Chapter VI

Interpretation: Law and Literary Works of Art[1]

> "...political morality depends on interpretation and ... interpretation depends on value. [and] I believe that there are objective truths about value."
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> *Ronald Dworkin*[2]

> "Interpretation is an active ascension of the spirit."
>
> *Tomonobu Imamichi*[3]

Almost all technologically advanced societies today confront increasingly grave problems.[4] One grave problem is the persistence of major social injustices in the midst of increasing affluence. And one of the most salient markers of such persisting social injustice is the increasing number of persons, especially the young and the old,[5] who continue to suffer very greatly from

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1 This essay is a revised version of an invited paper initially presented at the 30th International Symposium on Eco Ethics held in Paris in October 2011 and published in *Eco-ethica 2* (2012), 175-199. A first revised version was presented at the Philosophy Department of The University of Athens in May 2012.

2 R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard UP, 2011), p. 7.

3 *JFL* [*Journal of the Faculty of Letters of The University of Tokyo*], *3* (1980), 65.

4 See, for example, T. Saint-Julien and R. Le Goix, *La métropole parisienne: centralités, inégalités, proximities* (Paris: Belin, 2007), pp. 87-109, and recent protracted debates about the social aspects of the future Paris supercampus in *Nature 467* (21 October 2010), 897, and the future Paris transport systems in France's afternoon newspaper of reference, *Le Monde,* May 21 and 28, 2011.

5 Cf. J. Groopman, "The Body and Human Progress," *The New York Review of Books,* October 27, 2011, pp. 76-81.

extreme poverty, or from what I will call here destitution.[6] Figuratively speaking, destitution is reducing many of these persons to dust.

§1. Overviews

In this essay I would like to recall several eco-ethical ideas that might help realize greater social justice by linking some related notions of interpretation in aesthetics, ethics, and the philosophy of law.

Here, I focus on but one of the many kinds of severe poverty[7] to be found in such technologically advanced European countries today as France.[8] International organizations understand

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6 "If absolute poverty has regressed in the world thanks to the development of the emerging countries, nonetheless absolute poverty still affects a quarter of the world's population. France has 8.2 million poor persons according to the statistics which Insee [the French national statistics office] published at the end of August this year [2011]. From 1970 to 1990 poverty in France diminished. Thereafter, it stabilized. But since 2002 it has once again increased" (Le Gall 2011, p. 3). Cf. the present numbers of poor people in the UK. According to the most recent authoritative study of the UK's Institute for Fiscal Studies done for the Joseph Rowntree Foundation, the number of adults who presently suffer from absolute poverty in the UK is 2.9 million. (The number of poor children is even greater at 3.1 million.) Persons living in absolute poverty are those who (according to current definitions) are living below 60 per cent of the inflation adjusted 2010-2011 median income (see the articles in *The Financial Times*, October 11, 2011 and October 12, 2011).

7 The general notion of poverty has proved very difficult to define satisfactorily. Among a variety of current approaches see the helpful although somewhat technical discussion in A. S. Bhalla and S. Qui, *Poverty and Inequality among Chinese Immigrants* (London: Palgrave/Macmillan, 2006), pp. 1-13. See also the excellent discussion in J.-L. Dubois, "*La pauvreté: uneapproche socio-économique*," *Transversalités 111* (July-September, 2009), 35-48, and the notions of poverty used in the longitudinal studies for France and for the EU countries in, respectively, "*Intensité de la pauvreté en France (1996-2005)*" at www.onpes.gouv.fr, and "Intensité de la pauvreté dans les pays de l'Union européenne (1997-2007)" at epp.eurostat.ec.europa.eu. Here, I rely on the more particular notion of poverty as "destitution" described below.

8 T. Pech provides a current, critical, and very well informed overview of the social situation in France today in his introductory summary article,

destitute persons as those who continue barely to survive on the equivalent of less than one dollar a day for securing, although incompletely, the minimum vital necessities of water, food, clothing, shelter, and medicine. This is the main sense in which I will be using the expression "destitution" in this essay.[9]

I also focus here on but one of the several types of social injustice afflicting the destitute, namely on the social injustice that arises from socially unjust laws. Many jurists and philosophers of law understand such laws as those that compromise the promotion of some important communal good.[10] And that will be the main sense here of the expression, "unjust law."

In concluding I offer several suggestions for discussion. The main suggestion will be that the eco-ethical move from aesthetic

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"*Comment va la société française?*", to the collection of recent empirical studies and articles in "*La société française," Alternatives* économiques, *Hors-série 89* (July, 2011), 4-5. See especially R. Castel, "*Le retour de l'insécurité sociale*," pp. 28-31, and the 12 "*fiches*" summarizing current data on twelve basic social themes on pp. 36-61. See also Castel's basic study, *Les métamorphoses de la question sociale* (Paris: Gallimard, 1999), and M. Bresson, *Sociologie de la précarité*, 2nd (Paris: Armand Colin, 2010), pp. 73-117. Recent statistics regarding France's social system in comparison and constrast with the systems of other European countries can be found in "*La France et l'Europe en chiffres*," *L'Etat social de la France* (Paris: La Documentation française, 2010), pp. 11-114

9 Other recent analyses and statistics for France, together with email addresses for all the relevant official institutional sources, can be found in "*Les Chiffres 2012: L'économie et la société*," *Alternatives économiques, Hors-série 90* (October, 2011). Note especially the longitudinal study of the evolution of inequalities from 2004 to 2009, the last year for which full official statistics are available, on p. 96.

10 Generally speaking, this is the sense of the expression to be found in many recent articles in the currently standard collections, *The Oxford Handbook of Jurisprudence and the Philosophy of Law,* ed. J. Coleman, S. Shapiro, and K. Einar Himma (Oxford: OUP, 2004), cited hereafter as "*OHJP 2004*," *The Blackwell Guide to Philosophy of Law and Legal Theory,* ed. M. P. Golding and W. A. Edmundson (Oxford: Wiley-Blackwell, 2004), *The New Oxford Companion to Law,* ed. P. Crane and J. Conaghan (Oxford: OUP, 2008), cited hereafter as "*NOCL 2008*," and *The Oxford Handbook on Philosophy of Law and Politics,* ed. K. E. Whittington, R. D. Keleman, and G. A. Caldeira (Oxford: OUP, 2010), cited hereafter as "*OHPLP 2010*."

to ethical interpretation by way of considerations about the variously temporally structured nature of the objects of differing kinds of interpretation may offer substantive help for overcoming difficulties with an otherwise promising account of the nature of just laws as necessarily constructive interpretations. My intention throughout is to show some of the possible philosophical interest and social pertinence of still further reflection on eco-ethics in the future.

§2. Social Justice and Social Injustice

Many people in today's quite affluent France have insufficient resources to feed themselves and their families properly.[11] But until very recently, both the French government and the European Union (EU) have provided substantial assistance to these persons. The continuation of such required aid, however, is now in quite serious question.

1.1 Eating Poorly in France. On 22 September 2011 the EU failed to agree on maintaining an essential food program for ca. 18 million of its neediest citizens.[12]

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11 J. Gadrey, "*Un creusement des inégalités par le haut*," *Problèmes économiques 3023* (6 July 2011), 14-17. See especially the Table, "*France (1996-2008): une décennie d'évolution des niveaux de vie et des revenu*s," on p. 17. See also D. Clerc, "*L'Etat des lieux*," in his *La paupérisation des Français* (Paris: Armand Colin, 2010), pp. 8-62, and J.-L. Outin, "*Lutte contre la pauvreté et politiques de solidarité: Une mise en perspective*," *L'Etat de la France 2011-2012,* ed. E. Lau (Paris: La Découverte, 2011), pp. 261-265.

