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JUSTICE AS INTEGRITY: OBJECTIVITY AND SOCIAL MEANING IN LEGAL THEORY

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ABSTRACT

While Dworkin views law as the embodiment of moral principles, the sources of those principles that he identifies do not supply the justification of force he ascribes to them. In this article I propose that judges interpret justice from what I call the social forms of society. I call this method justice as integrity and propose it as the foundation of law as integrity. By showing how social meanings are necessarily part of our understanding of social and natural phenomena, I hope to show that Dworkin's political theory, and hence his legal theory, are tenable only upon a constructivist foundation of justice closer to Michael Walzer's than his own. While this methodology better explains the moral foundations of law, I reject the metaphysical implications that both he and Dworkin ascribe to it. Constructivism does not imply ethical relativism nor does it provide any moral or epistemological barriers to criticism of social practice in one's own society or elsewhere. I hope to make Dworkin's constitutional theory more viable by reconceiving the objectivist pedigree of social and empirical meanings. Social meanings can create clear, objective principles that apply across a pluralistic community and permit judges to interpret justice as insiders of the social forms of their community.

> . . . . We milk the cow of the world, and as we do,
> we whisper in her ear, 'you are not true.'
>
> Richard Wilbur

INTRODUCTION: MORE EMBARRASSING QUESTIONS

THIRTY-FIVE years after Ronald Dworkin asked some embarrassing questions about the concept of law as a system of rules, some very awkward questions remain (Dworkin, 1967: 14–46). Perhaps the most embarrassing is why judges still do not adjudicate fundamental rights in a

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manner that explains and justifies legal practice. I argue in this article that the problem of describing the way judges actually decide cases stems from an inability to identify the sources of law that in turn arises from an inability to identify the sources of justice.[1] Surprisingly, Dworkin skirts this issue because of his metaphysical view that morality is not subject to metaphysical evaluation. It has this special status because unlike science, it supposedly makes no causal claims available for empirical measurement or criticism (Dworkin, 1996: 119). This idea leads him to reject a genuinely interpretive idea of justice with a stronger claim to objectivity than his own.

I intend to show that justice interpreted from the social forms of society, what I call justice as integrity, is the foundation of law as integrity. I begin with the premise that Dworkin's idea of law as incorporating some moral justification of force is correct. Yet the justification he identifies neither fits nor justifies legal practice. American law does not and, indeed, cannot reflect the neutrality between different conceptions of life that he contends it does. Liberalism counsels neutrality to preserve autonomy, but liberalism cannot be neutral about itself if it is to enforce the neutrality that preserves autonomy. It can only justify the imposition of neutrality because of some deeper conception of justice that identifies it as the correct thing to do. I argue that the norms justifying the enforcement of neutrality, or any other conception of justice, must fit with shared meanings that are not contained only within the law. If these shared meanings were not larger than the law then they could only reflect what the state has already done, not justify it.

This argument rests on an idea of justice as an interpretive concept. In an attempt to resurrect an interpretive theory of law, I will explain why Dworkin's political theory, and hence his legal theory, are tenable only upon an idea of justice as the construct of social meanings. This constructivist idea of justice as the interpreted product of shared meanings is closer to Michael Walzer's than his own. Nevertheless, I reject the metaphysical implications that both Walzer and Dworkin ascribe to it. Constructivism implies no moral or epistemological barriers to social criticism. One of the main critiques of judicial constructivism is that it introduces inherently contestable norms into a process that needs objectively correct decisions. I hope to show that constructivism can create clear, objective principles in a pluralistic society that permit judges to interpret justice as insiders of the forms of their community. By interpreting justice with integrity, judges can successfully adjudicate law with integrity as Dworkin originally envisioned.

SOCIAL FORMS: THE IDEA OF COMMON MEANING

The idea of 'social forms' borrows from Joseph Raz's idea of forms of behavior that are widely practiced within the community. As he describes them, they reflect 'shared beliefs, folklore, high culture, collectively shared metaphors and imagination. . . .' (Raz, 1986: 310–12). Like Raz, I am careful to distinguish these forms from shared practices or conventions that connote

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conscious agreement. Although their effect may guide our explicit behavior, these forms are implicit in all our interpretations of our selves, our relationships and the larger social environment.

Social forms are themselves the intellectual progeny of Wittgenstein's 'forms of life'. In section 242 of his *Investigations*, Wittgenstein says:

> '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. (1997: s. 242)

Social forms of justice, like forms of life, are not the explicit agreements people have about the world, or common practices, or even social facts, but rather the implicit understandings people learn and share that make explicit agreements (or disagreements) about justice possible. Wittgenstein's concept of rule following, however, suggests something more rigid than the idea I mean to convey.[2] He developed these ideas with an idea principally to elucidate the nature of language. I use 'social forms,' rather than 'forms of life' to suggest that the common understandings about social practices apply to forms of intentional human behavior other than just speech.

The idea that justice is rule based is rejected by Dworkin as a semantic fallacy. The fact that we disagree about matters of justice, in his view, means that there are no such shared meanings. As Peter Winch points out, however, the idea of intentional behavior, which of course is a precondition of legal responsibility, requires that actions have meaning. The existence of the concepts that form the reasons for action are dependent on group life because they emerge from shared meaning. To say that a person acted intentionally is to say that the actor had a reason for the action, which is to say that s/he understood the meaning of these actions to be *x* and not *y*. As Winch pointed out, putting a mark on a piece of paper is not voting unless the actor understands him- or herself to be voting. Even though a dog can make a mark on a piece of paper, it cannot vote (Winch, 1958: 45, 64). While people may disagree about whether it was right to vote Tory or Labour, they will not disagree on what it means to be voting. Moreover, they will be capable of understanding the reasons why others voted as they did even though they may disagree on the weight or sensibility of those reasons.

