Dworkin, Dignity, and the Body: Constructing a Critical, Carnal Legal Hermeneutic

Jackson Reese Faust

Follow this and additional works at: https://digitalcommons.memphis.edu/etd

Recommended Citation
https://digitalcommons.memphis.edu/etd/3246

This Dissertation is brought to you for free and open access by University of Memphis Digital Commons. It has been accepted for inclusion in Electronic Theses and Dissertations by an authorized administrator of University of Memphis Digital Commons. For more information, please contact khggerty@memphis.edu.
DWORKIN, DIGNITY, AND THE BODY: CONSTRUCTING A CRITICAL, CARNAL LEGAL HERMENEUTIC

by

Jackson Reese Faust

A Dissertation
Submitted in Partial Fulfillment of the
Requirements for the Degree of
Doctor of Philosophy

Major: Philosophy

The University of Memphis
August 2022
DEDICATION
For my grandfather, Thad B. Reese, Jr. (1925-2002), who first taught me the grandeur of ethical life.
ACKNOWLEDGEMENTS

One reason I have always been drawn to the thought of community is the realization that I am inevitably a product of the time, energy, and love given to me by others. Of course, it falls on me to use those gifts to the best of my ability—and I hope that I do. Until then, I will take this occasion to express my gratitude to some of the people to whom I am particularly indebted:

Thank you most of all to my mother, Libby Reese Farmer, for her constant love and steady belief in me and my capabilities, her many sacrifices on my behalf, and her abiding optimism and faith—I couldn’t have asked for, let alone deserved, a better parent.

Thank you to my aunt, Katherine A. Reese, and her husband Justin O. Schechter, who have always encouraged my ambitions, broadened my horizons, and supported my endeavors.

Thank you to their parents, Thad B. (to whom this thesis is dedicated) and Ruth H. Reese, who ensured that I never wanted for lack of anyone or anything, whether spiritual or material.

Thank you to the Sisters of Divine Providence, who established Saint Camillus Academy in Corbin, Kentucky, and provided me a moral and intellectual grounding on which I still rely.

Thank you to Julianne Chung, one of my oldest and dearest friends, for her steadfast empathy and encouragement as I sought to enter academia and for her continued confidence in me.

Thank you to Kenneth Winkler of Yale University and Shannon Craigo-Snell of Louisville Theological Seminary, for supporting my academic ambitions, for long after I was their student.

Thank you to my teachers and colleagues at Birkbeck, University of London, who rekindled my love of learning and fostered in me the spirit of intellectual adventure. I am especially grateful to my advisor Costas Douzinas, and my mentor and friend, Oscar Guardiola-Rivera.

It is impossible for me to overstate my gratitude to the Department of Philosophy at The University of Memphis. The collection of eccentric and brilliant weirdos better known as the
philosophy graduate student community has been vital to my philosophical development. Their breadth and depth of knowledge and deep sense of camaraderie has both enriched and inspired me throughout this program. Special thanks are due to Drs. Mike Ardoline, Andy Britton, and Jonathan Wurtz for being such good sports about my Hegelian predilections; Dr. Ben Curtis, a veritable public intellectual; Dr. Jim Zubko, a true ontologist; and to my fabulous cohort of 2017: Steph Butera, Dr. Christian Kronsted, Dr. Zak Neemeh, Dr. Corey Reed, and Jasper St. Bernard.

I am likewise grateful to the Memphis philosophy faculty, whose guidance, encouragement, support, and occasional tolerance of my work has been crucial to my professional development. I am of course especially thankful for my committee, Shaun Gallagher, Mike Monahan, Remy Debes, and Kas Saghafi—as well as Drucilla Cornell—but I would be remiss if I did not also mention Jim Bahoh, David Gray, Mary Beth Mader, Tim Roche, Danny Smith, Lindsey Stewart, and Deb Tollefsen, as well as Verena Erlenbusch-Anderson (now at Syracuse). I must also thank our department instructors who have variously provided great conversations, professional opportunities, technical support, and simply the wisdom of a lifetime of philosophy: Sila Özkara, Kevin Taylor, and Amit Sen (who I must also single out for selflessly offering to proofread this dissertation). I am also grateful to Connie Diffee and Cathy Wilhelm, who valiantly herd all us philosopher-cats and keep the lights on (as well as turn them off at the end of the day).

Lastly, I appreciate the Southern Journal of Philosophy for awarding me a Dissertation Completion Grant for Summer 2021, as well as the Marcus Orr Center for the Humanities for awarding me a Freeburg Dissertation Fellowship for Spring 2022.
ABSTRACT

This dissertation argues that an embodied legal subject is necessary to reorient law toward moral justice and describes how this subject alters the interpretation of legal texts. More specifically, it contends that humans’ mutual embodiment and institutionally-mediated vulnerability justifies basing adjudication on lived experience alongside—and given similar interpretive weight as—traditional legal texts. To justify this contention, it argues that Ronald Dworkin’s legal and political thought can be grounded by G.W.F. Hegel’s concept of “ethical life” (Sittlichkeit)—the integrated moral and political community—by dint of Dworkin’s distinctive account of dignity. It then uses this reading of Dworkin to propose a theory of legal subjectivity—i.e., the persona that is the object of legal analysis—that is both embodied and embedded within its legal community, such that dignity is a function of mutual social recognition. To operationalize this subject as co-constituted with the community, the dissertation defends a robust social ontology using the critical phenomenology of Frantz Fanon and the embodied hermeneutics of Paul Ricœur. Since the very existence of the embodied subject is its co-constitution with others and its inviolable dignity, the dissertation proposes a novel theory of legal interpretation that reads law in terms of intercorporeal intersubjectivity; this elevates the lived experience of the embodied legal subject to be as authoritative a source of legal norms as case law and constitutions. It then contends that this carnal legal hermeneutic can orient law toward a justice beyond legal process alone before demonstrating this contention by critiquing the recent United States Supreme Court decision Shelby County v. Holder using this hermeneutic. In so doing, the dissertation argues that the socio-cultural, material, and spatial embeddedness of race-based voter disenfranchisement means that legal officials must instead consider the lived reality of easily identifiable persons who risk the concrete indignity of losing their capacities as full citizens.
# TABLE OF CONTENTS

**Introduction: For Corporeal Justice** ................................................................. 1
  Framing the problem ......................................................................................... 3
  Overview of the argument .............................................................................. 6

**Chapter I: Dworkin’s (Hegelian) Legacy**
1 Introduction ..................................................................................................... 14
2 From principles to dignity .............................................................................. 15
   2a Dworkin’s maturing thought: principles and integrity ......................... 16
   2b Law as integrity ....................................................................................... 21
   2c “Middle-late” Dworkin: moving toward dignity .................................... 28
   2d Dignity as the ground ............................................................................. 36
   2e Preliminary conclusions ......................................................................... 39
3 Critiques (and a defense) of Dworkin: merit and separability ................. 40
   3a Hart’s (posthumous) inclusivism and its defenders ......................... 41
   3b Raz’s exclusivist challenge .................................................................. 53
   3c A cautionary conclusion with critical legal theory ............................ 56
4 Reframing legal community as Sittlichkeit ............................................... 58
5 Conclusion .................................................................................................... 65

**Chapter II: Rethinking Dignity with Dworkin and Hegel**
1 Introduction ..................................................................................................... 66
2 Dworkin and Kant on dignity ...................................................................... 68
   2a Revising Kant’s account ....................................................................... 68
   2b Dworkin’s Kantian dignity? .................................................................. 71
3 Hegel: subject and Sittlichkeit .................................................................... 75
   3a Negativity and the Hegelian will ......................................................... 76
   3b Integrating subjectivity and freedom through the will ...................... 83
   3c Hegel’s intersubjective moral community ......................................... 87
4 Dworkin’s (Hegelian) dignity as the intersubjective recognition of negativity 95
5 Conclusion .................................................................................................... 103

**Chapter III: Two Challenges to Dignity: The Impossibility of Community or Recognition?**
1 Introduction ..................................................................................................... 106
2 Nancy’s critique of community: neither artefact nor project ................. 109
3 Fanon’s critique of (colonial) ontology: recognition unrealized ............. 118
4 Sharing sociogeny and “being singular plural” toward recognition? .... 126
   4a Nancy’s social ontology of “being singular plural” ......................... 127
   4b Fanonian sociogeny: collective meaning and affective praxis .......... 137
   4c Sharing sociality as creating community: a revised social ontology . 144
5 Conclusion .................................................................................................... 146

**Chapter IV: A New Skin for Recognition: Fanon’s Affective Sociogeny and Ricœur’s Carnal Hermeneutics**
1 Introduction ..................................................................................................... 148
# Table of Contents

## Chapter V: Dignity in the Flesh: A Ricœurian Legal Hermeneutic
1. Introduction ........................................................................................................ 178
2. Dworkin’s “moral reading” of the American constitution ....................................... 180
   2a. How to read law through norms ....................................................................... 181
   2b. Later constitutional theory: the moral reading .................................................. 188
   2c. Final constitutional comments—and a critical reorientation ............................... 193
3. Constitutional interpretation in terms of embodied dignity ........................................ 197
4. Ricœur’s carnal legal hermeneutics ........................................................................... 203
   4a. Explanation and understanding in service of interpretation ............................... 203
   4b. The body as engaged legal text ......................................................................... 212
5. Conclusion ............................................................................................................. 220

## Chapter VI: Interpretivism through Embodiment: Shelby County v. Holder
1. Introduction ............................................................................................................. 222
2. Shelby County v. Holder dissected ........................................................................... 225
   2a. Background and facts ......................................................................................... 226
   2b. The majority opinion ......................................................................................... 232
   2c. The dissenting opinion ..................................................................................... 236
3. The critique from embodiment: doing justice to (and with) dignity ......................... 239
   3a. Which principles (of dignity) at play? .................................................................. 242
   3b. The amici curiae: voices of the indignified ......................................................... 246
   3c. Critical legal phenomenology on the Court ......................................................... 253
4. Shelby County reconsidered: protecting the actual capacity to vote ....................... 261
5. Conclusion ............................................................................................................. 266

## Conclusion: Enacting Corporeal Justice .................................................................. 268

## References ............................................................................................................ 272
Introduction:

For Corporeal Justice

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

—Oliver Wendell Holmes, Jr., *The Common Law* (1881)

This dissertation is concerned with justice. Originally synonymous with appropriating what is due or owed, justice is most often seen as synonymous with legal systems, whether or not the systems in question are actually concerned with, let alone yield, just results. In Anglo-American common law systems, judicial interpretation is the practice through which a legal community’s notion of legal justice is applied as well as altered outside of the legislature. This practice raises fraught questions about the sources of normativity upon which judges may draw when deciding legal disputes. The majority of Anglo-American legal scholars adhere to “legal positivism,” which—in the words of its modern progenitor H.L.A. Hart—rejects the idea that law either “must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it” (1994: 185). Hart instead describes the structure of the idea of justice as “a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different” (*id.* 156). Although he never claimed there was no necessary connection between law and morality, Hart was never clear on the conceptual link
between legality, morality, and justice (Gardner 2010: 261–65). In a different register, Jacques Derrida describes the difference between law and justice as follows:

[Law is] the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule. (1992: 16)

Because justice is incalculable, Derrida claims the act of justice always concerns “singularity, individuals, irreplaceable groups and lives, the other, or myself as other, in a unique situation” (id. 17). What Derrida seems to be claiming is that, while it is just that generally applicable laws coordinate behavior and distribute resources, justice demands taking account of specificity. By his lights if not in his language, law is merely a necessary but ultimately insufficient institutional condition of justice—and certainly not its ultimate guarantor. Still, if Derrida is correct that (moral) justice always exceeds the parameters of legal justice, then discerning the relationship between the two seems to lie within the aporias of experience.

Following this insight, this dissertation seeks to challenge the positivist separation of fact and value by focusing on the body of the legal claimant as a site that is inscribed, shaped, and delimited by sociality and legality. In what follows, I argue for a theory of legal interpretation that elevates the lived experiences of its subjects to the same esteem as traditional legal sources such as case law and constitutions. Doing so, I maintain, would render the law more just, by reducing the gap between procedural (legal) justice and substantive (moral) justice. Because the space between legality and justice (as morality) is mediated by that of subjective experience, only an embodied legal subject can force legal decision makers to recognize the material conditions that constitute or hamper its capabilities and capacities. Such a subject, I argue, makes human dignity into a concrete value that can be evaluated through the capability of embodied subject(s) to enact and perform their legally protected rights and privileges. In this sense, I argue
that an embodied phenomenology can reorient legal interpretation toward a more substantive notion of justice—a “corporeal justice” that takes the lived experiences of legal claimants as crucial to any just result.

**Framing the problem**

In contemporary Anglo-American legal philosophy, the predominant school of jurisprudence is Hart’s legal positivism. This theory insists that law is grounded solely in “social fact,” i.e., that the law is neither necessarily grounded in, nor has need for recourse to, moral norms (which, for legal positivists, are not the same as social facts). While proponents of this theory allow judges and other authorized legal officials to utilize morality when interpreting laws or making legal decisions, they may only do so when licensed by a statute itself, or if the norm is already so accepted within the legal community as to be a social fact. As a result, most Anglo-American legal philosophers and practitioners maintain a separation between legality and (social) morality, cleaving the concept of justice between its legal aspects and its moral salience. Anatole France thus remains prescient in describing “the majestic equality of the law, which forbids rich and poor alike from sleeping under bridges, begging in the streets, and stealing loaves of bread” (1894: 118). The question then becomes, how does law avoid the formalist adjudication that positivism, at least on a conceptual level, seems to justify?

Against positivism, Ronald Dworkin insisted that legal decision-making possesses an irreducible moral character. He argued that any account of social fact which fails to take account of moral principles is fatally impoverished, and in reply, provided an “interpretivist” theory of adjudication that he called “law as integrity.” According to Dworkin, “integrity” is an adjudicative principle that “instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—
expressing a coherent conception of justice and fairness” (1986: 225). This theory claims that judges utilize “principles”—i.e., standards to be observed as “requirements of justice or fairness or some dimension of morality”—when deciding cases, particularly so called “hard cases,” where there is no straightforward legal answer to a problem (Dworkin 1978: 22). Such principles provide reasons that argue “in a general direction” but do not necessitate specific decisions (id. 26). Further, these principles establish continuity between past decisions and present cases at hand; in this sense, Dworkin claims that principles generate judicial decisions (id. 84). The law thus consists in the official decisions that actively “commit the community to the rights and duties that make up the law” (1986: 97).

In so doing, Dworkin argues that judges must exercise their best “political judgment” when deciding cases: they bring together legal rules and moral principles, based on their interpretation of a community’s political morality (id. 256). A judge’s decision becomes binding based on the strength of its “fit” with precedent and its “justification” of the rules within. For Dworkin, the law’s legitimacy derives from the legal institutions and actors of a community, wherein judges mediate between conflicting moral and political values. Hence, Dworkin maintains, the law is made from, and against the backdrop of, the normative conflict between different views on liberty and equality; security and plurality; religious tradition and secular community, amongst others. Legal justice resides in the norms within case law and local notions of morality and justice, constrained by integrity’s values of fit and justification. In this sense, Dworkin sees legal justice as one that is ultimately derivable from the moral understanding and norms of the relevant legal community, albeit housed within and mediated by its legal and political institutions.

Critics have attacked Dworkin for various theoretical failures, attacking the plausibility of his account, its explanatory power, its consistency, and its tenability (Stavrapolous 2017). Though
resolving these myriad debates is outside the scope of this dissertation, I maintain that the fundamental disagreements lie between how limited the law is or ought to be, based on whether “social fact” encompasses more than mere (re-)descriptions of the legal community in question, and hence whether a more normatively comprehensive account of interpretation is needed. On Dworkin’s account, this is simply too impoverished a view of social facts: there are moral and political principles and arguments at stake in every case, that inflect every reading of a society, such that fact and value are not as distinct as positivists claim.

This holistic account of value is given its broadest scope in Dworkin’s final monograph, *Justice for Hedgehogs*, wherein he argued that human dignity is the normative ground for his legal and political philosophy. Using a framework of liberal egalitarianism, Dworkin described “dignity” as consisting in two fundamental moral principles: “the equal objective importance of everyone’s life” (2011: 260) and the responsibility each person has for their own life (*id*. 261). To some degree, Dworkin’s concept of dignity replaced his earlier emphasis on “integrity,” although both concepts performed a similar function of integrating his normative thought as a whole—that is, as concepts that orient our evaluative practices, whether in law or the everyday question of “how to live well.” However, even with this concept of human dignity as the ground of his normative thought, Dworkin’s legal interpretivism still runs the risk of remaining within the realm of abstraction—that is, of reasoning without fully considering the effects of a legal decision on the people it will most directly impact, let alone the unequal socioeconomic and political positions of different people within the legal community. What is needed, then, is a revised interpretivism that not only centers but *embeds* the vulnerability of specific legal claimants by reference to their human dignity; in other words, a way for legal decision makers to
gesture toward the aporias of experience in pursuit of a justice beyond mere “legal” justice—or what I have called “corporeal justice.”

**Overview of the argument**

In this dissertation, I attempt to bridge the gap between moral justice and legal justice by expanding the scope of Dworkin’s legal interpretivism, using the tools of Hegelian social and political theory and post-Heideggerian hermeneutic phenomenology. More specifically, I argue that Dworkin’s interpretivism can be expanded by prioritizing the attestations of an *embodied* legal subject, one materially situated within and co-existent with the legal community. The entry-point for this intervention is through Dworkin’s notion of human dignity: as the basis of his normative theory, one can expand the scope of his interpretivism by re-articulating “dignity” to better capture the singularity of a subject’s embodied existence within and constituted by the legal community. I argue that recognizing this embodied singularity implicates the subject’s material, socio-cultural, and socioeconomic contexts, aspects that constitute the very subjectivity through which a legal claimant is recognized by a community’s social, political, and legal institutions, as well as hamper or enable a claimant’s capability to enjoy or exercise their rights. The institutional (mis)recognition of the singular embodied capabilities of the legal claimant, I will argue, is equivalent to the institutional (mis)recognition of that claimant’s dignity.

Such a re-articulation integrates the body of the legal subject into the body of the law itself. That is, the body, its material situatedness, and its possibilities for action all become—or more accurately, *are interpretable as*—a living text, and thus a key source for legal interpretation. This is *not* a reduction of the subject to their body: doing so would be the obverse of traditional legal thought’s reduction of the subject to a disembodied mind. Rather, the embodied legal subject is an artefact that is shaped by and through its material situated-ness within its particular context:
self is sited between body and socio-cultural environ. Simply put, the embodied legal subject is both a product and an achievement of larger social, cultural, political, and ideological processes and discourses within its legal community, as well as an active participant in the ongoing process of its own construction and self-articulation. In phenomenological terms, the “textuality” of the embodied legal subject can be understood as the expression of its body schema as experienced and expressed by the subject as legal claimant. Hence, by focusing legal analysis on the material textuality of the embodied subjects involved in legal decision-making, I argue that the link between morality, politics, and law is made more concrete, which renders law more capable of redressing wrongs. Doing so, I argue, correlates legal justice more closely with remedying injustice than contemporary jurisprudential accounts allow, because tracing the contours of the lived experience of mutually vulnerable, embodied legal subjectivities heightens the need for careful scrutiny of the material, morally salient aspects of their lives. Accordingly, the legal hermeneutic that must be used to adjudicate is one that takes this intersubjective, carnal condition as ground and limit of legal adjudication. To this extent, the body is not reduced to a text, but is recognized for its textuality alongside more traditional legal texts, allowing for a normatively broader—and I will argue, more just—legal interpretation.

The argument will proceed as follows: in Chapter I, I provide an overview of Dworkin’s mature thought through a close analysis of his later-career monographs. While certain themes persist throughout his œuvre, I focus on Dworkin’s mature work—from Law’s Empire to Justice for Hedgehogs—to trace how Dworkin gradually widens his normative analysis, from issues of general jurisprudence to issues in political philosophy, and then to issues of ethics and morality more generally. Key to Dworkin’s mature theory of law, “law as integrity,” is his insistence that the legal community is a source not simply of social fact, but of social norms as well. Since his
theory attempts to reframe legal decision-making as the resolution of normative conflict, I defend Dworkin’s legal interpretivism against critics by emphasizing its holistic, communally mediated account of normativity in adjudication, arguing that disputes involving non-legal norms are fundamentally interrelated with—and productive of—specifically legal norms. I conclude the chapter with Cornell and Friedman’s re-reading of Dworkin’s idea of the legal community as Hegelian Sittlichkeit. Although I largely agree with the authors’ re-grounding of Dworkin’s thought within Hegelian social ontology, I part ways with their acceptance of Dworkin’s claim that his understanding of human dignity is Kantian as well as their attempt to re-read his dignity as a kind of Kantian regulative ideal.

Doing so, however, does not seem to accord with the account of dignity Dworkin describes in Justice for Hedgehogs. So, in Chapter II, I maintain that if Dworkin seeks to provide a cohesive account of norms for any given (legal) community, from which moral norms already present within it can be drawn to justify legal decisions, then it makes more sense to frame Dworkin’s account of dignity in Hegelian—rather than Kantian—terms. Due to Hegel’s focus on sociality as subtermining ethical life and its norms, I will argue that Dworkin’s two principles of dignity are better framed in terms of Hegelian Sittlichkeit. I demonstrate that a Hegelian theory of dignity—understood as the legal-institutional recognition (Anerkennung) of the ethical subject’s power to exercise their distinctive, embodied will both through and against their material conditions and prevailing understandings of social norms—already subsists in Sittlichkeit and thus better supports Dworkin’s principles of dignity than the Kantian analogue propounded by Cornell and Friedman. Building from Robert Williams’ explication of Hegel’s ethics of recognition, the intersubjective relations of reciprocity that constitute Hegel’s ethical life also render the normative determinations of the community into actualized principles. Since
the intersubjective component actualizes social norms through the community’s institutions, I argue that a Hegelian dignity would better serve Dworkin’s aims. To make the case, I carefully examine how the Hegelian ethical subject emerges from a series of “negations” involving the will (Wille). The ethical subject’s capacity to deploy negativity as it mediates both abstract right and subjective morality in Sittlichkeit is a key aspect of Hegel’s normative thought, so I show how this subject necessarily comprehends other such subjects and its social context through recognition. I then argue that the intersubjective recognition of the will’s capacity to negate both captures Dworkin’s twin principles of dignity and better fits his theory of legal interpretation.

In these first chapters, I make the case that there is a shared ontological commitment in the legal and political thought of Dworkin and Hegel: that a single social—and thus political and legal—ontology must not only be presumed when adjudicating legal disputes, but actively referred to as site and source of legal norms. While legal positivists contend that only references to social facts or other non-moral sources can be used in adjudication, I maintain with Dworkin and Hegel that “sociality” is less a repository of practices to be described, than it is a politically defined space within which values and norms are constantly articulated, contested, and enacted by citizens. In this social ontology, any conception of the legal community and its norms—legal or otherwise—will necessarily be interpretations made by the legal decision-maker, and thus subject to scrutiny in the field of contestation. Such interpretations do not (and cannot) exist in void; as Hegel has shown, our intersubjectively constituted sociality both forms and informs our specific norms, customs, and practices, including the rights, duties, and powers that every subject within the legal community is taken to possess. Since legal authorities cite (presumptively) shared social and political values when rendering their decisions and articulating their reasons
for those decisions, the very notion of what is “held in common,” such that it would ground and justify any given legal judgment, is always contestable.

The danger in attempting to give normative weight to what is “held in common,” however, lies in its ability to justify exclusionary and domineering political practices; so, in Chapter III, I confront two conceptual challenges to key components of my account of embodied dignity. Specifically, I consider Jean-Luc Nancy’s critique of “community” as used within canonical European social and political philosophy, and Frantz Fanon’s critique of “ontology” as it was understood within the colonized society of French Martinique. Both critiques attack the notion of a “totalizing totality”—whether of being, in the case of colonial ontology, or of society, in the case of community—that claims to encompass and exhaust all possibilities of existence or sociality. From each of these critiques, I will draw important insights for the ontological sociality that undergirds the constructive theory of legal interpretation that I propose to center Dworkin’s dignity. I will argue that Nancy opens the possibility of thinking community not in terms of a pre-given communal “essence,” but as the fundamental ontological relations between subjects as singular, embodied beings living plurally, an account which I claim preserves a crucial element of dignity. By engaging with Nancy’s ontology of “being singular plural,” I hope to retain an idea of singularity that undergirds any talk of a “subject.” Similarly, I argue that Fanon opens the possibility of reading embodied sociality as a phenomenologically rich site of facts and values without it being reducible to either. Both of these critiques will force my account to propose an “ontological sociality” in which meaning-making only ever resides within the irreducibly social co-constitution of subjects, albeit one that can never totally determine them or capture every aspect of their singular being.
To begin fashioning the legal hermeneutic that would comprehend and seek to address these concerns, I continue my engagement with Fanon by bringing his notion of “sociogeny” into conversation with Paul Ricœur in Chapter IV. After making the case that Fanon’s sociogeny and Ricœur’s carnal hermeneutics share several attributes such that a productive reading of the two together can be made, I argue that Fanonian sociogeny can be understood as a logic explicating how new forms of social meaning are produced through intersubjective social relations. Since Fanon was vague about the operation of sociogeny—and said nothing about the concept outside a decolonial context—I argue that a Ricœurian hermeneutics of embodiment can advance the meaning-making that accompanies such action, through his understanding of narrative, imagination, and their respective relation to ideology and utopia. I propose that a creolizing reading of their accounts alongside each other pushes each to their phenomenological limits: hermeneutics is forced to confront the interpretive challenges involved in thematizing liberation “from below” the auspices of established normative systems, while sociogeny must engage utopian imaginaries to construct new “genres of the human” beyond its immediate context (Wynter 2003: 269). I conclude that the creolizing thought of Fanon and Ricoeur can theorize how new collective meanings—and new understandings of normativity—can be exercised both inside and outside social institutions; and further, that taking the decolonial “view from below” offers an important methodological perspective from which to theorize normativity in pursuit of fostering better relations of mutual recognition—especially for legal interpretation.

I make this case in Chapter V by arguing that an intersubjective, intercorporeal sociality both enacts and exceeds law by “grafting” Ricœur’s (creolizing) carnal hermeneutics to Dworkin’s (Hegelian) account of dignity. Because his interpretivism rests on a notion of human dignity by way of an integrative political morality, Dworkin’s jurisprudence affirms that normative sources
of legal authority reside within sociality—as norms that are articulated, enacted, performed, and contested by embodied subjects embedded within the political and legal community. Expanding this concept of dignity to account for intercorporeal intersubjectivity through Hegel’s theory of recognition opens the way to reading the embodied singularity of each legal subject as intimately intertwined with others as co-habitants and co-constituters of a shared social and political world bounded by the law. Crucially, this co-constitution means that the lived experiences of legal claimants—and particularly, the most marginalized (and thus most vulnerable) such subjects—provide key insights into what rights and privileges the law does (not) protect, and for which citizens. Following the carnal hermeneutics inspired by Ricœur, I argue that the textuality of law that allows for legal interpretation extends to the phenomenological experiences of legal subjects as concrete agents co-determined by those material communal relations. This co-constitutive aspect of legal subjectivity thus places greater responsibility on political and legal institutions to remedy direct threats or concrete harms to the dignity of legal subjects, as indexed to their embodied (in)capacities and as attested to by the subjects themselves.

In Chapter VI, I demonstrate the power of this carnal legal hermeneutic by critiquing the United States Supreme Court’s decision in Shelby County v. Holder (2013). I first present the jurisprudential history of the Voting Rights Act of 1965—the statute in controversy—and the relevant facts of the case itself—including the Act’s 2006 reauthorization by Congress—before analyzing the arguments made by the Court to arrive at its ruling. I then use the interpretivism based in embodied dignity I proposed in earlier chapters to critique of the majority’s holding as well as the dissenting opinion. I argue that neither opinion considers the effects of the Court’s ruling based on the attestations of the specific persons who will be directly affected by the Court’s decision; that is, that there is no evidence cited that either indicates the disregard for
racialized subjects’ dignity that will follow striking down §4(b) of the Act, or acknowledges the limitations of simply upholding the subsection as written due to other widespread structural impediments to fully recognizing that dignity. Both deficiencies, I argue further, could be avoided by reasoning from the position of the person(s) least capable of exercising those rights, as indicated in the amici curiae, “friends of the court,” briefs filed by third parties interested in the outcome of the proceedings. Crucially, these briefs carry forward attestations of the lived experiences of the specific, racialized persons that will most likely—and almost certainly—be detrimentally affected by a finding that the coverage formula is unconstitutional and thus provide crucial insights in the processes that shape the subjectivities of those affected.

I conclude this dissertation by sketching out in more detail the concept of “corporeal justice” toward which this proposed legal hermeneutic gestures—that is, a rigorous, demanding form of justice imbricated with embodiment that has been theorized to some degree by other political and legal scholars. In this vein, what this project offers are the beginnings of a novel theory of legal interpretivism that relies on lived experience of embodied citizens as a source of legal norms for a legal community alongside more conventional sources of these norms in case law and statutes. Since this interpretive theory features an account of dignity indexed to embodied capability, my hope is that it can aid in enacting—if not necessarily achieving—this corporeal justice, and that this approach can also contribute lay firmer theoretical groundwork for more normatively-robust accounts of legal justice, including a concrete, intersubjective account of “dignity” for American jurisprudence.
Chapter I

Dworkin’s (Hegelian) Legacy

The approach to jurisprudence that emphasizes principle cannot stop and simply show the links between legal and social practice, but must continue to examine and criticize social practice against independent standards of consistency and sense.

— Ronald Dworkin, Taking Rights Seriously (1978)

1 Introduction

This chapter consists of three parts. In the following section, I provide a critical overview of Dworkin’s mature thought, through a close analysis of his later-career monographs. While certain themes persist throughout his œuvre, I focus on Dworkin’s mature work—Law’s Empire and after—because these works trace how Dworkin gradually widens his normative analysis, first from issues of general jurisprudence to issues in political philosophy, and then to issues of ethics and morality more generally. Key to Dworkin’s theory of law, “law as integrity,” is his insistence that the legal community is a source not only of social fact, but of social norms as well. Following Dworkin’s broad understanding of normativity, I will use the term “social norms” to describe the principles and reasons that guide and direct actions, that are inclusive of—but are not necessarily limited to—those associated with morality, which are practiced within a specific community. In the second section, I will defend Dworkin’s theory of legal interpretation—also called “legal interpretivism”—against its positivist critics by emphasizing its textually-grounded, communally-mediated account of normativity in adjudication. This holistic notion of jurisprudence attempts to reframe legal adjudication as an institutional resolution of normative conflicts since, following Dworkin, these disputes always involve broader non-legal norms that are fundamentally interrelated with—and productive of—specifically legal norms.
After making this defense of Dworkin, I turn to Cornell and Friedman’s rereading of his theory within Hegelian social and political theory. Using G.W.F. Hegel’s *Elements of the Philosophy of Right*, they argue that Dworkin’s idea of legal community is tied together by a single rule of law (*Recht*, for Hegel) while also possessing a distinct, concrete political morality (*Sittlichkeit*) that is instantiated in its social and civic institutions. With this understanding of a legal community, Cornell and Friedman argue that tensions within Dworkin’s theory are better resolved under this Hegelian framework. The authors convincingly argue that Hegel’s non-contractarian view of community, that also recognizes it as a moral whole, allows concepts like “integrity” to be attributed to the legal community. Importantly, Hegel’s notion of *Sittlichkeit* is necessarily real, in the sense that it shares in the concreteness of the legal community. The concrete reality of the legal community—and its norms—implicates not simply the positivist notion of social facts for adjudicating legal disputes, but the very material existence of the community’s constituents. Though I largely agree with their rereading of Dworkin’s legal community as Hegel’s concept of *Sittlichkeit*, I diverge from Cornell and Friedman’s acceptance of the Kantian account of dignity that Dworkin utilizes. In the next chapter, I will reframe Dworkin’s account of dignity under Hegel’s social and political framework, based both on Cornell and Friedman’s re-reading of his legal community and Dworkin’s own intersubjective understanding of dignity.

