Justice:

A matter of conviction or interpretation?

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Abstract:

Justice is a concept that, when fulfilled, has the power to make us cry with happiness and, when transgressed, to sob with sadness. This dissertation is an attempt to understand whether justice is the subject for personal theories grounded in conviction or collective theories of societies and humanity grounded in interpretation. The answer, it argues, is both.

To do so, the dissertation first elucidates Ronald Dworkin's interpretive theory of constructive interpretation and examines the ways in which it is similar to, and different from, hermeneutic theories of understanding.

The dissertation then examines how Dworkin applies constructive interpretation to the concept of "justice." While he acknowledges justice is an institution or theory we interpret like law, Dworkin abandons the constructive interpretation of society’s theory of justice in favour of developing a personal theory. Despite Dworkin’s fears to the contrary, the dissertation highlights the presence of universally shared implicit meanings from which it is possible to interpret a theory of justice that is immune from the threat of both relativism and subjectivism.

To elucidate this point, the dissertation hermeneutically reconstructs Dworkin's theory of constructive interpretation so as to articulate an interpretive theory better equipped to understand what justice means for people collectively. It then employs this reconstructed theory, which I call conversational interpretation, to interpret humanity’s theory of justice. It shows how the hermeneutically conscious interpretation that results will reflect what justice means, not just for society, but also for humanity.

Drawing on Michael Walzer's theory of thick and thin morality, the dissertation then shows how conversational interpretation can illuminate the existence of both minimal and maximal collective theories of justice. It explains that, as the minimal understanding of humanity’s theory of justice is universally held, it is neither subjective
nor relative: it can provide the basis for substantive external criticism of other peoples' and other societies' understandings of justice.

Although the maximal understanding of a society’s theories of justice is relative, the dissertation explains how it can nevertheless provide the basis for extensive criticism within a society. Finally, the dissertation argues that, while constructive criticism is necessary at times, it is deeply personal and should, therefore, be a critical tool of last resort. Conversational interpretation provides several, more reflective, ways to criticise others’ views about justice.
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I dedicate this dissertation to those who face grave injustice in the course of their daily lives.
Introduction

Justice, the name we give to “moral rightness,” is a central concept in political theory. Traditionally conceived to denote theories of punishment, in contemporary political theory theories of justice have focused on the redistributive principle of social justice.¹ This dissertation adopts a broad understanding of justice that encompasses both social justice and punishment, as manifest in the full spectrum of civil, political, economic, social and cultural human rights outlined in the United Nations Universal Declaration of Human Rights and ensuing international human rights law.²

Conceived in these broad terms, justice is a concept that, when fulfilled, has the power to make us cry with happiness or, when transgressed, to sob with sadness. It is both the diversity and the ferocity of the emotional reactions that justice invokes in us that has compelled me to write this dissertation. At its core, this enterprise is an attempt to better understand why, despite our unfathomable diversity, humanity is so often united by the invocation of the concept of justice.

Justice is a concept we employ to describe times of jubilation. When racial segregation under apartheid officially ended in South Africa in April 1994, many in the world proclaimed that justice had finally prevailed in that country. When Daw Aung San Suu Kyi was released in November 2010 after spending two decades under house arrest for exercising her right to freedom of expression, many called it a significant step towards realising justice in Myanmar (Burma). And when, for the first time ever, in February 2011 the United Nations Security Council referred the human rights crisis in Libya to the Prosecutor of the International Criminal Court, many labelled it a victory for justice.

Justice is, however, also a concept we invoke in times of deep despair. Phyo Wai Aung, a 31 year old construction contractor, was arrested on 22 April 2010, accused of being involved in bombing Myanmar’s water-festival. After being arrested, he was taken to

². Including but not limited to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
Aung Thabyay Interrogation Centre where he repeatedly told his interrogators that he had multiple witnesses to an alibi. Despite this evidence of his innocence, over the next five days Phyo Wai Aung was tortured using a variety of psychological and physical techniques to force him to confess to bombing the water festival. During the course of his torture, Police Lieutenant Swe Lin taunted Phyo Wai Aung by reminding him that, “Even if you die during the interrogation, we will be fine.”³ In order to procure a confession, Swe Lin also told Phyo Wai Aung that “All suspects fled the country, so we will interrogate you until we get the confession from you, and we will bring in your family members and torture you in front of them.”⁴ In order to compound the effects of the torture, Phyo Wai Aung was deprived of sleep for five days and made to stand upright for two days. Different police officers tortured him, day and night, as they worked in rotation. He was blindfolded and routinely punched, kicked and beaten with broomsticks in the torso and head. Finally, he was forced to kneel naked on sharp gravel with his arms raised above his head while his genitals were burnt until he could not take the pain any longer and confessed.

When we hear Phyo Wai Aung’s harrowing story, we are repulsed that Swe Lin and his colleagues could act with such contempt for the requirements of justice. Many of us say, for example, “Torture is abhorrent, no matter where it happens or who commits it – it’s unjust; it’s just wrong!”

“Alice” was in an ambulance being rushed to Port Moresby hospital to give birth in Papua New Guinea.⁵ The ambulance was stopped by a group of gun-wielding men who kicked out the drivers and stole the vehicle. When they realised Alice was lying in the back, they stopped the ambulance on the side of the road and gang raped her at knife point. Alice’s rapists ordered her to lie still but, with her body being periodically wracked by contractions, it was an impossible demand. As a result, the men repeatedly lacerated her face; the scars from which serve as a constant reminder of her horrific ordeal.

⁴ Ibid.
⁵ Information obtained from Amnesty International Pacific Researcher 2009.
Alice’s terrifying story similarly evidences to many of us a grave injustice. It prompts many of us to exclaim, for example, “Everybody knows rape is wrong! How could those men think otherwise?”

Finally, many of us find distressing the story of 11 year old “Adisa” who lives on the streets in Nigeria. Adisa’s brother taught him how to shine shoes and used to work with him until he died a few months ago. Now Adisa has to work alone. Life in his home village was very hard and, after his father died, Adisa decided to move to Lagos with the hope of sending money to support his sick mother. Unfortunately, his mother died three months after Adisa left his home village for Lagos. Adisa is very good at repairing shoes but, since his brother died, people think he is too young to do as good a job as his brother did. Consequently, they do not bring their shoes to him anymore and he finds it very hard to earn enough money to survive. Adisa says, “Life is hard but what can we do? I am not the only person like this. There are many children like me or even worse.”

Sadly Adisa is right; the current famine ravaging Somalia is causing one child to die every six minutes due to malnutrition.

Many of us are distraught at Adisa’s story because, despite humanity’s acknowledgment of poverty as an unacceptable injustice and the commitment of world leaders to eradicate it, his story is testament that we are failing our fellow men, women and children because extreme poverty is still rife.

The powerful reactions many of us have to the stories of Phyo Wai Aung, Alice and Adisa are evidence of the importance we place on the concept of justice. The reactions I, and hopefully you too, have to these stories demonstrate that we each have a personal theory of justice about what we believe is morally right and wrong. My reactions to these stories show, for example, that I believe it is morally wrong for anyone to starve

8. “The eight Millennium Development Goals (MDGs) – which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 – form a blueprint agreed to by all the world’s countries and all the world’s leading development institutions.” United Nations, “We Can End Poverty,” http://www.un.org/millenniumgoals/bkgd.shtml (accessed August 20, 2011).
to death because of extreme poverty, to be forced to have sex or to have their reproductive organs burnt as a form of punishment. My views about the justice, or lack of it, of these three specific scenarios, however, are reflective of a more abstract understanding of what is just and what is not. It is not only torture, rape and poverty that I believe are unjust; I, like most people, also hold views about the injustice of slavery, abortion, incest and polygamy. Furthermore, I would no doubt also have a view about the justice of any number of other situations that have not yet crossed my mind and, indeed, may never exercise my brain. The ability to hold views about the morality of any number of scenarios, both considered and hypothetical, is possible because I have an abstract understanding or theory of justice, whether implicit or explicit, about what I believe is morally right and wrong. I can apply that theory to any given situation to determine whether or not I consider it to be just. As this personal theory of justice is always particular (at least in part) to me, I cannot rely on any other person, or his or her theory of justice, to justify it. Instead, personal theories of justice (at least the elements that are unique to an individual) are a matter of immutable belief and, once argumentation is exhausted, must ultimately be justified by a reliance on conviction. They must, that is, ultimately be adhered to because we know them to be right.

The commonality between your reaction, my own, and that of many others to these horrific stories of rape, torture and poverty also shows that people share collective abstract understandings or theories of justice. These collective abstract theories of justice are evidenced by the fact that, at a more practical level, many people characteristically agree that slavery, torture and poverty are wrong; they typically agree that genocide, paedophilia and gratuitous violence are unjust; and they would also be likely to agree that any number of hypothetical situations were immoral. Indeed, these collective views about the justice or otherwise of specific scenarios are so deeply rooted within and between individuals all over the planet that they govern our behaviour towards each other. I shall call these collective views about the justice or otherwise of specific scenarios, vis-à-vis collective abstract theories of justice, “institutions” of justice.
These institutions of justice may, or may not, be reflected in any given jurisdiction as legal rules. Take, for example, the collective institution against rape which is reflected by legal rules in many, but not all, legal systems. Similarly those institutions of justice may, or may not, be reflected in any given social practice. Take, for example, the institution against poverty which is partially reflected in practices of giving and charity in different societies around the world. Irrespective of the status of these institutions of justice as legal rules or social practices, they exist as collective views that govern our behaviour.

Reference to the word “collective” here is employed to emphasise that binding views about justice arise from shared understandings of what is morally right and wrong. As such, collective institutions about the justice or otherwise of particular scenarios, and the more abstract theories of justice that those institutions embody, can be shared, for example, between two people, a family, a village, a society, a country or the whole of humanity. Unless otherwise specified, this dissertation is focused on humanity’s collective institutions of justice, to which I shall collectively refer as humanity’s theory of justice. As Bernard Williams points out, collective theories of justice “are strongly internalized in upbringing, at a level from which they do not merely evaporate with the departure of policemen or censorious neighbours. This is part of what it is for them to be moral rules, as opposed to merely legal requirements or matters of social convention.”

As humanity's theory of justice is nothing more than the commonality in meaning between human beings' individual theories of justice and the unique ways in which they express those theories, its discovery and articulation is a matter of interpretation. It is only through interpretation that we are able to understand the collective meaning behind

9. “Almost every country of the world has a penal code that prohibits assault in some form, and these provisions are sometimes used for prosecuting cases of violence against women. ... Today, many countries have some type of legislation concerning violence against women, most commonly against domestic violence ... Marital rape is now recognized as a crime in as many as 50 countries including Austria, Belarus, Bhutan, Cyprus, Hungary, Mexico, Nepal, and the Seychelles. At least 45 nations have specific legislation against domestic violence, 21 more are drafting new laws, and many countries have amended criminal assault laws to include domestic violence.” UNIFEM, Not a Minute More (New York: UNIFEM, 2003): 38-40. http://www.cities-localgovernments.org/uclg/upload/docs/notaminutemore-endingviolenceagainstwomen.pdf (accessed August 20, 2011).
the varying vocabulary we each use to describe humanity’s theory of justice. This interpretive approach to understanding humanity’s theory of justice can be contrasted with the reliance on conviction inevitably required to justify our personal theories of justice.

Take the story of Phyo Wai Aung. The overwhelming majority of human beings who, because of their personal theory of justice, believe torture to be unjust will each express that view in a unique way. I might say that torture is immoral because it is inherently dehumanising both for the victim and for the perpetrator. Someone else, however, might proclaim that torture is inexcusable because we should never intentionally inflict pain and suffering on another human being. A third person may suggest that torture is wrong because, as any information it yields is unreliable, it serves no valid purpose. Yet no matter how we each articulate our own personal view, that torture is unjust, humanity also has a shared expression for this view in the form of a collective institution against torture. Humanity’s institution against torture is evidenced by the existence of a myriad of collective renunciations of, and prohibitions against, torture. To take a few examples: there are 147 States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\textsuperscript{11} and 167 States Parties to the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{12}, both of which categorically prohibit the use of torture in any circumstances. Indeed, the support for the prohibition against torture is so overwhelming that it is considered part of customary international law and is therefore legally binding on everyone, everywhere, irrespective of whether any particular government has signed, ratified or incorporated the CAT or the ICCPR into its domestic criminal law. In parallel to these international prohibitions against torture, there exist more localised manifestations of humanity’s institution against torture. Many, but not all, countries’ criminal laws make the act of torture illegal.\textsuperscript{13} Every time a child is tortured to death through child abuse here in New Zealand the public is outraged. When the true extent of the atrocities committed in Nazi

\textsuperscript{11} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
\textsuperscript{12} International Covenant on Civil and Political Rights.
concentration camps during World War Two became known, humanity’s pledge was “never again.” And, in Syria the torture of 13 year old boy, Hamza Ali al-Khatib, by the security and intelligence services prompted such public outrage that it has become the rallying cry for sweeping human rights reforms in that country and through the Middle East and North Africa.\textsuperscript{14}

It is important to note that an individual’s personal theory of justice will inevitably influence his or her understanding of collective theories, including humanity’s theory of justice. We do not understand the world around us from some neutral or Archimedean vantage point. As Williams acknowledges, “all moral motivation is the product of social influences, teaching, culture, etc. It is no doubt true. But virtually everything else about a man is such a product, including his language, his methods of thought, his tastes, and even his emotions...”\textsuperscript{15} Our understanding of collective theories of justice is influenced by our personal exposure to, and encounters with, acts of justice and injustice. For example, having gone to a school whose pupils were impoverished will give someone a particular perspective of what it means to be poor; having fought in the Korean War will leave someone with a unique definition of what torture means; and being subjected to psychological (or any other form of) abuse will leave a victim with an indelible understanding of what it means to be abused.

Similarly, collective theories, including humanity’s theory of justice influence individuals’ personal theories of justice. Such influence is at its strongest when an individual’s theory of justice stands at odds with collective theories. Take, for example, the theories of justice of certain police officers in Papua New Guinea who historically believed it was morally acceptable to rape a woman who presents herself at a police station to complain about her husband’s sexual abuse. As humanity’s theory of justice, which I assume includes a collective institution prohibiting rape, has been advocated and applied locally, police officers in Papua New Guinea who once believed rape

\textsuperscript{15} Williams, \textit{Morality: An introduction to ethics}, 22.
acceptable are increasingly questioning and revising their personal theories of justice. They are, that is, increasingly refraining from raping those women who complain of marital rape.

Indeed, collective theories, including humanity’s theory, of justice and individuals’ personal theories of justice are so interconnected that we often do not distinguish which one we are employing when we speak of justice. This can, and frequently does, lead us to mistake one for the others. Nevertheless, they are clearly distinct theories, one personal, the others communal. Such confusion is understandable and arises not least because of the identical way in which we express personal and collective theories of justice.

When I first heard the stories of Phyo Wai Aung, Alice and Adisa, my responses were ones of emphatic disapproval. I did not say, “For me, torture is wrong” or “In my opinion it would be preferable if people did not starve to death.” I did not use such subjective language because I do not believe our views about torture and extreme poverty are unique to each individual, in the same way that we consider our preferences or tastes to be. Whether as individuals or collectively as human beings, we do not feel the same way about whether female genital mutilation is inhuman treatment as we do about whether chocolate or strawberry is the best ice cream flavour. We view issues of morality, torture and poverty as matters of what is “right” and “wrong,” rather than mere expressions of our subjective preferences or tastes. We do so because, while an immeasurable divergence exists between different peoples’ and societies’ views about justice, there is wide interpersonal agreement that some arguments about justice will be more compelling than others. Our views about justice (the object), that is, are not determined by us (the subject) alone but are, at least in part, determined by justice which is, by virtue of that interpersonal agreement, perceptible to others.

In the case of the gang rape of Alice, when I first heard of her ordeal I said, referring to my personal theory of justice, “rape is morally unacceptable; it is wrong; it is bad and it should never happen.” When employing humanity’s theory of justice, such a response is also common. In fact, humanity’s responses to the extermination of Jews during World War Two, the genocide of the Tutsi population in Rwanda, and that of Bosnians in Srebrenica, are communal examples in point. When, applying either our own or humanity’s theory of justice, we approve or disapprove of the morality of something, we do not do so as a subjective expression of our personal preferences or tastes. When my colleagues heard my response to Alice’s story, they did not say “Chris is just expressing his personal opinion because, where morality is concerned, there are no “facts;” no one is ‘right’ or ‘wrong.’ Chris has his opinions, other people have theirs and that’s the end of the matter.”\(^\text{17}\) When I say rape, torture and poverty are wrong, I am asserting, and people understand me to be asserting, that I and/or humanity believe such acts of depravity are wrong for everyone.

Just as the nature of our responses, both individually and collectively, to these grave stories of injustice demonstrate that we do not consider morality to be subjective, our individual and collective responses demonstrate that we do not view morality as being relative to a particular society either. It is true that there are those who would say “‘Right’ means (can only be coherently understood as meaning) ‘right for a given society’; that ‘right for a given society’ is to be understood in a functionalist sense; and that (therefore) it is wrong for people in one society to condemn, interfere with, etc., the values of another society.”\(^\text{18}\) Nevertheless, those people are in the minority. Typically when we speak of genocide or paedophilia, just as with rape and torture, we do not say, “Well of course it is unjust and wrong in New Zealand, but it is morally acceptable if it occurs in Germany or Rwanda.” As if those responses were not enough, the very existence of humanity’s theory of justice is yet further evidence that we do not typically view issues of justice as relative. When we say something is unjust we characteristically reject subjectivism by asserting that it is unjust for everyone, and relativism, by claiming that it is unjust everywhere.

\(^\text{18}\) Williams, *Morality: An introduction to ethics*, 34.
Our non-relative responses to these grave stories of injustice are reflective of the serious philosophical flaws of relativism. Relativism makes two contradictory assertions: firstly it claims that views about morality or justice can only be said to be “right” or “wrong” within a particular society; and secondly it asserts that it is wrong to criticise or interfere with the views and values of people from other societies.19 This second assertion claims not only that it is wrong for someone within a particular society to criticise or interfere with the views and values of people from other societies but that it is wrong for everyone everywhere to do so, no matter which society they are from or where they now live. However, it is this very type of claim to universal application that is explicitly precluded by relativism’s first assertion. As Williams points out, “[t]he central confusion of relativism is to try to conjure out of the fact that societies have differing attitudes and values an a priori nonrelative principle to determine the attitude of one society to another.”20

It is, of course, true that different societies have different collective theories about justice. Some, for example, believe female circumcision is a necessary step towards womanhood, others that corporal punishment is necessary to deliver justice, and yet others, remarkably, that incest is a father’s right.21 Simply because peoples’ and societies’ theories of justice are not without difference, does not mean humanity lacks, or is incapable of having, a collective theory of justice. These differences merely highlight the truism that humanity’s theory of justice will be much less detailed and prescriptive than families’ and societies’ theories of justice, and even less detailed and prescriptive than individuals’ theories.

The objectivity of morality is, however, not a corollary of this rejection of justice’s subjectivity and relativity; at least not on any simple metaphysical definition of objectivity. Individuals’ theories and collective theories, including humanity’s theory, of justice are not characteristically expressed, or understood, as moral “facts” that can

20. Williams, Morality: An introduction to ethics, 37.
be proven against “some permanent, ahistorical matrix or framework” that exists independently of humanity. We do not, that is, typically use the vocabulary of metaphysical or “strong” objectivity during our conversations about torture, poverty or rape or any other issue of justice.

It is true, however, that we do sometimes employ the vocabulary of objectivity within our conversations about justice. When substantive argumentation fails to convince our adversaries, we may flippantly say “I’m right and you are wrong. That is just how it objectively is.” We do so, however, in a much weaker sense than the metaphysical one just described. When we refer to objectivity in our discussions about justice we do so to emphasise that morality is not subjective or relative. We refer to objectivity, that is, firstly to assert that our answers to moral questions are not just matters of preference or taste. Secondly, when we speak of slavery being “objectively” wrong in this “weak” sense, for example, we also do so to emphasise that we believe it is not just wrong for us, but to assert that we believe it is morally repugnant for everyone. Our statement, that slavery is “objectively” wrong, is not meant, or taken, as a strong claim to objectivity: that the statement is the outcome of some timeless moral formula which, when applied to the issue of slavery, categorically proves it to be, as a matter of fact, unjust.

At its core, this dissertation is an attempt to explore to what extent a theoretical justification exists for humanity’s theory of justice and, in particular, for its anti-subjective, anti-relative and anti-objective (in the strong sense) characteristics just described. It is an attempt to legitimate our demands for tyrants to end grave injustices as, much more than expressions of taste or preference, expressions of what it means to be human.

Ronald Dworkin, one of the world’s most influential contemporary political and legal philosophers, has developed an interpretive theory, which he calls constructive interpretation, which this dissertation employs as the framework for exploring whether or not humanity’s theory of justice is theoretically justified. Constructive interpretation has been developed by Dworkin as a general theory of how to interpret social practices

such as law. While its focus is therefore on *social practices*, designed as a general theory of interpretation, constructive interpretation is nevertheless well suited, as a starting point at least, to the task of interpreting humanity’s theory of justice as a collection of *institutions* about justice.

Dworkin’s interpretive theory is particularly valuable when exploring the theoretical justifiability of humanity’s theory of justice, as it explains why interpretation is never subjective or objective in the strong sense. Constructive interpretation’s focus on *social* practices does, however, leave it vulnerable to the charge of relativism; that is, the accusation that the interpretations it produces are only applicable or “right” for the society in which a practice is interpreted. This dissertation therefore reconstructs Dworkin’s interpretive theory to produce a new theory of interpretation, which I shall call conversational interpretation, which is immune from the threat of relativism. When conversational interpretation is applied to humanity’s theory of justice, this dissertation argues that the resulting interpretation will produce a non-subjective, non-objective (in the strong sense) *and* non-relative interpretation of what justice means collectively for humanity. While it will be very limited in scope and depth, such an interpretation can provide the basis for substantive criticism of other people’s and other societies’ theories of justice.

Conversational interpretation is also capable of interpreting what justice means for people in smaller collectives such as families, communities and societies. While such interpretations will be relative to the family, community or society in which they are interpreted, they will nevertheless provide the basis for extensive criticism within, for example, that family, community or society. They will also be likely to include a greater number and depth of institutions of justice, in contrast to the relatively limited scope and depth of humanity’s theory of justice.

There will, however, always be times when our views about justice are so particular that they are not included in our family’s, community’s, society’s or humanity’s theories of justice. It is at these times that we have no choice but to rely on our personal theory of justice to justify our particular views about justice.
Justice is, therefore, a matter of relying on our personal theories of justice at times, our family’s at other times, our community’s and society’s theories at others, and on humanity’s theory of justice at yet other times. More often than not, however, others share our views about justice so that we can and, I argue, should rely on a collective theory of justice to justify them. While reliance on one’s personal theory of justice is necessary at times, that reliance should be a matter of last resort. Our first resort should be to understand what views about justice we, as fellow human beings, share in common with one another. Only when humanity’s theory of justice does not cover the particular moral issue in question should we rely on our society’s theory of justice. Only when society’s theory of justice is insufficiently broad or deep to cover the particular scenario in question should we rely on our family’s theory of justice. And finally, only when no collective theory of justice will suffice should we turn to our personal theory of justice. It is, after all, easier to remind someone to adhere to what they, as a member of your family, community or society or humanity, already believe, than it is to convince them to revise their personal theory of justice and the convictions that justify it.

