will revisit the area in question with great infrequency. . . . [I]t is not *we* who will be “closing in on the law” in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts. To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.

102. *Id.* at 1179:

Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncer-

The linchpin to Justice Scalia's approach to the Rule of Law is that judges must be able to find only a single interpretation of the law and enunciate it in a clear and defensible fashion.¹⁰³ To ensure equal treatment, the judge must be able to clearly state for the public the rule being applied. Uniformity among judges requires that they discern the same meaning for the same law, divorced from the facts of the particular case in point. Predictability requires that not only judges, but also the public itself, be able to discern and anticipate the uniform meaning that ultimately will be given to a particular statute. Therefore, to make this concept of the Rule of Law possible, Justice Scalia limits judicial discretion to a highly constrained mode of statutory interpretation—New Textualism. This theory emphasizes adhering literally to the plain meaning of the statutory language and rejects undertaking any analysis of other sources of interpretive authority that otherwise might lead reasonable minds to differ regarding meaning.¹⁰⁴

tainty regarding what the law may mean. . . . There are times when even a bad rule is better than no rule at all.

103. *Id.* at 1183–84:

Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.

104. While New Textualism focuses primarily on divining "the intent that a reasonable person would gather from the text of the law," in some limited situations even New Textualism deigns to broaden its inquiry. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 17 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*]. Thus, it is permissible to construe the text of a law in its statutory context to prevent ascribing a meaning contradicted by other parts of the statute itself. *Id.* It is also permissible for a court to correct mere scrivener's errors in interpreting a statute. *Id.* at 20. Additionally, in rare circumstances where there is a "solid indication in the text or structure of the statute that something other than ordinary meaning was intended[,]" the plain meaning of a statute can be modified by a court. *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (emphasis added). In Scalia's view the proper approach to statutory interpretation is to

first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Putting aside whether New Textualism's approach to statutory construction is actually necessary to fulfill the promise of the Rule of Law (discussed below), serious questions exist regarding whether strict statutory interpretation will in fact promote the Rule of Law as New Textualism's proponents contend.

When the Rule of Law exists, citizens respect society's laws and have faith in the institutions of government. The legitimacy of a society's legal system is inextricably tied to how effectively the law reflects the society's culture and morality.¹⁰⁵ Contrary to the claims of New Textualism, a strict approach to statutory construction is likely to harm the Rule of Law. Since New Textualism forecloses the consideration of societal values when interpreting statutes, the law is less easily adapted to its societal context.¹⁰⁶ Since courts are prohibited from inserting societal values into the law, this burden must be shouldered entirely by the legislature. As discussed below, this is an institutional burden that the legislature is unlikely to be able to bear alone. As the society's laws become increasingly isolated from its collective values, the public will begin to recognize that the law is no longer serving its desired societal function and is being perverted to benefit unethical individuals. As a result, citizens will become disenchanted with the entire legal system and the Rule of Law will be undermined.

Id. at 404 (Scalia, J., dissenting). However, even when the ordinary meaning of the text is found to be contrary to the remainder of the statutory scheme, New Textualism maintains that the appropriate meaning is still to be ascertained by reference to the statute as a whole in light of its plain meaning and statutory context, rather than by an analysis of the statute's legislative history or other evidence. *See, e.g.,* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring) (noting that legislative history and other evidence could be used to *confirm* that an *ordinary meaning* should nevertheless be given to a text *despite reaching an absurd result*, but maintaining that it is inappropriate to use such authorities to develop the actual meaning of the text even when its ordinary meaning is absurd). Consequently, even in the limited circumstances when New Textualism departs from the ordinary meaning of a statutory text, it refuses to permit extra-textual values or authorities to inform the statute's meaning.

105. *See* discussion *supra* Part III.A.

106. This is not to imply that a legal system based on strict judicial construction is theoretically impossible. For instance, if the institutions of government facilitated the rapid creation and revision of the society's laws, then the laws could be kept in tune with society's value without the need for judiciary to fulfill this role. However, whether such a system is possible in practice is considerably more doubtful.

New Textualism's singular focus on literal interpretation inadvertently promotes unethical behavior and public disrespect for the law. In the first instance, the legislature is charged with reflecting society's values when it drafts the law. Nevertheless, citizens may attempt to circumvent the societal values reflected in the law.¹⁰⁷ By enforcing the letter of the law, rather than its spirit, the judiciary permits citizens to view the law as a system detached from any societal implications. Individuals are free to actively circumvent society's purpose, as long as they carefully structure their actions to meet the law's literal requirements. Such actions are unethical because they contravene the society's values, even though the actions may ultimately be found to be technically legal. By focusing solely on a statute's literal words, New Textualism makes the law more easily manipulated by those who seek to avoid society's values.

If robust character traits controlled individual action, then citizens of good character would resist the temptation to take advantage of the law's literal words. The fact that the judiciary's literalist approach to statutory interpretation makes it easier to play games with the law would be irrelevant to an individual's actions. Unethical, but potentially legal, actions would be best dissuaded by developing a virtuous citizenry. Unfortunately, such robust character traits do not exist and cannot be relied on to prevent unethical acts.¹⁰⁸

By making it easier for citizens to avoid the purpose of a law, New Textualism has relaxed a key societal constraint dissuading unethical actions. Unless constrained by law or society, individuals will act in their own self-interest.¹⁰⁹ Thus, rational people will consider whether the law prohibits a self-interested action. If the judiciary is known to adhere strictly to a statute's words, then individuals will undertake self-interested actions as long as they can be structured to skirt the literal words of the statute. The fact that such actions may be

107. In any society there will always be a certain segment of the population that will ignore societal values by breaking the law and acting unethically. This will occur regardless of the mode of statutory interpretation in use by a society. However, this article argues that strict statutory construction will exacerbate this phenomenon by encouraging more people to attempt to "game" the system and thereby undermine its legitimacy.

108. See discussion *supra* Part II.

109. See, e.g., THOMAS HOBBS, *LEVIATHAN* 91 (Richard Tuck ed., Cambridge University Press 1991) (1651).

unethical in light of the societal purposes underlying the statute becomes irrelevant to the actor.¹¹⁰ If other societal constraints (*e.g.*, fear of peer censure) do not exist, a rational individual will engage in self-interested, unethical behavior as long as it meets the statute's literal words. Under New Textualism, this is appropriate since it is the responsibility of the legislature alone to retool the law to meet society's needs if the original statutory language is deficient.¹¹¹

New Textualism's refusal to look beyond a statute's literal words presents the legislature with a Sisyphean task. If a law containing only general principles is enacted, a literalist judiciary will either strike the law down for vagueness or enforce it strictly as drafted, thereby covering many specific situations that the legislature did not intend to cover. If a detailed and narrowly crafted statute is enacted, then individuals will devise methods to thwart the legislature's purpose without violating the specific provisions of the narrowly drafted statute. Since a literalist judiciary will refuse to narrow a general statute or extend a specific one to comport with societal and legislative purposes, the legislature faces the impossible task of drafting its legislation with every conceivable situation in mind. Since its statutory language inevitably will prove insufficient, the legislature must continually and constantly revise its laws to ensure that society's goals are not frustrated. With so much effort devoted to maintaining prior laws, new societal concerns may go unaddressed.

Additionally, the legislature's constant revision of the law is likely to create rules so convoluted, specific, and complex that the average citizen simply despairs of ever understanding them. Such a situation breeds contempt for the law and raises

110. This should be contrasted to a situation where the law is interpreted in its social context. If citizens know that courts will enforce the spirit of the law, then individuals must explicitly consider whether their actions are unethical (*i.e.*, contrary to the societal values underlying the law) to determine the legality of their self-interested actions.

111. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 63 (1994). *But see* Barak, *supra* note 80, at 84:

New textualism also offends substantive democracy by failing to consider the legal system's fundamental values at the time of interpretation. The principle of separation of powers recognizes the judge's authority to interpret the text. This interpretation is based on a partnership that recognizes the need to examine both the intention of the author and the 'intention' of the legal system (that is, the current values of society).

concerns about equal treatment. Those who are well-advised by teams of attorneys can be expected to uncover technical gaps enabling them to “legally” avoid the law. The average citizen will assume that the complexity of the law is being exploited by the rich and powerful in this manner. When the law ceases to become understandable and court decisions make literalist interpretations that society views as contrary to its desires, respect for the law evaporates.¹¹²

Further, even when the legislature is able to promptly amend the law to close particular loopholes, it is effectively approving the unethical acts that prompted the amendment. By implicitly rewarding those who are the first to discover and exploit unintended consequences in the law, strict interpretation creates a dynamic where citizens rush to undertake unethical actions to gain an advantage over competitors.¹¹³ This rush to the bottom promotes the belief that unethical action pays and leads to the perception that the law itself is fundamentally unjust.

By refusing to shoulder the difficult burden of applying reason to the interpretation of statutory text, the judiciary validates the right of the well-advised to circumvent the law’s intent by artifice and the identification of technical loopholes. Abdication of the judicial role as a fair interpreter of the law results in making the law not only unaffected by *desire*, but also unaffected by *reason*.¹¹⁴ Detaching the law from its societal context leads to increased unethical action and public disenchantment with the injustice of the legal system. Perhaps New Textualism would not undermine the Rule of Law in a world where intrinsic virtues encouraged ethical behavior.¹¹⁵

112. See, e.g., William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1181 (1992) (concluding that Justice Scalia’s approach to statutory interpretation is likely to “attract[] public disrespect rather than provid[e] the public with a reassuring image of the judicial process.”).

113. Of course, the legislature might try to stem this problem by enacting retroactive laws, but this itself would defeat one of New Textualism’s main concerns about the Rule of Law, that it be predictable.

114. In Aristotle’s understanding of the Rule of Law, discussed in more detail *supra* Part III.A., he states that “[t]he law is reason unaffected by desire.” ARISTOTLE, *supra* note 87, at 485.

115. Some commentators explicitly maintain that Justice Scalia’s views reflect a commitment to traditional notions of individual virtue and responsibility. See, e.g., George Kannar, *Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia*, 12 CARDOZO L. REV. 1845, 1861–64 (1991).

Unfortunately for New Textualism's thesis, such a world does not exist.

Since human nature cannot be relied on to prevent a society's citizens from abusing the law, one potential non-legal curb on unethical behavior is peer censure. Unfortunately, the application of a strict interpretation approach for legal matters is likely to blunt the effect of peer censure as a curb on unethical behavior. While strict interpretation insulates the law from society's values, public morality continues to be influenced by the operation of the legal system. Thus, as people become accustomed to thinking of the law as a system of formal rules that can be gamed using a literal approach, they may begin to see moral rules in the same light. Moral precepts are typically general standards of behavior that are intended to apply to a wide variety of situations. Morality's force is greatly circumscribed if citizens apply moral standards in a literal manner and limit their application to particular types of situations. In this way New Textualism may cause a general decrease in the force of society's moral directives. Similarly, the potential for group censure may be blunted by appeals to the purported legality of the actions. That is, if the formal institutions of the society (*i.e.*, the branches of government) permit the action as a legal matter, how forceful is the claim by members of the society that the action is nevertheless morally indefensible in light of society's values?

For these reasons, the position that strict interpretation by the judiciary promotes the Rule of Law is incorrect. To the contrary, a policy of strict interpretation encourages abuse of the law, detaches the law from common reason, promotes additional complexity, and fosters a similarly narrow interpretation of moral directives. Strict interpretation should not be rejected due to the instances of injustice it causes for particular claimants or based on theoretical arguments regarding the indeterminacy of all language. Strict interpretation should be rejected because it is fundamentally inconsistent with the need for law to reflect society's values and because it provides citizens with incentives to actively work to avoid the law's requirements.

C. An Alternative Approach for Realizing the Rule of Law

If New Textualism's strict statutory construction approach will not secure the Rule of Law, can the Rule of Law be achieved in a way that facilitates the law's interaction with so-

cietal values? This section demonstrates that Justice Scalia's concerns about equality, uniformity, and predictability can largely be addressed in a manner that both promotes the Rule of Law and recognizes a legitimate role for judicial consideration of society's values.

The Rule of Law arises from the close interaction between a society's laws and its values and is best realized by the judiciary consciously interpreting the law within its societal context.¹¹⁶ The judiciary should therefore reject New Textualism and embrace a more inclusive mode of statutory interpretation.¹¹⁷ In this view of the interplay of the judicial function

116. This conception of the law was understood by Justices Cardozo and Frankfurter over sixty years ago. In eschewing the dictionary definition of the words of a taxing statute, Cardozo stated: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering*, 290 U.S. 111, 115 (1933). Echoing this thought ten years later, Justice Frankfurter commented: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose." *United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting). See also OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963) ("The life of the law has not been logic: it has been experience.").