12 These numbers are those of Dacian Ciolos, a European Commissioner of Agriculture and Rural Development at the time (whose remit included the PEAD) writing in *Le Monde*, 27 September 2011. (See also *Le Monde's* issues of 20 September with Editorial and of 22 September.) Despite continuing to proclaim the superiority of its regional social model over the global market capitalist model during the ongoing aftermath of the successive financial and economic tsunamis since September 2008, the EU's latest failure to agree on substantive matters of value has undermined the Social Democratic and Christian Democratic ideals of social justice. The founders of the EU put these ethical ideals into place after the vast and utterly catastrophic inhumanities of the Second World War. It was in accordance with such ethical ideals that the later president of the EU, Jacques Delors, created and secured approval for funding the European

This program is the European Program for Assisting the Neediest (in the French acronym, the PEAD).[13] Through its 240 accredited national charitable organizations within 20 of the EU's 27 member states,the PEAD assists impoverished persons. Even in very affluent France, the PEAD supports ca. 2 million people daily in 1200 food banks. Throughout France, four charitable associations finance these food banks – the French Federation of Food Banks which alone includes 79 separate entities, the Red Cross, the *Secours catholique,* and the *Restos du Coeur.* Even with such help, many still go hungry.

On 13 April 2011, however, the European Court of Justice (ECJ)[14] issued a formal decision upholding a challenge to the

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Program for Assisting the Neediest (in the French acronym, the PEAD). This same ethical ideal of justice, solidarity, and fraternity in the continual sustaining and promoting of providential member states is still present today in the EU's evolving basic treaties. Moreover, the ideal of socially just societies providing for all the needy, and especially for the extremely poor, is an ideal that successive decrees of the European Court of Justice continue to protect and apply. Substantive backgrounds can be found in the European Social Charter of the European Union www.coe.int.socialcharter.

13 This program is an important part of the EU's general social policy. The PEAD was first established in 1985 according to Article 39 of the Treaty of Rome which entered into force on 1 January 1958 establishing, among other matters, the Common Agricultural Policy (CAP) of the EU. On EU social policy generally see S. Hix and B. Hoyland, *The Political System of the European Union,* 3rd ed. (London: Palgrave Macmillan, 2011), pp. 206-209, and for French social systems see N. Murard, "Organisation et fonctionnement de la protection sociale," in Lau 2011, pp. 266-270. On details of the PEAD see the recent historical note of H. Nallet, the French Minister of Agriculture in the 1985 government of L. Fabius under President F. Mitterand, who succeeded in winning the support of the other EU ministers of agriculture for the new program (*Le Monde,* 18 October 2011). On the controversial CAP see Hix and Hoyland 2011, pp. 227-230.

14 Cf. curia.europa.eu. For a description of the European Court of Justice see S. Hix and B. Hoyland 2011, pp. 75-101. Cf. C. Bernard, *The Substantive Law of the European Union: The Four Freedoms,* 3rd ed. (Oxford: OUP, 2010). The statutes of European Law can be found in several places, e. g. in *Droit institutional de l'Unioneuropéenne,* 6th ed. (Paris: Dalloz, 2010). A general overview can be found in A. Aust, "European Union," in his *Handbook of International Law,* 2nd ed. (Cambridge: CUP, 2010), pp. 430-448.

continuation of the PEAD.[15] And at the 22 September 2011 meeting of the 27 Ministers of Agriculture of the EU, seven ministers representing the states whose challenge the ECJ had upheld in April, formally proposed that the ECJ decision be applied immediately. The Ministers voted, however, neither to accept nor to reject the proposal; instead, they voted to postpone its consideration.

If applied as EU law requires, the ECJ decision will result in the PEAD's annual subsidies to the French groups being cut, not by the average 65% for the 20 participating EU countries overall, but for France by ca. 80%, from 480 million euros in 2011 to 15.9 million euros for 2012. Such massive cuts will have an enormous negative impact on the availability of proper food for many impoverished people. Arguably, several of their rights will be infringed. In some cases, already indigent persons will become destitute.[16]

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15 The judicial decree was the instrument that seven EU countries seized upon first in 2008 to challenge the legality of continuing the PEAD subsidies for alleviating the suffering of the destitute. They succeeded. But was the ECJ April 2011 decree socially just? The EU had agreed under the Delors presidency to fund these subsidies both from the originally abundant surpluses resulting from the controversial EU common agricultural policy and also from additional member state contributions. The seven countries challenged the legality of continuing these subsidies on the grounds that the earlier agricultural surpluses had now much declined. The ECJ court ruled that, with respect to the treaty provisions in current effect, the EU's continuation of this policy was illegal. The proceeds of EU surplus food sales were no longer to be transferred any longer to the PEAD.

16 In fact, European governments have been unable to muster sufficient and sustainable political will to raise resolvable issues of social justice high enough on their list of national priorities to alleviate even the utter destitution of Europe's much more limited numbers of errant street children. Not to mention dealing effectively with the much greater problems of reducing very high unemployment, ensuring the availability of affordable housing, reforming the unjust educational system, and properly funding the social security systems. On the much more easily resolvable problem of destitute street children in Paris see P. McCormick, "*Du pain et des pierres à Paris: Misère des enfants, éthique philosophique et innovations sociales*," *Pauvretés et urgences sociales,* ed. J.-R. Armogathe and M. W. Oborne (Paris: Editions Parole et silence, 2011), pp. 33-62.

Like the other 19 dissenting countries, France does not want to apply the decision. But since such ECJ rulings cannot be appealed,[17] apply universally (across all 27 member states), and take precedence over any national rulings, how exactly is France reasonably to justify, at least in this instance, the ethical but illegal importance of non-compliance?

One possible argument would rely on a "thick definition" of the rule of law, one that necessarily includes "the protection of human rights within its scope."[18] If successful, this argument would result in the matter being transferred from the jurisdiction of the ECJ to that of the European Court of Human Rights.[19] This transfer of jurisdiction would then give rise to some reasonable hope of winning a new ruling disallowing the challenge on the grounds of not transgressing in matters of evident social justice. The PEAD might then continue till its re-evaluation in 2014. But how is "social justice" to be taken here?

1.2 The Concept of Social Justice. The concept of social justice is difficult to articulate[20] and its history is complicat-

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17 "The decisions of the Court [i.e. European Court of Justice] are binding and there is no appeal against them" (*The Oxford Dictionary of Law* [ed. J. Law and E. A. Martin, 7th ed. (Oxford: OUP, 2009), 210]; hereafter cited as "*ODL* 2009."

18 T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), pp. 66-67.

19 For details consult its website at www.cpt.coe.int/ECHR/homepage_fr.

20 In France, for example, even the 40 member strong right wing *(La Droite populaire)* of the already conservative UMP party currently governing the country under President N. Sarkozy, whose restrictive social policies have aroused much criticism, calls for more "*justice sociale*" (*Le Monde,* 28 September 2011). But such wide uses of the expression "social justice" makes it almost impossible to understand clearly what is the sense and significance of the expression "social justice" in France today. Like the concepts of justice and art, the concept of social justice essentially involves matters of degree. (I simplify here and focus exclusively on but one understanding of social justice as mainly distributive justice. However, social justice is also to be considered not just in terms of distributive justice but in those of social recognition. See N. Fraser, *Qu'est-ce que la justice social? Reconnaissance et redistribution*, tr. and ed. E. Ferrarese [Paris: La Découverte, 2011], pp. 43-69).

