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RETURNING TO LAW AS MODUS VIVENDI: SOCIALITY AS LAW'S FIRST AND FOREMOST PURPOSE

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> "Rabbi Chanina the vice-high priest said: 'Pray for the welfare of the government, for were it not for fear of the state, every man would swallow his neighbor alive.'"
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> – The Talmud, Tractate Avot 3:2 (c. 1st century CE).

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I. OVERVIEW: WHAT IS THE ULTIMATE PURPOSE OF LAW?

Several theories within the philosophy of law compete for recognition as law's central guiding principle. Each begins from the premise that a system of rules instituted among a political community has a purpose – a normative aim – based on a certain anthropological account of what human beings are and what they need. Each then accounts for the law's current and potential function, pursuant to those needs. Each then proceeds to show how certain specific rules can bring the law in line with its ultimate purpose, which itself serves the greater ultimate purpose of providing human beings what they need – in other words, advancing human flourishing.

To make this abstraction more concrete, consider the influential theory of Law and Economics, admittedly presented here in simplified form. Law and Economics posits that law's normative aim is *efficiency*: Legal rules should be designed to minimize waste and allocate goods in such a way that will maximize overall happiness.[1] This can be traced to an unspoken but unmistakably implied anthropological account of what is good for people, what makes them happy, and what the law therefore ought to facilitate for them: What is good for people, individually and communally, is happiness (on the minimalist law-and-economics account that is whatever they may be bargaining for, or whatever may be the coin of the realm); much of the law can be explained by assessing its tendency to place burdens on those best suited to handle them, and those parts of the law that do not seem to account for efficiency ought be changed to facilitate efficient allocations of burdens and benefits. Law's purpose is to achieve such an end.

Or consider the most popular – if least often articulated – theory of law with obvious moral valence: Law as substantive justice. Many

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[1] Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *The Law and Economics of Contracts*, HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., Elsevier 2007); (Colum. L. & Econ., Working Paper No. 296, at 7, 2006).

law professors, activists, and especially law students tend to view law as a vehicle for achieving substantive forms of justice, such as achieving equity (substantially equal results) among people of disparate means and backgrounds.[2] Such a theory can rest on a few anthropological accounts, but is frequently built upon the foundation laid by John Rawls in his *Theory of Justice*, which posits that economic desert cannot be said to stem from social contributions, because each person's ability to contribute is in large part determined by "morally arbitrary" conditions surrounding his birth and upbringing. No person truly deserves what they have received by "moral luck."[3]

Because human beings *are* arbitrarily unequal, and because human beings *need* a fair society in which to live, law should be structured in ways that level the inequalities created by random chance and moral luck. Some theorists have reviewed the laws of torts, for example, and concluded that some of its long-acknowledged principles are predicated on theories of "distributive justice," under which a pre-existing pattern of property holdings is made more equal or more fair by tort law's design.[4] Still many more argue that many areas of Anglo-American common law ought to engage in more "distributive justice" that accounts for litigants' standing in society before determining what outcome is most equitable.[5]

This paper argues for an alternative central organizing principle to the law that aims to do less than achieve efficient outcomes or

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[2] *See, e.g.*, Sophia Moreau, *Equality and Discrimination*, THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 171–190 (John Tasioulas ed., 2020).

[3] *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[4] *See* Jules Coleman, Scott Hershovitz & Gabriel Mendlow, *Theories of the Common Law of Torts*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2021 ed.) [https://perma.cc/QW8Z-EGUB].

[5] *See, e.g.*, Jeffrey M. Gaba, *Taking 'Justice And Fairness' Seriously: Distributive Justice And The Takings Clause,* 40 CREIGHTON L. REV. 569, 584 (2007); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

advance substantive goals such as distributive justice. In what follows, I will argue that the law's primary goal is and ought to be providing a *modus vivendi*: A basic set of settled and stable background principles that allow citizens to live together peaceably. In doing so, I follow in the tradition of Samuel Pufendorf, who, building on Thomas Hobbes, argued that the first principle of the law of nature is the obligation to cultivate and perpetuate "sociality" towards other people.[6] This theory may therefore be thought of as law-and-sociality, law as social glue, or law as minimum condition for pluralistic coexistence.

My argument for the superiority of this view rests on an exploration of the nature of the law as distinct from democratic politics, and its role in mediating problems of diversity in the modern world; in other words, its instantiation of a "minimum agreement" between people seeking to take life's bare necessities for granted and avoid violence and chaos.[7] After making the case that the normative aims of such a theory are preferable in the abstract to substantive visions of the law, I examine what a background principle of law-as-*modus-vivendi* looks like concretely, dividing it into its key component parts and providing some ways in which it can influence judges' and lawmakers' thinking, competing with more prevalent frameworks for choosing between legal rules. With these defenses and broad frameworks in mind, I proceed to compare this vision of law as social glue in a few examples to rules that have emerged from other theories which may have pulled the law (and tools of its interpretation) farther from its most basic purpose, undermining sociality in the process. I then suggest some *modus-vivendi*-centric alternatives to these rules and tools.

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[6] SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO, 2 vols., vol. 2: *Of the Law of Nature and Nations*, transl. C.H. Oldfather & W.A. Oldfather, THE CLASSICS OF INTERNATIONAL LAW, ed. J.B. Scott, no. 17 (1934).

[7] F.A. Hayek, *Historians and the Future of Europe*, THE COLLECTED WORKS OF F.A. HAYEK, VOL. 4: THE FORTUNES OF LIBERALISM, ESSAYS ON AUSTRIAN ECONOMICS AND THE IDEAL OF FREEDOM (1992).

Finally, I provide an overview of growing threats to the law's ability to sustain coexistence under a minimum agreement posed by the Critical Legal Movement. Examining some of the epistemic assumptions of increasingly prominent critical theories, I aim to show that these theories are diametrically opposed to seeing the law as *modus vivendi*, not merely because they pursue substantive outcomes more radical than the Rawlsian distributivists mentioned above, but because they rest upon theories that deny the possibility of finding sufficient commonality across cultures (often racialized or gendered cultures) to assume that all individuals can know about and adhere to the demands of the minimum agreement. Such theories may be designed to increase "inclusivity," but are substantially more likely to undermine the ability to cooperate between people of differing cultures and are therefore contrary to law as social glue.

II. WHY LAW AS MODUS VIVENDI?

I begin with an examination of law as *modus vivendi* in the abstract, drawing support for such a view of the law from its very nature as a set of rules beyond democratic referendum, as well as from an anthropological account of how stability is maintained in diverse versus homogeneous societies.

A. THE LAW/POLITICS DISTINCTION

Answering the question of which vision of the law ought to predominate requires an antecedent question: Why do we have law to begin with? (Let us assume that a political community wishes to abide by certain rules around which they can structure their lives and distinguish right from wrong.) Why should a political community, people whose lives will be intertwined in business, government, and regular social relations, not ground its rules in democracy, or some form of voting system among the living? Why should they be constrained by the dead hand of the past, in the form of decisions, norms, traditions, and assumptions baked into the structures the living take for granted despite having crystallized long ago?