117. As used in this article the phrase "inclusive statutory interpretation" is used in a general descriptive sense. It indicates a system where judges are free to consider *all* relevant factors (legislative intent, statutory language, particular case facts, broader societal concerns, etc.) in arriving at the meaning of a statute. The term is intended to be significantly broader than the traditional formulations of "purposive" interpretation espoused by Hart and Sacks. HART & SACKS, *supra* note 83. While the phrase "inclusive statutory interpretation" bears a close affinity to interpretive theories based on "practical reasoning" or "dynamic interpretation," those terms have not been adopted for use in this discussion since attempting to specify the particulars of an ideal interpretive methodology is beyond the scope of this article. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). The focus here is that statutory interpretation should take societal values into account to effectively promote the Rule of Law. It is left for others to debate the mechanics and particulars for how this weighing of social values is best achieved. While the literature in this area is voluminous, those interested in exploring the specific parameters of particular inclusive interpretive systems should review the following works in addition to those cited above: William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L. J. 865 (1993); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 622 (1993); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Barak, *supra* note 80, at 66; Michael Livingston, *Practical Reason*, "Pur-

with society, the law is not static and judges must facilitate the ability of the law to reflect its changing cultural context. As Professor Radin states:

[J]udges are an interpretive community conscious of their obligation to act as independent moral choosers for the good of a society, in light of what that society is and can become. The law, as long as it is part of a viable and developing community, is neither “found” nor “made,” but continuously re-interpreted. There are still rules. But there are no rules that can be understood apart from their context; nor are there rules that can be understood as fixed in time.¹¹⁸

This understanding of the judicial function requires courts to “make” law in the context of interpreting it.¹¹⁹ Adherents of New Textualism will object that such judicial discretion (1) undermines the equality, uniformity, and predictability of the legal system; and (2) violates the separation of powers on which the U.S. Constitution is founded. This section demonstrates that substantial consistency with the Rule of Law’s call for equality, uniformity, and predictability can be achieved by appropriately shaping the institutional framework to which the judiciary adheres.¹²⁰ Additionally, contrary to New Textualism’s position, this article maintains that inclusive interpretation by the judiciary strengthens our constitutional separation of powers.

posivism,” and the Interpretation of Tax Statutes, 51 TAX L. REV. 677 (1996); Mary L. Heen, *Plain Meaning, the Tax Code and Doctrinal Incoherence*, 48 HASTINGS L. J. 771 (1997); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986).

118. Radin, *supra* note 67, at 817 (citations omitted).

119. Popkin, *supra* note 112, at 1171 (“Legislatures state general rules, but the organic/contextual nature of language requires meaning to be developed through cases, where the relationship between text, context, and specific facts can be established. This leads directly to a lawmaking role for the courts, the institution which resolves cases.”) (citation omitted). *See also* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 81 (1987) (advocating judicial representation of societal values).

120. The relevance of an institutional focus when examining the impact of different interpretive approaches has been noted by others as well. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003).

1. Achieving Equality, Uniformity, and Predictability with Institutional Consensus

New Textualism maintains that equality, uniformity, and predictability are essential elements for promoting the Rule of Law. These three concepts are closely linked and share a similar aim: to cause every judge to reach similar results in similar cases based on similar rationales. New Textualism achieves this aim by limiting judicial interpretation to the plain meaning of the literal statutory language. While injustice may result because judges are denied the ability to tailor the law to particular facts, New Textualism's approach imposes similar results in all cases based on the similarly determined plain meaning of the statute. However, this is not the only means of achieving this goal.

The key to designing a judicial system that appreciates its social context, while still substantially complying with the need for equality, uniformity, and predictability, is to ensure that the system promotes genuine *consensus* among judges regarding the appropriate result for any particular case.¹²¹ If most judges would agree regarding the proper application of the law to a particular fact pattern based on an examination of all the relevant information (including societal context), then equality, uniformity, and predictability would be maintained while the injustice of an inflexible rule would be avoided. Where the relevant judicial institutions create an interpretive community sharing similar values and approaches to legal interpretation, individual beliefs will be sufficiently constrained by reason and peer scrutiny for substantial consensus to emerge.¹²² Such a judicial system achieves true equality, uniformity, and predictability in the law by constraining the passions and desires of

121. Note that this requirement is distinct from the statement that one should "[t]reat like cases alike and different cases differently." HART, *supra* note 99, at 155. That statement is a justification for obeying past precedent by requiring that similar fact patterns receive the treatment previously applied under the law, but different facts can warrant departures from a prior rule. As such, the statement sidesteps the question of how one is to determine whether the addition or subtraction of a particular fact actually constitutes a significant difference.

122. Such general consensus was thought to exist within the context of the English common law. *See id.* at 131–32. Professor Bruner has asserted that the force leading to such general consensus in the common law was the shared understanding of the implicit moral precepts on which the law is ultimately based. *See generally* Bruner, *supra* note 74.

individual judges from within the judiciary, rather than merely giving the *semblance* of eliminating such motives by imposing an artificial uniformity over all cases, as New Textualism does.

The American judicial system is institutionally positioned to produce consensus around its decisions.¹²³ Consensus is institutionally promoted by (1) requiring published opinions stating the judges' reasoning so that it can be openly scrutinized, criticized, and ultimately overruled or accepted by society; (2) requiring that decisions be grounded on the facts of the particular situation, prior precedents, accepted legal principles, and the statutory text, thus ensuring that the law's evolution is well-considered; and (3) ensuring that the judges themselves share a common understanding of their role and how they are to reach their decisions.

The first two criteria are well established in American jurisprudence and are considered hallmarks of the common law system.¹²⁴ However, the third requirement necessitates that judges agree on the correct mode of statutory interpretation. As New Textualism gains strength, the judicial schism over statutory interpretation becomes a threat to the system's traditional ability to reach consensus regarding legal meaning. Two judges examining the same case are more likely to reach dissimilar conclusions if one is bound to examine only the literal words of the relevant statute while the other feels free to factor in societal values and statutory purpose.

To borrow an analogy from H.L.A. Hart, the nature of law is that a strong core of consensus exists about most aspects of

123. Popkin, *supra* note 112, at 1170 ("Courts are in a good position to apply public values to the resolution of disputes because . . . their process of reflective thought and collegial dialogue gives them a unique opportunity to work out the implications of public values.") (footnote omitted). See also Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 77-87 (1989) (approving judicial lawmaking on constitutional grounds); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74-76 (1986) (highlighting the legitimate role of judges in using practical reason and dialogue).

124. See generally RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION (1998); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 201 (1984); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3 (1989) (stating "[t]he notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-31, 142-67 (1921) (discussing common law adjudication and the evolution of precedent); Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961).

the law, but rational persons can differ regarding the appropriate result in situations falling within the penumbra around this central core of consensus.¹²⁵ Hart attributed this core and penumbra phenomenon to the inherent nature of the law.¹²⁶ However, in light of the inevitable link between law and society's values, it may be more correct to view the core as representing areas of consensus in society and the penumbra where society is striving to reach a consensus.¹²⁷ Consequently, while Hart feared the penumbra's implications (and therefore strove to demonstrate that it was in fact a small set of situations), a society-based approach can accept the penumbra's existence as reflecting a legitimate step in ultimately reaching consensus on an issue.

Substantial consensus on the outcome of factually similar cases is likely to result if the judiciary embraces an inclusive mode of statutory interpretation. This consensus will grow out of judges' receptiveness to interpreting the law in light of the surrounding society, the shared values of the legal community inhabited by the judges, and the requirements that decisions represent reasoned applications of the law to particular factual situations.¹²⁸ While the concept of consensus is not monolithic and some cases will defy easy agreement, on most issues judges will reach similar conclusions because they all will be drawing

125. Hart demonstrates this concept through the now famous vehicle-in-the-park example. Suppose a law forbids taking a "vehicle" into a public park. This unequivocally prohibits automobiles; but are bicycles, roller skates, or toy automobiles characterized as vehicles? In Hart's eyes, general words like "vehicle" have a "standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-608 (1957). Accordingly, Hart deems any problems arising outside this core of standard instances "problems of the penumbra." In Hart's view, logical deduction cannot be used to apply legal rules to penumbral cases; arguments and decisions of these matters, however, must remain sound and rational. Thus, according to Hart, the criterion in penumbral cases is "some concept of what the law ought to be . . ." *Id.*

126. *Id.*

127. See Radin, *supra* note 67, at 794.

128. As discussed in Part II, *supra*, judges will not suppress their individual self-interest as a result of their intrinsic good character. It is institutional constraints and peer pressure that limit their actions. For instance, even though a judge may in theory have considerable discretion to ignore the law in a particular case, he is prevented from making a decision as a practical matter if most other judges would disagree. If the biased decision is made, he is likely to be overruled on appeal and heavily criticized by the legal community.

on the same societal values and interpretive factors in reaching their reasoned conclusions about a statute's application.

Judicial decisions on questions lacking a social consensus are still a valid exercise of the judicial power. Such decisions assist society in framing the debate about penumbral issues, and consequently are legitimate even if society ultimately rejects the original judicial stance. While the judiciary should not be anxious to make rulings in the penumbra, such cases will need to be addressed periodically if courts are to fulfill their role in developing societal consensus. A judge faced with such an issue must employ all her judicial craft to develop a decision that fits best with her perception of society's needs.¹²⁹ By stating her rationale, she helps crystallize a position for society to consider. If society concurs, then the legislature is likely to build positively on the judicial move, thereby moving society closer to a consensus.¹³⁰ If society ultimately believes the decision is unwarranted, then the legislature is likely to statutorily overturn the decision.

Similarly, on occasion, the courts will be required to make difficult choices between competing societal interests. This duty may require a court to affirmatively reject the immediate desires of the society in order to preserve the existence of more dearly-held, long-term societal values. Acting as society's conscience in the face of majoritarian excesses is an important aspect of integrating society's values into judicial interpretation.

A society's desire to combat terrorism is a topical case in point. If a legislature, with full public support, approves the use of torture to interrogate suspected terrorist sympathizers, a judge could still legitimately rule that such a law is impermissible. While public opinion in the hypothetical favors fighting terrorism by any means necessary, contrary, longstanding, societal values maintain that torture is never an acceptable method of interrogation and that deprivation of liberty without due process cannot be tolerated in a free society. Thus, the

129. There is substantial academic discussion of the concept of what exactly judicial craft entails and how it is to be cultivated. *See, e.g.*, Brett G. Schauffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); KURT LEWELLYN, *COMMON LAW TRADITION* (1960); Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993); HART & SACHS, *supra* note 83.

130. Certainly civil rights legislation fits into this mode as do many other situations of alleged judicial activism. *See* Radin, *supra* note 67, at 789–90.

judge must weigh the competing societal values and needs. This is an appropriate and necessary judicial function. The society may ultimately decide to ignore its conscience by amending the Constitution, replacing the judges in question, or otherwise obviating the anti-majoritarian decision, but such an ultimate rejection does not denigrate the appropriate function served by the judiciary in reminding society that a choice between competing values must be faced directly to resolve the question.¹³¹

The foregoing has assumed that equality, uniformity, and predictability are in fact necessary for maintaining the Rule of Law. However, it can be argued that the Rule of Law will not be undermined by short-term departures from these goals. The Rule of Law exists as long as the public has faith in the law's ability to protect individual rights. This faith grows out of the historical legitimacy of the legal system (*i.e.*, its previously demonstrated ability to keep the law attuned to society's needs). Consequently, particular instances of injustice, unequal treatment, non-uniformity, and legal uncertainty would not be fatal to the Rule of Law as long as *long-term* equality, uniformity, and certainty ultimately emerge. Thus, even where judicial decisions evidence a high degree of inequality and non-uniformity, respect for the law can be maintained if the legal system ultimately reaches uniform positions within a reasonable time period. Such periods of legal turmoil can be justified as necessary costs of actively involving the legal system in forging social consensus on unclear topics. It is only when unequal treatment becomes rampant across many issues, and uniformity conflicts between jurisdictions are never resolved, that the legal system breaks down and loses the respect of the citizens. As long as a society has faith that the system is capable of self-correcting and reasonably resolving any equality and uniformity issues that arise, there is no reason to believe that even high levels of non-uniformity on emerging issues would jeopardize the public's traditional faith in the Rule of Law.

131. Indeed, judicial action in these situations often provides additional time for society to consider its actions more fully and permits short-term passions to cool.

2. Understanding Limited Judicial Lawmaking Functions as Consistent with Constitutional Separation of Powers

New Textualists will likely object to the judiciary interpreting the law in its societal context based on separation of powers concerns. Justice Scalia has clearly indicated his belief that society's values must be reflected solely through the legislature.¹³² However, in an ever-changing society, this is not a task easily borne by the legislative branch alone. For the law to truly represent society, all branches of government must actively participate. The Rule of Law is best achieved through checks and balances on the exercise of power that allow a society to alter its beliefs and laws in a considered manner. To fulfill its designated role in this system, the judiciary must be permitted to interpret the law in accordance with societal values.

No constitutional mandate requires judges to be limited only to purely textual exegesis in interpreting the law.¹³³ Article III of the Constitution gives the judiciary the authority to decide cases and controversies, but no specific theory of judging is prescribed. To the extent the original intent of the Framers is thought to be relevant, Professor Eskridge has persuasively demonstrated that "the Framers practiced and preached a highly contextual approach which was open to revising, ameliorating, and bending statutory words in light of reason and fundamental law."¹³⁴ This accords with the reality that the federal judiciary has in fact historically exercised its judicial craft in a broad contextual manner. Indeed, it is difficult to envision how the judiciary could adequately fulfill its constitutional role without the ability to ascribe meaning to the law based on the facts of particular controversies. As James Madison noted:

All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal,

132. Scalia, *Common-Law Courts*, *supra* note 104, at 9–13, 34–35.

133. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*]; William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1526–30 (1998) [hereinafter Eskridge, *The Unknown Ideal*]; Popkin, *supra* note 112, at 1161.

