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## Interpretation and Accessibility

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## INTERPRETATION AND ACCESSIBILITY

KAREN PETROSKI\*

### INTRODUCTION

Professor Eskridge's lecture reminds us that the issue of interpretation—and statutory interpretation in particular—has been a topic of discussion among judges and legal theorists for decades. Yet there is clearly still much more to say on the matter. And despite the consistently recognized centrality of interpretation to legal practice, interpretation remains a highly contested undertaking—not only in its application, but in its very description. What are we talking about when we refer to statutory interpretation? Is it a matter of what lawyers and judges do already, or a matter of self-conscious practice? Should it be one or the other, or is it satisfactory for it to be both? Would these questions be answered differently from a scholar's perspective and from a judge's? Should they be? These last questions have new significance in the contemporary legal academy, in which the relationships among teaching, scholarship, and practice are being critically re-examined and might be in the process of being reformed in a lasting way.

My remarks will not answer these questions but will, rather, seek to make the case for asking them explicitly and discussing the answers we would want to endorse as a responsible educational community. Below, I first discuss the central role that the concept of interpretation has played in dominant scholarly theories of law and legal activity. Then, I briefly examine the influence (or lack of influence) of this theoretical trend on the law school curriculum. I then turn to the current climate of legal education, and in particular the impact of the discourse of accessibility in contemporary discussions of this institution and the reasons the imperative of accessibility might be an elusive goal. I conclude by identifying some key questions for community discussion that emerge from the developments I describe, focusing on the question of whether legal theory and legal interpretation can be, or should be, radically accessible activities.

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\* Assistant Professor, Saint Louis University School of Law. Thanks to Jonathan Bollozos and Jordan Panger for research assistance and to William Eskridge, Joel Goldstein, and the other participants in the 2012 Childress Lecture proceedings—especially Liz O'Brien and the staff of the Saint Louis University Law Journal—for making possible the forum in which these ideas were initially presented.

## I. THE CENTRALITY OF INTERPRETATION TO MODERN THEORIES OF LAW

The history of modern Anglo-American legal theory is partly a story about the rise to dominance of legal positivism, as Professor Eskridge's paper (and Professor Shapiro's recent book, discussed further below) have recounted. But it is also a story of increasing attention to the close relationship—perhaps even amounting to an identity—between those practices we call “legal” and the human activity we call “interpretation,” which I will define for purposes of this discussion as referring to the identification of the meaning or significance of communications.

Professor Eskridge notes this connection very early in his lecture, when he remarks that since 1957, statutory interpretation has been a “locus for jurisprudential theory.”<sup>1</sup> Herbert Hart's exchange with Lon Fuller of that year took the practice of statutory interpretation to be illustrative of the implications and shortcomings of legal positivism.<sup>2</sup> But this focus by legal theorists on the interpretation of statutes dates back well beyond the mid-twentieth century. Those fathers of Anglo-American positivism Jeremy Bentham and John Austin, at the end of the eighteenth and beginning of the nineteenth centuries, both also treated legislation and its interpretation as core components of their theories of law.<sup>3</sup>

As the presentations in this symposium show, Anglo-American jurisprudence since the Hart-Fuller debate has continued to draw on statutory interpretation as a central example and a proving ground for theories of law.<sup>4</sup> Most of the scholars since Hart and Fuller who have sought to explain what is unique about what lawyers and judges do have made interpretation central to that explanation. Since the 1970s, for example, Ronald Dworkin has been developing a theory of law (which has since evolved into a more general

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1. William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 866 (2013).

2. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–11 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958).

3. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 323–25 (Prometheus Books 1988) (1789); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10–17, 31–32, 107–08 (Wilfrid Rumble ed., Cambridge Univ. Press 1995) (1832).

4. See, e.g., James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975 (2013) (observing that certain approaches, including the ordinary meaning approach, “is promoted by liberals and conservatives, purposivists as well as textualists”); Victoria F. Nourse, *Decision Theory and Babbitt v. Sweet Home: Skepticism About Norms, Discretion, and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909 (2013) (explaining that norms are drawn from a diversity of areas and that normativity, as a result, deserves more academic attention and less “closeting”).

theory of morality) that centers on interpretation.<sup>5</sup> According to Dworkin today, not only is law basically an “interpretive” activity, but so is morality more generally.<sup>6</sup> An implication of his position is that if we can reach an understanding of interpretation, we will be able to understand what makes law and legal activity what they are.