2 From principles to dignity

In this section, I will recount how Dworkin’s work moves from advocating for the centrality of principles in legal decision-making, toward an investigation into the normative fundament of these principles. While his earlier work will be briefly recounted, my analysis will focus on the development of Dworkin’s theory of “law as integrity” from *Law’s Empire* (1986) through
Justice for Hedgehogs (2011). In tracing this development, I will emphasize that the essential insight animating Dworkin’s project is his insistence that legal positivism is inadequate to the task it sets for itself: that a full consideration of the “social practice” or “social fact” prioritized by legal positivists must necessarily include consideration of the moral and political norms within a legal community. From this critical position, Dworkin utilizes “integrity” as an adjudicative principle that “instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness” (1986: 225). Hence, Dworkin seeks to overcome what he argues is a too-narrow vision of law propagated by legal positivists, in order to arrive at what he claims is a more complete understanding of law within (Anglo-American) society.¹

2a Dworkin’s maturing thought: principles and integrity

Since almost the beginning of his published academic career, Dworkin has maintained that jurisprudential issues are “at their core issues of moral principle, not legal fact or strategy” (1978: 7). When Dworkin first challenged Hart’s positivism, he utilized “principles,” i.e., standards to be observed as “requirements of justice or fairness or some dimension of morality” (Dworkin 1978: 22). Against Hart’s emphasis on legal rules, Dworkin argued that “principles” provide reasons that argue “in a general direction” but do not necessitate particular decisions (id. 26). A key feature of principles is their “weight or importance,” which judges must ask about when one principle intersects with others, based on the circumstances in the case at hand (id. 26–27). Unlike with rules, a conflict of principles does not render any one principle invalid; rather, one principle may simply be dismissed in the case in question while still remaining available for

¹ Although he can often make broadly prescriptive statements about the nature of law, Dworkin explicitly claimed that he was only writing from within the Anglo-American legal context.
deciding future cases. The example that Dworkin gives is *Riggs v. Palmer*, a case in which the New York Court of Appeals held that, although a murder victim properly conveyed his property to an heir through a validly executed will, “general, fundamental maxims of contract law” prevented the heir—who, in this case, was also the murderer—from profiting from his crime (*id.* 23; *cit.* 115 N.Y. 506 (1889)). Importantly, Dworkin argues that taking such tacit principles to be “law” alongside explicit statutory rules “means that the law of a community is only distinguished from its other social standards because the community’s legal officials have made decisions that actively commit the community to those principles (*id.* 44). He rejects the positivist distinction between legal and non-legal principles using a “master rule” that gives separation criteria, such as Hart’s “rule of recognition” (1994: 106–16).² Dworkin therefore holds that legal obligation can be imposed by established legal rules and legal principles derived from broader normative principles that are held by and within the legal community (*id.*).

This scheme of principles forms the core of Dworkin’s early theory of adjudication. For Dworkin, a general moral or political principle is considered “a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question” (1978: 66). For a decision to be legally binding, he argues, judges use such principles to justify settled legal rules “by identifying the political or moral concerns and traditions” that support them (*id.* 67). Over time, Dworkin refined his theory, arguing that principles justify a legal decision “by showing that the decision respects or secures some individual or group right” (*id.* 82). Since rights and duties reside within past decisions, ²Hart’s particular use of “recognition” is distinct from Hegel’s concept of *Anerkennung*, which is translated into English as “recognition.” For Hart, recognition is not an intersubjective process whereby a self-consciousness comes to understand another consciousness as a similarly rational agent but instead refers to the process by which a social custom becomes enforceable through a state’s legal system (1994: 44–49). The rule of recognition itself is what Hart calls the second-order rule within a legal system that determines whether a rule is legally enforceable and therefore “valid” (*id.* 94–123). Dworkin’s criticisms of this concept will be addressed later in this chapter; Hegel’s *Anerkennung* will be discussed in more detail in the following chapter.
legal decision-making for Dworkin is a constructivist enterprise that utilizes principles to extend or limit them. Legal principles establish continuity between the legal rights recognized in past decisions and those at issue in present cases at hand; and as such, Dworkin argues that principles generate judicial decisions (id. 84). He proposes the “rights thesis,” the claim that judges enforce existing political rights as embedded in the institutional history of a legal system; crucially, then, rights are “creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions” (id. 87). What follows is that legal officials, and especially judges, bear a political responsibility to only make political decisions that can be justified by a political theory that justifies other political decisions that they make in terms of consistently applied principles. Hence, for Dworkin, legal decisions are always political decisions made considering certain sets of principles (id. 88).

From this understanding of legal decision makers’ political responsibility, Dworkin denies that judges have discretion in the way that legal positivists claim, i.e., that when some lawsuit cannot be decided under a clear rule of law laid down in advance by some institution, the judge may create new legal rights under the fiction that one of the parties possessed these rights in advance (id. 81). Dworkin instead argues that in these “hard cases,” judges make decisions about the “rights of the parties,” so their reason for making a judgment “must be the sort of reason that justifies recognizing or denying a right” (id. 104). He also claims that the judge must bring to their decision “a general theory of why, in the case of his institution, the rules create or destroy any rights at all, and he must show what decision that general theory requires in the hard case” (id.). Dworkin further claims that judges must at some point decide hard cases by constructing some theory of the constitution (id. 105). He argues that these constitutional theories are subject to two criteria: that they must “fit” with the constitution’s rules and precedents, and that they be
informed by a political theory that best justifies the shape of that structure (id. 106–7). Whether the judge must decide cases that are constitutional or statutory in content, or even derived from the precedents set in the common law, Dworkin holds that the language and canonical terms used in these documents limit the ability of judges to wildly deviate in their reasoning. Hard cases are therefore less of a problem for Dworkin’s account than they are its moments of clarity: they are novel controversies through which tacitly or putatively agreed-upon principles that undergird an area of law could be articulated, argued over, and provisionally—if not ultimately—decided, given the social and political grounding of the specific legal community.

As he continued to develop his theory, Dworkin became more explicit that the ground of legal decisions is political rather than “purely” legal in some special or distinct sense (1985: Ch. 1).3 He argues that “[t]he more frankly political the subject matter of a case […] then the more the explicitly political character of the statute or precedent in question will constrain the judge’s own political morality” (1985: 30). Dworkin maintains that the social and political underpinnings of the legal community provide tools that judges ought to use in hard cases, implying that these norms are always at play in legal decision-making, even in “easy cases” where statutes or laws are directly on point. Such a position puts Dworkin at odds not only with legal positivists who look to patterns of social practices to distinguish distinctively legal norms from non-legal norms, but also with prominent practicing lawyers and judges. Crossing swords with “intentionalist” theories of constitutional interpretation—such as “originalists” who claim to honor the “original intent” of the Framers of the Constitution of the United States, or “textualists” who claim to be guided only by the written text of legislation—Dworkin disputes that these intentions determine

3 Dworkin, however, strenuously denied that legal decisions should be made on the basis of political policy; instead, he argued that grounding legal decisions on political principle should be encouraged and more widely discussed (1985: 11).
how constitutions, statutes, or precedent ought to be interpreted and adjudicated. He argues instead that any recognizable theory of judicial review “aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole” (id. 35). Moreover, Dworkin argues that intentionalists ultimately undermine their own arguments that their readings are “noninterpretive,” since there is nothing within the “four corners” of the relevant documents themselves that call for such a reading (id. 36). Instead, the reasons that these intentionalists give “must be taken from or defended as principles of political morality which in some way represent the upshot or point of constitutional practice more broadly conceived” (id.). Amidst his criticism of intentionalist theories of legal interpretation, Dworkin stakes out the necessity of political morality for legality to operate in stark terms:

Begin at the beginning. A group of people met in Philadelphia and there wrote a document, which was accepted by the people in accordance with the procedures stipulated in the document itself, and has continued to be accepted by them in the way and to the extent that it has. If this makes that document law, it can only be because we accept principles of political morality having that consequence. But these principles might not only establish the Constitution as law but limit it as well. We cannot tell whether these principles do have this consequence, of course, until we decide what these principles are. Any answer to that question must take the form of a political theory showing why the Constitution should be treated as law, and certain plausible political theories at least raise the question whether the document must be limited in some way. (id.)

For Dworkin, the U.S. Constitution simply cannot be interpreted in a void or as a discrete document: it must be (re-)embedded in some political theory that imposes some limits on what the government can or cannot do. Essentially, he maintains that judges cannot “discover” the

---

4 An argument often made in support of textualist or originalist reading strategies is that authorial intent is sufficiently settled by the language of the text, such that the meaning of a particular provision in the text is bound by the text itself—hence, the “original intent” can (and must) be found in the text (see, e.g., Scalia and Gutmann 1997). For Dworkin, however, this evinces a confusion between what authors intended to say in promulgating the language, and what they intended (or expected or hoped) would be the consequence of their saying it (1997: 116).
Framers’ intention(s) “without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid” (id. 56). Hence, he holds out the legal system as “an institution that calls some issues from the battleground of power politics to the forum of principle [and] holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice” (id. 71). Since for Dworkin moral principles ground, justify, and guide law—whether they are embedded in the Constitution or ascertained by interpreters through precedent—they remain integral to Dworkin’s theory of legal interpretation, although he moves away from that specific framing of non-legal normativity’s role in legal reasoning.\(^5\)

2b Law as integrity

The publication of *Law’s Empire* in 1986 marked Dworkin’s mature view of the nature of law and legal interpretation, wherein he moves away from the “rules vs. principles” language of his earlier work (but without repudiating it) to articulate the role of “integrity” in legislation and adjudication. Dworkin now holds that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice” (1986: 225). He argues that the law contains “the rights and duties that flow from past collective decisions and therefore license or require coercion” and the “scheme of principles needed to justify them” (id. 227). An unflagging liberal, Dworkin proposes that “the most abstract and fundamental point of legal practice” is to “guide and constrain the power of government” and insists that state force neither be used nor withheld “except as licensed or required by individual rights and responsibilities flowing from

\(^5\) Interestingly, Dworkin seems to have first begun thinking about the role of integrity in legal interpretation in terms of coherence while considering his relationship to the natural law tradition (1982) alongside his examination of the relationship between law and literature (1985: Ch. 6, originally published in 1982).
past political decisions about when collective force is justified” (id. 93). For him, rights and responsibilities are “legal” in that they license government coercion because they “flow from past decisions of the right sort” (id.). He therefore proposes his model of “law as integrity,” which accepts the link between law and coercion just sketched but also supposes that these constraints benefit society “by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does” (id. 95–96). Rights and responsibilities “flow from,” are consistent with, past political decisions when they “follow from the principles of personal and political morality” that decisions presuppose by way of justification (id. 96).

A key component of Dworkin’s mature theory is the role of political morality in ascertaining what “integrity” means for a legal community. Dworkin describes political morality as consisting of arguments about “how far and in what way past political decisions provide necessary condition for the use of public coercion” (id.). Law, he continues, consists in the decisions its officials make that actively “commit the community to the rights and duties that make up the law” (id. 97). In doing so, he claims that judges rely on their “political judgment” when deciding cases: they bring together legal rules and moral principles, based on their interpretation of the legal community’s political morality (id. 256). For Dworkin, political morality is distinct from both the popular morality of a community—that is, the set of opinions about justice and other political and personal virtues that are held as matters of personal conviction by most members of that community—as well as from the “moral traditions” that emerge from its popular morality over some sizable historical period (id. 97). Against these “passive” conceptions of normativity held by a community, Dworkin argues that a community is actively committed to law through the decisions that its officials make, because these judgments “commit the community to the rights
and duties that make up law” (*id.*). Individual conceptions of law held by individual legal decision makers will provide different answers to the question of whether the rights and duties that follow from past political decisions depend on popular morality or the content of those decisions in some way—or even not at all. Hence, Dworkin understands “political morality” to be intimately related to—although not identical with—both the reasons that permit government coercion, as well as the moral traditions and matters of personal conviction held by individual members of a legal community.

Undergirding the relationship between political morality and “law as integrity” is Dworkin’s understanding of community and its associative obligations. Dworkin argues that “ordinary politics” and “utopian political theory” share the ideals of “a fair political structure, a just distribution of resources and opportunities, and an equitable process of enforcing the rules and regulations that establish these”—what he abbreviates as “the virtues of fairness, justice, and procedural due process” (*id.* 164). However, he detects in ordinary politics another virtue: a requirement that government speaks with one voice, “to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some” (*id.* 165). This virtue is “political integrity,” the demand that a state “act on a single, coherent set of principles even when its citizens are divided about what the right principles and justice and fairness really are” (*id.* 166). His distinguishes two practical principles of integrity: “integrity in legislation,” which asks those who create law by legislation to keep that law coherent in principle; and “integrity in adjudication,” which tasks legal decision makers with the responsibility to see the law—and enforce it—as coherent in that way (*id.* 167). Drawing a parallel between personal morality and political integrity, Dworkin assumes a particularly deep personification of the state or legal community: namely, that it can be committed to principles of
fairness or justice or procedural due process in the same way that a specific person can be committed to convictions or ideals or projects (id.).

In defending this personification of the legal community, Dworkin denies he is supposing a (seemingly Hegelian) metaphysics of a “spooky, all-embracing mind that is more real than flesh-and-blood people”; instead, he maintains that “the community has its own principles it can itself honor or dishonor, that it can act in good or bad faith, with integrity or hypocritically, just as people can” (id. 168). More specifically, Dworkin endorses the claim that the responsibilities of officials and citizens “cannot be reproduced by a reductive translation into claims about officials and citizens one by one,” because doing so ignores the corporate identity—and thus, moral agency—that is attributed to a community when its officials and citizens make normative claims about the character or content of the community (id. 168–69). Personification, in other words, presumes a responsibility of the community to its members and allows principles “that draw their sense from a practice or way of thinking to which the personification is indispensable” to figure into collective decision-making about the grounds and limits of that responsibility—but without claiming that the community has a metaphysical existence independent of its members (id. 169–71). Dworkin calls his ideal of political integrity a “working personification,” because it assumes that “the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals” (id. 172). As part of his evidence for this claim, Dworkin points to the responsibilities of impartiality with which legal officials are charged when acting in their official capacity: that is, to treat all members of the community as equals and to abnegate the individual’s normal latitude for self-preference (id. 173–74). In so doing, legal officials adopt the personae of the community personified, serving as
agents of the community *qua* moral agent, such that officials are charged with making political and legal decisions that cohere and are consistent with the principles held by their community.

This description of political integrity invites the question of which principles are sufficiently “held by the community” such that one can determine whether a proposed principle offered in a dispute is consistent or coherent (or neither) with the community’s political morality. In disputes over matters of principle, Dworkin notes a tension between our notion of political fairness—that each person or group in a community should have a roughly equal share of control over the decisions made by the legislature—and our notions of justice—that some people are or are not entitled to some resource, liberty, or opportunity based on political decisions (*id.* 178–80). Such a tension, he claims, indicates that integrity is a part of our collective political morality, since integrity “holds within” political communities rather than among them (*id.* 183–85). Within the American constitutional context, this means that each state possesses integrity due to its own sovereignty, by which it promulgates its own laws, through which it speaks with one voice (*id.* 185–86). But the federal structure provided by the American constitution possesses its own integrity that governs interstate relations as well as the division of power between states and national government (*id.* 186). Integrity is therefore congruent with sovereignty on Dworkin’s account, even if not identical. Still, Dworkin maintains that integrity is a special political virtue not because a state or community is a distinct entity, but because of “the social and intellectual practices” that treat it as a distinct moral agent (*id.* 187–88). He then claims that a political society that accepts integrity as a political virtue “promotes its moral authority to assume and deploy a monopoly of coercive force” (*id.* 188). This invocation of a state’s moral authority as related to its adherence (or lack thereof) to the virtue of integrity directly implicates the role of individual citizens in developing the public standards of their community; integrity thus “fuses
citizens’ moral and political lives” (id. 189). So, for Dworkin, a state that accepts integrity as a political ideal presents a better case for its legitimacy because it places the obligations and responsibilities that one has as a member of the community up for contestation (id. 190–92).

In keeping with his emphasis on the role of the legitimacy of a community’s laws, Dworkin refines his concept of community by rendering it in terms of “associative obligations” (id. 196). He defines these obligations as “the social responsibilities social practice attaches to membership in some biological or social group” (id.). These responsibilities emerge, he argues, not simply through the history of social practices or the explicit extension of conventions, but through shared activities and events that generate obligations (id. 196–97). However, Dworkin maintains that establishing necessary and sufficient conditions for such obligations—such as being a friend or a colleague—would render the relationship perverse; hence, he argues that such obligations are essentially interpretive. The examples Dworkin gives are of being self-conscious of the obligations of a friendship when some situation requires a person to honor those obligations lest they betray their friend, or of becoming another’s colleague even if that person votes against your appointment. Hence, he argues that we have “a duty to honor our responsibilities under social practices that define groups and attach special responsibilities to membership, but this natural duty only holds when certain other conditions are met or sustained” (id. 198). A prominent condition for these kinds of obligations is reciprocity: Dworkin claims that associative obligations “can be sustained among people who share a general and diffuse sense of members’ special rights and responsibilities from or toward one another, a sense of what sort of sacrifice one may be expected to make for another” (id. 199). From this account of associative obligation, Dworkin fashions an account of political community that is built from obligations that derive neither from accidents of geography or history nor from a shared commitment to a distinctive set
of rules (id. 209–10). Instead, he endorses the “model of principle” wherein a community’s members understand that they are governed by common principles, such that politics is a debate over which principles the community should systematically adopt, and which view it should take on justice, fairness, and due process (id. 211). Members of such a community would also accept that their political rights and duties are not exhausted by the decisions their political institutions have reached but depend more generally on the scheme of principles that those decisions endorse (id.). Importantly, although he concedes that it is not “automatically” a just community, Dworkin argues that the model of principle makes the responsibilities of citizenship “fully personal” to each citizen, and therefore each accepts integrity as a political virtue (id. 213–14). And crucially for Dworkin’s theory of legal interpretation, integrity ties the legitimacy of a community’s legal decisions to the political legitimacy of the community, grounded on the associative obligations that its members (understand themselves to) hold and feel towards each other. In this sense, the practice of legal adjudication is intimately tied with the notion of a political community as a collective going concern, as an ongoing normative enterprise.

To summarize, if for Dworkin the political morality of a community serves as the limits of its law and is grounded by its virtue of political integrity, then only the community’s interpretation of itself—through its members’ understanding of its received history, its present constitution, and its future projects—can be the site and source of its norms as well as its schemes of normative justification, including its legal system. Importantly, community is cast not as a simple reservoir of timeless truths or eternal values, but as a dynamic, ongoing project of argumentation and justification in pursuit of the best way to live together consistent with the community’s moral and political—and thus, legal—values. Dworkin recognizes this continuity of coherence through his claim that present decisions become binding law based on the strength of their “fit” with past
legal precedent. He uses the example of the “chain novel” to describe how this notion works: when handed a novel in progress composed by previous authors, the present author is constrained by the chapters that have already been written. Likewise, past precedent exerts its weight upon present legal decisions. This notion of fit entails the other criterion of political morality, now called “justification”: the decision must justify the rules contained within legal precedent. For Dworkin, the law’s legitimacy derives from that of a community’s legal institutions. As the result of judges’ mediations of conflicting moral and political values, the law is made from, and against the backdrop of, such normative conflict (so principled critique of law remains warranted). For Dworkin, legal justice resides in the norms within case law, articulated through principled judicial readings of local notions of morality and justice more broadly, while constrained by integrity’s twin values of fit and justification. Crucially, he attempts to resolve problems of jurisprudence by reframing law as a complex interpretive enterprise between precedent, politics, and morality, which he will continue to develop in terms of a notion of integrity that eventually gives way to his distinctive account of dignity.

2c “Middle-late” Dworkin: moving toward dignity

In this subsection, I will examine how Dworkin develops his account of law as integrity further in what I will call his “middle-late” period, covering the texts Freedom’s Law, Sovereign Virtue, and Justice in Robes. These works showcase Dworkin’s shift from the centrality of integrity to adjudication, to that of dignity in his normative thought more broadly. This shift is accomplished in his multi-volume explication of his theory of “political morality,” which played such an important role in his theory of legal decision-making as the link between legality and

---

6 Admittedly, Dworkin first explores the concept of dignity in Life’s Dominion (1993), in the context of contributing an argument to then-current American debates concerning abortion and euthanasia, but the concept had not yet assumed the central place in his normative thought. Still, the arguments made in that text will be analysed in Chapter V, while articulating Dworkin’s hermeneutic strategy alongside the carnal hermeneutics of Paul Ricoeur.
sociality. This development in his normative thought can be read as Dworkin making the case for his larger normative framework in *Justice for Hedgehogs*.

*Freedom’s Law* presents Dworkin’s deepest foray into questions of American constitutional law using his theory of adjudication, which he now calls “the moral reading” of the United States Constitution (1996a: 2). *Contra* Hart’s restriction of the rule of recognition to legal officials, Dworkin proposes that “we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke principles about political decency and justice” (*id.*). For example, he claims that the First Amendment to the U.S. Constitution “recognizes a moral principle—that it is wrong for government to censor or control what individual citizens say or publish—and incorporates it into American law”; from this principle, people who form opinions on novel cases or controversies “must decide how an abstract moral principle is best understood […] whether the true ground for of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law,” extends to the case or controversy in question (*id.*). Following his general theory in *Law’s Empire*, Dworkin confirms that this reading brings political morality into the heart of constitutional law, although he admits that this form of morality is “inherently uncertain and controversial, so any system of government that makes its principles part of its law must decide whose interpretation and understanding will be authoritative” (*id.*). He contends further that “so far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all,” they already make use of the moral reading (*id.*). It is in this sense that Dworkin claims that the moral reading is not “revolutionary in practice,” because he maintains that lawyers and judges instinctively do so “in their day-to-day work” (*id.* 3). The evidence that Dworkin cites for this position are Supreme Court judges whose rulings defy the political expectations of their presidential
appointors, because “politicians fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice” (id. 5). More will be said about this collection of essays in Chapter V, wherein I bring Dworkin’s interpretive thought into dialogue with Paul Ricoeur’s hermeneutics.

In Sovereign Virtue, Dworkin stakes out his understanding of political equality, illustrated in both theoretical writing and in his analysis of court decisions. For Dworkin,

No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community—without it government is only tyranny—and when a nation's wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect. For the distribution of wealth is the product of a legal order: a citizen's wealth massively depends on which laws his community has enacted—not only its laws governing ownership, theft, contract, and tort, but its welfare law, tax law, labor law, civil rights law, environmental regulation law, and laws of practically everything else. (2000: 1)

When government action worsens the lives of some of its citizens, there is a communal obligation to explain precisely how they have been given the equal concern that is their right (id. 1–2). Whether that explanation can be made depends on what “genuine equal concern” requires; given that the meaning of this concept is constantly contested, Dworkin seems to accept that debates and controversies over our fundamental political virtue is also a contestation over the very conditions of political legitimacy, of “the majority’s right to enforce its laws against those who think them unwise or even unjust” (id. 2). For his part, Dworkin advocates a form of material equality that he calls “equality of resources,” which argues that a distributional scheme treats people as equals “when it distributes or transfers so that no further transfer would leave their shares of the total resources more equal” (id. 12).

As he lays out his arguments for this form of distributive justice, Dworkin claims that a particular form of liberty emerges from this egalitarian scheme: that “if we accept equality of
resources as the best conception of distributional equality, liberty becomes an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it” (*id.* 121). In making this argument, Dworkin claims that the sort of liberty we tend to value is valuable not for its own sake, in some absolutist sense, but because we think that “lives led under circumstances of liberty are better lives just for that reason” (*id.*). Equality of resources, he claims, is sensitive to the special character and importance of liberty because it makes equal distribution depend on “a process of coordinated decisions in which people who take responsibility for their own ambitions and projects, and who accept, as part of that responsibility, that they belong to a community of equal concerns, are able to identify the true costs of their own plans to other people, and so design and redesign these plans so as to use only their fair share of resources in principle available to all” (*id.* 122). To make the distribution process adequate to its task requires an adequate process of discussion and choice for that purpose, meaning that a “substantial” degree of liberty is necessary for the process to work (*id.*). In other words, Dworkin attempts to dissolve the seeming conflict between the two, in arguing that they mutually support each other: “Liberty is crucial to political justice because a community that does not protect the liberty of its members does not—cannot—treat them with equal concern on the best understanding of what that means” (*id.* 181). While Dworkin’s adequation of liberty and equality merits its own discussion, such an examination is outside the scope of this dissertation; instead, what matters for its purposes is that this text marks Dworkin’s gradual shift from questions of general jurisprudence to the broader contours of his normative philosophy. The “political morality” that Dworkin refers to in his earlier work is now specifically articulated and argued for in terms of equality, liberty, and community.
That is not to say that Dworkin completely abandoned questions of general jurisprudence. In his final monograph of this middle-late period, Justice in Robes, Dworkin returns to these debates in general jurisprudence. He explicates these views on legal judgment through considering the “nature of the doctrinal concept of law,” asking “whether moral considerations figure among the truth conditions of propositions of law, and, if so, how” (2006: 5). For Dworkin, the resolution to legal disputes depends on how legal practitioners develop what he calls a “general theory of law,” even if any given lawyer or judge will not have explicitly articulated such a theory (id. 9). The key question, then, asks “[w]hat assumptions and practices must people share to make it sensible to say that they share the doctrinal concept so that they can intelligibly agree and disagree about its application?” (id.). Dworkin charts these assumptions and practices out in three stages: the semantic, the jurisprudential, and the doctrinal. In the first stage, he characterizes the central concepts of political and personal morality as “interpretive concepts” (id. 11). In contrast to criterial and natural kind concepts, which share an underlying convergent practice, Dworkin claims that these interpretive concepts must converge in “actually treating the concept as interpretive” in practice, albeit not necessarily in application. That is, he maintains that a useful theory of an interpretive concept must itself be an interpretation; in this sense, the “doctrinal concept of law” functions as an interpretive concept (id. 12).

At the next stage, the jurisprudential stage, Dworkin states that a theorist must construct the kind of theory of law that is appropriate for the answer given at the semantic stage to the question of what kind of concept the doctrinal concept is (id.). Further, because he holds that doctrinal concepts are interpretive, Dworkin attempts to interpret the practices in which the concept figures as “a general account of the mix of values that best justifies the practice and that therefore should guide us in continuing the practice when at the next stage we frame truth
conditions for discrete propositions of law” (*id.* 12–13). For Dworkin, these values should be found in an “aspirational” concept of law to determine “which values supply the best conception of that concept—which other values, that is, best explain the rule of law as a political ideal” (*id.* 13). Hence, this is the crucial stage where morality first figures into legal reasoning, since Dworkin maintains that “any theory about how best to understand an explicitly political value like the aspirational value of law must be an exercise in political morality” (*id.*). For Dworkin, the ideal of political integrity must figure prominently in any account of the aspirational concept of the values of legality and the rule of law, since he ties the legitimacy of a state’s exercise of coercive power to governing with a coherent set of political principles whose benefit it extends to all citizens (*id.*).  

Once the theory of law’s value is laid out in the jurisprudential stage, the doctrinal stage is the one at which the truth conditions for propositions of law are laid out in light of the values identified. Here, the salience of the competing accounts of the overarching value of legal practice emerges, for it is from these normative schemata drawn up at the jurisprudential stage that doctrinal theories come about and impact how propositions of law are constructed. Whether the role of morality ought to play a part in legal decision-making in particular cases will depend on whether the aspirational concept of legality utilized by the decision-maker privileges, say, political integrity or the efficient coordination of interests. For example, a judge that privileges the efficient coordination of interests as the aspirational goal of law will likely accept a doctrinal theory that holds a particular proposition of law to be true if it renders the content of legal rule

---

7 Here, Dworkin concedes that others who agree with him at the semantic stage that the doctrinal concept of law is interpretive and that a general value of legal practice must be found in an aspirational concept of legality might argue for a different account of the values captured in that concept (2006: 13). One of these, the planning and coordination in the interest of personal and collective efficiency, is explored in contrast to Dworkin’s own conception.
uncontroversial, because it would promote the efficient coordination of those interests through law. In contrast, Dworkin argues that the doctrinal stage presents further space for interpretation of what the law is on that issue: that is, that propositions of law are true only if they flow from “principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice” (id. 14). In this regard, Dworkin keeps the interpretive, moral nature of resolving disputes alive through the various stages of his general theory of law. At this stage, he returns to his earlier interpretive concepts of fit and justification, with the latter now serving a more prominent role as including the former, as well as holding that it “describe some sufficiently important value” that legal practice serves, such as legal integrity or the efficient coordination of interests (id. 15). With justification now re-conceived as fit and value, Dworkin reiterates that these represent different aspects of the same judgment of political morality.

This more explicit inclusion of value within the rubric of justification provides greater content to the practice of legal interpretation. Given Dworkin’s commitment to the overarching value of political integrity as crucial for legitimizing a state’s coercive power, then integrity means legal interpreters must concern themselves with “why it is important that a political community extend to everyone the same regime of principle” (id. 16). For Dworkin, the proper explanation of this requirement “fixes on how the community actually uses its powers to intervene in citizens’ lives, not on reasons that different officials have given for such intervention in the past” (id.). On his account, legal interpretation therefore demands “principles that would justify the substantive claims about legal rights, duties, and the rest that a particular legal practice recognizes and enforces,” as well as “the great army of constitutional and procedural practices in which these substantive claims are embedded” (id.). For example, statutes that are passed by a
legislature must factor into the interpretation of the relevant law used to render a doctrinal judgment for a case; but at the level of judgment itself, Dworkin claims, political morality plays an important role in how that interpretation considers the constitutional role of the legislature—that is, the reasons we have “for supposing that a [legislative] body constituted as that body is constituted has the power to make law” (id.). Hence, even when the question is one of legislative interpretation rather than legislative power, “the political principles that are taken to justify legislation remain powerful because they justify interpretive strategies” (id. 17). In other words, for Dworkin, one cannot tug at even a single thread of the normative web of legal practices and principles without also pulling at the others that constitute the normative regime of the whole of the political community. Choices of interpretation depend on one’s understanding (or rejection) of the moral and political principles that justify the complex practice of legislation and the political morality that supports it (id.)

There is yet a further stage of legal analysis that Dworkin discusses, the adjudicative stage, which concerns the question of what political officials should actually decide or do in particular cases. For Dworkin, the adjudicative question is not settled at only one stage of the legal decision-making process, but rather depends on the various decisions made through the stages. Even at the semantic stage, the doctrinal concept of law remains for Dworkin an interpretive concept, one that functions as embedded in practices that suppose that some propositions of law have implications for the exercise of power; thus, our sense of its correct application is sensitive to our judgment about how such power should be exercised (id. 19). Different decisions made at the semantic stage will affect the adjudicative stage, as will decisions at the jurisprudential stage. For Dworkin, integrity requires that judges consult morality in some cases to decide both what
the law is as well as how they should honor their responsibilities as judges, so the integrity that he attributes to legal practice flows through these later stages (id. 20).

In his concluding remarks of this last collected response to questions of general jurisprudence, Dworkin returns to the question of the relationship between law and morality. In contrast to the traditional understanding that “morality” and “law” refer to “departments” of normative thought, he suggests that law is instead a department of morality, much like political theory (id. 34). For Dworkin, this suggestion would encourage us to see jurisprudential questions as “moral questions about when, how far, and for what reason authoritative, collective decisions and specialized conventions have the last word in our lives” (id. 35). In his final monograph, he attempts to provide the intellectual topography of his account of this cohesive normative vision, based on rereading his political-juridical concept of “integrity” as a more fundamental yet still communal value.

