ESSAY

Interpretation Is Not Interpretation: A Friendly Reply to Professor West

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The normative universe is held together by the force of interpretive commitments — some small and private, others immense and public. These commitments — of officials and of others — do determine what law means and what law shall be.

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[1] Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

INTRODUCTION

In her recent article *Adjudication Is Not Interpretation*,[2] Professor Robin West articulates a powerful critique of the core of the law-and-literature debate in American law reviews:[3] modern theories of interpretation ultimately place meaning in the hands of communities,[4] identify critique as an interpretive act of equal dignity to the interpretive act of adjudication,[5] and confine critique within the walls of community.[6] Professor West questions the effect these modern theories have upon groups who have never had a real voice in the community. To embrace *any* form of interpretivism is to silence *pro forma* their critique of adjudication.[7] And what about the "natural" or "animalistic" self, the self unconstructed by community and stripped of communal moorings? Is critique of adjudication from the basis of "real human needs" possible?[8] It must, she argues. We must make it so. And I agree. We must create a niche for the kind of legal analysis and criticism exemplified by her short and insightful analysis of *Brown v. Board of Education*:[9]

> How do we, or should we, criticize an act of power? In public life, no less than in private life, I believe we should criticize acts of power not by reference to their rationality, or their coherency, or their "integrity," but by reference to their motivation and effects. An act of power in public life as well as in private life that is praiseworthy is an act of power which, in short, is loving: it is the act that originates in the heart and is prompted by our sympathy for the needs of others, and empathy for their situation. I see no reason not to hold adjudicatory acts of power to this standard. *Brown v. Board of Education*, for example, is a good opinion, because it

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[2] West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1986).

[3] *See generally id.* at 203-04 n.1 (collating the major law-and-literature writings). There are two ways to interpret the "point" of the law-and-literature debate. First, literary theory "means" that meaning may or may not reside stably in texts. Accordingly, past-text-looking adjudicatory practices may or may not be stable themselves. Second, legal theorists are appropriating literary texts and literary theory to sharpen and to deepen their own debate about the relative power of legalism and morality. It shall become clear that I prefer the second interpretation of the "movement."

[4] Professor West offers two sources of community meaning: (1) the communal conventions of meaning identified by "objective interpretivism," *id.* at 215-17, or (2) politically-powerful meaning-imbuing interpretive communities identified by "subjective interpretivism." *Id.* at 244-46.

[5] *Id.* at 207-08.

[6] *Id.* at 209, 236-37, 247-48, 268-69.

[7] *Id.* at 217-19.

[8] *Id.* at 253-58, 270-76.

[9] 347 U.S. 483 (1954).

> is a sympathetic rather than cynical response to a cry of pain, not because it renders "consistent" conflicting strands of constitutional jurisprudence. Indeed, the strength of the opinion lies more in its willingness to *ignore* the community's texts rather than its willingness to read them: the opinion speaks to our real need for fraternity rather than our expressed xenophobia; and it taps our real potential for an enlarged community and an enlarged conception of self rather than our expressed fear of differences. The test for the morality of power in public life as in private life may be neither compliance with community mores, as objectivists insist, nor political success, as subjectivists claim, but love.[10]

Professor West responds to the possibility of this kind of critique by rejecting adjudication-as-interpretation, and by embracing adjudication-as-power ("imperativism"). For her, only through imperativism can we recover unheard moral voices within the community and the unheard moral voice within ourselves.[11]

While I am excited about Professor West's call for an authentically moral critique of law and legal institutions, I cannot reconcile myself to the position that legal positivism is morally empowering. We must not make any mistake about West's vision: she readily admits that her position could be framed in terms of legal positivism.[12] Hers is certainly not Hobbesian legal positivism, which approves and celebrates the purely coercive nature of law-making in the *Leviathan*.[13] Professor West's vision is more like Hans Kelson's descriptive notion of the "pure theory" of law, which distinguishes internal (formal, coherence- and process-centered) from external (moral) critique of law.[14] She identifies internal critique with all interpretivism, and external critique with imperativism. Her identification of external critique with imperativism ultimately makes possible the recovery of authentic moral voices.

It is undoubtedly true that imperativism (or external critique) is *relatively* liberating for suppressed moral voices. *But what does one do when external critique spurs one on to challenge the law*? What can an imperativist say when she must argue *Brown* before the Supreme Court? The imperativist can abandon the interpretive standards of the politically-constituted community of meaning ("professionalism")[15] and tell the justices a compelling human story. This strategy may work, but

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[10] West, *supra* note 2, at 278 (footnote omitted).

[11] *Id.* at 207, 252.

[12] *See id.* at 205 & n.5.

[13] *See, e.g.*, T. HOBBES, LEVIATHAN 223-28 (C. Macpherson ed. 1951).

[14] *See* H. KELSON, GENERAL THEORY OF LAW AND STATE 3-89, 119-22 (A. Wedberg trans. 1961).

[15] West, *supra* note 2, at 248-51.

it will most often fail. There are powerful institutional,[16] and sometimes personal,[17] barriers to empathetic adjudication. Nevertheless, the imperativist would argue that these barriers simply point out the gulf between theory (authentic moral critique) and practice (empathetic advocacy). My response to this strawman imperativist is that we must bridge the gulf. Professor West's failure to address this gulf ultimately represents the source of my unease with her theoretical prescription. A love expressed *solely* through listening is not always a strong one. It is in some sense an inauthentic one. Lovers must love by aiding as well as by listening. Moreover, aiding on the periphery of the community — in the private sphere[18] — is not enough. Lawyers must love by fighting injustice, *especially by fighting injustice in courts*. I believe that Professor West falls into a kind of nihilism — even as she attacks the inherent moral nihilism of subjective interpretivism[19] — as suggested by her skepticism about expressing authentic moral critique *through professionalism*. The balance of this Essay demonstrates how Professor West can hold authentic moral critique of law together with professional action in service to that critique.

First, through an examination of Alice's encounter with Humpty Dumpty in *Through the Looking Glass*,[20] I will introduce two distinct kinds of interpretive methods. The first method, determinism, views conventional or communal meaning as a fundamental constraint on the interpretation of texts. The second method, constructivism, views communal meaning as the starting (enabling) point of interpretation, but it further demands that the interpreter challenge this meaning in her construction of a voice.[21]

Second, I will explore determinism and constructivism, focusing on

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[16] *See, e.g.*, R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119-48 (1975) (describing various institutional and professional constraints which antislavery judges saw as limiting their ability to express their authentic moral voices in the course of adjudication).

[17] *See, e.g.*, J. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 139-51 (1976). Noonan suggests that Cardozo's desire to distance himself from his father's corrupt judging led him to an ultimately unjust aloofness from the real parties in cases. *Id.* A powerful symbol of this aloofness was the unnecessary and purely discretionary award of costs against an indigent Helen Palsgraf.

[18] To the extent "the private sphere" is a stable description of *some* social institution(s).

[19] West, *supra* note 2, at 209.

[20] L. CARROLL, *Through the Looking Glass and What Alice Found There*, in ALICE IN WONDERLAND 101 (D. Gray ed. 1971).