134. Eskridge, *All About Words*, *supra* note 133, at 1087.

until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.¹³⁵

New Textualism's proponents often refer to the non-elected nature of judges as a justification for limiting judges to a passive application of the literal statutory words crafted by elected officials.¹³⁶ This argument maintains that judges should not be able to create laws binding citizens because their non-elected status makes them unresponsive to the preferences of the public. However, there is little reason to believe that the elected nature of legislators makes them fairer interpreters of societal desires in particular cases than appointed judges.¹³⁷ For example, wealthy contributors and special interest groups may have disproportionate power over the actions of elected officials. Similarly, agenda control by the political party in control of the legislature may sometimes result in laws not truly reflective of majority views in the country.¹³⁸ Conversely, the fact that appointed judges are free from direct political pressure and need not cater to special interests to retain their positions, works to make the judiciary more objective about the society's needs and desires. Additionally, judicial decisions can help frame the societal debate about emerging issues.¹³⁹

135. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

136. Scalia, *Common-Law Courts*, *supra* note 104, at 10.

137. Popkin, *supra* note 112, at 1169–70. *See also* Chemerinsky, *supra* note 123, at 77–87; Michelman, *supra* note 123, at 74–76; WILLIAM GREIDER, WHO WILL TELL THE PEOPLE? THE BETRAYAL OF AMERICAN DEMOCRACY (1991).

138. This is especially true in situations where the majority of the country advocates a moderate position, but one or both political parties advocate more extreme positions as a matter of internal party politics. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1514 (1990) ("When we vote for candidates it is often difficult to know exactly what we are saying. And even if representatives perfectly mirrored the people who voted for them, inequalities of representation and all sorts of institutional practices prevent accurate legislative expressions of popular will."). For example, assume that 60 percent of the population votes Republican and 40 percent Democratic. While the majority of the country has a Republican affiliation and Congress is under Republican control, not all issues facing the country divide easily along party lines. Assume that 60 percent of the population favors continuing affirmative action programs, but that this majority is composed of all Democrats and one-third of Republicans. If the Republican Congress acts in accordance with the party's majority and eliminates government affirmative action programs, the action nevertheless represents the views of only a minority of the entire populous.

139. *See supra* notes 102–104 and accompanying text.

New Textualism is based on a highly formalistic understanding of the separation of powers doctrine where governmental powers are strictly compartmentalized and the judiciary is required to act solely as the faithful agent of the legislature.¹⁴⁰ Any judicial lawmaking to fill gaps in the statutory structure or to ensure justice in particular cases is an improper usurpation of the legislature's role. Contrast this with a functionalist approach to the separation of powers.¹⁴¹ Under a functional approach, the separation of powers is merely a means to create checks and balances within the government. These checks and balances force government action to be deliberate and well considered.¹⁴² The separation of powers is intended to constrain the Leviathan of government¹⁴³ to actions on which a social consensus exists while dissuading majoritarian excesses. The general division of power between the executive, legislative, and judicial branches facilitates such checks on the exercise of authority, but that general division does not require an *absolute* separation of authority for each function. For instance, in addition to its enforcement activities, the executive branch is permitted to administratively interpret legislation and to create law through administrative practice and regulations.¹⁴⁴ Such actions do not contravene the separation of powers because the executive's actions can be checked by the exercise of legislative and judicial power. Similarly, permitting the judiciary to have a limited lawmaking function

140. See, e.g., Easterbrook, *supra* note 111, at 63; Scalia, *Common-Law Courts*, *supra* note 104, at 34–35.

141. For a comprehensive discussion of the formalist versus functionalist debate, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725 (1996).

142. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 122–23 (3d ed. 2000) (discussing the American legal system of checks and balances).

143. HOBBS, *supra* note 109, at 91. According to Hobbes' rationale, while the individual's natural state is one of liberty, human reason leads each to believe some unrestrained liberty must be ceded to an authority—the Leviathan—to ensure survival; otherwise, people will remain in the state of nature which is that of war and conflict. The Leviathan (in Hobbes' discussion, the Commonwealth) serves as the guarantor of the agreements or covenants that people make in the reasoning state to eliminate conflict and promote peace when disagreements amongst people arise.

144. While such executive branch actions are potentially subject to judicial review and subsequent legislative alteration, this merely acknowledges the existence of the system's checks and balances.

in the context of deciding a particular case is not prohibited by the Constitution's separation of powers.

By restricting courts to literal statutory interpretation, New Textualism weakens the judiciary's ability to fulfill its constitutional duty to prevent abuses by the legislature and the executive. In the words of Professor Eskridge, the Founders expected the judiciary "to strike down unconstitutional laws, trim back unjust and partial statutes, and make legislation more coherent with fundamental law" as part of the separation of powers.¹⁴⁵ By preventing the judiciary from filling interstitial gaps in the law, New Textualism denies the judiciary an important tool in smoothing out the rough edges of legislation to protect citizens from unintended injustices created through the exercise of legislative power.

Finally, New Textualism's preoccupation with preventing the judiciary from "making" law fundamentally misconceives the nature of law in a societal context. A law only has vitality to the extent society accepts it. Whenever society consents to the application of a law to its citizens, laws can be thought of as being "made" since the society could replace the existing rule with a new one.¹⁴⁶ Viewed in this manner, even the rote application of an established rule by a court represents "making" law because the judge's will has forced society to continue adhering to the rule. Further, when a court interprets a statute for the first time, the court fixes a meaning by choosing between several possible alternatives. The mere *act* of choosing represents making law. Even a court whose choice is seemingly pre-determined by the tenants of New Textualism is making law by choosing to apply strict construction rather than another interpretive method.¹⁴⁷ Since there can be *no*

145. Eskridge, *All About Words*, *supra* note 133, at 995.

146. See generally Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (arguing that every judicial decision represents an affirmative act of "violence" implicitly creating law by rejecting alternative interpretations, justifications, and precedents).

147. Even Justice Scalia has acknowledged that the act of "finding" a statute's meaning under New Textualism can be seen as "making" law. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring):

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses "difficulties of a . . . practical sort" when courts decide to overrule prior precedent. But those

interpretation of a statute without the creation of law, New Textualism's claim of superiority on this basis fails and the legitimacy of a court "making" law is recognized as an integral part of the judiciary's interpretive function.

3. Positive Ethical Implications of Inclusive Statutory Construction

The foregoing discussion has demonstrated that, contrary to New Textualism's position, strict statutory construction is detrimental to the Rule of Law. It has been shown that a system of inclusive statutory construction can help foster and maintain the Rule of Law, even if it is defined using New Textualism's criteria. This part has also examined the negative impact that strict construction in the legal realm has on a society's overall ethical complexion. What remains to be considered then, is how achieving the Rule of Law through inclusive interpretation is likely to affect society's morality.

As discussed earlier, a society's laws and its morality are interrelated concepts, which have strong influences on each other. In this regard, inclusive statutory interpretation permits the law to reflect societal values and thereby reinforces society's moral precepts. Since inclusive interpretation requires that statutes be given a meaning in accord with their societal purpose, it is more difficult for unethical citizens to utilize technical loopholes to legally thwart the law's intent. Thus, under an inclusive approach the legal aspect of moral enforcement is strengthened. Additionally, the use of an inclusive approach to legal questions is likely to prompt individuals to accept a similar approach to weighing the ethical questions they face in daily life, thereby further strengthening adherence to society's moral code. Finally, adopting an inclusive approach

difficulties are one of the understood checks upon judicial lawmaking; to eliminate them is to render courts substantially more free to "make new law," and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.

(emphasis in original) (citation omitted). *But cf. id.* at 546 (White, J., concurring):

[E]ven though the Justice [Scalia] is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.

for achieving the Rule of Law provides society with an important means of inserting its values into cultural sub-groups by co-opting lawyers and other professional advisors as society's agents.¹⁴⁸ These concepts can be readily illustrated by examining their application to the business world.

The business world is a distinct sub-culture of American society. It is common for a person's moral conduct in personal relationships to differ from what she considers ethically required in a business setting.¹⁴⁹ Additionally, companies engender their own "firm culture" that shapes executives' beliefs and

148. Society often enforces its moral beliefs through informal censure and "shaming" activities. *See supra* note 66. However, morality's relativistic nature presents difficulties for a large society because specific sub-cultures within the society may not share and accept the relevance of more broadly held moral precepts. This problem is particularly relevant as modern American society appears to be undergoing a marked decline in participation in civic organizations which would ordinarily serve as the backbone of shared societal beliefs. *See, e.g.*, ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). Where society is composed of numerous enclaves, it is vital to alter the beliefs and considerations of any aberrant subgroup to increase compliance with the broader moral belief. Professional advisors can be co-opted by society and used as a vehicle for inserting broader societal concerns into such insular cultures. For a discussion of the impact of the analogous approach of creating dedicated ethics officers in large organizations, see Joshua Joseph, *Integrating Business Ethics & Compliance Programs: A Study of Ethics Officers in Leading Organizations*, 107 *BUS. & SOC'Y REV.* 309 (2002) (discussing the role and effect of ethics officers in large organizations). For instance, one approach to using professional advisors to insert society's morality into insular sub-groups would be to require professional advisors to explicitly raise ethical concerns with their clients. *See, e.g.*, Christine Parker, *The Ethics of Advising on Regulatory Compliance*, 28 *J. OF BUS. ETHICS* 339, 339-351 (2000) (giving a general explanation of ethical roles of lawyers and ethics professionals within organizations).

149. *See, e.g.*, Michael Bommer et al., *A Behavioral Model of Ethical and Unethical Decision Making*, 6 *J. BUS. ETHICS* 265, 268 (1987) (referring to employees as "ethical segregationists" for this reason); Gene R. Laczniak & Patrick E. Murphy, *Incorporating Marketing Ethics Into the Organization*, in *MARKETING ETHICS: GUIDELINES FOR MANAGERS* 97, 100 (1985); Linda Klebe Trevino, *Moral Reasoning and Business Ethics: Implications for Research, Education, and Management*, 11 *J. BUS. ETHICS* 445, 450 (1992). Indeed, this is exactly the situation we would expect to find given the non-existence of robust character traits. The situational factors constraining a behavior in a personal setting may not exist in a business setting, leading to markedly different behavior. *See also* Thomas W. Dunfee, *Business Ethics and Extant Social Contracts*, 1 *BUS. ETHICS Q.* 23, 30 (1991) ("Most individuals are concurrently members of multiple communities and, as a consequence, they regularly confront conflicting or competing ethical norms. Coherent communities having social contracts could include one's profession, family, religion, community, employer, nation, business generally, industry, colleagues, peers, and so on.").

attitudes regarding acceptable behavior.¹⁵⁰ For many businesses, the drive for corporate profit has become an overriding desire that obscures the significance of other considerations.¹⁵¹ Unethical corporate action is not the result of “evil” executives.¹⁵² Unethical activities arise because the circumstances of the situation fail to constrain the behavior. Two key constraints in this regard are (1) the action’s legality; and (2) the risk of group censure.¹⁵³ Endorsing inclusive statutory interpretation addresses the first constraint by preventing reliance on technical loopholes to establish legality. However, reaffirming an inclusive approach to statutory interpretation will not be a panacea for all ethical abuses. Society must also create

150. Tim Barnett & Cheryl Vaicys, *The Moderating Effect of Individuals’ Perceptions of Ethical Work Climate on Ethical Judgment and Behavioral Intentions*, 27 J. BUS. ETHICS 351 (2000); Benjamin Schneider, *Work Climate: An Interactionist Perspective*, in ENVIRONMENTAL PSYCHOLOGY: DIRECTIONS AND PERSPECTIVES 109, 116 (Nicholaus R. Feimer & E. Scott Geller eds., 1983); Randall S. Upchurch & Sheila K. Ruhland, *The Organizational Bases of Ethical Work Climates in Lodging Operations as Perceived by General Managers*, 15 J. BUS. ETHICS 1083, 1085–86 (1996); John C. Wimbush & Jon M. Shepard, *Toward An Understanding of Ethical Climate: Its Relationship to Ethical Behavior and Supervisory Influence*, 13 J. BUS. ETHICS 637, 643 (1994); Bart Victor & John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101 (1988). See also, Rick Wartzman, *Nature or Nurture? Study Blames Ethical Lapses on Corporate Goals*, WALL ST. J., Oct. 9, 1987, at A1 (“[E]ven the most upright people are apt to become dishonest and unmindful of their civic responsibilities when placed in a typical corporate environment. ‘The culprit is not the personal value but corporate culture. . . . People’s personal values are getting blocked by the needs of the company.’”) (citations omitted).

151. See David Campbell et al., *Social Welfare, Positivism, and Business Ethics*, 11 BUS. ETHICS: A EUROPEAN REV. 263 (2002) (discussing the ongoing conflict between business ethics and the drive for profits). See also Gordon Pearson, *Making Profits and Sweet Music*, 9 BUS. ETHICS: A EUROPEAN REV. 191 (2000).