2d Dignity as the ground

Justice for Hedgehogs is perhaps Dworkin’s most ambitious work, wherein he lays out the very fundaments of his general normative framework. The book’s overarching argument is a defense of the “unity of value” thesis, which Dworkin understands as the claim that “Value is one big thing,” although he restricts himself to defending the idea that “ethical and moral values depend on one another” (2011: 1). For Dworkin, a government is legitimate if (but not only if) it shows 1) “equal concern for the fate of every person over whom it claims dominion”; and 2) it respects fully “the responsibility and right of each person to decide for himself how to make something valuable of his life” (id.). What this entails is a boundary around which systems of distributive justice are acceptable: because Dworkin maintains that there is no such thing as “politically neutral distribution,” every such distribution of resources “must be justified by
showing how what government has done respects these two fundamental principles of equal concern for fate and full respect for responsibility (id). Along with these principles of equality, Dworkin proposes a scheme of liberty—distinguishable from the simple “freedom” to act without government domination or constraint—that emerges from a right to ethical independence that flows from a principle of personal responsibility (id. 4). By designating “freedom” as solely negative liberty and his own notion of “liberty” as comprehending both its negative and positive aspects, Dworkin embeds liberty into a “more general political morality” which argues that a person “cannot determine what liberty requires without also deciding what distribution of property and opportunity shows equal concern for all” (id., 364–65; cf. Berlin 1969).

What more does this form of political morality advocated for by Dworkin require? Noting the seeming conflict between his unified account of equality and liberty and the right to participate in one’s own governance, he proposes a “partnership conception” of democracy (id. 5). In this conception, a genuinely democratic community requires that each member see one another as a partner engaged in the collective endeavor of governing, with an equal voice and an equal stake in the result (id.). This conception of democracy requires the protection of the very individual rights to justice and liberty that democracy is sometimes said to threaten; hence, Dworkin conceives of law as a branch of morality that protects procedural justice, “the morality of fair governance as well as just outcome” (id.). He thus understands law’s relation to morality as part of a tree structure: law is a branch of political morality, which is a branch of a more general personal morality, which is a branch of a general theory of living well (id.). Hence, as in his earlier work on legal interpretation, this account of political morality requires integrity of a

---

8 As Gallagher notes: “The individual’s autonomy, which is a relational autonomy, varies, positively or negatively, in relation to the individual’s positive or negative interactions, the valence of which will depend, in part, on the individual, in part on the others with whom she interacts, and in part on the structural features of the specific practices or institutions within which she interacts” (2020: 211).
different kind, as a necessary condition of truth; he claims, “We do not secure finally persuasive conceptions of our several political values unless our conceptions do mesh” (id. 5–6). For Dworkin, political morality is broader than a mere limiting principle for how judges can interpret the law; it is now also an ordering principle for self-governing in a way that is consistent with the political values of equality, liberty, and justice, with law serving as a forum for deciding how competing understandings of these values might articulate what it means for all to “live well.”

This overriding normative frame of “living well” is how Dworkin brings the political virtue of integrity to bear on his personal virtue of dignity, through his account of interpretive concepts. He claims that disagreement arises because we share at least some of our conceptual references:

We share them because we share social practices and experiences in which these concepts figure. We take the concepts to describe values, but we disagree, sometimes to a marked degree, about what these values are and how they should be expressed. We disagree because we interpret the practices we share rather differently: we hold somewhat different theories about which values best justify what we accept as central or paradigm features of that practice. That structure makes our conceptual disagreements about liberty, equality, and the rest genuine. Is also makes them value disagreements rather than disagreements of fact or disagreements about dictionary or standard meanings. That means that a defense of some particular conception of a political value like equality or liberty must draw on values beyond itself: it would be flaccidly circular to appeal to liberty to defend a conception of liberty. So political concepts must be integrated with one another. We cannot defend a conception of any of them without showing how our conception fits with and into appealing conceptions of the others. (id. 6–7)

Since political morality depends on interpretation of political and other social values, Dworkin argues that any successful theory of interpretation must account for the “sense and possibility of truth in interpretation, as well as the ineffability of that truth and the familiar, irresolvable clash of opinion about where it lies” (id. 130). This value account of interpretation that Dworkin proposes is therefore a social account of interpretation because it relies on the practices in which people participate and treat certain concepts as identifying a value or a vice but disagree about how it should be characterized or defined (id. 160). He argues that when there is sufficient
agreement about the paradigm instances of a concept, we are permitted to propose theories or conceptions of the concept that justifies the judgments made about those paradigms (id. 161). Morality, for Dworkin, is like law in that each must fit within a larger web of justification—that is, there cannot be an “outside” position from which one can evaluate, because evaluation would require reference to some other value claim or proposition. He therefore denies that morality can be categorical in the way usually understood, arguing instead that we need “a statement of what we should take our personal goals to be that fits with and justifies our sense of what obligations, desires, and responsibilities we have to others” (id. 193). Further, since morality and ethics are ultimately integrated, Dworkin refines his normative telos of living well by adding the discrete imprimatur to create a good life for oneself and others (id. 195). These ethical principles, for Dworkin, form the basis of his account of dignity, and therefore for his constructive normative project. While the details that project will not be examined further, I will take these basic ethical principles of human dignity to be fundamental to constructive reinterpretations of Dworkin’s theory of legal interpretation, including my own.

2e Preliminary Conclusions

This tour of Dworkin’s œuvre has been somewhat lengthy, but its purpose has been to show that Dworkin’s interpretive theory of law fits within a broader normative framework wherein legal, political, social, and moral principles are embedded within—and therefore subject to interpretation by—the relevant legal community. It has also traced Dworkin’s progressively more comprehensive account of how normative values are integrated because they are ultimately irreducibly holistic—one cannot isolate particularly legal values that are utterly distinct from moral values, and as such, a certain kind of morality is required when making legal decisions. Finally, the crux of Dworkin’s normative project resides in the ethical principles he associates
with human dignity. Given its foundational role in his normative thought as whole, for the remainder of this dissertation I will take his concept of dignity to be essential to any interpretation of his theory of legal interpretation beyond its original context. Because this dissertation is both a constructive reinterpretation and extension of Dworkin’s legal interpretivism, I will be concerned with defending his larger normative project only insofar as it relates to his theory of legal interpretation. For the remainder of this chapter, I will address criticisms of Dworkin’s legal interpretivism, as well as his replies, before examining a similar extension of Dworkin’s thought that utilizes his concept of dignity.

3 Critiques (and a defense) of Dworkin: merit and separability

Now that a broad overview of Dworkin’s normative thought has been given, I will examine some criticisms of Dworkin’s interpretivism to further flesh out his distinctive approach to legality. I will confront some significant criticisms levelled against Dworkin’s theory of law as integrity, arguing that much of the response is built on either drawing increasingly finer-grained—although perhaps the more apt term is “Ptolemaic”—distinctions between “norms” and “social facts,” or attempting to subsume the former term under the latter. Criticisms of his theory from defenders of legal positivism will be drawn from H.L.A. Hart, Jules Coleman, Wil Waluchow, and Joseph Raz. In replying to these critiques, I will argue that Dworkin’s theory of law depends on the position that each legal community represents its own “normative whole”. By this, I mean that a jurisdiction and its particular laws will reflect—and thus, to varying

---

9 What might be noticeable is the lack of critique from the lens of natural law theory. Certainly, Dworkin writes as a quasi-natural lawyer since he bases both his theory of rights and of adjudication on principles that exist outside the legal system. Or perhaps, more accurately, he denies that there are distinct legal principles that are independent of political or moral principles. In fact, he has welcomed the charge, claiming himself to be a certain kind of natural lawyer (1982). Still, even if Dworkin seems to be writing as a kind of moral realist, he flatly denies the theistic natural lawyers’ claim of a divine origin of human rights (2011: 340). He also departs from the contemporary natural lawyers’ claim that valid laws must fulfill certain moral criteria, whether of an “implicit morality” in legal procedures or the moral validity of laws themselves (cf. Fuller 1958, Finnis 2011).
degrees, represent—the particular normative positions held by members of that community, as constituted by their laws, institutional history and cultural practices. This approach may seem vulnerable to the criticism that no one person—or even a group of similarly-situated persons—can decisively or “absolutely” characterize a legal community, particularly if such a community contains multiple, conflicting accounts of the good. The nature of law is that it does represent the community’s (legally) enforceable norms. Because of this unique institutional role, the nature of legal decision-making is intimately linked with some understanding of the legal community’s values. The dispute that emerges between Dworkin and legal positivists is whether the former’s notion of “political morality” is subsumed under the latter camp’s emphasis on “social facts.”

Here, I will argue that the legal positivist tradition—whether exclusive or inclusive—is best read as already encompassed by Dworkin’s account, as Dworkin’s theory of legal adjudication takes a broader view of social fact than positivism. Although I will not argue that all Dworkin’s criticisms of legal positivism always hit their mark, I will accept the claim of many positivists that legal positivism can accommodate Dworkin’s critiques—but I argue that this is only because Dworkin’s legal interpretivism is more comprehensive and provides a better explanation for how judges and other legal decision makers come to legal conclusions. In doing so, I will focus on the critiques of Dworkin’s account that contest his understanding of the (alleged) limits of law, what legal positivists call the “separability thesis.” What this thesis amounts to, however, depends on the specific formulation given by various interpreters and inheritors of Hart’s project, as Hart’s own understanding of the thesis is not binding on his successors.

3a Hart’s (posthumous) inclusivism and its defenders

H.L.A. Hart was often Dworkin’s target for criticisms of legal positivism, so a short primer of Hart’s formulation of legal positivism (and the separability thesis) is in order. In *The Concept of
Law, Hart seeks to ground law in an authoritative social rule that exists only because it is *practiced*—that is, used to guide conduct—based on customs about who has the authority to decide disputes, what they shall treat about sources of law, and how laws may be changed (Green and Adams 2019). He famously posited a distinction between primary rules and secondary rules within a legal system: the former rules are identified as the explicit rules within a legal system—such as statutes and administrative rulings—while the latter are the rules that are to be presupposed for the primary rules to function. Among the various secondary rules, Hart maintained that “the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers” (Hart 1994: 101). The rule of recognition is expressed in the “internal point of view,” a perspective of a speaker that accepts and applies the rule “in recognizing some particular rule of the system as valid” (*id.* 102-03). For Hart, “valid” in this circumstance is most frequently, but not always, used to recognize that a rule passes “all the tests provided by the rule of recognition and so as a rule of the system […] that it satisfies all the criteria” that the rule of recognition provides (*id.* 103). He further clarifies that the rule of recognition is an *ultimate* rule, in the sense that, when the validity of a particular by-law or statute is questioned, one eventually reaches a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity. (*id.* 107)

Still, Hart maintains that, at the stage of analysis he was considering, one moves from an internal statement about legal validity of a rule in a system, to “an external statement of fact which an observer of the system might make even if he did not accept it” (*id.* 107–8). To make such a move, he claims, is to move outside the bounds of questions of legal validity and into a statement of value (*id.*). In fact, Hart’s understanding of legal positivism is intimately linked with a
rejection of moral criteria for law’s validity: he takes legal positivism to mean “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so” (id. 185–86). This is not to say that all versions of legal positivism accept this precise formulation—as will be seen below—but it is the form that Hart endorses.

To begin to respond on Dworkin’s behalf, the different scope of his project should be noted. While Dworkin’s account concerns the constituent elements of our legal practice, Hart provides an analytical philosophy about general legal practices (Burton 1987: 100). Still, while he does not endorse a rule of recognition that provides criteria of legal validity, commentators have observed that Dworkin’s interpretive criteria could still be formulated as a rule of recognition (id. 119). Indeed, Hart notes that Dworkin “ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values” (Hart 1994: 250). However, Dworkin also claims that “we have no difficulty identifying collectively the practices that count as legal practices in our own culture” (1986: 91), since these practices are “treated as given in day-to-day reflection and argument” (id. 66.). Hence, for Dworkin, sourcing law in social fact is almost banal—the normative reasoning within a legal decision is what matters. For him, fidelity to social fact means that one must account for the society’s moral norms. Because such norms frequently conflict, social convention—let alone social convention divorced from moral claims—cannot be the sole ground for legal decisions.

The positivist account that Hart articulated and defended in The Concept of Law was subtly modified in response to Dworkin’s criticisms, but never during Hart’s lifetime. Hart’s only sustained rejoinder to Dworkin was an unfinished essay that was posthumously edited and included in a second edition of The Concept of Law. In his famous postscript, Hart takes
Dworkin to task for misunderstanding his theory, whilst also clarifying some of his own positions within the debates that emerged in response to Dworkin’s criticism. Importantly, he states that his task in the Concept was to “give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect” (1994: 239). He also claims that law as an institution has taken “the same general form and structure,” albeit with “many misunderstandings and obscuring myths” that have clustered around it (id. 240). Still, he concedes that his starting point is “the widespread common knowledge of the salient features of a modern municipal legal system,” while also denying that he sought to “justify of or commend on moral or other grounds the forms and structures which appear” in his general account (id.). Hart claims that Dworkin assumes that no adequate account of the “internal perspective” of “an insider or participant” in the legal system “can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an external observer,” even though Dworkin does allow for it (id. 242; cf. Dworkin 2017: 2103). Hart also explicitly accepts what he calls the “soft positivist” reading of his theory, elsewhere called “incorporationism” (Coleman 1982) or “inclusive legal positivism” (Waluchow 1994).

A crucial point of disagreement that Hart picks out is Dworkin’s infamous “semantic sting” argument, which he imputes to philosophers that he claims “suppos[e] that all concepts are governed by shared criteria” of a certain factual background that determines whether a use of a concept is correct, incorrect, or falls in a border between the two (2004: 9–10; cf. Dworkin 1986: 45; 2017: 2109).\(^\text{10}\) Dworkin maintains that the concepts at play in law, and particularly within adjudication, cannot be captured by the shared-criteria background, because of the sheer variety

of disagreements as to their meaning (id. 10). Because law is a political concept, Dworkin argues, people use it to form claims of law that prohibit or permit or require certain actions; even as Hart claims to provide a purely descriptive second-order philosophical claim, accepting it clearly impacts the first-order legal claims made in legal practice (id. 19–20; cf. Dworkin 1996).

Hart disputes this characterization of his legal theory. He claims that he nowhere bases his rule of recognition on the idea that it is “part of the meaning of the word ‘law’ that there should be such a rule of recognition in all legal systems,” or that “if the criteria for the identification of the grounds of law were not uncontroversially fixed, ‘law’ would mean different things” (1994: 246). He accuses Dworkin of confusing the meaning of a concept with criteria for its application, as well as confusing the meaning of “law” with the meaning of propositions of “the law” within some particular jurisdiction (id. 246–47). Hart also reminds Dworkin that he has specifically allowed that some systems of law, such as the United States, might explicitly allow principles of justice or specific moral values alongside pedigree to serve as criteria of legal validity (id. 247; cf. Hart 1958: 598). Hart complains that Dworkin further misrepresents his positivism by evaluating it—under the guise of “conventionalism”—on the presupposition that the purpose of law is to justify coercion, whereas Hart assumes that the most specific purpose that law serves is to provide guides to human conduct as well as standards of criticism of that conduct (id. 247–48). Hart also accepts that legal principles play an important role in adjudication, although he disputes Dworkin’s characterization of rules as operating in an “all-or-nothing” matter by insisting that difference between a rule and a principle is a matter of degree rather than kind (id. 259–63).

11 To overcome Dworkin’s criticisms, Matthew Kramer has argued that a more accurate understanding of what Hart means by “rules” is encompassed by the term “norms” (2018: viii). Mistaken though Hart’s use of the term might have been (shown to have been) for his argument, the use of “norms” now seems to muddle more than clarify. In
In the broadest sense, Dworkin’s response is that Hart’s positivism falls prey to the semantic sting because Hart maintains what Dworkin calls an “Archimedean” position that attempts to stand “outside” the domain of the body of belief under investigation (2017: 2097–98, 2105–112; cf. 1996; 2004). Hart, he claims, holds an account of law that posits a “criterial semantics” for the identification of what “law” is, such that one can determine whether a certain proposition is or is not a legal proposition based on some shared criteria; Dworkin, however, denies that such an account can adequately explain the vast divergences in what lawyers, judges, and other legal officials take “the law” to mean in their everyday practice (2017: 2108–111; cf. Stavrapoulos 1996). Dworkin uses Hart’s citation of the Due Process Clause of the Fourteenth Amendment as a moral criterion sanctioned by the United States Constitution to note that there is a great deal of disagreement among legal practitioners and scholars as to its meaning (2017: 2115). Essentially, he claims that Hart’s theory of law attempts to provide a neutral, second-order account of the “first-order substantive ‘value judgments’ of ordinary people about liberty, equality, justice, legality and other political ideals” (2004: 3). For his part, Dworkin denies that second-order analysis is as divorced from first-order judgments as (he claims) the Archimedean analysts would like to believe. He points to Hart’s response to his example of *Ira S Bushey & Sons Inc v. United States*, where Hart gives what Dworkin calls the “sources thesis”:

> According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g., legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of law. (Hart 1994: 269)

any case, Hart certainly saw fit enough to accept Dworkin’s criticism that he stated in his “Postscript” that he ought to have discussed further the role of principles.

---

12 Dworkin provided two replies to Hart’s postscript: an article published in 2004 as “Hart’s Postscript and the Character of Political Philosophy,” which was drawn from a larger piece that remained unpublished until 2017, “Hart’s Posthumous Reply.” While the earlier publication is an expanded adumbration of one argument within the later publication, the latter is a point-by-point rebuttal of Hart’s claims within the postscript. Further, Dworkin incorporates by reference his 1996 article “Objectivity and Truth: You’d Better Believe It.” Hence, all three pieces will be used to respond to Hart’s claims.

46
Dworkin summarizes their disagreement as one about how far and in what ways lawyers and judges must make their own “value judgments” to identify the law in particular cases (2004: 4).\textsuperscript{13}

For his part, Dworkin holds that legal argument is a “characteristically and pervasively” moral argument, such that lawyers “must decide which of competing sets of principles provide the best—morally most compelling—justification of legal practice as a whole” (\textit{id.} 4–5). According to Hart’s sources thesis, Dworkin claims, “substantive legal argument is normative only when social sources make moral standards part of the law” (\textit{id.} 5). But if this were true, then in cases where no legislature or past judicial decision has made morality pertinent in a legal dispute, no moral judgment or deliberation could enter the legal question of whether a plaintiff is legally entitled to the damages she might seek on Hart’s view—indeed, Dworkin claims, he would have said, far as the law is concerned, she must lose (\textit{id.}). He therefore challenges Hart’s claim that his account of law is merely descriptive; rather, because the object of jurisprudence is law—a contested political value, not a natural kind like gold or a tiger—a philosophical analysis of law cannot be neutral or disengaged in the way that Hart wants (\textit{id.} 13, 19). For, according to Dworkin, when a legal theorist says that the law contains or validates a rule, the theorist “accepts a rule himself, in the particular sense of confirming that it really is a rule of the system in question, and that plainly goes beyond just describing other people’s attitudes” (2017: 2013). That is, for Dworkin, these orders cannot be sufficiently distinguished to assign them distinct logical categories, meaning that Hart’s position is evaluative because it takes sides in the disposition of a case (2004: 20).

\textsuperscript{13} It is interesting to note that Hart’s positivism was possibly inspired by the sociologist Max Weber. In her biography of Hart, Nicola Lacey recounts an anecdote by John Finnis that Hart had heavily annotated his copy of \textit{Max Weber on Law in Economy and Society} (Lacey 2004: 230–31). This text, which draws mainly from Weber’s \textit{Economy and Society}, explicates Weber’s understanding of the sociology of law. Although Hart claimed inspiration from Peter Winch’s \textit{The Idea of a Social Science}, Lacey argues that his extensive notes in the text strongly suggest a “Weberian undertow in \textit{The Concept of Law}” (\textit{id.} 230). This certainly places Hart’s claim that he was engaged in a “descriptive sociology” in a new light.
What if, on the other hand, the sources thesis is not merely a semantic claim, and Hart was attempting to elucidate the criteria of application that legal officials and lawyers might recognize when they make claims about what the law requires of permits? Dworkin argues that this claim must also fail because there simply are no such widespread shared criteria—“even hidden ones”—for endorsing or rejecting propositions of law, whether within the same jurisdiction or for all legal systems everywhere (id.). Part of their disagreement, Dworkin continues, seems to come from their different approaches to the overlap in their respective projects. Hart, in his “Postscript,” maintains that his account “is descriptive in that it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law” (1994: 240). While he admits that Dworkin may be correct that law is identified by reference to value judgements, Hart insists that it is only because Dworkin’s description of this first-order legal practice is a better second-order description of that practice than what Hart himself provides (Dworkin 2004: 5). As Dworkin understands it, there is disagreement over the kind of theory to answer the question of what law is, with Hart believing that such a theory is only a description of a legal practice, while Dworkin maintains that this theory is “an interpretation of legal practice that makes and rests on moral and ethical claims” (id.). Still, despite their differences, Dworkin claims that he and Hart are both engaged in the study of “the very concept of law” (id.)—what their disagreement hinges on, in fact, is precisely the question of theoretical disagreement between legal practitioners.

Defenders of Hart’s internalist position (Coleman 1982, 2001; Waluchow 1994) have offered various responses to Dworkin’s challenge. An early intervention by Jules Coleman posited that the rule of recognition can be described semantically whereby some moral principles are legally binding, without every moral principle being a legal one (1983: 35). Hence, he argues that if a
rule is a legal rule if it possessed characteristic $C$; and that a moral principle is a legal principle if it possesses characteristic $C_i$; then a rule of recognition that states that a norm is a legal one if and only if it possesses either $C$ or $C_i$ survives Dworkin’s criticism (*id.*). In response to Dworkin’s claim that controversy over the rule of recognition implies the lack of such a social rule, Coleman argues that what matters in cases of controversy is whether there exists a social practice amongst judges, rather than the rule of recognition (*id.* 43). Hence, where Dworkin finds evidence for a normative theory of the rule of recognition, Coleman instead finds evidence of the existence of a social practice amongst judges of resolving disputes in a particular way—that is, a practice that specifies a social rule governing judicial behavior (*id.* 44).

Coleman later argues that the actual practice of judges provides an existence condition for the rule of recognition, which consists in a convergence of behavior and the internal point of view:

The convergent behavior fixes the rule, but does not determine its content; nor does the range of convergent behavior determine the scope of obligations the rule purports to impose. As with any rule, the content of the rule of recognition extends beyond any finite pattern of behavior; and as with any obligation-imposing rules, the obligations the rule imposes are determined by its *content*, and are not limited to the convergence of behavior of those subject to the rule. (2001: 83)

However, Dworkin disputes that the account Coleman presents is very helpful. He counters that supposing additional abstract conventions leaves legal positivism “too close to the trivial theory that in every legal system officials accept the requirement that they must make their decisions about the law in the way such decisions ought to be made” (1983: 253). If this bare account is to be rejected, then Coleman’s conventional account is caught in a difficulty:

It must stipulate some interesting level of concreteness that any convention must have if it is to count as the fundamental legal convention of a community. But then if it then offers the universal claim, that every legal system displays a convention at that level of concreteness, this claim is false, as Coleman seems to recognize. And if it offers only the existential claim, that some legal systems provide conventions of that sort, it is only negative positivism back again. (*id.*)
Dworkin argues that Coleman confirms the second danger by claiming that the examples he gives as conceivable systems no more than restate the thesis of the “negative” positivism that Coleman rejects. In essence, Dworkin disputes the claim that an ever-more-abstract rule can capture the behavior that it is attempting to describe in a theoretically interesting way; further, if there is any uniform practice amongst legal practitioners, it is their pervasive disagreement about not only what counts as “the law,” but also what “law” is, in the broadest sense.¹⁴

In his later estimation of Coleman’s subsequent work, Dworkin claims that Coleman has effectively accepted Dworkin’s criticisms of positivism, but re-integrated them into a positivist framework (2006: 188).¹⁵ Dworkin notes that Coleman’s theory of inclusive legal positivism is very much like his legal interpretivism, so it is puzzling that Coleman claims that he provides a “better understanding” of law when both accounts allow for substantive disagreements and divergences in the behavior legal practitioners (id. 188–89, cit. Coleman 2001: 99, 157–58). The difference, Dworkin argues, is that Coleman claims that this disagreement is the conventional practice of law, as the criteria of law “are and must be” matters of convention (id. 187, cit. Coleman 2001: 100). Due to this commitment to conventions, Dworkin argues that Coleman simply re-interprets such fundamental disagreement as indicating disagreement about a more-abstract convention, such that no legal disagreement is ever over fundamental grounds of law;

¹⁴Certainly, this disagreement can again be generalized into a descriptive practice amongst legal practitioners. But redescribing substantive moral and political disagreements amongst practitioners as already being included within a social practice of disagreement seems to implicitly cede the ground to Dworkin’s position whilst maintaining that one is simply engaging in “descriptive sociology.” Likewise, if “the law” can always be distinguished from “law” by simply claiming that the former implicitly refers to the latter, positivism seems to slide further toward Hans Kelsen’s quasi-transcendental Grundnorm that Hart was so insistent to avoid in his own work, but without the normative imprimatur that Kelsen imputed to his concept. (Kelsen 1967; cf. Bix 2018).

¹⁵It should be noted that in his piece, Dworkin characterizes positivists as “drawn to their conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline” (2006: 188). I make no claims about the (in)accuracy of this statement, aside from noting that impugning the motives of one’s professional colleagues—even if theoretical adversaries—is indecorous and uncharitable.
instead, it simply becomes a disagreement over the *application* of the fundamental rule of recognition (Dworkin 2006: 192–94). Coleman also attempts to utilize Michael Bratman’s notion of a “shared cooperative activity” (SCA) to argue that law rests on convention as a matter of conceptual necessity, which Dworkin dismisses as too divorced from Bratman’s account to carry his own argument (*id.* 194–97, cit. Coleman 2001: 80–81, 96, 98, 158; cf. Bratman 1992). Indeed, Dworkin maintains that, if there is any collective agreement within the law system that meets the concrete coordination conditions of Bratman’s SCA, it is exhibited by the various camps of judges that agree on specific ends to be accomplished through the law, and that conflict with other such camps (Dworkin 2006: 196–98). Hence, if Coleman claims that the bases of law rest in the existence of some fundamental (legal) convention—however abstract—then Dworkin argues that conflicts and disagreements over the fundamental grounds of law constitute the generative sites of these conventions.

Working within a similar theoretical vein, Wil Waluchow articulates and defends a theory of “inclusive legal positivism,” which follows Hart’s claim that every legal system contains a rule of recognition that can—but need not—incorporate non-legal norms to identify valid legal rules of a legal system. For Waluchow, legal positivism should be identified “principally as a thesis concerning the conceptual separation of law and morality, as a denial of the natural lawyers’ claim that legality, lawfulness, and legal validity are always in some way or other and to some extent a function of the moral validity of law” (*id.* 229–30). So, while he disagrees with Dworkin’s claim that there is no external perspective from which to ascertain social practices, Waluchow concedes that the descriptive-explanatory theory of legal positivism he defends “can

---

16 Curiously, in a footnote, Waluchow identifies this definition with Jules Coleman’s “negative positivism,” which Coleman himself already found theoretically uninteresting and Dworkin had summarily rejected (1994: 230, n. 55, cit. Coleman 1982).
be based upon and even guided by non-moral, evaluative considerations,” such as the principles of coherence or charity (id. 19). Moreover, he is more explicit than Hart that morality may play a contingent role in setting criteria for legal validity, even suggesting inclusive legal positivism could accommodate Dworkin’s interpretivism as part of a Hartian rule of recognition (id. 186–88). Such a concession to Dworkin, however, seems to violate the elegance that is taken to be a theoretical virtue of legal positivism. That is, if inclusive legal positivism contends that morality “need not” or does “not necessarily” play a role in law, but the actual practice of law is suffused with the language of morality and generally understood to carry some non-legal normative weight, then internal legal positivism seems to give up the game to Dworkin’s interpretivism.

Stephen Perry likewise notes how similar Waluchow’s methodology is to that of Dworkin, despite the former’s insistence that he is articulating a form of positivism (1996: 369–74). A key point that Perry seizes upon is Waluchow’s agreement with Hart’s claim that the special function of law is to guide human conduct; for Perry, this guidance function remains normative, even if Hart and Waluchow want to claim it is merely descriptive or explanatory (id. 37, cit. Hart 1994: 40, 91–93 and Waluchow 1994: 119). Waluchow also argues that certain common law principles (as distinct from moral principles) can receive greater “weight” in legal decision-making (1994: 136–39), which has clear echoes to Dworkin’s early account (1978) of how principles function in legal reasoning. Lastly, Perry claims that Waluchow’s endorsement of political morality as a resource for courts to pursue statutory interpretation also seems to endorse Dworkin’s interpretivism, even though Waluchow claims to derive his account from Hart (id. 380; Waluchow 1994: 233). Given their methodological proximity and shared acceptance of some role for morality, the difference between Dworkin and Waluchow seems to be less one of
understandings of law than of commitments to specific methodological perspectives, as Thomas Bustamante (2019: 18) has suggested.

In response to these internalist positivist challenges, what seems to be at stake is a question of whether morality ultimately “washes out” into social practice: that is, if normativity is wholly encompassed by and included within social practices, then simply redescribing them—whether as social practices, convergent behaviors, or conventions—works to obscure the normative contestation that Dworkin sees as essential to legality. Hence, for the remainder of this dissertation, when I refer to “sociality,” I will understand it in a more robust sense than the positivist concern with “social fact” or “convention,” both of which seem to imply a quasi-scientific understanding of the relevant legal community. In contrast, I understand “sociality” to refer to the phenomenon of social life as whole, encompassing not only social-scientific descriptions of “social fact” within a jurisdiction, but also prevalent, widely-held normative positions and arguments, collective narratives and belief systems, and folk understandings of various social and scientific phenomena. I include these aspects of sociality, which resist easy reduction to scientific standards of predictability or truth-aptness, not because I reject the idea that law can be a truth-seeking enterprise, but because I maintain that legal arguments need not attempt to mimic the truth procedures of scientific investigations in order to be adjudicated in a court of law or eventually enshrined within the law. More will be said about this idea of sociality in Dworkin’s legal communities in Section 4 of this chapter.

3b Raz’s exclusivist challenge

This subsection will examine “exclusivist” positivist criticisms of Dworkin, starting with Joseph Raz. For him, law is an institution of a social type, so all the rules which belong to this
social type are legal rules (Raz 1979: 45). Raz argues for the “strong social thesis” (later called the “sources thesis”) such that law has a source

if its contents and existence can be determined without using moral arguments (but allowing for arguments about people’s moral views and intentions, which are necessary for interpretation, for example). The sources of law are those facts by virtue of which it is valid and which identify its content. (id. 47–48)

“Sources,” for Raz, encompass “formal sources” that establish the validity of a law—such as a state law or federal statute in the United States—and “interpretive sources,” which are all “relevant interpretative materials”—such as past decisions incorporating the rule (id. 48). He does not deny that morality can play a role in law, but that its use must first be licensed by the law, which gives it a proper source. For example: if a law required that unregulated disputes (i.e., those with respect to which the law is unsettled) be determined by moral considerations, then using morality to do so does not thereby incorporate morality in toto into the law. Rather, Raz maintains that the use of morality was “sourced” by law, so only the aspect of morality utilized in the decision becomes part of the law (id. 45–46). In this sense, any moral norm that cannot be found in a social norm, is excluded as a valid source of law.