The meanings that an actor attaches to an action do not belong to him or her alone. They are intersubjective phenomena whose meanings, implicit in rule-governed behavior, go deeper than consensus. These intersubjective meanings are constitutive of a set of practices in life that precede explicit agreements about value that can produce consensus or, indeed, civil war. As Charles Taylor observed, while values about the legitimacy of slavery or the Reformation can belong to one person, several people or everyone, the intersubjective meanings in which the beliefs can be formulated cannot belong to any one person because they are rooted in social forms (1985: 32).

Communitarians refer to these intersubjective meanings as constitutive meanings because they constitute a person's identity and, indeed, the very idea of the self (Taylor, 1989: 1–8). The idea of social forms shares this notion,

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with qualifications. The relation of constitutive meanings to identity is quite important when we come to consider the question of interpreting a judge's convictions and intuitions, as Dworkin would have us do. For if the convictions, indeed the identity, of the judge and those interpreting his or her convictions are themselves shaped by constitutive meanings, then no objective interpretation of justice can be detached from those shared meanings in the way that Dworkin suggests. Charles Taylor and Michael Walzer offer an alternative methodology that views the idea of justice, and indeed moral philosophy, as a more purely interpretive enterprise.

Taylor and Walzer believe that these constitutive meanings have a special status which insiders have a duty to support (Taylor, 1989: 208) and outsiders have a duty to respect (Walzer, 1985: 219). The idea of social forms that I employ in this article rejects both of these notions. Here, I agree with Dworkin that individuals or communities should feel free to condemn their own or other societies' conceptions of justice. I also reject a related epistemological argument of some communitarians, that criticisms emerging out of alien social forms will be incomprehensible. I will draw parallels in social and scientific explanation to show that social forms of justice pose no insuperable epistemological barrier to criticism or comprehension across hermeneutic divides. So my discussion of social explanation will challenge elements of Dworkin's and Walzer's interpretive models.

Justice as integrity implies a social meaning that is, at least in some instances, objectively true. Nevertheless, I do not intend to argue the case for moral realism so much as illustrate the presence of constructivism in science as well as law and morality. To some, the idea of scientific constructivism conjures up a postmodernist nightmare in which electromagnetic and gravitational forces do not apply to those communities that do not practice gravity or electricity. This concern is unwarranted. Constructivism does not permit each person's convictions to count as empirical reality. It does suggest, however, that empirical objectivity is never completely divorced from social forms. Kuhn's idea of 'normal science' illustrates how any theory of scientific truth, in its own way, depends upon the creation and interpretation of social forms (Kuhn, 1970: 10). The common meaning that scientists ascribe to phenomena comes from shared hypothetico-deductive models, and before that, the constitutive understanding that scientific truths are deducible from observations embedded in explanatory hypotheses (Hempel, 1966). According to this methodology, as a model encounters more inexplicable phenomena the consensus degrades until it emerges around a different theory that incorporates the 'anomalous' observations. Truth, or normal science, exists during periods of consensus about the explanatory power of a model. This process is constantly in flux so normality is the exception rather than the rule. Moreover, because these new meanings rely on consensus, no *understanding* of a phenomena can be independent of the knowing observer.

An empiricist would point out the difference between a phenomenon's existence and our understanding of its existence. While it is true that we cannot make the planets revolve in the opposite direction merely by coming

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to believe that they do, this does not mean that scientific explanation cannot be contingent in a strong sense. Ian Hacking observed how scientific explanation depends upon a dialectic among broad theories, speculative conjectures within the theories and more down-to-earth understandings of what can be done about them. The observance of anomalies in the heavens, for example, could require a change of paradigm about the universe, or a revision of theories of optics. Alternatively, it could require a reengineering of telescopes or perhaps simply an adjustment to the lens. Discoveries in science depend on many considerations including the ways in which these different factors are pursued. Hacking observes that it is not incoherent to speak of different paths that are equally successful in terms of their ability to explain phenomena, that did not include some of the phenomena that we take to exist, independent of what anyone thinks (1999: 68–78).

If interpreting the social forms of a community is a component of natural as well as axiological reality, law as integrity will require judges to look at more than precedent to determine the institutional moral principles that fit with the law. Interpreting justice, as Dworkin says Hercules should do, will require him to consider *all* the intersubjective meanings of the community that help constitute a judge's intuitions and convictions. Dworkin appears to imply the reverse, that we can understand the social forms through the judge's convictions. Yet we cannot fathom these convictions without knowledge of the intersubjective meanings that constitute them.

CAN PAST BEHAVIOR JUSTIFY ANYTHING?

Dworkin tells us that law must be understood as the best internal interpretation of past political decisions that justify the state's use of collective force (1986: 93). For Dworkin, that justification consists in the principle of integrity which, in turn, relies on an idea of equality (1986: 185). 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. Dworkin takes justice to be a quasi-interpretive concept in which the judge looks to the institutional morality implied in precedent. When this is inconclusive, he suggests that judges may have to impose their own radically detached convictions that are not interpreted from social meanings. Although Dworkin's intentions may be interpretive, trying to discover institutional morality through the prism of legal precedent cannot capture the complex moral picture that Dworkin's idea of legal integrity requires. As he interprets these principles, they provide no greater insight into the comprehensive moral framework of a community than Hart's rule of recognition (Hart, 1994: 100–10).