152. See discussion *supra* Part II. A number of specific business ethics inquiries have also highlighted the importance of situational factors in fostering ethical business behavior. See, e.g., O.C. Ferrell & Larry G. Gresham, *A Contingency Framework for Understanding Ethical Decision Making in Marketing*, 49 J. OF MARKETING 87, 92–93 (1985); W. Harvey Hegarty & Henry P. Sims, Jr., *Organizational Philosophy, Policies, and Objectives Related to Unethical Decision Behavior: A Laboratory Experiment*, 64 J. APP. PSYCH. 331, 336–37 (1979); Linda Klebe Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601, 614 (1986); Mary Zey-Ferrell & O.C. Ferrell, *Role-Set Configuration and Opportunity as Prediction of Unethical Behavior in Organizations*, 35 HUM. REL. 587, 591 (1982).

153. As used herein, “unethical” activity refers to actions that are at least arguably legal, but nevertheless would be viewed as improper by society as a whole.

and reinforce social constraints aimed at minimizing unethical behavior.¹⁵⁴

The effectiveness of shame as a tool of social control is closely linked to group identification. To encourage business people to behave ethically (*i.e.*, in accordance with broader societal values) in legally ambiguous situations, society must ensure that the business sub-culture owes fidelity to the same beliefs and enforces them through formal and informal censure. Professional advisors represent an ideal vehicle for society's achievement of these ends.¹⁵⁵ An example will illustrate how attorneys can serve this function.¹⁵⁶ Assume that public companies are legally required to disclose all the assets and liabilities of majority-owned subsidiaries in their financial statements (*i.e.*, requiring financial consolidation with the subsidiaries). Suppose further that a clever chief financial officer develops a series of complex transactions whereby a large amount of his company's liabilities can be shifted to an entity that does not satisfy the technical legal requirements for financial consolidation, but where the company ultimately remains fully responsible for the liabilities as an economic matter. On a literal reading of the relevant law, the transactions permit the company to reduce its stated liabilities on its financial statements despite the fact that, in reality, the company retains full liability. Since this is contrary to society's desires, the proposal is unethical despite being legal under a literal reading of the law.

Such a complex business transaction will not proceed without the approval of legal counsel. In a legal environment characterized by strict statutory construction, outside counsel reviewing the transaction will convey this judicial reality to the company. The transaction is likely to go forward since there is

154. For the reasons discussed in Part II, *supra*, society cannot rely on the intrinsic virtue of group members to ensure ethical actions because individuals lack robust character traits.

155. See, *e.g.*, Roy D. Simon, *Legal Ethics Advisors and the Interests of Justice: Is an Ethics Advisor a Conscience or a Co-Conspirator?*, 70 *FORDHAM L. REV.* 1869 (2002) (discussing the weight that clients place on the advice of ethics advisors in the law firm context).

156. This example is loosely based on the factual situation present in Enron's off-balance sheet financing transactions. William C. Powers, Jr. et al., *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corporation* (Feb. 1, 2002), available at <http://news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf>; First Interim Report of Neal Batson, Court-Appointed Examiner, *In re Enron Corp.*, (Bankr. S.D.N.Y. Sept. 21, 2002).

a high likelihood that technical conformity will make these unethical transactions legal. It is unlikely that the reviewing attorney would even consider raising the unethical nature of the transaction with the company. If inclusive interpretation applies, however, then the reviewing attorney is in a much different situation. Factoring judicial attitudes into the legal appraisal may now lead the attorney to conclude that the transactions are illegal. Assuming the company refuses to act illegally, the transactions will not be undertaken. The law (with the aid of an inclusive gloss) has dissuaded the company's unethical action.

Alternatively, the reviewing attorney may conclude that the transactions have a substantial chance of being upheld by a court, even though she believes this likelihood is less than fifty percent. Should the company forego arguably legal transactions because of their unethical nature? It is important to stress that the company's managers will not make this decision based on their intrinsic character, since individuals lack robust character traits that could influence their behavior. The decision will be based on the firm's culture and the managers' attitudes toward risk. If the company's executives are focused primarily on the large positive impact the transactions will have on corporate profits and stock price, they may well decide to proceed with the proposed transactions. Normal moral qualms that managers would have in a similar personal situation may be eclipsed by the firm culture's exclusive focus on profits.¹⁵⁷ The executives may rationalize their choice by focusing narrowly on the chance that the transaction may be legal. They may even try to bolster their position by consulting several attorneys in an attempt to find one that will judge the transactions "more-likely-than-not" to succeed in court. If the transaction is believed to be "legal," then by definition the managers may believe it cannot be immoral. The managers may rationalize their unethical actions as required by competi-

157. In their personal relationships, people generally accept that causing others to rely on deceptive statements is morally wrong, even though it may not be illegal. For instance, if Cadillac Jack sells me his car based on the representation that he has "never had to take it to a mechanic," he has committed an unethical act by not also telling me that he spent countless hours maintaining the lemon himself. Here, the company's proposed transaction is the moral equivalent of deceiving those reading and relying on the company's financial statements, even though a court may ultimately rule it legal based on technical compliance with the law.

tive pressure. If the company fails to undertake an unethical but legally permissible transaction, then it will be put at a competitive disadvantage when competitors proceed with similar plans.¹⁵⁸

If the attorney does nothing in this situation, the proposed transactions will go forward. Society will be harmed by the unethical action. Additionally, the company and its executives may be harmed if the transaction ultimately is found to be illegal. Here is society's opportunity to dissuade the unethical action by using the attorney as society's professional business conscience.

It is proposed here that attorneys should have an affirmative obligation to raise ethical considerations with their clients.¹⁵⁹ Such an obligation is fully consonant with the traditional role of lawyers as general business advisors and is not in conflict with the provision of unbiased legal advice. A client need not heed his attorney's counsel, just as he could reject a purely legal recommendation. Additionally, if the requirement is mandated by the profession's formal code of ethics, then lawyers raising ethical concerns would not be placed at a competitive disadvantage.¹⁶⁰ Finally, alerting the client to ethical concerns that he may be overlooking ultimately is in the client's best interest. Such a requirement simply reasserts the lawyer's role as a professional, as opposed to a mere technician.¹⁶¹

158. The executives' focus on profit and competition thus brings in an element of game theory as well to their calculus. While all the competitors, and society as a whole, will be better off if no one engages in the unethical activity, the added benefit of being the only actor to take the unethical action may prompt everyone to act unethically. See generally HAL R. VARIAN, INTERMEDIATE ECONOMICS 466-78 (1987); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944) (seminal work on game theory); GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR (Martin Shubik ed., 1964).

159. Such a course of action previously has been suggested by this author for tax attorneys reviewing tax shelter transactions. See Richard Lavoie, *Deputizing the Gunslingers: Co-opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43 (2001).

160. Many lawyers are hesitant to raise purely ethical (as opposed to legal) concerns with clients for fear of adverse client reaction. The fear is that a client may take his business elsewhere if the attorney is not seen as being 100 percent behind the client. If all attorneys are required to raise ethical concerns, then the client's incentive to shop for another attorney in such situations would be eliminated.

161. "Professional" is used here to connote a view of lawyers as filling a useful societal role by serving as independent actors who must weigh their own self-interest in meeting client desires against their obligation to work for society's

This type of advisory attorney role would be largely precluded if a strict statutory construction approach dominates the legal system. If the interpretation of the law is limited to its literal words, then there is little role for attorneys other than to be technicians searching for ways to legally exploit the law. Additionally, one technician can easily be replaced with another more obedient one, so an attorney is unlikely to raise non-legal issues. When legal interpretation is more nuanced, clients must rely on the skill and judgment of their lawyers more than their technical prowess. As such, relationships of trust are more likely to develop, which in turn facilitates frank discussions between attorney and client.

Returning to the reviewing attorney in our example, if she is under an affirmative professional obligation to raise ethical concerns, then there is a significant chance that the executives might be dissuaded from their unethical activity. First, the executives are using the attorney's views about the legal strength of the proposed transactions to rationalize their subordination of ordinary moral beliefs to the goal of corporate profits. When the attorney herself indicates that moral considerations should be a factor, even if the transaction has a good chance of being upheld as technically legal, she undercuts the executives' rationalization that all legal behavior is *per se* moral. Second, by highlighting the moral element, the executives may focus on the risk of incurring adverse public opinion *even if* their legal position is upheld. Third, if the attorney-client relationship has existed for some period of time, then the executives may view the attorney as a member of their cultural group, or at

well-being. This obligation to work for the public good is imposed under various codes of professional ethics and the oath to uphold the law taken when attorneys are sworn into the bar. *See, e.g.,* Bradshaw v. United States Dist. Court, 742 F.2d 515, 518 (9th Cir. 1984) (“[T]he practice of law is a profession—not a business or a skilled trade,” the difference being that “while the chief end of a trade or business is personal gain, the chief end of a profession is public service.”); ABA MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002). For general discussions of the obligations of legal professionals, see William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485 (1995); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6–7 (1988); Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773 (1987); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7 (1989); Lisa H. Newton, *Professionalization: The Intractable Plurality of Values*, in PROFITS AND PROFESSIONS: ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS 23 (Wade L. Robison et al. eds., 1983); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

least as a figure whose views should be respected. Consequently, the attorney's raising a moral concern may itself be viewed as a type of group shaming that could dissuade this transaction or prevent the managers from proposing ethically problematic transactions in the future.

Finally, merely having the ethical concern overtly stated may alter the dynamics of the group. The power of the firm culture may prevent any of the executives from being first to raise an ethical issue.¹⁶² Fear of negative reaction from co-workers can be a strong incentive to remain silent. Ethical considerations may be the elephant sitting in the center of the boardroom that no one wants to acknowledge. The attorney generally is sufficiently independent of the firm's culture that she should be able to spot ethical issues as an outsider. Her fear of reprisals (*e.g.*, not being used in the future) for raising ethical issues would be overshadowed by an affirmative professional obligation to raise such issues. Once the subject is broached, particular executives may feel freer to acknowledge their personal or professional ethical qualms.

While strict statutory interpretation promotes unethical business behavior, inclusive interpretation helps dissuade unethical actions. Additionally, inclusive interpretation creates a legal atmosphere conducive to society using the legal profession and other professional advisors to insert ethical considerations into business decisions. One means for achieving this result would be to amend the relevant professional codes of conduct to affirmatively require raising ethical issues with clients.

D. Summary

Ethical behavior is the result of the legal and social constraints placed on individuals, not personal character traits. Encouraging ethical behavior, therefore, requires adjusting these legal and social constraints. The law itself is a social institution. It is closely linked with the moral values and beliefs of the society it serves. In order for the law to function as a viable constraint on individual action and to reinforce the moral precepts of society, it is necessary that the law be interpreted

162. In this regard, numerous social psychology studies have demonstrated that individuals are prone to suppress their own concerns if the group they are in appears untroubled (the "group effect"). *See generally* DORIS, *supra* note 35, at 32-33 and sources cited therein.

in light of society's values. Consequently, theories of judicial interpretation that attempt to divorce the law from its social and moral context by severely limiting judicial discretion misperceive the nature of the law and unintentionally lead to increased unethical behavior. Such unethical behavior undermines the Rule of Law in society.

Inclusive statutory interpretation appropriately takes societal values into account when interpreting the law. Rule of Law concerns regarding equality, uniformity, and predictability can be adequately addressed under an inclusive approach by institutional constraints. Inclusive interpretation avoids New Textualism's ethical pitfalls and opens an avenue for using the practicing bar as an additional tool of social constraint on unethical business behavior.

IV. THE ETHICAL CRISIS OF CORPORATE TAX SHELTER ACTIVITY

This part attempts to ground the foregoing theoretical discussion with a concrete illustration drawn from the field of corporate taxation. In particular, the impact that different modes of statutory interpretation have on the level of unethical behavior in the context of corporate tax shelter activity will be discussed. For some, the very concept that ethical considerations could impinge on tax planning may seem absurd.¹⁶³ After all, the appropriateness of tax planning has long been accepted.¹⁶⁴

163. See, e.g., Rick Taylor, *Rusty Pipes Is Simply Rusty, Says Tax Practitioner*, TAX NOTES TODAY, July 11, 1994, LEXIS 94 TNT 135-46:

I will do everything that I can to be absolutely certain that my clients do not pay one dime more tax than is absolutely required! That is what I was trained to do and that is what my clients pay me to do. To accuse me or anyone else in the tax community of not "playing fair" and to demand that I somehow overlook planning ideas in the name of morals is, in the words of Judge Learned Hand, "mere cant."

164. See, e.g., *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."). A number of other cases contain similar statements supporting the appropriateness of tax planning:

The only purpose of the vendor here was to escape taxation. . . . The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.

Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930);

Additionally, certain provisions of the Internal Revenue Code (the “Code”) were adopted with the express goal of harnessing tax planning as a means of modifying taxpayer behavior.¹⁶⁵ However, while tax planning is permissible, tax evasion is not. The gray area between the two falls under the domain of tax ethics.