[21] *See infra* notes 25-30 and accompanying text.

their relationship to subjective and objective interpretivism. I will establish that subjectivism and objectivism prescribe an essentially determinist theory of interpretation. When Professor West rejects interpretivist theories of adjudication *pro tanto* because of her critique of subjectivism and objectivism, she does not account for the possibility of a constructivist theory which preserves authentic moral critique without abandoning a claim to being interpretive.[22]

Third, I will contrast constructivism with imperativism, and show that constructivism provides a firmer ground for Professor West's analysis of *Brown* than does imperativism.[23]

I. Determinism and Constructivism

A. *Humpty Dumpty and Alice on Interpretation*

After debating the relative merits of birthday and unbirthday presents — Alice preferring birthday presents, Humpty Dumpty preferring unbirthday presents because they might be received 364 days of the year — Humpty Dumpty concludes, "There's glory for you!"

> "I don't know what you mean by 'glory,'" Alice said.
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> Humpty Dumpty smiled contemptuously. "Of course you don't — till I tell you. I meant 'there's a nice knock-down argument for you!'"
>
> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
>
> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."
>
> Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again. "They've a temper, some of them — particularly verbs: they're the proudest — adjectives you can do anything with, but not verbs — however, *I* can manage the whole lot of them! Impenetrability! That's what *I* say!"
>
> "Would you tell me, please," said Alice, "what that means?"
>
> "Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life."
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> "That's a great deal to make one word mean," Alice said in a thoughtful tone.

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[22] *See infra* notes 31-70 and accompanying text.

[23] *See infra* notes 71-107 and accompanying text.

> "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra."
>
> "Oh!" said Alice. She was too much puzzled to make any other remark.
>
> "Ah, you should see 'em come round me on a Saturday night," Humpty Dumpty went on, wagging his head gravely from side to side, "for to get their wages, you know."
>
> (Alice didn't venture to ask what he paid them with; and so you see I can't tell *you*.)[24]

What are we to make of this conversation? One way to view it is as a dispute about the meaning of meaning. Humpty Dumpty seems to think, counter to Alice's intuitions, that words have essentially arbitrary meaning, which is fixed only by looking to the subjective intentions of the speaker.[25] A more fruitful way to understand Alice's encounter with Humpty Dumpty is to view it as a dispute about the proper interpretation of interpretation. Humpty Dumpty thinks that he can interpret linguistic texts as he pleases, as long as he "pays" them. He does not, of course, wrench his words far away from their meaning. "Glory" does not *generally* mean "a nice knock-down argument." However, it is not an unreasonable usage, at least to an egghead like Humpty Dumpty. The same can be said of "impenetrability." Humpty Dumpty pays words for his exercise of mastery with some sense of obedience to communal meaning. In essence, the obedience to communal meaning acts as the starting point for his interpretation, but not the end. Alice, on the other hand, sees nothing but communal meaning. She only understands Humpty Dumpty when he translates for her. She does not pay her words; she does not really "use" them. Nonetheless, without her Humpty Dumpty's wage arrangement with words is not possible. She is the guardian of the meaning which empowers Humpty Dumpty's interpretive efforts. Without Humpty Dumpty her interpretive world is empty: "In one sense words are our masters, or communication would be impossible. In another we are the masters; otherwise there could be no poetry."[26]

The rest of Alice's conversation with Humpty Dumpty illustrates how they each adopt separate, but equally worthy, interpretive postures. Alice says:

> "You seem very clever at explaining words, Sir. . . . Would you kindly tell me the meaning of the poem called 'Jabberwocky'?"

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[24] L. CARROLL, *supra* note 20, at 163-64 (emphasis in original).

[25] *See* Pitcher, *Wittgenstein, Nonsense, and Lewis Carroll*, 6 MASS. REV. 591, 603-05 (1965).

[26] Holmes, *The Philosopher's Alice in Wonderland*, 19 ANTIOCH REV. 133, 137 (1959).

> "Let's hear it," said Humpty Dumpty. "I can explain all the poems that ever were invented — and a good many that haven't been invented just yet."[27]

It is fruitful to compare his explanation of the poem with his earlier interpretations of "glory" and "impenetrable." Alice recites the first stanza of *Jabberwocky*:

> 'Twas brillig, and the slithy toves
> Did gyre and gimble in the wabe:
> All mimsy were the borogroves,
> And the mome raths outgrabe.[28]

Under Humpty Dumpty's lengthy exegesis, this stanza becomes:

> About four in the afternoon the lithe, slimy
> badger-lizard-corkscrew beasts
> Did twirl and burrow about the sundial:
> The flimsy mop-top birds were miserable,
> And the green pigs, far from home, made a
> bellowing-whistling-sneezing sound.[29]

I'm not sure that this really helps Alice understand the poem, but she obviously gets what she wants; after all, she doesn't object or question his explanation. Recall earlier Alice argued that glory "*doesn't* mean 'a nice knock-down argument.' "[30] However, this time Alice offers no argument since Humpty Dumpty's interpretation of the first stanza accords with Alice's theory of interpretation. Humpty Dumpty simply articulates the conventional meaning of the words. But his interpretation of *Jabberwocky* does not accord with the theory of interpretation he was using earlier. It does not tell us anything about Humpty Dumpty. The interpretation of glory as "a nice knock-down argument" at least told us something about Humpty Dumpty being an egghead.

B. The Two Senses of Interpretation

One of the central debates in the social sciences involves the tension between two kinds of *descriptive* interpretation: meaning and function. Functionalist interpretation is black-box explanation. What is important to the functionalist is that explanation have great predictive value, even if it "explains" social events in ways that would strike the participants and quasi-detached observers as inappropriate, inaccurate, and strange. By contrast, interpretivist explanation strives to remain essen-

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[27] L. CARROLL, *supra* note 20, at 164.

[28] *Id.*

[29] *See id.* at 164-66.

[30] *See id.* at 163-64 (emphasis added); text accompanying *supra* note 24.

tially true to the self-understanding of the participants, risking explanatory force for local descriptive accuracy.[31] It would be easy to claim that Humpty Dumpty adopts a functionalist theory of the meaning of words, and that Alice adopts an interpretivist one. From this claim one could argue that what Humpty Dumpty was doing with the words "glory" and "impenetrable" — unlike what he was doing with "brillig," "slithy," and "raths" — was not interpretation. If one argues what Humpty Dumpty was doing with "glory" and "impenetrable" was *descriptive*, I would agree. But he was not.

Although some claim that there is little difference between descriptive interpretation and other kinds of interpretation,[32] it should be distinguished from *normative interpretation*. Ronald Garet describes normative interpretation as

> the sort of moral reflection that characterizes the Christian who consults the Gospels in a time of moral or spiritual crisis; the student who is awakened to oppression and liberty by the poems of William Blake; the judge who takes instruction in justice from the constitutional writings. In each case, the interpretation of certain texts *that are invested by the reader with special value* guides the reader's moral reflection and action. In this activity there is a connection between textual interpretation and normative guidance that is definitive of the species of moral reflection that I call "normative hermeneutics."[33]

Within normative interpretation there is no *easy* meaning/function distinction. Therefore, functionalist interpretation ceases to seem outside the boundaries of the interpretive project. This blurring of the meaning/function distinction is at the heart of Arthur Leff's claim that "with people, what a thing does is only one of the things it means, but

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[31] Countless sources elaborate on this theme. My favorite meditations on meaning and function in descriptive interpretation are found in Clifford Geertz's efforts to sustain and defend an "interpretive" cultural anthropology resting on "local knowledge." *See, e.g.*, Geertz, *"From the Native's Point of View": On the Nature of Anthropological Understanding*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 55 (1983) [hereafter Geertz, LOCAL KNOWLEDGE]; Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3 (1973).