In his most significant criticism of Dworkin, Raz argues that there are limits to law; and that there is a test to distinguish law from what is not law (1972: 823). Because he holds that certainty and uniformity should be prioritized as law’s goals, over and against morality’s goal of “correctness”, Raz claims that Dworkin conflates moral reasoning with legal reasoning (id. 842), and thus has “no hard and fast line between acts which are specific [i.e., rules] and those which are unspecific [i.e., principles]” (id. 838). For Raz, rules are preferable for regulating human behavior because “they are more certain than principles and lend themselves more easily to uniform and predictable application” (id. 842).
Raz defends the limits of law by challenging Dworkin’s criticism of the positivist case for judicial discretion. Dworkin takes this discretion to be a claim that, in some instances, judges are not bound by standards set by the legal authority in question, because the law simply “runs out” (1978: 32). Dworkin, as we have seen, denies that judges have such “strong” discretion, since he holds that the law includes norms that are binding because of their (political) moral content, which judges draw upon in their decision-making. Raz critiques Dworkin’s inference that, if some principles are law, then such judicial discretion does not exist. He replies to Dworkin with three situations where judges are given discretion, even with legal principles: i.e., the vagueness of principles; their relative importance; and limits on the considerations a court may consider (id. 843–45). Raz concludes that “legal principles do not exclude judicial discretion; they presuppose its existence and direct and guide it” (id. 846–47). For him, Dworkin’s morality is just the set of moral views “which became social norms in the community” (id. 848). Likewise, Raz continues, judges have the discretion to consider at least some principles that can be brought under the social role of recognition through “judicial custom” (id. 852). Such a custom would arise if a particular principle were cited by many judges over a period as a principle that must be considered when adjudicating cases; according to Raz, that practice would constitute a distinct social role that would stand alongside a Hartian rule of recognition as a test for legal validity (id.; cf. Dworkin 1978: 65). He therefore contends that there is a limit to law, such that judges are bound by what it authorizes—based not on morality, but on social fact.

From Dworkin’s position, Raz’s argument does a disservice to morality and law. Standards of certainty and uniformity concern the moralist as well as the judge, especially if both value fairness. Even without accepting “law as integrity,” judges do attempt to give “correct” decisions based on the facts of a case and past legal rulings. Dworkin goes even further, by
arguing that there is a “right answer” to hard cases (1978: 279–90). Principles argue for or against extending prior decisions, by giving reasons for (or against) their application. Unlike valid rules, principles can conflict, so judges must argue that some principles be given greater or lesser “weight” than others. There are always principles within the law and its community, but always bounded by integrity’s demands of fit and justification. A judge thus cannot exercise the “strong” discretion that Dworkin argues legal positivism requires, because the answers are already there; judges must suss them out by careful, imaginative reading. So, Dworkin agrees with Raz that judges have some discretion to interpret law, but he also allows moral norms to enter that discretion as social facts, so long as they remain bound by his notion of integrity. As seen in Dworkin’s debates with the inclusivists, cloaking morality under the mantle of social fact simply obscures the essential contestability of the claims and arguments that are at play in legal argument and interpretation.

3c A cautionary conclusion with critical legal theory

A final critique of Dworkin comes from the contemporary Critical Legal Studies movement. Originally emerging from the American legal academy, its influence at home has since waned even as it remains an active research program in law faculties overseas (Unger 2015: 4, 25). In their coauthored monograph, Costas Douzinas and Adam Gearey praise Dworkin for recognizing that moral philosophy is an “inescapable component of juridical hermeneutics” (2005: 137). However, they argue that, if the law never “runs out” due to its reliance on the norms of the legal community, then the law risks reifying the asymmetrical power relations within the community, thus rendering its coercive power a “field of pain and death,” particularly for its most vulnerable and marginalized members (id. 9, cit. Cover 1986). So, even though Douzinas and Gearey accept that “the law is interpretation and interpretation is the life of the law,” they caution that:
the values a legal system promotes represent the dominant ideology of society—they are the canonical expressions of its social and political power. The “others”—the poor, the underprivileged, the minorities and the refugees—can find little solace in rules and principles that sustain and are sustained by their subjection. (id. 8)

Further, they worry that Dworkin’s theory is “the last step in the juridification of morality and in the assertion of the moral legitimacy of legalism—both common symptoms of the de-ethicalisation of the law” (id. 138). Even as morality and moral philosophy enters law, they argue, its task is “to legitimise judicial practice by showing the law to be the perfect narrative of a happy community” (id. 137). Hence, Douzinas and Gearey remain concerned that for those who want to challenge the dominant political theory; for those unrepresented, unrepresentable and excluded from the “integrated” community; for those who experience the law not as rationality, rights and justifications but experience it as victims of the exercise of power and as the targets of legal force; for all those 'others', law’s empire has no place. (id.)

Justice on Dworkin’s account, they argue, is reduced to mere “fairness—the restoration of balance and proportion and the redress of the status quo between individuals” (id. 137).

While I share in Douzinas and Gearey’s celebration of the hermeneutic and moral turn in legal thought that Dworkin helped inaugurate with his interpretivism, I depart from them by arguing that Dworkin’s theory of law—properly supplemented with his account of dignity—can address the asymmetrical power relations that suffuse sociality, while also retaining a notion of “ethicality” within the law that can render it more responsive to a justice beyond fairness alone. However, it will require some expansion of his account of dignity as well as his theory of the legal community. In the final section of this chapter, I will examine how Dworkin’s account of legal community can be helpfully reread in terms of a more philosophically robust social ontology through Hegel. I will argue further that this rereading also opens Dworkin’s interpretivism to deeper normative analysis that can push law closer to justice, through his distinctive account of human dignity.
4 Reframing legal community as Sittlichkeit

So far, I have argued that Dworkin’s “law as integrity” is appealing for its deployment of two senses of integrity: 1) the sense of the law having a moral cohesion that expresses a more or less unified constellation of behavioral guidelines for human conduct, and 2) the sense of integrity as “integrating” the legal community as one political entity bound by the same rule of law. This discussion of the role of legal community within Dworkin’s work has prompted Drucilla Cornell and Nick Friedman to read Dworkin’s theory of law as integrity as resting upon a Hegelian conception of community. As Cornell and Friedman read Dworkin, it is precisely this question of integrity that links law to morality (2014: 68).

In their book *The Mandate of Dignity*, Drucilla Cornell and Nick Friedman argue that Ronald Dworkin’s theory of adjudication is best understood in terms Hegel’s theory of Sittlichkeit (“ethical life,” although perhaps more accurately, “ethicality”). Dworkin, as we have seen, argues for an approach to legal interpretation—called “law as integrity”—that reads the constitution, statutes, and case law of a legal system as an integrated whole, such that any gaps in the law can be filled with principles drawn from the political morality within the legal community. In this manner, Dworkin argues that judges can render general moral principles into legal principles by integrating them into the legal system. From this account, Cornell and Friedman argue that the collective “we” that Dworkin uses as the basis of this interpretive framework can be made more theoretically robust through appeal to Hegel’s Sittlichkeit. However, Dworkin grounds his larger normative theory on a notion of dignity, which Cornell and Friedman argue is best understood as a kind of Kantian regulative ideal that supplements

---

17 It should be noted that Cornell and Friedman are not the first to point to shared theoretical touchstones between Dworkin and Hegel. Thom Brooks has made the case that both Hegel and Dworkin occupy a middle space between natural law theory and legal positivism (2005; 2007).
their initial reading. While the authors seek to draw out Dworkin’s affinities with critical idealism, this reading remains unsatisfying, as it undercuts the relationality emphasized in the Hegelian argument that preceded it.

Reading *Law’s Empire*, Cornell and Friedman argue that Dworkin’s interpretive legal community is best defended by reference to Hegel’s moral community, for three reasons (2014: 29). First, Hegel develops a non-contractual account of community, wherein individuals live embedded, intersubjective lives (*id*.). As described in the previous section, Hegel does not build his notion of ethical life on the contractarianism that much liberal theory uses to formalize its political relations. Like Robert Williams, the authors affirm that, for Hegel, the rights of individuals achieve normative validity through intersubjective practice; hence, reciprocal recognition defines self-identity and is embedded in the institutions of right themselves (*id*. 32). Personhood is guaranteed by the public norms of the state, such that the legal rights and duties that flow from such personhood do not exist by themselves (*id*. 33–34). For Hegel, the ideal of the rule of law stems from the legal recognition of personhood, which is evaluated in terms of the radical egalitarian aspirations implicit in the full development of the horizontal dimension of relations of reciprocity (*id*. 35). In this manner, Hegel links the legitimacy of a legal system to how well (or poorly) it recognizes the subject as both autonomous and sovereign (*id*.). Further, in keeping with this need for legitimacy, judges must provide reasons for their decisions: “By taking the form of law, right steps into a determinate mode of being […] This is achieved by recognizing it and making it actual in a particular case without the subjective feeling of private interest” (*id*.). The judge acts as the “organ of the law,” speaking with the authority of the community “under some principle; that is to say, it must be stripped of its apparent, empirical, character and exalted into a recognized fact of a general type” (*id*. 36, cit. *PhR* §226). Cornell
and Friedman provide an instructive passage from Hans-Georg Gadamer—his own hermeneutic theory an inspiration for Dworkin’s theory of adjudication in Law’s Empire—to explicate the Hegelian position:

The work of interpretation is to concretize the law in each specific case—i.e., it is a work of application. The creative supplementing of the law that is involved is a task reserved to the judge, but he is subject to the law in the same way as is every other member of the community. It is part of the idea of a rule of law that the judge’s judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. (2004: 325–26)

Because the judge speaks not as a member of the relevant community, but as an official who expresses its shared ethical (sittlich) commitments, Cornell and Friedman affirm that Hegel’s Sittlichkeit possesses concrete, institutional relations of justice that are embodied in its social practices (2014: 36).

Both Dworkin and Hegel take the judge to operate in this manner, although subtle differences remain between the two. Although Dworkin allows that judges may utilize ethical principles that conform with the community as a whole, he denies that justice is actualized; for Dworkin, justice is either “an abstract external theory or the subjective opinion of the individual” (id. 37). In this respect, the authors demonstrate that, for Hegel, communal obligation does not conflict with justice; rather, such duties express the form of freedom that is actualized as a substantial reality within the community (id. 36–37). Recall that Hegel understands these relations to subsist in the reciprocal recognition of right: “duty and right coincide in this identity of the universal and the particular will, and in the ethical realm, a human being has rights in so far as he has duties, and duties in so far as he has rights.” (id. 37, cit. PhR §155). In this sense, the positive law cannot be understood as the “dull weight of positivity”: the real social practices that constitute the ethical order of a community demand that the law be a legitimate embodiment of the reciprocal symmetry that undergirds it (id. 38). Hence, Cornell and Friedman argue that Dworkin’s ideal of
integrity in the law is unsustainable from a Hegelian perspective—the consistency that Dworkin’s ideal demands cannot be given from either external theory or personal opinion, but from principles already present in the ethical order, based in the actualized relations of reciprocal recognition (id.).

The second feature of Hegel’s normative thought that aids Dworkin’s interpretive legal community is its normative realism: the reality of Sittlichkeit allows properties like integrity to be attributed to a community as whole, rather than just to individuals. For Hegel, individuality cannot be separated from the social and communal structures that support its flourishing. In contrast to Dworkin, Hegel provides an account of sociality (and legality) wherein the being of the individual cannot be separated from the reality of the community (id. 39). Hegel’s account of subjectivity is both a social reality and a narration of the objective spirit of cultural institutions as an “actress” on the stage of history (id.). Dworkin, the authors contend, does not adequately explain how his ideal figure of the judge comes to speak for the community, because he does not consider how many selves come to self-identify with the community (id.). Further, they argue, Dworkin’s idealized judge undermines how such an accomplishment is both intersubjective and mediated (id.). While Hegel does not attempt to provide coherence through reference to such an idealized figure, he still acknowledges that judges and lawyers are guided by the ideals and principles that are embodied in the social practices that we recognize as law (id. 39–40). For Hegel, Cornell and Friedman emphasize, these forms of social life also inform the standards of rationality embodied in our actual institutions and can be made explicit in their objectivity (id. 40). Likewise, legal interpretation takes place within such institutions, informed by parameters of the specific community’s Sittlichkeit (id.) In this way, the authors argue that Hegel improves
Dworkin’s theory of adjudication by rendering the principles of community into *real* features of the community itself, rather than as something outside it entirely or merely within one individual.

Finally, Cornell and Friedman point to Hegel’s use of relations of reciprocal symmetry—that is, of recognition—as providing the institutional and ethical content for a *Sittlichkeit* (id.). Such a ground for the normative principles that both shape the politico-legal system broadly and legal reasoning in hard cases in a court of law is absent in Dworkin’s thought. Importantly, the mere affirmation of its existence is insufficient for determining the adequacy of a political or legal system. The authors argue that the institutional analysis that Hegel provides depends on the realized relations of reciprocal symmetry to provide a rational limiting principle that guides legal interpretation (*id.* 40–41). For Hegel, while reason is the ultimate source of normativity in a community, the character of an embedded ethics within a specific *Sittlichkeit* is contextualized by its particular history and tradition, and thus allow for an idealized “we” to be thought when adjudicating legal claims. Since Dworkin does not rigorously theorize relations of *intersubjective* recognition—as distinct from Hart’s criterial secondary rule of legal-institutional validity*18*—that generate and subsist in these norms, Hegel’s theory of ethical life provides firmer theoretical grounding for the adjudication that Dworkin advocates.

These latter two features are precisely the ones that Cornell and Friedman take issue with when applying their Hegelian reading of Dworkin to the context of South Africa. For Dworkin, the adjudicative principle of integrity “instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness” (1986: 225). In other words, the history of the community in question provides insight into whether it has accepted a

---

*18* See note 2 above.
particular principle. In South Africa, although the last apartheid laws were formally repealed in 1991, its Constitution was drawn up by the Parliament elected in 1994—the first election held with universal adult suffrage—before being promulgated by President Nelson Mandela in 1996. Based on Dworkin’s understanding of integrity, Cornell and Friedman argue that neither the principles of justice nor fairness can be found in South Africa’s past (2014: 55). Of course, in a formal sense, the constitution signals a clear and decisive break with the apartheid past; however, the authors suggest that, even if a break is acknowledged, Dworkin advocates disguising the break for the sake of legal integrity (id.). For if, as Dworkin maintains, the role of the judge is to provide a constructive interpretation of precedent, the authors argue that his integrative approach undermines the critical power of reconstructing the law through interpretation (id. 56).

This failure prompts Cornell and Friedman to further fault Dworkin’s reliance on the weight of precedent in his interpretive account; in this regard, they claim, he remains a thinker of the traditional Anglo-American common law (id. 58). Despite Dworkin’s own reticence to embrace their conclusion, the authors draw out the radicality of his “recognition that the past of precedent is not simply there for us to recollect, but demands an interpretation if it is to be made present” (id.). Cornell and Friedman thus argue, pace Dworkin, that legal interpretation is not only prospective and retrospective; rather, the very process of recollection itself is prospective since it implies “a promise to guide our conduct in the future in accordance with the reevaluation of the ‘should be’ inherent in the ‘might have been’” (id. 59). For Dworkin, continuity in legal interpretation is always continuity in principle, which the authors interpret as revealing a limit in their Hegelian reading of Dworkin’s community of principle (id.). There can be no idealized “we” in a country like South Africa, they claim, because “the ethical foundations of the community have been torn asunder by the ravages of colonialism and apartheid”; that is, there is
no continuity of shared principles that can be defended under the present constitution (id. 59–60). Due to this perceived inability to prospectively reconcile principles within an apartheid past with the present constitutional order, Cornell and Friedman argue that even a Hegelian Dworkin’s community of principle cannot be actualized in the post-colony (id. 81–82). Due to the claimed impossibility to actualize such a community, the “we” appealed to in legal interpretation must be a future aspiration—i.e., a Kantian regulative ideal, which the authors find in a Kantian understanding of dignity (id. 82). Whether this reading can be sustained using Dworkin’s own description of his two principles of dignity, however, will be discussed in the next chapter.

While their criticism of Hegel depends on a tacit bracketing of his logic of history, that issue is outside the scope of this chapter. Rather, what it has sought to do is establish a Hegelian reading of Dworkin’s theory of adjudication in terms of Sittlichkeit, and to motivate a re-articulation of Dworkin’s two principles of dignity in similarly Hegelian terms in the following chapter. As Cornell and Friedman admit, Dworkin’s account of integrity ultimately gets re-read in terms of fidelity to his principles of dignity (id. 12). Key to their argument is that the intersubjective relations of ethical subjects embedded in the same community both ground and

---

19 Indeed, the very existence of “the community” in South Africa—whether as a political or legal entity—is a direct historical result of European colonialism. Without this colonialism, there would in fact be numerous communities (Venda, Xhosa, Zulu, etc.) within “South Africa,” which would then only exist as a geographic description of a region rather than designate any sort of state or community. I am grateful to Mike Monahan for this emphatic clarification.

20 For example, an argument can be made that it would have been impossible for the legal regime of South Africa to break with its past were it not for a massive normative shift in intersubjective relations of recognition that generated this change. Indeed, such radical change depends on the sort of capacity for negativity found within the Hegelian will that next chapter will argue for. Robert Williams explains Hegel saw slavery as justified only in a “historically relative sense”, because “only in this sense can there be recognition between two different cultural worlds. That is, the impossibility of direct recognition, as it were makes indirect historical consciousness and historical recognition necessary. Indirect historical recognition is another way of practicing the Freigabe, or release” (1997: 356; cf. PhR §57). Consciousness for Hegel is always in a process of development, meaning that even the achievement of the constitutional Euromodern nation-state is but one stage in the unfolding of the Concept.
affect how legal interpretation is done. In the following chapter, I will argue that the same intersubjective relations of reciprocal recognition relied upon for generating the “we” in Hegel’s *Sittlichkeit* can also be used to theorize Dworkin’s notion of dignity in Hegelian terms.

5 Conclusion

Through his long career, Dworkin consistently defended the role of morality in law against the dominant school of legal positivism, from “legal principles” in his earliest legal thinking to the “political morality” that informed his later thought. His embedding of law within a larger scheme of normativity in his mature work—whether in terms of the legal community or the broader moral question of “how to live well” in his last book—likewise opened up legal thinking to more holistic consideration of the sources of legal norms in the legal community. Since Dworkin sites morality as generated by competing interpretations of a community’s social practices, thereby refusing to reduce a community’s norms to mere “social facts,” Cornell and Friedman’s siting of his notion of “legal community” in Hegel’s concept of concrete intersubjective relations within political community (*Sittlichkeit*) provides a much stronger ground for Dworkin’s theory of adjudication. What the remainder of this dissertation will do is expand Dworkin’s legal interpretivism as grounded by Hegelian *Sittlichkeit*, using Hegel’s account of intersubjectivity to reconstruct Dworkin’s two principles of dignity in terms of *embodied* relations. The result, it will argue, will allow legal interpretation to more closely approach a notion of justice that is not merely “legal,” but “moral,” in the broader normative sense that the term “justice” is used to evoke.
Chapter II

Rethinking Dignity with Dworkin and Hegel

Die Würde des Menschen ist unantastbar.
Sie zu achten und zu schützen ist
Verpflichtung aller staatlichen Gewalt.

Human dignity is inviolable.
To respect and protect it is
the duty of all state authority.

— Article 1(1) of the Basic Law (Grundgesetz)
for the Federal Republic of Germany

1 Introduction

In the previous chapter, I described and defended Dworkin’s theory of legal interpretivism, paying special attention to his use of the notion of the “political morality” of a legal community. Due to that emphasis, I argued that Dworkin provides a more robust normative account of legal adjudicative power, because his interpretivism relies on a more holistic notion of sociality than competing theories of jurisprudence. I concluded that chapter with Cornell and Friedman’s re-reading of Dworkin’s notion of the legal community as Hegelian Sittlichkeit. Although I largely agree with their re-grounding of Dworkin’s thought within a Hegelian social ontology, the authors take Dworkin at his word that his understanding of dignity is Kantian, and thus attempt to re-read his notion as a kind of Kantian regulative ideal. Doing so, however, seems to distort the two principles of human dignity that Dworkin gives in Justice for Hedgehogs.¹

¹There are many different substantive meanings of “dignity” that can be used: Remy Debes (2017a) gives a critical historical overview of several senses in his introduction to his edited volume, while Suzy Killmister has listed the following contemporary conceptions: inner worth, elevated status, admirable quality, and respectful treatment (2020: 6–13). Here, I offer a substantive theory of human dignity—that is, what it consists in—from which to ground the use of lived experience as a site and source of legal norms. In this sense, the notion of human dignity that I am describing and arguing for is like Hannah Arendt’s contention that such dignity consists in “the right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community” (1973: 296–99; cf. Menke 2014). The account of human dignity I defend is similarly situated in an existential register, albeit in a co-existential account of human sociality, such that protections or violations are indexed to the intersubjective (mis)recognition of a subject’s singular, embodied capacities.
In contrast to these authors, I maintain that, if Dworkin seeks to provide a cohesive account of norms for any given (legal) community, from which moral norms already present within it can be drawn to justify legal decisions, then it makes more sense to frame Dworkin’s account of dignity in Hegelian—rather than Kantian—terms. Certainly, while he saw himself as completing Kant’s critical project, Hegel departs from his subjectivist moral system by critiquing it as overly formalistic, and instead focusing on lived relations between subjects. Due to Hegel’s focus on sociality as subtending ethical life and its norms, I will argue that Dworkin’s two principles of dignity are better framed in terms of Hegelian Sittlichkeit. I will demonstrate that a Hegelian understanding of dignity—understood as the institutional recognition of the ethical subject’s power to exercise their distinctive, embodied will against prevailing understandings of social norms—subsists in Hegel’s Sittlichkeit, and better supports Dworkin’s vision than the Kantian analogue propounded by Cornell and Friedman.

First, I give a (quite) brief overview of dignity—Kant’s notion of Würde, specifically—in order to contextualize Dworkin’s dignity, as well as to read his particular use of Kant against Cornell and Friedman’s rereading of his position. I argue that Dworkin’s shift from “integrity to dignity” is less dramatic than the authors maintain, because Dworkin’s notion of dignity retains a second-person aspect that Kantian dignity lacks. Due to this intersubjective component, I claim that a Hegelian notion of dignity would better serve Dworkin’s aims. To make the case, I carefully examine how the Hegelian ethical subject emerges from a series of “negations” involving the will (Wille). The ethical subject’s capacity to intentionally deploy negativity as it mediates both abstract right and subjective morality in Sittlichkeit is a key aspect of Hegel’s

---

2 Or, in the more Hegelian language I will use later, the subject’s power to “deploy negativity,” the ability of a rational subject to exercise Hegel’s logical notion of “negativity” through the will, beyond the realm of pure logical relations, into the world generally—and more particularly, within the social world. More will be said about this concept in Section 3, “Hegel: subject and Sittlichkeit.”
I then argue that this intersubjective recognition of the will’s capacity to negate captures Dworkin’s twin principles of dignity, and that it also fits within his holistic theory of legal interpretation. To argue this latter point, I examine Cornell and Friedman’s reading of Dworkin’s jurisprudence as requiring a Sittlichkeit, and present Dworkin’s principles of dignity within the aforementioned “intersubjective recognition of the will’s negativity.” I conclude by considering how a Hegelian account of dignity can be sketched in terms of this intersubjectivity within his normative thought.

2 Dworkin and Kant on dignity

In this section, I will give a brief overview of contemporary accounts of human dignity to differentiate Kant’s notion more clearly. To facilitate this investigation, I present Oliver Sensen’s critical account of Kant’s understanding of human dignity. After this brief presentation of how Kantian dignity differs from contemporary dignity, I will then analyze Cornell and Friedman’s argument for a Kantian reading of Dworkin’s dignity. I will conclude the section by claiming that their rereading both elides Kant’s conception of dignity and obscures Dworkin’s notion. In this light, their attempt to reframe Dworkin as a Kantian critical idealist is less successful than their reading of him as a Hegelian social theorist.

2a Revising Kant’s account

Kant is regarded as one of the key modern thinkers of the moral concept of dignity, but his precise account of dignity differs from the contemporary understanding. Pre-Kantian conceptions of dignity referred to a sense of high social rank or status: that is, the “honors and respectful treatment that are due to someone who occupied that position” (Darwall 2017: 182, cit. Rosen 2012: 11). This sense of “high office” was used by Cicero and was later understood to refer to an
aspirational standard, as used by David Hume and Adam Smith (id. 184; cf. Rosen 2012: 19–31).

As Stephen Darwall points out, however, none of these senses of dignity was taken by these authors either to imply an equal standing between differently situated individuals, or to ground a normative theory of human rights (id.). Oliver Sensen argues that, since Kant, the general understanding of dignity used to stand in for “a value inherent in all human beings that grounds the requirement to respect them,” possesses three main features:

1) it is a value or objective preciousness all human beings possess equally;
2) this standing gives one the right to make second-personal claims on others (e.g., for an apology); and
3) this standing gives the right to demand a special treatment from others (2017: 258).

Moreover, Kant seems to specify this contemporary paradigm for dignity in his *Groundwork of the Metaphysics of Morals* when he claims that “What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity” (id., cit. Kant 4:434). Later in the same text, he describes this dignity as “an inner worth” (id. 239, cit. Kant 4:435).

Sensen challenges this conventional account of Kant’s influence on dignity, arguing instead that Kant understands dignity in the older sense “as rank or elevated standing” (2017: 240; 2011: 152–64). By carefully reading Kant’s use of “dignity” (Würde) throughout his corpus, Sensen makes the case that, for Kant, such an elevation by itself does not give rise to rights or duties, because “it is merely a relation in which one thing x is raised above another y in a specific respect” (id.). Due to this relationship, such dignity cannot ground morality, at least as Kant understands it. Sensen recalls that Kant’s moral philosophy is based on the a priori law of reason: if one grounds morality in anything else, then the unconditional character of morality

---

3 That said, many liberal theorists have recently attempted to “level up” every individual to a place of such honor, one “structured by recognition and respect for the rights we take human dignity to involve or ground” (Darwall 2017: 189; cf. Appiah 2010; Waldron 2012, Debes 2017a).
will be destroyed (2011: 213). Dignity is therefore not the ground of Kantian morality, but “expresses the idea that something is raised above something else, for instance that human beings are special in nature because they should be treated as equal, while non-rational things need not be” (id.). While in contemporary terms “dignity” is the value that grounds the requirement to respect others, for Kant “dignity” describes how human beings are special in nature because they have freedom (2017: 258). For Kant, the source of morality is one’s own freedom: “Autonomy is therefore the ground of the dignity of human nature and of every rational nature” (Kant 4:436).

In comparing the three aforementioned aspects of contemporary dignity to Kant’s account, Sensen makes the following counterclaims:

1) Kant does not ground morality in a third-personal fact of being valuable, but rather in a first-personal law of one’s own reason, the Categorical Imperative
2) Kant holds that it is neither a value nor one’s own dignity by which one can make rights claims; and
3) Kant does not specify the particular way in which one has to respect others. (id. 258–60).

To summarize, for Kant, the right (of the categorical imperative) is prior to the good, and the duty of the agent is prior to the right of the victim:

Universal dignity is not itself part of this foundation, on Kant’s account, but it describes (a) that rational beings are special in nature in virtue of possessing freedom, (b) that all human beings are special because they should be respected, as required by the Categorical Imperative, and (c) what should be respected in others, their striving to realize their initial dignity. (id. 260–61)

This concludes the brief overview of Kant’s notion of dignity in contrast to the contemporary notion, in which Dworkin will partake to a degree. As shown, the contemporary notion is similar to—but nonetheless quite distinct from—Kant’s notion, as the latter is embedded within Kant’s
metaphysical commitments.⁴ In the next subsection, I will analyze how Cornell and Friedman frame their Kantian rereading of Dworkin’s notion of dignity.

2b Dworkin’s Kantian Dignity?

Now that Kant’s understanding of dignity has been contrasted with a more contemporary understanding, I turn to Dworkin’s account of dignity, as well as Cornell and Friedman’s Kantian rereading. I will show that Dworkin gives a “light” reading of Kant, wherein he eschews a close reading of Kant’s ethics—and almost totally ignores his metaphysics—in favor of using Kantianism to support his normative views. After reading Dworkin’s treatment of Kant and dignity, I will analyze how Cornell and Friedman attempt to ground Dworkin with Kant.

Early in his text, Dworkin rightly notes that, for Kant, freedom is an essential condition of dignity (2011: 19). To lay out his own view of dignity, Dworkin proposes what he calls “Kant’s principle,” that a person “can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms” (*id.*). For Dworkin, dignity requires both self-respect and authenticity (*id.* 204). The first principle of dignity is Kant’s principle: it insists that “I must recognize the objective importance of my living well” (*id.* 205, 260). Dworkin’s second principle of authenticity is “the other side of self-respect. Because you take yourself seriously, you judge that living well means expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstance” (*id.* 209). Dworkin argues that such authenticity “demands both that I be responsible in the virtue sense and that I accept relational responsibility when appropriate” (*id.* 210), and “stipulates what dignity demands we try to establish in our relations with other people” (*id.* 211). In short, this principle

---

⁴ As Sensen himself notes, his revisionist reading of Kantian dignity runs counter to the standard reading. For critical responses, see, e.g., Bacin, Bojanowski, Klemme, Schönecker (all 2015) — plus Sensen’s (2015) reply, wherein he modifies his views slightly — as well as Schönecker & Schmidt 2018.
of authenticity maintains that we “cannot escape influence, but we must resist domination” (id. 212).

Notably, however, Dworkin explicitly distinguishes his project in *Justice for Hedgehogs* from Kant’s. He states the need for “a statement of what we *should* take our personal goals to be that fits with and justifies our sense of what obligations, duties, and responsibilities we have to others” (2011: 193). Dworkin claims that Kant’s moral program seems to fit this description, because

> His conception of metaphysical freedom is most illuminating when it is understood as an ethical ideal that plays a dominant justifying role in his moral theory. *Our own interpretive project is less foundational because [it is] more evidently holistic.* We look for a conception of living well that can guide our interpretation of moral concepts. But we want, as part of the same project, a conception of morality that can guide our interpretation of living well. (id., italics added.)

Following this differentiation, Dworkin states that his task is to draw out the ethical implications of what he has called “Kant’s principle”. After describing his principles of dignity, he discusses Kant’s moral thought in order to show that his claims “are most persuasive when understood as an interpretive account linking ethics and morality” (id. 266). Importantly, Dworkin does not engage *with* Kant, aside from claiming that his arguments are “comparatively weak” and that his theories of freedom and reason are “opaque” (id. 265). Rather, he uses Kant as an interpretive fellow-traveler for his own project. Dworkin’s reading “begins in ethics: with ethical demands that match the two principles of dignity we have now recognized. Kant’s ‘principle of humanity’ is in the first instance about the mode in which we must value ourselves and our own goals” (id.). For Dworkin, this reading entails his two principles of dignity; Kant’s theory of moral autonomy is matched with Dworkin’s own account of moral responsibility—without justifying or

---

5 Cornell and Friedman rename this principle that of “accountability”, given their intention to reframe Dworkin as a Kantian critical idealist and move him from the Romantic connotations of “authenticity” (2014: 95–97).
grounding it (*id.* 265–66). In this manner, Dworkin rereads Kant’s moral philosophy in terms of his own notion of dignity, instead of using it as a ground for his own concept.