This dissertation divides the above argument into three chapters. The first chapter elucidates Dworkin’s theory of constructive interpretation and examines the ways in which it is similar to, and different from, the theory of philosophical hermeneutics of Dworkin’s mentor Hans-Georg Gadamer. After elucidating Dworkin’s approach to the constructive interpretation of justice, the second chapter argues that, despite Dworkin’s fears to the contrary, it is possible to produce an interpretation of humanity’s theory of justice that is not relative. Finally, the third chapter reconstructs Dworkin’s theory of constructive interpretation so as to articulate conversational interpretation, a new interpretive theory. This chapter argues that conversational interpretation is better equipped to understand what justice means for people collectively and shows how a conversational interpretation of humanity’s theory of justice can produce a theory that is not subjective, relative, or objective (in the strong sense). It highlights, that is, the existence of a theory of justice that reflects what justice means, not just for an individual or a society, but also for humanity. This dissertation, therefore, concludes, contrary to Dworkin, that while justice is both a matter of interpretation and conviction, reliance on conviction should be a last resort.
Constructive Interpretation

Introduction
The objective of this chapter is to elucidate Ronald Dworkin's interpretive theory of constructive interpretation and examine the ways in which it is similar to, and different from, hermeneutic theories of understanding. To do so, the chapter will first outline Dworkin’s theory of constructive interpretation before comparing and contrasting it with Gadamer’s theory of philosophical hermeneutics. While Dworkin considers the role of interpretation in several of his other publications, most notable amongst them being *A Matter of Principle*, the main focus in this chapter is the theory of constructive interpretation that he develops in *Law’s Empire*, where the connection with hermeneutics is most explicit. This is also the only time that Dworkin presents and defends a general theory of interpretation, abstracted from his theories of law and politics. This abstraction allows for a clear comparison of constructive interpretation and philosophical hermeneutics.

In comparing and contrasting Dworkin’s theory of constructive interpretation with Gadamer’s theory of philosophical hermeneutics, this chapter will attempt to highlight how similar the two theories are, despite contemporary views to the contrary. First, it will show that Dworkin, like Gadamer, believes that meaning includes more than the description of empirical observations. For both these anti-reductionist theorists, in order to understand human actions we must also understand the purpose, sense or point behind those actions. Second, it will point out that neither Gadamer nor Dworkin believes that understanding requires an interpreter to recount the author’s original intentions. Not only would such a task be impossible; attempting it would also deny the important role Dworkin and Gadamer believe the interpreter plays in achieving

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understanding through interpretation. Third, the chapter will show that Dworkin shares Gadamer’s view that understanding acquired through interpretation can never be objective (in the strong sense). This is because it is impossible for an interpreter to free him or herself entirely from the social and historical context within which he or she interprets. Finally, the chapter will demonstrate that neither Dworkin nor Gadamer resigns his own theory to being subjective.

This chapter also points out several very significant differences between these two theorists. First, it highlights how passive the role of the social practice is within Dworkin’s theory of constructive interpretation, relative to its role within Gadamer’s theory of philosophical hermeneutics. Second, and again in contrast to philosophical hermeneutics, it points out the dominant role the interpreter plays within constructive interpretation. Finally, this chapter draws attention to the noteworthy difference between Gadamer’s recognition that an interpreter must approach the objective of interpretation with an anticipation of completeness and Dworkin’s requirement that an interpreter interpret the object of interpretation, namely the social practice, so as to make it the best it can be.

**The semantic sting**

Dworkin develops his theory of constructive interpretation to counter what he calls the “semantic sting.” Victims of the semantic sting are, according to Dworkin, those people who believe that genuine disagreement can only ever occur when people accept and follow the same criteria for deciding when each other’s claims are valid. Such people argue that you

and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is ... If you do not count my copy of *Moby-Dick* as a book because in your view novels are not books, any disagreement is bound to be senseless.27

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This account of how we disagree may represent an accurate description of disagreement over empirical observations such as precisely what words are to be found in a particular text or who the president of the United States of America was in 2004. Dworkin argues, however, that it does not accurately describe philosophical disagreements, such as whether democracy is a better form of government than dictatorship or whether killing an unborn child to save its mother is morally justified. In such situations, those who have fallen prey to the semantic sting would have the dilemma of having to argue that either, despite appearances, we do actually accept roughly the same criteria for deciding when each other’s claims are valid or there is no genuine agreement or disagreement at all. The second proposition seems absurd. We do at times attribute different meanings to words like freedom or democracy and thus misunderstand each other. However, characteristically we share the same semantic understanding of words and the vast majority of our agreements and disagreements are, therefore, genuine.

By contrast, the first proposition requires the existence of an agreed set of ground rules which provide criteria to govern the agreements and disagreements we periodically have. If such a set of hidden rules did exist, however, disagreements would be nothing more than semantic disputes over whether or not empirical facts met certain criteria. The problem is that such an account of disputes is not reflective of how we actually agree and disagree. In reality, disagreements are often neither semantic nor senseless but genuine, even though people use different criteria for deciding the validity of claims. If you and I disagree about whether it is right or wrong to kill an unborn child to save its mother, we are typically not disagreeing about whether the empirical facts of this scenario fit some commonly held criteria for deciding what is morally right and wrong. We are more likely to be disagreeing over the most appropriate criteria for deciding such issues or, indeed, whether such criteria can exist, even in theory. This is

28. Dworkin in fact implies it does not, suggesting that “Perhaps this picture of what makes disagreement possible is too crude to capture any disagreement, even one about books. But I shall argue only that it is not exhaustive.” Ibid, 46.
29. Ibid, 45.
30. Ibid.
31. Note, the notion of a set of commonly held criteria for validating our claims exhibits a methodology that is altogether more particular and formulaic than the interpersonal agreement discussed in relation to subjectivity in the introduction. Ibid, 46.
particularly problematic for Dworkin, and indeed all philosophers of law, whose disagreements are philosophical and not empirical; characteristically focusing on the justification of law and whether or not it includes a moral element.

**Constructive interpretation**

In order to explain how we do, in reality, actually have genuine disagreements and agreements without the existence of common criteria for validating our claims, in chapter two of *Law’s Empire* Dworkin describes and defends constructive interpretation, a general theory of the process of interpreting social practices. Constructive interpretation is only applicable, however, to social practices which are also "interpretive concepts." Social practices are only interpretive concepts when participants develop an "interpretive attitude" towards them so that they “make and dispute claims about the best interpretation of [social practices] – when they disagree, that is, about what some ... practice actually requires in concrete circumstances.”

This interpretive attitude consists of two components. Firstly, Dworkin argues that there must be “an assumption that the [social] practice does not simply exist but has value, that it serves some interest or purpose or enforces some principle.” Secondly, there must be an “assumption that the requirements of [the social practice] - the behaviour it calls for or judgement it warrants - are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its [value, purpose or principle.]” Combining these two components, constructive interpretation requires the imposition of “meaning on [a social practice] - to see it in its best light - and then to restructure it in the light of that meaning.” In this way, constructive interpretation not only decides why a social practice exists, but also “what, properly understood, it now requires.”

In order to expound and refine constructive interpretation into a practical theory applicable to social practices such as law, Dworkin employs an analytical distinction between three stages of interpretation. First is the "pre-interpretive stage," which

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32. Ibid.
33. Ibid, 47.
34. Ibid.
35. Ibid.
consists of the interpreter identifying the “rules and standards taken to provide the tentative content of the practice” that is to be interpreted. Second is the "interpretive stage," where the interpreter settles on a general justification for the elements of the social practice identified at the pre-interpretive stage. Third, and finally, there is a "post-interpretive" or reforming stage, where the interpreter adjusts his or her understanding of what the social practice “really” requires so as to fulfil the justification settled upon at the interpretive stage.

As others have observed and Dworkin himself notes, the actual constructive interpretation of a social practice would be much less deliberate and structured than this analytical distinction suggests. Nevertheless, his distinction enables us to break down the theory into its constituent parts and, in so doing, better identify the different influences at work.

The pre-interpretive stage
The first stage of constructive interpretation is labelled pre-interpretive to indicate that a very large degree of consensus is required about the rules and standards of a social practice. Dworkin elucidates this requirement by suggesting “that the classifications it yields are treated as given in day-to-day reflection and argument.” Employing a useful analogy, Dworkin suggests that the equivalent to the pre-interpretive stage in literary interpretation “is the stage at which discrete novels, plays, and so forth are identified textually; that is, the stage at which the text of *Moby Dick* is identified and distinguished from the text of other novels.” As this analogy highlights, the pre-interpretive stage is the point at which the social practice being interpreted is identified.

In order to further elucidate his theory of constructive interpretation, Dworkin employs the example of the social practice of courtesy. He asks us to imagine an invented community whose members “follow a set of rules, which they call “rules of courtesy,”

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40. It is not to say that a degree of interpretation is still required at this stage for, as Dworkin points out, “social rules do not carry identifying labels.” Ibid.
41. Ibid.
42. Ibid.
on a certain range of social occasions. They say, “Courtesy requires that peasants take off their hats to nobility,” for example, and they urge and accept other propositions of that sort.” When constructively interpreting courtesy, the pre-interpretive stage requires a large degree of consensus about what precisely those rules are. Those rules may stipulate, for example, that children need not doff their hats, that men need only doff their hats to other men and that no one need doff their hats on Sundays.

Consensus is required at this stage of constructive interpretation for two reasons. First, it ensures that the interpretive attitude within a community flourishes, enabling meaningful debate at the interpretive stage about the purpose of a social practice and, at the post-interpretive stage, how to reform that practice to see it in its best light.

For the interpretive attitude to flourish, participants must share a similar view of the world. This includes a common language so that they understand the meaning of words other participants use such as, for example, “doff,” “Sunday” and “children.” If a common vocabulary was all that participants shared, however, debates about a social practice would be limited to semantic disagreements over the way in which participants use certain words.

As well as a shared semantic vocabulary, therefore, participants “must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other’s claims, to treat these as claims rather than just noises.” That means participants must not only share the same dictionary, but a similar view of the world so that they can recognise the sense and purpose behind the views and actions of others.

Nevertheless, participants’ views of the world must not be identical. If they were, they would undoubtedly share exactly the same understanding of any given social practice and they would have nothing to argue about. Thus people’s shared understanding of the world at the pre-interpretive stage must be sufficiently dense to facilitate genuine debate

43. Ibid, 47.
44. Ibid, 63-64.
but not so alike that disagreement is impossible. By way of an illustrative example, people must share enough in common that they are able to agree what each other means when they refer to “doffing.” They must not, however, share such similar worldviews that they agree without variance that “doffing,” as it is now understood, is justified.

Second, consensus is required at the pre-interpretive stage because constructive interpretation of a social practice is neither the report of the personal preferences of the interpreter, nor of other individuals within a society, but an attempt to understand what the social practice means for society as a whole. Participants must, therefore, be capable of tentatively outlining the explicit rules and standards that combine to make up the substance of the social practice they share.

Without the requirement of consensus at the pre-interpretive stage, an interpreter could not claim that his or her interpretation of a social practice was an interpretation of what that practice means for society. His or her interpretation would merely be a personal expression of what some practice means for him or her as an individual. Therefore, as Dworkin says, “an interpretive community is usefully defined as requiring consensus at [the pre-interpretive] stage”. That is, consensus about the day-to-day classification of a social practice is required; not consensus about everything we say and do.

**Interpretive stage**

The second stage of constructive interpretation is the interpretive stage. This is the point at which “the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive [sic] stage.” This justification “will consist of an argument [for] why a practice of that general shape is worth pursuing, if it is.”

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45. Ibid., 64.
46. As Dworkin says “So each of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what it really requires.” Ibid.
47. Ibid., 66. I shall explore this point in more detail in relation to the social practice of justice in Chapter Two.
48. Ibid.
49. Ibid.
Employing Dworkin’s example of the social practice of courtesy again, now that there is a pre-interpretive consensus within a society about what rules and standards make up the practice, the participants can develop an “interpretive” attitude towards courtesy. As Dworkin reminds us, the first component of this interpretive attitude is the assumption at the interpretive stage

that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle - in short, that it has some point - that can be stated independently of just describing the rules that make up the practice.\(^{50}\)

The purpose of courtesy might be, for example, to show respect to socially superior others.

While this purpose or justification need not accommodate all aspects of the current practice identified at the pre-interpretive stage, “it must fit enough for the interpreter\(^ {51}\) to be able to see himself as interpreting that practice, not inventing a new one.”\(^ {52}\) This requirement of fit is not, however, as onerous as the requirement of consensus at the pre-interpretive stage.\(^ {53}\) According to Dworkin, precisely what that level of fit is, is a question that “only history can teach us.”\(^ {54}\) Although less than clear, Dworkin’s reference to "history" here is most likely recognition that participants, collectively as society, over time are the inevitable arbiters of whether or not a purpose exhibits the appropriate level of fit at the interpretive stage and that the interpretation that results, therefore, reflects what a social practice means for society.\(^ {55}\)

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50. Ibid, 47.
51. An interpreter “needs convictions about how far the justification he [or she] proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new.” Ibid, 67.
52. Ibid, 66. For further discussion on the distinction between interpretation and invention see Dworkin, A Matter of Principle, 146-177.
53. Dworkin, Law’s Empire, 67-68.
54. Ibid, 67.
55. A contemporary example of Dworkin’s point here might be the controversial social practice of female circumcision or genital mutilation (FGM). It will be future societies that will be the final arbiters of whether any of FGM’s purported purposes actually explain and justify the practice.
When a social practice’s rules and standards discovered at the pre-interpretive stage are capable of being understood as potentially serving a number of different purposes, an interpreter must settle on the purpose that best justifies and explains the social practice.\textsuperscript{56} While the purpose of courtesy was understood, for example, as being to show respect to social superiors, an interpreter may decide that the purpose of showing respect to those who merit it actually provides a better justification of the social practice.\textsuperscript{57} It is the purpose an interpreter settles on as the best justification of a social practice that he or she then employs at the post-interpretive stage.

\textbf{Post-interpretive stage}

The final stage of constructive interpretation is the post-interpretive, or reforming, stage. At this point the interpreter must adjust his or her sense of what the social practice really requires for society so as to better serve the justification settled on at the interpretive stage.\textsuperscript{58} The interpreter must ask him or herself certain questions, including whether the practice's rules and standards should be changed and if they should, how and why. At this post-interpretive stage, what a social practice really requires may change, sometimes dramatically, from what it initially required at the pre-interpretive stage.\textsuperscript{59}

Again utilising the example of courtesy, while there was an assumption at the interpretive stage that courtesy had a point,\textsuperscript{60} the post-interpretive stage requires the further assumption that the requirements of courtesy are not necessarily or exclusively what they have always been. Instead, these requirements must become sensitive to the point or justification of courtesy so that they are understood, applied, extended, modified, qualified or limited in light of that point. Accordingly, the post-interpretive stage is the point at which an interpreter reforms the practice of courtesy so as to impose his or her point, purpose or justification on it.\textsuperscript{61}

\textsuperscript{56} Ibid, 67.
\textsuperscript{57} Unfortunately, Dworkin does not provide any guidance as to how, when a social practice is capable of serving more than one purpose, an interpreter should decide which is the best.
\textsuperscript{58} Dworkin, \textit{Law's Empire}, 66.
\textsuperscript{59} Ibid, 48-49, 66.
\textsuperscript{60} That is, the second component of the interpretive attitude was present.
\textsuperscript{61} Dworkin, \textit{Law's Empire}, 47.
Thus, while courtesy may have started out as the practice of showing respect to social superiors, in light of the justification settled on at the interpretive stage that the proper ground for respect is merit, the requirements of the practice may require reform. As Dworkin illustrates, this post-interpretive reform means that people’s views about the proper grounds of respect, for example, may change from rank to age or gender or some other property. The main beneficiaries of respect would then be social superiors in one period, older people in another, women in a third, and so forth.62

However, not just any revision of a social practice will suffice. Constructive interpretation requires an interpreter to interpret a social practice at the post-interpretive stage so as to “see it in its best light”63 or make it the best it can be. Elucidation of Dworkin’s optimisation requirement will be facilitated by a brief discussion of Gallie’s notion of a “contested concept,”64 to which Dworkin’s idea of an interpretive concept is heavily indebted.65

Gallie offers seven conditions that characterise a contested concept.66 It is, however, the influence of the seventh condition that is particularly critical in explaining the origins of

63. Ibid, 47.
65. Interpretive concept is the new name Dworkin gives in Law’s Empire to his earlier notion of a “contested concept.” When Dworkin first refers to a contested concept, he cites Gallie’s "Essentially Contested Concepts."
66. They are: 1) It must be appraisive in the sense that it signifies or accredits some kind of value achievement; 2) This achievement must be of an internally complex character … 3) Any explanation of its worth must therefore include reference to the respective contributions of its various parts or features … (that is) the accredited achievement is initially variously described; 4) The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; 5) Each party recognises the fact that its own use of it is contested by those of other parties, and that each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question; 6) The derivation of any such concept from an original exemplar whose authority is acknowledged by all the contestant users of the concept; and 7) The probability or plausibility, in appropriate senses of these terms, of the claim that the continuous competition for acknowledgement as between the contest users of the concept, enables the original exemplar’s achievement to be sustained and/or developed in optimum fashion. Gallie, “Essentially Contested Concepts,” 171-172, 180.
Dworkin’s optimisation requirement.67 This requirement states that disputes over a contested concept will be over which of the alternative conceptions sustains or develops the exemplar “in optimum fashion.”68 This condition is expressed in constructive interpretation by the post-interpretive requirement on the interpreter to reform the social practice in light of its purpose or justification, to make it the best it can be. As Batchelor writes, “The idea seems to be that when we are dealing with a contested concept, the alternative conceptions of that concept will be exhaustive.”69 In other words, if you do not believe that one particular conception of the concept is the best, you must believe some other conception is better.

If we apply this definition of a contested concept to Dworkin’s theory of constructive interpretation, it follows that, if an interpreter does not believe one particular interpretation of the concept is the best, he or she must, ipso facto, believe that another interpretation is better. Consequently, an interpreter must select the interpretation that he or she believes to be the best amongst those available. When we revise the requirements of a social practice at the post-interpretive stage, Dworkin believes we do not endeavour simply to provide another alternative perspective of what the practice might or could require, but purport to interpret what it “really” requires. According to Dworkin, the objective of constructive interpretation is, therefore, to interpret a social practice so that it is, in light of its purpose, value, justification or point, the best it can be.

While courtesy was at one time the social practice of showing respect to social superiors in the form of hat doffing, an interpreter may revise his or her understanding of the proper grounds for respect to be, for example, merit. In light of this new understanding of respect, an interpreter may reform courtesy at the post-interpretive stage to be the

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67. The sixth condition requires that the contested concept be derived from “an original exemplar whose authority is acknowledged by all” users of the concept. For Dworkin’s theory of constructive interpretation, this condition is expressed in the requirement of pre-interpretive community-wide consensus about the content of a social practice. Gallie, “Essentially Contested Concepts,” 180.
68. Ibid.
69. As we have seen, this requires that it is not possible for all available alternatives to be rejected as possessing no value and thus inadequate. Noting Gallie’s first requirement, the claim that competing conceptions are exhaustive seems to be plausible. Thomas Nim Batchelor, The Role of Hermenutics in the Debate Between Natural Law Theory and Legal Positivism (Lincon: The University of Nebraska, 1989), 309.
practice of showing respect by conferring knighthoods on those who are meritorious because of their outstanding contribution to society, whether they are old, young, rich, poor, male or female. In this way, constructive interpretation is the process of reviewing and revising the rules and standards that make up a social practice so as to fulfil and indeed enhance the purpose or justification for its inception in the first place. It is, literally defined, a constructive interpretive theory.

Dworkin’s chain novel: a brief analogy
Now that we understand what constructive interpretation entails, it will be useful to explore briefly Dworkin’s analogy of a "chain novel" to profile a number of constructive interpretation’s defining features. Dworkin constructs an artificial genre of literature\(^70\) which he calls the chain novel. In this genre, a group of authors is tasked with writing a novel, where each author is required to write one chapter. As the title of Dworkin’s artificial genre suggests, each chapter is written in isolation, one after the other. Thus, the first author writes chapter one and then passes it to the second author. He or she writes chapter two and passes it to the third author, and so on until the novel is complete.

Consequently, “No author writing late in the chain is free to start over from scratch, for to do that would be to cease playing the game of writing a chain novel.”\(^71\) Just as the previous chapters of the novel act to constrain the author, the requirement of consensus about the rules and standards that are taken to make up a social practice at the pre-interpretive stage and, to a lesser extent, the degree of fit the justification an interpreter settles on at the interpretive stage must have with those rules and standards constrain the interpreter. As the chain novel highlights, this constraint is significant. An author

\(^{70}\) Hoy has criticised what he describes as the overly abstract and formal process of interpretation that the chain novel example suggests. He claims that, in order to interpret, an interpreter need not construct a general theory of the genre that the object or practice of interpretation is taken to belong. He further claims that, to do so, would unnecessarily limit the author’s ability to learn from the object or practice being interpreted (this criticism is addressed later in the chapter). David Couzens Hoy, “Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism,” *Law and Philosophy* 6, no. 3 (1987): 337-344. However, just as with the analytical distinction between the stages of interpretation, Dworkin acknowledges that the chain novel is a particularly abstract and artificial construction. As he notes, while the “imaginary literary enterprise is fantastic,” it is “not unrecognizable.” Dworkin, *Law's Empire*, 229. The chain novel example should not be read as an exemplar of the process of constructive interpretation but a mechanism employed by Dworkin to better illustrate the fusion of object and purpose.

\(^{71}\) Leyh, “Dworkin's Hermeneutics,” 862.
writing the fourth chapter in a chain novel would likely have characters, the beginnings of a plot and a location imposed upon him or her by the authors of chapters one, two and three. An author of the fourth chapter cannot leave unexplained some major structural dimension of the text, a subplot of significant dramatic importance or an important metaphor that has already been integrated into the novel.\footnote{Dworkin, Law's Empire, 230.} Similarly, an interpreter at the pre-interpretive stage of constructive interpretation must defer to social consensus about what rules and standards are taken to make up a practice and, to a lesser extent, whether the justification he or she has settled on at the interpretive stage fits those rules and standards.\footnote{Ibid, 66.}

While this constraint is significant, it is also passive. An author in a chain novel will likely have a plot, a scene or scenes and characters imposed upon him or her. However, once these have been incorporated into the chapter, an author is free from any further constraint to develop the novel in whichever way he or she sees fit. Similarly, while an interpreter is constrained by the need for consensus about the rules and standards of a social practice at the pre-interpretive stage and, to a lesser extent, for the justification at the interpretive stage to have a degree of fit with those rules and standards, he or she is free\footnote{While Dworkin's post-interpretive stage does impose a duty on the interpreter to optimise a social practice, I use the word "free" here to highlight the level of autonomy granted to an interpreter in fulfilling that duty.} at the post-interpretive stage to make a practice the best it can be. Dworkin highlights the passive nature of this constraint when he comments that interpretation is a process of “recognizing, whilst struggling against, the constraints of history.”\footnote{Dworkin, Law's Empire, 62.}

While the preceding chapters of a chain novel are analogous to Dworkin’s pre-interpretive requirement of consensus, so too is the novelist’s role within his example of the chain novel analogous to the interpreter’s role within constructive interpretation. While an author in the chain novel must write his or her chapter so that it is consistent with what has been written in preceding chapters, he or she is free to write his or her chapter “so as to make the novel being constructed the best it can be.”\footnote{Ibid, 229.} They are free, that is, to develop existing characters, create new ones or kill off old ones, create a sub-

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72. Dworkin, Law's Empire, 230.
73. Ibid, 66.
74. While Dworkin's post-interpretive stage does impose a duty on the interpreter to optimise a social practice, I use the word "free" here to highlight the level of autonomy granted to an interpreter in fulfilling that duty.
75. Dworkin, Law's Empire, 62.
76. Ibid, 229.
plot or twist, or to move the story to a new location. Similarly, once an interpreter has identified the content of a social practice at the pre-interpretive stage and settled on a justification for that practice at the interpretive stage, he or she is free to reform the practice to make it the best it can be. As Dworkin’s example of courtesy illustrates, a social practice can be altered, sometimes drastically from what it once was, at the post-interpretive stage of constructive interpretation. For example, while courtesy might at one time be seen as the practice of showing respect to social superiors, it may at another time be viewed as showing respect to those who merit it.

It is this prominent role of the novelist and interpreter that highlights yet another analogy between the tasks of writing a chain novel and constructively interpreting a social practice: the absence of the role of the author. In the chain novel, while there is an author for each of the novel’s constitutive chapters, there is no editor who is, for example, responsible for ensuring the coherence of the book. Similarly, Dworkin does not cast a role within constructive interpretation for some imaginary “author” of the social practice. The tasks of enforcing coherence with what the social practice has meant in the past and ensuring the interpretation makes the practice the best it can be are left solely to the interpreter.  