That is, whether the concept of social justice or social injustice properly applies to a situation is not essentially a matter of yes or no, as with

ed.[21] Still, common sense suggests that some persisting situations, for example those of destitute and hungry immigrant children in very affluent Paris, are socially unjust. What the expression "socially unjust" refers to here is that the socially unjust situation of such famished Paris children is a supposed fact.

The supposition is that some major French institutions that assist persons to live normally with one another in social com-

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the concept of a square, but a matter of more or less, as with the concept of democracy. (Note however the different modern philosophical accounts of just what a concept is, for example the different views of Frege and Russell (see S. Soames, *What is Meaning?* [Princeton: PUP, 2010], pp. 11-32, especially p. 12 [Frege] and p. 24 [Russell]). Soames provides a more detailed account of the differences between Frege and Russell in his *Philosophy of Language* [Princeton: PUP, 2010], pp. 7-32.) A situation thus is not either socially just or socially unjust *tout court;* it is more or less socially just or socially unjust. (These matters of degree are finally matters of judgment rather than those of observation alone. The sun has risen, I observe, or not, but I need to deliberate and not just observe before I can properly assert whether the persisting situation of the extremely poor in extraordinarily resourceful Paris is more or less socially just or unjust. Unlike the concept then of, say, the sunrise, the concept of social justice may be taken roughly as an "essentially contested concept," an "appraisive concept." The nature of such concepts is essentially contested in the sense that arguments about their nature never end. And the application of such concepts is to situations where basic ethical values are always involved. Hence these essentially contested concepts are also necessarily not descriptive. Other parties recognize such concepts as centered on complex and intrinsically valuable common achievements whose sense and significance is never free from contestation.) That is, the concept of social justice, like the concepts of justice and law, is an "essentially contested concept." (This notion goes back to the influential 1956 article of W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society*. See the excellent discussion of J. Pitts in her critical review of the essentially contested concept, liberalism, in "Free for All [Review of D. Losurdo, *Liberalism: A Counter-History*]," *TLS,* 23 September 2011, 8-9, and that of A. Marmor in his suggestion that the concept of law is also an essentially contested concept (*Philosophy of Law* [Princeton: PUP, 2011], pp. 132-133).Thus to describe a situation as "socially unjust" is to make a necessarily contentious claim about what the expression "socially unjust" should properly mean (Cf. Pitts 2011, p. 8.)

21 See D. Johnston, "The Idea of Social Justice," in his *A Brief History of Justice* (Oxford: Wiley-Blackwell, 2011), pp. 167-195.

munities of various kinds are unacceptably deficient. Among these failing institutions are institutions for properly regulating the quality, price, and distribution of food, health, housing, and education.[22] But their failure is a matter of degree and not a failure *tout court.*[23] By contrast, common sense also suggests that some situations are socially just when the major social institutions governing such situations are so organized and run that they normally help persons and groups to live with one another in reasonable harmony.[24]

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22 As I write, as increasing numbers of reliable reports have especially made plain in this presidential election year in France, many of these major institutions show quite serious and persistent deficiencies, and have for some time. Consequently, many commonsensical understandings of the society that these challenged institutions structure take French society today to be a "socially unjust society."

23 That is, some competent observers take French society to be socially unjust because it continues to leave unresolved, for lack not of resources but of sufficient political will, justly to establish its priorities, not concerning the far greater problems of unemployment, nuclear power, and environmental evils, but concerning the still great, inhumane, and thoroughly resolvable evil of the vast suffering of its chronically undernourished poor. Nonetheless, some competent observers have deliberated on the extraordinary resources currently deployed in France for substantially assisting the huge numbers of the unemployed, the very numerous small and middle business people including the many restaurant owners benefitting from massive reductions in the valued added tax (TVA or VAT) that costs the French state ca. 2 billion euros per year, the large numbers of employees of major corporations like Alstom, and even the many persons working for the biggest banks, but not available for properly and durably feeding, clothing, housing, and educating the very far fewer numbers of destitute Paris street children. And some have not unreasonably come to the conclusion that the persistence of the avoidable suffering of at least these Paris street children and their most often premature deaths result from the demonstrable social injustice of some of the governing institutions of a partly socially unjust society itself.

24 But is that the case in French society today in Paris? Opinions differ. Some competent observers see the swelling statistics on assault, drugs, fraud, financial crimes, government corruption, etc., despite repeated government efforts to massage the numbers and to stymy any complete independence for the French judicial system, regularly interfering in the naming of chief judges and in the administration itself of justice in political sensitive cases, as not sufficient (given the similar problems globally

But then what is it that enables many major institutions regularly to ensure sufficient social harmony so as to make normal satisfying human lives possible for most persons within a particular society? Many would argue that it is "the rule of law."

Roughly, the rule of law prescribes that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[25] But if the rule of law in France leaves so much social injustice to continue unabated,[26] isn't the understanding of what is held to rule, namely the law itself, just a matter of interpretation? And isn't interpretation finally merely subjective?

1.3 Interpretation. Philosophical uses of the expression, "interpretation,"[27] largely follow common usage in distinguish-

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of most major urban concentrations) to justify the allegation that French society today is socially unjust. But these observers most often fail to use the concept of social justice properly; they most often fail to qualify to what degrees French society is more or less socially unjust.

25 T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), p. 8 and 37. Bingham, the former Senior Law Lord of the UK, spells out each of the components of this descriptive and rough definition in chapters 3 to 8 in terms of eight conditions formulated on pp. 37, 48, 55, 60, 66, 85, 90, and 110. Generally, the somewhat clichéd expression, "the rule of law," here denotes the governance of society in terms of a written corpus of just laws in sufficient number so that, when regularly and properly interpreted, applied, and judicially reviewed, institutions and individuals consistently succeed in largely avoiding social dis-harmony (social discord) and in largely achieving social harmony (social accord).

26 Many informed observers argue that perhaps the major problem with the rule of law in France today is the absence of any complete independence of the judiciary from the executive. For a recent description of some of the serious problems that follow from this lack of judicial independence see the interview with the former French judge and current member of the European Parliament, Eva Joly, in *Le Monde,* 19 October 2011.

27 In common English parlance today the word "interpretation" denotes either a process or the product of such a process. As a process the noun "interpretation" denotes what the verb "to interpret" denotes. That is, interpretation, the dictionary tells us, means mainly either "to explain the meaning of (information or actions): *the evidence is difficult to interpret,*" or "to understand (an action, mood, or way of behaving) as having a particu-

ing between interpretation as an activity oriented towards the articulation of some statement about the meaning of anything whatsoever, and interpretation as the articulated statement itself. In addition, philosophers also use the word "interpretation" in logic and in philosophical semantics.[28]

But "interpretation" in the philosophy of law or jurisprudence[29] is understood mainly in more general terms.[30] Broadly

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lar meaning: *he would no longer interpret her silence as indifference*" (ODE, 3rd ed. 2010). As the product of a process "interpretation," however can mean either one of two things. As a so-called mass noun (i.e., one which a speaker treats as a continuous entity having no natural boundaries, interpretation means "the action of explaining the meaning of something: *the interpretation of data*." But as a so-called count noun (i.e., one which a speaker treats as having a separable quality with natural boundaries), interpretation means "an explanation or way of explaining: *this action is open to a number of interpretations*."