Surely some hard-core democrats would treat this as a non-rhetorical question and admit that if it were practical, they would like to see all rules voted upon all the time. But the caveat suggests a better answer: It is impractical to constantly litigate questions that, put to a vote, would inevitably divide people. Losers of the previous vote would push for another, each time. Worse, no citizen would have time to do those things meant to be built upon the ground laid by these rules. Who has time to run a business when there's another vote about how much businesses will pay in taxes?

Law exists distinct from politics, even in a free and democratic society, because political communities need to settle those things that citizens rely upon to structure their lives. It follows, then, that the law should be geared towards fulfilling the purpose that justifies its existence to begin with. The law, by its very existence, takes a step towards achieving what Henry Hazlitt called "the aim of 'society,'" society being "nothing else but the combination of individuals for cooperative effort."[8] Human beings choose to live in political communities because our "satisfaction can best be maximized by cooperating with others," which can only occur against a backdrop of rules that are not subject to constant change or whose determination crowds out opportunities to cooperate and maximize our satisfaction.[9]

B. SUBSTANTIVE THEORIES OF LAW ARE PREDICATED UPON SOCIAL COOPERATION

Hazlitt points out that "without social cooperation modern man could not achieve the barest fraction of the ends and satisfactions that he has achieved with it. The very subsistence of the immense majority of us depends on it."[10] In the context of law we can frame this point as an argument for law-as-social-glue's superiority over

[8] HENRY HAZLITT, THE FOUNDATIONS OF MORALITY 35 (3d ed. 1998).
[9] *Id.*
[10] *Id.* at 37.

alternatives such as Law and Economics or Law as Substantive Justice: Concerns about efficiency and fairness are predicated upon, and therefore secondary to, concerns about having a functioning cooperative society to begin with.

An example illustrates the ways in which alternative theories take the law's primary purpose for granted. Law and Economics might approach a dispute over whether reliance on a disputed contract was reasonable with a set of tools used to determine who was best equipped with knowledge and means to take on particular burdens *ex ante*, and it would consider whether a given ruling would provide good economic incentives for future contracting parties. A judge employing such an approach might use this analysis to determine, to take an example from Richard Craswell, "whether reliance has been efficient, and in such cases … can provide good incentives by finding a contract when a party relied reasonably in response to a pre-contractual communication, but finding no contract when the party relied either excessively or not at all."[11] Law as substantive justice might do a similar but simpler analysis, urging a judge to find a contract when a less-powerful or less financially flexible party relied on a more-powerful or more financially flexible party, and to not find a contract when the opposite is the case.[12]

What Hazlitt points out is that a great deal has happened prerequisite to either of those analyses, and we ought not take it for granted. Two parties cooperated, each determining that their joint efforts furthered his own interests relative to embarking on some project to improve one's circumstances on his own. In the example given, one party even posits that he has *relied* on the word of the other, demonstrating the depth of social interconnectedness that this paradigm takes for granted. It is unthinkable that in a chaotic world, a world

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[11] Hermalin, Katz & Craswell, *supra* note 1, at 59.

[12] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (1965).

lacking cooperation, that one person could rely on another's word and bear that as an argument before an arbiter. Perhaps most of all, the two parties have agreed to sort out their differences before a neutral tribunal and abide by its determination.[13] Neither chose to embrace the power of might to make right, by simply overpowering his adversary.

Before we can advance efficiency or fairness, we need to ensure that those prerequisites are solidly in place and functioning to advance social cooperation. Put slightly differently, a legal regime's stability – its ability to provide predictable outcomes and peaceful resolution of disputes – is logically antecedent to all the other goals people may desire a legal regime to provide. Justice, efficiency, and redistribution accomplished through the law depend on the existence of settled rules all are expected to follow and judgments all are expected to treat as legitimate and therefore accept. For those expectations to mean anything, citizens of a political community must be committed to its continued existence. There must be a widespread commitment to cooperation and preservation of those fundamental constitutive elements of the state that make prosperous coexistence possible.

In this light, we may add the observation that judicial considerations often downplayed or seeming quaint, such as predictability and stability in judicial outcomes, are actually the *sine qua non* of the law. Bolder theories of law that aim to achieve substantive outcomes are doomed to fail without them, because no powerful party would submit to an unpredictable and unstable system or choose to participate in it in the first place. Ensuring that powerful parties remain committed to coexistence with less-powerful parties is a recurring theme, discussed further in Part V.

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[13] Joseph Raz, in *The Rule of Law and Its Virtue*, gestures at the possibility that this is the essence of the rule of law, but does not say so explicitly. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 210-29 (1979).

C. PROBLEMS OF PLURALISM AND THE DIVERSE SOCIETY

The centrality of sociality to human flourishing, and its status as predicate for other uses of law in society, becomes especially apparent in a diverse society. This additional source of context and perspective illustrates why law-as-*modus-vivendi* is an especially crucial paradigm in diverse democracies that increasingly characterize the Western world, but especially in the United States, which is an exceptionally diverse and pluralistic country.

Diversity can be a wonderful thing, but it also presents unique challenges. A diverse array of languages, cultures, cuisines, and ways of life can increase our chances of achieving what Hazlitt points to as "the aim of each of us" as individuals, which is "to maximize his own satisfaction."[14] A wider buffet of choices within nearly every realm of our lives makes the human life more interesting and enjoyable, and ostensibly contributes to greater mutual understanding.

But the challenges posed by diverse societies cannot be overlooked. A basic problem with many coexisting cultures within one state is that traditional social contract theory tends to break down. The conceit of social contract theory is, in simplified form, that like-minded people willingly bind themselves to a set of rules in order to establish a common good, based on their shared values and norms, and conduce to an assumed view of the good and worthwhile life.[15]

Traditionally, these social contracts were not signed but emerged from the mists of time among tribes who could count on shared premises and views of the good life as a result of a shared history and common mythos.[16] Many nation-states today, even if they allow

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[14] HAZLITT, *supra* note 8, at 35.

[15] *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

[16] *See, e.g.*, Arash Abizadeh, *Historical Truth, National Myths and Liberal Democracy: On the Coherence of Liberal Nationalism*, 12 J. Pol. Phil. 291, 291-92 (2004) (extensively citing ERNEST RENAN, "QU'EST-CE QU'UNE NATION?," OEUVRES COMPLÈTES DE ERNEST RENAN 902 (Henriette Psichari ed., 1947).

immigrants to become citizens, comprise one or few closely-related ethnic groups, who tend to look relatively similar, speak the same or similar languages, and by temperament or by norm engage in mostly the same behaviors. This description characterizes most Scandinavian and Eastern European countries. Other nation-states, such as Japan, are even more homogeneous due to cultural norms surrounding immigration and a strong sense of separateness from other ethnic groups.[17] A social contract that depends on assumptions about what your neighbor cares about and what they will do with their freedoms is easier to adhere to when citizens can assume that their neighbors are essentially quite like them.