The problem of sources surfaces in 'The Model of Rules' (Dworkin, 1967: vol. 35) when Dworkin argues for the status of principles as part of law rather than as free-floating principles of justice that a judge is free to follow if he wishes. Why not a third category of free-floating principles of justice that

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judges *must* invoke without discretion when rules conflict or run out? This not only preserves the preexistence of rights but has the added virtue of fitting judicial practice better than Dworkin's model. The judge in *Riggs* v. *Palmer* explicitly drew upon moral principles beyond precedent to justify his interpretation. He invoked everything from Blackstone's idea of common reason, public policy, divine law, Roman law, the Napoleonic Code, Bolognan Law and the wisdom of philosophers and statesmen, to interpret the principle that no one should profit from his own wrong (*Riggs* v. *Palmer* 115 NY 506, 511–13). If all these norms were manifest in the common law of New York State then there would be no moral principles left to be free-floating. Moreover, once those free-floating principles are incorporated into institutional morality, they cannot be interpreted without reference back to free-floating moral principles that dictated their inclusion in the first place. They embody a larger scheme of moral principles than legal precedent alone can encapsulate.

Past state actions and legal precedents are what judges are trying to interpret when they invoke principles. They cannot use only those sources, even interpreted abstractly, to support their justifications without reducing them to a tautology, or as Dworkin would put it, a useless mirror. Hence, the principle that the judge invokes in *Henningsen*, that courts will not permit themselves to be instruments of inequity and injustice, must derive from a source outside precedent. Otherwise the judges' 'interpretation' is either circular or a violation of integrity. It violates integrity because American legal history is replete with examples of the judiciary (in the name of positivism) embracing its institutional role as instruments of inequity and injustice. The most prominent example is the enforcement of the fugitive slave acts.[3] Putting that and similar decisions in their best light hardly supports the judge's principle in *Henningsen*. So it violates integrity.

This comes, of course, from my personal view about the injustice of slavery. If such views are impermissible, non-legal, free-floating ideas of justice, then the judge's statement in *Henningsen* is a tautology. If principles of morality may be derived only from past legal decisions, then the court cannot, by definition, be an instrument of injustice. Every application of precedent is ipso facto just according to this model because justice is defined as the application of the morality implicit in precedent as interpreted by the judge. The judge's principle in *Henningsen* can only be a proposition about the world if it is falsifiable, at least in theory, if not in practice. It is impossible to show how the court might ever be unjust unless the source of this moral principle existed outside of institutional morality.

The principles established in *Riggs* and *Henningsen* both rely on the more abstract notion of fairness that cannot be captured in past state actions alone. This move up the level of abstraction ultimately takes us away from precedent as the interpretive base of institutional morality into pure conceptions of justice that come from outside what the state has already done. If justice hits the dead end of metaphysics and runs out, so must principles of law.

The principles implicit in past state action are too limited to give a

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sufficient account of a community's principles of justice even if judges employ esthetic judgments. Apart from the circularity of extracting justice from the thing that must be justified, past decisions will be too inchoate to enable insiders to interpret their community's institutional morality. It is not that those sources cannot provide a coherent justification of law but rather that they can provide too many coherent justifications, none of which can defeat any other on its own terms.[4] Does *Griswold* v. *Connecticut* (381 US 479) support a liberal reading of American law, because of its protection of contraceptive freedom, or a conservative reading because its justification for that protection rests on preserving the sanctity of the family? Some of *Griswold*'s progeny suggest the former and others the latter. *Riggs* and *Henningsen* suggest that justice is derived from multiple community forms, not simply from principles implicit in past judicial convictions. Dworkin's resistance to justice as integrity is based upon a mistaken notion about the subjectivity of social meanings. He denies them a reality that scientific phenomena enjoy. Justice in his view is objective and so it cannot be interpreted from the common meanings of social practices (Dworkin, 1996: 87). Objectivity, in his view, reduces to the deep convictions no one can persuade you to renounce. This proposal seems oddly postmodernist given that it permits both Pol Pot and Mother Theresa to hold objectively true, but contradictory, moral beliefs. It would not be anomalous if one believed in the objectivity of locally shared understandings, but Dworkin does not.

SOCIAL FORMS AND OBJECTIVITY

Lawyers treat the question of where to look for the moral principles supporting law as an issue of constitutional theory. Any resolution must, however, also take account of metaphysical considerations because knowing where to look for the justifications of force hinge on whether justice is independent of human perspective or a product of human agency. Dworkin has written relatively little on this question (Dworkin, 1985: 216, 1986: 424 n.20) and when critics address it they generally raise more questions than they answer (Edward, 1988; Altman, 1990).

Disagreement over the content of justice ostensibly suggests the nonexistence of any shared meanings.[5] People who hold this position see disagreement as the natural consequence of living in a world of conflicting and incommensurate ends. Others view this persistent disagreement as proto-shared meanings that will thicken as the world develops into a community. The former view, the crux of Dworkin's objection to moral constructivism, incorrectly treats shared meanings as if they were conscious agreements like treaties or contracts. The social meanings that comprise justice are not the product of conscious agreements any more than Wittgenstein's conventions of language are consciously adopted. Just because meaning is produced by language rules does not mean it can be amended at will. No one can impose constitutive meanings on a community because the

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reality that social forms describe requires common understandings and interpretations to exist (Wittgenstein, 1997: s. 241). Regarding the forms of life as so fungible conflates the background fact of agreement with the insider's interpretation of which acts do or do not accord with a rule that comes from the agreement. The background understanding affects the way we judge things, but when we criticize someone for breaking a rule we are interpreting from an internal perspective how the concept of correctness is understood within the social form (1997: s. 242).