28 In propositional logic, for example, the word "interpretation" denotes the assignment of a truth-value to each propositional variable, whereas in predicate logic "interpretation" denotes the assignment of "an object (or name) to each individual variable…" [*The Penguin Dictionary of Philosophy,* ed. T. Mautner, 2nd ed. (London: Penguin, 2005), p. v]. In semantics, philosophers usually use the word "interpretation" in contrast with "translation." Thus, "an interpretation explains what an expression means. A translation presents two expressions, together with the implicit claim that they have the *same* meaning…" (*Ibid.*).

29 In this essay I use the expressions "philosophy of law" and "jurisprudence" as roughly synonymous. More precise uses however are often required. Thus, the *ODL* distinguishes between jurisprudence as "the theoretical analysis of legal issues at the highest level of abstraction," from legal theory as "theoretical inquiries about law 'as such' that extend beyond the boundaries of law as understood by professional lawyers (e.g.; the 'economic analysis of law' or 'Marxist legal theory')" and from the philosophy of law or legal theory which "normally proceeds from the standpoint of the discipline of philosophy; that is, it attempts to unravel the sort of problems that might concern moral or political philosophers, such as the concepts of freedom or authority." Two widely used and current texts on jurisprudence are B. Bix, *Jurisprudence: Theory and Context,* 5th ed. (London: Sweet and Maxwell, 2011) and D. Brooke, *Jurisprudence, 2011-2012,* 5th ed. (London: Routledge, 2011).

30 Interpretation is "the process of determining the true meaning of a written document. It is a judicial process, effected in accordance with a number of rules and presumptions" (*ODL 2009*, p. 294). Rules and Principles of statutory interpretation are given in summary on p. 295.

speaking, any philosophical account of the nature of the law may be called an interpretation. But, narrowly, interpretation has "a partly evaluative meaning." That is, many philosophers use "interpretation" narrowly to denote the explanation of how value judgments implicit in some laws may be taken as correct. Some unfashionable philosophers of law would add: correct judgments of value in the sense of being objectively true independently of thinking or speaking about them.[31]

Consider now more closely this objectivist jurisprudential sense of interpretation.

§3. Social Justice and Law as Interpretation

The major proponent of the unfashionable objectivist view is Ronald Dworkin.[32] Strikingly, his theory relies on an analogy

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31 Note that throughout I rely generally on English language usage and on references to the English language literature. See the somewhat different understanding of "interpretation" in, for example, French law in E. Millard, *Théorie générale du droit* (Paris: Dalloz, 2006), pp. 87-98. In French law two of the most important recent works I am unable to discuss here are those of M. Delmas-Marty, *Les forces imaginantes du droit,* vols. I-IV (Paris: Seuil, 2004-2011) and P. Rosenvallon's trilogy, *La Contre-démocratie, La légitimité démocratique,* and *La société des égaux* (Paris: Seuil, 2006-2011). For this essay's subject, M. Delmas-Marty's "*Les droits fundamentaux*" in her fourth volume, *Vers une communauté de valeurs* (2011), pp. 189-376, and P. Rosenvallon's "*La société des egaux (Premiére ébauche),*" in his third volume (2011), pp. 351-411 are the most relevant. A very useful survey of 60 years of German law since the founding of the German Constitutional Court in Karlsruhe can be found in M. Jestaedt, O. Lepsius, C. Möllers, and C. Schönberger's book, *Das entgrenzte Gericht* (Frankfurt: Suhrkamp, 2011). The earlier and strictly philosophical work of Paul Ricoeur on justice is most effectively synthesized and discussed in A. L. Shenge, *Paul Ricoeur: La justice selon l'espérance* (Brussels: Lessius, 2009), pp. 141-322.

32 A related yet importantly different objectivist view that draws support from continental philosophical work is that of N. Simmonds, *Law as a Moral Idea* (Oxford: OUP, 2007), pp. 145-150. For a brief overview of Dworkin's work see R. Wacks, "Law as Interpretation," in his *Philosophy of Law* (Oxford: OUP, 2006), pp. 40-51. Dworkin's 2008 Holberg Prize cited his "theory of law which enables legal rules to be understood as norms whose content is the result of an ongoing interaction between political

between aesthetic interpretation in the arts and "constructive" interpretation in the law.[33]

2.1 Law as Necessarily Evaluative? On the constructive conception of law as interpretation, law and morality are not distinct.[34] Like political philosophy, the philosophy of law is taken to be continuous with moral philosophy in that central questions of political morality and the rule of law are continuous with moral and ethical questions.[35] Thus the concept of law is

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decisions, society's needs and moral considerations." See www.holbergprisen.no. Note that the 2004 Holberg laureat, Jürgen Habermas, was cited for holding similar views.

33 Dworkin's understanding of the concept of law is mainly a constructive interpretative concept of values rather than a purely descriptive concept of facts. To interpret a work of art, one commentator writes, is to explain its meaning by accounting "for the work's artistic features in terms of a view of its value" (*Ronald Dworkin,* ed. A. Ripstein [Cambridge: CUP, 2007], p. 8). Similarly, "to interpret a statute is to explain the meaning of its claims in terms of an account of the values underlying the legal system in general" (*Ibid.*). To interpret the moral status of a particular action is to explain its meaning in terms of the values it incorporates. And more generally, to interpret a political practice such as the passage or the defeat of a proposed piece of social legislation is to explain the meaning of its details in terms of the values they encompass. Thus, in the aesthetic and the ethical realms as well as in the legal and political realms both some basic aesthetic and ethical concepts and some basic legal and political concepts are intrinsically interpretive. This means that such concepts refer essentially to axiological properties that are of the nature of the matter at issue and hence independent of that matter's relations with other things. Some basic concepts then, such as the concepts of beauty in aesthetics and the concept of justice in the philosophy of law and the concept of law itself, are essentially interpretive concepts. That is they could not be the concepts they are without referring necessarily to objective properties in things.

34 They are distinct in the various schools today of legal descriptivism (legal positivism) that continue to dominate English language jurisprudence. See for example J. Waldron, "Legal and Political Philosophy," and A. Buchanan and D. Golove, "Philosophy of International Law," both in *OHJP 2004,* pp. 352-381 and 868-934 respectively.

35 And "For Dworkin, questions about law are always questions about the moral justification of political power…" (Ripstein 2007, p. 4). See A. Marmor, "Law as Interpretation," in *NOCL 2008,* pp. 628-629. Cf. N. MacCormick, "Arguing about Interpretation," in his *Rhetoric and the Rule of Law*

not a descriptive concept but an interpretive one.[36] More generally, as Aristotle already held,[37] on this account ethics and political philosophy are inseparably connected. And on the view of law as constructive interpretation, ethics, political philosophy, and jurisprudence are also closely connected.[38]

(Oxford: OUP, 2005), pp. 121-142. Note that throughout I follow here the widespread philosophical usage of confining talk of morality mainly (although not exclusively) to issues of duty, obligation, and principle similar largely to Kantian approaches to morality, and confining talk of ethics largely to issues of the good, the right, and virtue which is mainly similar to Aristotelian approaches to ethics. Cf. S. Blackburn, *The Oxford Dictionary of Philosophy,* 2nd ed. (Oxford: OUP, 2005), p. 241 and 121 respectively.