Finally, Dworkin’s analogy shows how isolated the roles of interpreter and the rules and standards of the social practice are from each other. While the novelist and preceding chapters both play significant roles in the production of a chain novel, they do so in isolation from each other. Indeed, that is the whole point of the chain novel: that each chapter is written in isolation from the preceding one. As we already know, both the interpreter and the rules and standards of the social practice play significant roles within Dworkin’s theory of constructive interpretation. The rules and standards that make up the social practice frame and constrain any interpretation of it. The interpreter settles on some justification or purpose for that practice before reforming its rules and standards in light of that purpose so as to make it the best it can be. They are, however, distinct, isolated and sequential roles within Dworkin’s theory of constructive interpretation.

77. Ibid, 52.
Similarities between constructive interpretation and philosophical hermeneutics

Now that we have an understanding of what Dworkin believes is involved in constructively interpreting a social practice, we can begin to explore how his theory of interpretation compares to Gadamer's theory of philosophical hermeneutics.

Anti-reductionism

Philosophical hermeneutics, like all other theories of hermeneutics, is anti-reductionist, denying that the methodology of the natural sciences is appropriate for the human sciences. As the object of study for the human sciences, human actions have a sense, meaning, purpose or significance which is not an externally observable phenomenon. Peter Winch’s example of a man casting his vote clarifies this point:

What he does is not simply to make a mark on a piece of paper; he is casting a vote. And what I want to ask is, what gives his action this sense, rather than, say, that of being a move in a game or part of a religious ritual. More generally, by what criteria do we distinguish acts which have a sense from those which do not?

In Winch's example, while scientific observation and the causal laws of physics are able to tell us that a man has marked a piece of paper, they cannot tell us what the purpose, sense or meaning behind his actions was. Science can explain the cause and effect of a physical act, but it cannot explain the act’s purpose. This is because the purpose of human action is socially constructed. The social practice of voting, for example, has meaning for citizens by virtue of a long shared history of political participation. Voting would not have meaning for a society ruled by a dictatorship, whose members had never been permitted to voice their political opinions. Because the object of study has a

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81. If the act of voting did have meaning for those living under a dictatorship, it would derive from the observance of political participation in other societies.
meaning or purpose, understanding it requires an interpretation. Interpretation enables an interpreter to understand, at least partially, the meaning or purpose behind discrete human actions by conceiving of those actions within the social context to which they belong. It is only once people's actions are seen within this context, that their socially constructed meaning and purpose are understandable.

Dworkin’s theory of constructive interpretation is explicitly anti-reductionist. As he declares, interpretation of social practices "is indeed essentially concerned with purpose not cause." For Dworkin, like other anti-reductionists, to understand human actions, such as those that collectively constitute social practices, requires much more than simply observing the discrete physical actions involved. It is to see the point, the purpose, the reason or the meaning behind those actions. While science can tell us, for example, that a porter tipped his hat to a passing woman, it cannot tell us why he did so. Only through interpretation can we understand that the gesture of tipping one’s hat belongs to the social practice of courtesy and that its purpose or meaning is to display respect to one’s social superiors.

Anti-authorial Intentionalism

Unlike Wilhelm Dilthey, Gadamer rejects conversational interpretation, the view that understanding requires the capacity to recapture the author’s original intentions. According to Gadamer, it is impossible to “project oneself into strange situations or to know ‘what it is like to be’ another person.” Furthermore, there is more to interpretation than simply recovering the author’s intentions or re-expressing the original meaning of a text. That is because meaning is not fully contained in the object of interpretation as it historically was or in the past psychological state of the author.

82. Batchelor, The Role of Hermenutics in the Debate Between Natural Law Theory and Legal Positivism, 293.
83. Dworkin, Law's Empire, 52 (emphasis added).
84. Indeed, as we shall see later, Dworkin arguably takes this concern with purpose too far.
86. Ibid.
Similarly, Dworkin rejects conversational interpretation, arguing not only that it is impossible to recover an author's historical intentions, but that they "are not the constitutive foundations of interpretive understanding. Failure to retrieve them is not an interpretive disaster, [therefore,] because there are other ways, and often much better ways, of finding value in traditions we have joined."

**Anti-objectivism**

Not only does Gadamer reject any aspiration to recapture the author's intentions; he rejects Dilthey's entire interpretive theory, seeing in it the core of scientism that suppresses the interpreter’s subjectivity and posits the existence of objective (in the strong sense) understanding. Gadamer rejects, that is, any commitment to

the basic conviction that there is or must be some permanent, ahistorical matrix or framework to which we can ultimately appeal in determining the nature of rationality, knowledge, truth, reality, goodness, or rightness.

Gadamer’s rejection of objectivity in the strong sense stems from his acknowledgment that it is impossible for an interpreter to extricate him or herself from his or her social and historical context or, as he terms it, "horizon." For, as he notes, “The very idea of a situation means that we are not standing outside it and hence are unable to have any objective knowledge of it.” Not only is such an Archimedean interpretive position

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90. Ibid, 423. According to Dworkin, the best way is by retrieving the interpreter's intentions. While the constructive interpretation of social practices is essentially concerned with purpose not cause, the purposes in play are not fundamentally those of some author but of the interpreter.
94. Gadamer, *Truth and Method* (1975), 269. Dworkin explicitly notes Gadamer’s point when he says that Gadamer “believes the Archimedean historical consciousness Dilthey supposed possible, free from what Gadamer calls, in his special sense of the word, prejudices, is impossible, that the most we can hope to achieve is an “effective historical consciousness” that aims not to look at history from no point of view but to understand how our own viewpoint is influenced by the world we wish to interpret.” Dworkin, *Law's Empire*, 420.
therefore impossible, but an interpreter’s horizon is partly constitutive of an interpreter and his or her interpretations. 95 As Gadamer notes, "history does not belong to us, but we belong to it."96 In this way Gadamer endeavours to refute Dilthey's pejorative view of the role of the interpreter.

Gadamer’s approach not only incorporates the role of the interpreter, but also legitimises it, seeing it as an asset rather than a liability.97 In this way, there is no strong sense of "objectivity,"98 independent of humanity, in Gadamer’s account of understanding because any adequate interpretation of the meaning of a text or actions of a person will depend on an interpreter and his or her horizon as much as on the text or actions themselves.

In a similar vein, Dworkin rejects both the methodology of the natural sciences for the human sciences and relies heavily on the role of the interpreter within his theory of constructive interpretation. As he says, unlike the methodology of the natural sciences, constructive interpretation for the human sciences is “essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter.”99

Dworkin also affirms Gadamer’s observation that the interpreter’s “situation is not an Archimedean point”100 from which he or she can perceive a social practice in its entirety and remain independent from it. Furthermore, Dworkin explicitly denies metaphysical realism or objectivism in the strong sense101 when he acknowledges that we can only

100. Ibid, 61-62.
101. The view “that there is a world of objective reality that exists independently of us and that has a determinate nature or essence that we can know.” Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis*, 9.
make sense of interpretive claims if we stop treating them as claims to ontologically independent meanings. 102

Indeed, Dworkin believes “the issue of objectivity, which is an epistemological conundrum, is not crucial for the theory of interpretation.” 103 When people offer a constructive interpretation of a social practice, Dworkin believes they are implicitly making the claim that it is, in their view, the best possible interpretation of that social practice. His argument is not that anybody who interprets a social practice will necessarily give the best, or objective (in the strong sense), interpretation. He is giving a quasi-phenomenological or descriptive account of interpretation from the point of view of the interpreter, with the addition of a transcendental argument 104 about what interpreters must believe about the validity of their interpretations. 105

The aim of an interpretive theory is not to prove that an interpretation is objective in the strong sense, but rather to explain why an interpreter is justified in believing it. 106 “The argument, in other words, establishes that the interpreter’s beliefs are necessary (or at least reasonable and appropriate), not that they are true.” 107 Dworkin’s optimisation requirement seeks to achieve this aim by occupying the middle ground between description and prescription. 108 The requirement for an interpreter to interpret a social practice in its best light is at once an aspiration which an interpreter must seek to achieve and at the same time a description of the underlying spirit of the process of interpretation: constructive interpretation does not produce objectivity in the strong sense.

104. That is, that an interpreter must believe that his or her interpretation is the best possible interpretation of that social practice.
106. Ibid.
107. Ibid.
**Anti-subjectivism**

While Gadamer abandons objectivism in the strong sense, he denies that this rejection entails a commitment to subjectivism,\(^{109}\) the view that rationality, knowledge, truth, reality, goodness, or rightness are creations of the mind, are unique to the individual and, therefore, equivalent to tastes or preferences. His rejection of subjectivism is heavily reliant on the notion of tradition. Indeed, Gadamer’s appeals to tradition have frequently resulted in his being accused of being too restrictive and conservative, rather than subjective or relative.\(^ {110}\)

For Gadamer, tradition refers to the living effects of the past in our present. In this way, tradition plays a critical role in constituting an interpreter’s horizon.\(^ {111}\) “We always stand within tradition,”\(^ {112}\) as it is “part of us.”\(^ {113}\) It is not, however, something that exists by nature, but rather a set of beliefs which must be “affirmed, embraced and cultivated.”\(^ {114}\) As tradition is partially constitutive of an interpreter’s horizon, it plays a significant role in shaping who we are and how we understand things.

By virtue of the interpreter’s existence within tradition, interpreters hold, in common with others around them, certain prejudices which they can never abandon or escape from.\(^ {115}\) That is not to say that such prejudices are negative and obstruct understanding. Indeed, for Gadamer, prejudices or pre-judgements (*praefaecium*) are the very things that allow that which is to be interpreted or understood to be grasped in a preliminary fashion. For, “without these [prejudices] the interpreter would have no foundation on which to base understanding of the past.”\(^ {116}\) To refer back to Winch’s example, without a pre-judgement about what “voting” means, we would not be able to interpret the sense or purpose of marking a piece of paper as casting a vote. Gadamer therefore treats these prejudices as an asset, not a liability, for the purpose of achieving understanding through interpretation.

\(^{109}\) Ibid, 295.
\(^{110}\) Ibid, 317.
\(^{111}\) Ibid, 295.
\(^{113}\) Ibid.
\(^{114}\) Ibid.
\(^{116}\) Donato, "Dworkin and Subjectivity in Legal Interpretation," 1536.
While we saw that the interpreter’s horizon negated the possibility of achieving objectivity in the strong sense, the role of tradition likewise negates the possibility of subjectivity. Subjectivism is only a threat when one accepts a conception of the individual as isolated from, and independent of, the influences of his or her tradition. There can be no truly subjective interpretation because an interpreter’s horizon is both constituted in, and limited by, the tradition to which he or she and those around him or her belong.

Dworkin’s constructive interpretation similarly rejects subjectivism. This rejection is evidenced by Dworkin’s acknowledgement that “interpreters think within a tradition of interpretation from which they cannot wholly escape”. He summarises Gadamer’s point that effective historical consciousness “aims not to look at history from no point of view but to understand how our own viewpoint is influenced by the world we wish to interpret.” In this way, Gadamer’s and Dworkin’s references to tradition acknowledge that an interpreter, and the interpretations he or she produces, are partly constitutive of that tradition and are not, therefore, subjective.

For Gadamer, this conclusion dictates that understanding requires us to become historically conscious. In other words, we must be able to recognise not only how history and tradition shape our present understanding, but also how our present understanding shapes tradition. Thus, “Understanding is not to be thought of so much as an action of one’s subjectivity, but as the placing of oneself within a process of tradition, in which past and present are constantly fused.” This realisation leads Gadamer to discredit the sharp distinction between subjectivism and objectivism. The hermeneutic circle, he writes,

is not formal in nature, it is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition

118. Ibid, 420.
and the movement of the interpreter. Then anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the communality that binds us to the tradition. But this is contained in our relation to tradition, in the constant process of education. Tradition is not simply a precondition into which we come, but something we produce ourselves, inasmuch as we understand, participate in the evolution of, and hence further determine ourselves.¹²⁰

Dworkin’s analogy of the chain novel highlights constructive interpretation’s similar simultaneous rejection of objectivism in the strong sense and subjectivism. As Hamula points out, like the relationship between the tradition of interpretation and the interpreter’s horizon, the relationship between the preceding chapters and the novelist within a chain novel is

a valiant attempt to outflank both objective and subjective interpretivism. Chain novel interpretation is neither purely objective, since it allows room for reinterpretation of the prior writings in a way that both unifies and provides new meaning, nor purely subjective, since it prevents the interpreter from proceeding independently of prior institutional writers.¹²¹

For Gadamer and Dworkin, as the interpreter and tradition are both constituted in and shaped by each other, one cannot speak of an interpretation as either being objective in the strong sense or subjective.

Differences between constructive interpretation and philosophical hermeneutics

The passive role of the social practice

According to Gadamer, each object of interpretation, as well as each interpreter, has its own horizon. That is, it has a social and historical context, embedded in tradition which, in part, constitutes its meaning. Gregory Leyh points out that the pre-interpretive stage of Dworkin’s constructive interpretation of a social practice functions as a rough

¹²¹ Hamula, "Philosophical Hermeneutics: Towards an Alternative View of Adjudication."
analogy to Gadamer’s horizon of the object of interpretation, "reflect[ing] a hermeneutical awareness of the limits placed on textual meaning by the past." As Dworkin himself acknowledges, “the history or shape of a practice constrains the available interpretations of it”.

Yet this analogy is short lived. While the primary function of the pre-interpretive stage, as Dworkin’s chain novel analogy highlighted, is to constrain the interpreter, Gadamer’s horizon of the object of interpretation plays a more active role in hermeneutic interpretation.

Indeed, Gadamer claims that hermeneutic interpretation requires the fusion of the horizons of the interpreter and of the object of interpretation. While it is heuristically necessary to speak of the horizon of the interpreter and of the object of interpretation separately, they are in fact one and the same. As Kenneth Henley notes, “[t]he horizon of the present and the horizon of the past cannot be separated off from each other.” By “fusion of horizons,” Gadamer means “the integration of our historically determined concerns with the object of understanding in such a way that this integration determines the content of the object for us.” “Fusion is not the same as jointure.”

Following Jürgen Habermas, another contemporary master of hermeneutics, Dworkin criticises what he views as the dominant role that the horizon of the object of interpretation plays in Gadamer’s account of interpretation. "Habermas criticises Gadamer ... for the latter's too-passive view that the direction of communication is one way, that the interpreter must strive to learn from and apply what he interprets on the assumption that he is subordinate to its author." According to Dworkin, unlike Gadamer, Habermas “makes the crucial observation ... that interpretation supposes that the author could learn from the interpreter.”

122. Leyh, "Dworkin's Hermeneutics," 860.
123. Ibid, 861.
124. Dworkin, Law's Empire, 52.
128. Dworkin, Law's Empire, 420.
129. Ibid.
Yet, a closer reading of Gadamer’s account of the fusion of horizons reveals that it entails far from a passive deference to the object of interpretation and that Habermas’ criticism is unwarranted. As Georgia Warnke explains,

the process of interpretation is a *dialogical* one in which one apprehends meaning in terms of one’s own prejudices and at the same time is forced to reconsider these prejudices in light of the questions provoked by confrontation with the object of interpretation.130

Not only does this dialogical approach dispel Habermas’ and Dworkin's fear that the object of interpretation dominates Gadamer's theory, but it actually shows the interdependence of the interpreter and the object of interpretation within philosophical hermeneutics. It is crucial to recognise that Gadamer’s fusion of horizons stands in direct opposition to Dilthey’s claim that the object of interpretation, or the author's intentions about it, has a privileged position within the interpretive enterprise.131

While Gadamer recognises the object of interpretation as an asset to interpretation, his concept of the fusion of horizons is intended to enable an interpreter to reflect on both his or her prejudices as well as those of the object of interpretation. By “bringing something to awareness in order to confront what is in fact accepted with other possibilities,”132 the fusion of horizons is an attempt to distinguish the prejudices through which we understand from those “opinions” which misguide us.133

In this way, the success of the process of interpretation is measured in terms of the prejudices guiding an interpretation.134 The more conscious an interpreter is about the prejudices on which the interpretation relies, the more those prejudices can be questioned. The more that prejudices are questioned, the more reflective an

131. Ibid, 137.
134. Leyh, "Dworkin's Hermeneutics," 863.
interpretation will be, relying on only those prejudices that, having withstood reflection, are justified. In this way, as Gadamer says, the authority of the object of interpretation or that of the interpreter “can rule only because it is freely recognized and accepted. The obedience that belongs to true authority is neither blind nor slavish.”135 These words indicate that, notwithstanding Habermas' criticism to the contrary, there is much in Truth and Method136 to indicate that Gadamer acknowledges that the author or object of interpretation can learn from the interpreter.137

According to Gadamer, the interpreter must remain open to what the object of interpretation has to say.138 An interpreter must, that is, hold a refutable presumption that the object of interpretation can contribute towards his or her understanding; that it is worth interpreting.

The interpreter’s openness towards the object of interpretation emerges in Gadamer’s theory in two distinct ways. First, it requires a presumption of the unity or consistency of the object of interpretation. As Gadamer says, “The harmony of all the details with the whole is the criterion of correct understanding. The failure to achieve this harmony means that understanding has failed.”139 It is this assumption of consistency that provides an interpreter with a standard for deciding whether to keep or discard individual aspects of an interpretation. Conversely, if an interpreter denies that a given object of interpretation is internally coherent from the start, he or she has no way of knowing whether its inconsistency is the fault of the object or of his or her understanding of it.140 Second, it requires an interpreter to try to accept the "validity of what the object of interpretation is saying.”141 For, without such a presumption of truth, an interpreter has no way to ensure that he or she is not unreflectively imposing his or her prejudices onto the object of interpretation.

135. Gadamer, Philosophical Hermeneutics, 34.
Thus, while Habermas and Dworkin are right to highlight that the object of interpretation can be developed or improved by the interpreter, Gadamer is making the point that so too can the interpreter learn from the object of interpretation.

Take, for example, the social practice of progressive taxation. An interpreter may hold the opinion that progressive taxation is unjust. He or she may believe that all citizens should be treated equally and that a flat taxation system is therefore just. However, when interpreting the social practice of progressive taxation, he or she may find that it draws a distinction between treating people with equal resources (equality) and treating people with equal consideration (equity). This may be a distinction the interpreter had not previously encountered. This distinction may be based on the belief that citizens should be treated with equal concern, based on what is equitable, rather than being provided with equal resources, based on an understanding of equality as treating people the same. Accordingly, it may require that, in order to treat people with equal concern, the tax department treat people differently. During the process of interpretation the interpreter will be confronted with his or her own prejudices as well as those of the social practice: he or she will, that is, be forced to evaluate his or her own prejudices and those of the social practice by reflecting on each in turn.

Crucially, the fusion of these two horizons will force the interpreter to abandon the opinions that, on reflection, he or she can no longer justify. In this example, the interpreter may conclude that the social practice’s distinction between equity and equality is valid and may abandon his or her prejudice to the contrary and conclude that to treat people with equal concern will often require an unequal distribution of resources. The interpreter may therefore conclude that, on reflection, progressive taxation is a justified and valuable social practice vis-à-vis a flat tax.

In contrast to Gadamer’s horizon of the object of interpretation, which plays an active role in the dialogical process of hermeneutic interpretation, the social practice at the pre-interpretive and interpretive stages of constructive interpretation plays a passive, albeit

142. I take progressive taxation to be a social practice because it is a series of physical actions aimed at the redistribution of resources and carried out in the interests of justice.
significant, role, merely acting to constrain the interpreter. The social practice provides the rules and standards that are taken to form the rough content of the social practice and in so doing ensures an interpreter is engaged in the interpretation of a social practice rather than the invention of some new practice. Much like the preceding chapters in Dworkin’s analogy of the chain novel, however, the social practice does not actively engage with the interpreter. An interpreter is not permitted to obtain any additional information about the social practice other than its tentative rules and standards at the pre-interpretive stage. Constructive interpretation does not, for example, permit an interpreter from exploring those human actions which historically constituted the social practice or those that are regarded as being on the fringe of belonging to a social practice.

In this way, it is Dworkin’s, and not Gadamer’s, approach to interpretation that is too passive. The role of the interpreter in Dworkin's theory is not passive, but the social practice's role is. Constructive interpretation limits the role of a social practice to the provision of a selective range of pre-determined information at the pre-interpretive stage for which an interpreter must settle on a justification at the interpretive stage. As such, constructive interpretation prevents an interpreter from accessing a plethora of additional information that would likely facilitate a deeper understanding of how a society perceives a social practice and what it considers that practice's purpose to be. In the absence of such information, an interpreter will inevitably rely more heavily on his or her own personal understanding of a social practice and what he or she, as an individual, believes its purpose to be. As the social practice plays such a passive role within constructive interpretation, many of the prejudices within an interpreter’s horizon will be relied upon without reflection against those prejudices of the social practice. In the absence of such reflection, an interpreter is unable to distinguish between those prejudices that facilitate understanding from those opinions that thwart it. Consequently, an interpreter who constructively interprets a social practice, with such a passive role prescribed for the social practice, may unwittingly rely on unjustified prejudices.

143. In the form of the requirements of consensus, about the tentative content of the social practice, at the pre-interpretive stage and fit, between that tentative content and an interpreter’s justification for a social practice, at the interpretive stage.
The dominant role of the interpreter

While Dworkin’s requirement that an interpreter settle on a justification for a social practice at the interpretive stage and Gadamer’s prejudices enable an interpreter to anticipate the meaning of what is to be understood, they also highlight another notable difference between the two theorists.

In order for an interpreter to see a social practice in its best light, Dworkin’s constructive interpretation requires him or her to settle on a justification for that practice at the interpretive stage. By considering the rules and standards which make up a social practice, as articulated at the pre-interpretive stage, and settling on a justification for those rules and standards at the interpretive stage, Dworkin’s interpreter is able to understand the sense or purpose of a social practice. For, without the ability to have in mind some purpose, justification or reason for a social practice, an interpreter’s understanding would be reduced to articulating an empirical explanation of the social practice. Similarly, Gadamer highlights that it is only to the extent that one anticipates the meaning of something through the holding of prejudices that it appears as anything at all.

However, Gadamer’s prejudices are, unlike Dworkin’s justification, not definitive in shaping an interpreter’s final understanding of the object of interpretation. Prejudices are necessary, Gadamer says, in order to project a preliminary meaning onto the object of interpretation so that it is understandable to an interpreter: they are, in effect, pre-judgements which enable an interpreter to begin a metaphorical “conversation” with the object of interpretation. Once this dialogue begins, an interpreter will reflect on his or her prejudices against those of the object of interpretation and, in so doing, will distinguish the prejudices by which we understand and must retain from those opinions by which we misunderstand and must reject.145

Unlike Gadamer, Dworkin constrains interpreters at the interpretive stage of constructive interpretation by requiring the justification they settle on to fit the rules and standards of a social practice as discovered at the pre-interpretive stage enough for the

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interpreter to be able to see himself or herself as interpreting that practice and not inventing a new one. As Dworkin describes the requirement of fit:

A participant interpreting a social practice, according to that view, proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. Very often, perhaps even typically, the raw behavioural data of the practice—what people do in what circumstances—will undermine the ascription of value: those data will be consistent, that is, with different and competing ascriptions … If the raw data do not discriminate between these competing interpretations, each interpreter’s choice must reflect his view of which interpretation proposes the most value for the practice...

Similar to the constraint of consensus at the pre-interpretive stage, the requirement at the interpretive stage that an interpreter’s justification must fit a social practice’s pre-interpretive content is passive. It does not engage with the interpreter as he or she endeavours to settle on a justification but acts as a constraint to be overcome by the interpreter. The requirement of fit, which represents a one-way relationship from interpreter to social practice, does allow the interpreter to reflect on the social practice’s prejudices at the interpretive stage. It does not, however, enable him or her to reflect on his or her own prejudices.

For Dworkin, once an interpreter has settled on some justification for a social practice, the post-interpretive stage of constructive interpretation requires him or her to reform the practice so as to make it the best it can be. Noting that an interpreter’s justification for a social practice merely requires a degree of fit with the content of that practice, the post-interpretive stage of constructive interpretation may be seen as the point at which

146. Dworkin, Law’s Empire, 66. For further discussion on the distinction between interpretation and invention see Dworkin, A Matter of Principle, 146-177.
147. Dworkin, Law’s Empire, 52-53.
148. The requirement of fit is, however, a weaker constraint on the interpreter than the pre-interpretive requirement of consensus about the rules and standards that are taken to make up a social practice. Ibid, 67-68.
an interpreter moulds or shapes a social practice to exemplify his or her unreflective prejudices about what it should be.