While Dworkin sees both law and justice as social practices, he interprets them differently. Although law is a matter of what rights are implied by past state actions, justice ultimately hinges on what people feel by virtue of their own *personal* convictions to be true (Baker and Hacker, 1980: 97). Justice draws on the social practice of morality but is more, 'radically independent' of the past' (Dworkin, 1983: 45 n.1). Unlike courtesy, which people understand to be an interpretation of a local social practice that might be different elsewhere, justice is supposedly a social practice that is interpreted to apply everywhere. If other societies do not follow our conception of justice, they are wrong for not doing so.

This view fails to account for religious communities, like Judaism, that define justice as absolute yet local in its application. While Jews believe they have a covenant with god that obligates them to perform 613 *Mitzvot*, or good deeds, they also believe that other groups have different relationships with god that generate different practices. These obligations apply to Jews everywhere but to gentiles nowhere. Jewish law does not, for example, require a Christian to keep Kosher or condemn him for not doing so.[6] So justice as a social practice could be understood to be absolute yet local. It could have universal application, but only if everyone is within the community of insiders who understand it to have this meaning.

It is not really clear what Dworkin means by a concept of justice having universal application. Does it require every community to subscribe to the same conception at the same level of abstraction? If so, it would be difficult to find two communities with the same idea of justice, let alone a universal version of it. If different conceptions and levels of abstraction count as one universal application, what happens when they conflict with each other? Although Britain and the United States abide by the same general concept of justice, they ascribe to different conceptions of it. We cannot simply calculate the greatest common moral denominator. Nor can we discount them as small differences in comparison to the two countries' abstract commitments to democratic values without begging the question. Deeply contradictory policies can be interpreted from this common abstract principle with no mechanism to determine which is objectively just.

The only way to save law as integrity from this fate is to think of justice as something that insiders interpret from their own community's social forms. Britain and the United States simply have different constitutive meanings of democracy that justify force differently in each society. Dworkin rejects this solution because he thinks justice is independent of

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society metaphysically. Principles of justice, he tells us, 'must be principles we accept because they seem right rather than because they have been captured in some conventional practice' (Dworkin, 1983: 46). Otherwise political theory will only be our mirror, uselessly reflecting a community's beliefs back onto itself. Yet what should judges do when there are implacable intracommunal conflicts over the best interpretation of past rules? In these circumstances, Dworkin believes that Hercules may have no alternative but to resort to abstract principles of justice which, he says, have no basis in a society's social conventions because the interpretation of those conventions is what is at issue. So Hercules will have to rely on his personal convictions about what is right.

Bedrock convictions can, of course, support a world view that one considers objectively true and determinate. This is what we must ultimately draw upon when defending our convictions and practices to outsiders or skeptics. As Wittgenstein noted, if he should exhaust all justifications to a skeptic about how a rule should be applied he would be inclined to say, 'This is simply what I do' (Wittgenstein, 1997: s. 217). This conviction justifies a truth, but one derived from society's forms of life, not radically detached from it. If the skeptic presses for additional justification he is going beyond the social form to the conceptual question of what counts as following a rule. That does not make the particular language game indeterminate. An insider, such as Hercules, might say, this is simply what we mean by 'adjudication,' or 'law' or 'cruel and unusual.' But his convictions are no more radically detached from social forms than the bedrock conviction of a mathematician than '1 + 1 = 2'. A judge's sense of justice may be more abstract than other rules he is interpreting, but they must in some sense derive from shared understandings. Otherwise, 'abstract' justice is not an interpretive concept (Dworkin, 1986: 424 n.20). It would be impossible to have a rationally held 'conviction' to live in the fifth dimension without any knowledge of its nature. Deeply held convictions must be shaped by society's social forms simply to conceive of them let alone to advance them.

The reverse is not true. While it may be impossible to embrace a way of life that one knows nothing about, it is very possible to reject existing practices even if they are widely accepted. Surely some poor woman being thrown on the funeral pyre must have had the deeply held conviction that there was a better way to deal with widowhood than *suttee* even if she did not know what that might be. Moreover, she could have these beliefs even if *no one* else in her community thought so. Disagreement between her and her community implies no lack of shared meanings about justice. The soon-to-be immolated widow and her 'co-celebrants' understand perfectly well what the practice of *suttee* means. She simply does not believe it justifies her death.[7] Disagreement about the merits of a practice does not mean that people do not share a common understanding of what that practice entails. The description of a social form and the judgments and justifications we make about it are different things (Wittgenstein, 1997: s. 241).

This is the same mistake Dworkin chided Michael Sandel and Mark Tushnet

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for making. Critics argue that because the rules of interpretation necessary to constrain the power of judges can only acquire content by reference to wide social consensus, 'individualist premises' of liberal thought are incoherent (Tushnet, 1983: 781). Because intersubjective meanings supposedly provide no objective values, rules not appealing to self-interest can only bind by coercion (Unger, 1975: 63). Tushnet, and now apparently Dworkin, both make the mistake of conflating people's agreeing on the meaning of words, rituals and social practices with their sharing a common purpose.