Moreover, a tribal mythos can logically foster social cohesion by allowing individuals to see their fellow citizens as members of a common family. It is near-literally true, in many cases, that ethnically and culturally homogeneous states, with many current residents aware that they are descended from the Franks or the Magyars or the Yayoi, do indeed comprise a population full of distant cousins. While not all cousins share values and behaviors, of course, it is logical that on average these societies will be higher-trust cultures. The legal, cultural, and economic policies of such states can bank on the assumption that citizens will treat each other more or less like family; individuals are more inclined to act in the common welfare, or at least not take advantage of each other.[18]

The United States cannot rely on such a mythos. As "a nation of immigrants," to use the often-repeated phrase, we cannot trace a heritage that binds us to anything replicating a family. Though one may certainly find cohesive communities on the local level, on the national level exists a much greater diversity of behaviors, expectations,

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[17] *See, e.g.*, Japan looks to accept more foreigners in key policy shift, REUTERS (Nov. 18, 2021) [https://perma.cc/7BDQ-7Y8B].

[18] For a further sociological explanation of imagined communities and resultant social behaviors, *see* CARA J. WONG, BOUNDARIES OF OBLIGATION IN AMERICAN POLITICS (2010).

norms, and views of the good life. America's remarkable diversity of subcultures and local communities can be a blessing, but it may render us too diverse to enjoy the luxury of a tribal or familial mythos that creates a high-trust culture in which we may assume no one is looking to take advantage of us.

A diverse nation, if it is to conceive of itself as a unified whole with some national rules, thus takes on the challenge of simulating the kinds of restraints that hinder self-interested individuals from taking advantage of those in whose welfare they are not directly invested. Albert Jay Nock observed that many doomed central planning experiments came from heavy-handed attempts to replicate the dynamic of a family at national scale, comparing those "striving after forms of organization, both political and social, too large for their capacities, believing that because they could organize a small unit like the family…they could likewise successfully carry on with a state" to "the lemmings on their migrations, finding themselves able to cross small bodies of water, think, when they come to the ocean that it is just another body of water like the others they have crossed, and so they swim until they drown."[19] Nock notes that this is no mere matter of size and control. "Nothing like that can, in the nature of things, be done."[20] It is a matter of the *nature* of these political communities, their qualities in addition to their size, that makes replication of a family dynamic difficult in the political context.

Boundaries of obligation, or the ways we consciously or subconsciously extend familial care to non-relatives, have their limits, and the area beyond those limits can destabilize a community if

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[19] *See* Robert M. Thornton, COGITATIONS FROM ALBERT J. NOCK 49-50 (1985) [https://perma.cc/D4JK-JSG9].

[20] *Id.* at 50.

unchecked by institutions that mediate the human tendency towards self-interest.[21] A humorous anecdote sums up the problem well:

> Former Texas senator Phil Gramm tells a story about talking to a group of voters. He was asked what his policy on children was. He said something like "My policy derives from the fact that no one can love my children as much as my wife and I do."
>
> A woman in the audience interrupted him and said, "No, that's not true: I love your children as much as you do."
>
> Gramm shot back his answer: "Oh, really? What are their names?"[22]

The woman in the audience had committed a common error of overestimating her own capacity for expansive boundaries of obligation. This error does not arise out of malice, but out of pragmatic limitations: human beings simply cannot care for many people as they care for their families. On the scale of the diverse nation-state, fostering a macrocosm of familial trust and coexistence – one in which violent struggle is off the table – is exceedingly difficult.

It should come as no novelty that mediating between diverse individuals is precisely what law, by its nature, does.[23] By setting rules in advance of disputable behavior clearly, generally, and accessibly, the law preempts dispute. By making those rules objective, or at least having an aim of being objective and knowable to all, law responds to the basic human problem of competing perspectives, each equally certain that it is in the right. Law's very existence recognizes that no

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[21] *See* WONG, *supra* note 18.

[22] JONAH GOLDBERG, SUICIDE OF THE WEST: HOW THE REBIRTH OF TRIBALISM, POPULISM, NATIONALISM, AND IDENTITY POLITICS IS DESTROYING AMERICAN DEMOCRACY 302 (2020).

[23] *See* Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at 4 (June 22, 2016) [https://perma.cc/N9U5-4MG2].

two people, not even identical twins, will see the same events the same way when there are reasons for each to engage in motivated reasoning. Its scope, moreover, speaks to the kinds of disputes between reasonable people of good will that have arisen in the past and that we might expect to arise again in the future. It fosters social cohesion by allowing all parties to coordinate their behavior to conform to a preexisting standard, root their claims in such a standard once dispute arises, and accept as legitimate an explained decision as to why one claim better adheres to the standard after all. In short, it is a common language into which individuals of varied tongues can translate their side of the story. Yet this feature of the law, often referred to in shorthand as "stability" or "predictability," often takes a backseat to more ambitious visions of law's purpose. Yet in their quest to advance substantive goals, those who conceive of law so ambitiously may lose sight of and even occasionally denigrate this most basic function of law – particularly American law.

Law can deal with diversity's challenges in a more specific sense. In America, citizens have traditionally shared what has been called a "civic-" or "civil religion," under which fidelity to the Constitution – the Supreme Law of the Land – takes on a unifying and solemnifying social role.[24] Constitutional civic religion has given and can give Americans common ground for mutual investment and trust by ensuring that all citizens feel part of one community of mutual obligation, as though they share not just America in time and place, but in history and in normative goals as well.[25] When all citizens are made

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[24] Robert Bellah, *Civil Religion in America*, 96.1 DÆDALUS 1, 1-21, (1967); *see also* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 81 (2009) ("[The Constitution is] a source of political identity for many Americans, and as a symbol of American sovereignty it is a potent reference for narratives of both restoration and redemption.").

[25] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980); *see also* Jason Mazzone, *Political Trust, Social Trust, and Judicial Review*, 36 CONST. COMMENT. 297, 306 (2021).

to believe that their neighbors, just like them, are committed to founding ideals such as individual liberty, religious pluralism, and republican virtue, it stands to reason that they are more likely to act towards their neighbors as if they shared a familial bond. Civic religion allows diverse people to rally around, at worst, a flag, a symbol of their shared destiny, and at best a shared set of ideals reflected in our supreme law. In that version, the flag stands for certain things instantiated in law, particularly constitutional law. Following the law is no longer a mere obligation for those who wish to avoid penalty; it is a sign of commitment to an ongoing shared project necessary to maintaining a peaceful and prosperous community. Participating in the common culture shaped by the law, with norms reflected by it, reinforces such a perception. As long as all are confident that their fellow citizens are equally dedicated to those things, the law can foster trust and accord between people who have little else in common.

To sum up: In a broad sense, the law is what mediates citizens' shared life; it sets the rules that give us our understanding of what responsibility we owe our fellow citizens, even though they have no other claim to our concern or our trust that they will use their freedom responsibly. In a specific sense, American law – particularly the Constitution and the ideals for which it stands – simulates a familial or tribal bond by imbuing citizens with a sense of shared commitment to those ideals, and a shared purpose in building a nation hewing closely to them. But legal regimes must avoid the pitfalls derided by Nock and Senator Gramm: To fulfill its lofty role, the law cannot aim to make citizens into a family literally; it cannot force individuals to treat each other with charity or goodwill, which would be making the mistake of treating citizens as if they actually were family. Rather, law in a free society should aim to establish rules that simulate the restraint one would exercise regarding his extended family, which allows all to trust and cooperate with each other.

With this theoretical defense and expression of the abstract goals of law-as-*modus-vivendi* in mind, we can attempt to bring this overarching theory into our realm, by thinking about its primary goals and how it might operate as a principle weighing on our substantive law and on judges tasked with interpreting that law.