[32] *See, e.g.*, Joseph, *Interpretation in the Physical Sciences*, 58 S. CAL. L. REV. 9 (1985) (stating that "interpretation in the physical sciences is often taken to be not merely among the many examples of such activity, but as a standard against which interpretation in other disciplines is to be measured").

[33] Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 37, 37-38 (1985) (emphasis added). Garet defines "hermeneutics" in the broadest sense possible — as the theory of (or meta-) interpretation. *Id.* at 38 n.2.

everything it means is another thing that it does."[34] Nonetheless there is a provisional, perhaps phenomenological, distinction between the two senses of normative interpretation. To understand this distinction, and to understand how and why Humpty Dumpty and Alice were employing different interpretive methods, one must understand the role *authority* plays in the formation of a normative interpretive project.

Garet locates the project between two features of human life. On the one hand, humans create and experience "worldviews," *i.e.*, visions of human nature which guide normative commitment. On the other hand, humans also create and experience what Garet calls "deposits":

> the potentially meaningful strata laid down either by an extraordinary event (a revolution, the founding of the state, or the redemptive ministry of a savior) or by the slow sedimentation of human wisdom (the evolution of culture). . . . In each case, the deposit can be understood as a formation of potentially meaningful lore whose vastness must be appreciated on a geological scale of time and distance.[35]

Normative interpretation is a worldview's attempt to recover guidance and wisdom from a deposit. *The character of the worldview and deposit determine the nature of the interpretive project.* Garet borrows Max Weber's metaphor of a worldview as the "switchman" guiding its practice along particular interpretive tracks.[36] The worldview struggles with two interrelated questions: (1) What is the breadth and depth of the deposit? How does the line between text (*interpretandum*) and nontext get drawn?[37] (2) What is the authoritative nature of the deposit? Does it merely locate moral authority, or does it bring the authority of the text into some kind of relation with the will of the interpreter?[38] Worldview, deposit, text, and authority are general problems of normative interpretation, sensible and perhaps solvable, only within *particular* projects.[39]

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[34] Leff, *Law and*, 87 YALE L.J. 989, 1008 (1978).

[35] Garet, *supra* note 33, at 47.

[36] *Id.* at 45 & n.14.

[37] Within constitutional interpretation, this struggle is illustrated in the debate between "interpretivists" and "noninterpretivists," the latter of whom Thomas Grey now labels as "supplementers" and "textualists." Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1-5 (1984).

[38] This issue is illustrated by the debate between "originalists" (who place will-defeating authority in the intent of the Framers) and "nonoriginalists" (who may be interested in, but not fundamentally bound by, the Framers' intent) in constitutional interpretation. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204-05 (1980).

[39] *See* Garet, *supra* note 33, at 44-51 (discussing relationship between worldview, deposit, text, and authority in formation of a normative hermeneutic project).

When a particular worldview concentrates on the discipline of the individual to the deposit, so that the text becomes morally binding over the interpreter, the worldview will demand an interpretive practice that requires painstaking attention to the *focal meaning of the text.* The interpreter must uncover meaning in the text, meaning placed there by the worldview, and act according to meaning. Yet when a worldview is concerned with bringing interpreter and deposit into a relation of celebration, so that the interpreter is "enjoined" to discover his or her humanity in the deposit, a very different interpretive practice is formed: *the use of text in the creation of a moral self* is authorized.[40]

Alice's theory of interpretation is very much like the interpretive practice of this first worldview: she finds the meaning of words in the focal recovery of meaning. This is precisely what Humpty Dumpty provides for her in his interpretation of the first stanza of *Jabberwocky.* In his interpretations of the words "glory" and "impenetrable," however, Humpty Dumpty's interpretive method is akin to the second worldview. He is using the words to create a self. In other words, eggheads find "nice knock-down arguments" glorious, and impenetrable discussions useless. Contrary to his boasts of mastery, he is not using words *solely* as he pleases. Alice's interpretive practice is not unintelligible to him. After all, he does deliver the goods she wants when it comes to the *Jabberwocky.* Yet under the worldview which forms Alice's practice, his practice *is* unintelligible.

II. Subjectivism, Objectivism, and Determinism

For both subjectivists and objectivists interpretive practice is nothing more than the focal recovery of meaning in legal texts, which accordingly disciplines the will of the interpreter to this meaning. Professor West correctly rejects the worldviews held by objectivists and subjectivists in favor of a moral realism. Accordingly, she rejects their interpretive practices. However, she errs in not seeing that her worldview can support Humpty Dumpty's interpretive practice as well as imperativism. In the remainder of this section I will describe the interpretive practices approved by subjectivists and objectivists, and discuss West's ideas about why they approve of them. In the next two sections, I will show how Humpty Dumpty's interpretive practice is sustainable under

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[40] *See id.* at 70-74, 102-06 (contrasting project of the first type — Martin Luther's "sola fide, sola gratia, sola scriptura" — with project of the second — Matthew Arnold's "humanistic perfectionism").

Professor West's worldview, and why it would be better if she adopted it, instead of imperativism.

In his article *Conventionalism*,[41] Owen Fiss attempts to characterize his debate with Stanley Fish by initially setting out the kinds of interpretive theories he does *not* advocate. He criticizes "excessively mechanistic"[42] theories of constitutional interpretation which rely on either the supposedly deterministic properties of the text or on original intent.[43] He also criticizes interpretive theories which grant "total freedom" to the interpreter and which view all interpretation as essentially a morally constructive project. He further criticizes these theories for seeing a number of *prima facie* interpretations (constructions) in the Constitution that can be judged, and one eventually chosen, only on the basis of the substantive morality of the chooser.[44] Thus, Fiss begins his effort to secure the "middle ground"[45] between these extremes by endorsing public morality as a counter-counter-majoritarian influence in adjudication:[46]

> Interpretation is counter[-]majoritarian, *even if properly understood*. . . . [But] a proper conception of interpretation will help us understand the pervasiveness of the counter[-]majoritarian dilemma and thus, in my judgement, reduce its significance. . . . I start with the view that the Constitution embodies a public morality, including a commitment to racial equality. But I recognize that this commitment, when applied to a particular situation, such as segregated schools, is capable of several readings, some of which may conflict with other constitutional promises, such as liberty. The judicial task is to choose among these readings (and to harmonize the whole), and this choice is for me . . . the core of the intellectual process known as interpretation. . . . [H]owever, I do not believe that the choice is unconstrained.[47]

Professor West correctly identifies the fear of judicial power as Fiss' *primary* concern.[48] In order to render plausible the purification of adjudication's counter-majoritarian dark side, Fiss turns to a structure of "disciplining rules." These disciplining rules limit the interpretive power of judges while making the constitutional text rich enough

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[41] Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

[42] *Id.* at 180.

[43] *See id.* at 178-82.

[44] *See id.* at 182-83; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740-43 (1982).

[45] Fiss, *supra* note 41, at 183.

[46] *Id. passim*; Fiss, *supra* note 44, at 753.