Dworkin dismisses the option of social meanings on the grounds that justice has nothing more abstract to appeal to except 'initially nonpolitical ideas' like concepts of human nature or theories of the self (Unger, 1975: 425). It isn't clear why these sources of justice are ruled out ex ante. They seem as eligible as someone's 'radically detached' personal convictions. Moreover, one cannot show that a conviction is detached from social understandings without appealing to some common understanding which entails that view. Someone immersed in these social meanings often fails to comprehend this. Many Bulgarians are genuinely surprised to learn that ethnic minorities in America are permitted to retain their alien family names. This contradicts their innermost personal conviction that Turks should convert their family names into Bulgarian. Do the different convictions that Americans and Bulgarians have about pluralism and tolerance really have nothing to do with different social meanings about identity, nationality and citizenship?

Dworkin addresses this conundrum with what might be called the *will to objectivity*: Dworkin, like Nietzsche's *Übermensch*, knows an ideal to be objectively true when he has the conviction that it is true and can think of no better reason to believe otherwise (Dworkin, 1996: 118). Yet this contradicts his fundamental idea of objectivity as something that remains true even if no one in the world believed it. This reverses the standard by making objectivity depend on at least *one* person having a deep personal conviction that something is true regardless of what is actually out there. He sidesteps this complication by arguing that *for someone who has this conviction* it is true whether or not he or anyone else believes it. That solution merely piggybacks on the person having a prior conviction that this is so. Objectivity is achieved by personal convictions and remains true for that person regardless of what is going on out in the world. As he says, '. . . [i]n the beginning, and in the end, is the conviction' (1996: 118).

Rather than engage this issue, Dworkin denies the relevance of metaphysics to morals tout court. This response is aimed at postmodernist critics who claim to have proven morality metaphysically incoherent. An external critique on metaphysical, not moral or other esthetic grounds, would trump his moral argument, and hence, integrity. He responds to this postmodernist attack by arguing that moral discourse cannot be touched by metaphysics. This does not so much show the objectivity of moral beliefs as suggest that no one need abandon those beliefs if they are not persuaded otherwise. On this view skepticism can only show a belief to be uncertain, not objectively wrong or indeterminate, because there is no such thing as external moral

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criticism. Following Simon Blackburn's argument (1993), Dworkin argues that metaphysical arguments for abandoning moral claims ultimately boil down to competing normative claims that are internal to moral discourse. Yet he does not prove that all metaphysical critiques are evaluative so much as show that you cannot prove that they are not really moral arguments. This simply shifts the burden of proof to those who are making the metaphysical claim to justify their metaphysics.

One might wonder why metaphysics, a mode of thought that concerns the nature of *things*, does not apply to the *thing* we call morality. This is particularly troubling if justice will be based on personal convictions. A judge's 'radically detached' personal convictions may well include principles of prejudice and superstition. Do they count as objective truths about the world as it really is? Dworkin argues that reconciling these convictions tightly with one's other principles will limit intolerance. But if someone is consistently prejudiced, reflective equilibrium will simply reinforce it. Coherent empirical beliefs could incorporate a view that the earth is flat but that view will run up against established scientific knowledge. This might be an effective brake for the moral equivalent of the Flat Earth Society but Dworkin exempts morality from such external disciplinary standards. Morality, like mathematics, is immune from metaphysical scrutiny because it apparently makes no causal claims to be judged. This lack of causality supposedly makes morality impregnable to criticisms from science, metaphysics or any other mode of thought that claims causality.

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. Dworkin argues that religion, unlike morality, belongs together with beliefs that claim causality. But the golden rule was understood to be a moral principle by Jesus and his adherents. Any attempt to dispute their understandings would appear to be nothing more than an *internal* dispute about the best way to understand the concept of morality: precisely the sort of critique that cannot refute anything under Dworkin's theory of objectivity.

The idea that morality makes no claim of causality can be true only by constitutive meanings that define it that way. Morality, like mathematics, logic and geometry, is not the product of empirical observations subject to challenge because the 'truth' of a geometric proof or logical deduction does not derive from any fact about the world. The fact that we all believe the truth of '1 + 1 = 2' is because we all share the same social form that defines it that way. The *agreement* about a mathematical proposition and following the *rules* of mathematics are related to one another. To paraphrase Wittgenstein, any attempt to justify the sum of the addition must also be making an argument about the appropriate way to follow the rules of addition (Wittgenstein, 1978: 392, 1997: s. 242). This means that morality can only be insulated from causality if it is the product of social forms that would not exist if no one thought they did. Yet Dworkin defines objectivity as

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something that would exist regardless of what anyone thinks about it. So disassociating morality from causality precludes it from his own idea of objective truth and puts it in the constructivist domain.

However much Dworkin may dispute my equivalence of religion and morality, by his own lights, our disagreement would be an internal argument within the domains of religion or morality. He cannot refute my equivalence without appealing to some other mode of thought (metaphysics?) to establish jurisdiction. Indeed, he cannot show whether or not a domain has causal effects without appealing to some definition of causality that is not part of what he seeks to define. To which domain should he appeal for this purpose? Is the assertion that morality is immune from judgment by categories that make causal claims a moral, metaphysical or scientific assertion? Dworkin's conception of objectivity cannot objectively explain which categories cover what phenomena without violating its own premises. The answer will entail either an internal dispute, which he contends can yield no certain answer, or an external judgment of a non-causal phenomena, which he does not allow. Yet, in order to define causality and morality in ways that are not tautological, some other domain that people accept for that purpose must be invoked. Surely morality cannot decide for itself whether it makes causal claims or whether it can be judged by other categories.