The importance of tax ethics derives from the very nature of the self-assessment tax system employed in the United States. Given the inability of the Internal Revenue Service (the “Service”) to audit more than a tiny fraction of tax returns, voluntary compliance is a central pillar supporting the tax system.¹⁶⁶ Taxpayers themselves must determine how the tax law applies and how much they owe. For the tax system to function properly, it is necessary for citizens to understand their legal obligations and comply willingly. In short, the Rule of Law is central to the successful functioning of a self-assessment tax system, like the one employed in the United States. If equality, uniformity, and predictability are lacking, citizens lose faith in

[W]hen the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

Bullen v. Wisconsin, 240 U.S. 625, 630–31 (1916);

Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Comm’r. v. Newman, 159 F.2d 848, 850–51 (2d Cir. 1947) (Hand, J., dissenting);

[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one chooses, to evade, taxation. Any one [sic] may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.

Gregory v. Helvering, 69 F.2d 809, 810 (2d Cir. 1934), *aff’d*, 293 U.S. 465, 469 (1935). *Cf.* David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215 (2002) (advocating that all tax planning should be made illegal). It is also significant that in all the above quoted cases the taxpayer’s position was ultimately rejected by the court despite the seeming pro-taxpayer tone of the quotations.

165. A typical example is the use of home mortgage interest deductions to promote home ownership.

166. The Service currently audits less than 0.6 percent of all income tax returns. Pamela J. Gardiner, *TIGTA Reviews IRS’s “Falling” Examination Rate*, TAX NOTES TODAY, June 25, 2002, LEXIS 2002 TNT 123–23.

the fairness of the tax system and are less inclined to honor it. Society's interest then, is in creating an institutional framework that fosters the Rule of Law and thereby secures the efficient operation of the self-assessment tax system.

If strict construction is the linchpin to achieving the Rule of Law, then society should not dissuade taxpayers from structuring transactions so as to come as close as possible to the line drawn by the statute between legal and illegal. Alternatively, if one believes the Rule of Law is best achieved by embracing the symbiotic nature of law and society, then society should encourage taxpayers to eschew the most aggressive readings of the Code in favor of a balanced appraisal of what the law comprehends in its societal context. More specifically, society should treat aggressive tax planning as unethical and create constraints to dissuade such behavior.

A. *Historical Perspective*

With these conflicting views in mind, we can now examine the historical factors leading to the current wave of corporate tax shelter activity.

1. Traditional Operation of the U.S. Tax System

The Code was one of Congress's first forays into developing a comprehensive statutory scheme to govern a field that lacked a significant common law foundation. Since initial enactment, Congress has demonstrated that it is able (and sometimes overeager) to alter and adjust its statutory framework to address emerging concerns. A proponent of New Textualism would see the Code as a clear area where the judiciary should limit itself to enforcing the law strictly as drafted, lest judicial tampering undermine this carefully crafted statute. Instead, the courts have applied inclusive statutory interpretation and developed numerous doctrines that could be invoked to prevent any perceived abuse of the statute's purpose.¹⁶⁷ While the judi-

167. An early landmark decision crystallizing this approach is *Gregory v. Helvering*, 293 U.S. 465 (1935). The following quotations summarize the traditional approach to statutory interpretation in tax cases:

[T]ax law has a rich history of nonliteral interpretation in order to avoid results that one person or another has considered to be inconsistent with the purpose of the statute as a whole. This tradition is illustrated by the

cially created anti-abuse doctrines vary in their phrasing and scope, in a simplified fashion they can all be viewed as a preference for substance over form.¹⁶⁸ These doctrines represent a judicial rejection of the position that the purpose of a statute can be circumvented as long as one adheres to its literal statutory language.

Under New Textualism, the high level of judicial activism in the tax area should have been ruinous for the Rule of Law and thus undermined respect for the tax system. However, as late as the mid-1970s, Americans still firmly believed in the

common law doctrines variously named as substance over form, sham transaction, step transaction, business purpose, and assignment of income.

Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 493 (1995);

There has developed a welter of rules and extrastatutory standards that impose particular scrutiny on transactions with results unfavorable to the Treasury. These standards are enshrined in celebrated cases . . . that stand as bulwarks against overreaching by taxpayers. It is from these cases that the basic weapons in the Commissioner's arsenal are derived—the business purpose doctrine, the step transaction doctrine, “substance over form,” and others.

Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 863–64 (1982). See also Michael Livingston, *Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 689 (1996) (“A large number of tax cases make some reference to ‘legislative purpose,’ often as one of many reasons for deciding the case.”); Robert Thornton Smith, *Interpreting the Internal Revenue Code: A Tax Jurisprudence*, 72 TAXES 527 (1994); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986) (reviewing Supreme Court tax cases in the early 1980s employing nonliteral interpretations to further the perceived policies of the Code). However, recent trends in the thinking on statutory interpretation and decisions by a number of courts applying a plain meaning approach to tax statutes have led some to question the validity of an inclusive approach. See, e.g., John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1504 (1997) (arguing against “antitextual” interpretations of the Code, which occur in tax with “unusual frequency”); Allen Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699 (2003) (arguing for the complete rejection of common law anti-abuse doctrines in the tax area because they are no longer necessary, create unacceptable levels of uncertainty in the tax law, and are directly contrary to the approach of New Textualism); Edward A. Morse, *Reflections On The Rule Of Law And “Clear Reflection Of Income”: What Constrains Discretion?*, 8 CORNELL J.L. & PUB. POL’Y 445 (1999) (maintaining that permitting administrative and judicial purposive interpretation in tax cases is contrary to the Rule of Law).

168. John Tiley & Erik Jensen, *The Control of Avoidance: the United States Experience*, 1998 BRIT. TAX REV. 161, 168.

fairness of the income tax system.¹⁶⁹ So the questions arise, how could a system so imbued with judicial discretion have nevertheless fulfilled the requirements of the Rule of Law so well prior to the 1980s, and what has changed to cause the fairly recent perception of widespread unfairness in the income tax system?¹⁷⁰

At least three factors can be identified as contributing to the traditional ability of the tax system to maintain its equality, uniformity, and predictability. First, the use of an inclusive mode of statutory interpretation permitted the courts to facilitate the interaction between the tax law and relevant societal values. More specifically, by taxing transactions in accordance with their substance, rather than their literal conformity to the statute, courts prevented taxpayers from avoiding the tax burden allocated by society. Consequently, the results reached by the courts had legitimacy with the public and provided evidence that all taxpayers were being held accountable.

Second, institutional factors worked to constrain judges and create equality and uniformity based on: shared societal values internalized by judges, their similar inclusive approach in resolving interpretive questions, the need to publicly explain factual differences warranting different treatment for different cases, and the shared understanding that the use of judicially created doctrines should be limited to abusive situations. Such judicial attitudes not only helped create consensus regarding judicial tax opinions, but also promoted predictability by establishing the legal landscape inhabited by practicing attorneys. In order to advise a client regarding the propriety of a new transaction, an attorney not only examined the relevant statutes, but also considered how a court would be likely to react. By internalizing the judicial approach, attorneys dissuaded transactions violating the substance of the law, even if a literal reading of the statute supported the transaction.¹⁷¹

169. Michael Graetz, *2001 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Erwin Griswold's Tax Law—and Ours*, 56 TAX LAW. 173, 177 (2002) (“[U]ntil 1972, the American people viewed the income tax as the fairest tax in the nation. Since 1980, they have consistently viewed it as the least fair.”).

170. *Id.* (“During the past 25 years the income tax has fallen into disrepute and disfavor.”).

171. See Franklin Green, *Exercising Judgment in the Wonderland Gymnasium*, 90 TAX NOTES 1691, 1692–93 (2001):

A final factor in the ability of the traditional judicial approach to achieve equality and uniformity relates to the nature of the statutory provisions in question. Traditionally, many Code provisions were cast in the form of general standards as opposed to specific rules.¹⁷² Given the wide variety of economic activity covered by tax laws, it is generally easier for the legislature to craft a standard regarding what is covered rather than attempt to legislate for each specific situation. However, by their very nature, standards are ambiguous and require interpretive guidance to understand how they apply to particular facts. This function, therefore, became the natural role of the judiciary. The fact that the judiciary stood ready to fill gaps left in the statutory structure both eased the burden on the legislature to draft for every situation and put taxpayers on notice that reliance on technical loopholes was a risky endeavor.

Viewed in this manner, it is understandable how the traditional method for drafting and interpreting tax statutes resulted in a fair and equitable system. The institutional framework encouraged taxpayers to report their income and structure their affairs in a way that complied with a fair reading of the relevant statutes. The use of inclusive statutory interpretation and the judicious use of anti-abuse doctrines created a tax system where the ethical response to self-reporting one's true income was in line with society's values. Far from undermining the Rule of Law, the active participation of the

[I]t has been a fundamental role of tax practitioners to identify for taxpayers those tax return positions that may be attempted and those that are beyond the pale. . . . In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system. . . . For self-assessment to be workable, tax advisers cannot fail to perform their gatekeeper function and cannot allow a floodtide of illegitimate issues to swamp the system. Accordingly, it is imperative that tax advisers apply professional standards with intellectual honesty in determining what positions have enough credibility to be able to be asserted.

172. In the present Code, however, excessively detailed rule-based provisions predominate. See, e.g., Coverdale, *supra* note 167, at 1522. For extended discussions of rules versus standards, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

judiciary in the evolution of the tax law kept the Rule of Law alive and well.

Unfortunately, the public's assessment of the U.S. tax system has markedly shifted over the past few decades. Today, there is widespread belief that the income tax system is unfair. The Rule of Law is flagging as the system struggles with its own mind-numbing complexity and revelations that many profitable corporations and wealthy individuals pay little or no tax. To highlight the causes of this paradigm shift, it is instructive to explore the current wave of tax shelter activity in vogue with corporate America.

2. Modern Corporate Tax Shelter Activity

The 1990s saw unprecedented growth in the development, marketing, and utilization of corporate tax shelter techniques. While exact figures are hard to come by, the government sustained substantial revenue losses.¹⁷³ Even more remarkable has been the extent to which these transactions have struck a cord with the public. In recent years, the popular press has made a practice of highlighting the existence of aggressive transactions when they come to light.¹⁷⁴ The negative impact of

173. See Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775, 1776 (1999). In early 2000, the Commissioner of the Service stated that by closing down just a handful of identified tax-shelter structures, the projected revenue savings was almost \$80 billion over ten years. See Lawrence H. Summers, *Summers Speech on Corporate Tax Shelters*, TAX NOTES TODAY, Feb. 29, 2000, LEXIS 2000 TNT 40-34, at ¶ 8. Also a recent study found that while corporate profits for the 250 largest U.S. companies rose by 23.5 percent from 1996 through 1998, federal corporate income tax revenues over the same period rose by only 7.7 percent. See Robert S. McIntyre & T.D. Co Nguyen, *ITEP Report on Corporate Tax Avoidance*, TAX NOTES TODAY, Oct. 20, 2000, LEXIS 2000 TNT 204-25.

174. See, e.g., James S. Eustice, *Abusive Corporate Tax Shelters: Old "Brine" in New Bottles*, 55 TAX L. REV. 135, 136 (2002); Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589, 594 (2003); Sheldon D. Pollack, *Revenge of the Muckrakers*, 75 TAX NOTES 255, 256 (1997). Representative popular press articles include: David Cay Johnston, *Sham Shelters for Business Flourish as Scrutiny Fades*, N.Y. TIMES, Dec. 19, 2000, at A1; David Cay Johnston, *A Tax Break for the Rich Who Can Keep a Secret*, N.Y. TIMES, Sept. 10, 2002, at C1; David Cay Johnston, *Big Accounting Firm's Tax Plans Help the Wealthy Conceal Income*, N.Y. TIMES, June 20, 2002, at A1; Tom Herman, *Tax Report*, WALL ST. J., Feb. 10, 1999, at A1; Janet Novack & Laura Saunders, *The Hustling of X Rated Shelters*, FORBES, Dec. 14, 1998, at 198; Anita Raghavan & Jacob M. Schlesinger, *Cat and Mouse: Wall Street Concocts New Tax-Saving Ploy; Then It's Feds' Turn*, WALL ST. J., Nov. 6, 1997, at A4;

such tax shelter activity for self-assessment is apparent. When the average citizen believes he is a chump for paying his full taxes, the system is in serious trouble.¹⁷⁵ In short, corporate tax shelter activity is undermining the Rule of Law in taxation.

While commentators have identified a number of factors characteristic of recent corporate tax shelter transactions,¹⁷⁶ the one truly defining element is that the transactions reach results at odds with the underlying policy, intent, and purpose of the tax law.¹⁷⁷ Corporate tax shelters are carefully crafted to comply with the literal requirements of the relevant tax law, while nonetheless circumventing its purpose. This represents a type of “creative compliance” with the law.¹⁷⁸ Corporate managers today approach their tax departments as profit centers rather than accepting corporate tax liabilities as a cost of doing business. When deciding how aggressive to be in structuring and reporting transactions, corporations typically opt for the most aggressive stance.¹⁷⁹

This modern approach is markedly different from past practices. Historically, professional advisors successfully dissuaded such aggressive transactions because the transactions were unlikely to be sustained if challenged in court.¹⁸⁰ Their

Jacob M. Schlesinger & Anita Raghavan, *U.S. Bars Certain Tax-Free Stock Deals, Cutting Off Billions in Planned Issues*, WALL ST. J., Feb. 28, 1997, at A4.