Although Dworkin declines to engage more deeply with Kant, Cornell and Friedman seek to place him on firmer Kantian ground in order to push his notion of dignity into the realm of the regulative ideal (2014: 82). Their reason for doing so—at least in terms of their goal of using Dworkin to think South African dignity jurisprudence—is their claim that the ideal “we” is not actualized in the post-colonial legal community (*id.*). Cornell and Friedman note that Dworkin interprets Kant’s third formulation of the categorical imperative—that we must respect the humanity of all others—when describing his first principle of dignity (*id.* 88). They note, too, that Dworkin emphasizes the uniqueness of the subject when moving from this first principle to the second (*id.* 88–89). Acknowledging that Dworkin admits to skipping a great deal of Kant’s metaphysical and moral thought, Cornell and Friedman rely on Kant’s *Religion within the Boundaries of Mere Reason* to argue that Dworkin and Kant are aligned in thinking that the pursuit of a happy and meaningful life is part of our self-respect (*id.* 89–92). Surprisingly, the authors do not rely on Kant’s articulation of dignity itself to ground Dworkin’s account of dignity. Rather, they rely on Allen Wood’s claim that “Kantian ethics rests on a single fundamental value—the dignity or absolute worth of rational nature, as giving moral laws and as setting rational ends” (2014: 94, cit. Wood 2008: 192). This reliance is misplaced according to Sensen: he critiques Wood’s reading of Kantian dignity, claiming that he incorrectly places Kant’s dignity as the most fundamental value in his reading of Kant’s ethics (2011: 164, 202; *cf.*

---

* More will be said about the relation of normative principles to the embodied, embedded social practices of a community in Section 4. For now, it will suffice to say that even the sort of dignity that Cornell and Friedman want to impute to Dworkin must already exist within the legal community for it to be applied within. As they argue in their text, Dworkin’s theory of jurisprudence holds that any principle conceived within a legal community is *already* some part of the political morality of the community (2014: 29–60).
Wood 2008: 94). Indeed, Sensen has suggested that Wood’s argument is too weak to establish that one has to value—or even esteem—one’self or others on Kant’s account (id. 79; cf. Wood 2008: 92). Admirably, Cornell and Friedman correctly note that the rational origin of moral maxims is fundamental to Kantian ethical thought. That said, the authors equivocate between Dworkin and Kant’s respective notions of dignity without elucidating the connection. If all that links their respective accounts of dignity is Dworkin’s adaptation of Kant, then another ground for this dignity is needed.

To summarize, Cornell and Friedman understand Dworkin’s concept of dignity in terms of Kant’s account of a regulative ideal, but they reread Dworkin as a sort of Kantian non-Kantian. When compared to the accounts of dignity given above, however, Dworkin’s notion of dignity seems much closer to the contemporary account rather than the Kantian one. In this sense, his concept of dignity seems ill-suited for the Kantian account within which Cornell and Friedman wish to frame it. Alternatively, a more coherent account of Dworkin’s theory of dignity would seek to place this foundational concept in terms of the intersubjective relations on which his two principles of dignity seem to depend. Such an account of dignity, I argue, can be found in Hegel’s ethical and political philosophy, within which Cornell and Friedman have already placed Dworkin’s theory of adjudication. In order to ascertain which aspects of Hegelian subjectivity are most salient for Dworkin’s account of dignity, I will examine the place of the ethical subject within Hegel’s normative thought. I will also focus on how Hegel understands the second-personal aspects of subjectivity to better ground Dworkin’s principles of dignity.

7 The main Kantian criticism that Cornell and Friedman inveigh against Dworkin is that he does not give adequate weight to harmonizing conflicting interests ex ante, rather than ex post (2014: 95–106). On these grounds, they seek to extend Dworkin’s thinking using Kant’s thought on our duty to do so. However, this extension does little to modify Dworkin’s notion of dignity, so an exploration of this argument is outside the scope of this chapter.
3 Hegel: subject and Sittlichkeit

In the previous section, I argued that the Kantian rereading that Cornell and Friedman apply to Dworkin’s concept of dignity fails to meet Dworkin on his own terms. Essentially, their use of Kant was at odds with Dworkin’s own use of Kant, i.e., as an interpretive heuristic for thinking through Dworkin’s concept of dignity. As shown using Sensen, Kant’s dignity is not used to justify Dworkin’s dignity metaphysically; rather, it is Kant’s moral conclusions that Dworkin uses to form his own notion of dignity. Hence, the dignity described by Dworkin depends less on Kant’s metaphysics and more on the second-personal aspects that his moral framework provides. Although their use of the Kantian regulative ideal was intended to provide a guide for Dworkin’s account of dignity within the South African constitutional context, Cornell and Friedman’s use of Kantian thought to better ground Dworkin’s dignity is less successful when measured against what Dworkin intends dignity to do for his own normative project. Still, I will argue the authors have already provided a stronger ground for Dworkin’s idea of dignity in their use of Sittlichkeit.

Earlier in their work, Cornell and Friedman argue that Hegel’s notion of Sittlichkeit can strengthen Dworkin’s theory of legal interpretation; however, they decline to extend this Hegelian reading of Dworkin to cover his principles of dignity. In this section, I will argue that Hegel’s theory of the ethical subject—a crucial component of his Sittlichkeit—can ground a notion of dignity that also captures the second-person aspects of Dworkin’s account. To do so, I will describe the Hegelian ethical subject’s capacity to deploy negativity through the will (as conscience) and its intersubjective constitution with others. These aspects, I will argue, track with the second-personal aspects that Dworkin utilizes for his account of dignity.

---

8 As will be discussed later, Cornell and Friedman claim that South African history contains a stark break between the moral order and the community; hence, the authors pursue the Kantian regulative ideal of dignity in order to defend South Africa’s constitutional protection of human dignity. Since this dissertation focuses on jurisprudence as a normative enterprise broadly, its relevance for South African constitutional law in particular will not be addressed.
3a Negativity and the Hegelian will

In this subsection, I will describe the ethical subject that Hegel lays out across the various stages of his *Elements of the Philosophy of Right* ("PhR"), in terms of the role that negativity plays within it. For this subject, this negativity most clearly resides within the will (*Wille*), which plays a key role in bridging abstract right and abstract morality in the ethical subject. Indeed, for Hegel, the will is “reason in practical activity,” and cannot be divorced from thinking (Williams 1997: 119; cf. *PhR* §5). Hence, this subsection will trace the role of negativity in Hegel’s person of abstract right and subject of morality (*Moralität*). The distinct, self-conscious use of negativity by the subjective will, I argue, grounds and facilitates the intersubjective recognition essential for ethical subjects in *Sittlichkeit*.

First, a brief primer on Hegel’s logic of negativity will be helpful. For Hegel, contradiction is found in “in all objects of all kinds, in all representations, concepts, and ideas” (§48R), which is why he posits dialectics as an essential means of philosophical investigation. In both his *Science of Logic* and *Encyclopedia Logic*, Hegel argues that the faculty of the understanding abstracts its representations from the concrete totality of reality. Using Hegel’s own example, if one were to reflect on what the most general “indeterminate” thought would be, then that thought would likely be “being” (Burbidge 2006: 38, cit. *SL* Ch. 1). However, thinking about the indeterminacy in “being” means that one is really contemplating *nothing*; hence, by simply thinking, one moves from the simple concept of “being” to what could be considered its opposite: “nothing.” But on turning one’s attention to “nothing,” that concept, too, fits the same defining characteristics as being—namely, that both are “completely indeterminate” (Burbidge 2006: 38). Surprisingly, then, “being” and its opposite, “nothing,” seem to be identical, which indicates that something has gone wrong and that a new ground or explanation is needed to resolve this paradox (*id.*). In
reflecting on these terms, thought has “passed over” from one term to the other, a movement that is itself an activity of thought in need of identification (*id.* 39, *cf. SL* 59–60). For Hegel, the term in ordinary language that captures this movement is “becoming,” which further reflection yields the movements of “passing away” from “being” to “nothing” and of “coming to be” from “nothing” into “being” (*id.*). Crucially for Hegel, it is *thought* that brings together these distinct movements of “passing away” and “coming to be” into a synthesis, a circle of self-perpetuation that collapses into a single, unitary thought (*id.*). The single unitary thought that results from this circular movement is the concept of “determinate being,” or simply, “existence” (*Dasein*).

In his technical philosophical language, Hegel describes these above-described movements as “moments” of thought—an initial abstraction by the understanding (in the example above, “being”); the negation of the abstraction (“nothing”); and the resulting “sublation” (*Aufhebung*) of the two (“determinate being”). He argues that these moments of thought are “moments of *everything logically real*; i.e., of every concept or of everything true in general. All of them together can be put under the first moment, that of *the understanding*; and in this way they can be kept separate from each other, but then they are not considered in their truth” (*EL* §§79; 79R). For Hegel, the understanding (*Verstand*) is the intellectual faculty in an individual’s consciousness that makes the immediate conceptual determinations (e.g., “being”) from which the dialectic draws the germ of its opposite (e.g., “nothing”), which also aided in forming its initial determination through the understanding—this is the initial “abstraction.” Hegel thus calls the dialectic the moment of thought that allows thinking to determine the limits of the “ob-*ject*” (*Gegenstand*) as well as to point out its own defects (*id.* §41A).

---

9 As explained by the translators of my edition of the *Encyclopedia Logic*, the neologism “ob-*ject*” denotes Hegel’s use of *Gegenstand*, which refers to “the ordinary object of experience, in all its modes—the object of ‘consciousness’” (Geraets, et al., 2011: xxii). This novel term is to be contrasted with what the translators render as
In the dialectical moment, thought pushes that object to its definitional limit—that is, the opposite term—and back again, such that the next distinct moment of thought results in a new conceptual understanding, one that goes beyond a mere contradictory opposition between the two, yet still incorporates that contradiction—this is the sublation. In his more technical language, Hegel calls the dialectic “the self-sublation of these finite determinations on their own part, and the passing into their opposites” (id. §81), and further, “the genuine nature that properly belongs to the determinations of the understanding, to things, and to the finite in general” (id. §81R). So, for Hegel, the term initially abstracted by the understanding possesses an identity which consists of both its “mere” (apparent, abstracted) identity and a plethora of non-identities. Because “mere” identity essentially emerges from competing possible non-identities, the relation between identity and non-identity “stages” the possible meanings of a term, as well as how the contradiction emerges and how the sublation is accomplished in thinking. Once the contradiction has emerged, the respective “stagings” of each term condition the subsequent sublation, because the sublated third term that posits the possibilities within both terms also sublates their apparent aspects. In other words, in my reading, “staging” refers to how the non-identities of each contradictory term shape the meaning of the emergent sublated term through their respective arrangements; referring again to the example above, thought can only conceive of the sublated concept “determinate being” or “existence” (Dasein) when one has already understood the concepts of “being” and “nonbeing.”

Notably, however, the negative moment of the dialectic is not what accomplishes the sublation by itself; rather, it is a necessary precondition for achieving the sublation. Without this positive, speculative moment—the “negation of the negation”—the dialectical moment itself is

simply “object”, Objekt, which refers to “the logical concept of the object (the one-sided counterpart of the still one-sided logical ‘subject’, or ‘subjective concept’)” (id.).
simply skepticism (*id.*). Hence, Hegel describes the dialectic as “the immanent transcending, in which the one-sidedness and restrictedness of the determinations of the understanding displays itself as what it is, i.e., as their negation. That is what everything infinite is: its own sublation” (*id.*). For Hegel, then, forcing the contradiction to emerge is a key aspect of the dialectic, itself the motor of his philosophical system:

Dialectic is usually considered as an external art, which arbitrarily produces a confusion and a mere semblance of contradictions in determinate concepts, in such a way that it is this semblance, and not these determinations, that is supposed to be null and void, whereas on the contrary, what is understandable would be true. […] According to its proper determinacy however, the dialectic is the genuine nature that properly belongs to the determinations of the understanding, to things, and to the finite in general. Reflection is initially the transcending of the isolated determinacy and a relating of it, whereby it is posited in relationship but is nevertheless maintained in its isolated validity. (§81R)

The dialectic can thus be taken as the logical operationalization of negativity, in two senses. In the first, the explicitly negative moment of thought in the dialectic “sets the stage” for sublation to occur in the face of what appears to the understanding as a contradiction. In the second, the sublation itself—the “negation of the negation”—preserves the kernel of truth within each prior determination and posits them within the subsequent, sublated thought-determination. However, that kernel of truth still subsists alongside aspects of the new thought-determination that do not partake in the truth of the absolute but were nonetheless essential to the thought-determinations of those concepts. In this sense, the negativity used in the moments of negation in the dialectic to obtain the contradiction is retained after the sublation; there is therefore never a time wherein the negative is totally eliminated, for that would imply a cessation of the movement of thought, and with it, the entire Hegelian system.

With the concept of negativity now explicated, its power in the *Philosophy of Right* can be better examined. In his introduction to the text, Hegel states that the basis of right is the “realm of spirit in general”, but that “its precise location and point of departure is the will; the will is
free, so that freedom constitutes its substance and destiny [Bestimmung]” (PhR §4). For Hegel, the will’s freedom is a “basic determination,” such that “will without freedom is an empty word, just as freedom is actual only as will or subject” (id. §4A). He maintains that, insofar as one is practical or active, i.e., insofar as one acts, “I determine myself, and to determine myself means precisely to posit a difference. But these differences which I posit are nevertheless also mine, the determinations apply to me, and the ends to which I am impelled belong to me” (id.). The will can make these distinctions because it contains “the element of pure indeterminacy”; i.e., “the ‘I’s pure reflexion into itself in which every limitation and content is dissolved; this is the limitless infinity of absolute abstraction or universality, the pure thinking of oneself” (id. §5).

He explicated this subjective capacity dissolve distinctions further, claiming that:

If the will determines itself in this way, or if representational thought [die Vorstellung] considers this aspect in itself [für sich] as freedom and holds fast to it, this is negative freedom or the freedom of the understanding. – This is the freedom of the void, which is raised to the status of an actual shape and passion. (id. §5R)

The negativity of this abstract freedom entails the possibility to reject or destroy any content, i.e., that which the subject represents to themselves, which is abstracted from the world by the subject (Hofmann 2014: 258). So, the freedom of the void is a necessary aspect of the will, but cannot be its only aspect; otherwise, the will would remain one-sided and ignore particularity. Hence, Hegel argues that this negative freedom is only one aspect of the will; in keeping with the dialectical logic described earlier, the other aspect similarly uses negativity to sublate (Aufheben) the first (PhR §6R). This negation of the abstract negation involves the “I,” which Hegel calls the transition from undifferentiated indeterminacy to differentiation, determination, and the positing of a determinacy as a content and object. […] Through this positing of itself is something determinate, ‘I’ steps into existence [Dasein] in general — the absolute moment of the finitude or particularization of the ‘I’. (id. §6)
In other words, the “I” for Hegel expresses the capacity to particularize against the abstract universal, to engage in a negation of that first, abstract negation.

For Hegel, the unity of these two moments is the will, as “particularity reflected into itself and thereby restored to universality” (id. §7). He argues that this unity is individuality—“the self-determination of the ‘I’”—because it “posits itself as the negative of itself, that is, as determinate and limited” (id.); and at the same time, the will “remains with itself [bei sich], that is, in its identity with itself and universality” (id.). In this determination, Hegel argues, the will “joins together with itself alone. – ‘I’ determines itself in so far as it is the self-reference of negativity” (id.). As reference to itself, he continues, the will is “indifferent to this determinacy”, because although the will knows its determinacy, it is not restricted by it, since the determinacy was posited by it itself (id.). In this key sense, Hegel maintains that this unity is the freedom that constitutes “the concept or substantiality of the will, its gravity, just as gravity constitutes the substantiality of a body” (id.). This unity of the will is a result of the will’s ability to move from universality to particularity—and back again—in making its determinations.

Importantly, Hegel states that the moment of particularization—that is, the aforementioned transition from undifferentiated indeterminacy to differentiation and determination—marks the difference between subjectivity and objectivity; that is, the formal will marks itself out as self-consciousness, and thereby “finds” an external world outside itself (id. §8). As individuality returning indeterminacy into itself, the formal will translates “subjective end into objectivity through the mediation of activity and of a[n external] means” (id.). Hegel further claims that the determinations made by the will “are its own – that is, its internally reflected particularization in general” are its content (id. §9). It should be noted too that, for Hegel, the will is “naturally”
determined by its “drives desires, and inclinations”— even conceding that they are rational—but this multitude must be “resolved” or “decided” by the will’s positing (id. §§11–12A).

In this sense, too, the will’s finitude is in its consciousness, as it is tied to the content of its drives, but it remains formally infinite as it “stands above them” (id. §14). The freedom afforded by this determination is what Hegel calls the “arbitrary will” (Willkür) (§15), but he warns that this arbitrariness does not constitute the whole of human freedom. In a remark, he explains that confusing the arbitrary will’s ability to choose with freedom actually annihilates one’s freedom, as the content of what one wills remains determined by what is given to it (id. §15R). Because of this contradiction, he argues that the indeterminate demand for “the purification of the drives” means that they ought to be subject to “the rational system of the will’s determination”; and further, that grasping these drives in terms of the concept is the content of the science of right (id. §19). As such, Hegel argues that reflection is what evaluates the drives and the various means to achieve happiness and necessitates the “cultivation of the universality of thought” through education—which foreshadows the necessity of a community to develop consciousness and ethical life (id. §20; cf. §174). Already, there is an irreducibly social aspect to thinking.

If these aspects of the will are accepted, then Hegel seems to be saying that negativity is as essential an aspect of the will as concrete freedom within the individual. In the remark to §7, he claims that the innermost insight of speculation is to regard “infinity as self-referring negativity, [the] ultimate source of all activity, life and consciousness” (id. §7R). The will which has being in and for itself is “truly infinite” for Hegel, because its object (Gegenstand) is itself, and to which it returns (id. §22). The crucial feature of the will as the capacity to deploy negativity within but also over and against what has been determined through the understanding—and importantly for this dissertation, within the historically-specific social and political context of
ethical life—For Hegel, the will’s return to itself is not just a possibility or capacity, but “the infinite in actuality” (id.). This means further that, in the free will, the truly infinite has “actuality and presence,” as “the will itself is the idea which is present within itself” (id. §22R). Recalling his earlier claim that the will and thinking are not divorced from one another, Hegel argues that the activity of the will is in sublating (aufzuheben) the contradiction between subjectivity and objectivity, and in translating ends from subjective determinations into objective ones (id. §28).

This capacity is reflected in what Stefan Bird-Pollan has called “self-integration” in his examination of the subject in Hegel’s *Phenomenology of Spirit*: the “striving for totality is a striving that necessarily takes its departure from a material condition, which is simply the fact of materiality, embodiedness” (2014: 16–17).

Indeed, as already mentioned, the will for Hegel is the “precise location and departure point” for right in general, which includes both ethics in everyday life and justice in politico-legal contexts. The implication that follows is that the will plays a key role in how the subject determines not only itself, but also its (negative and positive) relationships with the external world, including which aspects of the social world it takes as its content. What this capacity of the will further implies, is that this capacity to deploy negativity has—and ought to be recognized as having—a central role in Hegel’s ethical subjectivity.

3b Integrating subjectivity and freedom through the will

With this understanding of the free will in mind, its role in Hegel’s normative thought can be examined more carefully. According to Hegel, the will that is “free in and for itself” remains abstract, and as such, it is the determinate condition of immediacy, rendering it as its own negative actuality (§34). This indeterminate determinacy of the will remains contentless aside

---

10 To be clear, Bird-Pollan is describing subject formation that results from the struggle for recognition between lord and bondsman (“master-slave dialectic”) in the *Phenomenology of Spirit* (2014: 9). However, the dialectical logic of subject formation in the *Philosophy of Right* retains the same form, in that the subject determines itself through its interaction with an external force—not another subject *per se*, but the external world in general.
from its own self-consciousness; for Hegel, this is the subject of abstract right, the [legal] person (§35). Notably, this personality is a completely abstract ‘I’ “in which all concrete limitation and validity are negated and invalidated” (§35R). This personality is “in general the capacity for right and constitutes the concept and the (itself abstract) basis of abstract and hence formal right” (§36). Additionally, while the particular will’s consciousness remains present as desires or drives, Hegel argues it is “not yet contained in the abstract personality as such”; it is only a determination of “permission or warrant”, since abstract right is only a possibility as compared to concrete action or moral and ethical relations” (§38). In this manner, abstract right gives very broad normative contours for the individual personality of the will: subjective against the nature before it, but “infinite and universal” within itself (§39). Personality overcomes (aufzuheben) this limitation by giving itself reality and positing that as its own; this externality is “property” (id.). So, for Hegel, personality marks out what is warranted to the self-relating abstract will in a bare normative sense: what is owed to one another when multiple wills come together in contract, or when one impermissibly harms another in committing a wrong, criminal or otherwise.

While abstract right for Hegel sets out the broad contours of permissibility for transactions between wills as personalities, morality for him concerns the will that has superseded the conflict of the universal will of being in itself and the individual will as being for itself (§104). In contrast to abstract right—which did not contain the will—in morality (Moralität), Hegel proceeds to describe how the will reflects into itself and its identity for itself, thereby determining “the person as a subject” (§105). Since the will of the subject is that of the individual “who has being for himself, at the same time exists,” Hegel claims that the subjective will allows freedom to be actualized (§106). The moral point of view, he argues, takes the shape of “the right of the subjective will […] and] can recognize something or be something only in so far as that thing is
its own, and in so far as the will is present to itself in it as subje

Still, Hegel maintains that the subjective will remains abstract and formal, because it is “immediate for itself and distinct from that which has being for itself”; it “constitutes the formal aspect of the will [in general]” as the “infinite self-determination of the will” (§108). Although the subjective will remains formal, he argues further that subjectivity is not posited as identical with the will when it first appears: rather, the moral point of view is one of “relationship, obligation, or requirement”—which is also the point of view of consciousness (id.; cf. §8).

Recall that, for Hegel, the formal aspect of the will as consciousness demarcates subjective and objective: he recites the series of negative moments whereby the will actively translates its subjective, self-given content into objective, “immediate existence” (§109; cf. §8). The initial particularization of self-positing identity of the will’s content is the first negation, which possesses a formal limitation in that it is “merely something posited and subjective” (§109). However, this limitation is also infinite reflection into itself, so it is present for the will itself, such that the will can overcome (aufzuheben) this restriction—the second negation (id.). In this manner, Hegel argues, the aforementioned opposition remains constant as the will’s “content or end”, its simple identity with itself (id.). This carries further implications within the moral point of view: freedom is present for the will in this identity of the will with itself (§110; cf. §105).

While the will retains identity within itself, its determined content contains subjectivity not just as an inner end, but also insofar “as the end has achieved external objectivity” (§110).

Further, while subjectivity is preserved in implementing one’s ends, the individual objectifies them and thus supersedes subjectivity, both in its immediacy and in its character as an individual’s subjectivity (§112). As a result, Hegel argues that “the external subjectivity which is thus identical with me is the will of others”: subjectivity is now the basis of the will’s existence,
while the will of others is now the existence that one gives their end (*id.*). Since this implementation of one’s own ends has the identity of one’s will and of the others within it, the end has “a positive reference to the will of others” (*id.*). In this sense, Hegel maintains that the concept of morality is both the will’s “inner attitude” and its involvement with “the welfare of others” (§112A). With this positive reference to the will of others, Hegel argues that the will expresses itself as “subjective or moral” in action, (§113), which entails responsibility (§117), purpose (§118), intention (§119), others’ welfare (§125), the good (§129), duty (§133), and the conscience (§136). Thus, the foundation of the intersubjectivity necessary for ethical life rests in this mutual recognition of the other’s will—with its constituent power of negativity; indeed, for Hegel, the (moral) subject can only obtain its “external freedom” in this manner.

More will be said about this mutual recognition in the next subsection. For now, tracing the will through the “relative totalities” of abstract right and morality demonstrates its particular capacity for negativity, as well as its importance for the subject of Hegel’s ethical and political life. Subjectivity, for Hegel, is “the absolute inward certainty of itself; it is that which posits particularity, and it is the determining and decisive factor—*the conscience*” (*id.* §136). He maintains that conscience is the formal aspect of the activity of the will, but it has no distinctive content of its own—this must be supplied by “the objective system of these principles and duties” present within the ethical sphere (§137). Otherwise, “as abstract self-determination and pure certainty of itself alone,” he claims that subjectivity “*evaporates* into itself all determinate aspects of right, duty, and existence [*Dasein]*” (§138). Additionally, in his remarks to §140, Hegel characterizes subjectivity as “abstract negativity” because it “knows that all determinations are subordinate to it and emanate from it” (§140R). Hence, he claims that determinations of some kind are needed for the conscience as well as the good, and he posits that
these are integrated into the “absolute identity” of pure self-certainty and abstract universality—the “concrete identity” of ethical life (§141). He elaborates further in his remarks that “the nature of the limited and the finite […] is for them to have their opposite present within them, the good its actuality, and subjectivity (the moment of the actuality of the ethical) the good” (§141R). Since each remains one-sided, they only become posited in their negativity, because they “one-sidedly constitute themselves as independent totalities” (id.). In this manner, Hegel argues, they cancel themselves out (sich aufheben) and are reduced to moments of the concept, as the ethical is a subjective disposition of right that has being in itself (id.).

In this brief overview of the Hegelian will, its power of negativity has been emphasized. Not only does it direct the various aspects of impulse and desire, prioritizing them on the basis of its particular content, but its self-reflection generates the subject in morality. The demarcation of subjective from objective applies not just to the individual, but also to the ends the individual intends. This self-referring negativity of the will is the crux of subjectivity, which Hegel holds to be a necessary condition of both morality and ethical life. For him, the realm of abstract right takes the will to be a mere personality that interacts with other persons, while morality requires a subject that can abstract itself from its circumstances. Even so, Hegel maintains that:

The sphere of right and that of morality cannot exist independently [für sich]; they must have the ethical as their support and foundation. For right lacks the moment of subjectivity, which in turn belongs solely to morality, so that neither of the two moments has an independent actuality. (§141A)

In this light, to fully comprehend how the will and its capacity for negativity might contribute to an alternative notion of dignity, it must be examined in its concrete actuality—in ethical life.

3c Hegel’s intersubjective moral community

In the previous subsections, I laid out the contours of the Hegelian subject by focusing on the role that negativity plays in constituting the willing subject. In this subsection, I will focus on
how Hegel’s ethical subject is *intersubjective* when considered in terms of *Sittlichkeit*, and how this intersubjectivity subtends the sociality of ethical life as recognition. Although recognition is not explicitly emphasized in the *Philosophy of Right*, this dissertation will follow Robert Williams’ argument that intersubjectivity subtends all of Hegel’s normative thought. Williams describes this practical intersubjectivity in terms of Hegel’s theory of recognition, which I will lay out as it relates to the will and its capacity for deploying negativity. Additionally, Hegel’s early concept of “releasement” or “letting-be” (*Freigabe*) will be used to think through how such intersubjective ethical subjects ought to live together and respect each other’s freedom. This exploration of *Freigabe* will not only clarify the character of Hegelian ethical intersubjectivity in *Sittlichkeit*, but it will inform how Dworkin’s theory of the interpretive legal community can be read as *Sittlichkeit* in the next section.

A quick overview of recognition—and Williams’ use of it—will be useful for this subsection. In *The Phenomenology of Spirit* (“PhS”), Hegel argued that self-consciousness requires another self-consciousness—one that is outside the first, so that it has “found [itself] as an other essence” and sublated it in a “doubling of self-consciousness” (*PhS* §§175, 179). This doubling allows the self-consciousness to become certain of itself, as well as to sublate itself for that other (*id.* §180). In its reversibility, one self-consciousness returns into itself, whilst the other self-consciousness does the same, as the other is just as self-sufficient (*id.* §§181–82). Hegel calls this movement between two self-consciousnesses the “pure concept of recognition, the pure concept of the doubling of self-consciousness in its unity,” where each mediates the other whilst mediating and integrating itself with itself—each recognizes themselves mutually recognizing each other (*id.* §§184–85). He fleshes this concept out further in terms of the misrecognition that occurs when an individual’s (*Individuum*) self-sufficiency is challenged in encountering another individual,
thereby prompting the “struggle for recognition” (*id.* §§186–88). What emerges from this struggle is a consciousness existing for itself in the “master,” which is mediated through the consciousness of the “servant,” as existing for another (*id.* §§ 190–92). Although the master initially has the dominant position, Hegel argues that the servant—through the work delegated to it by the master—is able to come to self-consciousness, and thereby achieve self-sufficiency (*id.* §§ 192–95). A more constructive account of recognition is later provided in Volume III of Hegel’s *Encyclopedia of Philosophical Sciences*—the *Philosophy of Mind* (“PhM”)—emphasizing the affirmative relationships that reciprocal recognition can ground (Williams 1997: 69). In this later text, the purposive activity of the individual will is to realize its concept—which, he maintains, is freedom—in the externally objective realm; when shaped into the actuality of a world, freedom becomes a form of necessity, and its validity in consciousness is freedom (*PhM* §484). Social reality is therefore the embodiment of free will (*id.* §486); as Williams puts it, “mutual recognition is the medium of liberation from coercion and domination, and as such it results in a universal social consciousness, or We, that is central to objective *Geist* and ethical life (*Sittlichkeit*)” (1997: 69–70).

Broadly, Williams claims that “recognition” is “a general concept of intersubjectivity,” wider than its popular understanding of master and servant (*id.* 10). More specifically, he argues that, after Fichte, practical subjectivity in German idealism is intersubjective because recognition “mediates the affirmative consciousness of freedom,” and thereby plays a crucial role in forming the ethical sphere, which includes ethical life (*id.* 2). This mediation decenters the modern concept of the subject propagated by Descartes and Kant, “transforming and expanding it” into an *ethical* intersubjectivity (*id.* 2–3). Within Hegel’s theory of ethical life, three levels of recognition operate: between individuals; between individuals and institutions; and between
individuals and the state (id. 3). Due to these interrelations, Williams emphasizes that “the themes of ‘freedom,’ ‘recognition,’ and ‘ethics’ are for Hegel not separable but inextricably intertwined; freedom presupposes and requires recognition. Recognition is the process wherein and whereby freedom becomes both actual and ethical” (id. 6). He thus reads the Philosophy of Right as providing a phenomenological-empirical investigation of the concept of freedom as “intersubjectivity and/or community” (id. 9). Importantly for this dissertation, such recognition is “the ideal unity of the social organism that is expressed in and as the spirit of its laws […] an account of how communal spirit is for itself as a ‘We’” (id.); it is “the intersubjective existential configuration, the actuality, in which the concept (Begriff) of freedom appears” (id. 24, cit. PhM §484). In this sense, Hegel’s recognition is not only constitutive of intimate personal relations, but also “the central structural feature of the idea of the state as an ethical community” (id. 25).