[47] Fiss, *supra* note 41, at 182-83.

[48] West, *supra* note 2, at 210-14.

to sustain the public-law litigation[49] agenda of advancing civil rights.[50] Thus, adjudication becomes the disciplined interpretation of a supplemented legal text.[51] But Professor West questions whether even a supplemented legal text can lay a *prima facie* claim to justness:

> However, even assuming its coherence, objectivism thus defined — the view that adjudication consists of the disciplined interpretation of a supplemented, objective legal text — does not do what Fiss hopes: it does not transform acts of moral power into acts of moral reason. It may indeed transform an act of power into an act of reason, but this does not necessarily translate into a gain in morality. For the conventional morality, or the "public morality," with which the supplementalists gloss the legal text is not the same as true morality: there is no guarantee that the conventional code of virtue to which a community subscribes is a moral one.[52]

Moreover, she sees that communities form themselves around constructs of otherness — standards that sharpen communality[53] at the expense of denigrated and peripheral members:[54]

> Moral relativism is no alternative to the moral nihilism Fiss fears in subjectivism. The claim that it is, I think, rests upon an optimism regarding "community," and more specifically our own historical community, which is simply unwarranted. Surely, from the perspective of those *most in need of the law's protection* — slaves, women, workers, children, the poor, the illiterate, the uneducated, dissidents and others members of that vast and silenced majority whom the "community" in its relative moral wisdom has at one time or another cast off — a relativism that ties justice to community norms and practices is as odious and even frightening as the "nihilism" Fiss imagines he sees in the deconstructive instincts of his opponents.[55]

Like Professor West, I question Fiss's worldview which assumes that counter-majoritarianism is bad and must be disciplined under the deposit of conventional political morality. However, I am mystified by her

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[49] *See* Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1-11 (1979) (explaining his concept of public law litigation and its agenda); *see also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[50] *See* Fiss, *supra* note 41, at 184-96; Fiss, *supra* note 44, at 746-50.

[51] West, *supra* note 2, at 217.

[52] *Id.*; *see* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985).

[53] Ronald Garet identifies communality as the inherent value of groupness as a "structure of the human." Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1052 (1983).

[54] *See, e.g.*, Cover, *supra* note 1, at 15-16; Evans, *Stigma, Ostracism, and Expulsion in an Israeli Kibbutz*, in SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY 166 (S. Moore & B. Myerhoff eds. 1975).

[55] West, *supra* note 2, at 218-19 (emphasis in original).

conclusion that the interpretive practice formed by this worldview is "interpretation" *pro tanto*. Fiss' claim of occupying the "middle ground" between textual determinism and textual constructivism is a little disingenuous. His theory of interpretation is a variation of determinism, supplementing the constitutional text with a text of communal values.[56] It is the constructivist pole which he associates with the counter-majoritarian bogeyman. If my interpretation of Fiss is correct, then Professor West too hastily rejects constructivist interpretation when she rejects objective interpretation.

The subjectivist response to Fiss, as personified by Stanley Fish, is that nihilism is nothing to worry about. The Constitution does not sit in the air, uninterpreted, vulnerable to nihilistic appropriation, and in need of external protection. The Constitution comes preinterpreted, and the nihilists can do nothing about it.[57] The nihilist can do nothing about preinterpretation because conventional legalism is powerful while nihilism is powerless.[58] The disciplining rules cannot stop nihilism for the same reason that nihilism does not pose a threat; rules which stand above the powerful interpretive community cannot bind it.[59] Without its political power, the community of conventional public morality which Fiss sees as central to constitutional adjudication cannot impose rules of objective interpretation on the Constitution. Similarly, with its power, it cannot impose such rules from above on itself. Constitutional inter-

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[56] This determinism is put into stark relief by Robert Cover's critique of Fiss's fear of interpretive "nihilism":

> By posing the question as one involving a choice between the judicial articulation of values (albeit contested) and nihilism, Fiss has made too easy the answer to his question about the institutional virtue of the judiciary and of the political system of which the judiciary is a part. The real challenge presented by those whom Fiss calls "nihilists" is not a looming void in which no interpretation would take place. Even those who deny the possibility of interpretation must constantly engage in the interpretive act. The challenge presented by the absence of a single, "objective" interpretation is, instead, the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another. By exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.

Cover, *supra* note 1, at 44.

[57] Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332-39 (1984).

[58] *Id.* at 1339-47.

[59] *Id.* at 1325-32; *see also* Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645 (1986); Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982).

pretation is objective because Owen Fiss is at the "powerful" center of it, while the nihilists are not.

In his latest contribution to the law-and-literature debate,[60] Stanley Fish extends to legal interpretation the critique of "theory" taking place within literature.[61] "Theory" in this sense has a very particular meaning:

> [A]n abstract or algorithmic formulation that guides or governs practice from a position *outside* any particular conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term "correctly" here understood as meaning independently of his preconceptions, biases, or personal preferences.[62]

"Theory" does not mean generalization, first principles, or programmatic description.[63]

Thus glossed, Fish argues, theory does not exist:

> First, . . . performing an activity — engaging in a practice — is one thing and discoursing on that practice [is] another. Second, the practice of discoursing on practice does not stand in a relationship of superiority or governance to the practice that is its object. . . .
>
> What is at stake here are two uses of the word "use": on the one hand, "use" in the sense of "making use of" as a component of a practice; on the other, "use" in the sense of using in order to generate a practice. It is in the first sense that . . . [practitioners] use theory, and it is in the second sense that no one (this, at least, is my thesis) uses theory. That is, no one follows or consults his formal model of the skill he is exercising in order properly to exercise it. . . . Even if the skill one exercises in a practice is the skill of talking theory, this does not make the practice theoretical; it just means that in the judgement of the practitioner who wants to get something done, talking theory is one of the resources he employs in the course of doing it.[64]

In other words, theoretical talk is not theory in Fish's special sense; it is theory in the sense of generalization, first principles, or programmatic description. Yet, it *is* possible to engage in theoretical talk that is not in any sense "making use of" theory to further practical aims. Such theory-talk is not really "theory" in the strict sense of "practice-generating"; it is simply *subversion* from within the practice:

> To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue "naturally" — without further reflection — from one's position as a deeply situated agent. Someone who

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[60] Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

[61] *See* Fish, *Consequences*, in AGAINST THEORY 106-31 (W. Mitchell ed. 1985).

[62] Fish, *supra* note 60, at 1779 (emphasis added).

[63] *Id.*

[64] *Id.* at 1777-78.

> looks with practice-informed eyes sees a field already organized in terms of perspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence. To think *with* a practice—by self-consciously wielding some extrapolated model of its working — is to be ever calculating just what ones obligations are, what procedures are "really" legitimate, what evidence is in fact evidence, and so on. It is to be a theoretician.[65]

On this basis Fish criticizes legal theorists on all sides of the spectrum for their common faith in the ability to construct theories of judging which will make adjudication "more" just.[66] Of course, there is a practice called "philosophy" which can be used to generate a theory of adjudication. This theory is not really "theory" in relation to law because it does not really generate law. Nor is it "theory" in relation to philosophy, or even "legal philosophy," because it is just part of the practice. In response to Mark Kelman's deconstruction of criminal law[67] Fish responds:

> If the criminal law depends on notions of personal responsibility and autonomous action which seem retrograde and harmful, perhaps we should do something to get rid of it. Perhaps so, but we won't get rid of it by assaulting it with a philosophical argument, even one that shows it to be less firmly grounded than many had assumed. That might be a knockdown argument in philosophy, but, despite what Dworkin and others might believe, law is not philosophy, and it will not fade away because a few guys in Cambridge and Palo Alto are now able to deconstruct it.[68]

"Crits (and natural lawyers) to the barricades!" Fish seems to proclaim, "And to the rest of you practitioners — you lawyers and judges — not to worry. They can't touch you. Just keep on interpreting."[69]

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[65] *Id.* at 1788 (emphasis in original).