III. TOWARDS A MORE PRECISE VISION OF LAW-AS-*MODUS-VIVENDI*

Thus far we have encountered a few versions of law-as-*modus-vivendi*, each thematically related but not yet made precise. We can begin to home in on an operative definition by thinking first of its primary goals as the fundamental constitutive theory of law distinct from politics, and from its role as a requirement of law's function antecedent to fairness or efficiency.

A. AVOIDING DIFFIDENCE, PROMOTING SOCIALITY

Drawing on the Hobbes-Pufendorf tradition, we may begin from the premise that law's primary goal is prevention of war of all against all.[26] Law is, on the account laid out in Part II, fundamentally about mediating inevitable differences between individuals who would otherwise solve their problems with violence or intimidation, and who cannot commit to constant public policymaking through the political sphere. Before we can have fairness in judgment regarding fair dealings with others, we need to get litigants into the courtroom. Even before that, we need individuals cooperating to have fair dealings to begin with. Chaos fosters what Thomas Hobbes frequently referred to as "diffidence," or the anxiety that people feel when they cannot know whether their neighbor is a threat or a source of fruitful cooperation.[27]

Prevention of diffidence works in a virtuous cycle with promoting sociality, or social cooperation. Cooperation is impossible when diffidence reigns, but when stabilizing institutions such as the law rule, and a sufficient number of parties looking to maximize their satisfaction by cooperating with others trust that the rule of law will

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[26] THOMAS HOBBES, LEVIATHAN, at ch. 13 (1651).

[27] *See* Alice Ristroph, *Hobbes on "Diffidence" and the Criminal Law*, FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW (Markus D. Dubber ed., 2014).

govern their interactions, they may begin to enter into contracts and make mutual exchanges. Because those exchanges are mutually beneficial and redound the benefit of both parties, commerce and exchange can present a viable alternative to violence and plunder, reinforcing the move away from diffidence and towards mutual trust. Thus, we may conclude that 1) promoting cooperation and 2) prevention of war of all against all are in large part two sides of the same coin.

Crucially, the move from diffidence to sociality rests heavily on the legitimacy of stabilizing institutions. This proposition necessarily elevates stability and predictability in the law to primary considerations. If disputants come to believe that they cannot use the logical tools that have proved successful in the past to predict the outcome of future cases, they will shy away from bringing their case to court, or even from entering into agreements to begin with. Sociality is predicated on trust not just of other individuals, but on the institutions that will be called upon to resolve disputes in a worst-case scenario. A court that changes course suddenly, deviating from the norms and expectations of a community to find a party surprisingly not liable, does not merely upset the expectations of that party. It upsets the expectations of everyone in the jurisdiction, who will have increased reason to fear that the next time a court issues a surprising judgment it will come at their expense. The second-order effects on cooperation and participation in shared life are therefore immense.

B. *MODUS VIVENDI* IN OPERATION

Just as other theories of law – such as the ones discussed in Part I – can operate in a variety of ways, so too can this theory enter the equation for lawmakers and judges seeking to shape legislation, regulation, and common law rules that will govern public life.

First, the above principles – disincentivizing diffidence, encouraging sociality, and legitimizing institutions – can operate as a rule of thumb, or an interpretive presumption. This means that in shaping the law at any stage, the relevant decisionmaker ought to ask him or herself whether the version of the rule under consideration would tend to promote peaceable coexistence and, ultimately, cooperation

among people who would otherwise distrust each other. Another version can be phrased maximally: What rule can we issue that would *most* encourage peaceable cooperation among fundamentally different people? Legislators making laws (putting live political questions to rest) as well as judges interpreting laws and issuing common-law rules, should use this presumption to guide their exercises of authority.

The second version is a stronger form of this posture, geared towards judges cognizant of the source of their authority and the demands of "doing *law*" rather than *politics*. It is to treat these principles as background considerations cutting against others in a kind of "totality of the considerations" analysis. I explain what I mean by background principle as follows.

Judges, by virtue of their role, must use certain unspoken yet omnipresent normative principles – what I call background considerations – to color their goals in adjudicating a given case. They ostensibly aim to do what is fair, right, and reasonable. All agree that these are legitimate judicial goals, but they may potentially conflict, and in the best case they are hazy words upon which much of our law is staked. Coloring these goals requires bridging the gap between the abstract (e.g., "fair") and more concrete (e.g., "in accordance with what the average person would have expected"). Historically, such background considerations have included, for better or worse, that we are a country of religious people,[28] that we are a nation that embraces substantive economic liberties and free-market economics,[29] that our Constitution cannot be interpreted as self-defeating,[30] and that our law allows individuals an expansive realm of self-definition.[31] Even putting these controversial examples aside, at a high

[28] *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
[29] *See* Lochner v. New York, 198 U.S. 45 (1905).
[30] *See* Terminiello v. City of Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).
[31] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

level of abstraction it is undoubtedly true that judges use background principles to inform their judgments, even if those principles broadly fall along the lines of, '*judges should not interpret the law to mean that anarchy is required to reign*.'

To treat the principles discussed here as a background principle, then, is to treat sociality as something more than even a presumption implied in private litigants' intents. It means being acutely conscious of the ways in which a given interpretation or rule promotes or detracts from sociality and deciding a rule of law in accordance with that consideration. After all, a judge's power, as an agent of the law who generally lacks democratic legitimacy,[32] derives from the legal/political distinction geared towards this very end. To "do law" is to advance the ends suggested by law's existence, foremost of which is laying the groundwork for a functioning cooperative society to exist.

Even if a judge is engaged in an efficiency analysis of a contract, he can keep *modus vivendi* concerns in mind to determine whether the economic efficiency is worth the potential tradeoffs to long-term cooperation and prevention of diffidence. If a judge is primarily concerned with substantive equality interests and distribution of wealth through legal rules, he may still wish to consider what the second- and third-order effects of such a ruling might be on future social cooperation, which, it bears noting, should tend to improve the economic satisfaction of less-materially-wealthy parties by fostering ongoing mutually beneficial exchange.

C. EPISTEMIC AND LOGICAL BASES FOR FOSTERING SOCIALITY

Whether as a presumption, a rule of thumb, or as a background principle, considerations of law-as-*modus-vivendi* require embracing

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[32] Whether an elected judge is properly regarded as an agent of law or democratic politics is a worthwhile query I intend to take up in future writing.

certain epistemic and logical principles as crucial to the law's functioning, antecedent to and undergirding the logical principles that give various theories of law their substance.

1. Public Reason

The epistemic basis for a system that allows fundamentally different people to cooperate and trust each other is one that embraces a defense of public reason. This is the notion that certain things are knowable to all people; for instance, that murder is wrong, that 1 + 1 = 2, and that these things are true and objective regardless of who discovered them as truths in nature, established them as truths embedded in positive law, or is being held to account for their alleged violation. More pertinent to social cooperation, defending public reason means insisting that all members of a political community, whether born into it or having joined it by choice or happenstance, are capable of knowing what a pre-existing rule means – indeed, that it has a meaning.