Dworkin is not usually classed as a legal positivist,<sup>7</sup> and as Professor Eskridge has explained, there is no necessary connection between the assumption that interpretation is central to legal activity and the positivist position that we can describe law fully without recourse to normative statements.<sup>8</sup> But theorists who account for the nature of law quite differently from Dworkin share his emphasis on the centrality of interpretation to their accounts of law. Antonin Scalia, for example—considered by some observers to be an orthodox positivist, or to represent himself as such—has also made legal interpretation, specifically the interpretation of statutes and constitutional text, central to his account of what law is and what it should be, at least from the judge’s perspective.<sup>9</sup> And Scott Shapiro, who has recently advanced a theory of law that seeks to bridge the divide between positivist and non-positivist theories, has also, in the process, put interpretation in general and statutory interpretation in particular at the core of his theory of what law is and what it should be.<sup>10</sup> Shapiro advances a theory that understands legal rules as plans; he supports his account mostly through examples of rules that are either analogous to or actually are legislative enactments.<sup>11</sup> Moreover, he argues that his theory is accurate specifically because it justifies a defensible approach to interpretation.<sup>12</sup>

Many of the most prominent contemporary legal theorists writing in English thus seem to agree that to understand what law is and how it functions, we need to understand legal interpretation, and especially statutory interpretation. As a result, as Professor Eskridge’s lecture indicates, most of these theorists also offer theories of statutory interpretation as components of their theories of law. Yet these theorists disagree in some fundamental ways about what law is and, accordingly, about the most appropriate or best theory

5. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* vii–xv (1977); RONALD DWORKIN, *LAW’S EMPIRE* 87–113, 225–28, 410–13 (1986); RONALD DWORKIN, *JUSTICE IN ROBES* 6–7, 34–35 (2006); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 1–19, 400–15 (2011).

6. See DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5, at 166–70, 400–09.

7. SCOTT J. SHAPIRO, *LEGALITY* 265–67 (2011).

8. Eskridge, *supra* note 1, at 867–68, 894, 906–07.

9. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9–18, 37–44 (1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51 (2012).

10. See generally SHAPIRO, *supra* note 7.

11. *Id.* at 119, 195–97, 225.

12. *Id.* at 170–73.

of statutory interpretation. They also disagree, albeit less explicitly, about what interpretation itself is. They seem to concur that some activity related to communication, meaning, and action lies at the core of legal activity, but their characterizations of that activity vary widely. For Dworkin, for example, interpretation is a realization of community values, a form of conceptual and cognitive harmonization.<sup>13</sup> For Scalia, it is more concretely a form of fidelity to textual authority, or as he puts it in his most recent book, “how a legal message is to be received by those who must apply its directives.”<sup>14</sup> For Shapiro, interpretation involves the implementation of plans that happen to be expressed in texts to resolve otherwise irresolvable moral quandaries.<sup>15</sup>

Legal theorists thus agree that a central part of what lawyers and judges do, and should be doing, is interpreting the law, with statutes understood as the paradigmatic form of the law. They also seem generally to agree, despite their theoretical differences, that interpretation requires some shared understanding or community to work.<sup>16</sup> But apparently no shared understanding of that practice itself exists; in fact, these theorists distinguish themselves from one another in part based on the differences between their accounts of what interpretation—and therefore law—is.

## II. THE STATUS OF INTERPRETATION IN THE LEGAL ACADEMY

Legal theorists like Dworkin, Scalia, and Shapiro are presenting descriptions of what law is, and we recognize them as experts on this matter. We also know from our everyday experience, however, that whatever else law is, what lawyers and judges do must count as law. And in the United States, part of what lawyers and judges have in common is their education within a particular institution: the law school. If the theorists are right that interpretation is central to what lawyers and judges do and should be doing, then it might seem to follow that in educating future lawyers and judges, we should be teaching them how to perform that activity, and it might also follow that we need to teach them what the activity is that they are being taught. But it is far from clear that we are doing this.

In his most recent book, for example, Scalia argues that we are not.<sup>17</sup> And indeed, the law school curriculum does not focus directly on legal or statutory interpretation outside of courses on legislation and some constitutional law

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13. See DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5, at 160–70.

14. SCALIA & GARNER, *supra* note 9, at 42.

15. See SHAPIRO, *supra* note 7, at 201–02, 213–14.

16. See DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5, at 160–62, 405–07; SCALIA & GARNER, *supra* note 9, at xxvii; SHAPIRO, *supra* note 7, at 204–06.