36 The *ODL* provides an excellent summary of why Dworkin thinks that legal argument is by nature interpretive. "Law, Dworkin argues, consists not merely of rules, as legal positivists generally claim, but also of what he calls 'non-rule standards.' When a court has to decide a hard case (i.e., one to which no statute or precedent applies), it will draw on these moral or political standards in order to reach a decision. …adjudication is and should be interpretive: judges must decide hard cases through an interpretation of the political structure of their community as a whole, from the most profound constitutional rules to the details of, for example the law of tort or contract. A successful interpretation is one that justifies the practices of the judge's society; it must 'fit' with those practices in the sense that it coheres with existing legal materials defining the practices. Moreover, since an interpretation provides a moral justification for those practices, it must present them in the best possible moral light. In other words, the principles to which a judge must appeal will include his own conception of what is the best interpretation of the network of political institutions and decisions of his community. He must ask whether his judgment could form part of a consistent theory justifying this complete network. There is always one 'right answer' to every legal problem; it is up to the judge to find it. This answer is 'right' in the sense that it coheres best with the institutional and constitutional history of the law. Legal argument and analysis is therefore interpretive in nature" (p. 296).

37 See for example *NE* $1094^{b}7$-11, and *Pol* $1323^{a}14$-23. See also C. D. C. Reeve's excellent and comprehensive discussion in his introduction to his English translation of the *Politics* (Indianapolis: Hackett, 1998), pp. xvii-lxxix, especially pp. xviii-xxvii.

38 Dworkin's most comprehensive and most considered presentation of his theory of the nature of law as constructive interpretation is to be found in his *Justice for Hedgehogs* (Cambridge, MA: Harvard UP, 2011), pp. 99-188 which I mainly rely on here. See also his discussions of ethics in his *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Har-

The basic claim here is that the content of the law is always moral because law always involves moral judgments as evaluative judgments.[39] A sketch of Dworkin's widely dispersed justificatory argument ("the framework argument") proves instructive.

(1) "Every conclusion about what the law requires, in any given case, is necessarily a result of interpretation."

(2) "Interpretation is, essentially, an attempt to present its object as the best possible example of the kind or genre it belongs to."

(3) "Therefore, interpretation necessarily involves evaluative considerations, and of two main kinds: considerations about the values inherent in the relevant genre, and evaluative considerations about the elements of the object of the interpretation that best exhibit those values."

(4) "From (1) and (3) it follows that every conclusion about what the law is necessarily involves evaluative considerations. What we deem the law to be always depends on our views about the values we associate with the relevant legal domain and ways in which those values are best exemplified in the norms under considerations."[40]

Now, examination of this argument shows that the conclusion does indeed follow logically from the premises; thus, the framework argument is valid. But is it also sound? That is, are the premises (1) and (3) both true?

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vard UP, 2000), pp. 242-284, and his early discussions of interpretation in his *Law as Empire* (Cambridge, MA: Harvard UP, 1986), pp. 313-327.

39 For Dworkin, "the content of the law is always a matter of evaluative/moral judgments" (Marmor 2011, p. 98).

40 Marmor 2011, p. 98. The conclusion of the framework argument is quite important. For, if true, this conclusion definitively undermines the traditional distinction in legal positivisms between what the content of the law is and what the content of the law ought to be. According to the conclusion of the framework argument the two terms in the traditional distinction here – what the law is and what the law ought to be – cannot be separated. "The only way to understand what the content of the law is," on this account of the law as interpretation, "is by reference to the kinds of content it ought to have under the circumstances" (*Ibid.*).

Commentators are divided about (3) which some take as partly true but perhaps not completely so.[41] But they apparently agree that (1) is false. For some conclusions about the nature of some laws do not follow from interpretation. If the traffic sign reads 35 km/h and the photograph shows me driving at 36 km/h, I have evidently, and not on interpretation, broken the law. Thus, the framework argument fails. Although not invalid, the argument is unsound because at least one of its two major premises is false.

Still, this valid but unsound argument is instructive. For premise (3) usefully distinguishes between two kinds of evaluative elements. And without such a distinction constructive interpretation risks confounding essentially distinct kinds of value[42] as forms of moral and ethical values only.

But once incorporated in the notion of constructive interpretation, this distinction strengthens the understanding of the overall general nature of the rule of law as following not just from factual observation but from constructive interpretation of the nature of law. As such, the law-that-rules requires interpretation; hence, it is open to constructions that may eventually redress persistent social injustices.

For the rule of law taken as necessarily evaluative can now be applied naturally to situations of manifest social injustice by elucidating the objective elements of those situations ("objects") where basic human values are violated.[43] Thus, understanding

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41 See for example S. J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," and D. Dyzenhaus, "The Rule of Law as the Rule of Liberal Principle," both in Ripstein 2007, pp. 22-55 and 56-81 respectively.

42 Cf. J. Finnis, *Natural Law and Natural Rights,* 2nd ed. (Oxford: Clarendon, 2011), pp. 59-99.

43 Cf. Marmor 2011: "Most writers on the rule of law ... assume that there is something special about *rule by law* that makes it a desirable form of governance. Thus their assumption has to be that legalism, per se, is good in some respect and worthy of appreciation. But of course, any such view must be based on some conception of what legalism is – which is to say that it must depend, at least to some extent, on what law, in general, is, and what makes it a special instrument of social control" (p. 11).

the law that is presumed to govern in French society, and taking the rule of law here[44] in the sense of constructive interpretation, duly highlights the need for scrutiny of unjust situations; primary attention is to be directed to the objective values in those situations.

But what are we to understand by the expression "constructive" in the notion of proper legal interpretation as constructive interpretation?

2.2 Constructive Interpretation and Social Justice. The key idea here derives from the similarity between two major types of interpretation, aesthetic and legal. Here is an excellent and quite well-informed summary that merits citation at length.

> "…in the late 1970s, Dworkin pointed to parallels between literary and legal interpretation. In both cases, a reader is confronted with a meaningful text and hopes to understand its significance. Dworkin argues that the way to determine the meaning … is through what he calls 'the aesthetic hypothesis' that the work is a valuable instance of its genre… the reader must have views about the genre into which the text fits, which can be formed only by reading the text itself. [But] reading the text to classify its generic markers is not enough, because generic markers themselves are subject to

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44 Note however a technical point. For the rule of law, where the nature of the law that Dworkin is at pains to elucidate in terms of constructive interpretation is English Common Law, is different from the rule of law where the nature of the law in question is *Le Droit français*or French law. In turn, each differs from European Union Law. Regarding general details of these differences see, for example, D. Salas, *Les 100 Mots de la Justice* (Paris: Presses Universitaires de France, 2011), pp. 26-27. In particular, for Common Law see the *OHPLP 2010*; for French law see M. Fabre-Magnan, *Introduction au Droit* (Paris: Presses Universitaires de France, 2010); and for EU Law see N. Foster, *EU Law* (Oxford: Oxford UP, 2011), pp. 80-122 (on the jurisdiction of the ECJ), and P. Craig and G. de Burca, *EU Law: Texts, Cases, and Materials,* 5th ed. (Oxford: OUP, 2011). A useful comparative approach to English and French law is P. Legrand and G. Samuel, *Introduction au common law* (Paris: La Découverte, 2008), especially pp. 59-87. These differences, however, do not invalidate the reflections here.