[66] *Id.* at 1779-81.

[67] Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[68] Fish, *supra* note 60, at 1798-99.

[69] This is precisely the comfort he offers to intentionalist literary critics:

> Of course, solipsism and relativism are what Abrams and Hirsch fear and what lead them to argue for the necessity of determinate meaning. But if, rather than acting on their own, interpreters act as extensions of an institutional community, solipsism and relativism are removed as fears because they are not possible modes of being. That is to say, the condition . . . of being independent of institutional assumptions and free to originate one's own purposes and goals could never be realized, and therefore there is no point in trying to guard against it. Abrams, Hirsch, and company spend a great deal of time in a search for the ways to limit and constrain interpretation, but if the example of my colleague and his student can be generalized (and obviously I think it can be), what they are searching for is never not already found. In short, my message to them is

Professor West attacks Fish for being the real moral nihilist in this debate:

> According to Fish, *any* critical claim that a professional, empowered group (such as lawyers, judges, doctors, or chairmen of English departments) has used that power in a way that frustrates something "real" (such as "real human needs") is confused, disingenuous, incoherent, and, worst of all, right-wing. Any such criticism violates the fundamental commitment of subjective interpretivism: there are only *interpretations* of rights, *interpretations* of needs, or *interpretations* of truth; there are no *real* rights, needs, or truths against which these interpretations can be evaluated. . . . What left-wing critics *ought* to be doing, Fish informs us (and them), is not criticising law on the basis of our "real" human needs or "real" potential, but instead, simply presenting alternative "imaginings, rationalizings, justifications, etc." to those presently espoused by the dominant vision. Just as the judge can't claim "truth" when he asserts that a contract does or doesn't exist (but can only claim institutional power), similarly a critic can't assert truth when she asserts that a law is frustrating our real needs, or is hurting us more than helping us, or is or isn't morally repugnant. All the critic, like the judge, can assert is institutional power — she either has it or she doesn't. The critic's alternative imagining, then, also cannot be judged on the basis of whether its assumptions are true or false to our real nature, our real needs, or our real potential. It can only be judged on the basis of whether or not the criticism has proven successful — whether it has displaced the dominant vision and become dominant itself.[70]

Given Fish's acquiescent and quietistic ("pro-professional") view of social authority, Professor West correctly accuses him of a profound moral nihilism.[71] Power in the hands of judges is a danger for Fiss. For Fish it is natural. What else are judges, and chairmen of English departments, but powerful? If they weren't powerful, they would be Crits and literary scholars who argue and occupy marginal positions.[72]

Fish's worldview requires a determinist interpretive practice. Once the written text is supplemented with the proper communal context, constructivism is impossible. It is impossible, except as delusion or subversion, because it is "working with" a practice. Professor West again justifiably rejects both this worldview and the interpretive practice it forms. Nevertheless, I am again puzzled why she feels that imperativism is the natural position to take against Fish's nihilism. Why can't she embrace a constructivism dedicated to the elucidation of unfulfilled real human needs?

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finally not challenging, but consoling — not to worry.
S. FISH, IS THERE A TEXT IN THIS CLASS? 321 (1980).

[70] West, *supra* note 2, at 250-51 (emphasis in original).

[71] *Id.* at 258.

[72] *See id.* at 253-57.

III. IMPERATIVISM AND CONSTRUCTIVISM

There are two reasons why Professor West might not want to embrace a constructivist theory of adjudication: First, she might not think that there is any particular reason to worry about imperativism. She may simply believe that the moral wisdom contained in her critique of interpretivism might be undercut by the difficulty of maintaining a viable distinction between constructivist and determinist interpretation. Second, she might not think that a constructivist theory of adjudication is possible under her worldview. In other words, constructivism does not even describe *prima facie* the articulation of real human needs. I do not think that either of these avenues of argument supports imperativism.

A. Positivism Is Not Empowering

Professor West argues that, once we cease to see adjudication as interpretation and start to see it as the exercise of power, it becomes possible to *criticize* adjudication from the perspective of real human needs and oppressed communities. This is true because imperativism banishes the kinds of limitations on such critique imposed by determinist theories of interpretation. On the other hand, imperativism also makes possible and perhaps legitimizes a theory of adjudication which is deaf to criticism. Originalist and intentionalist judges, as well as Owen Fiss, are motivated by the fear of counter-majoritarianism. Only unlike Fiss, judges doubt that any form of supplement is a sufficient bulwark. On the distinction between literature and law, Judge Richard Posner, an intentionalist, says:

> The difference has also to do with *power*. A literary critic may be an influential person, but he is a private individual in a competitive market. Unlike a judge, he wields no governmental power. In our society the exercise of power by appointed officials with life tenure (true of all federal and, practically speaking, many state judges) is tolerated only in the belief that the power is somehow constrained. The principal constraints are authoritative texts. A judge who proclaimed himself a deconstructionist or even a New Critic would properly be excoriated for having cut himself loose from [the] moorings that are part of the fundamental design of American government. Literary texts, on the other hand, need not be authoritative to perform their function in society.[73]

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[73] Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1370-71 (1986) (emphasis added).

Professor West says something eerily similar to Judge Posner:

> Noxious and even dangerous as I take the general view to be, there is nevertheless something refreshing about Fish's happy acceptance of the powers that . . . English departments [wield]: many outsiders have begun to suspect that the critics of literary traditionalism have been protesting too much. Perhaps it is true that the institutional power wielded in English departments enables, or facilitates, more than it crushes, just as Fish suggests. It might be true that English departments, and the hierarchies that define them, promote discourse more than they silence it. They probably do encourage speech, over the long haul, more than they censure. Even the most sadistic, wrong-headed, ill-willed and ruthless departmental chairperson — of which, I suspect, there are relatively few — has limited reach. He or she can crush careers. But she cannot, and does not, fine, imprison, or execute. The exercise of power in English departments may well be generally benign. Although Fish would never put the point his way, English departments, even with their internal wars, may further more than they frustrate our "real" human needs for culture, diversity, language, and intellectual and linguistic stimulation.[74]

Would Professor West embrace, along with Judge Posner, an originalist or intentionalist theory of constitutional adjudication in order to curb the possibly dangerous exercise of judicial power?[75]

Professor West is concerned with opening the possibility of authentic moral critique of legal practices. I cannot legitimately criticize her for not specifying a relatively complete theory of adjudication in her article. However, she opens up the possibility of this critique by rejecting two significant theories of adjudication. We may well ask, what will fill the

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[74] West, *supra* note 2, at 257.