17. SCALIA & GARNER, *supra* note 9, at 7–9.

courses.<sup>18</sup> At many law schools, these are not required courses.<sup>19</sup> A concern that students at such schools might graduate without any explicit instruction in either the theory or practice of legal interpretation motivated several participants in this symposium to urge strongly that these courses be made a standard part of law school coursework.

On the other hand, if legal interpretation is nothing more than the practice of understanding the law and constructing arguments about what it means—as some theorists might argue<sup>20</sup>—then the existing law school curriculum is already addressing and teaching legal interpretation, perhaps sufficiently. It might be that students need not be taught what interpretation is, as long as they are taught how to do it. And if scholars and educators cannot agree about exactly what interpretation is, it might be futile to expect more than this kind of diffuse training in interpretation as a kind of “know-how.”<sup>21</sup>

Is this enough? Should law professors be debating the nature of law and legal interpretation if we cannot explain how this debate relates to what goes on in law school classrooms? It is becoming increasingly difficult to answer this question affirmatively—not just when focusing on the sufficiency of instruction in legal interpretation in the current legal curriculum, but also when considering other aspects of the standard legal curriculum. Long-term concerns about the shape of legal education have become more urgent over the past several years.<sup>22</sup> We are hearing and talking more and more about the gaps

18. *Id.*; see also Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 169 (2008) (advocating the addition of legislative courses to first-year law school curricula).

19. Of the nineteen law schools whose 2012–13 curricula were surveyed for this essay, only six (Harvard, Columbia, New York University, Georgetown, University of California-Hastings, and Fordham) require a course in Legislation (usually in the form of a second-semester course in legislation and regulation). See Appendix, *infra*. A similar proportion of law schools offer courses in legislative drafting or legislative clinics. See *id.* Courses focusing specifically on legal interpretation appear rare outside the most elite law schools. See *id.*

20. See, e.g., DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 87–113, 225–28, 410–13; SHAPIRO, *supra* note 7, at 302–06.

21. See, e.g., HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* 23 (2007) (“Over the last half-century, the most important transformation in the way expertise has been understood is a move . . . toward a . . . wisdom-based or competence-based model. . . . [E]xpertise is now seen more and more as something practical—something based in what you can do rather than what you can calculate or learn.”).

22. See, e.g., JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 18–22 (1914) (evidencing that similar concerns have been present in legal education for a century now); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 87–126, 162–84 (2007) (explaining the need for a move to more practical application-based curricula and the obstacles to such an effort); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91

between legal education and legal practice, between academic activities and the real world, between theory and the things that lawyers and judges actually do.<sup>23</sup> In this climate, defending the status quo is increasingly difficult. To understand what these developments mean for scholarship and teaching about legal and statutory interpretation, we need to consider what is occurring outside scholars' bookshelves and law school classrooms—and even outside lawyers' offices and judges' chambers.

### III. ACCESSIBILITY AND INACCESSIBILITY IN LEGAL EDUCATION

“Accessibility” has been a rallying cry of academic reformers in the United States since the emergence of modern institutions of higher education in this country in the late nineteenth century.<sup>24</sup> In recent decades, prompted by economic, demographic, political, and technological shifts, this theme has taken on new implications. Over the past generation or so, policymakers, administrators, and the public have come to conceive of higher education as part of a more general system of private enterprise, rather than as a public good.<sup>25</sup> One result of this shift has been to encourage those making policy decisions and seeking funding for the academy to define their goals and activities in private-enterprise terms.<sup>26</sup> This new way of describing academic activity requires the identification of educational products and direct communication with the market for those products.

Those who focus on the legal academy have seen these trends in several specific developments over the past couple of years. An even wider audience learned of them through the series of articles by David Segal published in the *New York Times* starting in January of 2011.<sup>27</sup> Segal's pieces, critical of law

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MICH. L. REV. 34, 34–35, 42 (1992) (drawing attention to the disparity between academia and practice and its detrimental effects on the legal profession); *see also infra* Part III.

23. *See* discussion *infra* Part III.

24. *See, e.g.*, ARTHUR M. COHEN & CARRIE B. KISKER, *THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM* 420–21, 464–78 (2d ed. 2010); *see generally* BILL READINGS, *THE UNIVERSITY IN RUINS* (1996).

25. *See* COHEN & KISKER, *supra* note 24, at 514–49, 559–61; *see also* READINGS, *supra* note 24, at 164–65, 177.

26. *See* SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY* 1–4, 181–206 (2004) (describing higher education entities' shift to using profit-focused methods and terminology in their operations).

27. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at BU1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1; David Segal, *A Possible New Curriculum*, N.Y. TIMES, Nov. 20, 2011, at N23; David Segal, *The Price to Play Its Way*, N.Y. TIMES, Dec. 18, 2011, at BU1; David Segal, *For 2nd Year, a Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 20, 2012, at B1; *see also* Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 26, 2011, at A18; Archive of Articles in *Room for Debate: The Case Against Law*

schools' financial models and curricula, brought renewed attention to the Law School Transparency (LST) initiative begun in 2009 by two law students.<sup>28</sup> Dedicated to "improving consumer information and to reforming the traditional law school model," along the lines of disclosure initiatives in other sectors, LST gathers and makes available data about the employment of U.S. law school graduates.<sup>29</sup> Faculty from prominent law schools have also joined student and journalistic demands for access to information and for institutional, curricular, and financial reform: two especially influential examples are Brian Tamanaha of Washington University, who published a book-length critique with a major academic press in 2012,<sup>30</sup> and Paul Campos of the University of Colorado, who from August 2011 to early 2013 posted daily exposes on his blog, *Inside the Law School Scam*.<sup>31</sup>

All of these initiatives describe the academy, and the legal academy in particular, as an accessible space that should be offering accessible products.<sup>32</sup> The products in question include student degrees but also, traditionally, scholarship. The differences between these products—and their potential irrelevance to one another—are familiar themes in the academic reform discussion.<sup>33</sup> Their similarities are less often noted, but these similarities are important, especially for the topic of this symposium. Both the scholarly and the educational products of the legal academy are specialized discourse products: for students, the ability to participate in a specialized discourse community,<sup>34</sup> and for scholars, contributions to a different specialized discourse community in which various features of the first discourse community are discussed and debated.<sup>35</sup>

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*School*, N.Y. TIMES (July 21, 2011), [www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school](http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school).

28. See generally LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited Jan. 6, 2013). Media mentions of LST have increased throughout 2011 and 2012. *LST Recognition*, LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/recognition> (last visited Jan. 6, 2013).

29. *About LST*, LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/about> (last visited Jan. 6, 2013).

30. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

31. Paul F. Campos, *INSIDE THE LAW SCH. SCAM*, <http://insidethelawschoolscam.blogspot.com> (last visited Mar. 18, 2013).

32. See, e.g., Paul F. Campos, *Bleg: Help Circulate the Law School Transparency Petition*, *INSIDE THE LAW SCH. SCAM* (Oct. 21, 2011, 6:05 a.m.), <http://insidethelawschoolscam.blogspot.com/2011/10/bleg-circulating-law-school.html>; *supra* notes 25–26; text accompanying *supra* note 29.

33. See *supra* note 27.

34. See, e.g., ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 3–4 (2007).

35. For a summary of some of the literature exploring academic discourse communities, see Karen Petroski, *Does It Matter What We Say About Legal Interpretation?*, 43 *MCGEORGE L.*



Scholars have always had to make a case for the utility of what they are doing, but there is now more pressure on them than ever before to make that case in terms accessible to their consumers, and their institutional environment is reinforcing that pressure.<sup>36</sup> In the legal academy, this translates into a drive to make legal education accessible to outsiders: to define the enterprise in a way that can be understood and valued by everyone. Since part of the enterprise involves the production of scholarship, there is pressure to make that product, too—including theories of law and interpretation—as accessible as possible. Shapiro's and Scalia's recent books are wonderful examples of the effects of this pressure, and their inherent interest and conceptual rigor are not compromised by their accessibility.<sup>37</sup>

The above discussion probably understates the importance of the imperative of accessibility in the contemporary legal academy, as well as higher education more generally. But accessibility is not the only imperative affecting the work of legal scholars and educators. Indeed, certain structural features of higher education and law, as those systems have developed in the United States over the past century, make accessibility a real challenge to attain. For one thing, the structure of scholarly enterprise encourages scholars to stake out personal positions that differ from the positions taken by other scholars, often on minor points.<sup>38</sup> The scholarly products of the academy, that is, are produced within a system that has classically rewarded producers of those products that both document their producers' expertise—measured by the embedding of those products within a system of specialized communication—and contribute to the continued functioning of such systems of specialized communication—by prompting differentiated responses from other producers or sometimes entire subsystems of new products applying details of earlier scholarly products to new topics.<sup>39</sup> The best works of legal theory—including Professor Eskridge's work—perform the latter function; they are not just

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REV. 359, 368–74 (2012) [hereinafter Petroski, *Does It Matter*] (discussing “[s]cholarly approaches to the study of academic practice”); Karen Petroski, *Legal Fictions and the Limits of Legal Language*, INT’L J. L. IN CONTEXT (forthcoming 2013).