Of course, many difficult cases arise because knowing precisely *what* a rule means can be challenging, and rules may well be susceptible to several reasonable interpretations due to vagueness or ambiguity. But in easy cases, insisting on public reason is crucial, lest the effort to "uplift" or "amplify" "subaltern" perspectives come to undermine sociality.[33]

To understand the importance of this epistemic basis and its application to easy cases, consider its logical opposite. If a judge arbitrating a dispute hinging on a simple sentence were to conclude that the proposition's meaning were subject to many meanings among

[33] *Cf.* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007) (arguing that law denigrates epistemic methods of marginalized groups); see also S. Lisa Hoffman, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022) ("[E]xamining how hegemonic power structures discredit and subjugate marginalized knowledge").

cultural lines – that a person from dominant Culture A is reasonable in holding interpretation A, indeed that interpretation A is the dominant and expected interpretation, but the person from minority Culture B is reasonable in interpretation B given his culture's particular circumstances – he would be faced with the choice of elevating one cultural understanding over another. He could conclude that imposing interpretation A on person B is a form of cultural imperialism, systemic bias, or, as some scholars have termed it, "cognitive illiberalism."[34]

A defense of interpretation A, though it is dominant – indeed precisely *because* it is dominant – is necessary to a regime of law-as-*modus-vivendi*. As the dominant understanding reflecting the dominant culture and dominant norms, it is the *only* option among theoretically infinite paradigms that stands any chance of being freely knowable to a newcomer joining a political community. There are an infinite number of alternative or subaltern interpretations, corresponding to each and every minority perspective and contextual background for interpreting a proposition. But interpretation A is most common, shaping the dominant culture and observable to anyone who wishes to follow its dictates. It serves as a force for sociality as long as one believes that reason is public, and that any kind of person, therefore, can deduce what it demanded of them by the rules of the community to which they belong.

Without settling on the controlling legitimacy of one interpretation over another, sociality becomes nearly unachievable. This is the case because elevating subaltern perspectives – engaging in cognitive liberalism, or more accurately cognitive egalitarianism – renders judgments unstable and unpredictable. We can expect this to cascade into diffidence and even segregation, as people of various cultures –

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[34] Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

aware that their interpretation may be deemed just one among many – will shy away from cross-cultural engagement.

In short, too much cognitive egalitarianism runs counter to the salutary effects of universal reason. The law's ability to mediate between different people suffers as a result, because it no longer serves as a common language into which people of various cultures can translate their claims. Under such a regime, people will naturally affiliate only with members of their own culture, secure in the expectation that they are speaking a common language whose plain meaning will be enforced by the law should a dispute arise.

It should be remarked here that the law's instantiation of rules based on public reason does not ensure unity, because minority groups may choose to settle disputes in alternative modes or arenas. A related question asks whether healthy pluralism, aimed at fostering sociality, requires – or, should be properly understood to allow – minorities to opt out.

Indeed, consenting members of various groups may choose to take their civil disputes to mediators other than those sanctioned by the state. So long as these disputants do not violate the laws of the state in settling their differences (by, for instance, dueling), there appears to be no threat to social cooperation. Opting out, whether done because disputants do not trust the cognitive paradigms of government courts or for other reasons, seems perfectly compatible with a pluralistic society. Of course, the state may be called in to ratify and enforce the results of these disputes, which would normally be contracts interpreted under state law. But there is nothing stopping disputants from agreeing that a state court, again, is unlikely to understand the intent encoded in the contract and therefore taking the dispute to another venue, as long as it is done peacefully and cooperatively.

2. Emergent Order

A related logical basis upon which this view of the law is predicated is the embrace of common law reasoning and emergent

economic orders. Rather than seeing these organic phenomena as morally arbitrary – i.e., as one choice among many – those who wish to encourage sociality ought to see emergent legal and economic orders as reflections of community standards for interpersonal interactions that are observable, ascertainable, and followable by all. Put simply, they emerged for a reason: Because they conduce to a political community's flourishing, as it has defined its ends and means.

To interrupt the natural process of emerging norms governing a community's interactions is to make much the same mistake as injecting cognitive egalitarianism into judicial reasoning. It disturbs the tendency of mediating bodies to produce predictable outcomes upon which citizens can depend. Outsiders and cultural minorities can observe emergent norms and conform their behavior to them, while insiders and majorities can trust that their understanding of local rules will continue to be enforced, allowing them to cooperate unencumbered by fear of sudden shifts. Organic processes left undisturbed, or tinkered with as minimally as possible, are crucial to encouraging the development of the law as a force for peaceable coexistence between people who see the world differently, though it is tempting to try to foster coexistence by forcing majorities to account for minority perspectives.

IV. SUBSTANTIVE PLURALISM

Finally, and somewhat more intuitively, embracing a pluralistic ethos in the substantive content of the law is crucial to encouraging the virtuous cycle of social cooperation and trust. It is almost tautological to argue that living together peacefully requires radical toleration of individuals who do not share one's own political, social, or religious views. One crucial (and shorthand) way judges and lawmakers can incorporate *modus-vivendi* considerations into their deliberations about rulemaking is to think about whether a given rule increases or decreases pluralism, the law's provisions for multiple groups with vastly different demands on individuals' lives to live together in peace.

It may be objected that defenses of public reason, cognitive illiberalism, and emergent-order reasoning are anti-pluralistic and

therefore in contradiction with substantively pluralistic rules. This objection confuses pluralism with what has been widely called *inclusion* or *inclusivity*. Pluralism demands that majorities and minorities live together in peaceable coexistence, while inclusivity demands that minority perspectives and epistemologies are treated on equal footing as majorities'.[35] To embrace pluralism means allowing self-governing sub-communities significant space to live meaningful lives in the ways *they* see fit, not imposing restrictions based on majority concerns and causing strife and distrust between the cultures. It likewise does not mean elevating minoritarian reasoning to the law of the land.

Such an objection notwithstanding, legal reasoning motivated by a desire to encourage sociality should conceive of the First Amendment's Religion and Free Speech Clauses robustly, providing substantive protections to minority groups that keep some distance between them and potentially overweening majorities. Beginning from an assumption that religious worship and speech do not immediately harm majorities, even when those majorities tend to have more restrictive codes, we can conclude that a reasonable rule of thumb is to preserve the peace between and among factions is to allow maximal freedom within a faction's four walls, as with its ability to adjudicate internal disputes provided there is mutual consent. This is of course subject to limits, which should be justified on the grounds of a freedom's threatening public safety or sociality. But as a matter of first presumption, encouraging cross-cultural participation and coexistence begins from a stance of not pitting groups against each other in a way that would discourage cooperation; they need only settle on a "minimum agreement" of basic rules that allow the maximal number

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[35] *See* Kenneth W. Mack, *The Two Modes of Inclusion*, 129 HARV. L. REV. n.290, 291-92 (identifying a "disruptive" form of "inclusion [that] required the transformation of some of the fundamental rules that governed educational institutions themselves and of the larger society that surrounded them").

of individuals to pursue maximizations of their satisfaction. This tends to comprise, substantively, those rules traditionally called liberalism, which begin from basic freedoms such as speech and worship.[36]

Having examined some potential working definitions of law-as-*modus-vivendi*, and some ways the concept can be operationalized by those institutionally capable of implementing it, we may examine a few places in which it is most sorely missing, as other theories of law, building on the law's power to mediate difference and encourage cooperation, have taken the law some distance from its fundamental stabilizing capacity.