[75] Professor West's recent writings make it very clear that she is *not* a fellow-traveler with Judge Posner in political and legal philosophy. West, *Authority, Autonomy, and Choice: the Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); *see also* Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986). Consequently, I find the similarity between Professor West and Judge Posner on this point troubling. Elsewhere, she criticizes the project as building a theory of adjudication on an intuitionistic, a priori, analytic base. Professor West advocates building such a theory on a naturalistic, historical, and hence falsifiable, one. West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985). Imperativism, as Judge Posner illustrates, is quite capable of being used as the basis for such an a priori jurisprudence. Constructivism, however, cannot: the project of constructing moral meaning out of legal resources *requires* a naturalistic and historical jurisprudence. Professor West runs the risk of being false to her own vision when she embraces imperativism.

vacuum? Having excoriated the fools for treading there, are we to expect angels or devils to rush in?" I must confess to being genuinely puzzled about Professor West's substantive theory of adjudication. I am sure that it must be some form of natural law theory. It could be the kind of open-textured natural law theory which invites the frank moral critique of adjudication, much like the vision I will discuss in the next subsection. It could just as easily be a theory which turns the judge toward professional and internal moral standards, like the "inner morality of law"[76] or the "rule of law virtues."[77] This possibility would generate a theory of adjudication not significantly different from Ronald Dworkin's objectivist call for judicial moral creativeness constrained by professional standards of fit.[78]

B. Humpty Dumpty Lawyering

The difference between Humpty Dumpty's interpretive practice and the one formed by either subjectivism or objectivism is this: for subjectivists and objectivists, communal meaning *constrains* interpretation. The properly supplemented text determines meaning in a relatively mechanical way. On the other hand, for Humpty Dumpty, communal meaning *enables* interpretation, making possible the construction of

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[76] *See* L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969).

[77] *See* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 313-21 (1985).

[78] *Compare* Dworkin, *How Law Is Like Literature*, in A MATTER OF PRINCIPLE 146, 160 (1985):

> A plausible interpretation of legal practice must also, in a parallel way, satisfy a test of two dimensions: it must both fit the practice and show its point or value. But point or value here cannot mean artistic value because law, unlike literature, is not an artistic enterprise. Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these. (This characterization is itself an interpretation, of course, but allowable now because relatively neutral.) So an interpretation of any body or division of law, like the law of accidents, must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.

With J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 27 (1980):

> The legal validity (in a focal, moral sense of 'legal validity') of positive law is derived from its rational connection with (i.e., derivation from) natural law, and this connection holds good, normally, if and only if (i) the law originates in a way which is legally valid (in the specially restricted, purely legal sense of 'legal validity') and (ii) the law is not materially unjust either in its content or in relevant circumstances of its positing.

morality from the experience of the text. For subjectivists, communal meaning is an epistemological/metaphysical constraint on the interpretive practice. For objectivists communal meaning becomes an ethical limitation in the interpretive practice. For either a subjectivist or an objectivist to go beyond communal meaning is to do something impossibly confused, morally inappropriate, or both. Humpty Dumpty's interpretive practice is both epistemologically/metaphysically and ethically enjoined to *start* at the point of communal meaning. No private languages are allowed.[79] Nevertheless, he is also morally bound to *exceed* these limitations in order to (1) construct a self more moral than the one unreflectively constructed by community, and (2) sculpt a society more just than convention alone can achieve. The model for Humpty Dumpty's practice is liberation theology.[80]

I do not want to discuss liberation theology here. Such a discussion would turn to another "law-and" in order to shore up law-and-literature. Instead, I would like to focus on constructivism as not only possible in light of critique from the basis of real human needs, but also necessarily involved in the discovery of these needs. Unlike Fish, I will not argue that there are no real human needs. Like Fish, I see that the perception of human needs is fundamentally bound up in language. Accordingly, I will argue that interpretation is at some level required to empower voiceless communities and selves. I agree with Professor West that neither subjectivism nor objectivism can empower *real* voices and human needs. I think that constructivism can.

In a recent essay, James Boyd White argues that both our conception

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[79] Thus, intentionalism as a provisional interpretive practice is sometimes justified depending on whether the intentionalistic motivations of the artificer(s) of the text are morally praiseworthy. I am not an originalist in constitutional interpretation, chiefly because the Constitution *qua* Constitution (*i.e.*, as text, not evolving doctrine) is in some sense irredeemably racist. *See* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26-42 (1987).

[80] *See, e.g.*, J. CONE, FOR MY PEOPLE: BLACK THEOLOGY AND THE BLACK CHURCH (1984); M. ELLIS, TOWARD A JEWISH THEOLOGY OF LIBERATION (1987); G. GUTIERREZ, A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION (C. Inda & J. Eagleson trans. 1973); S. WELCH, COMMUNITIES OF RESISTANCE AND SOLIDARITY: A FEMINIST THEOLOGY OF LIBERATION (1985).

Yet another parallel, not altogether distant from liberation theology, is Roberto Unger's notion of anti-necessitarian social theory, which challenges the taken-for-granted character of all social institutions (including, of course, moral, legal, and political conventions) and enshrines "context-smashing" as the constitutive end of social action. *See* R. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987); R. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK (1987).

of the self and of the other is bound up with the nature of language:

> Each of us is partly made by our language, which gives us the categories in which we perceive the world and which form our motives; but we are not simply that, for we are users and makers of our language too, and in remaking our language we contribute to the remaking of our characters and lives, for good or ill. This remaking is necessarily a shared or collective process, for language itself is socially constructed. The reciprocity I speak of thus exists at the collective as well as at the individual level, for our community is defined by our language — our language *is* the set of shared expectations and common terms that enable us to think of ourselves as a "we" — and that language too can be transformed.
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> This implies that on some occasions at least we may be able to contribute to the remaking of our shared resources of meaning, and thus of our public or communal lives.[81]

How else are we to articulate submerged voices in the community and submerged voices within ourselves, except by the interpretive *appropriation* of meaning? In an important sense, language is ineradicably individual.[82] In another sense, language is highly mechanistic.[83] Either sense threatens our ability to experience language as empowering — instead of fixed and controlling — when we attempt to speak with unconventional voices. The key to learning to speak from such voices is not to *supplant* conventional voices (meanings) as much as it is to *supplement* them with formerly hidden voices. "The art of all speech," Professor White tells us, "thus lies in learning to qualify a language while we use it: in finding ways to . . . acknowledge other modes of speaking that qualify or undercut it. The art of expression is the art of talking two ways at once: the art of many-voicedness."[84] In some sense, law is a social institution *uniquely* suited to the experience of many-voicedness:

> From this point of view, the law offers an especially interesting form of life, for at its central moment, the legal hearing, it works by testing one version of its language against another, . . . and by then making a self-conscious choice between them. It is an institution that remakes its own language and it does this under conditions of regularity and publicity that render the process subject to scrutiny of an extraordinary kind. As an ethical or political matter, the structure of the legal process entails remarkable possibilities — little enough realized in the event — for thinking about and achieving that simultaneous affirmation of self and recognition of other that many (I among them) think is the essential task of a discoursing and differing humanity. The ethical possibilities arise from the fact that

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[81] White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1962 (1987).

[82] *Id.* at 1964.

[83] *Id.* at 1966.