36. See, e.g., SLAUGHTER & RHOADES, *supra* note 26, at 22–23, 29, 113–16, 302, 333.

37. See, e.g., Frank H. Easterbrook, *Forward* to SCALIA & GARNER, *supra* note 9, at xxvi.

38. See, e.g., ANDREW ABBOTT, CHAOS OF DISCIPLINES 21–27 (2001); RANDALL COLLINS, THE SOCIOLOGY OF PHILOSOPHIES: A GLOBAL THEORY OF INTELLECTUAL CHANGE 80–82 (1998).

39. See, e.g., Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?*, 56 J. LEGAL EDUC. 374, 375 (2006) (arguing that high-quality articles are cited regardless of the review's prestige); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 888–90 (1996) (finding that articles published in more prestigious schools' journals are more likely to be cited); Petroski, *Does It Matter*, *supra* note 35, at 366 n.35, 387–88; Ronald D. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 8 (1986) (discussing article selection).

exercises in hairsplitting that are comprehensible only to a handful of specialists, but speak to experts in a number of areas. This kind of scholarly work is not possible, however, in the absence of a broader field of differentiated specialist knowledge areas that a path-breaking theorist can bridge through his or her work. The consequences of these dynamics of scholarly production include the diversity of scholarly positions that Professor Eskridge explores in his lecture and that, well beyond this symposium, fill the pages of law reviews and the shelves of law school libraries.<sup>40</sup>

A second force in the legal academy working against accessibility is the nature of legal training, which gives graduates the ability to participate in a particular professional discourse that the general public is unable to navigate. Like other professional discourses, legal discourse depends for its authority on being nontransferable, or in a certain sense inaccessible.<sup>41</sup> Clients need lawyers because nonlawyers lack the ability to communicate according to legal conventions; lawyers' ability to so communicate is fundamental to every service they perform as lawyers. It follows that, should those conventions become available to and understandable by all—should they become radically accessible—the demand for lawyers' services would disappear or at least change virtually beyond recognition.<sup>42</sup> Even if legal education were to be reformed to address only and all of what lawyers-in-training need to know and do in order to join the profession, then, it would continue to involve training in an inherently esoteric art.

In both of these senses, there is a certain devotion to inaccessibility built into the project of legal education. We can understand the current crisis in that institution as, among other things, a product of the clash of these competing pressures toward accessibility and away from it, particularly as those pressures are manifested in communicative products and skills.

#### CONCLUSION: ACCESSIBILITY ALL THE WAY UP?

Given the imperative of accessibility, can we accept a continued commitment to inaccessibility in the projects of legal education, scholarship, and theory? Should we? Or should we strive for accessibility all the way up? I present these remarks in the hope that they might inspire others to agree with

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40. See Karen Petroski, *Is Post-Positivism Possible?*, 12 GERMAN L.J. 663, 681–84 (2011) (discussion of how several particular scholars have fit into the development of Anglo-American legal positivism in comparable ways, despite the distinct subject matter and approach of each individual).

41. See, e.g., ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 86–91 (1988).

42. See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 6–7 (2008).

me that we need to discuss these questions more explicitly if we hope to make real progress on the task of legal education reform.

The theoretical disagreement over what exactly interpretation is—despite the agreement that whatever it is, it is central to what lawyers do—is encouraged by the dynamics of scholarly activity, and also perhaps by a shared and only partly recognized drive to keep the core activity of lawyers contestable and inaccessible. The absence of consensus about what interpretation involves is not just a result of scholarly competition or a focus on an inherently elusive concept but also a matter of collective, tribal self-preservation. We will need to decide as a group whether this reluctance to work toward a common and easily communicated understanding of our core activity is something we want to work against. We will need to decide, that is, whether we want the concept and practice of legal interpretation to be radically accessible, whether accessibility would change that practice beyond recognition, and whether a society operating with a radically accessible form of legal interpretation is the society we want. There are no simple answers to these questions, but it will be hard to agree on the direction legal education should take if we do not address them.