V. BRINGING THE LAW BACK TO ITS CORE PURPOSE

There is nothing inherently wrong with using the law to further substantive goals such as efficiency or equality, though one can certainly quibble with various theories' merit as a matter of principle. However, theories of law that use courts to achieve a variety of ends risk distancing the law from its core purpose, which, as explained above, is inherent to law's function as an entity distinct from political decision-making and therefore antecedent to those other theories. When efficiency or equality considerations undermine sociality considerations, the law is actually being wielded to weaken itself. Eventually, a Jenga tower with pieces being pulled out from its base to build upon the top is liable to topple. To make this paper's abstract arguments more concrete, I lay out a few places where substantive considerations have or are liable to supplant the basic stabilizing function of law and undermine the law's overarching *modus-vivendi* purpose.

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[36] F.A Hayek, *supra* note 7; *see also* Gerald Gaus, *The Range of Justice (or, How to Retrieve Liberal Sectual Tolerance)*, CATO UNBOUND (Oct. 10, 2011) [https://perma.cc/4HE7-TMMK].

A. CONTRACTS

The law of contracts concerns what a political community considers an enforceable promise and is therefore a centerpiece of any regime concerned about trust – and the synthesis of multiple parties' intents – among citizens looking to maximize their respective well-beings. One long-standing rule in the common law of contracts is the "plain meaning rule," which holds that a court must uphold disputed contract language that is unambiguous and clear on its face, and may not bring in extrinsic evidence to contradict the plain meaning.[37] This rule is adhered to by a majority of jurisdictions in the United States, and understandably so, due to many of the same reasons outlined in Part III: Springing a source of ambiguity on a contracting party *ex post* seems an obvious violation of the law's commitment to stability and predictability.[38] But in a series of cases out of California, a competing rule has emerged that allows courts to disregard the plain meaning of a contract if it believes there is "parol," or extrinsic, evidence that would create ambiguity regarding a contract's meaning.[39] Judges enforcing the rule have become its sharpest critics: "It matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol [extrinsic] evidence," under California common law, which may "raise[] the specter of

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[37] *See, e.g.*, W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990) (holding that "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face").

[38] *See id.* (arguing that the rule brings "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence").

[39] *See generally* Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557 (1998).

ambiguity where there was none before."[40] The assault on plain meaning came from a well-intentioned desire to make courts more inclusive of epistemologies that could help courts divine the true intention of a contract's authors, but in fact yielded "a serious impediment to the certainty required in commercial transactions."[41] The drive for greater cognitive egalitarianism threatens to undermine future contractors' interest in stability and predictability that would encourage future cooperation.

A judge looking to apply law-as-*modus-vivendi* would reverse course, and institute the "four corners rule" of plain meaning and extrinsic evidence. Ensuring that all parties are well-assured in advance of what the contract will mean is a primary goal, and the text is the instrument available to all parties, accessible to and knowable by all.[42] In other realms of contract law, such a judge would be hesitant to invalidate contracts whose terms are clear for reasons often raised by scholars concerned with equality, such as procedural unconscionability doctrine, which tends to invalidate contracts made between unequal parties that end up benefitting the more powerful party. Precisely because it is the more powerful party who needs to be induced into dealing with the less powerful, rather than the other way around, concerns of sociality suggest that judges worry less about the procedural or contextual dynamics surrounding a deal and more about the contents of the deal itself as embodied in the agreed-upon contract – and what it portends for future dealmakers who will be unsure whether they ought to trust people unlike themselves.

B. STATUTORY AND CONSTITUTIONAL INTERPRETATION

A related problem creating diffidence between the people's representatives (what we might call representative polarization, as it is

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[40] Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988).

[41] Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 532 (1968).

[42] *See generally* Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87 (2001).

itself representative, symbolic of the vicious cycle of polarization within the public) arises in the field of statutory and constitutional interpretation. "Purposivist" methodology threatens to place a gap between a provision's plain meaning and its ultimate meaning as expounded by a court. In such cases, legislators ostensibly haggle and bargain over every word they will eventually vote upon; those who look at a given rule and approve of it – in its final form as prepared for voting – vote in favor, while those who disapprove of the final compromise vote against.[43] But for a variety of substantive reasons courts have chosen to interpret laws' sweep beyond their plain meaning. Reasons have spanned the spectrum, from giving effect to a law's "broad remedial purpose" as a public safety measure,[44] to ensuring that a health-insurance law accounted for lessons learned from prior failed attempts.[45]

Whatever the reason in a given case, purposivism necessarily entails looking beyond the accessible materials forming the basis of a compromise between fundamentally differing entities – representatives standing for fundamentally different constituencies – and peering into the abyss of possibilities of what the law *could be*. In so doing, it makes compromise more difficult and Congress more diffident. If, hypothetically, a Republican lawmaker wished to vote for a Democratic-led bill on police reform, knowing that a court was liable to construe legislative approval of a change to policing as a broad remedial mandate to change policing in some fashion (despite the absence of explicit language admitting such a move), the lawmaker would reasonably be wary that a court could stretch a vote for measured incremental reform into a call for revolutionary change. Rather than take that risk, the Republican lawmaker understandably

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[43] *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 70 COLUM. L. REV. 106 (2006).

[44] United States v. Article of Drug Bacto-Unidisk, 394 U.S. 784, 792 (1969).

[45] King v. Burwell, 576 U.S. 473, 482 (2015).

chooses to cooperate less with his Democratic counterparts. By reducing or removing the influence of stable, publicly understandable markers such as text, courts make cooperation between different factions, in legislatures and in the jurisdictions they represent, more difficult.

Moreover, the public, which is meant to follow these laws, relies on them for consistent guidance about how to conform their behaviors to the law's demands. Without a reliable public notice function, because the notice the public has access to is limited to the words of the law voted upon, individuals lack the coordinating mechanisms laws are meant to serve in the first place. No one enjoys stability or predictability when laws are liable to change in accordance with information made public only through the inquiries of a court. Such is the nature of the evidence unearthed to reveal a statute's purpose, which often consists of transcripts of back-room negotiations and draft legislation no citizen could have known about.

Law-as-*modus-vivendi* therefore requires a kind of textualism (though there are many subspecies).[46] The text of a law is a common language for lawmakers and the result of their compromise. In addition to avoiding the pitfalls discussed above, sociality demands giving maximum effect to results of compromise wherever possible in order to induce and incentivize future compromise by ensuring that its specific dictates will be honored. That means honoring the shared language settled on by lawmakers to give effect to their understanding of the compromise at hand, and to allow the public to coordinate its behaviors based on stable knowable information. The more uncertainty (as understood by law-abiding Americans, rather than a specialized tribunal trying to ascertain the will of a legislature through previously-inaccessible evidence) a court introduces in its mode of

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[46] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

interpretation, the more difficult it will be to get people to cooperate socially.

C. LAW OF DEMOCRACY

In the law of elections and democracy – which mediates the political sphere, a major part of American public life – a series of judicially-created rules reinforces a view of a society stratified by racialized voting interests. These rules take race-based diffidence as an intractable fact of American life and reify them in law, thereby fulfilling its own expectations of racial division.