The interpreter’s role at the interpretive and post-interpretive stages of constructive interpretation ensures that the prejudices of the social practice will be reflected on and challenged by the interpreter. The passive role of the social practice at the pre-interpretive and interpretive stages enables little opportunity for an interpreter to reflect on his or her own prejudices at any stage of constructive interpretation. Rather than the engagement between the interpreter and the social practice determining the content of the social practice,\(^{149}\) constructive interpretation grants the interpreter licence to determine this content, based on his or her prejudices.

Constructive interpretation does not, therefore, fulfil Gadamer’s vision of a fusion of horizons but, rather, is the process of overlaying the horizon of the social practice with the interpreter’s horizon. David Couzens Hoy has rightly suggested that, “although Dworkin has argued against reducing interpretation to authorial intention, as has Gadamer, he has not freed himself sufficiently from intentionalism, and has come too close to reducing textual meaning to interpreter’s intention.”\(^ {150}\)

While Dworkin rightly observes that interpretation assumes that a social practice can benefit from an interpreter, an interpreter can also learn from a social practice. To say that an interpreter’s horizon can be expanded or enhanced by encountering new objects of interpretation is at the same time to grant that there is a difference between the “best as he or she has understood it so far” and “what this new object of interpretation now shows him or her beyond his or her previous conception”.\(^ {151}\) This difference suggests that understanding is not just the process of overlaying the horizon of the object of interpretation with the horizon of the interpreter. As Gadamer says, our understanding through interpretation is always supplemented from the individual case, even productively determined by it.\(^ {152}\)

\(^{151}\) Hoy, "Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism," 340.
Making a social practice the “best it can be”

Constructive interpretation requires an interpreter to interpret a social practice so as to see it in its best light. As we know, Gadamer acknowledges the importance of an interpreter approaching the object of interpretation with an anticipation of completeness. Furthermore, as Hoy has pointed out,

the idea of constructive interpretation has intuitive appeal. Hermeneutics from Schleiermacher and Dilthey to Heidegger and Gadamer has been predicated on the assumption that the interpreter must grant to what is being interpreted, if not empathy, at least some initial sympathy and charity.\footnote{153}

However, while an anticipation of completeness is a necessary precondition to ensuring that an interpretation is reflective, Dworkin’s best light requirement goes considerably further, ensuring interpreters invent, not interpret, social practices. Furthermore, Hoy argues that Dworkin’s claim that constructive interpretation consists of making a social practice the best it can be is “not descriptive of the real practice of interpretation.”\footnote{154} For example, we do not hear interpreters arguing that their interpretation of Mao’s Cultural Revolution or Pol Pot’s Agricultural Socialism makes them the best they can be.

Dworkin does acknowledge his optimisation requirement is not a necessary feature of all interpretation and affirms it only as a paradigm case:

I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets – a “scientific” interpretation of the Holocaust would not try to show Hitler’s motives in the most attractive light, nor would someone trying to show the sexist effects of a comic strip strain to find a non-sexist reading – but only that this is so in the normal or paradigm cases...\footnote{155}

\footnotesize{153. Hoy, "Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism," 338.  
154. Ibid, 341.  
155. Dworkin, Law's Empire, 421.}
His restriction of constructive interpretation to normal or paradigmatic cases, however, suggests that optimisation is a matter of degree, and that there might be a range of interpretation where interpreters do not really try to see the object of interpretation in its best light.\footnote{156}

However, Dworkin argues that even in a situation where an interpreter interprets an object in its worst light, his or her interpretation would still presuppose, and be necessarily parasitic on, the best interpretation:

Someone might set out to discredit a writer, of course, by trying to show the latter’s work in the worst not the best light, and he will naturally present his case as an interpretation, as a claim about what that writer’s work ‘really is’. If he really does believe that no more favourable interpretation fits equally well, then his argument falls under my description. But suppose he does not, and is suppressing a more attractive reading that is also eligible given the text. In that case his strategy is parasitic on the normal description, because he will succeed only if his audience is unaware of his true aims; only if they believe he has tried to produce the best interpretation that fits.\footnote{157}

As Hoy notes, “here he goes back toward proposing his constructive theory not as applying only to normal or paradigm cases, but as supplying a logically necessary feature of all interpretation.”\footnote{158} However, there are cases, of which Dworkin’s example of the Holocaust is one, where the application of his optimisation requirement invalidates an interpretation. Some things seem so despicable that any attempt to legitimate, enhance or justify them thwarts the interpretive task of understanding what a social practice \textit{really} requires. What a social practice really requires is not what an interpreter thinks it \textit{should}, in its ideal form, require but what it actually \textit{does} require.

\begin{footnotes}
\item[156] Hoy, "Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism," 343.
\item[157] Dworkin, \textit{Law's Empire}, 421-422.
\item[158] Hoy, "Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism," 344.
\end{footnotes}
In direct contrast to Dworkin’s best light requirement, the best possible interpretation from Gadamer’s perspective is the interpretation that is closest to achieving a fusion of both the interpreter’s and the object of interpretation’s horizons. Only by engaging in a dialogue with the object of interpretation can an interpreter become aware of his or her own, and the object of interpretation’s, prejudices and retain only those that withstand critical reflection. Thus, “hermeneutical awareness comes in degrees”: the more conscious an interpreter is of the prejudices guiding his or her interpretation, the better that interpretation is. Gadamer’s fusion of horizons ensures that both the object of interpretation and the interpreter play an active role in the process of interpretation, enabling reflection on the prejudices of both. It ensures that interpretation is a partnership where neither partner dominates the relationship. While Dworkin’s endeavour to answer the question of how an interpreter is to produce the best possible interpretation is a noble endeavour, his answer highlights a fundamental difference between constructive interpretation and philosophical hermeneutics.

**Conclusion**

Dworkin's theory of constructive interpretation characteristically requires an interpreter to interpret a social practice so as to see it in its best light. It shares many similarities with Gadamer's philosophical hermeneutics. Most notably, both Dworkin and Gadamer reject the view that the human sciences can be reduced to what is empirically observable. Interpretation is therefore required to understand the socially and historically constituted sense or purpose of human actions. Linked to this acknowledgement is Dworkin and Gadamer's rejection of subjectivity. As an interpreter, and the interpretations he or she produces, is partly constitutive of his or her social and historical context, those interpretations are not subjective. At the same time, the constitutive role the interpreter, and his or her unique horizon, plays within both theorists' thinking negates any possibility of objectivity in the strong sense.

While there are several fundamental similarities between Dworkin and Gadamer's theories, there are also some significant differences. First among them is the role that the object of interpretation plays. While constructive interpretation perceives the social

159. Wright, *Festivals of Interpretation*, 117.
practice as a constraint for the interpreter to acknowledge and struggle to overcome, the role the object of interpretation plays in philosophical hermeneutics is active, fundamental to enabling an interpreter to reflect on his or her prejudices and thus to achieving understanding. Second is the role of the interpreter in their respective approaches. While the role that Gadamer's interpreter plays reflects a balanced relationship between interpreter and the object of interpretation, Dworkin's interpreter dominates the process of constructively interpreting a social practice so that his or her horizon overlays the horizon of the social practice. Finally, there is Dworkin's optimisation requirement. While Gadamer acknowledges it is important to approach the object of interpretation with an anticipation of completeness, Dworkin's theory goes considerably further by requiring an interpreter to see a social practice in its best light. Thus, while constructive interpretation is clearly similar to philosophical hermeneutics in several fundamental respects, it is also very different in other critical ways.
Interpreting Justice

Introduction
The objective of this chapter is to examine how Dworkin applies constructive interpretation to the concept of "justice." The approach taken to justice is important for Dworkin because of the pivotal role it plays in justifying his legal theory. The chapter will, therefore, begin by exploring how Dworkin applies constructive interpretation to the social practice of law to produce his legal theory of "law as integrity." Law as integrity argues that the purpose of law is to endeavour to uphold a society's "institution" of justice consistently. Institution or theory, as I shall call it, of justice here mean people's collective understanding of justice that governs their behaviour vis-à-vis an individual's personal theory of justice. Dworkin's account of law as the enforcement mechanism for a society's theory of justice means that he believes his theory of law as integrity justifies law's coercive power and explains the existence of an obligation on citizens to obey the law. This chapter points out, however, that such an obligation only exists for as long as the law upholds a society's theory of justice. The coherence of Dworkin's theory of law as integrity, therefore, rests heavily on the approach he takes to the concept of justice.

With these stakes in mind, the chapter turns to consider Dworkin's approach to justice. While Dworkin acknowledges justice is an institution or theory we interpret like law, he does not constructively interpret it. Afraid of its supposedly relativist and subjectivist consequences, Dworkin abandons the constructive interpretation of society's theory of justice in favour of developing a personal theory.

After elucidating Dworkin’s approach to developing this personal theory of justice, the chapter argues that, despite Dworkin’s fears to the contrary, it is possible to interpret a theory of justice for humanity that is neither subjective nor relative. In doing so, it will first highlight the distinction between implicit and explicit shared meanings. This distinction unveils the presence of universally shared implicit meanings from which it is

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160. Whether as particular societies or universally as humanity.
possible to interpret a theory of justice for humanity that is immune from the threat of relativism. This chapter further shows that an interpretation of a theory of justice for society or humanity grounded on implicit shared meanings need not fall victim to the threat of subjectivism either. Finally, I argue that the objectivity of Dworkin's personal theory of justice relies on the existence of implicit shared meanings of which his own understanding of objectivity rejects the relevance.

**Law as integrity**

Dworkin's legal theory of law as integrity stems from his dissatisfaction with the way his predecessors of legal philosophy explained philosophical disagreements about law. Falling prey to the semantic sting, many legal theorists, including Herbert Hart, suggested that genuine disagreement can only occur when people accept and follow the same criteria for deciding when each others' claims are valid. However, when lawyers and judges engage in philosophical disagreements about law, Dworkin suggests that, despite the absence of shared criteria to validate each other's claims, those disagreements are still genuine. For example, in a particular case "one judge, proposing one set of tests, [may say] the law favours the school district or the employer, and another, proposing a different set [of tests], that it favours the schoolchildren or the employee." While neither judge shares the tests of the other, Dworkin argues that their disagreement is still genuine.

Dworkin suggests, therefore, that the social practice of law, like his example of the social practice of courtesy, is also an interpretive concept whose participants have undertaken an interpretive attitude towards it. For, first, there exists an assumption within society that law does not simply exist but has a value, purpose or point.

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164. Ibid, 3.
166. Ibid, 47.
Second, there is an assumption that the rules and standards that make up law are not static, but are fluid so as to be sensitive to its purpose. 167

Thus, Dworkin suggests that lawyers and judges characteristically “develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice.” 168 When they have philosophical disagreements about law, those disagreements are interpretive. They are disagreeing, that is, about the soundest interpretation of some important aspect of judicial practice. 169

With the interpretive attitude flourishing, constructive interpretation not only decides why the law exists, but also “what, properly understood, it now requires.” 170

It is this phenomenon which Dworkin believes constructive interpretation more accurately accounts for and he accordingly applies it to the social practice of law. For Dworkin, the best constructive interpretation of the social practice of law is the one that best justifies the law's coercive power and explains a citizen's obligation to obey the law. 171 This justification in turn derives from the principle of integrity. 172 According to Dworkin, "Integrity requires consistency because otherwise there could be no coherent principle justifying law, and hence no right answer about what the law was in a given jurisdiction." 173 Thus, Dworkin's theory of law as integrity requires judges to decide cases and lawmakers to write legislation 174 in such a manner that the law becomes more coherent, appearing as the product of a single vision, just like the authors in his chain novel analogy. 175 Integrity alone is not, however, enough to justify the coercive power of the law. Dworkin concedes that it is possible for the legislature and judiciary to make

167. Ibid.
168. Ibid, 87.
169. Ibid, 87.
174. “Law as integrity” is a legislative as well as adjudicative principle, but Dworkin applies it most prominently in the domain of adjudication.
consistently unfair or wrong decisions. The single vision of the law which integrity must advance, therefore, is that the social practice of law is constitutive of a society's institution or theory of justice. As mentioned in the Introduction, Dworkin's foundational right is commonly referred to as 'the right to justice', 'the right to equality' or 'the right to equal concern and respect'. Dworkin, Law's Empire, 185.


178. Ibid, 73.

179. Ibid, 73.
interpretive attitude towards it. While the interpretive attitude may not be a conscious undertaking, participants "each - some more reflectively than others - form a sense of justice that is an interpretation nonetheless, and some of [them] even revise [their] interpretation from time to time.\textsuperscript{181}\ That is, there is an assumption amongst participants of the social practice of justice that it does not simply exist but has a purpose and that the requirements of justice are sensitive to that purpose. Consequently, Dworkin suggests that:

Perhaps ... justice started ... in simple and straightforward rules about crime and punishment and debt. But the interpretive attitude flourished by the time the earliest political philosophy was written, and it has flourished since. The progressive reinterpretations and transformations have been much more complex than those I described for courtesy, but each has built on the rearrangement of practice and attitude achieved by the last.\textsuperscript{182}

The existence of this interpretive attitude prompts Dworkin to conclude that justice is an institution, or social theory, we interpret.\textsuperscript{183} By referring to justice as an institution, Dworkin draws an important distinction between the institution or social theory of justice on the one hand, and a personal theory of justice on the other. Society’s theory of justice means people’s\textsuperscript{184} collective understanding of justice that governs their behaviour. By contrast, justice as a personal theory is an individual’s view about what justice means for them personally.

When Dworkin says "justice is an institution we interpret"\textsuperscript{185} he is therefore claiming: first, that there exists a collective understanding amongst society about what justice requires; and second, that that collective theory is sensitive to the purpose society

\textsuperscript{181}. Dworkin, \textit{Law's Empire}, 73-74.
\textsuperscript{182}. Ibid, 74.
\textsuperscript{183}. Dworkin uses the terms "institution" and "social practice" interchangeably. As the distinction does not impact upon Dworkin's endeavour to constructively interpret justice, I follow his lead in this chapter. The distinction between interpreting the institution and social practice of justice will, however, become important in chapter three when I hermeneutically reconstruct constructive interpretation. Ibid, 73, 224.
\textsuperscript{184}. Whether as a particular society or universally as humanity.
\textsuperscript{185}. Dworkin, \textit{Law's Empire}, 73, 224.
believes justice serves. Having come to this conclusion, Dworkin undertakes to interpret constructively society’s theory of justice.

As the pre-interpretive stage of constructive interpretation demands, Dworkin suggests that society shares a sense of the rough boundaries of its theory of justice.\textsuperscript{186} As he notes, "[i]t is paradigmatic for us now that punishing innocent people is unjust, that slavery is unjust, that stealing from the poor for the rich is unjust."\textsuperscript{187} While some explicit agreement exists about society’s theory of justice, however, it is only about the rough or "tentative content".\textsuperscript{188} Indeed, the fact that we frequently, or even characteristically, disagree about what justice requires is testament to the fact that such agreement is not ubiquitous.

Nevertheless, it is the existence of this pre-interpretive consensus about society’s theory of justice that Dworkin says enables us to distinguish between those arguments about society’s theory of justice we reject from those arguments that we would even not count as arguments about society’s theory of justice at all.\textsuperscript{189} For example, while we may deplore the arguments about justice advanced by a libertarian, we can distinguish them as arguments about what society’s theory of justice should be. In contrast, the notion that "abstract art is unjust" is deemed incomprehensible as an argument about society’s theory of justice according to our pre-interpretive consensus about the rules and standards that make up that theory. It is this consensus that ensures that the interpretive attitude flourishes, enabling meaningful agreements and disagreements about society’s theory of justice.

However, it also ensures that an interpretation of justice is neither an interpreter's personal theory of justice, nor that of other individuals within a society, but is an attempt to understand what justice means for society as a collective. As Dworkin says, an interpreter of society’s theory of justice "must distinguish between trying to decide what other members of his community think [it] requires and trying to decide, for

\textsuperscript{186} Ibid, 75.
\textsuperscript{187} Ibid.
\textsuperscript{188} Dworkin, \textit{A Matter of Principle}, 217.
\textsuperscript{189} Dworkin, \textit{Law's Empire}, 75.
himself, what it really requires.” Of course, this is not to say that Dworkin believes an interpreter can acquire an objective understanding (in the strong sense) but, simply, that he or she must attempt to understand what the theory of justice means for society as a collective. Indeed, it is critical to interpret society's collective understanding of justice because, as we know, it is the instantiation of society’s theory of justice which Dworkin believes explains citizens' obligation to obey the law and thus validates law as integrity.

The threat of relativism

While there is a pre-interpretive consensus about the rules and standards that make up the tentative content of society’s theory of justice, Dworkin suggests that these rules and standards only exist within the society in which the theory of justice is interpreted. For example, while members of a particular society may agree that justice requires universal suffrage and that corporal punishment should be abolished, these rules may not be included in the pre-interpretive rules and standards of another society's theory of justice. Indeed, another society may very well hold, at the pre-interpretive stage, that the collective theory of justice requires suffrage only be granted to men and the imposition of corporal punishment for murder. Dworkin concludes, therefore, that a theory of justice is relative to the society in which it is interpreted.

Dworkin does not believe this perceived pre-interpretive divergence between societies is a problem for social practices like courtesy and law, because an interpreter of law or courtesy knows that his or her interpretation of that practice within their society will not necessarily be the same as another interpreter's interpretation of a comparable practice.

190. Ibid, 64.
within another society. He does, however, believe it severely reduces the utility of constructively interpreting a society’s theory of justice. As Dworkin says,

if we take justice to be an interpretive concept, we must treat different people's conceptions of justice ... as claiming a more global or transcendental authority so that they can serve as the basis for criticizing other people's practices of justice even, or especially, when these are radically different.

When I say that "slavery and genocide are unjust," Dworkin suggests that I am not merely making the relativist statement that slavery and genocide are wrong for members of my society, but that I am making the universal statement that they are unjust for everyone, everywhere. If the constructive interpretation of a theory of justice is only capable of producing an understanding which is relative to a particular society, therefore, Dworkin believes it is of no practical value to philosophers, politicians and everyday people who debate matters of justice.

**A quasi-interpretive approach**

David Fagelson argues that, with this threat of relativism front of mind, Dworkin considers justice to be a "quasi-interpretive" concept. On the one hand, Dworkin acknowledges that different peoples' understanding of justice will develop as interpretations of their society's theory of justice. On the other hand, however, Dworkin rejects the applicability of his theory of constructive interpretation to interpret what justice means for a society.

When interpreting justice, Dworkin says that, compared to law and courtesy, "the leeways of interpretation are ... much more relaxed". An interpretation, Dworkin tells us, "is not required to provide a good fit with the political or social practices of any

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194. Fagelson has pointed out, however, that some communities, like Judaism, define justice as absolute and yet local in its application. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 576 and Dworkin, *Law's Empire*, 424.
198. Ibid, 425.
particular community, but only with the most abstract and elemental convictions of each interpreter."199

Constructive interpretation was developed as an interpretive theory for understanding what social practices mean for society. In order to ensure that interpretations do just that, and are neither the personal theory of an interpreter nor that of other individuals within a society, the pre-interpretive and interpretive stages of interpretation imposed constraints on the interpreter. Firstly, the pre-interpretive stage required a consensus about the tentative rules and standards taken to make up the content of the social practice. Secondly, the interpretive stage required the justification for the practice that the interpreter settled on to provide a degree of fit with this pre-interpretive consensus.

Yet, Dworkin's statement, that the leeways of interpretation are much more relaxed for an interpretation of justice, removes both constructive interpretation's pre-interpretive and interpretive constraints. While Dworkin acknowledges that an interpreter's interpretation of justice will still develop as an interpretation of his or her society's theory of justice,200 according to his statement, society’s theory of justice will provide no constraints on an interpreter. Accordingly, an interpreter's interpretation of justice will develop in whichever way he or she alone dictates. An interpretation without such constraints will never reflect what, as a collective theory, justice means for society but only what, as a personal theory, justice means for an individual interpreter. In rejecting the application of constructive interpretation, Dworkin abandons the attempt to interpret constructively what the theory of justice means for society in favour of understanding what justice, as a personal theory, means for the individual.

As a consensus exists within particular societies about the rules and standards that make up the tentative content of those societies’ theories of justice, it is possible to interpret constructively what, as a collective theory, justice means for those societies. However, as no such consensus exists between societies,201 Dworkin concludes that it is not possible to interpret constructively what, as a collective theory, justice means for

199. Ibid.
humanity. As such, he believes people characteristically develop personal theories of justice. As he puts it, people's "main work consists ... in developing and defending what are plainly full-blooded conceptions of justice, controversial theories that go well beyond paradigms into politics."\textsuperscript{202}

Far from an interpretation of what justice means for society, these "full-blooded conceptions" merely represent each individual's personal theory of justice. According to Dworkin, "There is nothing neutral about these [theories]. They are interpretive,\textsuperscript{203} but they are committed, and their value to us springs from that commitment."\textsuperscript{204} It is this commitment to a personal theory of justice, vis-à-vis society's theory, that Dworkin believes mitigates the threat of relativism. By relying on a personal theory of justice, Dworkin believes that he does not have to account for the global variance amongst different societies' theories of justice. Instead, he asserts that his theory of justice is universally applicable; that, consequently, his views about the justice or otherwise of any given situation can be said to be “right” or “wrong” irrespective of which society they arise in; and that he is therefore entitled to criticise the views and values of other societies if they contravene his personal theory of justice. While such an approach does prevent Dworkin from having to explain why the existence of the global variance amongst different societies' theories of justice is not proof that those theories of justice are relative to their respective societies, it does instead require him to explain why his personal theory of justice is justified in claiming universal application.

As we know, Dworkin still claims that personal theories of justice are quasi-interpretive.\textsuperscript{205} If these personal theories are to be quasi-interpretive and yet still claim universal application and thus avoid the threat of relativism, Dworkin must make one of the following two claims. He can claim that he is entitled to affirm an interpretation of a personal theory of justice with global application because, drawing on constructive interpretation's optimisation requirement, this is the best interpretation of his society's

\begin{itemize}
  \item \textsuperscript{202} Ibid, 75-76.
  \item \textsuperscript{203} Dworkin believes they are still quasi-interpretive because different people’s ethical conceptions of justice will still develop as interpretations of their society's institution of justice.
  \item \textsuperscript{204} Dworkin, Law's Empire, 76.
  \item \textsuperscript{205} Ibid, 73.
\end{itemize}
theory of justice. Alternatively, he must claim that this interpretation makes justice the best it can be.

It is immediately apparent, however, that the first is not an option for Dworkin. Having abandoned constructive interpretation and the pre-interpretive and interpretive constraints that it incorporates, Dworkin cannot claim to be interpreting what, as a collective theory, justice means for his society. While inevitably evolving from an interpretation of a society’s theory of justice in which he participates, no constraints exist on Dworkin to ensure that the interpretation that results reflects in any way the society’s theory of justice that it has evolved from. Dworkin must, therefore, endorse the second option and claim that his interpretation of justice, as a personal theory, is best understood as claiming universal application because it makes justice the best it can be.