With a working definition of recognition, the next key concept—Freigabe—can be explored. Although this term does not appear in the Philosophy of Right, Williams builds on Ludwig Siep’s analysis of Hegel’s early concept of freedom, wherein he identifies four main aspects: autonomy (Autonomie), union (Vereinigung), self-overcoming (Selbstüberwindung), and release (Freigabe) (id. 80, cit. Siep 1992: 159–71). Since Siep does not explicitly link these features with recognition, Williams argues that his analysis both presupposes and implies that Hegel’s freedom is intersubjectively mediated through recognition (id.). In his own text, Williams links each of these features with Hegel’s discussion of recognition in his Encyclopedia. Of these, the most important for this dissertation’s purposes is the explication of Freigabe, described as “the renunciation of attempts to dominate and control the other” whilst also signifying “allowing the other to be, being open to the other, and affirming the other as she determines herself to be” (id. 84). Freigabe corresponds to the final moment of recognition in the Phenomenology, “through
which *Geist* is constituted as the I that is a We” *(id.)*. Importantly, *Freigabe* makes it clear that “the ‘We’ Hegel is after is a community of freedom that does not absorb or reduce individuals to some homogeneity but rather presupposes, requires, and accepts individuals in their differences” *(id.)*. In other words, *Freigabe* is “the cognition of otherness of the other, the difference of difference” that is the “external” manifestation and expression of individual self-overcoming *(id.).*

Recalling Hegel’s claim that right is “any determinate existence in which the free will is present,” Williams clarifies that a free will—even a self-consciously free one—remains only subjectively so unless it is acknowledged by other wills *(id. 116; cf. PhR §29).* In fact, he argues, Hegel’s account of the will across both abstract right and morality necessarily depends on *some* such recognition, whether in terms of property ownership or interpersonal relations. Whatever methodological individualism that Hegel displays across the first two parts of the *Philosophy of Right*, he claims, results from the abstractive method that Hegel uses to draw out their features and limitations. As Williams explains, the concept of recognition “transforms the apparently individual subject of part 1 into an ethical intersubjectivity; the latter is a presupposition and condition of the methodological individualism” *(id. 199).* This reading is well-supported by Hegel’s stipulation that the normative spheres described in Parts 1 and 2 require the ethical relationship described in Part 3 as their foundation *(PhR §141A).* As Williams argues, the threshold of the ethical for Hegel is reached “when the other comes to count. In the process of recognition, the I becomes a We. The We is the whole or totality that is nonheteronomous because its unity is qualified by *Freigabe*, that is, releasement and affirmation of difference and otherness” *(1997: 199).*
Williams argues further that, in ethical life, the other “counts” on at least two levels of recognition: 1) as a particular, in the “shapes and institutions in which we first experience the nonheteronomous priority of the whole over the part”; and 2) as a universal, a social institution such as civil society and state, including constitution and laws (id. 199). He clarifies these relations by distinguishing between two modalities of freedom in Hegel’s *Sittlichkeit*: ethical substance and ethical freedom. *Ethical substance* designates the objective determinations and conditions of freedom through institutions such as the family, civil society, and the state; *ethical freedom* is subjective freedom, including both *Wille* and *Willkür* (id. 200). The modalities depend on each other: the institutions of ethical substance remain abstract and potential without ethical freedom; and the latter remain merely formal and arbitrary without the former’s institutions, as evinced in Parts 1 and 2 of the *Philosophy of Right* (id. 200–1). For Hegel, subjective freedom requires ethical substance for its content and ends, and ethical substance requires subjective freedom for its realization (id. 201). Hence, the state is “the actuality of concrete freedom,” which requires that:

personal individuality [*Einzelheit*] and its particular interests should reach their full development and gain recognition of their right for itself (within the system of the family and of civil society), and also that they should, on the one hand, pass over of their own accord into the interest of the universal, and on the other, knowingly and willingly acknowledge this universal interest even as their own substantial spirit, and actively pursue it as their ultimate end. The effect of this is that the universal does not attain validity or fulfilment without the interest, knowledge, and volition of the particular, and that individuals do not live as private persons merely for these particular interests without at the same time directing their will to a universal end [*in und für das Allgemeine wollen*] and acting in conscious awareness of this end. The principle of modern states has enormous strength and depth because it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity, while at the same time bringing it back to substantial unity and so preserving this unity in the principle of subjectivity itself. (*PhR* § 260)

Against a too-hasty reading of Hegel as a kind of proto-totalitarian, his early notion of *Freigabe* presents him as a kind of classical republican—concerned with preserving freedom as non-
domination. Indeed, for the mature Hegel, “the will remains free in its determinations precisely because they are its own. There is no contradiction between freedom and determinacy [...] Hegel conceives the will as a totality of negative and affirmative tendencies” (id. 127). Recalling §7 of the *Philosophy of Right*, Williams argues that the will’s being at home in its determination makes the transition to the level of interhuman relations possible: there is no inherent conflict between freedom and determination, so there is no inherent conflict between freedom and relation (id.).

As a speculative relationship, mutual recognition allows the self “to get itself back” in the recognition of the other, because each is a member of the reciprocally constituted universal and remains free in relation (id. 127–28). For Hegel, the structure of freedom is to be in a restriction without restrictions, such that the will is an intersubjective totality—freedom requires community (id. 128). In this sense, Williams emphasizes that Hegel’s account of the will’s freedom is non-negating (unnegierend) (id). This is significant for the reading of reciprocal recognition that Williams has so far sketched out: it corresponds to the final phase(s) of mutual recognition, that is: “union with (*Vereinigung*) and release (*Freigabe*) of the other, allowing the other to be, wherein the self returns to itself out of and through the other” (id. 129).

A crucial question remains, however: what about the subject itself must be recognized in Hegel’s theory of ethical life? That is, if mutual recognition demands the fourfold structure of autonomy, union, self-overcoming, and *Freigabe*, which aspect(s) of the ethical subject are unified and released such that the necessary relations of recognition can occur in *Sittlichkeit*?

Following §112 of the *Philosophy of Right*, I suggest that the distinctive determinate content that

---

11 It should be noted that Williams argues that the early understanding of recognition that Hegel provides is carried through to his mature work via the *Science of Logic* (id. 129). In this sense, while the emphases and terminology may shift, the general concept of non-reductive union remains present in Hegel’s understanding of the concrete universal—which, in the *Philosophy of Right*, is *Sittlichkeit*. 

93
each individual subject utilizes to construct their selves—and thus, their way of engaging with
the external world as actualized in their community—is at the core of this ethical subject. Since
the will determines which content consists in its subjectivity and are properly its own—i.e., by
demarcating subjective and objective—it holds a distinct role in Hegel’s normative thought.
Within morality, the culmination of the will is the conscience, albeit one that remains at the
abstract and one-sided level—even to the extent that it can lead to its own dissolution in pursuit
of its solely particular ends (§§137–40). While Hegel certainly recognizes this negative power as
creating the possibility for evil action, the conscience also possesses the positive power to
develop and recreate anew the “substantial content of freedom and ethical life” through action
the universal determinations and conditions of freedom constitutive of ethical life” (id. 204).
While Hegel maintains that action is always particular, it nonetheless has a universal aspect due
to its location in the “social, reciprocally mediated, determinate universality” of Sittlichkeit (id.).

Hence, for Hegel, the negative power of the will (as conscience) allows “the evaporation of
right and duty in subjectivity,” but demands some “abstract foundation” that must be explicated
in terms of objective, universal determinations if it is not to be considered evil (§138).

12 This part of my argument is indebted to Remy Debes’ contention that respecting the “peculiar perspective” that
each person possesses consists in recognizing their dignity (2018). Debes articulates his idea of “perspective” as
“experiences that mean something” to a specific subject, as distinct from the content of their beliefs (id. 65–66). For
the purposes of this dissertation, I claim that the Hegelian will is the faculty of human cognition that integrates a
specific subject’s experiences—and the meanings that the specific subject gives to those experiences—into their
perspective as an ongoing, dynamic process of interacting in and engaging with the world (id. 68). Following Debes’
claim that obtaining a sufficiently “holistic” understanding of a specific person requires dynamic, dialogic
engagement with the person—which includes giving the person the opportunity to endorse or veto certain
interpretations of their experiences—I will argue that consulting the phenomenological attestations of a specific
legal subject’s lived experience is necessary for adjudication in service of justice beyond legal process (id. 74–75).
So, drawing from Debes’ (2017b) argument that legitimate empathic judgments recognize an agent’s affective
dignity, I will claim that a “just” legal decision must recognize the dignity of the legal subject, not as solely rational
(or willing or affective) but as a member of the legal community who is subjectivized by the community’s norms,
institutions, and distributions of resources—that is, made into a unique subject with a peculiar perspective—as
attested to by the legal subject.
Determinations of the subjective will are thus never wholly private: posited distinctions “give the ethical a fixed content which is necessary for itself, and whose existence [Bestehen] is exalted above subjective opinions and preferences: they are laws and institutions which have being in and for themselves” (§144). Williams clarifies further that ethical life “embodies the reciprocal correlation between rights and duties such that these coincide in each member” (1997: 207). As Hegel states: “duty and right coincide in this identity of the universal and the particular will, and in the ethical realm, a human being has rights in so far as he has duties, and duties in so far as he has rights” (§155, emphasis added). In keeping with the notion of Freigabe described earlier, the rights of another correspond to one’s duties, such that these duties relate to something ethically substantial within Sittlichkeit. What this relation seems to imply, then, is an intersubjective recognition of this negative power of the subjective will to impact the determinations of itself and the community.

In this section, I have argued that the Hegelian will possesses a unique capacity to deploy negativity in both its capacity to self-integrate as well as to posit new determinations. Given its relationship to subjectivity, the determinations that it can affect, and the impact that it can have on intersubjective rights and duties within Sittlichkeit, the will is an essential aspect of the ethical and legal subject in Hegel’s normative thought. What this means for Dworkin’s theory of dignity, and the possibility of a Hegelian account of dignity, will be explored in the next section.

4 Dworkin’s (Hegelian) dignity as the intersubjective recognition of negativity

So far in this chapter, I have argued that 1) despite the case made by Cornell and Friedman, Dworkin’s notion of dignity borrows less from Kant than it does from a contemporary second-personal account; 2) the Hegelian ethical subject, via the will, deploys negativity both by making a distinctive self, but also through its intersubjective relationships with others; and 3) that
Hegel’s notion of ethical life demands that subjects mutually recognize and respect these capacities in other members of that community. In this section, I will show that the congruence between Dworkin’s interpretive legal community and Hegel’s ethical community justifies reading the former’s notion of dignity in the Hegelian terms sketched out in the previous sections. Extending Cornell and Friedman’s Hegelian reading of Dworkin in the previous chapter, I will read his two principles of dignity in Hegelian terms, to demonstrate that this rereading better supports his second-person account of dignity than the Kantian account proffered by Cornell and Friedman.

In the preceding chapter, I laid out Cornell and Friedman’s recasting of Dworkin’s legal community of principle in terms of Hegelian Sittlichkeit. While the authors found that Hegel’s theory improved Dworkin’s account of law as integrity, they argued that the idealized “we” necessary for Sittlichkeit is impossible for a country such as South Africa, where a decisive break with past norms occurred with the promulgation of the current constitution. Because of this break, the authors seek to find an alternative grounding of the “we” for the South African context, using the constitutional protection of human dignity to do so. As stated earlier, Cornell and Friedman argue that Dworkin’s emphasis on adjudicative integrity ultimately gives way to a (Kantian transcendental) notion of dignity in his later normative work. As argued, however, the account of dignity that Dworkin ultimately endorses is less beholden to Kantian critical idealism, than to the second-personal, intersubjective relations that ground Hegel’s normative thought. Indeed, in light of the support that Cornell and Friedman have given for reading Dworkin’s theory of adjudication in terms of Hegel’s Sittlichkeit—and particularly their endorsement of Hegel’s emphasis on reciprocal relations of recognition—the best reading of Dworkin’s theory of dignity is in terms of Hegel’s theory of the will in ethical life.
A key piece of evidence for this rereading is Dworkin’s stated intention to integrate ethics with morality, in keeping with his “unity of value” thesis discussed in the previous chapter. Like Hegel, Dworkin understands morality and ethics to refer to distinct normative regimes that are ultimately capable of being integrated in civil society, or what Dworkin earlier called the “community of principle.” The unity of value thesis shows that Dworkin seems to be conceiving of the difference between the two regimes in roughly the same manner as Hegel’s distinction between Moralität and Sittlichkeit, while also intending that the former be fulfilled in terms of the latter. For Dworkin, ethics is “the study of how to live well,” of the “the responsibility to make something of value of our own lives”; in contrast, morality is “the study of how we must treat other people” (2011: 13). As discussed above, Hegel’s Moralität conceives of the subjective will in an abstract, formal sense, which lays the groundwork for the ethical subject in Sittlichkeit; that is defined by its concrete relations with others. For Hegel, it is ethical subjectivity that integrates the “relative totalities” of abstract right and morality, while Dworkin integrates his own domains of morality and ethics through his conception of dignity, claiming that “we are drawn to morality in the way we are drawn to other dimensions of self-respect” (id. 14). The process of such integration entails, as much of Dworkin’s work does, an interpretive integration of the two domains (id.). In this subsection, I will argue that the space that Dworkin lays out through his account of dignity is comprehended by Hegel’s account of the will as contextualized within Sittlichkeit.

Recalling from earlier, Dworkin posits and defends two principles of dignity:

---

13 It bears repeating here that Dworkin classifies “law” as a branch of morality, so he does not follow Hegel’s tripartite scheme of abstract right, morality, and ethical life. Still, I will argue that Hegel’s insights on ethical life can aid in further concretizing Dworkin’s notion of dignity because both philosophers conceive of “ethicality” as a space of integrated communal life that gives concrete content to more abstract normative ideas and concepts. Indeed, if Dworkin conceives of justice as in some way “distributive,” it behooves his theory to think of dignity in material, interrelational terms—or so I am arguing in this dissertation.
1) **Kant’s principle:** a person “can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms”; and

2) **The principle of accountability:** “the other side of self-respect. Because you take yourself seriously, you judge that living well means expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstance” (*id.* 209).

For Dworkin, dignity is an indispensable condition of living well (*id.* 13). Admittedly, Dworkin uses language that attributes it to one’s standing, as bestowing some sort of rank or the self-assurance of such social position (*id.* 14). However, I do not take this statement to support the claim that dignity is reducible to social rank or esteemed right in the sense of either Cicero or even Kant; rather, because he understands moral values as integrated with—rather than simply incorporated in—ethical responsibility, it admits the need for intersubjective recognition to support this value (*id.* 202–3).

In this sense, Dworkin does not understand dignity to be epiphenomenal to human freedom, as Sensen shows that Kant did, but to be a fundamental value in itself that is necessary for living a good life. Dworkin maintains that “living well” means “striving to create a good life, but only subject to certain constraints essential to human dignity” (*id.* 195). This understanding of human dignity is not purely subjective; rather, like Hegel’s intersubjective account of mutual recognition in ethical life, dignity is mediated through one’s obligations to others as well as others’ obligations to them in civil society. Indeed, in a strikingly Hegelian move, Dworkin uses his principles of dignity “to help identify the content of morality: acts are wrong if they insult the

---

14 Hegel’s concept of “honor” in one’s estate [*Stand*] is a helpful comparison: in Hegel’s thought, these systems possess “corresponding means, varieties of work, modes of satisfaction, and theoretical and practical education” into which individuals are assigned but are not restricted to based on birth (*PhR* §199–207). For Hegel, one achieves actuality by entering into existence (*Dasein*) by achieving “the honor of one’s estate” through self-determination—that is, by making oneself “a member of one of the moments of civil society through his activity, diligence, and skill” (*id.* § 207). In a similar manner, I argue that Dworkin’s concept of dignity refers to these social-institutional relations rather than an abstract moral worthiness. Again, this reading goes against Dworkin’s explicit references to Kantian dignity and his language of standing, but as I argue above, the content and character of Dworkin’s account as he describes it musters in a more Hegelian direction.
dignity of others” (id. 204, emphasis added). Additionally, he uses dignity as “an organizing idea because it facilitates our interpretive project to collect widely shared ethical principles under one portmanteau description” (id. 205).

Taking these principles one at a time, in order, Dworkin maintains that dignity has a connection to morality (id.). Cornell and Friedman take this position as an invitation to ground his account in Kant, but Dworkin does not understand his first principle of dignity to be a moral claim itself; for him, it “describes an attitude that people should have toward their own lives: they should think it important that they live well” (id.). Although this principle is described in terms of self-respect, Dworkin intends it to be the ethical equivalent of the moral principle that asserts the equal worth of human lives (id.). He rejects the claim of an intrinsic, objective value of human being, citing its lack of clarity; in contrast, he explicates this first principle in terms of Stephen Darwall’s notion of recognition respect—i.e., “the respect we must show people just out of recognition of their status as people”—to characterize the self-respect that dignity demands (id. 205–6; cf. Darwall 1977). While this language seems to recycle the Kantian conception of dignity as recognizing the “intrinsic value” of human being, Dworkin goes on to describe this self-respect in terms of accomplishments and activities that have objective, rather than merely subjective, importance (id. 206–8). He further claims that this first principle entails a parallel respect for the lives of all other human beings (id. 255–60). In sum, this principle of self-respect seems to decenter the subject itself as the ground of respect for others, shifting it instead to the intersubjective recognition of the subject’s ethical will as mediated through and within external relations—a stark difference from the Kantian grounding of dignity in one’s subjective, rational autonomy.15

15 In this regard, Dworkin’s account appears ready to pick up the metaethical gauntlet thrown by dignity as described by Debes (2009). Although Dworkin provocatively claims that all metaethical claims are reducible to substantive
Given Dworkin’s explication, this first principle of dignity also recalls Hegel’s arguments regarding the will in *Moralität*, wherein the subjective will is externalized through its determinations and establishes identity with the will of others (*PhR* §112). Recalling that determinations of the subjective will are never wholly private for Hegel, the distinctions posited by the community give a fixed content to the norms within ethical life, rendering its content actual. Indeed, as Hegel emphasizes, the will asserts itself not only in prioritizing and directing the drives, but in the very self-integration of the subject in demarcating the subjective from the objective (§§8, 108–9). For Dworkin, recognizing this capacity for self-making entails recognizing—and respecting—this same capacity in others. Similarly, the *Freigabe* that Williams emphasizes in Hegel’s theory of recognition is congruent with this respect for others that Dworkin argues is corollary from self-regard. In this manner, as Cornell and Friedman argued in the previous subsection, the ethical reality of *Sittlichkeit* bolsters Dworkin’s arguments that the principles held by the legal community are actualized by the social practices of its citizens. Further, due to the intersubjective constitution of *Sittlichkeit*, this principle can be further analogized to Hegel’s argument (via Williams’ explication) that ethical substance—i.e., the objective determinations and conditions of freedom—determines the content and ends to ethical subjects’ freedom.

Such ethical freedom is a central concern of Dworkin’s second principle of authenticity, the “other side of self-respect” (2011: 209). For Dworkin, this means seeking “a way to live that grips you as right for you and your circumstances,” not necessarily a commitment to a single normative claims (2011: 25–28, 67; see also Kalderon 2013 for a critical examination as well as Dworkin’s 2013 reply), the common starting point for both Dworkin and Debes is that of Darwall’s recognition respect. According to Debes, if persons have dignity, then its recognition respect would entail “deliberating in a way that is vigilant about irreplacibility. It antecedently rules out choices that would risk harm to or destruction of persons and it favors choices that avoid such risks (whatever that harm or destruction is substantively said to consist in)” (2009: 67).
overriding ambition, but “to what we call character, or what Nietzsche called a ‘style’: a way of being you find suited to your situation, not one drawn mindlessly from convention or the expectations or demands of others” (id. 209–10). What is crucial on Dworkin’s account, is not that one lives differently from others, but “that you live in response to, rather than against the grain of, your situation and the values you find appropriate” (id. 210). To be clear, Dworkin does not valorize rebellion for its own sake, as he argues for “a personal sense of character and commitment to standards and ideals out of which we act. It requires that we recognize some acts as self-betrayal” (id.). Authenticity includes “being responsible” in both a virtue sense of acting with responsibility, as well as a relational sense of accepting responsibility for one’s actions: “I do not treat an act as my own, as issuing from my personality and character, unless I regard myself as judgmentally responsible for it” (id.). The other aspect of Dworkin’s authenticity is ethical independence: while we cannot escape others’ influence on our decision-making, he argues that “so far as decisions are to be made about the best use to which a person’s life should be put, these must be made by the person whose life it is” (id. 212). Dworkin maintains there is an objective importance to such authenticity, that “we must seek the right values for our lives, the right narrative, not just any narrative […] We seek coherence in imposing a narrative on a life, but a coherence endorsed by judgment, not just a coin flip” (id. 213). Authenticity for Dworkin therefore requires a conscious accounting of how one wishes to conduct oneself in life, as a member of one’s community.

These descriptions of Dworkin’s concept of authenticity echo two aspects of Hegel’s description of the role of the will in ethical life that I mentioned above: specifically, the negative power of the will (as conscience) to dissolve the distinctions between right and duty, and their concrete determinations in ethical life within and against which the subject can direct this power.
For Hegel, the ethical freedom that one has depends on the concrete determinations of ethical life in its social organizations and political institutions, in addition to the self-determinations that the will makes for itself as the subjective conscience. The institutional ethical substance of *Sittlichkeit* requires the intersubjective freedom of the community’s subjects to be actualized. As stated earlier, for Hegel, these mutual relations of recognition concretize the principles that Dworkin claims are promulgated in laws and constitutions, and that are used to adjudicate hard cases. These relations of reciprocal recognition have actualized right within the community, and also provide the grain with or against which the subject acts, according to both Hegel and Dworkin. As Dworkin explains further, the second principle of dignity also “limits the acceptable range of collective decision,” which he uses to defend his conception of liberal rights (2011: 371). While Dworkin emphasizes these liberal rights due to his commitment to political liberalism, Hegel understands the ethical subject to be constituted between right and duty, mediated through the (inter)subjective relations of recognition that constitute ethical life. Although not emphasized by Hegel within the *Philosophy of Right*, the aspect of letting-be within mutual recognition—*Freigabe*—can likely be used to theorize more robust duties to respect these rights.

To summarize, reading Dworkin’s theory of adjudication as *Sittlichkeit* into his two principles of dignity entails recognizing the negative power of the will (as conscience) within the ethical subject. Using Hegel’s account of the relation between will and recognition in his normative theory, Dworkin’s account of dignity can be understood as receiving its content from the ethical substance of *Sittlichkeit*, embedded within the historically-specific institutions of ethical life, whether explicitly named as such or not—while its form is contained within the ethical freedom exercised by the will itself. Although Dworkin does not utilize Hegelian thought
in either his legal theory or larger normative, Cornell and Friedman convincingly re-situate his notion of the legal community—and thus his theory of legal interpretivism—within Hegelian Sittlichkeit to better ground the power of his legal interpretivism. Here, I have built on their insight by also situating Dworkin’s account of human dignity in Sittlichkeit to better concretize its demands.

5 Conclusion

In this chapter, I have argued that the two principles of dignity advocated by Dworkin fit better within a Hegelian framework. In contrast to the Kantian reading of dignity proposed by Cornell and Friedman, Dworkin’s principles correspond to Hegel’s account of the will as conscience. Hegel understands the will and its power to deploy negativity as essential not only to the broad normative space of abstract right and morality, but to the concrete form of ethical life necessary to contextualize subjective action through the actualized right of Sittlichkeit. Building from Williams’ explication of Hegel’s ethics of recognition, the intersubjective relations of reciprocity that constitute Hegel’s ethical life also render the normative determinations of the community into actualized principles. Following Cornell and Friedman’s rereading of Dworkin’s theory of adjudication within Sittlichkeit, I have argued that the principles that Dworkin relies upon for his account of dignity are likewise actualized within the legal community.

So much the better for Dworkin’s understanding of dignity—but what does this mean for a Hegelian account of dignity? If there were to be something like a Hegelian notion of dignity, this chapter argues that such a legal or ethical concept would have to be carved out from the determinations that are already made within the particular ethical or legal community itself. Like Kant, Hegel does not conceive of dignity as a fundamental value that grounds either subjects or their value; however, he aims to improve upon Kant through emphasizing that the subject and its
conditions for ethical action can never exist outside its socio-political context. Hence, situating the ethical subject in *Sittlichkeit* means a Hegelian notion of dignity would ultimately have to be drawn from the concrete, intersubjective relations of recognition that undergird that legal and ethical community. Ethical subjectivity for Hegel is agency that unifies subjective and objective, indeterminacy and determinacy, right and duty in engaged activity within the community. Hence, Hegel recognizes the power of the will—particularly its negativity—as an essential capacity for navigating ethical life. If there were to be a place for human dignity in Hegel’s thought, it would surely reside in this power of the willing, embodied subject of ethical life, a power whose achievement can only be made possible by and realized through the kinds of relations the subject of *Sittlichkeit* can build with others and with(in) the institutions that structure the subject’s life.\(^\text{16}\) In Dworkin’s terms, the Hegelian ethical subject is constantly engaged in interpreting itself and its world through its actions within it.

What this implies further is that any imputation of a particular value to a Hegelian normative theory must also take account of the intersubjective aspects that concretize these values. For Hegel, the fact that the constitutional nation-state exists is not pre-ordained: what has arisen is the result of processes that can be rationally understood. Of course, Hegel is not giving a recipe for a successful-nation state: surely there are failures of recognition. But following Hegel’s logic means that subjects always have the power to re-articulate what these norms of ethical life are, such that they are re-articulable. This is not the story of History progressively marching toward utopia; rather, it is the understanding that what occurs is comprehensible, and therefore, re-interpretable. This is what Dworkin contributes to Hegel: an emphasis on that interpretive power—broadly understood as a way of negotiating between and amongst various

\(^{16}\) I am grateful to Mike Monahan for pressing me to clarify in greater detail how ethical life enables the willing ethical subject to accomplish its ends.
determinations—within intersubjectively-constituted subjects. For Dworkin, like Hegel, recognizes that the community is the objective determination of value for that community, and is therefore the ultimate source for the normative principles utilized in adjudication and the valuation of a life well-lived. In the next chapter, I will examine two criticisms of this proposed social and legal ontology, using critiques that attack two of its key concepts—community and recognition. I will argue, however, that these criticisms ultimately possess the conceptual resources that can deepen its normative project.
Chapter III

Two Challenges to Dignity: The Impossibility of Community or Recognition?

How are we not alone when we are neither before the gods nor within the bosom of the community? That is what we have to learn, through a community without communion, and a face-to-face encounter with no divine countenance.

—Jean-Luc Nancy, The Inoperative Community

1 Introduction

In the previous chapters, I have made the case that there is a shared ontological commitment in the legal and political thought of Dworkin and Hegel: that a single social—and thus political and legal—ontology must not only be presumed when adjudicating legal disputes, but actively referred to as (the ultimate) site and source of legal norms. While legal positivists utilize various theses regarding social facts and sources to further their accounts of legality, I maintain with Dworkin and Hegel that sociality is less a repository of descriptive normative states, than it is a politically defined space within which values and norms are constantly articulated, contested, and enacted by citizens. In such a social ontology, any conception of the legal community and its norms—legal or otherwise—will necessarily be interpretations by the legal decision-maker, and therefore subject to scrutiny in the field of contestation. Such interpretations do not (and cannot) exist in void; as Hegel has shown, our intersubjectively-constituted sociality both forms and informs our specific norms, customs, and practices, including the rights, duties, and powers that every subject within the legal community is taken to possess. Since legal authorities cite (presumptively) shared social and political values when rendering their decisions and articulating their reasons for those decisions, the very notion of what is “held in common,” such that it would
ground and justify any given legal judgment, is always fundamentally contestable. And certainly, the account that I am providing does not—and does not claim to—escape this same scrutiny.

Likewise, the account of dignity that I have defended as intersubjectively embedded within this social(-political-legal) ontology is itself subject to contestation only in terms of its specific contours. If sociality depends on the embodied intersubjective relations and norms that citizens’ practices generate, then the recognition afforded to their capacity to freely exercise and enjoy their rights by other citizens or the state as a member of a community—that is, their dignity—can be understood as “the collectively self-designated allowances for and limitations placed on the exercise of their embodied, legally-guaranteed capacities.” In this crucial sense, a legal subject’s intersubjectively-recognized dignity shares in the embodied precarity and vulnerability of the legal subject. The degree to which a legal community (mis)recognizes this dignity is measured by the actual capacity of a specific individual or collective to exercise their rights; and more specifically, the degree to which that exercise is facilitated or impeded by state or private actions. While this account of dignity seems less robust or normatively salient than other accounts due to its location in intersubjective relations as opposed to some transcendental realm, I contend that my account actually strengthens the legal concept of dignity because it indexes the legal recognition of rights to the intersubjective recognition that undergirds legal accounts. Further, this account of dignity is directly tied to the social basis of normativity as understood through both Dworkin and Hegel. What matters, then, is not a conceptual or criterial understanding of “what counts” as possessing dignity. Instead, what matters is that dignity always and already obtains when one is a member of a community, and its recognition (or lack thereof) in specific persons or groups by the community is reflected in its social practices—and most explicitly, through the rights its legal system protects or leaves vulnerable to other forces in society. Later
chapters will demonstrate how lived experiences of these intersubjective social practices of (mis)recognized dignity can enrich legal interpretation through reference to the lived bodies of legal subjects.

Before making that stronger case, the account of embodied dignity that I have argued for raises two challenges that contest the possibility of such recognition; in this chapter, I will address fundamental challenges to two key concepts of my account so far: ontology and community. Specifically, I will consider Jean-Luc Nancy’s critique of “community” as used within canonical European social and political philosophy, and Frantz Fanon’s critique of “recognition” as it was understood within the colonized society of French Martinique. Importantly for the argument of this dissertation, both critiques attack the notion of a “totalizing totality”—whether of being, in the case of colonial ontology, or of society, in the case of community—that claims to encompass and exhaust all possibilities of existence or sociality. Both authors argue that the grounding relations of sociality are ontologically “open” in a way that resists totalization or completeness by rejecting the fixity of categories of social meaning, which allows for a more dynamic understanding of what it means to live together. From each of these critiques, I will draw important insights for the ontological sociality that undergirds the constructive theory of legal interpretation that I propose to center Dworkin’s dignity. I will argue that Nancy opens the possibility of thinking community not in terms of a pre-given communal “essence,” but as the fundamental ontological relations between subjects as singular, embodied beings living plurally, an account which I claim preserves a crucial element of dignity. Similarly, I will argue that Fanon opens the possibility of reading embodied sociality as a phenomenologically rich site of facts and values without it being reducible to either. This latter
insight will be developed further in the following chapter, in dialogue with the carnal hermeneutics of Paul Ricœur.

2 Nancy’s critique of community: neither artefact nor project

In this section, I will present Nancy’s critique of the notion of “community,” as it has been most often deployed in Western political thought. Although I am not attempting to subsume Nancy under a Hegelian ontology, or vice versa, I am nonetheless focused on how Nancy conceives of how the ontological bears upon sociality—that is, as a fundamental ethical relation that entails a certain responsibility for others that also constitutes the grounds for this responsibility to be acted upon in social life. In other words, it is not my intention to do violence to the spirit of Nancy’s thought: rather, I am using his critique of community and his subsequent reconsideration of what fundamental ontology implies for sociality in order to ascertain the limits of certain concepts within the socio-legal ontology that I am advocating in this dissertation. Hence, the lessons drawn from Nancy’s insights should not be read as an attempt to assimilate—let alone to sublate (Aufheben)—his philosophical œuvre within a totalizing system of metaphysics. Indeed, it is precisely this inability to incorporate Nancy within Hegel’s system that renders his analysis so crucial to the project inaugurated by this dissertation. Hence, in this section, I will argue that the fundamental ontology that Nancy pursues in his deconstruction of “community” works to ontologize social relations in a fruitful way for thinking about the social construction of meaning.

Nancy claims that, at least since Jean-Jacques Rousseau, “community” has been fetishized in such a way that its immanence has been utilized as the means of delineating its origins (1991: 9). This notion of “community” is not equivalent to “society,” however—the latter is “a simple

---

1 Much of this section is drawn from Faust 2021.
association and division of forces and needs” (id.). Rather, community is principally “sharing, diffusion, or impregnation of an identity by a plurality wherein each member identifies himself only through the supplementary mediation of his identification with the living body of the community” (id.). The “organic communion with its own essence” gives lie to the problem of community for Nancy: the essence of community is a mythic unity that almost idyllically ties its members together, as if such communion is the natural(ized) situation for an ideal community. Such imagined unity, however, implies designations of who belongs and who does not, based on their accordance or discordance with its presumed “organic totality,” what Nancy calls a totality “in which the reciprocal articulation of the parts is thought under the general law of an instrumentation which cooperates to produce and maintain the whole as form and final reason of the ensemble” (id. 76). As “the totality of the operation as means and of the work as end,” the organic totality that is often taken to be “community” further implies a naturalized distinction between those within the community and those who come from outside of it (id.).