It is not clear why causal phenomena should be treated differently from morality. Dworkin says that this disparity is in virtue of content. The kind of respectability a particular judgment deserves must be judged against reasons that are relevant to its domain. This is sensible. It would be silly to judge the skill of a surgeon by how well s/he can write a legal brief. The problem is that Dworkin's spheres do not exist in the real world and would not exist at all if no one thought they did. Phenomena in the real world do not come with labels indicating their genus or species. These domains are the product of social meanings about what sort of judgments fit where.

Dworkin does not specify how far content insulates a domain from criticism, or indeed, what standards we would use to define a domain. May a philosopher of the mind criticize a neurologist about the nature of thought or are these separate domains? Are Protestant critiques of transubstantiation invalid external evaluations of Catholicism or acceptable internal criticisms from the common domain of Christianity? Disagreements over the objective truth of a phenomenon often hinge precisely on which standards to apply to understand it: was Galileo an astronomer, a mathematician or a natural philosopher?; should Adam Smith's *Wealth of Nations* be judged by the standards of positive economics or moral philosophy?; should Dworkin's theory of integrity be judged by the standards of law or morality? This notion of objectivity undercuts his legal theory, which rests upon the premise that law is the embodiment of moral principles. If true, and morality makes no causal claims, then law cannot make any causal claims either. This theory of metaphysical categories precludes any idea of law that entails notice, which is premised on the causal relationship between the existence of rules and behavior. Yet notice is also a moral concept derived from the idea of fairness,

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so according to Dworkin's principle, it could have none of the causal effects of the sort that justified its role in law in the first place.

Differences over what fits where do not obviate the possibility of categories but they do imply that no conviction can ever be judged solely by the standard of its own domain. There must be some sort of referee domain that determines the standard by which a conviction should be judged. This referee category cannot itself be the progeny or progenitor of a category being judged without biasing the judgment. One cannot rely on which domain better explains or predicts events because that judgment is influenced by the standard used to test a domain's accuracy. Although economists probably believe that rational maximization best explains human behavior, a Buddhist monk might argue that altruism is the better predictor of outcomes. Each domain will evaluate and describe observations through its own prism. So when a soldier jumps on a hand grenade to save his unit, the monk will describe it as an act of altruism while the economist will insist that the soldier was maximizing his self-interested desire to be altruistic. If morality cannot be embarrassed by science, neither can astrology, religion, or any other domain because they will all vindicate their own world view.

Which domain can we use to determine that morality has no causal effects? As a causality-free domain, morality cannot make this decision independent of social meanings about the nature of causality. Many domains have causal effects. Can each domain have its own idea of causality, free from 'external' criticism? If so, ethical relativism will be the least of our problems. These domain disputes are legion. As much as Galileo argued that heliocentrism was an empirical theory, Pope Urban saw it also as a moral theory, which if true, would have grave *causal* effects. Disputes among domains cannot be resolved without reference to a different domain that is accepted for that purpose. Otherwise, multiple domains will declare jurisdiction over a particular mode of thought. Metaphysics, which is the domain that studies the nature of things, seems best suited for this role even though this domain too is necessarily the product of social forms.

Social meanings must at some level determine conceptions of objectivity, causality and truth. Galileo and Urban's struggle was over the definition of knowledge, causality, and whether empirical observations or grace provided a better picture of the universe as it really was, regardless of what observers believed. That we think Galileo won the argument is not because he could give empirical evidence to support his conviction. Indeed, there is no empirical evidence that could disprove the existence of God because religion does not care about empirical measurement and science does not care about grace. Galileo won the fight because we now have the *common understanding* that empirical observations describe the orbit of the earth better than faith or grace. Hence, our empirically objective beliefs are predicated on social meanings about which domain to use to examine the world as it really is regardless of perspective.

If justice is an interpretive concept then, like law, it invites and indeed requires disputes about what is the proper theoretical interpretation of the

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concept. The fact that we have disputes about justice within a society, and that they do not just fade away when we invoke the right rule – or the correct interpretation of what abstract justice requires – is what makes it interpretive. Dworkin seems to have been stung by his own semantic stinger. His objection to the existence of disagreements about justice implies a positivist conception of morality inconsistent with his concept of law.

The concern about the relativity of social meanings invokes the logical positivist distinction between fact and value. In its purist form, positivism required every proposition of a theory to be empirically verifiable in order to be a meaningful statement of fact about the world. Once it became clear that no theory of empirical science could meet this standard, it loosened to require the theory as a whole to be empirically verifiable. This changed, yet again, once it became apparent that facts and values were entangled such that it was impossible to show what was description (and therefore empirically verifiable) without invoking evaluative terms (Putnam, 1981: 127–49).

The most recent incarnation of this distinction does not deny that ethical statements are true but says they are only *relatively* true as opposed to things objectively out there in the world which are *absolutely* true. This position rests on the presumption that the world of ethics can only be true in a local sense while science is converging on a single correct theory of the world as it is, even if we cannot understand or imagine what it might be (Williams, 1985: 136). While our ability to predict and mathematize our predictions may 'progress', there is no way to know whether these progressions represent any convergence on a single truth about the world. There is no empirical basis for this presumption, and indeed, there could be none, by definition, until after such a convergence occurred. Until then, the only foundation for a theory of convergence can be faith.