As Dworkin acknowledges, this requires him to jettison any idea that treating personal theories of justice as interpretive tells us anything about the conditions for their justification. As we know, the fact that personal theories of justice evolve from interpretations of societies' theories does not impose any constraints on an interpreter. Its collective origins do not, therefore, in any way justify a personal theory of justice. Indeed, Dworkin emphasises this point:

For it is part of our common political life, if anything is, that justice is our critic not our mirror, that any decision about the distribution of any good - wealth, welfare, honors, education, recognition, office - may be reopened, no matter how firm the traditions that are then challenged, that

206. As Mahoney, points out, referring to "interpretation" here is somewhat dubious. "If the restrictions of fit do not preclude affirming a principle as just, the sense in which claims about justice are interpretive is rather unclear." Jon Mahoney, "Objectivity, Interpretation, and Rights: A Critique of Dworkin," Law and Philosophy 23, no. 2 (2004): 213.
207. Ibid.
208. For a good overview of the fundamental importance of universality for such theories see Max Pensky, The Postnational Constellation (Cambridge: M. I. T. Press, 2001).
we may always ask of some settled institutional scheme whether it is
fair.211

Personal theories of justice, Dworkin says, must be theories we accept because we
believe them to be right,212 not because they fit some contemporary social theory of
justice.213

While in the previous chapter we saw that Dworkin does not view objectivity as critical
for his theory of constructive interpretation, he does view it as critical for his quasi-
interpretive personal theory of justice. Dworkin does not argue that anybody who
constructively interprets a social practice will give the objectively right interpretation.
Rather, he makes the claim that interpreters should endeavour to achieve the best
interpretation of that social practice. This is, however, a weak claim to objectivity. It
will be recalled that he does not embrace objectivity in the strong sense;214 the view
“that there is a world of objective reality that exists independently of us and that has a
determinate nature or essence that we can know.”215 Instead, Dworkin argues that there
is a natural or face-value way to read people's, including Dworkin's, everyday claims to
objectivity. He says that “We use the language of objectivity ... to repeat [claims],
perhaps in a more precise way, to emphasize or qualify their content.”216

Dworkin believes that we make claims to objectivity (in this weak sense) in three
distinct ways. The first is “to distinguish genuine ... claims from mere reports of
taste.”217 That is, that we use the language of objectivity to assert that our claims are not
subjective. The second and third are that we use the language of objectivity to assert
that our claims are “universal” and “absolute.” Take, for example, the claim that
“abortion is wrong.” If I were to say that “abortion is wrong for everyone no matter

212. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 576, Gordon
Baker and Peter Hacker, An Analytical Commentary on Wittgenstein's Philosophical Investigations
214 Ronald Dworkin, "Walzer: You'd Better Believe It," Philosophy and Public Affairs 25,
216. Dworkin, Law's Empire, 81.
217. Ibid.
what circumstance, culture, religion or ethical background they come from, ”218 I would be claiming that abortion is universally wrong; that it is wrong for everyone everywhere. I would, that is, be asserting that my claim is not relative. If I were to claim that abortion “is never overridden by competing considerations, that it is never true, for example, that abortion is the lesser of two evils,”219 I would be claiming that abortion is absolutely wrong, or that nothing can change the fact that abortion is wrong. According to Dworkin, these assertions say not only that I think abortion is wrong, but that it is “objectively,” in the weak sense, wrong by repeating, emphasising, or qualifying the content of the original claim and by asserting that my claim that abortion is wrong is universal and/or absolute.

True to this claim, while Dworkin believes his own quasi-interpretive 220 personal theory of justice 221 is "objective,"222 he does so in the weak sense merely to emphasise that he is claiming to have produced the best possible personal theory of justice. He believes, that is, that his theory of justice is not just another possible theory, much like a subjective report of taste, but that it holds universally and absolutely. As such, Dworkin’s claim does not necessitate the additional claim to objectivity in the strong sense that there is some permanent framework to which he is appealing when claiming that his conception is objective independent of humanity.223 As we know, he explicitly rejects this metaphysical realist 224 or strong objectivist view.225 His use of the word “objective” is therefore more appropriately understood as a weak claim to objectivity

218. Ibid, 98.
220. As we now know, while Dworkin's personal ethical conception of justice is an interpretation of his society's institution of justice, that institution does not constrain Dworkin's conception in any way.
221. Equal concern and respect.
that rejects both subjectivism and relativism, but is not based on absolute foundations.\(^{226}\)

Not only does Dworkin believe his personal theory of justice is objective in the weak sense, but he also contends that philosophers of justice characteristically believe so too:

Disputes about justice almost always take the form of argument, not about how important justice is or when it should be sacrificed to other values, but what it is. That is, we might say, where the action is. It would therefore be most implausible to treat a philosophical theory of that concept as Archimedean: it would be implausible, that is, to suppose that an informative theory about the nature of justice could be neutral among issues of substantive political argument. True, skeptical philosophers of justice - who argue that justice is only in the eye of the beholder, or that claims of justice are only projections of emotion - often suppose that their own theories are neutral. But it would be very surprising to find a philosopher defending a positive conception of justice - that political justice consists in the arrangements that maximize a community's wealth, for example - who believe that his theory was not itself a normative theory. Philosophers of justice understand that they are taking sides...\(^{227}\)

It is, however, questionable whether this particularly weak claim to objectivity can justify his reliance on moral truisms about human nature in his personal theory of justice.\(^{228}\) Dworkin claims that unlike law:

Interpretations of justice cannot themselves appeal to justice, and this helps explain the philosophical complexity and ambition of many

\(^{226}\) Indeed, consistent with his view of the interpreter’s task of producing the best interpretation, Dworkin claims that he thinks his theory of constructive interpretation is the best interpretation of interpretation. For, as he says, “a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts. (So any adequate account of interpretation must hold true of itself.)” Dworkin, Law’s Empire, 49.


theories of justice. For once justice is ruled out as a point of fundamental and pervasive political practice, it is natural to turn for a justification to initially non-political ideas, like human nature or the theory of the self, rather than to other political ideas that seem no more important or fundamental than justice itself.\(^{229}\)

Dworkin has emphasised that personal theories of justice that claim universality cannot be justified by reference solely to their origins as interpretations of a society’s theory of justice.\(^{230}\) However, he does suggest here that those same universal personal theories could depend on what might be described as moral truisms or facts about human nature.

Dworkin's personal theory of justice requires a political community to treat all its members "with equal concern and respect."\(^{231}\) While within the pages of *Sovereign Virtue*\(^{232}\) Dworkin articulates a comprehensive theory of justice that includes subsidiary conceptions of freedom, community and political democracy, the book is most famous for its definition and defence of a personal theory of distributive justice that has come to be called "equality of resources." Dworkin justifies this theory by reference to the moral truisms or facts about human nature\(^ {233}\) that people are responsible only for the life choices they make\(^ {234}\) and that, accordingly, what people have should be sensitive to choice but insensitive to endowment.\(^ {235}\)

On the surface Dworkin's reliance on such truisms would be better justified by a claim to the strong sense of objectivity or metaphysical realism rather than his claim to a weak sense of objectivity.\(^ {236}\) Reliance on moral truisms does, of course, require someone to believe that views about morality, such as one’s personal theory of justice, are not

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\(^{229}\) Dworkin, *Law’s Empire*, 425.

\(^{230}\) For an alternative account of this understanding of Dworkin see Guest, *Ronald Dworkin*, 235. For a critique of Guest’s account in turn, see Mahoney, "Objectivity, Interpretation, and Rights: A Critique of Dworkin," 206.


\(^{232}\) Dworkin, *Sovereign Virtue*.

\(^{233}\) As Dworkin considers justice to be only a quasi-interpretive concept, Mahoney suggests that perhaps the justification for justice stems from moral truisms about human nature. Mahoney, "Objectivity, Interpretation, and Rights: A Critique of Dworkin," 214.


\(^{235}\) Ibid, 120.

\(^{236}\) For an earlier discussion of this supposed tension see MacCormick, "Dworkin as Pre-Benthamite."
subjective or relative; that they are more than the mere expression of a personal preference and apply universally. It must, that is, at least include a claim to objectivity in the weak sense. However, reliance on moral truisms requires more than the mere rejection of the idea that our views about justice are comparable to our taste in ice cream or relative to a particular society. For, the idea of moral truisms includes the assertion that they are true as a matter of “fact” which is entirely independent of human beings’ cognitive ability to perceive it. It is this assertion about the nature of morality that is advanced by metaphysical realism or objectivity in the strong sense. Indeed, Jon Mahoney suggests that Dworkin may need to rely on "a moral point of view," rather than the interpretive pedigree of his personal theory of justice, to justify its universal applicability.\textsuperscript{237}

Dworkin's answer to this conundrum lies in his theory of the "will to objectivity," first developed in \textit{Law's Empire} but presented most powerfully two decades later in \textit{Objectivity and Truth: You'd Better Believe It}.\textsuperscript{238} According to this theory, Dworkin knows his personal theory of justice, and the truisms it relies on, are objectively true because he holds the conviction to that end. He cannot, that is, think of a convincing reason to believe otherwise.\textsuperscript{239} As he explains,

any reason we think we have for abandoning a conviction is itself just another conviction, and that we can do no better for any claim, including the most sophisticated skeptical argument or thesis, than to see whether, after the best thought we find appropriate, we think it so, if you can't help believing something, steadily and wholeheartedly, you'd better believe it. Not, as I just said, because the fact of your belief argues for its own truth,

\textsuperscript{237} As Mahoney says, "One could develop the thought that claims about justice appeal for their justification to "the most abstract and elemental convictions of each interpreter" by claiming every interpretive exercise that concerns justice is subordinated to demands of practical reason that enjoin agents to accept reasons all can share. However, for this strategy to succeed, Dworkin would have to characterize the constraints on our reflective convictions in terms of reasons that potentially bind all reasonable persons. And if he accepts this, then the moral rather than interpretive point of view will be advanced as the source of justification for moral norms with universal scope in which case is conception of moral justification would be similar to the one preferred by Kantian realists." Mahoney, "Objectivity, Interpretation, and Rights: A Critique of Dworkin," 214.

\textsuperscript{238} Dworkin, "Objectivity and Truth: You'd Better Believe It."

\textsuperscript{239} Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 578.
but because you cannot think any argument a decisive refutation of a belief it does not even dent. 240

This approach does, however, still require someone somewhere to hold the conviction that Dworkin's personal theory of justice, and the truisms it relies on, are objectively true for them to be so - even if that someone is Dworkin himself.

Yet, as Fagelson has argued, Dworkin's approach of establishing objectivity by reference to someone's convictions "contradicts [his] fundamental idea of objectivity as something that remains true even if no one in the world believed it." 241 For example, Dworkin argues that the requirements of justice, dictating that human beings be treated with equal concern and respect, remain objectively true whether or not anybody actually believed them to be. 242 In particular, his example of slavery exemplifies this view. Dworkin says that slavery is "objectively" wrong, that this is not just a matter of opinion, that it would be true even if he, and everyone else, thought otherwise. 243 At the same time as arguing that objectivity is independent of whether or not anybody holds a conviction that it is, 244 Dworkin maintains that objectivity is achieved by someone holding a conviction that it is. 245

His response to this apparent contradiction is to sidestep the issue by arguing that, for someone who has this conviction, 246 it is true whether or not he or she or anyone else believes it to be. 247 This approach simply relies on Dworkin having a prior conviction that objectivity is independent of anyone's, including his own, views about it. 248 As Fagelson describes Dworkin's argument, "Objectivity is achieved by personal convictions and remains true for that person regardless of what is going on out in the world." 249 It is no exaggeration to say, as Dworkin does, that in order to justify the

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242. Dworkin, Law's Empire, 80-82.
243. Ibid.
244. Ibid, 80.
246. That objectivity is independent of anybody actually believing it to be.
247. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 578.
249. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 578.
objectivity of his personal theory of justice, "In the beginning, and in the end, is the conviction." 250

While Dworkin's argument obviously does not prove the objectivity of moral beliefs, therefore,251 it does nevertheless "suggest that no one need abandon those beliefs if they are not persuaded otherwise." 252

Thus, for Dworkin, the objectivity of his personal theory of justice is justified because he holds the conviction that objectivity is independent of anyone, including himself, actually believing it is. In this way, Dworkin is able simultaneously to claim his personal theory of justice is objective in the weak sense253 and maintain that it is right, whether or not anyone, including himself, actually believes it is. Using this approach, there is no need for Dworkin “to give our ordinary moral or interpretive claims a bizarre metaphysical base.” 254 All that is required to establish their objectivity, in the weak sense, in Dworkin's eyes is the presence of a simple conviction.

As Fagelson notes, "[b]edrock convictions [like Dworkin's] can, of course, support a world view that one considers objectively true and determinate". 255 Unlike Dworkin's account of the natural or face-value meaning of our claims to objectivity however, his approach of justifying objectivity's independence from people's convictions about it in conviction is strikingly personal. For, his claim to objectivity rests on a conviction that is likely to be held by him alone. The validity or truth of his theory of justice is, therefore, likely to be unique to Dworkin. While he may consider his personal theory of justice to be objective and to apply universally for everyone therefore, the conviction

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251. Dworkin endeavors to prove the objectivity of morality by showing that, as there is no such thing as external skepticism about morality, any argument in favour of abandoning the objectivity of morality is simply another competing normative moral claim. As such, as Dworkin would say, "all the argument waits to be made." Dworkin, Law's Empire, 85. See also Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," Dworkin, "Objectivity and Truth: You'd Better Believe It," and Simon Blackburn, Essays in Quasi-realism (New York: Oxford University Press, 1993).
252. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 578.
253. That is, his view that people use the language of objectivity to repeat, emphasise or qualify their claims. Dworkin, Law's Empire, 81.
254. Ibid.
that Dworkin’s universal and objective theory of justice relies on likely only holds credence for Dworkin alone.

Furthermore, Dworkin's reliance on conviction to justify objectivity comes at a cost to his ability to reflect on prejudices. According to Gadamer’s theory of philosophical hermeneutics, an interpreter requires prejudices in order to enable him or her to grasp what is to be interpreted or understood in a preliminary fashion. However, as preliminary judgements or suppositions, through the fusion of horizons these prejudices will be reflected on and revised so that only those that are justified are relied upon.

Dworkin, along with all other objectivists, acknowledges the fallibility of convictions when he says that we should abandon them if we encounter more convincing ones. After all, we are all capable of making mistakes. However, his view, that the objectivity of morality is independent of people's convictions about it, makes his personal theory of justice irrefutable in practice. As we know, according to Dworkin’s theory of the will to objectivity, his personal theory of justice remains objective whether or not anybody actually believes it is. Indeed, as long as Dworkin holds the conviction that objectivity is independent of anyone's convictions about it, including his own, his ethical conception of justice remains objective even if everybody, including Dworkin, no longer believes it is. As long as Dworkin holds this conviction, that objectivity is independent of anyone's convictions about it, therefore, his personal theory of justice will remain irrefutable. As such, there is no need for Dworkin to reflect on his, or his personal theory’s, prejudices. Indeed, even if he did so, his reflections would have no impact on the objectivity of his personal theory of justice.

As Dworkin’s reliance on conviction inhibits his ability to reflect on both the prejudices of the object of interpretation (his personal theory of justice) and his own prejudices, Dworkin cannot distinguish between those prejudices which aid his understanding from

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258. Unless, of course, he reflected on and revoked his conviction that objectivity is independent of anyone's convictions about it.
259. Noting Dworkin's acknowledgement that ethical conceptions of justice develop from interpretations of social institutions which interpreters themselves participate in.
those opinions which misguide him. Dworkin therefore has no way of knowing whether the prejudices his personal theory of justice relies on are justified or not - whether they thwart or aid understanding.

The relativism of shared meanings debunked
For fear of the relativist consequences, Dworkin refutes the value of constructively interpreting a theory of justice for society and rejects the possibility of constructively interpreting a theory of justice for humanity and instead develops a personal theory. It is, however, appropriate to consider whether it is in fact possible to interpret a non-relativist theory of what justice means not only for particular societies, but for humanity.

An alternative non-relativist account of what justice means for humanity is possible with a distinction between implicit and explicit shared meanings. When considering the application of constructive interpretation to justice, Dworkin was conscious to ensure that there was a consensus at the pre-interpretive stage of the rules and standards that are tentatively taken to make up the content of the theory. While Dworkin concludes that these explicit shared meanings, as I shall call them, are present within a society, he does not believe they are present outside the society in which the theory of justice is interpreted. Without the presence of universally held explicit shared meanings about justice, Dworkin concludes that it is impossible constructively to interpret a universal theory of justice for humanity, and abandons it in favour of interpreting a personal theory instead. Fagelson has, however, highlighted the presence of what I shall call implicit shared meanings, which call into question Dworkin's decision to reject the interpretation of humanity's theory of justice as the basis for a universal, and therefore non-relativist, interpretation.

Fagelson's idea of implicit shared meanings or, as he calls, them "social forms" draws heavily on Ludwig Wittgenstein's concept of "forms of life." For Wittgenstein and the theory of meaning and understanding that he develops, “The meaning of an expression is what we understand when we understand that expression.” Understanding in this context requires one to know the expression’s use across the variety of, what Wittgenstein calls, "language-games" in which it occurs. Knowing an expression’s use is to have an ability to follow the rules for its use within those "language-games." Following rules, in this context, is not some mysterious inner process but rather “a practice embedded in the customs and agreements of a community and as such is essentially public.” While rules do guide and inform standards of correctness, they do so only because they are based on consensus: to follow a rule correctly, therefore, is to adhere to the agreed practices of a community. As Anthony Grayling describes Wittgenstein's point, “We acquire the ability to use expression, to follow the rules for their use, by our training as members of that community.”

It does not follow from Wittgenstein’s account of meaning and understanding that truth is the product of our agreements. As Wittgenstein clarifies:

"So are you saying that human agreement decides what is true and false?" – It is what human beings say that is true and false, and they agree in the language they use. That is not agreement in opinions but in forms of life.

Understood in this way, implicit shared meanings are

265. Ibid, 96.
266. As Grayling has observed, however, “one should not take it to imply that it is possible to understand expressions individually, for in Wittgenstein’s view it makes no sense to say that someone understands just one or a few sentences, or that he follows just one or a few rules. To understand any given sentence is to understand the language-games of which it is part; corollatively, to follow a rule is to have mastery of the practice of rule-following itself.” Ibid.
the underlying consensus of linguistic and non-linguistic behaviour, assumptions, practices, traditions, and natural propensities which humans, as social beings, share with one another, and which [are] therefore presupposed in the language they use.\footnote{268 Grayling, \textit{Wittgenstein: A Very Short Introduction}, 97.}

Consequently, meaning is only conferred on linguistic expressions because of the shared outlook and nature of its users.

In a similar vein to Wittgenstein, Joseph Raz has developed the notion of "forms of behaviour" that are widely practised and which reflect the “shared beliefs, folklore, high culture, collectively shared metaphors and imagination...” of a community.\footnote{269 Joseph Raz, \textit{The Authority of Freedom} (Oxford: Oxford University Press, 1986), 310-312.} It is upon Wittgenstein's "forms of life" and Raz’s "forms of behaviour" that Fagelson develops his idea of implicit shared meanings.\footnote{270 Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory.” Again noting that Fagelson prefers the term "social forms."}

Fagelson's idea of implicit shared meanings is particularly useful within the context of Dworkin’s theory of constructive interpretation because they distinguish themselves from explicit meanings (shared or not).\footnote{271 Ibid, 570-571.} As Fagelson says, implicit shared meanings about justice “are not the explicit agreements people have about the world, or common practices, or even social facts.”\footnote{272 Ibid, 571.} They are not, that is, the same as the explicit agreement between you and me that abortion, for example, is just, that euthanasia is ethical or that the death penalty is repugnant to the requirements of justice. Rather, they are "the implicit understandings people learn and share that make [such] explicit agreements (or disagreements) about justice possible.”\footnote{273 Ibid.}

It will be recalled that, at the pre-interpretive stage of constructive interpretation, Dworkin is concerned with the degree to which a society explicitly agrees on the rules and standards taken to belong to the society’s theory of justice. By contrast, Fagelson is concerned about the implicit shared meanings that make such explicit agreements
possible. Dworkin’s focus on the absence of explicit shared meaning about what justice means for humanity inhibits him from asking whether there exist implicit meanings universally shared, from which we can interpret a theory of justice for humanity.

This question, which Dworkin does not even think to ask, may well have an affirmative answer. Winch points out that the very idea of intentional behaviour requires that people's actions have meaning.\(^{274}\) As Fagelson explains, "the existence of the concepts that form the reasons for action are dependent on group life because they emerge from [implicit] shared meaning."\(^{275}\) Marking a piece of paper does not, for example, constitute voting in a democratic election unless the actor understands his or her actions to be contributing towards that process. Similarly, simply because a cat can mark a piece of paper with its paw, does not mean that it understands the practice of voting. Furthermore, while people invariably disagree about whether it is right to vote democrat or republican, labour or national, liberal or conservative, they will very rarely disagree about what it means to vote. Not only will they possess an implicit shared meaning about the purpose of voting, but, while not necessarily agreeing with a voter's explicit decision to vote for one political party or another, will be capable of understanding the reasons for that decision.

To determine whether these implicit meanings are universally shared, we need only determine whether people from a plethora of divergent cultural contexts can understand each other's arguments about typical issues of justice such as abortion, slavery and incest. It is critical to note that, consistent with Fagelson's idea of implicit shared meanings, people need not agree with each other about the explicit substantive requirements of justice such as whether slavery or incest or abortion is just or otherwise. All that is needed to illustrate the presence of universally shared implicit meanings about justice is an ability for people from diverse backgrounds to comprehend one another's arguments about it. The fierce debates that occur between academics at Cambridge and Stockholm, politicians at the United Nations and the Association of South East Asian Nations and ordinary people in Beijing and London on an almost ubiquitous basis are testimony to the existence of universally shared implicit meanings.

\(^{274}\) Winch, *The Idea of a Social Science and Its Relation to Philosophy*, 45, 49, 64.

\(^{275}\) Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 571.
about justice. While we do not all agree about the explicit requirements of justice, we all have the capacity to understand each other's arguments in favour of one requirement or another.

While shared explicit meanings about justice will exist to a greater or lesser degree depending on the place, time and people, implicit shared meanings about justice are not relative to any given society but exist universally, irrespective of social, historical or political context - no matter when we were born, where we live or who we are, we can all discern arguments about justice. For example, we share implicit linguistic meanings across languages, cultures, sexes, ages and to a very significant degree across times. Furthermore, we clearly share implicit societal or, more broadly, anthropological meanings about humanity’s theory of justice. Humanity is in agreement, if only implicitly, that justice is a moral concept, that it is a concept of what is right and wrong.

Notwithstanding Dworkin’s concern at the absence of universally shared meanings about justice therefore, Fagelson's distinction between implicit and explicit shared meanings highlights the existence of universally shared implicit meanings without which cross-cultural communication would be impossible. Their existence does not mean that disagreements about the explicit requirements of justice will vanish. It does, however, mean that we can understand and discern arguments about justice as just that, and not about abstract art, the rules of cricket or simply an assortment of senseless noises.

Dworkin abandons the constructive interpretation of humanity’s theory of justice because of the absence of universal consensus about the explicit rules and standards included in it. Indeed, notwithstanding his acknowledgement of the existence of rough or tentative explicit shared meanings about society’s theory of justice, Dworkin suggests that such explicit meanings are not ubiquitous and may render disagreements about justice senseless even between members of that society. For, as he rhetorically asks, "how can the parties be debating about justice when there is no shared

understanding? ... What can it mean even to say that people disagree about social meaning? The fact of the disagreement shows that there is no shared social meaning to disagree about.”

However, if justice is an interpretive concept, like law and courtesy, it invites and indeed requires theoretical as well as semantic disputes both within societies and between them. The fact that we characteristically have disputes about the explicit requirements of justice which cannot be resolved by invoking the right rule is what makes them interpretive. It does not mean, as Dworkin would have us believe, that such disputes are senseless but, on the contrary, testifies to the existence of implicit shared meanings. While we may not all share the same explicit meanings about justice, the implicit meanings we share give us the capacity to understand each others' contrary arguments about it.

As Fagelson has poignantly observed, in abandoning the constructive interpretation of humanity’s theory of justice because of a lack of universally shared explicit meanings, "Dworkin seems to have been stung by his own semantic stinger." Genuine agreements and disagreements about justice can only occur, according to Dworkin's quotation above, when people share the same explicit meanings about it. However, while they must share meanings to understand each other's claims, these are implicit, not explicit. For example, I need not agree with you that abortion is unjust or that female genital mutilation is justified, to understand your claims. Remembering that the objective of Dworkin's theory of constructive interpretation is to understand what justice means for people as a collective, people need only share implicit meanings so that they understand these explicit claims as arguments about justice and not as senseless noise or about something else entirely. The objective of understanding what justice means for society and humanity through interpretation is as much about understanding people's

278. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 581-582.
279. Ibid 582.
280. As a consensus about the explicit rules and standards of the institution of justice exists within societies, Dworkin does believe we can have meaningful agreements and disagreements about justice within a society. He just doesn't believe we can have them between societies. Dworkin, Law's Empire, 73-76.
disagreements as it is about uncovering the explicit shared meanings people have about justice. It is, that is, about understanding and not consensus.

The subjectivism of shared meanings debunked
While this chapter has allayed fears of the relativist consequences of interpreting a theory of justice for humanity by highlighting the existence of universally shared implicit meanings, Dworkin also resists the applicability of constructive interpretation to humanity’s theory of justice for another reason. He is afraid of its subjectivist consequences.