These totalitarian-adjacent characteristics leave Nancy suspicious of retrospective attempts to revive or re-establish “lost” community, “whether this consciousness conceives of itself as effectively retrospective or whether, disregarding the realities of the past, it constructs images of this past for the sake of an ideal or prospective vision” (id. 10). For Nancy, community, “far from being what society has crushed or lost, is what happens to us—question, waiting, event, imperative—in the wake of society” (id. 11). Despite the pretensions or claims of those seeking to invoke “lost” immanence, there is no common that has been “lost” in any community, because Nancy argues that community is only ever the experience of “what is common” in response to the absence of such commonality at a fundamental ontological level. In fact, Nancy maintains that attempts to realize such a “pure” or “absolute” immanence entails the quite literal death of
the community, since it is impossible to set a limit on such criteria; accordingly, he argues that
the Nazi regime might well have led to the suicide of the entire German nation, since imposing
ever-more stringent ideas of purity would continue in an endless promulgation of attempts to
eliminate difference in pursuit of obtaining some lost "essence" (id. 12–14). Instead, community
is defined by its lack of an essence—any appeals to restore or return to a "lost community" is
fundamentally an imposition of an essence that never was. Due to this fundamental lack, Nancy
claims that community "assumes the impossibility of its own immanence, the impossibility of a
communitarian being in the form of a subject. In a certain sense community acknowledges and
inscribes—this is its peculiar gesture—the impossibility of community" (id. 15). Rather, for
Nancy, community is "the presentation to its members of their mortal truth [...] of the finitude
and the irredeemable excess that make up finite being" (id.).

More importantly—and here is where Nancy explicitly distances himself from Hegel—a
community is "not a project of fusion, or in some general way a productive or operative
project—not is it a project at all," in the sense of a "spirit of a people" whereby the collectivity
and the project reciprocally determine each other (id.). Immanence entails realizability in a
particular mode of being, or subjectivity; but for Nancy, community "gestures" its own
impossibility through the inability to posit a particular subject, upon which a society is modelled
and thus built.² Reflecting on Georges Bataille’s work on community, Nancy characterizes the

² In his introduction to the edited collection Who Comes After the Subject?, Nancy describes the “dominant
definition of the philosophical (or 'metaphysical') subject” in terms of Hegel, “that which his capable of maintaining
within itself its own contradiction” (1991: 6). The possession of the contradiction, with its “ownmost” alienation and
the reappropriation of this “being outside-of itself,” is for Nancy the logic of subjectum, a grammar of subjectivity
that reappropriates to itself “the exteriority and strangeness of its predicate” (id.). In his interview with Jacques
Derrida in the same volume, he proposes that “in lieu of the 'subject,' there is something like a place, a unique point
of passage” (id. 99). Then, repeating his invocation of Hegelian subjectivity, he remarks that the “what” of the
“itself” brings forth “the place, and the question, of a 'who' that would no longer be ‘in itself’ in this way” (id. 101);
this question, he clarifies later, refers to "something on the order of singularity” (id. 107). Hence, I will understand
Nancy as claiming “the subject” to be a tied to a particular historical-theoretical formulation that depends on a more
ontologically basic notion of singular being, in the order he calls “singularity.”
modern experience of community as neither a work to be produced nor a lost communion, but “space itself, and the spacing of the outside, of the outside-of-self” (id. 19). The crucial point for this experience is the exigency of a “clear consciousness of separation,” what Nancy characterizes as Hegelian self-consciousness—itself a product of recognition, but “suspended on the limit of access to self”—of the fact that “immanence or intimacy cannot, nor are they ever to be, regained” (id.). For Nancy, this consciousness at the extremity of self-consciousness is the suspension of the desire for recognition itself but can only occur through the communication of community: “both what communicates within community, and as what community communicates” (id.). Since self-consciousness can only experience such an interruption of the desire for recognition if one has already achieved self-consciousness with others—because, conceptually, self-consciousness is an achievement rather than a given for Hegel—this clear consciousness is “ecstatic” in the Heideggerian sense of “standing outside” of the self, such that it is held only in and through the community (id.). Community, for Nancy, only exists at the very edge of self-consciousness; it is an “areality” that cannot be confined to a territory or reduced to a subjectivity (id. 19–20). Further, the areality of ecstasy and community are linked: Nancy argues that they are “poles” that give rise to and limit each other, initiating a resistance to fusion, to “being ‘realized’ in a unique and total being (id. 20). If, for Nancy, community cannot be based on models of a communitarian essence that we can present to ourselves, it must instead be thought in terms of “its insistent and possibly still unheard demand” beyond such models (id. 22).

Since community resists being reduced to either a geographic territory or an ethnically bound culture, subjectivity becomes less a substantial ground for community than a limit from which the exigency of community can be thought, although not in an unqualified sense. Nancy notes
that Bataille came up against “the paradox of a thinking magnetically attracted toward community and yet governed by the theme of the sovereignty of a subject. For Bataille, as for us all, a thinking of the subject thwarts a thinking of community” (id. 23). Nancy is clear that this subject is neither “the ordinary notion of ‘subjectivity’ nor the metaphysical concept of a self-presence as the subjectum of representation” (id.). But this subject cannot be the subject of speculative idealism, since Nancy maintains there must be some spacing—that is, an alterity—between subject and other to allow for communication (id. 24). Against the idea of the “subject-representing”—in which he sees the possibility of reducing otherness to sameness—Nancy posits the “being-communicating” as a transcendental “being-outside-itself” (id.). Following this suggestion further, he advocates thinking the “sharing [partage] of community […] between singular existences that are not subjects and whose relation—the sharing itself—is not a comminution, nor the appropriation of an object, nor a self-recognition, nor even a communication as this is understood to exist between subjects” (id. 25). In this sense, there is neither subject nor communal being at the level of some fundamental ontology, but community and sharing; there is a theoretical excess in the thought of community, “an excess in relation to the theoretical,” such that “only a discourse of community, exhausting itself, can indicate to the community the sovereignty of its sharing (that is to say neither present to it nor signify to it its communion)” (id. 25–26). For Nancy, “subject” and “communal being” are terms already captured within existing theoretical traditions that can limit the possibility for community as designating some kind of “essence,” so a discourse of community that “exhausts itself” indicates

---

3 It is worth noting that, contra Jacques Derrida’s argument that Bataille operates with a “Hegelianism without reserve,” Nancy finds that Bataille is still beholden to “the Hegelian law of a reserve that is always more powerful than any abandonment of reserve; a reserve that is in fact the sublation of the Subject reappropriating itself in presence” (1991: 24). Contrast this reading of Bataille’s Hegelianism with Nancy’s own reading of Hegel that emphasis the power of negativity to open thought out to “the concrete world of singularities in which ‘nothing is assured of presence or of being’” (Shaw 2015: 108, cit. Nancy 2002: 78).
that this notion of “sharing” (in French, “partage”) is crucial to the thought of “community” that is beyond a theoretical discourse of essences. Hence, Nancy denies that either (theoretical) discourse or isolated reflection is what generates the thought of community; he is instead “trying to indicate, at its limit, an experience—not, perhaps, an experience that we have, but an experience that makes us be” as a plurality (id. 26). Such an experience that makes us be, for Nancy, shares what community reveals to each of us, namely, one’s existence outside oneself. In other words, the sharing of community exposes the finitude of one’s existence, as a being that was born and will die, but also as a member of community of other finite beings (id. 26–27).

This refusal to essentialize a particular subjectivity in thinking a specific community opens Nancy’s discussion of singularity. For Nancy, the singular being is “neither the common being nor the individual,” because such beings do not possess “a generality of what is common and of the individual,” which also precludes them as the more theory-laden designation “subjects” (id. 77). In this way, Nancy is attempting to locate a more ontologically fundamental notion of “a being” that does not fall into the metaphysical presuppositions of historical terms for “man” or “human essence” such as “subject,” “common being,” or even “individual.” In fact, he argues that the thematic of individuation, frequently associated with subjectivity, “detaches closed off entities from a formless ground,” whereas singularities form a “groundless ‘ground’” through

---

4 In a later work, Nancy clarifies how singularity might be thought more concretely when considering the strangeness of a singularity as “someone” that is understood in the way a person might say “it’s him all right” about a photo, expressing by this “all right” the covering over of a gap, making adequate what is inadequate, capable of relating only to the “instantaneous” grasping of an instant that is precisely its own gap. The photo—I have in mind an everyday, banal photo—simultaneously reveals singularity, banality, and our curiosity about one another. The principle of indiscernability here becomes decisive. Not only are all people different but they are also all different from one another. They do not differ from an archetype or a generality. The typical traits (ethnic, cultural, social, generational, and so forth), whose particular patterns constitute another level of singularity, do not abolish singular differences; instead, they bring them into relief. As for singular differences, they are not only “individual,” but infraindividual. It is never the case that I have met Pierre or Marie per se, but I have met him or her in such and such a “form,” in such and such a “state,” in such and such a “mood,” and so on. (2000: 8; cf. note 2, supra)
their networking, interweaving, and sharing with other singularities (id. 27). That is, singular beings are constituted by sharing that does not "close them off" from other singular beings; instead, “they are distributed and placed, or rather spaced, by the sharing that makes them others: other for one another, and other, infinitely other for the Subject of their fusion,” and therefore fundamentally resistant to any sort of communion (id. 25). “Sharing” and “spacing” necessarily implies distance; in this manner, Nancy preserves the alterity between singular beings without relying on a Lévinasian infinity or exteriority. While there is nothing behind a singular being, there is “outside and in it, the immaterial and material space that distributes it and shares it out as singularity, distributes and shares the confines of other singularities, or even more exactly distributes and shares the confines of singularity—which is to say of alterity—between it and itself” (id. 27). Hence, a singular being appears “as finitude itself,” at the end or the beginning with the contact of another singular being, at the confines of the same singularity that is “always other, always shared, always exposed” (id. 28). Consequently, “community” for Nancy means “that there is no singular being without another singular being,” and that there is what might be called “an originary or ontological ‘sociality’ that in its principle extends far beyond a simple theme of man as a social being” (id.). In place of the sort of communion sought by totalizing accounts, there is instead communication, wherein finitude co-appears or “compears” (comparaît) as the being-in-common of singularities (id. 29). Communication for Nancy can be understood as the sharing of meaning among singular beings, that inscribes their separation but also their sharing of a space in common; it thus serves as an exposition to the outside that defines singularity, the mutual exposition “in the appearance of the between as such: you and I (between

5 Importantly, Nancy does not limit the thought of singularity to “man,” such that it excludes the “animal.” He writes: “even in the case of ‘man’ it is not a fortiori certain that this community concerns only man and not also the ‘inhuman’ or the ‘superhuman,’ or, for example, if I may say so, with and without a certain Witz, ‘woman’: after all, the difference between the sexes is itself a singularity in the difference of singularities” (1991: 28).
What is exposed in this compearance is finitude, the “essence” of community—conditions under which, Nancy claims, communication cannot be rendered into a “social bond” that imposes a “dubious” intersubjectivity which attaches objectified “subjects” together within “the economic link or the bond of recognition” (id.). Instead, communication exposes singular beings to the outside that defines singularity; singularity is thus the primordial structure of a communitarian sociality that does not posit a communitarian essence.

This claim that the experience of community occurs through communication among singular beings—but without a metaphysics of intersubjectivity—complicates an easy acceptance of the Hegelian social ontology that has been argued for so far in this dissertation. Indeed, while Nancy notes that the Hegelian desire for recognition is operating in communication, he argues that, before recognition, there is “knowing without knowledge, and without ‘consciousness,’ that I am first of all exposed to the other, and exposed to the exposure of the other” (id. 31). Hence, Nancy argues, community cannot be produced, because that “would presuppose that the common being, as such, be objectifiable and producible (in sites, persons, buildings, discourses, institutions, symbols: in short, in subjects)—an impossibility since community for Nancy is experienced only at the shared limits of singular beings exposed to one another (id.). Citing Maurice Blanchot, Nancy suggests instead that community occurs in “unworking” (désœuvrement), as encountering “interruption, fragmenting, suspension… made up of the interruption of singularities, or of the suspension that singular beings are” in the static, determinate sense implied by communitarian essences. (id.). Since on his account, community reveals the finitude of singular beings, and communication exposes singular beings to the

---

6 Of course, the Hegelian will reject this claim outright; however, Nancy is attempting to get below the sort of subjectivity that Hegel deploys in his thought. Whether Nancy’s argument is successful, of course, is outside the scope of this dissertation; what is important here is that Nancy is making this claim to articulate a notion of singularity that is irreducible to traditional metaphysical discourses.
“outside” that defines this singularity, communication is “the unworking of work that is social, economic, technical, and institutional” (id.). I take Nancy to mean that communication “interrupts, fragments, suspends” the essences that are posited as works, that is, as complete—especially objects that are taken to be so in everyday life, such as subjective identities, discourses, institutions, and societies. However, Nancy does not include “the political” insofar as it is outside the form of the State or Party, which he instead ties to that which “the communitarian unworking resists” (id.; 158, n. 26). In fact, later in his text, Nancy elaborates that the experience of community—the limit of singularities exposed in common—also defines the limit “at which all politics stop and begins”; and further, that the communication that constitutes this limit “demands that way of destining ourselves in common [i.e., collectively orienting ourselves toward a future] that we call a politics, that way of opening community to itself, rather than to a destiny or to a future” (id. 80). While Nancy claims that communication is without limits, he nonetheless maintains that it “takes place on the limit” of our collective experiences, wherein we share in our unworking as singular beings-in-common (id. 67). What exposes this limit, the very unworking that designates “the singular ontological quality that gives being in common,” is what Nancy calls “literature” (id. 66). Literature, for Nancy, is not simply “writing,” or even a particular genre of “writing,” but an indication that community can never be fully or completely realized. Since he maintains that community can never be “completed” or “closed” through fixing its meaning, literature communicates—in Nancy’s precise use of the term—the common exposure of singular beings, their “compearance” in their finitude; in this sense, literature inscribes our “being-in-common, being for others and through others,” as something incomplete, unfinished, and ongoing (id.).
To summarize, Nancy’s critical analysis of community problematizes what we commonly refer to as community, in both its quotidian and theoretical senses. Community on this account is best understood as a feeling of one’s finitude in the company of others, a limit-experience on which one and others attempt to assert their shared co-existence. In this sense, Nancy seems to echo Dworkin’s account of “associative obligations,” as he points to a lateral sharing of such limits as essential to this thought of being-in-common. However, Nancy argues for a notion of community that subsists between and among singular beings, which resists the dyad particular-universal that marks the Hegelian thought of totality as well as the isolated, individual notion of the subject. For Nancy, community does not arise as a social production, whether conceived by an individual subject or a collective effort to make immanent an ideology; rather, one experiences or is constituted by it as the shared experience of finitude as plural singularities, an experience at the limits of singular being from and against which we act. He argues that community understood as a work or through its works would presuppose a common being that can be objectifiable and producible, such as in specific “sites” or “subjects.” And yet, Nancy does not preclude a Hegelian account of either the state or recognition; rather, he situates his investigation into community as an examination of what Hegel presupposes. Indeed, the notion of singular sharing will be crucial when examining how meaning is constructed according to Nancy, and what this might mean for the social ontology being proposed in this dissertation.

Before that, however, Fanon’s critique of ontology—and with it, the possibility of mutual recognition—must be considered.

3 Fanon’s critique of (colonial) ontology: recognition unrealized

In the previous section, I presented Nancy’s critical analysis of community as one that resists the reduction of “being-in-common” to a communitarian essence that threatens to propound an
exclusionary organic totality. What resulted was a thoroughgoing subversion—although not an outright rejection—of key concepts that have been deployed throughout this dissertation: not only community, but subjectivity, intersubjectivity, and even recognition. By locating the experience of community within an ontology that embeds alterity between singularities as a simultaneous sharing and spacing, Nancy problematizes the conventional language that is often used to think “community” in everyday political life. With this conclusion in mind, Fanon’s critique of ontology within the context of French colonial Martinique will be used to provoke a perhaps deeper challenge to the notion of shared ontology, even if Fanon appears to be working at “only” the sociopolitical level rather than the level of the ontological proper. My goal in this section will be to show that Fanon—in a related albeit distinctive manner—likewise contests the cleavage between ontology and sociality, in the hopes of providing an alternative way to situate meaning-making within a social ontology of mutual, embodied co-existence.

In his *Black Skin, White Masks*, Fanon uses the lived experience of colonized black subjects to contest the ontological account that has been imposed upon them, “a zone of nonbeing, an extraordinarily sterile and arid region, an utterly naked declivity where an authentic upheaval can be born” (2008: 2). Entering the world to uncover the meaning of things and to be at its origin, he instead finds himself “an object among other objects” (*id.* 89). Locked in this reification, Fanon appeals to the gaze of the white Other to be liberated; but he finds that “the Other fixes me with his gaze, his gestures and attitude, the same way you fix a preparation with a dye” (*id.*). Outside his home territory, Fanon finds that he cannot experience “being for other” as described by Hegel, because “any ontology is made impossible in a colonized and acculturated society”—something he dryly notes that “those who have written on the subject have not taken sufficiently into consideration” (*id.*). A particular impurity or flaw has been impressed upon the
Weltanschauung of a colonized people that prohibits ontological explanation; hence, Fanon diagnoses the problem:

Ontology does not allow us to understand the being of the Black person [l’être du Noir], since it ignores the lived experience [l’existence]. For not only must the Black person be black; he must be black in relation to the White person [en face du Blanc]. […] The Black person has no ontological resistance in the eyes of the White person. (id. 89–90)

Fanon does not explicate what he means by “ontology” in this context—or, for that matter, in any other. Still, he finds that, local or regional differences notwithstanding, confronting the white gaze causes an unusual weight to descend on the Black person: their metaphysics is “abolished,” rather than sublated, when contradicted by those imposed by the “new civilization” (id. 90). The Black person is robbed of their share of the world as the white world negates the Black person’s very body image: “the man of color encounters difficulties in elaborating his body schema. […] It’s an image in the third person. All around the body reigns an atmosphere of certain uncertainty” (id.).

Although his precise use of “ontology” not clarified, Fanon is clearly not concerned with articulating or defending a fundamental ontology as understood in its classically metaphysical sense—that is, as a “mind-independent reality,” Writing in a Heideggerian vein, Axelle Karera notes that for Fanon, ontology cannot “come to terms with lived experience. Its explanatory power is unrealizable, radically canceled, wherever processes of racialization have objectified the black body” (2020: 290). In nonrepressive circumstances, she continues, the formative relation between body and world “‘creates a genuine dialectic [une dialectique effective] between my body and the world’. The distinct corporeality of the black, which arrives as an unfortunate malediction, troubles the fundamental aspect of this dialectic” (id., cit. Fanon 2008: 91).

Alternatively, Marilyn Nissim-Sabat reads Fanon as claiming “the epidermalization of antiblack racism and black self-negation is at one and the same time the internalization of the
ontologization of whiteness” as if these categories were mind-independent essences (2010: 45). In this sense, Fanon argues that the mythico-ontology of race constantly attempts to lock the white person into their whiteness and to do the same to the black person and their blackness. Being ensnared in these mythically defined categories that arrest one within either whiteness or blackness implies that there is, in fact, a shared ontology between the two—albeit one that actively prevents reciprocal recognition from obtaining across the categories. For this reason, Fanon deploys a sociogenic analysis in *Black Skin, White Masks*, to both expose and rupture the ontological project of coloniality, and thereby open toward the broader, affective analysis in his sociogeny. More will be said on Fanon’s sociogeny in the following section; for now, let it suffice to say that Fanon locates his analysis of both coloniality and decoloniality within the sociality of the colonized, rather than in a Eurocentric fundamental ontology that subjugates blackness in order to elevate whiteness.

This problem of shared ontologies poses a clear challenge to this dissertation’s claim that human dignity can be understood as based in an intersubjective account of recognition. What this requires, then, is a more careful parsing of what “ontology” means for Fanon. Later in the text, Fanon summarizes Hegel’s account of recognition in the following manner:

"Man is human only to the extent to which he tries to impose himself on another man in order to be recognized by him. As long as he has not been effectively recognized by the other, it is this other who remains the focus of his actions. His human worth and reality depend on this other and on his recognition by the other. It is in this other that the meaning of his life is condensed. … There is at the basis of Hegelian dialectic an absolute reciprocity that must be highlighted. (2008: 191)"

Fanon reminds the reader that, for Hegel, achieving self-consciousness requires a two-way movement between Self and Other; if the circuit is shut off, both are kept within themselves, so each must mutually recognize each other beyond their natural reality, mediating each other in their shared human reality (*id.* 192, cit. Hegel *PhS* §184). Since each desires self-consciousness,
it is only in risking one’s life in the struggle for recognition that freedom is obtained: “This risk implies that I go beyond life toward an ideal which is the transformation of subjective certainty of my own worth into a universally valid objective truth” (Fanon 2008: 193). For Fanon, writing amidst the colonial context, this struggle is a fight “for the birth of a human world, in other words, a world of reciprocal recognitions” (id.). However, he also points out that the Other can recognize the Self without a struggle, but at the cost of being regarded as merely a legal person, a \textit{persona} (from the Latin, “mask”), rather than a being with an independent self-consciousness—in other words, in a corrupted form of recognition (\textit{id}. 194, cit. Hegel \textit{PhS} §184). In this sense, Fanon ruefully recounts the French metropole’s abolition of slavery, arguing that the Black “went from one way of life to another, but not from one life to another” (\textit{id}. 194–95). This leads to his critique of applying Hegel’s model of the struggle for recognition to the French colonial context: “For Hegel, there is reciprocity; here the master scorns the consciousness of the slave. What he wants from the slave is not recognition but work” (\textit{id}. 195, fn. 10). In other words, there can be no genuine recognition of the colonized by the colonizer because under coloniality, distinctions between colonizer and colonized are enforced \textit{as if} the two were ontologically distinct, \textit{despite} the shared being between the two that \textit{must} exist for misrecognition to occur.

Perhaps the most penetrating application of Fanon’s insights to challenge a social ontology of recognition comes from Glen Coulthard. In \textit{Red Skin, White Masks}, Coulthard argues against Charles Taylor’s appropriation of the lord-bondsman dialectic found in the \textit{Phenomenology of Spirit} to argue against the “difference-blind” liberalism in pluralistic, multicultural societies such as Canada and the United States (2014: 29; cf. Taylor 1994). For Taylor, there is nothing contradictory with carving out group-specific claims \textit{and} maintaining a core set of fundamental human rights; in fact, he argues, the provision of these group-specific claims can be defended on
liberal grounds precisely because our cultural communities serve as the backdrop for developing
one’s identities and capacities (Taylor 1994: 32–34, 61). Taylor thus proposes a “politics of
recognition,” arguing that the state ought to facilitate healthy relations of recognition by
delegating political and cultural autonomy to Indigenous groups, so that they may preserve their
cultural integrity and exercise self-determination (id. 40). While accepting that Taylor’s proposal
represents an improvement over the historical treatment of indigenous peoples by the Canadian
government, Coulthard faults his understanding of recognition as something to be “granted” or
“accorded” a subaltern group by a dominant group (2014: 30–31). He further critiques Taylor for
failing to comprehend Fanon’s insistence that colonial configurations of power could be
transformed only if both the objective, structural level and the subjective, psychological level are
attacked (id. 33). Hence, like many liberal scholars, Taylor ignores the generative socio-political-
economic aspects of colonialism even as he allows redistribution schemes (id. 35).7 Coulthard
completes his critical reading of the politics of recognition by conceding that, although Fanon
saw little emancipatory potential in Hegel’s theory of recognition within the colonial context, he
nonetheless accepts that relations of recognition are constitutive of subjectivity and necessary
conditions for realizing human freedom (id. 43). As a result of rejecting Hegel’s ontological
framing of the struggle for recognition, Coulthard underscores Fanon’s advocacy for personal
and collective self-affirmation of the colonized, on their own terms and in accordance with their
own values (id., cit. Fanon 2008: 195–97). He also highlights that Fanon contributes a multi-
dimensional racial/cultural aspect to the dialectic of recognition that draws out the “multifarious

---

7 Coulthard also faults Taylor for missing the textual points described in the preceding paragraph: i.e., Fanon’s argument that colonized societies no longer must struggle for their freedom, as they can negotiate it from the colonizers (2014: 37–39); and his distinguishing the nonrecognition in colonial social relations from the mutual desire for recognition as described by Hegel (id. 39–42). Additionally, in the footnotes, Coulthard claims that Taylor “seems to downplay the fact that the agency and self-understanding fought for and won by the slave occurs in a condition marked by inequality and misrecognition, not reciprocity” (id. 193, n. 85). As such, Coulthard demands a response from Taylor as he explicates Fanon’s answer.
web of recognition relations that are at work in constructing identities and establishing (or 
undermining) the conditions necessary for human freedom and flourishing” (id. 44).

Coulthard’s critique of Taylor’s politics of recognition using Fanon shows that the possibility 
of recognition remains a key part of Fanon’s liberatory project, even as he rejects Hegel’s 
ontology as the ground for such relations. That said, Fanon’s direct critiques of general ontology 
were confined to the pages cited here, leaving the work of teasing out its implications in other 
contexts to later scholars. As critical as Fanon was of traditional ontological categories,
Efthimios Karayiannides argues that some of his readers have given in to a “temptation to 
ontologize” Fanon’s work. In a recent article, he has assessed two competing accounts of the 
critique of ontology that Fanon offers: one associated with post-colonial scholars such as Homi 
Bhaba, that emphasize the ambivalence of social identities; and the other from Afropessimists 
such as Frank Wilderson, that emphasize the specificity of blackness (2020: 338). Karayiannides 
argues that both camps fail to apprehend the thrust of Fanon’s critique and end up with an 
account of the formation of colonial subjectivities that “fall[s] back on a general ontology of the 
kind Fanon explicitly rejects” (id. 343). In the case of post-structuralist readings, he argues that 
the anti-essentialist nature of such analysis eliminates the attention Fanon paid to the specific 
social relations that impel the liberatory struggle, while the Afropessimists ontologize the “zone 
of nonbeing” into such an exclusive struggle that Fanon’s insights cannot be thematized for 
similar struggles, such as those of indigenous peoples or the Palestinians (id. 344). Against these 
ontologically suspect readings, Karayiannides reads Fanon as radically questioning philosophies 
of general ontologies that seek to undercut sociality through identifying the social relations that 
must be transformed in the struggle for a nonracial society. He finds in Fanon’s later work a 
description of racist society “as a series of ‘techniques’, that is a series of practices and

124
institutions, that govern and constrain the conduct of subjects and fix their mode of relating to
one another and induce anxiety on the subjects on which they are imposed” (id. 350–51, cit.
Fanon 2018). Under this conception of racist society, the aim of antiracist struggle is “to
fundamentally transform the set of techniques and institutions which shape the conduct of
subjects and fix their mode of relating to one another” (2020: 351). For Karayiannides, the
takeaway of this non-ontological reading of Fanon in conjunction with his psychiatric writing is
that antiracist struggle must be thought less in terms of describing an ontology of identity, than
of thinking how “to produce forms of self-organization that escape the specific techniques and
modes of surveillance that are used to impose certain social relations on individuals within a
given society” (id.). In other words, following Karayiannides, a Fanonian analysis investigates
social relations in order to discern the social institutions and systems that produce ill-effects in
subjects constituted by that society—that is, a properly phenomenological ontology wherein
sociality is ontological.

One need not fully enter the realm of decolonial critique to contest the idea that a given
political society fails to include all members it claims authority over: indeed, one can, like Taylor
and his interlocutors, remain at the level of liberal theoretical debates over multiculturalism. Still,
as Coulthard and Karayiannides well demonstrate, Fanon provides a thoroughgoing challenge to
the conceit that multiracial, multicultural societies will necessarily facilitate relations of
reciprocal recognition in grounding the categorical presumptions of the relations within a
specific society—whether due to active exclusion or passive ignorance—as well as to the conceit
that general ontologies that attempt to subsume specific social relations can truly contribute to
the work of collective liberation. So, while resisting the temptation to ontologize Fanon’s
thought, I will focus in the next section on creating a dialogue between him and Nancy to build
toward an ontological sociality that can ground the intersubjective account of dignity that I have argued for in the previous chapter. This proposed social ontology will attempt to embed both the singular being of intersubjectively-constituted subjects—*without* claiming that singularity can be “fused with” or assimilated into intersubjectivity—and recognition—*without* falling into a closed, static fundamental ontology that is “prior to” the social. Both features, in other words, will attempt to construct an ontological sociality that cannot be reduced to or preceded by a fundamental ontology,

4 Sharing sociogeny and “being singular plural” toward recognition?

In this section, I will discuss the accounts proffered by Nancy and Fanon—“being singular plural” and sociogeny, respectively—to argue that both thinkers gesture toward a form of mutual recognition that is divorced from overdetermined or totalizing readings of Hegel. Rather, since neither Fanon nor Nancy describe or defend a robust ontological account that is prior to or independent of sociality, I will take them each to be contributing to a *social ontology*. I will present Nancy’s ontological account of “being singular plural” (*l’être singulier pluriel*), then argue that the “singular plurality” that Nancy articulates grounds a social ontology that is compatible with Fanon’s sociogenesis, while still preserving singularity.8 For Fanon, sociogenesis describes the ongoing process of collective meaning-making by a people such that they can re-define and re-describe themselves as a self-determining collective, including generating a communal “we-subject.” After noting resonances between these positions, I will argue for their compatibility—*without* claiming that either one dissolves into the other—because

---

8 While the idea of a “social ontology” does some violence to Nancy’s understanding of both sociality and ontology, I will persist in using it to distinguish my project from his own investigations. That is, I will be taking his ontological insights as a challenge against which I might fashion a social ontology that takes his concerns seriously, without attempting to follow his thought to the letter. More will be said on this in the final subsection of this section. See Devisch 2014 for another attempt to think Nancy social-ontologically.
they both gesture toward a sociality that possess the normative end of mutual (reciprocal) recognition. This preservation of singularity at the ontological level of sociality is intended to preserve the logical space for a social ontology amenable to the account of dignity that I have argued for in my previous chapters. Likewise, the use of sociogeny as an analytic approach reveals how subjectivity—at the level of one’s very bodily comportment and habits—is an accomplishment of the social relations within which one lives and is therefore an effect of their attendant systems of power, as well as one’s ongoing participation in them.