[84] *Id.*

> the premises of the legal hearing commit it to a momentary equality among its speakers and to the recognition that all ways of talking, including its own, may be subject to criticism and change.[85]

I do not want to be as Panglossian as Professor White seems. Adjudication is a tough nut to crack. Judges need not be any more sympathetic to socially marginal people than are more pragmatic political actors. Adjudication *is* in an irreducible sense imperative. The judge's velvet glove does hide a fist of steel. People are fined, imprisoned, and sometimes killed through adjudication. It is surely not acceptable for judges, lawyers, and law professors to hide behind communities of meaning. Yet Professor West cannot abandon interpretation to uncover critique from the perspective of real human needs. The key which unlocks the loving exercise of judicial power is constructivism — Humpty Dumpty lawyering — not positivism.

IV. CONSTRUCTIVISM IN *Brown v. Board of Education*

Professor West ended with *Brown v. Board of Education*.[86] I began with her assessment of it.[87] It is only fitting that I end with my assessment of it.

Brown is a constructivist, not imperativist, decision. To understand why *Brown* is fundamentally constructivist, one has to understand that it cannot be seen as a discrete legal dispute. It was the culmination of the efforts of the social movement to challenge white apartheid in America. It is important to note that one should not characterize the social movement which led to *Brown* simply as the Black struggle for racial justice *pro tanto*. Only a portion of the Black struggle led to *Brown*. This portion was committed to a constructivist theory of adjudication over an imperativist one. As Mark Tushnet characterizes the NAACP litigation strategy, it represented litigation as a "social process," which can begin only "when people start to see that they might understand what has happened to them as something for which the legal system may provide a remedy."[88] The choice between imperativism and constructivism was presented to the Black movement for racial justice at two critical points before *Brown*. If, at each point, a portion of the movement had not been committed to taking the constructivist path, *Brown* could not have been. Both of these choices are reflected in

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[85] *Id.* at 1963-64.

[86] 347 U.S. 483 (1954).

[87] *See supra* note 10 and accompanying text.

[88] M. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 xiv (1987).

the decision itself, and represent a constructivist break with precedent.

The first point in which an imperativist/constructivist choice faced the NAACP occurred in the late 1920s and early 1930s. The choice centered upon whether to employ litigation as a *strategy*, as opposed to a tactic. This debate is part of, and recapitulates, a perennial debate among black activists over the efficacy of working within the white system. Tushnet describes the more immediate conflict in these terms:

> Two opposed positions were stated . . . . One might be called "economic instrumentalism," and the other "autonomous legalism." Those who held the former view regarded legal rules as among the instruments wielded by the economically powerful in their own interests; they concluded that litigation was likely to be futile unless it was preceded by alterations in the distribution of power and, ultimately, wealth. In contrast, the "autonomous legalists" thought that the expressed norms of fairness embodied in American law could, at least occasionally, be employed with significant effect to remedy racial segregation, even if the segregation was in some sense the product of economic forces and interests.[89]

It should be obvious that the debate between what Tushnet calls "economic instrumentalists" and "autonomous legalists" is a debate between proponents of imperativism and constructivism. Roger Baldwin, an economic instrumentalist, wrote the following in his assessment of the NAACP's 1929 request for money from the Garland Fund to finance litigation:

> My own view is that such a legalistic approach will fail of its object because the forces that keep the Negro under subjection will find some way of accomplishing their purposes, law or no law. My personal view is that the whole problem should be approached from the economic standpoint and primarily that of the union of white and black workers against their common exploiters.[90]

Ralph Bunche, another economic instrumentalist, criticized the NAACP litigation strategy in an issue of the *Journal of Negro Education* devoted to "The Courts and the Negro Separate School":

> The confidence of the proponents of the political method of alleviation is based on the protection which they feel is offered all groups in the society by that sacred document the Constitution. Particularly do they swear by the Bill of Rights and its three supplements, the Thirteenth, Fourteenth and Fifteenth amendments, as a special charter of the black man's liberties. The Constitution is thus detached from the political and economic realities of American life and becomes a sort of protective angel hovering above us and keeping a constant vigil over the rights of all America's chil-

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[89] *Id.* at 11.

[90] *Id.* at 8 (quoting October 21, 1929, letter from Roger Baldwin to L. Hollingsworth Wood).

> dren, black and white, rich and poor, employer and employee and, like impartial justice, blinded to their differences. This view ignores the quite significant fact that the Constitution is a very flexible instrument and that, in the nature of things, it cannot be anything more than the controlling elements in the American society wish it to be. In other words, this charter of the black man's liberties can never be more that our legislatures, and, in the final analysis, our courts, wish it to be. And, what these worthy institutions wish it to be can never be more than what American public opinion wishes it to be. Unfortunately, so much of American public opinion is seldom enlightened, sympathetic, tolerant or humanitarian. Too often it resembles mob violence.[91]

For Bunche and Baldwin adjudication is an exercise of power that is dominated by the standards of the majority group. It would ignore a critique grounded in the real human needs of Blacks. Thus, a legal challenge to the "separate but equal" standard would be fruitless. Majority power will not bend to words. Had not some group within the Black community opted for the constructivist view, as the autonomous legalists in the NAACP did, *Brown* quite possibly would never have existed as the morally praiseworthy decision that we know.

The second point when an imperativist/constructivist choice presented itself came after the decision to employ litigation as a strategy. As a litigation strategy, the NAACP legal staff sought to attack the inability of the "separate but equal" standard to deliver substantially equal educational opportunity. However, they were faced with a difficult choice between suits that sought equalization of educational facilities, and suits that directly challenged the premise of "separate but equal." This dispute need not have arisen within the context of the imperativism/constructivism debate. Indeed, proponents of equalization litigation were more worried about finding potential plaintiffs in extremely racist communities than they were concerned over predicating their cases on the receptivity of courts to direct attacks on the "separate but equal" principle.[92] Thurgood Marshall, then chief architect of the litigation strategy, certainly experienced the conflict in these terms. He opposed the move toward using equalization suits as the strategic form of the litigation strategy in constructivist terms:

> Every segregated elementary school, every segregated high school and

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[91] Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 J. NEGRO EDUC. 308, 315-16 (1935).

[92] *See* M. TUSHNET, *supra* note 88, at 108 (quoting October 8, 1947, letter from Carter Wesley to Thurgood Marshall stating: "You know as well as I that you aren't going to get a Negro with nerve enough in that mean East Texas town, to sue to have his child go to a white school. But you will get plaintiffs to sue to make their school equal, because that follows the pattern that the white man himself has set up").

> every segregated college unit is a monument to the perpetuation of segregation. It is one thing to "take" segregation that is forced upon you and it is another thing to ask for segregation. I still believe that if the opposition finds that there are *representative* and *respectable* Negroes who cannot be bought and who have standing, who are in favor of segregation, then they will consider that as a much better victory than any legal case that they can win against us.[93]

Marshall believed that using an equalization strategy would send the wrong social signals by articulating the wrong "real human needs" of Blacks. Further, Marshall believed that seeking equalization necessarily involves implicit acceptance of the "separate but equal" standard. His faith in the possibility of directly challenging "separate but equal" was essential to his opposition to an equalization strategy and shows his constructivism. An imperativist, having lost the argument with the NAACP over having a litigation strategy at all, would see equalization as the only way to get some practical good out of litigation.