Starting with the case of *Thornburg v. Gingles* in 1986, the Supreme Court adapted into its jurisprudence the notion that voting was inevitably going to be polarized by race, and therefore Section 2 of the 1965 Voting Rights Act (VRA) requires that racial minorities have their interests reflected in a minimum number of what came to be known as "opportunity districts."[47] When racial minorities became *too* packed in such districts, the Court decided that it would enact a rule making sure that racial minorities had just the right amount of voting power – enough nearly to guarantee that they would be able to elect their "candidates of choice," but not so much that the community would only be able to exercise its voting power in one district.[48] In both instances, the Court pitted different racial groups against another as competitors in the electoral process – not just at a place in time, but indefinitely into the future of American elections.

This judicial adventure is predicated upon a noble idea that the law can be used to advance substantive equality in the political realm. But it fails to account for the fact that judges are "doing law,"

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[47] Thornburg v. Gingles, 478 U.S. 30 (1986).

[48] *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455 (2017); Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

even when dealing with politics, and the fundamental aim of law is allowing people to live cooperative lives rather than stratified and diffident lives. By reifying the notion that racial blocs do and ought to amount to blocs of vastly different interests, and entrenching such as social "fact" – rather than as a phenomenon that need not remain the case years in the future – courts place artificial boundaries between the very groups they are aiming to equalize. In the interest of elevating minority voting interests, courts engaged in such reasoning deepen distrust between factions who understandably come to see each other as competitors against each other for political supremacy rather than partners with common interests for future coalitions. They increase the importance of racial identity in politics, compelling citizens to see members of other races essentially as members of an enemy faction (possibly one receiving enviable systemic favor) rather than as persuadable fellow citizens whose political views may be heterodox or varied.

While the VRA has since been amended to encompass some of the "vote dilution" aims of the *Gingles* line of cases, judges should do what they can *not* to essentialize racial voting patterns and concretize them in law. One way to do this is to decouple racial politics from party politics in the theory of the law of democracy, by looking instead only at whether the party favored by a particular group at a particular time has been stymied by clever districting. This would at least take the small step away from guaranteeing racial groups rather than actual voting blocs or extant coalitions representation. By no longer essentializing the group's vote in favor of the party, courts can allow the group the possibility of participating in regular partisan politics, the democratic equivalent of being a participant in a mass economy or culture, both in the eyes of the minority and the majorities who could be dissuaded from investing in minority outreach. Such participation can be salutary: "Minority voters are not immune from the obligation to pull, haul, and trade to find common political ground," wrote Justice Souter in 1994, "the virtue of which is not to be slighted in applying a statute meant to hasten the waning of

racism in American politics."[49] Regular participation in political life, as one faction among many, allows racial minorities to compromise, throw their weight around for electoral politics, and enjoy the mutual benefit that comes with trade, such as pulling a coalition trying to court them closer to desired policy positions. Removing that possibility, by removing the obligation "to pull, haul, and trade," can actually work contrary to integration and social cooperation.

D. CRIMINAL LAW

It is worth considering at least in brief the vast possibilities for the law to foster distrust in the realm of criminal law. Activists and "progressive prosecutors" have pointed to racial and ethnic disparities in incarceration to argue that racial equality requires minimizing prosecutions, eliminating cash bail, and even abolishing prisons.[50] This may well be done in the name of a racially harmonious future, but in the present it can have disastrous consequences for social trust and cooperative coexistence. If people who have committed violent crimes are not prosecuted, are released easily, or are not sentenced to prison, the neighborhoods in which they tend to cluster will surely be regarded as dangerous places, and people with the means to live elsewhere will choose to do so. This encourages race- and class-based

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[49] Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). Note that if there is an acceptable form of purposivism under the theory of law argued for here, it is "hastening the waning" of forces that drive distrust within a nation, racism chief among them.

[50] *See, e.g.*, Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020) [https://perma.cc/43TT-XH5J]; March Mauer, *Addressing Racial Disparities in Incarceration*, 91(3) PRISON J. 87S, 97-98 (2011) (endorsing "jurisdictions striv[ing] to not only reduce their detained population but to do so in a way that reduces racial disparity as well"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001); Angela J. Davis, *The Progressive Prosecutor: An Imperative For Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 3 (2018) ("[C]hief prosecutors are implementing a new model of prosecution that focuses on alternatives to incarceration and second chances, and they are making a difference.").

segregation and may cause people to use characteristics such as race, sex, age, and/or appearance as proxies for potential danger. In short, by failing to separate between threatening and non-threating people in reality, a lax approach to criminal prosecution can induce hyper-vigilance among the population. It does not inevitably lead to a war of all against all, but it does discourage social intercourse and cooperation between individuals who may appear to pose "risks" to each other.

Without delving too deeply into policy issues fraught with tension, it is worth remembering that the effects of criminal justice choices redound not just to criminals and victims, but to the communities that suffer from second-order effects of criminal activity. Because prosecutors act on behalf of those communities, as agents of "the state" or "the people," one consideration they ought to keep in mind as they seek leniency or stringency within their discretion is how the outcome of a criminal case may ripple through low-trust communities, compounding the problems that lead to poverty, alienation, and further crime. Juries tempted by nullification or judges tempted by light sentencing should likewise consider that an act of mercy for an individual can set a community back by increasing the likely levels of diffidence in communities where the law and other sources of binding obligation fail to simulate the familial bonds that keep individuals from harming each other.

VI. CONTEMPORARY THREATS TO THE *MODUS VIVENDI*

Aside from the particular legal rules discussed in the previous Part, there are several ascendant theories posing risks to the view of law laid out above. These threats began in the legal academy but their reach has expanded to influence other fields over the last few decades. A more extreme version of the "cognitive illiberalism" argument constitutes Critical Legal Theory (CLT), the set of postmodern legal principles whose tenets have reshaped the academy over the last decade. CLT tends to be suspicious of the rules that characterize the Anglo-American legal tradition, seeing in every assumption

baked into our legal tradition a framework for oppression and subjugation.[51]

To Critical Race (CLT as applied to race) theorists, there can be no objective, ascertainable, determinate meaning to legal propositions, only "false objectivity" that embeds white supremacy in rules reflecting sectarian, indeed racialized values.[52] "Allegedly neutral goals," one summary of CLT's conclusions puts it, "were actually imprinted with white cultural practices."[53] Appeals to common reason so crucial to the development of social cooperation are especially "problematic, given the 'rhetoric of rationality and objectivity that the powerful use to justify their domination generally,'" as described in a 2011 book on "critical race consciousness."[54]

Critical gender theory takes a similar tack, arguing that invitations to use common reasoning in criminal law merely "reinforc[es] cultural values that condone masculine violence," by assuming that there are times when violence is expected, if not condoned.[55] "Juries cannot be expected to enforce a standard of reasonableness which adequately protects a woman's life…what is reasonable cannot be determined without reference to value systems biased in favor of men."[56] An objective standard, on this view, is a wolf in sheep's

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[51] Robert A. Williams Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5(1) LAW & INEQ. 103, 104 (1987); *see also What is critical race theory?*, UCLA SCH. PUB. AFFS.: CRITICAL RACE STUD. (accessed August 30, 2022) [https://perma.cc/F6SC-BFAD].

[52] *See Critical Race Theory*, THE BRIDGE (accessed Aug. 30, 2022) [https://perma.cc/N69L-T9YF] ("[C]ritical race theorists argue that the imperial, objective voice of law so often veils the perpetuation of racial hierarchy" and therefore prefer policies that "reject the pretense of merit and objectivity.").