Dworkin’s fear of subjectivism is, like his fear of relativism, derived from his failure to draw a distinction between explicit and implicit shared meanings. As will be remembered, without the benefit of such a distinction, Dworkin wrongly conflates implicit shared meanings with explicit ones. Therefore, he wrongly assumes that any constructive interpretation of humanity’s theory of justice must be based on explicit shared meanings. He considers this precludes the constructive interpretation of humanity’s theory of justice because, as he has rightly observed, explicit shared meanings about justice are not ubiquitous within societies, let alone between them.

Accordingly, based on Dworkin's mistaken conflation of implicit with explicit shared meanings, he concludes that any attempt to interpret humanity’s theory of justice constructively would be limited to documenting the vast divergence amongst individuals' personal theories of justice.

Again, however, Dworkin has fallen victim to his own semantic sting. Regarding shared meanings as explicit, and therefore inherently contestable, conflates the presence of universal understanding with agreement. As we have seen, the meanings from which humanity’s theory of justice can be universally interpreted are no more explicit than Wittgenstein's conventions of language. It is implicit meanings which are universally shared and upon which it is possible to interpret humanity’s theory of justice.

283. For a discussion of this issue see Wittgenstein, Philosophical Investigations, 241.
Shared by humanity, implicit meanings are not subject to any one individual's consent or adherence but are created, developed and discarded by humanity as a collective. As such, they are inter-subjective phenomena whose meanings are never subjective to an individual. For example, while explicit shared meanings about the justice or otherwise of slavery, incest or abortion can belong to one person, to some people or to everyone, the historical, social and linguistic implicit shared meanings on which such explicit arguments are based belong to humanity. An interpretation of humanity’s theory of justice based on implicit, not explicit, universally shared meanings would therefore be immune from the threat of subjectivism.

The issue of objectivity

In order to defend the objectivity of morality, and thus his personal theory of justice, against subjectivists and other sceptical post-modernists, Dworkin "denies the relevance of metaphysics to morals tout court." He does so by claiming that there is no such thing as external moral scepticism and instead argues that all arguments sceptical of the objectivity of morality are simply competing normative moral claims. For example, he claims that "the thesis that there is no right answer to the question whether abortion is wicked is itself a substantive moral claim, which must be judged and

286. For a general discussion of this point see Sabina Lovibond, Realism and Imagination in Ethics (Oxford: Basil Blackwell, 1983), 117-120.
289. Dworkin makes the assumption that our shared language and common experience include assessments on what we take to be a distinct "moral" dimension. Dworkin, "Objectivity and Truth: You'd Better Believe It," 90.
290. Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 578.
291. External moral scepticism is the non-moral theory that there is no such thing as objective morality. As such, it does not take sides in substantive moral controversies. Accordingly, as Dworkin explains, an external sceptic "agrees with most people that genocide and slavery are wrong, for example. He only denies that these practices are really wrong, or that their wrongness is "out there" in reality." Dworkin, "Objectivity and Truth: You'd Better Believe It," 92. See for example John Mackie, Ethics: Inventing Right and Wrong (New York: Penguin Books, 1977).
292. As Fagelson has warned, Dworkin does not prove that all metaphysical critiques are evaluative. He has merely shown that post-modernists cannot prove that they are not moral arguments. In this way, he has simply shifted the burden of proof: Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 579. See also Dworkin, "Objectivity and Truth: You'd Better Believe It."
evaluated in the same way as any other substantive moral claim". As such, all arguments, both for and against the objectivity of morality, wait to be made.

This argument does not show the independence of objectivity from people's convictions about it, the objectivity of morality or the objectivity of Dworkin's personal theory of justice, but does suggest that he need not abandon these convictions unless a competing normative morally sceptical argument persuades him to do so. Again Dworkin invokes his theory of the will to objectivity by claiming that, "if you can't help believing something, steadily and wholeheartedly, you'd better believe it." And Dworkin cannot find a reason to abandon his convictions that objectivity is independent of people's convictions about it, and that morality, and his personal theory of justice in particular, is objective.

As Fagelson has pointed out, however, Dworkin does not demonstrate that all moral sceptics' claims for abandoning the objectivity of morality are competing normative moral arguments so much as show that sceptics cannot prove that they are not. By doing so, Dworkin shifts the burden of proof to those moral sceptics who claim that there is no such thing as objective morality to explain why their claims are anything more than competing internal moral claims. He does so by showing that a wide variety of supposedly external sceptical arguments about the objectivity of morality can be readily read as competing internal moral arguments. No better example exists than Dworkin's critique of the following supposedly externally sceptical statement by Richard Rorty:

Given that it pays to talk about mountains, as it certainly does, one of the obvious truths about mountains is that they were here before we talked about them. If you do not believe that, you probably do not know how to

294. Dworkin, Law's Empire, 85.
297. Ibid, 118.
play the usual language-games which employ the word "mountain." But the utility of those language games has nothing to do with the question of whether Reality as It Is In Itself, apart from the way it is handy for human beings to describe it, has mountains in it.\textsuperscript{299}

As the above quotation highlights, Rorty imagines two distinct discourses. The first is the ordinary level at which mountains exist, have always existed and will presumably exist in the future and would do so even if people did not. The second is the external sceptical level at which Rorty and other external sceptics say that "Reality as It Is In Itself" does not contain mountains; that mountains exist only in virtue of the utility of a "language game" that people at the first level of discourse play. Rorty's second level statement is only externally sceptical if it can be shown to be saying something different to the statement at the first level of discourse.

Dworkin argues, however, that Rorty "doesn't explain what the difference in meaning is; he only claims there is one through pointless capitalization."\textsuperscript{300} Whether or not Dworkin is successful in his endeavour to show that Rorty's,\textsuperscript{301} and other external sceptics', second level statements are simply repeats of the first order statements, he is successful in showing that they can be read simply as further first level statements. As such, Dworkin successfully shifts the burden of proof to supposed external moral sceptics to prove that their statements are external to the moral domain.

Dworkin has also claimed that, even if those sceptics' claims are external to morality, morality is immune from such metaphysical scrutiny.\textsuperscript{302} His claim comes as a reaction to Gilbert Harman's suggestion "that we cannot regard any belief as reliable unless we think that the best causal explanation of why we hold it refers to the state of affairs it describes."\textsuperscript{303} Dworkin refutes this suggestion by saying that nothing about morality

\textsuperscript{300} For further examples see Dworkin, "Objectivity and Truth: You'd Better Believe It," 96-99.
\textsuperscript{301} Dworkin's argument on this point is less than complete. Dworkin does not disprove Rorty's assertion that first level statements are different to second level statements as challenge Rorty to prove it. Ibid, 96.
\textsuperscript{302} Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 579.
requires, justifies or invites such a test. In fact, Dworkin suggests that morality actually excludes causal explanation. For example, a causal explanation of morality would require us to show that slavery would be moral but for the existence of some feature of the world that makes it immoral. The problem is, however, that we cannot envision a world in which such a feature did not exist. As Dworkin explains,

an adequate causal explanation of a belief includes showing that the belief would not have occurred if the alleged cause had not been present, and we cannot understand or test that counterfactual claim with respect to moral or aesthetic beliefs because we cannot imagine a world that is exactly like one except that in that world slavery is just.

According to Dworkin, therefore, morality's lack of causality makes it immune to criticisms from science, metaphysics or any other mode of thought that claims causality.

However, the fact that we all agree that the statement "1 + 1 = 2" is true is because we share implicit meanings that define it that way. Similarly, whether or not morality makes causal claims is dependent on the existence of implicit shared meanings that define it that way. Dworkin's defence of the objectivity of morality can, therefore, only be insulated from causality, and thus external moral scepticism, if he can show there are implicit shared meanings that define morality as excluding causal explanation.

304. Dworkin, "Objectivity and Truth: You'd Better Believe It," 119. Fagelson in fact challenges Dworkin's assertion that morality does not make causal claims. As he says "It will come as a surprise to many that morality makes no claims to causal effect. Jesus articulated a series of moral principles including a rather important causal one which claimed that if one treated others as one would wish to be treated then one would enter the Kingdom of Heaven." Fagelson, "Justice as Integrity: Objectivity and Social Meaning in Legal Theory," 579.
305. That is not to deny the obvious fact that at other points in history when society believed slavery to be moral. However, other points in history were different in a myriad of other respects. Dworkin's point is that we cannot imagine a world that is exactly like this one except that in it slavery is just.
The fact that such implicit shared meanings would not exist if no one thought they did is a truism. Yet, as we know, Dworkin holds the conviction that the objectivity of morality is independent of anyone's convictions about it. Dworkin's defence of the objectivity of morality against external moral sceptics relies on the existence of implicit shared meanings. Yet his understanding of objectivity rejects the very relevance of implicit shared meanings.

To resolve this incoherence, Dworkin has two choices. He can abandon his view that objectivity is independent of anyone's convictions about it and, if he finds that no implicit shared meanings exist that define morality as excluding causal explanation, relinquish his supposed definitive refutation of external scepticism. In abandoning his view that objectivity is independent of anyone’s convictions about it, Dworkin is not, however, forced to abandon the objectivity of morality in the weak sense. It simply means Dworkin cannot rely on this particular argument to debunk external scepticism and leaves all arguments, both for and against the objectivity of morality, to be made.

Alternatively, Dworkin can hold the further conviction that morality is free from causal claims. While the latter would, in Dworkin's eyes, ensure morality remained immune from moral sceptics’ criticism, it would also increase the number of very personal convictions, highlighted earlier, that Dworkin's personal theory of justice is reliant on and, I suggest, simply prolongs his futile debate with external sceptics. The former, however, would pave the way for Dworkin to interpret a non-relativist and non-subjectivist understanding of humanity’s theory of justice.

It is even unclear why modes of thought that do claim causality should be treated differently from morality, which supposedly does not. It is obvious and appropriate that tests for the validity of judgements should be relevant to the domain to which those

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311. Dworkin, Law's Empire, 85.
judgements are taken to belong. For example, it would be foolish to judge Richard Hugh McCaw's rugby skills by how well he can sing *Les Misérables*. However, the distinction between domains is not always or even characteristically so clear cut. For example, should Dworkin's theory of law as integrity be judged by the standards of law, morality or both?

This absence of clarity over what fits where does not obviate the possibility of categories which themselves originate from implicit shared meanings, but it does imply that morality cannot be judged solely by its own standards of validity.\(^313\) There must be, that is, some sort of referee that determines the standards by which a domain is defined and in which domain any given argument belongs.\(^314\) As a supposedly causality-free domain, morality itself cannot perform such a role independent of implicit shared meanings about the nature of causality. While Fagelson has suggested that metaphysics, the domain that examines the nature of things, is well placed to perform the role of referee,\(^315\) it too is the product of implicit shared meanings. For, at some level, implicit shared meanings *must* determine the meaning of concepts like causality, morality and objectivity.

Ultimately, therefore, whether morality is free from causal claims, and thus whether the objectivity of Dworkin's personal theory of justice is defensible against externally sceptical arguments, will depend on the existence of implicit shared meanings that define morality, objectivity and justice that way. While Dworkin need not abandon his reliance on conviction, doing so would enable him to interpret what justice means for humanity. In doing so, Dworkin would be able "to move towards a more genuine universalism,\(^316\) and beyond his spurious claim to objectivity. In the next chapter I will argue that such an approach would not only justify law as integrity but also produce a much more useful result than Dworkin's personal theory of justice, grounded as it is on very personal convictions, can ever achieve.

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313. Ibid, 581.
314. Ibid.
315. Ibid.
Conclusion

Having developed a general theory of interpretation in constructive interpretation, Dworkin applies it to the social practice of law to produce his legal theory of law as integrity. As this chapter has shown, however, law as integrity's justification of law's coercive power and the obligation to obey it, relies on the law upholding a society's theory of justice, not some individual's personal theory of it.

While Dworkin considers justice to be a theory we interpret like law, he does not apply his theory of constructive interpretation to it. Instead, afraid of its supposedly relativist and subjectivist consequences, Dworkin abandons the constructive interpretation of society’s or humanity’s theory of justice in favour of interpreting a personal theory of what justice means for him. Doing so enables Dworkin to hold the conviction that his personal theory is objective and universal and therefore avoids the threat of subjectivism and relativism. His reliance on conviction does, however, mean that the conviction his personal theory of justice relies on is deeply personal and non-reflective.

In contrast, this chapter has shown that a distinction between implicit and explicit shared meanings unveils the presence of universally shared implicit meanings from which it is possible to interpret a non-relativist and non-subjectivist theory of what justice means for humanity. It has also shown that, despite Dworkin's defence of the objectivity of morality relying on the existence of implicit shared meanings, his own understanding of the independence of objectivity from convictions rejects the relevance of such shared meanings.317 This chapter has argued that, to resolve this contradiction, either Dworkin can abandon his dependence on conviction or he can entrench it by holding yet another personal conviction. The latter may be the easier and more comforting option, especially when, as Dworkin says, scepticism "grips us in a dark night".318 The former would pave the way for Dworkin to interpret what justice means for humanity. The next chapter will argue that such an approach would produce a much more useful result.

Introduction
Dworkin has a dilemma: while he has developed powerful and influential theories of law and politics, they are inconsistent. As will be remembered, the justification for Dworkin’s legal theory of law as integrity rests on an interpretation of what justice means for society. Dworkin’s political theory does not, however, provide such an interpretation. Instead it advances a personal theory of what justice means for Dworkin. As such, Dworkin’s political theory cannot justify his legal theory.

While there are other options available to Dworkin to rectify this dilemma, this chapter elucidates how a hermeneutic reconstruction of constructive interpretation, applied to humanity’s theory of justice, can provide the justification that his theory of law as integrity needs.

First, the chapter hermeneutically reconstructs Dworkin's theory of constructive interpretation so as to articulate an interpretive theory better equipped to understand what justice means for people collectively. It then employs this reconstructed theory, which I call conversational interpretation,\textsuperscript{319} to interpret humanity’s theory of justice. The chapter shows how the hermeneutically conscious interpretation that results will reflect what justice means, not just for society, but also for humanity. The chapter therefore argues that a conversational interpretation of society’s theory of justice will provide law as integrity with the justification it needs. It makes use of the example of the prohibition against torture to elucidate how the conversational interpretation of humanity’s theory of justice would work in practice.

Drawing on Michael Walzer's theory of thick and thin morality, the chapter then explains how conversational interpretation can illuminate the existence of both minimal

\textsuperscript{319} My account of conversational interpretation is to be distinguished from Dworkin and Gadamer's understanding of it as attempting to understand the author's original purpose or intentions. I describe it as "conversational" to emphasise the dialogical approach it prescribes, not to invoke Dilthey's account of interpretation as attempting to recapture the author's intention.
and maximal collective theories of justice. The chapter explains that, as the minimal understanding of humanity’s theory of justice is universally held, it is neither subjective nor relative: it can provide the basis for substantive external criticism of other peoples' and other societies' understandings of justice. Although the maximal understanding of a society’s theories of justice is relative, the chapter explains how it can nevertheless provide the basis for extensive criticism within a society. Finally, the chapter argues that, while constructive criticism is necessary at times, it is deeply personal and should, therefore, be a critical tool of last resort. Conversational interpretation provides several, more reflective, ways to criticize others’ views about justice.

**Justice as the keystone**

To understand why Dworkin’s theories of law and politics are inconsistent we must first recall the justification for his legal theory of law as integrity. Dworkin argues that the best theory of law is the one that best justifies law’s coercive power and explains a citizen's obligation to obey it. He believes law as integrity provides such a justification by virtue of the fact that it views law as the enforcement mechanism for a society's own collective understanding of justice, namely a society’s theory of justice. If the law is instantiating a society's theory of justice, it is using the state's coercive power to hold a society to its own collective understanding of justice. As Fagelson affirms, "the most reasonable place to start, in order to justify force to a community, is its own understanding of what justice consists in".

However, according to this approach, law is only justified if it instantiates what justice means for society. As will be remembered, however, when developing his political theory, Dworkin does not constructively interpret society’s theory of justice. Instead, he abandons his interpretive theory of constructive interpretation and develops and defends a political theory that advances a personal theory of what justice means for him, as an individual. While this approach enables Dworkin to develop a theory of justice

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320. For a general discussion of the distinction between Dworkin's normative and descriptive accounts of law see McCaffery "Ronald Dworkin, Inside Out."
321. For further discussion of this point see Smith, “Concerning Lawful Illegality,” 1534-1549 and MacCormick, "Dworkin as Pre-Benthamite."
323. I assume that a society is synonymous with a legal community.
that he believes is objective,\textsuperscript{325} it negates Dworkin's ability to understand through interpretation what justice means for society.\textsuperscript{326} If, as a result of his quasi-interpretive approach to justice, Dworkin is oblivious to what justice means for society, it becomes unclear how his legal theory of law as integrity is meant to instantiate it. Consequently, Dworkin needs to: explain how his theory of law as integrity is able to understand and then instantiate society’s theory of justice without recourse to constructive interpretation; provide a different justification for law as integrity that does not rely on instantiating what justice means for society; or adopt an interpretive approach to understanding society’s theory of justice.

This chapter argues that the third of these options is the keystone to uniting Dworkin's inconsistent theories of politics and law. In particular, it argues for a hermeneutically reconstructed constructive interpretation of society’s theory of justice that would enable Dworkin’s legal theory of law as integrity to instantiate what justice means for society. The remainder of this chapter will explore both how such a hermeneutical reconstruction can be achieved and what its consequences would be for Dworkin's political theory of justice.

\textbf{A hermeneutic reconstruction of constructive interpretation}

Chapter one outlined Dworkin's theory of constructive interpretation and compared and contrasted it to Gadamer's philosophical hermeneutics. It will be remembered that Dworkin, like Gadamer, views understanding as the result of the interaction between the interpreter and the object of interpretation. It is, however, the precise nature of this interaction that marks the departure of Dworkin’s constructive interpretation from Gadamer’s philosophical hermeneutics.

In the following pages, this chapter will argue that the interpretive theory, which I call conversational interpretation, that results from a hermeneutic reconstruction of Dworkin’s theory of constructive interpretation provides a more reflective methodology than constructive interpretation for interpreting what justice means for people.


\textsuperscript{326} Fagelson, "Strong Rights and Disobedience: From Here to Integrity," 245.
collectively, as particular societies and as humanity. I describe this interpretive theory as "conversational" to emphasise the dialogical approach it prescribes and not to invoke Dilthey's account of interpretation as attempting to recapture the author's intention or re-express the original meaning of a text.  

**Methodology**

It will be remembered that Dworkin's theory of constructive interpretation employs an analytical distinction between three stages of interpretation. Dworkin and others do point out that the “Actual interpretation ... would be much less deliberate and structured than this analytical structure suggests.” Despite this however, as will be remembered, the distinction between stages in constructive interpretation precludes an interpreter from achieving a truly reflective interpretation.

An interpreter is constrained by the need for consensus about the rules and standards of a social practice at the pre-interpretive stage and, to a lesser extent, for the justification at the interpretive stage to have a degree of fit with those rules and standards. Therefore, once a social practice has provided these constraints, its role in constructive interpretation is complete. A social practice plays little part at the interpretive stage of constructive interpretation, where the interpreter settles on a general justification for the social practice, and no part at all at the post interpretive stage, where he or she adjusts his or her understanding of what the social practice “really” is so as to make it the best it can be.

While the interpreter plays a significant role in constructive interpretation, his or her contribution is constrained by Dworkin's analytical distinction between stages of interpretation. The interpreter plays no role at the pre-interpretive stage. Instead, it is the social practice which is the sole source from which an interpreter must furnish the practice’s tentative rules and standards.

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328. Leyh, "Dworkin's Hermeneutics," 858.
In stark contrast to Dworkin's three distinct stages in constructive interpretation, Gadamer's philosophical hermeneutics abjures any simple notion of interpretive method.\textsuperscript{330} For Gadamer, an interpreter is able to achieve understanding only by entering into a conversation with the object of interpretation. It is this dialectical approach to interpretation that enables understanding by bringing one's prejudices into question as well as those of the object of interpretation.\textsuperscript{331} It is the very absence of methodology and hierarchy within philosophical hermeneutics that ensures that both interpreter and the object of interpretation can contribute to the interpretation throughout the dialogue. It is this feature of philosophical hermeneutics that ensures hermeneutically conscious understanding through reflection.

The limited nature of the social practice's contribution at the interpretive stage and the absence of it at the post-interpretive stage of constructive interpretation precludes an interpreter from reflecting on his or her prejudices. At these stages, an interpreter is free, providing he or she ensures that the pre-interpretive requirement of consensus and interpretive requirement of fit are met, to interpret a practice in whichever way he or she sees fit.\textsuperscript{332} As the social practice’s contribution is limited at the interpretive stage and non-existent at the post-interpretive stage, an interpreter has little against which to reflect on his or her prejudices at the interpretive stage and nothing against which to reflect on them at the post-interpretive stage. He or she will have no way of distinguishing between those prejudices that are justified and therefore facilitate understanding and those opinions that are not justified and therefore thwart it.

If, however, the social practice is permitted to engage throughout the interpretive process, it will allow an interpreter to reflect on his or her prejudices. On top of the role the social practice plays during the pre-interpretive and interpretive stages, it may be capable of contributing to the post-interpretive stage and more to the interpretive stage. It may, for example, have additional information that questions, or affirms for that matter, the justification or purpose an interpreter settles on at the interpretive stage. This

\textsuperscript{331} Gadamer, \textit{Truth and Method} (1975), 266 and Batchelor \textit{The Role of Hermeneutics in the Debate Between Natural Law Theory and Legal Positivism}.
\textsuperscript{332} Dworkin, \textit{Law's Empire}, 47.
could, for example, come in the form of a historical chronology of the content of a social practice. We may take the example of the social practice of justice and, in particular, the practice of taking part in the governance of one's country. In New Zealand in 1853 British subjects aged 21 and over who possessed sufficient land were permitted to vote in elections. In 1867 Maori gained universal suffrage in respect of four reserved seats in the lower house. In 1879 the requirement for voters to own property was abolished and in 1893 New Zealand became the first country in the world to afford women the right to vote. If an interpreter was privy to this information, it may call into question the justification he or she had settled on at the interpretive stage for the social practice of voting. If so, it would enable an interpreter to question his or her prejudices and discern those that inform from those opinions that misguide him or her. In this case it may affirm an interpreter's prejudice that everyone should be able to choose the people who govern them and, at the same time, cause him or her to reconsider his or her view that the right to vote should only be afforded to those over 18 years old.

Likewise, the absence of the interpreter's role at the pre-interpretive stage precludes him or her from reflecting on the prejudices of the social practice. At the pre-interpretive stage of constructive interpretation, an interpreter must furnish a social practice’s tentative rules and standards. “[T]he classifications [the pre-interpretive stage] yields [must be] treated as given in day-to-day reflection and argument.” As such, an interpreter is precluded at the pre-interpretive stage from questioning the contemporary account of what a social practice comprises. It prevents them, for example, from suggesting that additional rules or standards may actually belong to a social practice or that others, already furnished, do not in fact belong to it. If he or she were permitted to do so, an interpreter would be able to reflect on a social practice's prejudices and recognise those that enable understanding and discard those opinions that do not.

Take again the example of the social practice of justice and, in particular, the practice of taking part in the governance of one's country. When an interpreter furnishes a social practice’s tentative rules and standards at the pre-interpretive stage, it would likely include the acts of voting in general and in local elections. An interpreter may suggest,

333. Ibid, 66.
contrary to this account, that taking part in the governance of one's country includes many other acts, including: writing submissions to select committees during the enactment of new legislation; writing letters to the editors of newspapers about topical political issues; and even debating such issues with one's friends, family and neighbours. These suggestions may call into question a social practice’s prejudices, including that participation in governance is restricted to those acts which are formally required of all citizens.

This preclusion of reflection due to constructive interpretation’s distinction between stages of interpretation is, however, easily rectified. It simply requires the removal of the restrictions on the interpreter and the object of interpretation about when they can contribute during the interpretive process. Doing so would enable a social practice to contribute not only at the pre-interpretive stage but also at the post-interpretive stage and, in a less restrictive way, at the interpretive stage of interpretation. Similarly, it would enable an interpreter to contribute to the pre-interpretive stage as well as to the interpretive and post-interpretive stages.

It is only by removing such constraints to engagement with the object of interpretation that an interpreter will be able to reflect on his or her prejudices as well as those of the object of interpretation. Only then will an interpreter be able to call his or her interpretation reflective. To that end, the interpretive process should manifest in an uninhibited dialogue between interpreter and the object of interpretation.