APPENDIX: COURSES ON LEGISLATION AND INTERPRETATION OFFERED AT  
SELECTED LAW SCHOOLS DURING THE 2012–13 ACADEMIC YEAR

**Columbia Law School:** Requires 1Ls to take Foundations of the Regulatory State (three credits). First-year students may also elect to take courses on Legislation (three credits) or Legislation and Regulation (three credits; both of these courses are also open to upper-level students). In 2012–13, offered upper-level electives on Advanced Constitutional Law: Law and Political Process (three credits); The Constitution (two credits; a seminar on techniques of constitutional interpretation); a seminar on Contracts, Collaboration and Interpretation (three credits); a course on Financial Statement Analysis and Interpretation (three credits); a seminar on History and Constitutional Authority (two credits); a seminar on Legal Interpretation (three credits; focusing primarily on statutory and constitutional interpretation); and a course on Reading the Constitution (two credits).<sup>43</sup>

**Fordham University School of Law:** In fall 2012, offered an intensive course in Congressional Investigations (two credits), and the 1L course in Legislation and Regulation for evening students (four credits). Appears to require 1Ls to take a spring course in Legislation and Regulation (offered in spring 2013, five sections, four credits). Also offered in spring 2013 a course in Legislative Drafting (three credits). Has previously offered courses in Constitutional Interpretation (fall 2010, three credits); Election Law (spring 2010, fall 2010, two credits); Election Law and the Presidency (spring 2012, three credits); History, Originalism, and the Founders' Constitution (spring 2012, two credits); Language of the Constitution (spring 2010, two credits); Legislative Drafting (fall 2010, three credits); Regulatory Drafting (three credits); and Statutory Interpretation and Separation of Powers (fall 2010, two credits).<sup>44</sup>

**Georgetown University Law Center:** In fall 2012, offered an elective in Federal Money: Policymaking and Budget Rules (three credits); an elective seminar on Lawmaking and Statutory Interpretation (three credits); the upper-level elective Lawmaking: Introduction to Statutory and Regulatory Interpretation (three credits); an upper-level elective Tax Treaties: A Practical Approach to Interpretation and Application (one credit); and a Federal Legislation and Administrative Clinic (up to ten credits). A planned seminar in Congressional Investigations (three credits) was cancelled. In spring 2013, required the first-year course Government Processes (four credits), and offered

43. See *Courses*, COLUMBIA L. SCH., <http://www.law.columbia.edu/courses> (last visited Mar. 31, 2013).

44. See *Past Course Offerings*, FORDHAM SCH. OF L., <http://law.fordham.edu/registrar/2775.htm> (last visited Mar. 31, 2013); *Class Schedules*, FORDHAM SCH. OF L., <http://law.fordham.edu/registrar/2750.htm> (last visited Mar. 31, 2013); *Course Descriptions*, FORDHAM SCH. OF L., <http://law.fordham.edu/16158.htm> (last visited Mar. 31, 2013).

the upper-level electives Congressional Investigations Seminar (two credits); Congressional Procedure and Legislative History Seminar (three credits); the How to Work the Hill: A Guide to Lawyering in the Congress practicum (five credits); a continuation of the Lawmaking and Statutory Interpretation seminar (two credits); Lawmaking: Introduction to Statutory and Regulatory Interpretation (three credits); and Political and Lobbying Activities of Tax-Exempt Organizations (two credits); as well as a continuation of the Federal Legislation and Administrative Clinic (up to ten credits).<sup>45</sup>

**Harvard Law School:** Required first-years to take a course in Legislation and Regulation (seven sections, in spring 2013). In fall 2012, offered an upper-level seminar in Advanced Legislation: Theories of Statutory Interpretation, and an upper-level elective on Law and the Political Process. In spring 2013, offered an elective (taught by a Kennedy School professor) on the U.S. Congress and Law Making (covering the legislative process).<sup>46</sup>

**New York University School of Law:** In fall 2012, offered a course on Legislation and the Regulatory State (four credits) for transfer and LLM students. In spring 2013, offered a required 1L course on Legislation and the Regulatory State (four credits, four sections), as well as electives on Federal Budget Policy and Process (two or three credits); Legislation and Political Theory (three or four credits); and The Law of Democracy (four credits).<sup>47</sup>

**Northwestern University School of Law:** In fall 2012, offered an elective in American Democracy (three credits). No legislation-related courses were offered during the winter term. In spring 2013, offered an elective in Legislation (three credits).<sup>48</sup>

**Stanford Law School:** In fall 2012, offered electives on Direct Democracy (two or three credits) and Statutory Interpretation (three credits), as well as a course on the legislative process, Legislative Simulation: The Federal Budget (three credits). In winter 2013, offered an elective on The United States Senate as a Legal Institution (three credits; taught by Russ Feingold). In spring 2013, offered an elective on Regulation of the Political Process (four credits).<sup>49</sup>

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45. See *Curriculum Guide: Courses*, GEORGETOWN UNIV. L. CTR., [http://apps.law.georgetown.edu/curriculum/tab\\_courses.cfm](http://apps.law.georgetown.edu/curriculum/tab_courses.cfm) (last visited Mar. 31, 2013).