[53] Paul Butler, *The System Is Working The Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

[54] GARY PELLER, CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE 133 (2011).

[55] PATRICIA EASTEAL, LESS THAN EQUAL: WOMEN AND THE AUSTRALIAN LEGAL SYSTEM 33 (2001).

[56] *Id.*

clothing, entrenching patriarchy by subtly reducing universal reason to a kind of reason universal only to men.

While these critics envision a more "inclusive" world characterized by greater racial and cultural equity, there is reason to believe that a push for greater cultural inclusion in legal standards could have just the opposite consequences. Inclusion, as noted earlier, can undermine diversity and pluralism.

How would this happen? One outcome we might expect in a regime that eschews its epistemic commitment to believing that all people are capable of knowing certain truths and conforming their behavior accordingly – that there are no "white cultural practices," because cultures and behaviors are distinct from race – is widespread withdrawal from the legal resolution of disputes.[57] Disputing parties under a regime with subjective, floating, or unascertainable standards would, with some justification, avoid taking their case to court.[58] There are, as history and the persistence of organized crime show, means beyond argumentation and arbitration available to prescribe and proscribe behaviors. Before we had trial by argument in a court of law, ascertaining the truth in a dispute was no less fraught with doubt and often far more barbaric. Trial could be by combat (a duel), by ordeal (which often involved holding red-hot metal in one's bare hands),[59] or by similarly unsavory means.

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[57] *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) ("[A]n age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury."); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) ("The object of the rule of law is to substitute for violence peaceful ways of settling disputes.").

[58] Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1815-16 (1986) ("In the absence of an effective peaceful means of vindicating private rights, people retain a plausible claim that they are entitled to vindicate these rights through self-help.").

[59] Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573 (1992) (examining "ordeals of cold water and hot iron as the ordinary methods of trial of crown pleas of felony in medieval England").

Predictability may seem like an abstract or archaic value, but viewed in this light, it is essential to preserving the public peace. When parties have no sense of how their dispute might turn out in court because the standards are unpredictable, they are far more likely to take their chances in a mode they can control – through violence or other forms of "trial." Without confidence that the judgment of the law will reflect communal values, expect the hand of vengeance to once again enforce socially-sanctioned behaviors.[60] Where judges lack legitimacy, individuals with the capacity to enforce their judgments will fill the void.

Unpredictability may not be the worst anti-sociality result of CLT's spread, though. If the corrective standards CLT advocates (e.g., achieving equity by ruling in favor of disempowered group members on account of their identity) became the norms on which courts would base their view of "reasonableness," members of "dominant" groups would withdraw from dealing with "subaltern" or "oppressed" groups. Knowing that, for instance, a contract dispute with a member of another race would be resolved in favor of the less-powerful party, the member of the ostensibly more-powerful race would simply avoid disputes by avoiding dealing with the less-powerful race. At best, this would deprive the less-powerful group of access to resources useful for social and economic mobility, which is a key cog in the virtuous cycle of sociality. At worst, it would breed enmity between social groups who either self-segregate or are forced by the coercive power of the state to "cooperate" against their will. It does not take a vivid imagination to see how this could lead to diffidence and violence.[61]

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[60] *Cf.* Robert H. Jackson, Opening Statement before the International Military Tribunal (Nov. 21, 1945) (accessed Sept. 1, 2022) [https://perma.cc/U95R-A37T].

[61] Moreover, inherent complexity in individuals' identity would lead to a "race to the bottom" to be considered the most victimized person in a dispute. This creates

Thus, even if we managed to avoid a resurgence of vigilante justice and protection schemes, our project in political pluralism would encounter an unprecedented obstacle. When the risk of losing in court becomes unknowable, people will not just avoid resolving disputes. They will take prophylactic steps to avoid the possibility of disputes to begin with. If we are told that many of our fellow citizens ascribe different meanings to words or interpret events differently – and that those differences fall largely along lines of race and ethnicity – it is only natural that people will only cooperate with others who look like they do.

Under our current reasonableness standard, citizens can trust that there is something objective – or at least knowable – that a court will look to in resolving disputes between people with competing perspectives. If we think we have the objective standard on our side, we will continue to associate and deal with people unlike us, confident that a court will enforce our version of events. The law can serve as a mediating language that fosters peaceable agreement and disagreement.[62] But if there's no assurance that we'll find ourselves on the right side of the law because the standard is unknowable and subjective at best, or openly stacked against people who look a certain way, we have to know our counterparts *very* well in order to cooperate.[63]

What we are likely to see in a world in which these differences are racialized – as CLT insists they are – is yet more self-segregation,

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perverse incentives against self-improvement and empowerment, whose anti-sociality ramifications we have already begun to see in a culture that lionizes victimhood. *See, e.g.*, JONATHAN HAIDT & GREG LUKIANOFF, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018).

[62] Alschuler, *supra* note 58, at 1810 ("The promise that every person's claims of injustice will be taken seriously tends to lessen alienation and to foster an awareness of community obligation.").

[63] *Id.* ("By assuring individuals that claims of injustice will be heard, considered, and judged on their merits, the judicial branch of government performs a distinctive service.").

interracial distrust, and a reversal of all the richness we get from encouraging diversity. This is the essence (and the great irony) of inclusion undermining diversity: By asserting that all perspectives are equally valid, we encourage people to engage only with those who are most like them.

Through the denial of common reason and shared reality, and its replacement by racialized and gendered conceptions of reality, critical theories foster distrust along those very racial and gender lines. If every subset of human beings has an equally valid claim to its own truth, and lacks access to a shared language, it is natural and to be expected that a society will fracture along those lines to minimize the risk of investing in an unpredictable future. Law does the opposite of establishing a *modus vivendi* when it embraces such a worldview.

CONCLUSION

Social cohesion is not merely a goal of the law among many. It is logically prior to law's other goals, and necessary to lay the groundwork for the law's ability to achieve fairness, efficiency, and equality. Judges wielding judicial power must be acutely aware of their role as practitioners of law, rather than politics, and the source of that distinction, which is the need for pragmatic settling of issues on which there will always be disagreement. Judges have their power and enjoy their legitimacy from issuing rulings that allow people to live together peaceably and build upon the predictability of the law to make their lives meaningful and satisfactory. In doing so, they also help turn a potential weakness into a social strength, allowing diverse types of people to live together and benefit from what all have to offer, maximizing social satisfaction while mitigating the risk of social discord and diffidence.

There are places in American law where other considerations have supplanted this fundamental goal, elevating substantive concerns in the law above concerns for the stability that makes such elevation possible. Indeed, a growing movement to undermine the epistemic basis of social cooperation – public reason – threatens to pull

the foundation out from under the law. A renewed recognition of the miraculous nature of law's ability to prevent a war of all against all, to do so in a historically-unprecedented diverse society lacking the familial basis of a social contract, indeed to foster such social cooperation that Americans are richer than any people in history, should lead scholars and practitioners to be grateful for quaint notions such as stability and predictability. Judges and citizens alike would be wise to begin to ask if perhaps it is time for our law to aim for a little less than we have asked of it as we have come to take its fundamental role increasingly for granted.