While the description of cultural practices may diverge, so too may scientific descriptions of natural phenomena. Should we think of a stone as an aggregation of time slices of particles or of different time slices of particles in different possible worlds? Both are theoretically possible but completely antithetical (Putnam, H., 1993: 149). The 'true' nature of the stone reflects the knowing observer because ultimately it must be our conceptual choice to decide which scientific method 'best explains' the world as it actually is. This conceptual choice must be interpreted from an internal perspective of a social form because that is the only basis from which scientists or judges can understand anything. People may disagree about what justice consists in but this requires more interpretation, not less. From this interpretation emerges the most appealing explanation, not as a logical deduction of existing data, but from the best and most powerful reading of a community's (of physicists or judges) traditions as expressed in its historical ideals, public rhetoric, foundational texts, ceremonies and rituals. Hercules must interpret justice in the same way he interprets law. This amounts to justice as integrity. There is no escaping this analogy by defining some 'correct' concept of justice without falling prey to the semantic sting and abandoning the idea of justice as an interpretive concept.

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The idea that one can always quiet semantic disagreement by invoking the correct rule is dubious. Even modes of thought like generative grammar, the rules of a language in its entirety, cannot quiet disagreement about the proper use of the language. 'Bad' used to be understood by speakers of English to mean the opposite of 'good' until American 'hip hop' culture began to use it as a synonym. There is no rule to invoke to clarify the true meaning of bad. The fact that constructed meanings like language can be uncertain and change does not mean that the English language does not exist. Similarly the lack of a semantic rule to invoke to settle all disagreements about the meaning of liberalism or republicanism does not mean that there are no common meanings about these conceptions of justice.

Dworkin unnecessarily burdens justice with a sort of moral intuitionism that implies that the self and justice are prior to, and separate from society. Liberalism does not entail this position. Rawls' constructivist view of justice requires the objective point of view always to be from somewhere (Rawls, 1993: 116). Whether justice is a product of reflective equilibrium or overlapping consensus, Rawls' liberalism does not deduce it from some brute conviction. Rather, like integrity in law, and scientific methodology, justice must fit together coherently with all the considerations that make up a conception of society. Any convictions in Rawls' liberalism require a tight fit with the community, because, according to the rules of equilibrium, these convictions are part of what his theory must coherently combine. The idea of justice as fairness emanating from overlapping consensus has an even more explicit fit with the social institutions of a community. It depends on social practices combined with practical reason. The form of justice chosen reflects what most people consider the most reasonable doctrine for them *given* the history and traditions embedded in public life (Rawls, 1993: 99). Disassociating justice from social forms may appear to inoculate it against relativism but it won't help judges reach any consensus on the appropriate sources of law. Indeed, if justice, and hence law, are based on a judge's 'radically detached' convictions, the judge would be more likely to adopt legal realism than law as integrity.

CONCLUSION: INTERPRETING JUSTICE WITH INTEGRITY

The previous section suggested why justice is fully, rather than quasi interpretive, as Dworkin contends. This does not doom the concept of justice to an ethical relativism that requires anyone to accept evil beliefs to be equally true. Social concepts like justice can be objectively true for those who share the social form that produces that meaning. As the last section attempted to show, this social component does not relegate justice to a second class of relative truth versus some absolute truth that natural phenomena enjoy. This is because the meaning of all phenomena must incorporate a social construct if only to determine what counts as knowledge in a particular area. These intersubjective meanings are a necessary, although not sufficient condition of

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successful explanation. Failure to explain some observations creates uncertainty and the degradation of the intersubjective meanings.

Predictability is as important for judges interpreting law as it is for astronomers observing the cosmos. This is because litigants have a right to have the existing law applied to them. If the law incorporates some idea of justice, as law as integrity assumes, then judges must be able to explain all the phenomena that comprise justice in their jurisdiction. If there remain unexplained phenomena, people cannot know what law they are obligated to follow. This defeats the notice requirement of law. Dworkin's law as integrity courts this problem because of where he directs the judge to look for justice. If law includes justice, then to predict it requires the interpretation of all manifestations of that social concept.

The tendency of constitutional theorists to repudiate the social foundation of justice is understandable. As Nagel observed, the more we can cordon off the life of the subject from what is being observed, the more objective the description will be (1986: 5). This common-sense view attracts broad support (Walzer, 1993: 165). In contradistinction, things that are created through common understandings need not be accommodated by the observer because the observer's beliefs about the object are partly constitutive of its meaning. The common-sense distinction between objective and socially created meanings is reinforced by the silliness we feel treating the search for justice like the search for the source of the Nile. The source of the Nile presumably remains the same regardless of what we think about it but would something be unjust if no one thought so? This common-sense view, however, is wrong.

While electrons may have what we call a negative charge regardless of what we think about them, there always exists the possibility of a future paradigm shift that makes the notion of electromagnetic charges among subatomic particles anachronistic. It is not that electrons will some day become positively charged. When a scientific paradigm shift occurs, the very existence of electromagnetic charges or subatomic particles may be denied in the same way we now think that phlogiston never existed. It would seem odd to insist that after such a paradigm shift that electrons objectively still had a negative charge just as it now seems strange to think that phlogiston ever objectively existed. So what *we believe* as objectively true about natural phenomena is partly constituted by the social forms about what counts as truth rather than whatever is out there in the world regardless of what we think. When paradigms shift, it is not the thing out there in the world that changes, but our understanding about what constitutes the objective truth of what is out there.