46. See *Harvard Law School Course Catalog*, HARVARD L. SCH., <http://www.law.harvard.edu/academics/curriculum/catalog/index.html> (last visited Mar. 31, 2013).

47. See *Search Course Descriptions*, N.Y. UNIV. SCH. OF L., <https://its.law.nyu.edu/courses/index.cfm?> (last visited Mar. 31, 2013).

48. See *Course Catalog*, NORTHWESTERN UNIV. SCH. OF L., <http://www.law.northwestern.edu/curriculum/coursecatalog/term.cfm> (last visited Mar. 31, 2013).

49. See *Courses*, STANFORD L. SCH., <http://www.law.stanford.edu/courses> (last visited Mar. 31, 2013).

**University of California, Berkeley School of Law:** In fall 2012, offered an elective on the Law of Democracy (three credits). In spring 2013, offered an elective on Legislation (three credits).<sup>50</sup>

**University of California, Hastings College of the Law:** Requires 1Ls to take a “Statutory Elective” in the spring semester; in spring 2013, the elective options were Education Law; Employment Discrimination Law; Environmental Law; Federal Income Taxation; and Legislation, Statutory Interpretation, and the Administrative State (each three units). In fall 2012, offered a course on Legislative Process (three units) and a Public Policy Advocacy Seminar (two units). In spring 2013, offered a course in Statutory Interpretation and Bill Drafting (three units); an Advanced Legislative Process Seminar (two units); and a Voting Rights Seminar (two units); as well as a Legislation Clinic (up to twelve points).<sup>51</sup>

**University of California, Los Angeles School of Law:** In fall 2012, offered an upper-level elective on Statutory Interpretation (two credits). Did not offer any legislation- or interpretation-related courses in spring 2013; a skills course on Public Policy Advocacy was not offered in the 2012–13 year.<sup>52</sup>

**University of Chicago Law School:** In fall 2012, offered an elective on Legal Interpretation (three credits, taught by Judge Frank Easterbrook). No interpretation courses were offered during the winter quarter, although Election Law (three credits) was offered. In spring 2012, offered an elective in Legislation and Statutory Interpretation (three credits), as well as one in Public Choice (three credits). Throughout the year, offered a Mental Health Advocacy Clinic (one to two credits, includes legislative advocacy).<sup>53</sup>

**University of Michigan Law School:** In fall 2012, offered an elective on Legislation and Regulation (four credits), and an upper-level elective on Voting Rights and Election Law (four credits, two sections). In spring 2013, again offered the Legislation and Regulation elective (four credits).<sup>54</sup>

**University of Missouri School of Law:** Offered no legislation- or interpretation-focused courses in fall 2012, but did offer an upper-level elective in Election Law (one to three credits). In spring 2013, offered upper-level elective on Legislation (one to three credits) and a Legislative Practicum (one

50. See *Courses@Boalt*, BERKELEY SCH. OF L., <http://www.law.berkeley.edu/php-programs/courses/courseSearch.php> (last visited Mar. 31, 2013).

51. See UNIV. OF CALIF. HASTINGS SCH. OF L., *2012–2013 Course Catalog* 3–4, 26, 41, 29, 31, 44, 56–57 (2012), <http://www.uchastings.edu/academics/catalog/docs/CAT12-13.pdf>.

52. See *Curriculum Guide*, UCLA SCH. OF L., <https://curriculum.law.ucla.edu/Guide/AllCourses/> (last visited Mar. 31, 2013).

53. See *Offerings*, UNIV. OF CHI. L. SCH., <http://www.law.uchicago.edu/courses> (last visited Mar. 31, 2013).

54. See *Office of Student Records*, UNIV. OF MICH. L. SCH., <http://www.law.umich.edu/currentstudents/registration/Pages/default.aspx> (last visited Mar. 31, 2013).

to three credits). Previously-offered courses not offered in 2012–13 included an elective on Advocacy and Government Agencies (one to three credits).<sup>55</sup>

**University of Missouri, Kansas City School of Law:** Fall 2012 course listings were not available in spring 2013. In spring 2013, offered no legislation- or interpretation-related courses. Lists as occasionally offered a course in Legislation (two to three units) and a Seminar in Constitutional Interpretation (two to three units).<sup>56</sup>