Until the late 1940s the NAACP tactically used equalization for two reasons. First, requiring equalization would make segregation very expensive to maintain. At the very least, it would obtain better educational facilities for Blacks.[94] This was the primary motivation for the *Teacher's Salary and Facility Equalization Cases*.[95] Second, the *Graduate School Cases*[96] allowed the NAACP to finesse the "separate but equal" doctrine to the point when it was ready for direct attack. Tushnet writes:

> An equalization strategy would not have been compatible with the idea of equality that was successfully invoked in *Brown*. Yet there was no relatively fixed ideal of equality with which racial discrimination was incompatible. The crucial cases in the litigation campaign show that the courts chose to enforce one of a number of plausible theories of equality. Indeed, without suggesting that alternative choices would have been less arbitrary, one can readily identify arbitrariness at key points in each opinion.
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> [I]n short, there was no conception of equality waiting to be enforced. Rather, *the courts and the NAACP were engaged in a process of constructing one* out of many possible conceptions of equality.[97]

The finesse shifted the focus of "separate but equal" analysis from physical facilities to less tangible opportunities which white graduate

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[93] *Id.* (quoting October 25, 1946, letter from Thurgood Marshall to Carter Wesley).

[94] *See id.* at 105, 114.

[95] *See generally id.* at 82-104 (describing Teacher's Salary and Facility Organization Cases).

[96] *See generally id.* at 70-81 (describing Graduate School Cases).

[97] *Id.* at 160-61 (emphasis added).

schools offered, but which newly-formed black ones could not.[98] Without this shift, made possible by the constructivist tendencies of decision-makers within the litigation campaign, *Brown* could not have been such a sweeping legal and moral indictment of segregation.

Finally, the *Brown* decision itself reflects these earlier conflicts between imperativism and constructivism. The decision turned on an interpretation of the word "equal" which only *started* at communal meaning. *Plessy v. Ferguson*[99] interpreted equality in physical and material terms: the races were treated equally when they were offered more-or-less like accommodations. The *Graduate School Cases*, *Gaines*,[100] *Sipuel*,[101] *Sweatt*,[102] and *McLaurin*,[103] continued and conventionalized this meaning. These cases invited the Court to determine whether "the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[104] It is true, as the Court pointed out, that the later *Graduate School Cases*, *Sweatt* and *McLaurin*, emphasized "intangible considerations" like the ability of the student to engage his or her white colleagues in debate.[105] But it is also true that these cases analyzed the intangibles in terms of their *instrumental* value in advancing the career for which the graduate study was being taken.[106] Communal meaning in this area of law provided only for the comparison of tangible facilities and intangibles that are bound up in the material well-being (success) of the Negro student. It did not authorize the Court to enquire into the effects of segregation in the "hearts and minds"[107] of Black children. The Court did show traces of the communal meaning of equality, *i.e.*, the substantive equality of opportunity. The Court also showed strong traces of an attempt to reconstruct social morality through law.

Although *Brown* is not the touchstone of racial justice that civics textbooks make it out to be — both for its checkered history of enforcement and its use by the white community to advance white interests[108]

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[98] *See infra* notes 106-08 and accompanying text.

[99] 163 U.S. 537 (1896).

[100] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[101] Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[102] Sweatt v. Painter, 339 U.S. 629 (1950).

[103] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[104] Brown v. Board of Education, 347 U.S. 483, 492 (1954).

[105] *Id.* at 493.

[106] *See McLaurin*, 339 U.S. at 640-41; *Sweatt*, 339 U.S. at 633-35.

[107] *Brown*, 347 U.S. at 494.

[108] *See* D. BELL, *supra* note 79, at 102-22.

— it is, as Professor West's homage to it testifies, an important effort at racial justice. I disagree with her implication that it is an imperativist decision. On the contrary, without a commitment to constructivism by at least part of the Black community, *Brown* would not have been. Although subjectivists and objectivists may now look back at *Brown* and embrace it,[109] I do not think that they could have endorsed its holding in the 1920s or 1930s. Imperativists could not have endorsed the struggle to achieve it. Only constructivists could dream the holding in *Brown* and achieve their dream.

CONCLUSION

Adjudication is an open-ended possibility. As Martha Minow has recently written:

> Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them. Rather than securing an illusory universality and objectivity, law is a medium through which particular people can engage in the continuous work of making justice. The law is "part of a distinctive manner of imagining the real."[110]

The tragedy of the closure of adjudication to professional castes and powerful communities is that the powerless must "whistle into the wind," while the powerful get to speak "with the wind at their backs."[111] Professor West is correct in seeing that it is the *power* of professional or interpretive communities that gives them their voice, and the *powerlessness* of subordinated communities which denies them theirs.[112] On the other hand, I think she is quite wrong in suggesting

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[109] Owen Fiss in particular is one of the foremost students on the implementation of *Brown*, and a powerful advocate for its vision of society. *See, e.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

[110] Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987) (quoting Geertz, LOCAL KNOWLEDGE, *supra* note 31, at 184).

[111] One scholar observes:

> Legal discourse empowers certain speakers by granting them a license to establish meaning. In this sense, power protects itself by rendering its aspiring usurpers mute or, when it allows them to speak, by putting words in their mouths and depriving their words of significance. Most speakers whistle into the wind, but a small few are privileged to speak with the wind at their backs.

Hutchinson, *Part of an Essay on Power and Interpretation (with Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 883 (1985).

[112] *See* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for*

that subordinated communities must first gain power in order to find a voice *in adjudication*. Like any other system, in its nooks and crannies, adjudication is open to prophetic voices.[113] Sometimes these voices fail abysmally, as in *Bowers v. Hardwick*.[114] Fortunately, sometimes these voices succeed as in *Brown*.[115]

Professor West might respond that I am looking at obfuscatory rhetoric by looking at a legalistic smokescreen thrown up by the Court to hide its morally good exercise of power. She may be right. I may be playing a Humpty Dumpty game of meaning in this Essay. The only difference between her imperativism and my constructivism might be that I take too seriously the obfuscating rhetoric of judicial decisions that vindicate real human needs. I think the "obfuscating rhetoric" is important in the hearts and minds of judges. Not only does it provide the *professional* context within which the vindication of real human needs can take place, but without it, real human needs cannot be communicated to a judge. Such rhetoric is not itself "real human needs" — that is something I imagine a subjective interpretivist might claim — but it is the essence of loving, constructivist, Humpty Dumpty lawyering.

Theory, 7 SIGNS 515 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence*, 8 SIGNS 635 (1983).

[113] *See, e.g.*, R. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988); Cornell, *"Convention" and Critique*, 7 CARDOZO L. REV. 679 (1986); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

[114] 478 U.S. 186 (1986) (holding statute barring adult consensual sodomy not a violation of the fourteenth amendment).

[115] The struggle over *Bowers* is not yet finished. Recently, in Watkins v. United States, 847 F.2d 1329 (9th Cir. 1988), a three-judge panel of the Ninth Circuit distinguished *Bowers* by construing it to hold only that there is no fundamental right to engage in homosexual sexual acts. The panel invalidated the U. S. Army regulations discharging homosexuals on the ground that homosexuals constitute a suspect class. *Id.* at 1352. The circuit vacated this decision and ordered rehearing *en banc*. Watkins v. United States, 847 F.2d 1362 (9th Cir. 1988). As of the publication of this Essay, the *Watkins* case was still pending.