175. See, e.g., Janet Novack, *Are You a Chump?*, FORBES, Mar. 5, 2001, at 122.

176. The following factors are often cited as indicative of tax shelter activity: (1) small economic risk and slight profit potential, (2) exploitation of unanticipated consequence of a rule, (3) inconsistent accounting and tax treatment, (4) development and marketing by a promoter, (5) confidentiality, and (6) high likelihood of Service challenge or congressional remedial action. See, e.g., Bankman, *supra* note 173, at 1777; Lavoie, *supra* note 159, at 49–50; U.S. Department of Treasury, *Treasury White Paper on Corporate Tax Shelters*, TAX NOTES TODAY, July 2, 1999, LEXIS 1999 TNT 127-12, 127-13, ¶¶ 11–17.

177. Michael Schler, *Ten More Truths About Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach*, 55 TAX L. REV. 325, 331 (2002).

178. The phrase “creative compliance” is borrowed from Professor Doreen McBarnet who uses the phrase to identify a situation where companies structure their affairs “to comply with the letter of the law but none the less render its declared purposes ineffective.” Doreen McBarnet, *Legal Creativity: Law, Capital and Legal Avoidance*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 73, 75 (Maureen Cain & Christine B. Harrington eds., 1994).

179. Joel Slemrod, *Tax Minimization and Corporate Responsibility*, TAX NOTES TODAY, Sept. 6, 2002, LEXIS 2002 TNT 175-20.

180. Green, *supra* note 171. The most notable exception was the wave of individual tax shelter transactions in the 1970s and early 1980s. While those tax shelter transactions pre-date New Textualism, they can nevertheless be explained

conclusions were based on the understood mode of judicial interpretation and an accepted understanding that courts would apply the judicially created anti-abuse doctrines in a prophylactic manner to prevent abuse.

Today, the rise of New Textualism has significantly altered both the traditional legal landscape and the advisor's role. The shift in judicial attitudes has made it more legitimate to take an aggressive view of the tax laws. Given the uncertainty regarding the appropriate mode of statutory interpretation, tax advisors can take the position that a literal interpretation of a statute could withstand judicial scrutiny even if it is contrary to the law's intent. As traditional constraints on overly aggressive tax positions have been relaxed, tax shelter activity has increased and the public's faith in the fairness of the tax system has been damaged.

B. Realizing the Rule of Law in Taxation

Whether one believes tax shelter activity is appropriate depends on one's views regarding the correct method of statutory interpretation, which in turn boils down to one's views regarding how the Rule of Law is best realized. Two diametrically opposed positions can be taken regarding tax reporting. In the traditional view, reporting should conform to the spirit of the law and the substance of the transaction.¹⁸¹ In the new view, the law is literally and technically applied to the taxpayer's chosen form even if absurd tax consequences result.¹⁸² Tax shelter activity is unethical from the first vantage point because, by definition, it achieves a result contrary to the intent of the law and defeats society's allocation of the tax burden. However, tax shelter activity is completely ethical and

as the result of the courts taking a highly formalistic approach to the tax treatment of liabilities which practitioners then exploited. *See, e.g.*, Boris Bittker, *Tax Shelters, Nonrecourse Debt, and the Crane Case*, 33 TAX L. REV. 277, 283-84 (1978); M. Carr Ferguson & Leonard J. Henzke, Jr., *The Formulation of Federal Tax Policy Through Litigation*, 1 VA. TAX REV. 85, 95-96 (1981); Calvin H. Johnson, *Why Have Anti-Tax Shelter Legislation? A Response to Professor Zelenak*, 67 TEX. L. REV. 591, 592-93 n.7 (1989); Allaire Karzon & Charles H. Coffin, *Extension of the At-Risk Concept to the Investment Tax Credit: A Shotgun Approach to the Tax Shelter Problem*, 1982 DUKE L. J. 847, 873-74 (1982).

181. *See generally* sources cited *supra* note 167.

182. *See generally* Coverdale, *supra* note 167; Madison, *supra* note 167; Morse, *supra* note 167. *See also* discussion *infra* Part IV.C.

appropriate under New Textualism since the purpose of the law is irrelevant as long as the literal language of the statute is obeyed. So again we face the question of moral relativism. Each side of the debate maintains that its moral stance is correct because each is unable or unwilling to understand or acknowledge the different foundation of the other's beliefs.¹⁸³ Historically, the tax system embodied the Rule of Law and employed an inclusive approach to statutory interpretation.¹⁸⁴ New Textualism's rise has contributed to the growth of corporate tax shelters and damaged the Rule of Law in taxation because the legislative institutions in the United States are incapable of fulfilling the burden New Textualism places on them.¹⁸⁵

Strict statutory construction is premised on the notion that the law should be interpreted in isolation from its societal context since it is the role of the legislature alone to conform the law to society's will.¹⁸⁶ With the judiciary abdicating its role in ensuring the fulfillment of society's will, there is a risk that the law will become detached and isolated from society's values. When this occurs, faith in the law evaporates and the Rule of Law suffers.¹⁸⁷ For the Rule of Law to be achieved using strict statutory construction, the legislature must shoulder the full burden of ensuring that the law reflects current societal values. While this may be theoretically possible, in reality the burden placed on the legislature by holding it to a literal interpretation of its statutes is too great.¹⁸⁸ When the public sees that the legislature is unable to make enforceable laws that ensure the attainment of society's values, and the judiciary refuses to bring the law into line with those values, then actual inequities result and disrespect for the law rises. This is the dynamic present in the modern-day tax system.

New Textualism places Congress in a highly reactive mode when dealing with tax statutes. Congress can never hope to draft tax legislation that covers every economic situation. In-

183. Schler, *supra* note 177, at 395 (“[A] debate about tax shelters is ultimately a debate about the role of government in society, a debate about moral philosophy rather than tax law. As a result, the different views about tax shelters are simply irreconcilable.”).

184. *See generally* sources cited *supra* note 167.

185. *See supra* text accompanying notes 111–13.

186. *See, e.g.,* Easterbrook, *supra* note 111, at 63.

187. *See supra* text accompanying notes 113–15.

188. *See supra* text accompanying notes 111–15.

deed, the problem is even worse because under a formalistic approach to the law, the statute must cover not only real economic transactions, but also highly structured transactions specifically crafted to exploit gaps in the statutory scheme that would not exist in ordinary transactions. Consequently, Congress must continually revise the law to address unforeseen applications. The self-assessment nature of our tax system and the low level of audit activity by the Service compound this problem by ensuring that Congress will only be aware of abusive interpretations of its statutory language in a small fraction of situations.

In such a world, the public will assume that the wealthy will find loopholes in the law that average taxpayers lack the knowledge and resources to uncover. Public perception that the only function of tax lawyers is to act as hired guns of the corporate elite will be based in reality since there is no role for professional advisers to exercise a gate keeping function if tax shelter activity is ethically appropriate. Since the institutions of our tax system simply cannot bear the burden imposed by New Textualism's reliance on strict statutory construction, an inclusive approach to statutory interpretation is necessary to ensure that the law is, in fact, achieving results in line with societal values. If the Rule of Law is to be restored in the tax arena, a key element will be reaffirming the traditional approach to statutory interpretation in tax cases. This conclusion can be readily seen by examining the likely efficacy of some of the general approaches to curbing tax shelter activity in light of the analysis presented in this article.

1. Reforming the Corporate Taxpayer

Corporate tax shelter activity would not exist if management decided against such aggressive transactions. Therefore, measures aimed at influencing corporate decision-making might be useful in reducing tax shelter activity. Managers approving tax shelters are acting in the context of their firm's corporate culture.¹⁸⁹ Their decisions are the result of situational factors, not intrinsically greedy character traits.¹⁹⁰ Aggressive tax planning directly benefits corporate profitability

189. See *supra* text accompanying notes 149–155.

190. See discussion *supra* Part II and sources cited *supra* note 152.

and, in many cases, also improves the institutional standing of the managers involved. Managers can rationalize taking aggressive tax positions based on the asserted legality of the transactions and the need to remain competitive with other companies that are engaging in such transactions.¹⁹¹ Tax shelters result because managers believe the benefits outweigh the risks.¹⁹² Ethical considerations about the moral appropriateness of playing games with the tax system generally do not enter the calculus.¹⁹³

Since individuals lack robust character traits, attempting to impact corporate behavior by imploring managers to be more ethical would have little impact. Similarly, blaming tax shelter activity on a few bad apple managers is not realistic given the scope of the problem and the overpowering force of situational factors in management action.¹⁹⁴ The focus, then, must be on altering the legal landscape and the firm cultures within which these managers operate.

If the legal environment is altered such that tax shelter transactions are more likely to be found illegal, then management's enthusiasm for such transactions would be tempered. A number of legal approaches exist in this regard. But, as discussed below, erecting legal obstacles to tax shelter transactions is likely to have little substantive effect on behavior in a strict interpretation atmosphere.

Altering firm culture is likely to prove difficult in the absence of legal changes. Desires for increased profits and competitive pressures drive the pursuit of tax shelters. If managers perceive that the transactions will likely be found legal under a literal approach to the law, then they will find it difficult to reject undertaking them on the basis of moral intangibles.¹⁹⁵ This will be especially true when they fear competitors will not exercise the same ethical restraint. Such strong situational incentives to engage in tax shelter activity require strong countervailing constraints. When strict statutory interpretation applies, the legal constraint will be weak. A strict interpretation approach also saps the strength of an ethical appeal by intellectually endorsing the appropriateness of

191. *See supra* text accompanying note 158.

192. Lavoie, *supra* note 159, at 52–55.

193. *Id.*

194. *See* discussion *supra* Part II and sources cited *supra* note 152.

195. Lavoie, *supra* note 159, at 52–55.

aggressive tax planning. Attempts to utilize professional advisors to insert society's moral concerns into the corporate culture will also have little impact under a strict interpretation system since corporate managers are likely to view their advisors as mere technicians whose ethical concerns can be dismissed.¹⁹⁶

Public outrage over corporate activity is one means of dissuading tax shelter activity not adversely impacted by New Textualism. If the public were to collectively censure and punish companies engaging in tax shelter transactions, then fear of such adverse reaction might dissuade management from undertaking the transactions. In at least one situation, public scrutiny of a particular tax shelter transaction apparently had an important impact on the company abandoning the proposed transaction.¹⁹⁷ Nevertheless, the use of such public pressure to dissuade corporate tax shelter activity is questionable. The level of focused media attention in this particular case is unlikely to be duplicated frequently.¹⁹⁸ Additionally, since corporate tax returns are confidential,¹⁹⁹ most corporate tax shelter transactions remain unnoticed unless they are brought to light through litigation or media attention.²⁰⁰

2. Reforming the Tax Law

While one could attempt to legislatively address tax shelter activity in a number of ways, the ultimate impact of such ef-

196. See *supra* text accompanying notes 155–58.

197. See Infanti, *supra* note 174, at 595–96 (describing the media attention preceding the decision of Stanley Works to abandon its planned migration to Bermuda).

198. Indeed, a large measure of the public outrage over the corporate expatriation transaction contemplated by Stanley Works may have been due to the patriotic impulse that U.S. companies should not abandon their country following the September 11, 2001 attacks. *Id.* at 594–95.

199. Even if all corporate tax returns were part of the public record, it is not clear whether abusive transactions would be singled out for public scrutiny. Certain tax shelters may not be apparent on the face of the corporate tax return. Even if the transactions are disclosed, it is unclear whether anyone representing the public (*e.g.*, the media) would have appropriate incentives to review the public tax return information in the absence of other evidence of wrongdoing. See, *e.g.*, Sheldon D. Pollack, *Revenge of the Muckrakers*, 75 TAX NOTES 255 (1997) (noting the media's historical lack of interest in discussing arcane tax issues).

200. For instance, the magnitude of Enron's extensive tax shelter activity only came to light after its bankruptcy filing.

forts is likely to be limited.²⁰¹ Legislating on an ad-hoc basis against particular tax shelters as they come to light is a crusade doomed to failure. Our complex tax laws simply provide too many opportunities for aggressive tax planning to ever hope that all the possible loopholes could be effectively closed legislatively.

If specifically legislating against particular transactions is a losing battle, perhaps a legislative means could be found to discourage tax shelter activity more generally. For instance, detailed rules requiring taxpayers to formally disclose aggressive transactions and positions to the Service might be adopted to force tax shelter plans out into the open.²⁰² However, disclosure is only effective at dissuading abusive activity if taxpayers are relying on non-detection as a significant factor in undertaking their transactions. While tax shelters typically have an element of the "audit lottery" mentality in them, most transactions only go forward if a reasoned legal analysis supports them. Given the literalist trend in the courts, attorneys (and their clients) often believe they have a solid chance of winning despite the fact that their transactions contravene the intent of the Code.²⁰³ While disclosure may aid the Service in identifying the most egregious transactions for litigation, it is not clear that disclosure would result in any meaningful reduction in tax shelter activity.²⁰⁴ For the same reasons, legislative attempts

201. The one legislative option which has some merit would be to statutorily require inclusive interpretation of tax provisions. See discussion *infra* Part IV.B.4.