**University of Pennsylvania Law School:** In fall 2012, offered an elective on the Originalism Debate and the Constitution (three credits). In spring 2013, offered electives on Election Law (two credits) and Political Law (two credits), as well as a Legislative Clinic (two credits).<sup>57</sup>

**University of Texas at Austin School of Law:** In fall 2012, offered a clinical program in Legislative Lawyering (three credits, with a three-credit practice skills companion course) and an elective in Texas Legislation: Practice and Procedure (two credits, taught by former Texas legislator J.E. Brown). In spring 2013, offered an elective in Antitrust: Economic Analysis and Legislative Interpretation (four credits); a continuation of the Legislative Lawyering clinic and practice skills course (three credits apiece); a Legislative Internship (three credits); an elective seminar on Originalism and Its Critics (two credits); and an elective seminar on Legislative Process (three credits).<sup>58</sup>

**University of Virginia School of Law:** In fall 2012, offered electives on Constitutionalism: History and Jurisprudence (three credits); Legislative Drafting and Public Policy (three credits); and Regulation of the Political Process (three credits). No legislation-oriented courses were offered during the January term. In spring 2013, offered electives on Government Ethics: Conflicts of Interest, Lobbying, and Campaign Finance (three credits), and Legislation (three credits).<sup>59</sup>

**Washington University School of Law:** In fall 2012, offered an intensive-course elective on The Interaction of Business, Government, and Public Policy in a Democratic Society (one credit), and a Congressional and Administrative

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55. See *JD Program Course Descriptions*, UNIV. OF MO. SCH. OF L., <http://law.missouri.edu/academics/curriculum.html> (last visited Mar. 31, 2013).

56. See UNIV. OF MO. KANSAS CITY SCH. OF L., *UMKC School of Law Alphabetical Course Listing* 5, 20, [http://www1.law.umkc.edu/academic/Course\\_Listings.pdf](http://www1.law.umkc.edu/academic/Course_Listings.pdf) (last visited Mar. 31, 2013); UNIV. OF MO. KANSAS CITY SCH. OF L., *University of Missouri-Kansas City School of Law—Schedule of Courses Spring Semester 2013 13* (2013), <http://law.umkc.edu/pdfs/registration-sp13-course-schedule.pdf> (last visited Mar. 31, 2013).

57. See *Penn Law Spring 2013 Courses*, UNIV. OF PENN. L. SCH., <https://courses.law.upenn.edu> (last visited Mar. 31, 2013).

58. See *Course Schedule and Descriptions*, UNIV. OF TEX. AT AUSTIN SCH. OF L., <http://utdirect.utexas.edu/lore/clst.WBX> (last visited Mar. 31, 2013).

59. See *Current Courses*, UNIV. OF VA. SCH. OF L., <http://lawnotes2.law.virginia.edu/lawweb/course.nsf/CbTbN> (last visited Mar. 31, 2013).

Law Internship (up to fourteen credits). In spring 2013, offered an upper-level elective on Legislation (three credits); an elective seminar on American Democracy and the Policy Making Process (three credits); an intensive-course elective on The Interaction of Business, Government, and Public Policy in a Democratic Society (one credit); an elective course on Organizing, Coalition Building, and Lobbying (three credits); and the Congressional and Administrative Law Internship (up to fourteen credits).<sup>60</sup>

**Yale Law School:** In fall 2012, offered an upper-level elective on Legislation (four credits) and a Legislative Advocacy Clinic (three credits). Also offered upper-level seminars on Reading the Constitution: Method and Substance (four credits) and The Judicial Role in Constitutional Interpretation: Comparing the U.S. and Canada (one or two credits), as well as a reading group on Contemporary Originalism (one credit). In spring 2013, offered electives Introduction to the Regulatory State (three credits, open to 1Ls, but not mandatory), The Law of Democracy (three credits, covering some aspects of the legislative process), and Legislation (three credits), as well as a continuation of the Legislative Advocacy Clinic, and an elective (open to 1Ls) on The Politics of Method: Law and Economics and Originalism (two credits).<sup>61</sup>

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60. See *Course Information and Directory*, WASHINGTON UNIV. SCH. OF L., <http://law.wustl.edu/registrar/pages.aspx?id=2124> (last visited Mar. 31, 2013).

61. See *Fall 2012 Course Overview*, YALE L. SCH., [http://ylsinfo.law.yale.edu/ww/prereg/course\\_overview.asp?Term=Fall](http://ylsinfo.law.yale.edu/ww/prereg/course_overview.asp?Term=Fall) (last visited Mar. 31, 2013).