**The object of interpretation**

As we know, through the threshold requirement at the pre-interpretive stage of constructive interpretation, the social practice’s tentative rules and standards are furnished. The threshold requirement of consensus does not allow the interpreter to contribute at this stage. Society’s (as the personification of the way in which a social practice is presented within society) sole contribution at the pre-interpretive stage is to inform the interpreter of the rules and standards that are taken to make up the

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335. As we know, this is in fact the social practice's only contribution through the process of constructive interpretation.
tentative content of their practice. This also highlights how passive the social practice's role is. Society is not permitted discretion to divulge any additional information or to contextualise the information already provided about its practice. The passive role constructive interpretation scripts for the social practice again precludes an interpreter from reflecting on his or her prejudices. By restricting a society to furnishing its practice’s tentative rules and standards, constructive interpretation ensures an interpreter's prejudices about everything other than those rules and standards are unquestioningly accepted. Again employing the example of taking part in the governance of one’s own country, by furnishing not only the tentative rules and standards but also its historical origins, at the pre-interpretive stage a society may draw an interpreter’s attention to additional elements of that society’s practice, such as public protests and marches.

It is also this passivity of the social practice's contribution that accounts for Dworkin's overly onerous requirement of consensus at the pre-interpretive stage of constructive interpretation.336 While he views constructive interpretation as a creative enterprise, Dworkin is conscious that an interpretation must still reflect what a practice means for society.337 Consequently, if the social practice's contribution to constructive interpretation is to be passive, and yet an interpretation is still required to reflect what a practice means for society, Dworkin believes the threshold requirement must be high enough to ensure an interpreter engages in interpretation and not invention.

While Dworkin's requirement of consensus may ensure this occurs in the majority of cases however, it will not guarantee it occurs in all situations. Once an interpreter has met the threshold requirement of consensus at the pre-interpretive stage and fit at the interpretive stage of constructive interpretation, he or she is free to reform a social practice so as to make it the best it can be. Take, for example, the social practice of justice. Suppose you or I, as an interpreter, can identify a social practice of justice of progressive taxation at the pre-interpretive stage that, at the interpretive stage, we

336. Dworkin, Law’s Empire, 66.
337. As we know, however, Dworkin does not apply constructive interpretation to the social practice of justice. He develops a personal ethical conception of justice rather than constructively interpreting what the institution of justice means for society. Ibid.
understand is employed by society to ensure an equitable distribution of wealth. It would still be open to us to reform that practice at the post-interpretive stage, through a reconstruction of what constitutes an *equitable* distribution, to require something entirely novel; for example, that those who are wealthy must work fewer hours than those who are poor so as to ensure wealth is equally dispersed. While this constructive interpretation of progressive taxation would meet Dworkin's pre-interpretive and interpretive thresholds, it would bear no resemblance to the original social practice and would represent wilful invention by the interpreter.\textsuperscript{338}

By allowing a social practice a broader mandate to engage at the pre-interpretive stage, an interpreter would be able to reflect on his or her prejudices. By doing so, an interpreter would also be likely to gain a deeper understanding of, and therefore connection with, a social practice. An interpreter who has a connection with a social practice is less likely to stray into invention and more likely to interpret the social practice that is seen, understood and valued. Indeed, such a connection would, as Gadamer suggests, ensure an interpreter approaches the social practice he or she is interpreting with an anticipation of its completeness and value to an interpreter’s endeavour to achieving understanding.\textsuperscript{339}

A consensus is required in order for an interpreter to interpret what a social practice means for society. Remembering Dworkin's conflation of implicit with explicit shared meanings, it is, however, a consensus about implicit shared meanings, not explicit ones as Dworkin’s theory of constructive interpretation assumes. It is a shared range of implicit meanings that enables people to recognise sense and purpose in what others say and do.\textsuperscript{340} For agreement and disagreement to be genuine, people must simply be able to understand one another. They need not actually agree with the substance of each other's claims. In the example of justice, as mentioned in the preceding chapter, while shared explicit meanings about substantive questions of justice will exist to a greater or lesser degree depending on the place, time and people, implicit shared meanings about the

\textsuperscript{338} Such an outcome would not fulfill constructive interpretation's ambition of understanding what practices mean for society.


\textsuperscript{340} Dworkin, *Law's Empire*, 63-64.
institution of justice that enable us to comprehend the sense and purpose in what each other says, exist universally. It is the very existence of these implicit shared meanings that, for example, enables genuine agreement and disagreement about justice, if not consensus about every substantive question of justice.

The interpreter
In contrast to the passive role the social practice plays at the pre-interpretive stage of Dworkin's theory of constructive interpretation, the interpreter plays a very active role at the interpretive and post-interpretive stages. At the interpretive stage, the interpreter is tasked with settling on some general justification for the social practice as discovered at the pre-interpretive stage. While the justification must fit the rules and standards of the practice as discovered at the pre-interpretive stage, an interpreter is free to develop whatever purpose he or she sees as best. While the interpreter is undoubtedly crucial to the task of interpretation, constructive interpretation casts the interpreter in a dominant role at the interpretive stage. This is only exacerbated by the extremely limited role the social practice plays at this stage. Through the requirement of fit at the interpretive stage, an interpreter is afforded the opportunity to reflect on those prejudices he or she holds in relation to a social practice’s tentative rules and standards but not on any of the other prejudices he or she holds. By allowing an interpreter almost unfettered discretion to decide what the justification of a social practice is therefore, constructive interpretation affirms an interpreter's prejudices and makes it even less likely that he or she will reflect on them at the post-interpretive stage.

It is, however, the optimisation requirement at the post-interpretive stage that exemplifies the interpreter's pervasive role within constructive interpretation. While, at this stage, an interpreter must interpret a social practice so that it is the best it can be, exactly how a practice is to be seen in its best light is a question that Dworkin leaves, without guidance, to the interpreter to answer. Without the social practice's contribution and with the almost unfettered discretion that is afforded to an interpreter at this stage,

341. Ibid, 47.
342. Ibid, 66.
343. Ibid.
344. Ibid, 47.
constructive interpretation once again precludes an interpreter from reflecting on his or her prejudices.

It will be remembered that, for Dworkin, the purpose of interpretation is to understand what a social practice “really” requires.\(^\text{345}\) His inclusion of the word "really" here is a reference to the post-interpretive optimisation requirement. As noted earlier, while an anticipation of completeness or a presumption of unity is necessary to achieve understanding through interpretation according to Gadamer,\(^\text{346}\) Dworkin's optimisation requirement goes considerably further. He requires an interpreter to interpret a social practice so that it is, in light of the justification or purpose settled on by the interpreter, the best it can be.\(^\text{347}\) Dworkin is not content to require an interpreter to interpret a social practice as it is now understood by society. Somehow suspicious of society's understanding, he requires an interpreter to improve on that understanding so as to make the social practice the best it can be.

In contrast, Gadamer views interpretation as the exchange between an interpreter and the object of interpretation, through which the interpreter can learn, the object of interpretation can be developed, and understanding can be achieved.\(^\text{348}\) Significantly, therefore, while Dworkin's view of the purpose of interpretation implies from the outset that the interpreter plays a dominant role, Gadamer's view of the purpose of interpretation implies a more balanced dialogue between an interpreter and the object of interpretation. It is only through such a conversation that an interpreter can reflect on his or prejudices and those of the object of interpretation and discard those opinions that are unjustified and inhibit understanding.

\(^{345}\) As Dworkin says “So each of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what it really requires.” Ibid, 64.


\(^{347}\) As Dworkin says “So each of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what it really requires.” Dworkin, *Law's Empire*, 64.

The objective of engaging in any interpretation is to understand. It is not, as Dworkin believes, also to improve or enhance reality. For, that is an entirely different enterprise. While an interpreter may come to question the validity or legitimacy of the connection between a social practice's content and its espoused purpose, it is not the job of an interpreter to fix a social practice's shortcomings. It is true that when an interpreter finds him or herself in such a situation through the process of interpretation, he or she may characteristically seek to improve a social practice. This is done, however, in the capacity, not as an interpreter, but as an inventor. Accordingly, it cannot, through reference to the outcome of the interpretation, be claimed a priori that the improvement or optimisation of the social practice represents what a social practice "really" requires. Instead, it must be asserted, and indeed society and humanity must be convinced, that the optimisation of the social practice represents what a social practice "should" require.

**Conversational interpretation**

Having elucidated the features of constructive interpretation that need to be modified to enhance an interpreter's ability to reflect on the prejudices that inform his or her understanding, I will briefly outline an interpretive methodology that embodies those changes. While constructive interpretation is concerned with interpreting social practices, as collective physical human actions, I will focus instead on interpreting collective, whether society’s or humanity’s, theories of justice, as people's collective understanding about what they believe justice requires. Conversational interpretation is concerned, that is, not with the collective physical actions people take in the name of justice, but people's collective views about what justice requires.

As every conversational interpretation is unique, understanding through interpretation is not reducible to method or technique. It can, however, by way of a rough metaphor, be described as a conversation, involving an exchange between trusting and honest

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351. Although, as noted in chapter two, Dworkin himself does not distinguish between the social practice of justice and the institution of justice.
conversational partners who seek agreement. I shall call this interpretive approach conversational interpretation vis-à-vis Dworkin’s constructive interpretation.

**Introduction**

Before an interpreter can begin his or her conversational interpretation, there must first be an "introduction" between the object of interpretation, in this case a collective, whether society’s or humanity’s, theory of justice, and the interpreter. This "introduction" will enable an interpreter to understand his or her, as well as the theory’s, background or history, interests, purpose and motivations. An interpreter will, that is, reflect on where both he or she and the theory have come from, why they are there and what they hope to accomplish through their conversational interpretation.

While an interpreter can engage in an act of self-reflection to understand his or her background or history, interests, purpose and motivations, society’s or humanity’s theory cannot do so. Consequently, the task of understanding the background, history, interests, purpose and motivations of society’s or humanity’s theory falls on an interpreter. For him or her to obtain this information, an interpreter will have to explore how a society or humanity expresses its theory through, for example, relevant laws, the views of academics, politicians and members of a society or humanity and the way in which it is reported on by the media. In undertaking this task of reflecting on the background or history, interests, purpose and motivations of society’s or humanity’s theory and his or her own, the interpreter will gain an awareness of both his or her prejudices and the prejudices of the society’s or humanity’s theory. It is, after all, our prejudices that allow what is to be interpreted or understood to be grasped in a preliminary fashion.353

The fact that understanding operates by means of such anticipatory structures means that understanding always involves what Gadamer terms the anticipation of completeness - the revisable presupposition that what is to be understood constitutes something that is understandable, coherent and meaningful.354 Accordingly, conversational interpretation requires an interpretation to be undertaken with honesty, a

353. Donato, "Dworkin and Subjectivity in Legal Interpretation," 1536.
presumption of trust and a willingness to learn. Honesty and trust will ensure that a greater breadth and depth of information about a society’s or humanity’s theory and the interpreter is brought to bear on an interpretation. The more information that an interpreter can reflect on, with a willingness to learn during a conversational interpretation, the more holistic and deep his or her understanding of a society’s or humanity’s theory will be.

Conversation

Once the "introduction" is complete and the interpreter has an initial understanding of both him or herself and a society’s or humanity’s theory, he or she can begin the interpretation proper. In the conversation that ensues, the prejudices of the interpreter and of a society’s or humanity’s theory come to the fore, both inasmuch as they play a crucial role in opening up what is to be understood, and inasmuch as they themselves become evident in that process. While a society’s or humanity’s theory obviously cannot engage in a conversation with an interpreter, the interpretive dialogue is, as a metaphor for the approach an interpreter should take towards the task of reflecting on his or her prejudices as well as those of a society’s or humanity’s theory, still valuable. As the prejudices of the interpreter and a society’s or humanity’s theory become evident, they can in turn be reflected upon by an interpreter. It is at this stage that each party’s prejudices will be questioned and, if found wanting, revised. It is this reflective questioning that enables genuine understanding through interpretation.

It is this opportunity for an interpreter to learn and the collective theory to develop from each other's prejudices that exemplifies the value of honest and trusting conversational interpretation. Each party will bring something unique to the interpretation that will be new to the other and will enable an interpreter to question not only the collective theory’s prejudices, but also his or her own.

Conclusion

Conversational interpretation is a matter of negotiation between the interpreter and a society’s or humanity’s theory such that the process can be seen as an attempt to come

355. Ibid.
to an "agreement." 

This will typically include agreement over the content and purpose of society’s or humanity’s theory that may well differ from either the society’s or humanity’s, or the interpreter's understanding at the beginning of the conversational interpretation. The agreement, or fusion of horizons, may well therefore document new rules and standards taken to form the content of a society’s or humanity’s theory, discard some rules and standards and modify or replace the theory’s purpose. Conversational interpretation may at times also highlight a disconnect, contradiction or hypocrisy between a society’s or humanity’s theory’s rules and standards and its purpose. Modification of its rules and standards or purpose will however, only occur as the result of honest and trusting reflection by an interpreter on both his or her prejudices and those of a society’s or humanity’s theory. In this way, as Gadamer says, the authority of a society’s or humanity’s theory or that of the interpreter “can rule only because it is freely recognized and accepted. The obedience that belongs to true authority is neither blind nor slavish.”

Objectivity, relativity and subjectivity

According to conversational interpretation, the process of interpreting a society’s or humanity’s theory resembles the same structure as a conversation. Both a society’s or humanity’s theory, through the way in which a society or humanity expresses its theory, and the interpreter tasked with interpreting it will contribute towards the process and will influence the outcome. Accordingly, every interpretation is unique to the interpreter and the socio-historical context within which a society’s or humanity’s theory is interpreted. Understanding achieved through conversational interpretation is not, and can never be, objective in the strong sense.

However, no matter who the interpreter is or what theory is employed to interpret a society’s or humanity’s theory, an interpreter and his or her prejudices will always contribute towards the understanding

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357. Malpas, "Hans-Georg Gadamer."
that results. Conversational interpretation is simply one of the few interpretive theories that acknowledges this and indeed values the indispensible role the interpreter and his or her prejudices play in achieving understanding through interpretation. It is the interpreter’s reflective prejudices which enable him or her first to comprehend the society’s or humanity’s theory that he or she is interpreting.\(^\text{361}\)

These prejudices are, in turn, grounded in the implicit meanings which are shared amongst society and humanity, making agreement and disagreement possible. While the influence of an interpreter’s prejudices ensures that every interpretation of a society’s or humanity’s theory is unique and therefore not objective in the strong sense, the implicit shared meanings that every interpretation is grounded on ensure the interpretations that result are not subjective to an individual interpreter, nor relative to a particular society. Understanding achieved through conversational interpretation is, therefore, not objective in the strong sense, relative or subjective.\(^\text{362}\) It is, however, reflective.

**A conversational interpretation of justice**

Dworkin does not himself interpret society’s or humanity’s theory of justice for the reasons articulated in the previous chapter. In order to understand what justice means for people collectively and to be able to justify his theory of law as integrity however, I will attempt to interpret society’s and humanity’s theory of justice. Employing Dworkin’s theory of constructive interpretation would enable us to interpret society’s theory of justice. Because of its artificial distinctions between stages of interpretation, the social practice's passive role and the interpreter's pervasive role, constructive interpretation will not, however, *always* produce an interpretation of what the theory means *for* people collectively. Furthermore, constructive interpretation's post-interpretive optimisation requirement means that an interpreter is required to understand what a social practice, in its ideal form, means.

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\(^{361}\) Donato, "Dworkin and Subjectivity in Legal Interpretation," 1536.

\(^{362}\) Noting that implicit shared meanings are those shared universally amongst humanity which enable understanding, agreement and disagreement both within society and between societies, conversational interpretations that are grounded in those meanings can neither be subjective to the interpreter or relative to his or her society.
In contrast, conversational interpretation is an interpretive theory which enables an interpreter to understand what a theory means for society and for humanity. It does not include an optimisation requirement, but instead directs an interpreter to interpret a society’s or humanity’s theory so as to understand what it actually means for people collectively, rather than what it would, in its ideal form, mean.

Furthermore, by replacing the constraints constructive interpretation places on an interpreter and a social practice's contribution with the expectation that an interpretation is conducted trustingly and honestly, conversational interpretation enables an interpreter greater opportunity to reflect on his or her prejudices as well as those of a society’s or humanity’s theory. As “hermeneutical awareness comes in degrees”, the more conscious an interpreter is of the prejudices guiding his or her interpretation, the better that interpretation will be.

Finally, by directing an interpreter to endeavour to come to an agreement with a society’s or humanity’s theory, conversational interpretation ensures that the authority of the theory or that of the interpreter does not rule because it is unreservedly accepted but because, on reflection, its authority is justified.

Accordingly, when applied to a society’s or humanity’s theory of justice, a conversational interpretation will, although inevitably the result of a conversation between the theory and an interpreter, reflect what that theory means for society and humanity. Its methodology will ensure that the unjustified prejudices of an interpreter and the theory of justice are discarded and that, accordingly, an interpreter is faithful to his or her task of understanding what the theory means for people collectively, rather than for him or herself.

The conversational interpretation of justice may provide the justification Dworkin's legal theory of law as integrity requires. It provides a methodology for interpreting what

363. And the pre-interpretive and interpretive requirements of consensus and fit respectively that accompanied that analytical distinction.
364. Wright, Festivals of Interpretation, 117.
365. Gadamer, Philosophical Hermeneutics, 34.
justice means for society and humanity. If law as integrity were to embrace the conversational interpretation of society’s theory of justice as the single vision of the law which it must advance then law would be constitutive of a society's theory of justice. Law would be justified and a citizen would have an obligation to obey it because it would be nothing more than an enforcement mechanism for a society's own collective understanding of justice.

This conversational interpretation of justice will, however, likely only vaguely resemble the personal theory of justice Dworkin invents and defends in *Sovereign Virtue*. We shall now begin to explore more precisely what a conversational interpretation of justice would look like.

**Justice: personal or collective theory**

As will be remembered, throughout the pages of *Sovereign Virtue* Dworkin presents and defends a comprehensive political theory of distributive equality. Yet, it is clear to any two members within a given society, let alone two people from different societies, that they do not share the same views about every substantive issue of justice. Like Dworkin's personal theory of justice, a conversational interpretation of justice will be unique to the interpreter and the socio-historical context within which it is interpreted.

Despite this, Michael Walzer provides a compelling explanation of how justice can simultaneously be a personal, societal and also universal concept. To illustrate how this is possible, he asks us to imagine the following scene from Prague in late 1989:

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366. As mentioned in the introduction, Dworkin's foundational right is commonly referred to as "the right to justice," "the right to equality" or "the right to equal concern and respect." Dworkin, *Law's Empire*, 185.

367. For further discussion of this point see Smith, "Concerning Lawful Illegality," 1534-1549 and MacCormick, "Dworkin as Pre-Benthamite."

368. Dworkin, *Sovereign Virtue*.

It is a picture of people marching in the streets of Prague; they carry signs, some of which say, simply, “Truth” and others “Justice.” When I saw the picture, I knew immediately what the signs meant – and so did everyone else who saw the same picture. Not only that: I also recognized and acknowledged the values that the marchers were defending – and so did (almost) everyone else. Is there any recent account, any post-modernist account, of political language that can explain this understanding and acknowledgement? How could I penetrate so quickly and join so unreservedly in the language game or the power play of a distant demonstration? The marchers shared a culture with which I was largely unfamiliar; they were responding to an experience I had never had. And yet, I could have walked comfortably in their midst. I could carry the same signs.370

The reason that justice is a deeply personal concept on the one hand and yet one of the few truly universal concepts on the other, according to Walzer, is that “Moral terms have minimal and maximal meanings; we can standardly give thin and thick accounts of them, and the two accounts are appropriate to different contexts, serve different purposes.”371 This is not to say that people possess two distinct moralities, one thick and the other thin. The minimal meanings of moral terms, such as justice, are embedded in their corresponding maximal meanings.372 For “morality is thick from the beginning, culturally integrated, fully resonant, and it reveals itself thinly only on special occasions, when moral language is turned to specific purposes.”373 The minimal meanings of moral terms therefore merely represent an articulation of their corresponding maximal meanings at varying levels of abstraction.

Returning to Walzer’s scene for a moment, for outsiders watching the protest unfold in their lounges in Paris and New York, the words and signs used by the Czech

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371. Ibid, 2.
372. As Walzer says, ”justice is relative to social meanings. ... Justice is rooted in the distinct understandings of places, honors, jobs, things of all sorts, that constitute a shared way of life.” Walzer, *Spheres of Justice*, 312-314.
demonstrators shed whatever particular meanings they may have for individuals within the parade in Prague and become universally accessible calls for an end to tyranny and the restoration of justice. While these minimalist meanings will no doubt have been shared by the Czech protestors, their chants and placards also have further, more particular, meanings too. Indeed, depending on the level of abstraction, the protestors in Prague will no doubt even disagree amongst themselves about precisely what those meanings are. While protestors and onlookers share the view that tyranny is unjust and must end, that is a minimalist account of each individual and societies’ maximal morality. That corresponding maximal morality will vary from person to person and society to society.

With Walzer’s conception of thin and thick morality in mind, we must turn our attention back to the conversational interpretation of a society’s or humanity’s theory of justice. I shall employ the prohibition against torture by way of an example to illustrate how justice is simultaneously a very personal, and yet undoubtedly a universal, theory. If I were to engage in a conversational interpretation of the prohibition against torture (as an institution of humanity’s theory of justice), I would be likely to find a myriad of rules that humanity and I consider make up the prohibition and an overall justification or purpose for those rules.

Upon concluding this conversational interpretation, humanity’s theory of justice and I may “agree” for example that the purpose of the prohibition against torture, as an institution of humanity’s theory of justice, is that “it is unjust to inflict physical or mental suffering on anyone gratuitously.” Furthermore, resuming our conversation to consider the application of our interpretation to a range of practical scenarios, we would be able to agree whether or not they were prohibited. We may, for example, decide that 1) a mother dislocating her son’s arm in order to save him from oncoming traffic would not amount to torture and would therefore not be unjust; 2) a man applying a

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374. Ibid, 4-5.
375. The word “agree” is here a metaphorical reference to an interpreter’s task of reflecting on both his or her prejudices as well as those of humanity’s theory of justice and retaining only those prejudices which are justified.
brandishing iron to his daughter for gratuitous enjoyment would indeed amount to torture.

It will be remembered that humanity’s theory of justice is not, as Dworkin's social practice of justice is, a reference to collective physical human actions. Instead, the phrase refers to people's collective understanding about what they believe justice requires that guides their behaviour.

Rather than conversationally interpreting humanity’s theory of justice, if I were to articulate my own personal theory of justice, I may conclude that the purpose of the prohibition of justice is that “it is always unjust to inflict physical or mental suffering on anyone.” Furthermore, when I consider the application of my personal theory to a range of practical scenarios, I would be able to decide whether or not they were prohibited. I may, for example, decide that 1) a mother dislocating her son’s arm in order to save him from oncoming traffic would not amount to torture and would therefore not be unjust; 2) a man applying a brandishing iron to his daughter for gratuitous enjoyment would also amount to torture; 3) a teacher slapping a student for swearing in class would constitute torture; 4) using electric shocks by police to thwart a terrorist’s deadly plot would likewise be torture.

Consider now if my neighbour were to articulate his or her own personal theory of justice. As a member of the same society, he or she would be influenced by a similar social and historic context or horizon and accordingly would be likely to settle on a similar understanding of the prohibition against torture to mine. Each person is, however, situated within a unique horizon and, while we likely share a similar socio-historical context, he or she will surely rely on a variety of different prejudices to those I relied upon. Accordingly, while his or her understanding may be similar to mine, it will undoubtedly be unique. My neighbour may come to the conclusion that the prohibition on torture, as an element of his or her personal theory of justice, dictates that “it is unjust to inflict physical or mental suffering except in exceptional circumstances where to do so would stop the infliction of similar or worse physical or mental suffering.” When considering the same scenarios as me, my neighbor may agree with my
application of the prohibition against torture in situations 1, 2 and 3. He may not, however, agree, consistent with his unique theory of justice and its subsidiary understanding of the prohibition on torture, that the police’s use of electric shocks to prevent a deadly terror plot is in contravention of the prohibition and thus unjust. Indeed, he may consider that for police to abstain from such an act, with the knowledge that their inaction will result in immense suffering, would itself be unjust.