202. Over the last few years the Service has adopted and revised its regulations to increase the level of disclosure for tax shelter transactions. Additionally, legislation to statutorily require additional disclosure is currently pending in Congress. A prime difficulty with any disclosure regime is properly defining the transactions covered such that the provision is neither overbroad nor underinclusive. See, e.g., Craig W. Friedrich, *Second Bite: The Treasury Tries Again on Tax Shelter Disclosures and Investor Lists*, 30 CORP. TAX'N 3 (2003) (suggesting that these revised disclosure rules will have little impact).

203. This may in part explain why taxpayers in identified tax shelters appear to have been slow to settle with the Service even after detection. Lee Sheppard, *Basis-Shifting Settlements Not Playing Well*, TAX NOTES TODAY, Dec. 2, 2002, LEXIS 2002 TNT 232-37. However, other unofficial reports suggest that the ultimate taxpayer response to the various tax shelter settlement offers has been positive. Sheryl Stratton, *Inside OTSA: A Bird's Eye View of Shelter Central at the IRS*, 100 TAX NOTES 1246 (2003).

204. Public disclosure of transactions may have a certain shaming effect, but tax information is generally confidential. However, for a discussion of the impact of public opinion in dissuading U.S. companies from migrating to foreign jurisdictions for tax reasons, see Infanti, *supra* note 174, at 591-96.

to dissuade tax shelter activity by increasing penalties are likely to fail.²⁰⁵

A final legislative option is to radically revamp the income tax system, or simply replace the income tax with a completely different system.²⁰⁶ While this presumably could restore confidence in the short run, one worries how long the Rule of Law could be sustained in the face of a literalist judiciary. Taxes must be raised from somewhere for the government to effectively serve society. Any new tax system will by necessity allocate that burden among the members of society. Those bearing the greatest tax burden will have an incentive to decrease their burden in opposition to society's will.²⁰⁷ If they are free to structure their affairs to literally comply with the law while avoiding its intent, then they (or their clever advisors) will find loopholes in the new system just as they did under the old. Unless one has faith that a tax system can be devised that is impossible to game,²⁰⁸ the inevitable result (given a literalist judicial stance) will be a highly complex system that the public perceives as unfair, because it can readily be manipulated by those with the inclination, resources, and sophistication to do so.

205. That is, a corporation's cost-benefit analysis of a proposed tax shelter will factor in the amount of penalties in light of the risk of their being assessed. Mark P. Gergen, *The Logic of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255, 261 (2002). Consequently, a belief that a literalist judiciary will uphold a tax shelter should mitigate even a very substantial increase in the amount of the potential penalty.

206. While such systemic reform may seem improbable from a practical standpoint, President Bush has recently suggested that the time may be ripe for completely replacing the income tax with a consumption tax. See Edmund L. Andrews, *White House Floats Idea of Dropping Income Tax*, N.Y. TIMES, Feb. 8, 2003, at C14.

207. Of course, the tax system could be designed to place the burden primarily on the lower and middle classes who lack the resources to find legal loopholes to avoid their burden. However, one has to question whether such an unequal system would truly be reflective of society's values, or whether the lower classes bearing the burden would resort to decidedly non-legal means to avoid their unequal burden.

208. The prospects for developing such a system are not promising given that all language is inherently ambiguous. Additionally, with many members of the tax bar out of work under such a new system, the sheer intellectual power that would be directed at discovering the weak spots in the system and developing methods of creative compliance should give any legislator pause about the likely success of her endeavor.

3. Reforming the Tax Bar

It has been suggested that the tax shelter problem is attributable in part to a general decrease in the professionalism of practicing attorneys, which permits competitive pressures to adversely affect their legal judgment.²⁰⁹ As the practice of law has moved away from being a profession toward being a business, many view lawyers as having devolved from wise counselors into mere pettifogging technicians. That the nature of legal practice is markedly different than it was in decades past is clearly evident. Once it was accepted that tax lawyers had a duty to help promote the fairness of the tax system. Today that belief is openly questioned. The adversarial credo of "my client, right or wrong,"²¹⁰ holds more and more sway and helps attorneys rationalize the suppression of their personal beliefs as they become the automatons of their clients.

Still, attorneys developing or opining on the legality of tax shelter transactions are not social miscreants bent on destroying the integrity of the tax system. Just like corporate managers, their actions are determined by the situational circumstances and firm cultures within which they operate. Tax lawyers are willing to develop tax shelter strategies for clients because it is lucrative to do so. However, attorneys succumb to this competitive pressure because the current state of the law paves the way for them to find plausible arguments supporting client desires. Attorneys who would never have considered opining favorably on a nonsensical but literal interpretation of the Code are now forced to do so. This is true not only because their competition is willing to give such opinions, but also because they know that the competition may well be proven *right* in giving such an opinion based on the rise of formalism in the interpretation and application of tax law. Since New Textualism's legal landscape will not constrain attorneys from advising

209. See generally Lavoie, *supra* note 159; Infanti, *supra* note 174, at 589–90.

210. Stephen Decatur, *Toast Given at Norfolk, April, 1816* ("Our country! In her intercourse with foreign nations may she always be in the right; but our country, right or wrong."), quoted in ALEXANDER S. MACKENZIE, *LIFE OF DECATUR*, 295 (1848). But cf. Carl Schurz's Speech in the U.S. Senate ("My country, right or wrong; if right, to be kept right; and if wrong, to be set right.") 1872–73 CONG. GLOBE, 42nd Cong., 2nd Sess. 1287 (1872).

favorably on tax shelter transactions, other constraints must be considered.

One attorney-based constraint focuses on the written opinion letters tax lawyers provide to their clients in connection with tax shelter transactions. These letters typically describe the tax shelter transaction in detail and discuss the relevant legal issues. If the transaction is ultimately questioned by the Service, these opinion letters are generally thought to insulate the taxpayer from the imposition of penalties by the Service. Currently, attorneys may draft such opinion letters without verifying relevant facts and by making unrealistic assumptions that summarily dispose of significant legal issues (*e.g.*, assuming that a business purpose exists for the transactions). Consequently, it has been proposed that the tax bar and the Service adopt stringent standards governing the form and content of attorney opinions approving tax shelter transactions.²¹¹

While requiring opinions to be more detailed and thorough is a laudable goal, it is not clear that such increased standards would have any significant impact in the current legal environment. If the drafting attorneys believe that the courts are likely to sustain a literalist interpretation of the relevant laws, then forcing them to be more explicit about the facts and law in their written advice will not change their conclusion. Traditional anti-abuse doctrines can be distinguished factually, or simply dismissed as outdated in light of the rise of New Textualism. Consequently, the benefits to be gained from higher opinion standards seem minimal since the real issue is that attorneys will endorse these aggressive transactions so long as there is a good chance that they will be approved by the courts.

In any event, focusing on written opinions may be largely irrelevant. The primary reason taxpayers obtain opinion letters is for their potential tax penalty protection. Focusing remedial measures on the availability of tax opinions only makes sense if penalties are actually considered a significant risk by the taxpayer. Since taxpayers engaging in tax shelter transactions typically believe that a literalist interpretation of the law is sustainable, the risk reduction attributable to a written opinion may no longer be a meaningful factor in determining tax-

211. See Lavoie, *supra* note 159, at 74–75.

payer behavior.²¹² For the same reasons, tinkering with the certainty level required for attorney advice on taking a position on a tax return,²¹³ or assuming that an attorney could be dissuaded from advocating a tax shelter position out of fear of malpractice liability,²¹⁴ seems untenable if the courts are likely to actually sustain a literal application of the law.

Finally, imposing an affirmative obligation on tax attorneys to raise the ethical aspects of tax shelter transactions with their clients would have little impact in today's legal environment. Clients currently view their tax advisors as mere legal technicians skilled at manipulating the law. Tax attorneys raising ethical issues are likely to be ignored (or more likely replaced) because their ethical advice has little force in a legal landscape dominated by New Textualism's view that *all* tax planning is ethically permissible.

4. Reforming the Judiciary

Reforms targeted at corporate taxpayers, the tax law and the tax bar will have only a marginal impact on tax shelter activity since they fail to address the interpretive roots of the tax shelter problem. Any effective solution must ultimately focus on the judiciary. Either the legislature must force the judiciary away from a literalist approach or the judiciary must do so itself. Legislative options for reforming the judiciary include codifying common law anti-abuse doctrines and adopting a statutory general anti-abuse rule.

While courts traditionally used common law anti-abuse doctrines as a prophylactic means of addressing schemes that undermined the purpose of the Code, in recent years the courts

212. Indeed, many recent tax shelters are going forward without formal written tax opinions.

213. See ABA Formal Opinion 85-352:

A lawyer may advise reporting a position on a tax return so long as the lawyer believes in good faith that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law and there is some realistic possibility of success if the matter is litigated.

A "realistic possibility of success" is generally thought to be approximately a one in three chance of success on the merits. See ABA Section of Taxation, Standards of Tax Practice Statement 2000-1 (Dec. 4, 2000); Jasper L. Cummings, Jr., *The Range of Legal Tax Opinions, With Emphasis on the 'Should' Opinion*, 98 TAX NOTES 1125 (2003).

214. See Lavoie, *supra* note 159, at 92-97.

have been less willing to do so. Courts with literalist leanings are able to disregard the traditional strength of such doctrines by finding them too vague or by analyzing them in a literalistic mode that distorts their function and permits them to be dismissed as inapplicable.²¹⁵ Similarly, practitioners advocating tax shelter positions often dismiss common law doctrines as factually inapplicable or impermissibly vague.²¹⁶ By codifying these anti-abuse doctrines Congress could affirm their legitimacy and ensure their serious consideration by judges and practitioners.

While codifying specific common law anti-abuse rules can potentially change judicial behavior, a number of factors make this approach sub-optimal. One potential difficulty with codification is that drafting statutory language closely replicating particular doctrines is difficult given the case law origins of the doctrines. It is likely that any statutory formulation of a common law doctrine would fail to cover all situations that could have been reached under a less precise, judicially developed standard. Further, such codifications might be applied literally by the courts, in an over-inclusive manner prohibiting transactions traditionally viewed as permissible. Finally, by freezing the doctrines in fixed statutory language, Congress is likely to forestall any future judicial development of the doctrines. Indeed, the act of codifying specific doctrines may be viewed by the judiciary as confirmation that any non-codified doctrines should no longer be relied upon, and that any future judicial development of anti-abuse doctrines is inappropriate.

A more promising means of legislatively altering judicial behavior is to adopt a statutory general anti-abuse rule (a "GAAR") similar to those enacted in a number of other countries.²¹⁷ A GAAR would effectively require that the judiciary

215. See, e.g., *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001); *United Parcel Serv. of Am., Inc. v. Comm'r*, 254 F.3d 1014 (11th Cir. 2001); *Compaq Computer Corp. v. Comm'r*, 277 F.3d 778 (5th Cir. 2001).

216. Lavoie, *supra* note 159, at 71 n.79. Indeed, sometimes it is even claimed that certain established anti-abuse doctrines do not exist in the common law. *Id.* at 62.

217. For a general discussion of the impact of GAARs in other jurisdictions, see Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. REV. 83 (2001); David A. Ward, *Tax Avoidance: Judicial and Legislative Approaches in Other Jurisdictions, in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 CONFERENCE REPORT* (Toronto: Canadian Tax Foundation, 1988) at 8:1-8:53; U.K. *Inland Revenue Publishes Consultative*

interpret the Code in light of its purpose and intent. Since the legislature would specifically mandate an inclusive approach to the interpretive question, even a literalist judiciary should feel constrained to obey the GAAR's directive.²¹⁸

The primary argument against the adoption of a GAAR is that it would create ambiguity in the law.²¹⁹ Since courts could apply the GAAR to overturn a literal reading of the law, taxpayers could never rely on the law as drafted and would always be forced to guess regarding how a court would rule. Even the tax treatment of ordinary business transactions would potentially become uncertain. This argument essentially reduces to a fear of judicial discretion. A GAAR would only create unacceptable levels of uncertainty for ordinary transactions if the judiciary in fact applies the GAAR in non-abusive situations and in an unreasoning manner. If the GAAR is used judiciously as a means of reaching transactions that take advantage of unintended gaps in the tax law, then it will never be applied to ordinary transactions and its existence will have no effect on the certitude of taxpayers operating within the norm.

Additionally, the institutional constraints on judicial action and the judiciary's return to its traditional interpretive approach as a result of the GAAR, will ensure that most cases will be decided without reference to the GAAR. Only in situations where knaves attempt to twist the legislature's statutory words to frustrate their meaning would the GAAR come into play. Tax lawyers (and tax judges) have extensive experience in resolving the application of ambiguous words to concrete facts. They are skilled at considering the purpose and intent of particular Code provisions and reaching reasoned conclusions regarding the law's scope. Such common training and experience usually results in the majority of practitioners reaching

Document on General Anti-Avoidance Rule, WORLDWIDE TAX DAILY, Oct. 6, 1998, LEXIS 98 TNI 193-20.