> interpretation. Instead, the reader must try to understand the text as the best text that it can be, … as having the features that make it most valuable."[45]

Note that in 2011 Dworkin writes in his culminating major work, "political morality depends on interpretation and … interpretation depends on value … [and] I believe that there are objective truths about value."[46] The commentator continues:

> "In so doing, the reader will construct an interpretation that will answer many questions about the text that did not have clear answers prior to the interpretation… In the case of literature, the interpretive strategy requires reading the text as a unified whole. … In the case of law, it requires reading the laws as a whole. … the interpretive strategy must be exactly the same. To make the law the 'best it can be,' the reader must first try to understand the parameters of the relevant law and so come up with competing interpretive hypotheses based on the relatively uncontroversial aspects of the law; but he or she must also consider the different directions in which the law might extend in the light of competing interpretations. The … lawyer or judge must then consider which interpretation makes the law the best it can be … determine which competing interpretation shows the law in its morally best light. … 'the best that it can be' in terms of its justice and integrity."[47]

Thus, the basic nature of law is its essentially evaluative, indeed moral and ethical character. And this conclusion follows from a proper articulation, or "construction," of a plausible working hypothesis for interpreting the nature of law.

2.3 A Problem with Understanding Law as Constructive Interpretation.[48] A serious problem arises, however, from the

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45 Ripstein 2007, pp. 14-15.

46 Dworkin 2010, p. 7.

47 Ripstein 2007, p. 15.

48 Although Dworkin's major work benefitted from extraordinary consideration and critical discussion over several years, including a special conference that the Boston University Law School devoted to a penultimate version of the book manuscript in early 2010, sustained examination of

fact that not all law can be subsumed under the heading of constructive interpretation. But, since on the account above, all constructive interpretation is evaluative by its nature, not all law can be necessarily evaluative.[49] For, as we saw in the traffic example, many areas of the law clearly are not matters of interpretation at all, whether constructive or otherwise.[50]

Behind the factual issue, then, of whether all laws require interpretation or not is the important distinction between what law is and what a just law is. Blurring this distinction sometimes follows from confounding the basic distinction between "grasping a value and having an evaluative judgment about it."[51] Levi-Strauss, for example, quite often came to a view about what values certain practices among Amazonian tribes incorporated without his making any personal evaluative judgment about those practices.

Accordingly, some critics of a philosophical conception of law as constructive interpretation distinguish the false view,

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the final printed version of the book in December 2010 has yet to appear. Nonetheless, since Dworkin had been working on this book for some years, colleagues have been aware of his major lines of reflection for some time. Moreover, his later work had already generated carefully considered critical reaction both in 2004 (see Burley, ed., *Dworkin and his Critics* [Oxford: Blackwells, 2004]) and in 2007 (Ripstein 2007). Further, the Boston University conference proceedings were published in April 2010, in time for Dworkin to reflect at some length on their results before finalizing his book manuscript for publication. Thus, despite no major new and sustained critical considerations appearing since the publication of *Justice for Hedgehogs*, perhaps the main and still unanswered criticism of law as constructive interpretation is relatively clear.

49 The most important formulation of this criticism is that of Marmor 2011 which I rely on here throughout. See also A. Marmor and S. Soames, *The Philosophical Foundations of Language in the Law* (Oxford: OUP, 2011), some of the conclusions of which are already to be found in Marmor 2011, pp. 136-159.

50 Still, whether the law that defines the speed limit in small French towns is a good law – that is, whether this law is a just law – is another matter. Here, interpretation seems essential. To continue with our example, we cannot conclude by factual observation alone whether the traffic law posted on a road sign is a just law or not.

51 Marmor 2011, p. 129.

that all law is essentially interpretive, from the perhaps largely true view, that all just law is essentially interpretive. Yet seeing how all reasoning about values involved in the justness or injustice of some law necessarily reduces to evaluative judgments, I think, remains difficult.[52]

Could a key element of the eco ethical project help in resolving this major problem that continues to block this otherwise persuasive understanding of law as constructive interpretation in matters of social justice especially? Perhaps.

§4. From Aesthetic to Ethical Interpretation

Tomonobu Imamichi's extensive published work in Western languages shows a major movement in his development of eco-ethics from mainly aesthetic concerns to mainly ethical ones.[53]

3.1 Aesthetic Interpretation. Imamichi accompanied much of his earliest work on eco-ethics with continued explorations of aesthetic matters. And, together with historical research in both ancient and medieval philosophy, work on aesthetic interpretation had most occupied him before his turn mainly, but not exclusively, to eco-ethics.[54]

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52 See for example J. Griffin's careful criticisms of Dworkin's earlier work on human rights in Griffin's *On Human Rights* (Oxford: OUP, 2008), pp. 20-22.On Dworkin's related notion of human dignity see the discussion in G. Kateb, *Human Dignity* (Cambridge, MA: Harvard UP, 2011), pp. 29-30. A recent, and thorough, treatment of human rights can be found in C. R. Beitz, *The Idea of Human Rights* (New York: OUP, 2009), pp. 96-125. An importantly different account of human rights from a French perspective can be found in D. Lochak, *Les droits de l'homme*, 3rd ed.(Paris: La Découverte, 2009), pp. 90-117. C. M. Herrera discusses the related but different idea of social rights in his *Les droits sociaux* (Paris: Presses Universitaires de France, 2009), pp. 11-37.

53 "There is not a multitude of interpretations. Rather, there is a figurative variety of one sole absolute form of interpretation on which the human spirit, once revealed and illumined by aesthetic judgments made in earlier stages, voyages to the idea of the beautiful" (Imamichi 1980, p. 65).

54 Thus, after leaving aside his very early piano compositions, Imamichi regularly organized the initial eco ethics symposia in such ways so as to include visits to art treasures on view only in temples like those in Nara,

One of his notable aesthetic interpretations focused on the poetry of Fujiwara no Kanesuke (877-933), the grandfather of today's much more well-known author of the Heian Period court masterpiece, *The Tale of Genji,* the aristocratic woman, Murasaki Shikibu (974-1031).[55] Drawing on some of his earlier analyses of Fujiwara no Kanesuke's short classical tanka poems, Imamichi developed further his understanding of aesthetic interpretation. He reflected on what interpreting artworks generally and, inparticular,what interpreting literary artworks would seem to require.[56] Imamichi concluded that aesthetic interpretation involves a final holistic synthesis of individual aesthetic judgments that are merely aggregated in earlier successive phases of analysis.[57]

Unlike the literary artwork whose nature as an object is always closed, the nature of any object of aesthetic interpretation of a literary artwork, he held, is essentially open (to further appreciation, to later analyses, and so on).[58]

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or to utterly exceptional gardens like those in Kyoto, or to major art museums in Tokyo, or to places of great aesthetic beauty such as Mount Koya. He also included visits to theatre productions in Kyoto and Tokyo, both to popular theatre and to Kabuki and to Nô drama as well. In several of the earlier Tokyo sessions at the end of our longer regular meetings in the Kyusesû villa on Lake Biwa, Imamichi chose to present some of his own continuing work in aesthetics and not just still more of his ongoing work on eco ethics alone. In particular, he selected for several of those early Tokyo sessions his own philosophical interpretations of selections from the earliest major collections of Japanese classical poetry.

55 See the much fuller discussion in P. McCormick, *Eco-Ethics and Contemporary Philosophical Reflection* (Heidelberg: Universitätsverlag Winter, 2008), pp. 125-134.