Consider finally a third person, this time from a society altogether different from my own: Iran. They are not likely to share the similar horizon that my neighbour and I do. They do, nevertheless, live within a society which at least purports to prohibit torture. Having articulated their personal theory of justice, they may conclude that the prohibition against torture dictates that “it is unjust to inflict physical or mental suffering on anyone gratuitously.” Consistent with this understanding, when considering the same practical scenarios as my neighbor and I, the Iranian may disagree with my application of the prohibition against torture in situations 3 and 4. They will be likely, however, to agree with my conclusions in situations 1 and 2.

As this example of the prohibition against torture highlights, justice is a theory that is unique to each individual at a level of particularity and yet is a theory that is shared by whole societies at a level of abstraction and by humanity at a higher level of abstraction. While justice is a theory that is understood and valued by humanity therefore, it is also a theory that, in particular situations, differs somewhat amongst citizens and greatly amongst humanity. As Walzer says, "Just as one can describe a caste system that meets (internal) standards of justice, so one can describe a capitalist system that does the same thing."

Humanity’s theory of justice as the lowest common denominator between individuals’ and societies’ theories of justice will be in a constant state of flux, varying sometimes

377. For example, Iran signed and ratified the International Covenant on Civil and Political Rights 1966 which, under Article 7, prohibits the use of torture or cruel, inhumane or degrading treatment.
greatly from time to time. The theories of justice of individuals consist of an immeasurable range of different moral rules, some of which will, and others will not, form part of societies’ and humanity’s theories of justice at any given time. For example, while I might view the concept of free tertiary education as an important element of my personal theory of justice, that view is not shared by consensus within my society and cannot therefore be considered to be a part of my society’s theory of justice. Additionally, while the concept of free speech is considered a fundamental pillar of my personal and my contemporary society’s theories of justice, it is unlikely to exist as an important element of Iranian society’s contemporary theory of justice, and therefore cannot be considered to be part of humanity’s theory of justice. It is likely, however, as we have seen above, that the prohibition on torture is an element of the contemporary theories of justice of Iranian society and of my own society and can therefore be considered to be a part of humanity’s theory of justice. The thickness of humanity’s theory of justice will therefore vary from issue to issue. While torture and genocide are both likely to form part of humanity’s contemporary theory of justice, the right to free speech and gender equality are unlikely to do so.

The critical power of conversational interpretation

Interpretive external criticism

Humanity’s theory of justice is therefore in a constant state of flux. This does not, however, preclude an interpreter employing it to criticise another society or individual's personal theory of justice. Indeed, humanity’s theory, as a non-subjective, non-relative understanding of justice, is crucial for the sake of criticism, particularly for the interpreter who is an outsider to the theory of justice of an individual or society that he or she seeks to criticise.

This ability for an interpreter to criticise another individual’s or society's theory of justice is not the product of persuasion but of the fact that we have expectations about the behaviour not only of our fellow citizens but of strangers too and that they likewise

379. As they are shared by humanity, these explicit meanings about the institution of justice which constitute the universal minimal understanding of the institution of justice are neither subjective to an individual nor relative to a society.
have overlapping expectations about their own behaviour and ours as well. These expectations derive from the fact that, as fellow human beings, we all share a common understanding of what justice requires in the form of humanity’s theory of justice.

Though we have different histories and cultures, human beings have in common explicit shared understandings about what justice requires. These shared understandings reveal themselves, as needed, as humanity’s theory of justice. It is during these times of need that we are able to move effectively from the particular to the general, abstracting ourselves for a time from our personal or our society’s theory of justice to humanity’s theory of justice. This is the approach of Amnesty International, whose members seek to hold to account those who transgress the requirements of justice. This is not on the basis of the requirements of its members' various personal theories of justice, but on the basis of the requirements of 'humanity's theory of justice. The success of this external interpretive criticism, however, depends heavily upon the interpreter's ability to restrain whatever impulse they have to impose their personal theory of justice across the range of cultural difference.

Humanity’s theory of justice, as the lowest common denominator between individuals’ and societies’ theories of justice, may be narrow in the scope of issues it covers and abstract in its content on those issues. It may, for example, include a universal prohibition against gratuitous violence, a rule against extrajudicial killings, and a requirement that people accused of a crime receive fair trials. It is unlikely, however, to include an expectation that citizens are permitted to participate in the politics of their country, protection for freedom of religion, or a right to receive a basic level of education or healthcare.

380. Walzer, Thick and Thin: Moral Argument at Home and Abroad, 17.
382. Ibid, 49.
383. It is possible, to use Parel's examples, to discover fruitful resemblances by comparing, for instance, "the Aristotelian politikos and the Confucian junzi, Indian dharma and the pre-modern Western notion of 'natural justice,' the Islamic prophet-legislator and the Platonic philosopher-king." Ronald Keith and Anthony Parel, Comparative Political Philosophy: Studies Under the Upas Tree (New Delhi: Sage Publications, 1992), 12.
To harness the critical power of humanity’s theory, an interpreter need only compare it to the personal theories of individuals or a society’s theory. Where a society or individual's theory is inconsistent or contradicts humanity’s theory, an interpreter need only point that fact out to that society or individual. The interpreter need not convince the society or individual of the authority of humanity’s theory of justice. This is implicit in its origin as the lowest common denominator amongst individual’s and societies’ theories of justice. Accordingly, in order to convince a society or an individual of the error of their ways, an interpreter need only point out the inconsistency between their theory of justice, whether as an individual or as a society, and humanity’s theory of justice. For, by definition, humanity’s theory of justice is embedded in every individual’s and every society’s theory of justice. What makes the critical power of the mirror so decisively authoritative with the potential to inspire dismay and guilt in the transgressor is social idealism. As Michael Walzer explains:

Individuals need to maintain a high opinion of themselves, a sense of their probity and righteousness; and similarly the members of any society (especially the leading members) need to believe that their distributive arrangements and policies are just. Hence the lies they tell, not only to others but also to themselves, their everyday evasions, and the veil they draw over the more ugly features of the world they have made. The critic tears aside the veil.

With his personal theory of justice, Dworkin is of course able to criticise another individual’s or society’s theory of justice. Yet, by doing so Dworkin is imposing his personal theory of what justice requires, grounded as it is on deeply personal conviction, on other people and societies without any regard to whether or not his theory is one they agree with or even understand. While this approach enables Dworkin to criticise the theories of justice of other people and societies,

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384. For further discussion on this point see Brian Orend, Human Rights: Concept and Context (Peterborough: Broadview Press, 2002), 77-78.
386. Walzer, Thick and Thin: Moral Argument at Home and Abroad, 42.
387. Ibid.
therefore, it does nothing to convince those individuals or societies of the validity of Dworkin’s theory of justice and therefore the flaws in theirs.

By contrast, by conversationally interpreting humanity’s theory of justice and using it as the basis for criticising individuals’ and societies’ theories of justice, an interpreter is able to hold an individual or society to a theory of justice they already understand and accept as legitimate. If an interpreter is able to use conversational interpretation to highlight an inconsistency between an individual’s or society’s theory of justice and humanity’s, he or she forces that individual or society to either reconcile those inconsistencies or live in hypocrisy.

Conversational interpretation provides an individual or society in such a situation the ideal methodology with which to reconcile inconsistencies between their theory of justice and humanity’s. For, by conversationally interpreting humanity’s theory of justice, an interpreter is able to reflect on his or her prejudices as well as those of humanity’s theory of justice and retain only those that are justified. An interpreter constructively interpreting humanity’s theory of justice so as to reconcile inconsistencies between humanity’s theory and his or her own may find that one or the other was reliant on an unjustified opinion and therefore requires revision.

It is timely to note that humanity's theory of justice is not the foundation of individual's or society’s theories of justice. People’s understanding of justice is thick or maximal from the beginning; they are culturally and historically integrated. Humanity's theory of justice only reveals itself when circumstances necessitate it: when our television screens depict pictures of students congregating in Tiananmen Square, monks lining the streets of Rangoon, or citizens chanting in Tahrir Square. Nevertheless, humanity’s theory itself presupposes the existence of the more substantive theories of individuals and societies. If we did not have our own history, culture and practices, we could not

388. Furthermore, his only justification for doing so is that Dworkin holds the conviction that his ethical conception of justice is the best.
vicariously march with the monks in Rangoon, the students in Tiananmen Square or the citizens in Tahrir Square; for, we would have no understanding of "justice" at all.

Interpretive internal criticism
Societies’ respective theories of justice are relative. Dworkin is quick to emphasise this fact when he says that, "If justice is only a matter of following shared understandings, then how can the parties be debating about justice when there is no shared understanding? In that situation no solution can possibly be just, on Walzer's relativist account, and politics can only be a selfish struggle." However, Walzer himself acknowledges the relativist nature of this particular aspect of his theory. That fact does not, however, preclude a society’s theory of justice from acting as an important platform for criticism. As already noted, we often criticise friends, colleagues and fellow citizens for not living up to a set of standards that they profess to honour. We measure them against their own professed ideals, charging them with contradictions, or even hypocrisy or bad faith. A critic who holds up a mirror to society as a whole is engaged in a similar enterprise. He or she means to show us as we really are. As Walzer says, a "given society is just if its substantial life is lived in a certain way—that is, in a way faithful to the shared understandings of the members."

As Walzer explains, if the pharaoh promises that he will see justice done, then the way is open for some Egyptian scribe to take his courage in his hands and catalogue all the injustices the pharaoh in fact condones. Interpretive criticism from an interpreter within a society claims that the purpose of a society’s theory of justice is hypocritically held, ineffectively enforced, or inadequate in its own terms. In this way, criticism of a society’s theory of justice by a participating interpreter can call into question society’s theory of justice itself by exposing its internal tensions and contradictions.

392 To the extent that a maximal meaning of the institution of justice holds within a society, while relative to that society, it is not subjective to any individual within it.
393. Walzer, Thick and Thin: Moral Argument at Home and Abroad, 41-42.
394. Walzer, Spheres of Justice, 313.
395. Walzer, Thick and Thin: Moral Argument at Home and Abroad, 42-43.
396. Walzer, Spheres of Justice, 26-28.
For this reason, internal interpretive criticism from an interpreter contributing to a society’s theory can be far more wide-ranging and concrete than interpretive criticism from an interpreter who is an outsider to the theory he or she seeks to criticise. Rather than being limited to comparing a society or individual's theory of justice against humanity’s, internal interpretive criticism can compare a society’s theory of justice against itself, highlighting any internal inconsistencies and hypocrisies which may exist.

Again, unlike a conversational interpretation of society’s theory of justice, Dworkin employs his personal theory of justice to hold other people to his understanding of what justice requires rather than their own understanding. By conversationally interpreting society’s theory of justice, an interpreter is able to hold a society to the theory of justice they already understand and accept as legitimate.

**Constructive criticism**

Sometimes, however, internal and external interpretive criticism will not suffice. We may find that, for example, while an individual’s or a society's theory of justice is not hypocritical or inconsistent with humanity’s theory, it still seems to us grossly deficient in some way. One example that immediately springs to mind is the subservient role of women in extremist religions. There are, however, countless other examples, as Dallmayr notes: "In non-Western societies, traditions such as untouchability, female infanticide, and female circumcision are typically viewed by Westerners as particularly obnoxious and horrifying." In such instances neither internal nor external interpretive criticism will show a society or individual's theory of justice to be wanting. As long as an individual or society is consistently prejudiced against women, and that behaviour is not prohibited by humanity's theory of justice, their demeaning treatment of women will be immune from internal or external criticism through conversational interpretation. At such times we may feel compelled to abandon conversational interpretation in favour of employing our competing personal theory of justice which we believe to be superior to the theories of the individual or society we deplore and seek to discredit. In such situations a mirror will not provide the critical power necessary to convince our adversaries of the error of their ways. What is required is not description, but

persuasion: persuasion that our personal theory of justice is, if not the "right" conception, at least better than the one they now describe and defend.

It is this endeavour that Dworkin suggests is the main work for philosophers of justice: developing and defending full-blooded conceptions of justice. Indeed, it is the endeavour Dworkin himself undertakes throughout the pages of Sovereign Virtue.

If this is our instinctive or habitual approach to criticising other people and societies’ views about justice however, we are missing a great opportunity to understand and learn from other individuals’ and societies' theories and, at the same time, to remind those individuals and societies of their own commitment to humanity’s theory of justice. Similarly, we miss the opportunity to reflect on our own society’s theory of justice, uncovering any inconsistencies or hypocrisies. As Dallmayr notes, "The central issue here is whether critique proceeds from a presumed self-righteousness or hegemonic arrogance, or else from a shared engagement and a willingness to engage in a mutually transforming learning process." It is a society’s commitment to humanity’s theory and an individual’s reflection upon his or her society’s theory of justice that provides us with very powerful, perhaps yet untapped, critical tools against the injustices we find most abhorrent: torture, slavery and genocide to name but a few.

As I have said, there will inevitably be times where we feel it is necessary to employ our personal theories of justice to convince others of the injustice of their views. As such an approach precludes us from reflecting on the prejudices that guide our understanding and does not in itself discredit the theories of others, reliance on our personal theories should be a critical tool of last resort.

As this chapter has shown, the conversational interpretation of our society’s theory of justice provides a non-subjective method to criticise the theories of other members of our society as well as society’s theory as a whole. Furthermore, the conversational

398. Dworkin, Law’s Empire, 75-76.
interpretation of humanity’s theory of justice provides a non-relative method to criticise individuals’ personal theories of justice. Both the conversational interpretation of our society’s and humanity’s theories of justice however, provide more reflective ways to criticise others' views about justice than Dworkin’s approach. If possible, we should seek to hold people to their own understanding of what justice requires before imposing, as Dworkin endeavours to do, our own personal theory on them. Justice is undoubtedly a matter of conviction and interpretation. We should, however, exhaust interpretation before relying on conviction.

Conclusion

This chapter has hermeneutically reconstructed Dworkin's interpretive theory of constructive interpretation so as to articulate an interpretive theory better equipped to understand what justice means for society and humanity. It then employed this reconstructed theory, which I call conversational interpretation, to interpret humanity’s theory of justice. The chapter showed how the hermeneutically conscious interpretation that resulted reflects what justice means, not just for society, but also for humanity. This chapter has argued that a conversational interpretation of a society’s theory of justice provides law as integrity with the justification it needs. It made use of the example of the prohibition against torture to elucidate how the conversational interpretation of a society’s and humanity’s theory of justice works in practice.

Drawing on Walzer's theory of thick and thin morality, the chapter then explained how conversational interpretation illuminates the existence of both a minimal theory of justice held by humanity and more substantive theories of justice held by societies. Humanity’s theory of justice is universally held and is neither subjective nor relative. It can, therefore, provide the basis for substantive external criticism of other peoples' and other societies' theories of justice. Although understanding society’s theory of justice is relative, this chapter has shown how it can nevertheless provide the basis for extensive criticism within a society. Conversational interpretation provides several more reflective ways to criticise others’ views about justice. Justice is a matter of conviction and interpretation. While constructive criticism is necessary at times however, it should be a critical tool of last resort.
Conclusion

Five decades ago, the story of two Portuguese students who were sentenced to seven years' imprisonment for raising their glasses in a toast to freedom horrified British lawyer Peter Benenson. He wrote to the British newspaper, *The Observer*, and called for an international campaign of solidarity for the "forgotten prisoners." On 28 May 1961, *The Observer* launched Benenson’s year long campaign, “Appeal for Amnesty 1961,” and called on people in Britain and around the world to protest against the imprisonment of men and women for their political or religious beliefs. May 28th 2011 marked the fiftieth anniversary of Amnesty International; the global human rights organisation started by Benenson, which now has more than three million members, supporters and activists in more than one hundred and fifty countries around the world.401

When introducing this dissertation, I spoke of the stories of Phyo Wai Aung, Alice and Adisa. This dissertation set out to answer whether or not we are justified in our calls for justice for these three individuals from vastly different societies. It has similarly been an attempt to answer whether Peter Benenson was justified in his call, not just to the British public but to humanity, to stand in solidarity with those two Portuguese students. It set out, that is, to understand whether justice, one of the most central concepts in political theory, is the subject for personal theories grounded in conviction or collective theories of societies and humanity grounded in interpretation. The answer, it has concluded, is both.

In arriving at this answer, the dissertation has developed, through a reconstruction of Dworkin’s interpretive theory of constructive interpretation, a hermeneutically conscious interpretive theory that I have called conversational interpretation. It is an interpretive theory that, while still reflecting several of constructive interpretation’s valuable attributes, also improves on Dworkin’s interpretive theory in a number of important ways.

Unlike Dworkin’s theory, which recognises but struggles against the social-historic context of an interpretation, conversational interpretation embraces the horizons of both the interpreter and the object of interpretation, in this case a society’s or humanity’s theory of justice, and the prejudices they encompass. According to conversational interpretation, a society’s or humanity’s theory of justice and the interpreter both contribute towards understanding what justice means for a society or humanity at large. This feature of conversational interpretation enables an interpreter to reflect on his or her prejudices as well as those of a society’s or humanity’s theory of justice and therefore discard those opinions that, upon reflection, they discover to be unjustified. It provides a unique opportunity for an interpreter to both learn and grow through his or her interpretation of a society’s or humanity’s theory of justice and, at the same time, to draw on his or her personal experience and knowledge to improve a society’s or humanity’s theory. In contrast, Dworkin’s theory of constructive interpretation, with the passive role it prescribes to the social practice and the dominant role it prescribes to the interpreter combined with its optimisation requirement, prevents an interpreter from reflecting on the prejudices that guide his or her understanding and discarding those opinions that are unjustified.

Given the constitutive roles both the interpreter and a society’s or humanity’s theory of justice play within conversational interpretation, every interpretation that results from its application is unique to the interpreter and the socio-historical context within which a society’s or humanity’s theory of justice is interpreted. This feature of conversational interpretation precludes the possibility of an interpreter interpreting a society’s or humanity’s theory of justice, or anything else for that matter, from an Archimedean position. As such, conversational interpretation does not claim to produce interpretations that are objective in the strong sense as reflections of some timeless reality that is independent of humanity.

However, no matter who the interpreter is or what theory of interpretation is employed, an interpreter and his or her prejudices will always contribute towards the understanding that results. Conversational interpretation is one of the few interpretive theories that
acknowledges and values the indispensible role the interpreter and his or her prejudices play in achieving understanding through interpretation.

This dissertation has also shown, however, that these prejudices are, in turn, grounded in implicit meanings which are shared amongst society and humanity. Indeed, it is the commonality between these implicit meanings that makes cross-cultural agreement and disagreement possible. While the influence of an interpreter’s prejudices ensures that every interpretation of humanity’s theory of justice is unique, their socio-historical origins ensure the interpretations that result reflect what justice means for society and humanity. While understanding achieved through conversational interpretation is not objective in the strong sense, neither is it subjective or relative.

In a world deeply divided by war, religion and political ideology, to name just a few contemporary divisive influences, conversational interpretation provides an interpreter the unique opportunity to focus on the commonality between your understanding, my own, our society’s, and humanity’s understanding of what justice requires. Conversationally interpreting a society’s or humanity’s theory of justice and using it as the basis for criticising individuals’ and societies’ theories of justice, enables an interpreter to hold an individual or society to theories of justice that they already understand and accept as legitimate. Employing society’s theory of justice, and the subsidiary institution against the infliction of disproportionate mental or physical suffering, to the stories of injustice highlighted in this dissertation’s introduction, for example, we are able to employ conversational interpretation to criticise Police Lieutenant Swe Lin and his colleagues’ torture of Phyo Wai Aung to obtain a confession. Similarly, employing humanity’s theory of justice, and the subsidiary institution against gratuitous violence I have argued it includes, we are able to employ conversational interpretation to criticise the perpetrators of Alice’s rape. Such an approach has the practical advantage of silencing any opposition from those former and current proponents, such as Lee Kuan Yew, of the dichotomy between Eastern and Western values.
Unlike the optimisation requirement of Dworkin’s theory of constructive interpretation, conversational interpretation does not endeavor to see a society’s or humanity’s theory of justice in its best light or ideal form. Its more humble ambition is to understand, through dialogical interpretation, what a society’s or humanity’s theory of justice requires and not what it could or should require from an ideal perspective abstracted from existing norms. It is an attempt, that is, to reflect on the prejudices that guide our collective understanding of justice, whether as a society or as humanity, and in so doing ensure that our reliance on them is justified.

As Dworkin has rightly pointed out however, when talking about issues of justice we characteristically do employ the vocabulary of objectivity. We typically say, for example, “I’m right and you are wrong. That is just how it objectively is.” However, when we use such language in our discussions about justice we do so to emphasise that it not subjective or relative: that is, that there are “right” and “wrong” answers that apply to everyone to questions about justice and that such questions are not just a matter of personal preference or taste. Conversational interpretation acknowledges this characteristic of the way in which we view justice and consequently is capable of achieving objective interpretations of a society’s or humanity’s theory of justice in the weak sense.

There will, of course, be times when humanity’s theory of justice fails, in our view, to cover an important matter of justice. While humanity’s diversity makes disagreement about justice inevitable, conversational interpretation does not preclude us from making a stand in the name of justice. Conversational interpretation simply provides us with the interpretive tools necessary in the first place to understand what theories of justice societies and humanity share in common. Once these are understood, and in our view found wanting, our conversational interpretation of humanity’s theory of justice is complete and we are free to develop some novel argument in order to convince others of the validity of our personal theories of justice. Doing so is not, however, an interpretive task of understanding what a society or humanity believes justice requires but personal task of articulating what we, as individuals, mean and endeavouring to convince others of the merits of such a theory. This is a task Amnesty International, Oxfam, UNICEF
and many other organisations have sought to advance so as to convince governments, companies and individuals to alleviate, for example, children’s extreme poverty. If we are able to do so, a norm may, over time, become so widely accepted by people that it comes to form part of our society’s or even humanity’s theory of justice.

While reliance on our personal convictions is therefore necessary at times, it should only be embraced to the extent that conversational interpretation of our society’s or humanity’s theory of justice cannot justify the theory of justice we believe in. In the majority of circumstances, however, the conversational interpretation of a society’s or humanity’s theory of justice will provide the justification that our invocation of justice requires. It is an interpretive theory that simultaneously is not arrogant with its weak claim of objectivity, and not meek in its refutation of subjectivity and relativity. Conversational interpretation enables us to challenge the validity of other people’s and societies’ theories of justice; remain open to external criticism and thus to learn from those people’s and societies’ theories; and yet hold fast to what, on reflection, we believe justice means.

This dissertation has provided the theoretical justification for a hermeneutic framework for understanding what people collectively, whether as a particular society or as humanity, believe justice requires. It has, that is, provided a theoretical justification for societies’ and humanity’s theories of justice. While justice is a matter of interpretation and conviction, our reliance on humanity’s, our society’s and our own personal theory of justice should be in that order.

Dworkin has developed a powerful theory of justice that has immense intuitive appeal. It is, however, a deeply personal theory that, grounded on conviction, prevents Dworkin from reflecting on the prejudices that guide his understanding. While he may be right that justice requires us to treat each other with equal concern and respect, the quasi-interpretive approach Dworkin takes to developing his personal theory does nothing to convince others of its merits. It leaves, as Dworkin would say, all the arguments both for and against to be made.
A conversational interpretation of what justice means for society or humanity does, however, include the notable merit of an inbuilt justification: it seeks to hold other people and other societies to an understanding of what justice requires that they already understand and accept.

As we know, the success of the process of interpretation is measured in terms of the prejudices guiding an interpretation. The more conscious an interpreter is about the prejudices on which the interpretation relies, the more those prejudices can be questioned. The more that prejudices are questioned, the more reflective an interpretation will be, relying on only those prejudices that, having withstood reflection, are justified. This dissertation has developed and defended a theory of interpretation in conversational interpretation that provides an interpretation greater opportunity than Dworkin’s theory of constructive interpretation does, to reflect on both the prejudices of society’s or humanity’s theory of justice as well as his or her own.

Finally, this dissertation has highlighted that Dworkin was wrong to abandon the interpretation of society’s and humanity’s theories of justice for fear of the subjective and relative consequences. It has shown how conversational interpretation can interpret a theory of what justice means for society and humanity that is neither relative nor subjective.

402. Leyh, ”Dworkin's Hermeneutics,” 863.
Bibliography


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