218. Schler, *supra* note 177, at 382. Indeed, the primary reason prompting GAARs in foreign jurisdictions was the need to eliminate literalist judicial interpretations of their tax laws. *See generally* sources cited *supra* note 217. However, the judiciary could actively attempt to frustrate the purpose of a GAAR if it so chose. *See, e.g.*, David Crerar, *Interpretations of GAAR: Before and Beyond McNichol and RMM*, 23 QUEEN'S L.J. 231 (1997) (noting the risk that reticence by Canadian courts might adversely impact the intended benefits of Canada's GAAR). Given the ardor of New Textualism's supporters, such a path cannot be discounted.

219. Schler, *supra* note 177, at 381.

similar conclusions on the tax treatment of any situation. The GAAR will simply legitimize judges and practitioners relying on their accumulated judgment as in days past. It will give them the tools they need to become true arbiters and trusted counselors once again.

Until recently, a GAAR in the United States has not seemed necessary due to the strength of judicially developed anti-abuse doctrines and the liberal approach to statutory interpretation in tax cases.²²⁰ However, given the rise of New Textualism and the decidedly mixed messages the judiciary is sending, enacting a GAAR appears to be the only method of altering the stance of the courts in the near future.²²¹ To the extent a GAAR is successful in changing judicial approaches to statutory interpretation in tax shelter cases, practitioners' views will change to reflect the new legal landscape. Attorneys will be able to resume their traditional gatekeeper role because their reasoned judgment regarding the likely outcome of a transaction in court will again have force. Once the traditional approach to statutory construction is reaffirmed, the numerous constraints on unethical behavior that were weakened under New Textualism should revive. Ultimately, the unethical tax shelter behavior of corporate executives would substantially decrease.

C. Whither the Judiciary?

Nevertheless, enacting a GAAR would not be required if the judiciary were to decisively reaffirm that the substance of a transaction and the purpose of the Code control. Unfortunately, the judicial trend in the tax arena is moving decidedly in the opposite direction.

1. Recent Tax Shelter Litigation

The struggle against New Textualism in the tax law arena is not yet lost, but the battle is not going well.²²² After some

220. See Lavoie, *supra* note 159, at 62–63 (asserting that a strong reaffirmation of traditional anti-abuse doctrines was preferable to a GAAR).

221. See discussion *infra* Part IV.C.1.

222. Schler, *supra* note 177, at 395.

initial victories,²²³ several courts of appeals have opted to apply the traditional anti-abuse doctrines in a literalistic manner, rather than as a prophylactic means of reaching abusive transactions.²²⁴ By circumscribing the application of the anti-abuse doctrines, these courts were able to sustain the taxpayer's literal application of the Code to achieve unintended benefits. While not all courts have capitulated to New Textualism's agenda,²²⁵ the elevation of form over substance by several courts of appeals does not bode well for future tax shelter cases brought by the Service.²²⁶ The Service is cautious of litigating cases for fear that the courts will refuse to apply traditional, common law, anti-abuse doctrines, and further weaken the strength of these doctrines. Similarly, the existence of pro-tax shelter judicial views emboldens taxpayers to engage in such transactions and gives them significant leverage in negotiating favorable settlements with the Service when the transactions are discovered and challenged.²²⁷

In the absence of a GAAR, the only hope for unifying the approach of the various circuits lies with the Supreme Court. While the Supreme Court has yet to take a case involving a modern corporate tax shelter transaction, its recent tax opinions stress a literalist interpretation of the Code and therefore place the continued viability of the traditional anti-abuse doctrines in considerable doubt.

2. Recent Supreme Court Decisions

The Supreme Court clearly expressed its views regarding the importance of the Code's literal language over its intended purpose in *Gitlitz v. Commissioner*.²²⁸ *Gitlitz* involved the interplay between the discharge of indebtedness provisions of the

223. See, e.g., *ASA Investorings P'ship v. Comm'r*, 201 F.3d 505 (D.C. Cir. 2000); *ACM P'ship v. Comm'r*, 157 F.3d 231 (3d Cir. 1998).

224. See, e.g., *IES Industries, Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001); *United Parcel Service of Am., Inc. v. Comm'r*, 254 F.3d 1014 (11th Cir. 2001); *Compaq Computer Corp. v. Comm'r*, 277 F.3d 778 (5th Cir. 2001).

225. See, e.g., *Boca Investorings P'ship v. United States*, 314 F.3d 625 (D.C. Cir. 2003).

226. Additionally, the difference in approach to the interpretive question creates a lack of uniformity that itself is disruptive to the Rule of Law.

227. See, e.g., Sheppard, *supra* note 203; Lee Sheppard, *Where Are We Going With Tax Shelter Settlements?*, TAX NOTES TODAY, Oct. 18, 2002, LEXIS 2002 TNT 204-61.

228. 531 U.S. 206 (2001).

Code and special treatment accorded to Subchapter S corporations. Section 108(a) of the Code provides that a taxpayer's income from a discharge of indebtedness is excluded from his income (*i.e.*, is not subjected to tax). However, as a *quid pro quo* for this exclusion, certain losses and other tax attributes of the taxpayer must be eliminated to prevent the taxpayer from obtaining a tax benefit for losses that he never economically suffered.²²⁹ Due to a technical gap in the statutory structure with respect to Subchapter S corporations, the taxpayer in *Gitlitz* was able to exclude his share of his corporation's \$2 million discharge of indebtedness while retaining the ability to deduct the losses funded by the discharged debt. In approving the taxpayer's entitlement to this admitted double benefit, the Court relied exclusively on the asserted "plain meaning" of the statutory text and completely ignored the existence of legislative history explicitly indicating the opposite understanding of the relevant language by Congress.²³⁰ In summarily dismissing the policy-based conclusions of the lower courts, Justice Thomas stated for the majority:

[Several courts of appeals] have discussed the policy concern that, if shareholders were permitted to pass through the discharge of indebtedness before reducing any tax attributes, the shareholders would wrongly experience a "double windfall": They would be exempted from paying taxes on the full amount of the discharge of indebtedness, and they would be able to increase basis and deduct their previously suspended losses. *Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.*²³¹

229. I.R.C. § 108(b) (2002). When a creditor discharges the indebtedness of a debtor, it is the creditor who has economically lost money, not the debtor. That is, the debtor originally received funds from the creditor which will never be repaid after the discharge. If the debtor is never required to report the amount of such funds as taxable income, it is inappropriate to permit the taxpayer to use the expenditure of such funds to create deductible tax losses.

230. *See Gitlitz*, 531 U.S. at 221 (Breyer, J., dissenting) (quoting H.R. REP. NO. 103-111, at 624-25 (1993)) ("The shareholders' basis in their stock is not adjusted by the amount of debt discharge income that is excluded at the corporate level.").

231. *Id.* at 219-20 (emphasis added) (citations omitted). Congress amended the Code to close the loophole approved in *Gitlitz* in The Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21, 40 (codified as amended at 26 U.S.C. § 402(a)).

It should be noted that *Gitlitz* did not involve an intentional tax shelter. The taxpayer did not intentionally have his company become insolvent so he could claim non-economic tax losses. Consequently, it is possible that the Court might take a different view regarding the appropriateness of examining the Code's policy in a structured tax shelter transaction. On the other hand, the majority opinion gives no indication that the decision relies on the unplanned nature of the taxpayer's position. *Gitlitz* is also significant because all the Justices, except Justice Breyer, joined in the majority opinion.

Another significant Supreme Court opinion is *United Dominion Industries, Inc. v. United States*.²³² In *United Dominion* the Court refused to follow the Service's interpretation of certain special loss rules in the context of corporations filing consolidated tax returns. The Court found that since the relevant regulations did not explicitly mandate the result desired by the Service, the taxpayer's position must be sustained. As in *Gitlitz*, the decision was nearly unanimous and explicitly rejected the government's contention that the taxpayer's position would open the door for significant tax-avoidance transactions.²³³ In the majority's view, the appropriate response would be for the Service to amend its regulations if it disliked the Court's interpretation.²³⁴ Only Justice Stevens would have upheld the position of the Service based on the strength of tax policy concern.²³⁵

232. 532 U.S. 822 (2001).

233. *Id.* at 837-38.

234. *Id.* at 838. A unanimous court also took a strikingly similar view in *United States v. Brockamp*, 519 U.S. 347 (1997). In that case the Court rejected policy-based arguments regarding the interpretation of a tax statute of limitations provision since it assumed the highly technical nature of the statute indicated a Congressional intent to have its literal language obeyed:

Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

Id. at 352.

235. *United Dominion*, 532 U.S. at 842 (Stevens, J., dissenting). *United Dominion* is also noteworthy for Justice Thomas's concurring opinion which vehemently takes issue with the willingness of Justice Stevens to defer to the Service on policy grounds. To justify his literalist position, Justice Thomas relies "on the traditional canon that construes revenue-raising laws against their drafter."

The message of *Gitlitz* and *United Dominion* is that the Supreme Court is likely to take a literalist approach to any tax shelter case. While the traditional common law anti-abuse doctrines have a long-standing history in prior Supreme Court decisions,²³⁶ it is conceivable that the strong literalist leanings of this Court could lead to significant limits being placed on these common law doctrines and to an outright rejection of the Court's prior decisions on this topic.²³⁷

3. Altering a Bleak Outlook

The outlook for resolving the ethical problem of tax shelters is bleak. Aside from enacting a GAAR, legislative responses to the crisis are likely to be unavailing. Similarly, the prospects for the judiciary voluntarily rejecting a literal approach to interpreting tax statutes are dim. Consequently, tax practitioners are compelled to factor judicial attitudes into their assessment of the law and will increasingly convey this new reality to their clients. Emboldened by this altered landscape, corporate managers will undertake unethical tax shelter transactions with greater frequency. As the inequalities inherent in such tax avoidance transactions become clearer, the public's disrespect for the tax system will steadily increase while compliance flags.

Id. at 839 (Thomas, J., concurring). However, this "traditional canon" is one the Supreme Court expressed doubt about as far back as 1938. For example, Justice Stone said:

We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer.

It is the function and duty of courts to resolve doubts. . . . Here doubts which may arise upon a cursory examination of [the relevant Code provisions] disappear when they are read, as they must be, with every other material part of the statute, and in the light of their legislative history.

White v. United States, 305 U.S. 281, 292 (1938) (citations omitted).

236. See, e.g., *Knetsch v. United States*, 364 U.S. 361 (1960); *Gregory v. Helvering*, 293 U.S. 465 (1935).

237. See Madison, *supra* note 167, at 749–50 (encouraging the Supreme Court to reject these common law anti-abuse doctrines since they are directly contrary to the approach of New Textualism). But see Alexandra M. Walsh, Note, *Formally Legal, Probably Wrong: Corporate Tax Shelters, Practical Reason and the New Textualism*, 53 STAN. L. REV. 1541, 1545 (2001) ("Given the weight of precedent carried by the economic substance doctrine, it is unlikely that even the current Court would reject the government's position in a corporate tax shelter case.") (footnote omitted).

While the prospects for altering judicial attitudes quickly are not bright, the judiciary is not a monolith and attitudes can change over time. Many judges still reject New Textualism's interpretive approach. Others may be open to reevaluating their literalist approaches in response to scholarly criticism and the example of other judges. Finally, it should be remembered that today's law students are tomorrow's judges. If law professors persuasively teach the importance of inclusive interpretation in upholding the Rule of Law to today's students, their efforts may eventually bear fruit.²³⁸

V. CONCLUSION

The field of social psychology provides persuasive evidence that individuals lack well-defined character traits. The direct implication of this research is that situational factors act as the primary constraints on individual behavior. In order for society to promote ethical behavior it cannot rely on appeals to the inherent virtue of its citizens. Instead, it must develop moral precepts and a system of laws to serve as situational constraints on unethical behavior. However, for such constraints to be effective, the society's citizens must identify with, endorse, and respect the relevant strictures.

In the legal realm, establishing such a Rule of Law requires that the society's laws grow out of and reflect the values of the society. While New Textualism insists that the Rule of Law's need for equality, uniformity, and predictability requires courts to strictly construe the law, this position fails to properly account for the close linkage between the Rule of Law and society's values. Strict statutory construction creates an environment where the law becomes detached from the values of the society it represents. This divide between society's moral and legal systems fosters unethical behavior that, left unchecked, ultimately subverts the Rule of Law in society. However, New Textualism's concerns regarding equality, uniformity, and predictability can all be addressed through properly crafted insti-

238. The emphasis here must be on the word *persuasively*. While most academicians are skeptical of New Textualism, many of today's entering law students are immediately drawn to its apparent elegance and simplicity. See Eskridge, *The Unknown Ideal*, *supra* note 133, at 1514 n.16 (1998) ("Many law students take to the new textualism like rats to a maze. Even some law students who dislike most of the results Scalia reaches find his methodology potentially attractive.").

tutional constraints that permit the judiciary to interpret the law in a manner inclusive of society's values. Further, inclusive interpretation also permits society to utilize professional advisors as an additional situational constraint on unethical business behavior.

The increasing acceptance of New Textualism in the federal courts is creating a situation in the United States where the law is diverging from society's values. New Textualism is unintentionally subverting the Rule of Law. This effect can be directly observed though an analysis of the current wave of corporate tax shelter activity in the United States. Similarly, the appalling increase in unethical business behavior in recent years is attributable in large part to increasing judicial acceptance of New Textualism. Such ethical abuses can be productively addressed by altering judicial attitudes toward statutory interpretation. This article is a humble attempt to influence those attitudes.