56 "*Die Aufgabe der Äesthetik in der Gegenwart,*" *JFL* [*Journal of the Faculty of Letters of the University of Tokyo*], *2* (Tokyo, 1977), 89-96; and "*Pour l'entélechie de l'expérience esthétique au cas de la poésie,*" *JFL 5* (Tokyo, 1980), 55-71.

57 In the particular case of poems, aesthetic interpretation synthesizes the aesthetic judgments formed in the preceding analyses of each major stage and element of the poem.

58 Imamichi 1980, p. 65. What determines this essentially open character of the object of an aesthetic interpretation, Imamichi claimed, is that all

3.2 The Unprecedented Contexts of Aesthetic Interpretation Today. Imamichi paid close attention to two aspects of aesthetic experiences of artworks that, on his view, traditional understandings of aesthetic interpretation do not address satisfactorily. These two features are appreciation of the pleasures that normally accompany aesthetic experiences of artworks, and appreciation of the creativity to which aesthetic experiences of artworks normally respond.

He called for a new understanding of aesthetic interpretation that would remedy these major deficiencies in traditional understandings. But achieving such a new understanding of aesthetic interpretation, he believed, would first require describing the novel contemporary global contexts in which traditional aesthetic interpretation continues to be pursued.

These contexts, Imamichi suggested, were unprecedented. For the human milieu had substantially changed. That is, throughout the modern era persons lived their lives within the pervasive contexts of the natural. But in the present era the natural was progressively giving way to the non-natural. The human milieu was changing from the global pervasiveness of the natural to the global pervasiveness of the technological.

Imamichi called this novel substantial change in the constitution of the human milieu today "the technological conjuncture,"[59] the globalized concatenation today of ever more powerful information and communication technologies. A new understanding of aesthetic interpretation was to be pursued then in these novel contexts.

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aesthetic interpretation, however multiple, returns inexorably to an "absolute [and unique] form of interpretation" of the idea of the beautiful. But for justifying such a controversial yet quite original claim Imamichi provided no sustained arguments that I know of.

59 Alternatively, Imamichi sometimes used the expression, "the technological cohesion." See my attempts to connect this unusual notion with several other sustained reflections in English-language philosophy today in P. McCormick, *Eco-Ethics and Contemporary Philosophical Reflection* (Heidelberg: Winter Universitätsverlag, 2008), pp. 153-179.

Articulating such an understanding that would not unsatisfactorily account for both the pleasure and the creativity that were essential aspects of normal aesthetic experiences would require shifting the interpretive focus from the values of aesthetic experiences to the values of the central contexts of these experiences, the newly changed human milieu, the technological conjuncture.

But this immense task would entail elaborating the ethical and not just aesthetic values of the new human milieu, the *oikos.* And this elaboration was to be pursued through progressive inquiries into various aspects making up the ethics of the new human milieu, an ethics of the *oikos,* an *oikos*-ethics, an eco-ethics.[60]

3.3 Interpretation Times. But how was the transition from aesthetic interpretation to ethical interpretation to go? Imamichi believed[61] that the shift from a new understanding of aesthetic interpretation to a new understanding of ethical interpretation had to go by way of metaphysics.

In particular, he surmised that, just as the peculiar nature of the time that aesthetic interpretation required for both gradually appreciating the pleasures of an artwork while gradually judging its creativity had now changed in the technological conjuncture, so the related but different nature of the time now required in the technological conjuncture for both acting rightly and acting justly had also changed.[62]

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60 While nonetheless maintaining, then, his regular activities and publications in the areas of aesthetics (witness his five volume anthology of aesthetics), Imamichi shifted his main efforts from aesthetics to ethics, from the nature of aesthetic interpretation to ethical interpretation, to the nature of interpretation itself.

61 That is, from at least his articles of the late 1970s on (the same period in which Dworkin was working out analogies between aesthetic and legal interpretation).

62 Generally on time see the recent articles in the comprehensive collection, *The Oxford Handbook of the Philosophy of Time,* ed. C. Callender (Oxford: OUP, 2011). In particular, for basic notions of time in literary works of art see, for example, in classical literatures J. de Romilly, *Le temps dans la tragédie grecque,* 2nd ed. (Paris: Vrin, 2009), pp. 9-45, and B. Williams, *Shame and Necessity* (Berkeley: UCal Press, 1993), pp. 130-168.

The main task involved then in articulating the novel contexts of interpretation today had to center on the changed nature of the kinds of temporality in the substantially changed human milieu of aesthetic and ethical interpretation. In both cases, Imamichi believed, we are dealing with the related but different temporalities of how we interpret our judgments of what is good and beautiful and the temporalities of how we interpret our actions as what is ethically good and right.[63] But return now to Dworkin's problem.

§5. A Time for Art and a Time for Law

As we observed, Dworkin came to his understanding of law as constructive interpretation by developing analogies between interpreting literary artworks and interpreting legal statutes.[64] But his results neglected the metaphysical nature of the different temporalities in both aesthetic and ethical interpretation that Imamichi's insights about interpretation had brought into focus. Could some eco-ethical insights help resolve the problem we saw with Dworkin's important theory of law as essentially interpretive?

4.1 Literary and Legal Interpretation. We noted that on Dworkin's view the basic nature of law is its essentially interpretive and finally moraland ethical character. The rule of law in a society on this view is the rule of objective moral laws in a society.

Thus, some persistent social questions in, say, affluent and resourceful French society, as to whether the contents of some actual laws are just regarding such deeply troubling ethical

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63 I do not know, exactly, how Imamichi understands the different kinds of temporality in discussion here since they partly depend on his understandings of Japanese verbal expressions of time which I am ignorant of.

64 See especially his controversies with Stanley Fish in R. Dworkin's *A Matter of Principle* (Cambridge, MA: Harvard UP, 1985), pp. 146-166, and his *Law's Empire* (Cambridge, MA: Harvard UP, 1986), pp. 228-238; and see S. Fish, *Doing What Comes Naturally; Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke UP, 1989), p. 392ff.

matters as ca. 2 million French persons requiring daily food assistance to avoid chronic undernourishment and its attendant evils are not to be addressed just by pursuing legal business as usual, by recourse mainly to legal precedent. They can be sustainably redressed only by interpreting constructively the law's moral merits.[65]

Doing so however requires revising the account of the nature of law in societies like French society that profess to be governed by the rule of law. Critical revisions must pay special attention both to the satisfactoriness of the analogy Dworkin draws between literary and legal interpretation and to a metaphysical gap in his own account of at least just law as constructive interpretation involving an essential evaluative and moral core.

4.2 Constructive Interpretation and the Best-Possible-Light Requirement. Seeing how all reasoning about values involved in determining the justness or injustice of some law necessarily reduces to evaluative judgments, I said earlier, remains difficult. Still, Dworkin might elaborate as follows.

Any attempt to determine the justness or injustice of any law must, we agreed for the sake of argument, be an interpretation. But as an interpretation such reasoning "must purport to present its object in its *best possible light,* as the best possible example of the kind it belongs to. [Yet] an attempt to present something in its best possible light, all things considered, necessarily relies on evaluative judgments of the kind that would be competitive with the judgments or reasoning one purports to interpret."[66] Thus, at the very least any good or just law (never mind for now any law whatsoever) does indeed eventually reduce necessarily to evaluative judgments.

But here is where the basic requirement that "interpretation, by its very nature, must present its object in its *best* possible light…" comes into serious question.[67]

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65 Cf. Ripstein 2007, p. 3.