This does not mean there are no objects out there in the world that have certain properties regardless of what we think of them. Empirical science simply does not constitute this reality. Moreover, changes in scientific understanding do not lead inexorably towards truth but rather, as Kuhn observed, towards greater complexity. These more complex understandings are not necessarily cumulative. The biggest advances in science come in paradigm shifts where the old set of knowledge is refuted, abandoned and replaced by

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a new set of knowledge that predicts more phenomena (Kuhn, 1970: 92). Oxygen did not build upon the idea of phlogiston, it discredited it. With the complexity comes the ability to predict a wider scope of cause and effect but there is no empirical foundation to say that improved predictability equals objective truth.

The possibility of disagreement occasioned by interpretation does not obviate objectivity. Such disagreements exist in empirical science. Indeed, competing and inconsistent scientific explanations of the universe are even held simultaneously. Just as a table can also be an altar depending on the understanding the knowing observer imposes on it, so too can it be solid from the Newtonian view or mostly empty space from the perspective of Quantum mechanics (Putnam, R. A., 1993: 183). Understanding energy and matter in terms of Quantum or Newtonian mechanics does not change the way the universe *really* is any more than Rawls' *Theory of Justice* or *Hammurabi's Code* constitute what justice actually is regardless of perspective. All these explanations reflect our common *understandings* of how the world is as much as how the world actually *is*.

Walzer, and of course Dworkin, appear to miss this distinction between description in concept formation and the justification of that concept. For Walzer, this is brought out by his attempt to reconcile the apparent enigma of a person who believes him or herself an object, appropriate for barter and trade. He contends that her enslavement must be autonomously chosen in order to be understood by her to be justified. This is only true if she happens to share Walzer's liberal beliefs about human agency. If this woman shared the common understandings of early European feudalism, the idea of autonomous moral agency would have seemed quite novel. Lacking most basic legal rights and being at the mercy of her lord, the serf could nevertheless understand her vassalage as a benign relationship of child to father or even friendship. Could this exploitation really be perceived by the serf as morally justified? Perhaps not with the 21st-century idea of human nature but the serfs' descendants were not to discover the phenomena of moral autonomy for another 500 years.

Walzer's dilemma suggests that he and Dworkin share a similar metaphysics of subjective and empirical meanings even though they draw different implications from it. If, however, empirical and axiological knowledge (as opposed to reality) both entail social construction, then the concern for cultural imperialism is inapt. We have no more reason to refrain from criticizing the feudal exploitation of the peasantry than Copernicus had from criticizing Ptolemy's geocentric theory of planetary motion.

If there is no Archimedean view from nowhere, then Hercules' must invoke some shared understanding of justice to justify force to anyone other than himself. Otherwise, Dworkin will remain in the embarrassing position of not being able to answer the awkward questions he first framed nearly 40 years ago. Integrity will not describe judicial practice until it can interpret justice from somewhere. While the most reasonable place to start, in order to justify force to a community, is its own understanding of what justice

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consists in, it is by no means the only place. It must be from someplace though because an interpretive concept of law cannot consist in principles of justice that themselves originate from non-interpretive sources. Judges sense the friction between interpretive law and 'semi' interpretive justice and avoid law as integrity as a sophisticated form of legal realism.

Integrity does not entail realism if judges, as insiders, interpret justice from all the social forms they can find, not just state precedent. Determining the sources of justice will involve evaluative decisions about meaning, but judges can no more avoid them than can astrophysicists. Judges cannot arrive at the objectively right answer of what the law is in their jurisdiction if they artificially disregard all the available instantiations of the social forms of justice in their community. There is no principled way to limit the sources of justice to moral principles implicit in past judicial convictions because determining what *is* precedent and what are those convictions entails reference to exogenous norms, as the judges in *Riggs* and *Henningsen* made clear. This must be true if institutional morality is not to collapse into a rule of recognition, devoid of all normative content.

The failure to understand why rights entail shared meanings about justice comes back to haunt Dworkin's concept of law. A right to equal concern and respect presupposes that individuals appreciate the equal moral worth of others. Yet without constitutive meanings of justice, this mutual toleration is implausible. So justice must be our mirror as well as our critic. It is true that when the constitutive understandings of justice are radically different from our own, rights may not seem to be taken very seriously. But this problem already exists with legal integrity. So while perhaps the modifications suggested in this essay provide no stronger rights than Dworkin originally proposed, they put them on a stronger foundation.

NOTES

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1. By sources of law I mean the fundamental authority from which all other rules or principles derive. For Kelsen, this would be the *Gründnorm*, for Hart, the rule of recognition, and for Dworkin, the moral principle of integrity.
2. Indeed, we ought to be careful about attempts to equate his idea of generative grammar with law. That would imply that the meaning of legal terms or their use could not be challenged and need not be elaborated. For a compelling critique of the casual application of Wittgenstein to law see Brian Bix (1993: 45–9).
3. *Scott* v *Sandford* 60 US 393 (1856) In the *Dredd Scott* decision, Justice Taney, writing for the majority, argued that the court's duty is to enforce the law even if it results in an injustice. Justice, he said, is for the state legislature to decide, not federal judges. See 60 US at 405. This legal principle was arguably binding on the judge in *Henningsen*.

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4. If all of society's social meanings are insufficient to identify justice, then state action, a subset of society's practices, seems even less equipped for this task (Dworkin, 1986: 424 n.20).
5. As an example, Brian Barry (1995: 78).
6. While murder is often taken as a universal principle that refutes any notion of local justice, the acts that constitute this crime vary greatly from country to country.
7. See for example, Veena Talwar Oldenburg (1994).

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