66 Marmor 2011, p. 132.

67 *Ibid.*

Thinking twice about the analogy Dworkin draws between literary and legal interpretation, one might well concur that in both cases one needs to construct a working hypothesis, an aesthetic one or a jurisprudential one. And in this sense, in both cases we may not improperly speak not just of interpretation but of "constructive interpretation."

But no argument compels one to agree that the object of the constructive interpretation in each case must be taken "in its best possible light;" something weaker may well suffice. Thus, for the sake of plausibility (the main consideration Dworkin cites in his advocating his best possible light assumption), the object of the working hypothesis that the interpretation constructs could just as well be taken in a reasonably possible or persuasive or cogent light.[68]

Since, however, the requirement to take the object only in its best possible light is what Dworkin sees as a *sine qua non* to his account of just law as constructive interpretation and hence necessarily evaluative and moral, then that account cannot go through. For more than one rational although weaker alternative is available. Hence, the best-possible-light requirement is, *pace* Dworkin, dispensable.

Accordingly, most critics of the theory of law as necessarily constructive interpretation, whether of the nature of law or of the nature of only just laws, agree: the best-possible-light requirement is very questionable. Hence, they reject the constructive interpretation of law, both in its most general form and even in its more restricted form.

Given, however, the substantial social promise that this account holds out, its extraordinary evaluative nature, and the bold and well-argued objectivity of some of the evaluative judgments that at least some law is held to incorporate, critics remain open to examining further revisions of this account.

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[68] Note that the "object" at issue here must be understood as having both intrinsic and extrinsic properties. Cf. D. Lewis, "Extrinsic Properties," in his *Papers in Metaphysics and Epistemology* (Cambridge: CUP, 1999), pp. 111-115, and D. Lewis and R. Langton, "Defining 'intrinsic,'" in Lewis 1999, pp. 116-132.

Perhaps, then, retrieving several eco-ethical reflections on the metaphysical character of interpretation could help obviate a recurring major difficulty with constructive interpretation. If successful, such a move might unblock a path for using the theory of law as constructive interpretation in successfully arguing the proposal that achieving durable social justice within, say, French society today necessarily requires the rule of law to be understood morally and ethically.

§6. Temporally Closed and Temporally Open Objects

One crucial element of an eco-ethical idea of interpretation we have noted is the notion of temporality. "Art takes time," Imamichi liked to say, and interpreting art takes time too. Law also takes time, and so does interpreting law; but the time is different.

In the case of aesthetic interpretation, we have not just the progressive interpretation aggregates that precipitate at each stage of the analysis of the artwork; we also have the synthetic interpretation that emerges as an aesthetically evaluative interpretive judgment at the conclusion of the analysis. This overall evaluative judgment combines antecedent individual aesthetic judgments ("Wallace Stevens's diction demonstrates unusual linguistic creativity," "His use of metaphor is not accidental but essential to the appreciative effects of the last stanza," and so on) into a culminating holistic aesthetic judgment ("This Stevens poem is a good and indeed beautiful poem").[69]

There is a temporal process; the process is incremental; but the process results in the emergence not just of an aggregate of

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69 I use the expression, "holistic," here in the common philosophical sense of some philosophical account that "may insist that the properties of a whole cannot be predicted or explained in terms of those of its parts..." (M. Proudfoot and A. R. Lacey, *The Routledge Dictionary of Philosophy,* 4th ed. [London: Routledge, 2010], p. v). By contrast, I use the expressions "analytic" and "synthetic" here not in Kant's controversial philosophical senses but in the more usual senses of breaking something down into its part and putting something back together again from its parts.

individual aesthetic judgments; what emerges is an aesthetic evaluative judgment that is more than merely the sum of its temporal parts. The culminating evaluative aesthetic interpretation is an emergent temporal and aesthetic whole. Its holistic nature includes, necessarily, its peculiar temporality.

May we say, similarly, that in the case of jurisprudential interpretation we have not just progressive interpretative aggregates that confirm or disconfirm successive working hypotheses about the justness or injustice of a particular statute and that result in a culminating legally evaluative holistic interpretative judgment?

May we say that what emerges from some jurisprudential deliberation is not just the aggregate of its successive legal and temporal parts but a holistic evaluative and temporalized interpretive judgment?

And may we also say that the time of constructive interpretation of the law, say its "chronicity,"[70] is basically different from the time of aesthetic interpretation of literary artworks? It is different in that the nature of the object of legal interpretation, the legal statute, is always by its nature open to the further succession of time (both the object and its interpretations may change), whereas the object of literary interpretation, the literary work of art, is temporally closed (only the interpretations but not the object may change)?

Suppose that our more knowledgeable colleagues were to say that, with necessary revisions and more technical detail, something reasonably like the preceding description may well fit at least much (if not all) of what normally goes on in a jurisprudential constructive interpretation of the justice or injustice of a specific statue (say, the justness of an ECJ ruling concerning the termination of the distribution of EU agricultural surpluses to accredited French institutions serving chronically under-

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70 See X. Emmanuelli, "*Proximité, urgence, chronicité*," *Pauvretés et urgences sociales,* ed. J.-R. Armogathe and M. W. Oborne (Paris: Editions Parole et silence, 2011), pp. 23-32. The notion of "chronicity" with respect to social justice and law as interpretation requires a paper in its own right.

nourished persons including the aged and many Paris children). What would then follow for the theory of just law as constructive interpretation is a resolution of the best-possible-light problem.

For on the incorporation of appropriate metaphysical reflection on the different specific temporalities of constructive interpretation, the best-possible-light assumption is no longer essential to the theory. That is, whatever interpretive hypotheses we come to adopt provisionally in our efforts to interpret the law constructively need not be presented in their best-possible-light because, of their nature, the object of these hypotheses is always open to further amendment. There simply is no best-possible-light because, unlike the object of literary interpretation, there is no end to the object of legal interpretation.

Given its continuing but still suspended promise for construing the rule of law in much more socially effective ways for promoting the good of individuals and groups in such ethically challenged societies as France today, revising the understanding of just law as the product of constructive interpretation with the help of such eco-ethical suggestions may well merit further critical discussion.

Envoi

The rule of law in France seems to allow the persistence of very great yet unnecessary personal suffering and premature death of many chronically undernourished persons in one of the most resourceful and affluent cities in the world.[71] Many of the aged and many children are among these persons. Actualizing a socially relevant account of the contents of just laws in terms of a properly temporalized constructive interpretation of the nature of law itself might raise some social priorities to where they ethically ought to be. For law on this account is not merely descriptive; it is, necessarily, moral and ethical.

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[71] Perhaps the persistence of such an ethically unacceptable situation may derive, partly, from insufficient critical reflection on just what choosing to live under the rule of law entails?

Understanding and preserving the rule of law in France today also requires ongoing moral and ethical reflection as an essential part of the political.[72] When pursued thoughtfully, could such political, moral, and ethical reflection make use of several central eco-ethical insights? In doing so, could it raise political consciousness and generate sufficient and sustainable political will to continue feeding the hungry in Paris? Could that political will succeed in reversing the ECJ's catastrophic ruling?

[72] The rule of law understood as properly temporalized constructive interpretation in such technologically advanced societies today as France is a necessary condition for the re-establishment and sustainability of social justice in that society. But it is not a sufficient condition. For without pervasive social solidarity and a partly spiritual and not just laicized understanding of fraternity, even if eventually re-established in French society, social justice certainly cannot be sustained. As Augustine memorably claimed, "*non intratur in veritatem nisi per caritatem.*"