4a Nancy’s social ontology of “being singular plural”

Given Fanon’s interest in overthrowing the yoke of colonialism, sociogenesis is necessarily a collective endeavor; hence, less attention is paid to the particularity of the individual when the end of communal meaning-making is liberation. For Nancy, whose concerns remain well within the modern European philosophical tradition, an ontological sociality must consider the singularity of (embodied) individuals who are nonetheless essentially, fundamentally “with one another” (l’un-avec-l’autre) in the same sense as Martin Heidegger’s being-with (Mitsein, Mitandersein, Mitdasein) (2000: 26). Nancy claims that “one could not even begin to be an other for oneself if one had not already started from the alterity with—or of the with—others in general […] neither the Same nor the Other. They are one-another, or of-one-another, a primordial plurality that co-appears” (id. 67). If Nancy’s singularity does have a ground, it is the interlacing of singular beings themselves; again, there is nothing behind singularity, only “the immaterial and material space that distributes it and shares it out as singularity” (Nancy 1991: 27). In prioritizing the “with” of “being-with,” Nancy emphasizes the active, immanent sharing of existence as the ground of sociality rather than a static condition or fixed identity of “being.”
This dynamic relation between singular beings distributed in the immaterial and the material that consists in Nancy’s ontological sociality is what he calls “being singular plural”, wherein singular beings share in their exposure to each other: they have no common being that undergirds existence aside from immanent “being-with-each-other” (2000: 3). This concept of “being singular plural” is a reworking of Mitsein, wherein Nancy “refuses to posit either a Husserlian originary subject or a Lévinasian originary otherness” (Watkin 2009: 179). Nancy describes this ontological relationality with characteristic lyricism:

Being is singularly plural and plurally singular. Yet, this in itself does not constitute a particular predication of Being, as if Being is or has a certain number of attributes, one of which is that of being singular-plural—however double, contradictory, or chiasmatic this may be. On the contrary, the singular-plural constitutes the essence of Being, a constitution that undoes or dislocates every single, substantial essence of Being itself. This is not just a way of speaking, because there is no prior substance that would be dissolved. Being does not preexist its singular plural. To be more precise, Being absolutely does not preexist; nothing preexists; only what exists exists. (2000: 28–29)

For Nancy, “there is no meaning if meaning is not shared, and not because there would be an ultimate or first signification that all beings have in common, but because meaning is itself the sharing of Being” (id. 98). For Nancy, the sharing of Being renders the ethical relation co-constituted as shared ontology between singularities; hence, what Heidegger called “fundamental ontology”, Nancy calls “originary ethics” since “ethics is what is fundamental about fundamental ontology” (2003: 189). In this sense, “the ethical relation is not ‘passed over’ in Nancy, it is simply thought of differently as a relation of being side-by-side rather than an ‘otherwise than being’ of transcendence in the face-to-face” (Watkin 2009: 183). In this way, Nancy instills ethical relations at the most fundamental ontological level, which is itself irreducibly social; at the same time, he resists the Lévinasian claim that ethics precedes ontology, arguing instead that

---

9 A similar attempt to thread the two poles of radical subjectivity and radical alterity will also be seen in Ricœur’s ethical thought in Chapters IV and V.
“[n]o ‘value,’ no ‘ideal’ floating above concrete and everyday existence provides it in advance with a norm and a signification” (2003: 179).

Still, it does not follow that Nancy has no place for alterity: Watkin explains that when he “thinks singularities as ‘other origins of the world’ he affirms that ‘what makes the alterity of the other, is its being-origin’” (2009: 183, cit. Nancy 1991: 9, 11). This alterity “is not a question of an Other (the inevitably ‘capitalized Other’) than the world; it is a question of the alterity or alteration of the world” (Nancy 2000: 11). The self neither founds the other in Nancy’s thought, nor vice versa; the originary ethic of being-with imparts an “absolute responsibility for sense […] to bear ourselves, bear up before the responsibility for making-sense that has unfolded unreservedly. Man has to understand himself according to this responsibility” (2003: 191–93). Since originary ethics emerges from “being singular plural,” it places a shared responsibility on sense-making, such that embodied singularities must fashion an ethical sense together:

We make sense [nous faisons sens], not by setting a price or value, but by exposing the absolute value that the world is by itself. “World” does not mean anything other than this “nothing” that no one can “mean” [vouloir dire], but that is said in every saying: in other words, Being itself as the absolute value in itself of all that is, but this absolute value as the being-with of all that is itself bare and impossible to evaluate. It is neither meaning [vouloir-dire] nor the giving of value [dire-valoir], but value as such, that is, “meaning” which is the meaning of Being only because it is Being itself, its existence, its truth. Existence is with: otherwise nothing exists. (2000: 4)

However, they must also fashion this sense without the benefit of a single core of meaning because the multiplicity of the said, of the sayings, “belongs to Being as its constitution. This occurs with each said, which is always singular; it occurs in each said, beyond each said, and as the multiplicity of the totality of being [l’étant en totalité] (id. 38). In other words, it is only

---

10 It bears highlighting that the French terms here translated as “meaning” and “value” are both compounds that incorporate “dire,” which is “to say” or “to speak.” This concern accords with other work by Nancy, not cited in this dissertation, that prompt Watkins to label an “ontology of enunciation,” that is, “being as an address, being as addressing, ‘to be’ as a transitive verb, being as a response to the question ‘who?’” (2009: 152).
through the plurality of singular beings that meaning exists and is communicated, within which value resides. For Nancy, ethics is immanent to singular beings and subsists within their communication with each other against the lack of value more absolute than the plural sharing of existence. Although he concedes that no norm or value can be determined at on the fundamental level, Nancy argues that against this absolute value of “being-with,” the “unevaluable dignity of making oneself the subject (or the agent) of possible evaluation” nonetheless generates an orientation to action toward an imperative to “make sense of existence as existence” (2003: 183).

In the context of the shared “interlacing” of singular beings in plurality, this ethics of “making sense of existence as existence” recognizes the incommensurability of either fixing a signification or filling out sense in terms of a particular idea, concept, or discourse (id. 189). Rather, it means an “absolute responsibility” for existence, that is, for the plurality of incommensurable singular beings that make sense of the world through their co-responsence with each other—for it is these voices, in co-responsence, that create the sense of existence (id. 294–99).11

What can be drawn from Nancy’s reflections on the originary ethics of “being singular plural” is an absolute responsibility for creating conditions—at the ontological level—for singular beings to *enunciate* their incommensurability; only by recognizing this responsibility can the possibility of collective sense-making of existence be accomplished in the contemporary absence of “pre-given” values or meanings. Two earlier essays by Nancy provide clues as to how such a shared ethical sense might be fashioned, both of which concern social norms and law. In “Myth Interrupted,” he argues that if community is understood as a shared discourse rather than a

---

11 Although this dissertation is not the space to explicate this relationship, it is interesting that Nancy seems to link incommensurability with human dignity; future work will attempt to draw out the implications of this account of singularity for a thought of dignity.
completed work, it cannot be rendered as a specific form based on a single organizing principle—to impose such an order is to render static and stable what is essentially a dynamic. In this manner, the invocation of community within political discourse is essentially an existential claim, one that stakes the contours of a “singular ontological order in which the other and the same are alike (sont le semblable): that is to say, in the sharing of identity” (1991: 34). In contrast, Nancy’s account of “community” can therefore be understood as an attempt to think the “non-givenness” of community as a social production around its lack of a(ny) determinate essence (id. 40–41). In this vein, Nancy explores the connection between myth and community, recently contending that “[a] myth figures words of originary speech, so insistently that it furnishes the figure [figure] that speaks these words” (Nancy 2016: 45; cf. Nancy 1991). In this sense, politics becomes a “determinate mythology” in the way that it outlines a formal figure, a privileged subject with characteristics for whom “the common” is said to signify, and for whom the community is meant to sustain; hence, the difficulty lies in thinking a sense of community that “disavows” domination (id. 58–60). Considering this difficulty, Nancy examines the register of the “mythic” as it relates to his notion of “literature” to theorize how “reader-companions” might form an “informal and formless communion” rather than a reductive notion of mythic community propounded through politics—a pressing concern given the always-present risks of authoritarianism and totalitarianism in the received thought of community (id. 65).

For Nancy, myth is “of and from the origin, it relates back to a mythic foundation, and through this relation it founds itself (a consciousness, people, a narrative)” (1991: 45). He credits Freud as the progenitor of the self-consciousness of myth within modernity, that “comprised within the very idea of myth is what one might call the entire hallucination, or the entire imposture, of the self-consciousness of a modern world that has exhausted itself and the fabulous
representation of its own power” (id. 46–47). But Nancy claims that the apparent abandonment of myth as foundation with the onset of modernity also operates as a myth, an “interruption” that conceals its continuing presence as an absence, due to its role as “full, original speech, at times revealing, at times founding the intimate being of community” (id. 47–48). It follows, then, that myth arises “only from the community and for it: [myth and community] engender one another, infinitely and immediately. Nothing is more common, nothing is more absolutely common than myth” (id. 50). Nancy claims that myth today is interrupted, “cut off from its own meaning, on its own meaning by its own meaning,” because it pretends to have lost its function as inauguration or foundation, having been reduced to “a fiction, a simple invention” (id. 52, emphasis in original). But mythic thought persists nonetheless as “the thought of a founding fiction, or a foundation by fiction,” that generates the “myth of myth,” that is, “a poetico-fictioning ontology, an ontology presented in the figure of an ontogony where being engenders itself by figuring itself; by giving itself the proper image of its own essence and the self-representation of its presence and its present” (id. 53–54). Myth is therefore “figuration proper” in that it represents “a particularly fulfilled and fulfilling form of the ontology of subjectivity in general” (id. 55). In this sense, following Kant’s definition of the will, Nancy claims the logic of myth “enable[es] the cause of representations to coincide with the reality of these same representations,” such that mythic will is “totalitarian in its content, for its content is always a communion, or rather, of all communions: of man with nature, of man with God, of man with himself, of men among themselves” (id. 56–57).

Since myth communicates itself necessarily as “belonging to a community,” it renders community as myth, so that its “force and foundation are essential to community and that there can be, therefore, no community outside of myth” (id. 57). Nancy proposes an interruption of
myth through his deconstructed notion of community: to wit, he proposes the “myth of the absence of myth,” which corresponds to interrupted community, interrupted totality, that indicates the “compearance” of singularities in common (id. 61). Interrupted myth disables the operation of myth as either a completion or a fulfillment; for Nancy, the voice of this interruption of myth is literature, since it gives voice to being-in-common: “once myth is interrupted, writing recounts our history to us again” by conveying the liminal experience of community (id. 64, 69). More precisely, this is because literature “does not reveal a completed reality, nor the reality of completion […] it reveals the unrevealable, that it is itself, as a work that reveals and gives access to a vision and to the communion of a vision essentially interrupted” (id. 63). In other words, for Nancy, the refusal of literature to offer a completed determination of community, coupled with its capacity to communicate shared experiences of community between singular beings, makes it an appealing alternative to mythic thinking.

This capacity of literature to “recount our history to us again” carries clear normative implications for sociality broadly, but especially for the normative claims of a legal system, which is itself vulnerable to mythic thinking (cf., e.g., Fitzpatrick 1992, 2001; Faust 2021). In his essay “Lapsus judicii,” Nancy analyses how the law operates as a form of fiction, as a re-figuration that dislocates the subject as a fixed object of adjudication—that is, as defined solely through the formal institutional norms embedded within the political and legal systems. He first notes how the term “jurisdiction” is articulated around a double structure: the court of law “states the right of the case, thereby making it a case: it subsumes it, suppresses its accidental character; picks it up [relève] after its fall” by declaring the dispute to be under its authority to resolve the legal issues involved, while it also “states the right of this case and so states right itself through this case: in a sense, right exists through the case alone, through its accidental character” by
declaring the decision to be the legally-binding resolution of the issue (2003: 155–56). Hence, he argues, “the relation of law to case—the relation of jurisdiction—means that no case is a law and that a case only falls under the law once the law speaks of it” (id. 156). What happens must be “struck by the seal of law (of its utterance) in order to be not simply judged but constituted as an instance or case of right, modeled or sculpted (fictum) in terms of right. Juris-diction is or makes up juris-fiction” by reconfiguring social conflicts into contestations over legal rights and obligations, whose resolutions can be enforced by the state (id. 157–58). For Nancy, the implication is that jurisdiction must be uttered: “The persona of the judge and his edictum are forged from the same fictitious gesture: right is said here of the case for which there can be no prior right, and which is the case of right” (id. 157). Importantly, Nancy maintains that juridical fiction “works with a world, with the accidental, eventful actuality of a ‘worldness’ that the law neither produces nor sublates […] if anything and everything can happen for right, it is because there’s always something that exceeds the limits of its spaces” (id.).

By drawing the case into the realm of right, Nancy argues, the judge “always says at the same time that the reality of the case is included in law and that saying it fictions or figures the very ‘being’ of the case” (id.). The juridical act therefore “forms or figures a fact whose essence or whose own sense” falls outside the form of the sovereign, autonomous subject that creates its own sense (id. 158). Nancy argues that the juridical person therefore figures the subject by dislocating it, as jurisdiction implies that “the origin is a case,” that the “the inaugural gesture of right involves an ‘area’ and thus a de-limitation, thereby contravening the logic of the subject. The loss of the substance of the Self is equivalent to the de-finition of the person; to finitude, in other words” (id.). Although this move seems to alienate the subject from the legal person, such that the latter over-determines the former, Nancy offers an out: since right is what is said
(fictioned) and the subject of its fictioning is only ever the subject that is stated, the *person* is “the one who states—whether on the level of accusation, defense, or sentence—and who states him- or herself thus” (*id.* 159). Juris-fiction therefore depends on the *lapse* between *that which is the case*—that is, the situation giving rise to the legal claims—and *the case*—the process of adjudicating those claims—to draw a figure that is both more constructed but less determined than the (political) subject—the legal *persona* or legal subject—that is nonetheless inseparable from singularity; otherwise, such a figure could not speak. Hence Nancy reminds the reader that the State attempts to cover over the essential “*lapsus*” of law, thereby engendering “a sometimes open, always latent revolt over the *right to say*—the ultimate demand of *the right to say the right of what is by rights without right*” (*id.* 169). Which leads to the question, who or what does this saying, if not the social subject, but a strangely displaced, dislocated *persona*? Nancy provides an answer:

The ontology of being-with is an ontology of bodies, of every body, whether they be inanimate, animate, sentient, speaking, thinking, having weight, and so on. Above all else, “body” really means what is outside, insofar as it is outside, next to, against, nearby, with a(n) (other) body, from body to body, in the dis-position. Not only does a body go from one “self” to an "other," it is *as itself* from the very first; it goes from itself to itself; whether made of stone, wood, plastic, or flesh, a body is the sharing of and the departure from self, the departure toward self, the nearby-to-self without which the "self" would not even be “on its own” ["à part soi"]. (2000: 84)

As it was for the Stoics, language for Nancy is incorporeal: “an audible voice or a visible mark, saying is corporeal, but what is said is incorporeal; it is everything that is incorporeal about the world” (*id.*). In this sense, “it is the exposition of the world-of-bodies as such, that is, as originally singular plural. The incorporeal exposes bodies according to their being-with-one-another; they are neither isolated nor mixed together. They are *amongst themselves [entre eux], as origins*” (*id.*). This implies that what speaks from below the mask of the legal persona is not the subject as constituted by Cartesian-Kantian metaphysics, but an embodied singularity.
temporarily displaced from this subjectivity, revealed in the subject’s de-limitation by law. In other words, the work of juris-fiction tacitly admits that what is recognized in the legal subject is not reducible to the legal persona, but instead conceals a singular, speaking being that exceeds such recognition.

To summarize, Nancy posits “being singular plural” as the essence of Being that also resists ascribing a single, substantial essence to Being. One of the ways it does this is by embedding alterity as the distance between singularities that nonetheless coexist through sharing the world. This concept builds on his earlier insights on the impossibility of realizing immanent community: in an age where myth no longer possesses its mythico-ontological power, something must speak to the need for some notion of community beyond what is immanent or essential. To convey the sense of being-with captured in the constitutive experience of community, Nancy posits literature as giving voice to being-in-common. If this is the case, then law might be thought as similarly fictioning to expose its limits, but Nancy is well aware of the power of a State to cover over this admission of its limits. However, by emphasizing the lapse that takes place in jurisdiction, such that judicial reasoning requires the juris-fiction of drawing the legal subject, Nancy likewise leaves room within for singularity to make its mark within plurality. Hence, while he argues that legality is founded on its fictioning, the displacement of the political subject nonetheless allows for the subject’s singular being to be emerge in juridical space. This seems to imply that, even given the determinations imposed by social institutions, there remains an irreducible singularity within a subject. This insight will play an important role in placing the embodied dignity that this dissertation has defended into the carnal hermeneutic it will articulate; for now, Fanon’s action-oriented sociogeny will be examined for its insights into how to create meaning and values for an incipient community, even one that appears to have no history.
4b Fanonian sociogeny: collective meaning and affective praxis

Surprisingly given the volume of academic literature discussing his concept, Fanon does not discuss what his concept of “sociogenesis” actually is. From his only use of the term in *Black Skin White Masks*, Fanon extends the epidermal schema imposed upon the Martinican colonial subject to the affective relations that drove the Algerian liberation struggle (Drabinski 2012; Whitney 2018). At the very least, the term can be said to include the collective power of meaning-making in response to the imposition of colonial order: for Fanon explicitly states that, “Society, unlike biochemical processes, does not escape human influence. Man is what brings society into being. The prognosis is in the hands of those who are prepared to shake the worm-eaten foundations of the edifice” (2008: xv). Lewis Gordon frames sociogeny as a question of philosophical anthropology: he argues that Fanon poses this question “to remind all of us that one cannot legitimately study man without remembering that desires and values emanate from him and shake the contours of investigation” (1995: 9). Fanon’s approach stands outside the Freudian psychoanalytic concepts of phylogeny and ontogeny because it involves “understanding that the problem and interpretation at hand must be addressed ‘on the objective level as on the subjective level’” (*id.*; cf. Coulthard 2014; Karayiannides 2020).

In this light, Fanon concludes that the struggle must be waged on two levels: the ontogenic level of individual struggle and the phylogenic level of structural and biological imposition (Gordon 2000: 54). More specifically, he locates the site of this struggle in sociogeny, the ground that actively shapes and conditions both ontogeny and phylogeny while also making them intelligible; and thereby becomes the terrain upon which acts of resistance can be theorized (*id.*). Without these sociohistorical considerations, the colonized black person does not appear and consequently cannot be understood through theoretical appeals to value/racial neutrality (*id.*).
Gordon argues that the significance of social reality on bodily formation includes “the sociogenesis of racism and colonized constructions of the self,” as well as the “symbolic transformation of intersubjective relations or, in a word, culture” (id. 84.). For Fanon, the problem of intersubjective relations between colonized and colonizer is not simply the traditional philosophical problem of others’ minds. Rather, because racism affirmatively denies the humanity of other people, “the Self/Other dialectic had to move through a veil in which the presumption was that on the other side waited that which was questionably human at best, which challenged any ascription of self and other” (Gordon 2010: 184). In this sense, the problematic moves beyond the disalienated black colonial subject, into the “zone of nonbeing” that structures this dehumanized position (Gordon 2015: 69). Hence, at the end of The Wretched of the Earth, Fanon urges his readers—but more specifically, his “comrades”—to develop “a new way of thinking, and endeavor to create a new man” toward the larger, eventual end of “making a new skin” (“faire peau neuve”) (Fanon 2002: 305).12 He recognized that purely physical struggle, while necessary, also requires what Sylvia Wynter has identified as the “‘liminal’ struggle to restructure epistemic categories into new, semiotic biogenesis, into new forms of life. Freedom, that is, always calls for a new humanity to emerge out of unfreedom, a new humanity that is paradoxically the guiding telos underneath a humanity denied” (Gordon 2000: 54, cit. Wynter 1996). This “semiotic biogenesis” entails a symbolic reconstitution that (re-)creates a totally new biological category of “the human,” thus inviting a hermeneutic component to liberation.

When Fanon first deploys this critique in Black Skin, White Masks, he lacks what Sonia Kruks calls a “middle level” of investigation, because he cannot “analyze the dynamics that mediate between particular existential experiences and more general historical processes. It is

---

12 My translation; cf. Philcox’s translation “a new start” (Fanon 2004: 239).
this lack that perhaps accounts for [his] sudden leap from the most concrete treatment of difference to such abstract universalism” (1996: 132). Indeed, Gordon notes that despite the key role that sociogenesis plays in his early and late works, Fanon devotes no energy to elaborating this concept (Gordon 2006: 248). Still, Sylvia Wynter has provided her own understanding of the theoretical contours of such a cultural re-programming, in what she calls the “sociogenic principle” (Wynter 2001; 2006; 2015). For Wynter, this principle is the “master code of symbolic life/death,” (2003: 272) such that alterations of these codes require shifts in the “politics of being,” that is, “a politics that is everywhere fought over what is to be the descriptive statement, the governing sociogenic principle, instituting of each genre of the human” (id. 318). This politics of being is not a Heideggerian fundamental ontology, but the sense that different modes of sociogeny are effectively “genres or kinds of being human, in whose always auto-instituted and origin-narratively inscribed terms, we can alone experience ourselves as human” (Wynter 2006: 117). Here, the term “genre” means “kind of human” that “sociogenically defines itself” (id.), implying the need for a kind of poetic (re-)articulation of the human beyond the ontologizing of coloniality.

Wynter’s sociogenic principle can be analogized to Fanon’s “national consciousness,” which he describes in affective, embodied, and collective terms drawn from his experiences in the Algerian war of independence. For Fanon, the colonial relationship is one of “physical mass,” with the numerous colonized held in “muscular tension” that sometimes spasms in internal conflict or against the colonizers; likewise, the colonial subject dreams “muscular dreams, dreams of action, dreams of aggressive vitality,” while their “overexcited affectivity” is “kept on edge” and expressed through practices such as dance, ritual, and myths (2004: 15–20). Such a situation contributes to the “atmospheric” violence of colonialism, and “ripple[es] under the
skin” of both colonized and colonizer alike (id. 31). In light of this comprehensive violence, this tension will erupt in spontaneous insurrectionary activity against the colonizers, prompting the regime to respond with repressive reprisals; however, Fanon maintains that “repression intensifies the progress made by national consciousness” (id. 32–34). Jane Anna Gordon has described this consciousness as a normative ideal that “supplement[s], broaden[s], and reconstruct[s] the initial [revolutionary] nationalism with political, economic, cultural, and therapeutic components,” whilst also “guiding and emerging out of each and all” (Gordon 2014: 131). What distinguishes national consciousness from a narrow, chauvinistic nationalism is its capacity to coalesce and direct the affects of the colonized toward the eventual replacement of the colonial order, instead of the latter’s emphasis on inclusivity through exclusionary tactics. Fanon remarks, too, that in Algeria, the national struggle channeled all anger and nationalized “every affective and emotional reaction” (2004: 230). The affective and emotional components that infuse revolutionary activity undergird the new national consciousness and therefore become concrete in the political, economic, cultural, and therapeutic components of the decolonial process, effecting the institution of a new—or at least embryonic—sociogenic principle. Hence, Fanon thinks a national consciousness at its best can serve as “the coordinated crystallization of the people’s innermost aspirations, […] the most tangible, immediate product of popular mobilization” (id. 97).

How then does this consciousness become a new sociogenic principle? Fanon recognizes that a national consciousness can still fall in a narrow chauvinism: he concedes that the various failings of the colonial elite and bourgeoisie—whether because of their lack of ties with the masses, their apathy, their mediocrity, or even their cowardice—can render its potentially liberatory guidance into “nothing but a crude, fragile empty shell” (id.). Fanon notes further that
“the [urban] proletariat is the kernel of the colonized people most pampered by the colonial regime” (id. 64), while the lumpenproletariat in the surrounding shantytowns serves as “the urban spearhead” of the insurrection (id. 81). So, the segment of the colonized population that Fanon finds most amenable to developing a national consciousness is the rural peasantry outside the colonized urban center, because they “intuitively believe that their liberation must be achieved and can only be achieved by force” (id. 33). Fanon sees the rural masses as both a repository of non-colonized values and a measure of the revolutionary movement’s strength, since they “have never ceased to pose the problem of their liberation in terms of violence, of taking back the land from the foreigners, in terms of national struggle and armed revolt” (id. 79). The rural masses therefore “play a crucial role either in the gestation of the national consciousness or in relaying the initiatives of the nationalist parties” (id. 68).

Fanon insists, too, that postcolonial leaders must keep the masses politicized, in the sense of ensuring affective investment in the success of the young body: “Since individual experience is national, since it is a link in the national chain, it ceases to be individual, narrow and limited in scope, and can lead to the truth of the nation and the world” (id. 140–41). Still, he warns against allowing this consciousness from becoming a crude or narrow nationalism, since it is neither a political doctrine nor a program: rather, once the nation has been established, the consciousness must become “social and political” (id. 142). To do so, he argues, means to explain, enrich, and deepen nationalism beyond the resuscitation of some pristine communal identity that claims to precede or remain pure of coloniality; rather, a truly liberatory national consciousness is a dynamic (re-)production of “the human” by an entire people (id. 144). Much the same way that an individual is a link in the national chain, the nation must become a link in the universal idea of the (postcolonial) human: “To politicize the masses is to make the nation in its totality a reality
for every citizen. To make the experience of the nation, the experience of every citizen” (*id.* 140). Doing so also requires taking account of the diversity of the population being mobilized to construct this national consciousness. Fanon argues that the “undifferentiated nationalism” that impels the decolonial struggle must eventually give way to a more nuanced social and economic consciousness that recognizes difference beyond the colonizer’s Manicheanism (*id.* 93–95). He therefore counsels rigorous organizing of the people and ideological sophistication of their leaders to maintain (the production of) a sufficiently robust national consciousness that can overcome these tribulations.

Clearly, for Fanon, a national consciousness worthy of its name can only be formulated and expressed in a mass revolutionary struggle against a colonial regime. Kris Sealey emphasizes that Fanon’s project foregrounds an anticolonial and decolonizing agenda based on the subjective, “everyday” transformations of the revolutionary context (Sealey 2020: 144–45, cit. *Fanon* 1967; 1969; 2018: 255). The cultural generativity of revolution mobilizes the people by pitching them in a single direction: “When it is achieved during a war of liberation the mobilization of the masses introduces the notion of common cause, national destiny, and collective history into every consciousness: it is totalizing, unifying, and national” (*Fanon* 2004: 50–52). Additionally, “[v]iolence alone, perpetrated by the people, violence organized and guided by the leadership, provides the key for the masses to decipher social reality” (*id.* 96.). This deciphering of social reality through struggle guided by the national consciousness effects a rewriting of the sociogenic principle that dictates the colonized world. Fanon finds that the sublimated activities involving local lore and practices falls by the wayside during the revolutionary struggle (*id.* 20.). Further, the awakening of a national consciousness allows for greater creativity and experimentation within the artistic production of the people (*id.* 175). This
observation is consistent with his claim that total liberation “involves every facet of the personality,” he writes, “When the nation in its totality is set in motion, the new man is not an a posteriori creation of this nation, but coexists with it, matures with it, and triumphs with it” (id. 233).

In this light, the revolutionary activity of decolonization is essential to making the “new skin” that Fanon calls for. In fashioning the possibility of this new skin through decolonal praxis, the people retell certain insurrectionary episodes in the life of the community to “maintain their stamina and their revolutionary capabilities” (2004: 30). This new form of collective meaning-making negates (and sublates) the dehumanizing narratives told by colonizers that simultaneously over- and under-determine the colonized Black person. The crystallization of national consciousness prompts a flowering of creativity, including the emergence of national literature and the re-emergence of the epic:

The people's encounter with this new song of heroic deeds brings an urgent breath of excitement, arouses forgotten muscular tensions and develops the imagination. Every time the storyteller narrates a new episode, the public is treated to a real invocation. Existence of a new type of man is revealed to the public. The present is no longer turned inward but channeled in every direction. The storyteller once again gives free rein to his imagination, innovates, and turns creator. (id. 173–74)

Such creative, collective meaning-making exhibits a sociogenic understanding of the colonial context, which is primarily held by the peasants. Fanon therefore seems to privilege a certain lived, affective, narrativized component of coloniality as essential for decolonization: that the revolution must be narrativized if it is to coalesce and convince the colonized masses to rally behind it, and that this narrative is the national consciousness. Importantly, his concern with the lived experience of the colonized native is what informs and sustains revolutionary praxis—from the “affective disorders” of the racialized, colonized subject in Black Skin, White Masks, through the collective, affective theories in The Wretched of the Earth. In this light, Fanon claims that a
national consciousness partakes in the development of a new sociogenic principle that facilitates building a postcolonial nation, and eventually a fully decolonized society. Of course, such a development is never guaranteed; it must be intentionally pursued to carry the revolution forward to its end-goal of making a new skin, with a commitment to “an openness to the other” (Sealey 2020: 166; cf. Fanon 1967). How, then, can one build a prospective, decolonial national consciousness that guards against the narrow nationalism that Fanon cautions against? What would be needed in response would be some way of translating the embodied experiences of the collective into a sense of sociality—a means of re-inscribing the incorporeal whilst keeping the singularity of corporeal bodies ever-present, akin to what Nancy describes in his account of non-essentialized community.

4c Sharing sociality as creating community: a revised social ontology

Some preliminary answers will be provided in the next chapter; for now, it is best to take stock of Fanon’s arguments against the backdrop of Nancy’s concerns. What Nancy’s ontology of singular plurality has provided is a thoroughgoing critique of essentialized community by deconstructing the modern philosophical subject into its presuppositions. Doing so has drawn out the fundamental relationality that grounds sociality, which has served to highlight the importance of interruptions in concepts—such as community or jurisdiction—that threaten to dissolve or cover over such singularity. For Nancy, sense-making depends on the capacity for singularities to enunciate their shared exposure to each other; in this regard, he emphasizes the necessity of “spacing” in ontology, one that attempts to subtend any account of the subject through a notion of “singular being” and embeds alterity as constitutive of such beings. Although Nancy explicitly
denies that his ontology is offering an account of (inter-)subjectivity, it can certainly be taken to
ground such relations in a social-ontological register.  

So, following Nancy in spirit if not in letter, “singularity” in this dissertation will be
understood as “the capacity of embodied legal subjects to exercise their rights and duties,” with
the spacing between singularities that are mutually exposed to each other in both Nancy’s
rethinking of community and “being singular plural” understood as the intersubjective relations
of recognition of that singularity between legal subjects that constitute their dignity. In one sense,
I am indeed no longer working at the same ontological level as Nancy, and my attempts to
“apply” his thought will fail on those terms. In another, more crucial sense, however, I am not
atting Nancy’s thought to the letter, but to use his insights to better inform my
account of social ontology: that is, as one that resists the reification of exclusivist accounts of
community while still allowing for the possibility of collective meaning to emerge. In this light,
taking Nancy’s concerns seriously means taking his ontological account of “being singular
plural” as embedding in a social ontology a recognition—if not assimilation—of the necessity of
interruption, as seen in the unworking of community and in juris-fictioning. Indeed, the ontology
of enunciation is a crucial aspect of juris-fictioning, as the lapse it effects within the ruling order
allows singularity to be voiced.

Fanon’s challenge to a politics of recognition (and its attendant general ontology) is likewise
mediated by reframing ontology as a social ontology; in fact, he seems to agree with Nancy that
there is an irreducibly social-existential element to ontology, even as he disputes the ability of a
general ontology to broach the colonial divide. Fanon’s existential analysis of the social and

---

13 Ignaas Devisch has similarly argued that Nancy provides a “social ontology,” albeit understood as an “existential
or fundamental investigation into the condition of being-with” (2014: xii). My reasons for departing from this
understanding of social ontology, however, are explained in the following paragraph.
political configurations of coloniality—especially as they deform the very relations between the body of the colonized subject and the world—reveal that such institutions can both occlude and do violence to the conclusions of general-ontological investigations. Given that he thinks that relations of mutual recognition are possible in non-racist society, it seems clear that Fanon assumes that there is a shared ontology between colonizer and colonized, but that it is deformed due to the impossibility of relations of mutual recognition. Following this assumption, Fanon’s own understanding of “ontology” is one that is irreducibly social—in his terms, a sociogeny. Whatever may be the true fundamental ontology—if there is such a conceptual scheme—what matters for Fanon is how certain conditions for sociality create historically-specific subjects as part of that society. Even if, for Nancy, the ontological is social as co-existent—and despite my own strong sympathies for his ontological position—a sociogenic understanding of the (social) ontology of political and legal institutions is more responsive to specific socio-historical conditions, particularly as they deform subjectivity through the occlusion of singularity. Still, Fanon is well-placed to carry forward the Nancian insight that non-totalitarian community is a liminal experience that constitutes beings through their mutual exposure to each other, as well as the need for some sort of “writing”—as literature, as art, as fictioning—to carry this shared experience. Hence, I will take Fanon’s sociogenic account of collective meaning-making to carry forward Nancy’s insights, within an ontological sociality that accepts singularity as constitutive of subjectivity and recognizes that alterity exists between co-existential, intersubjective beings.

5 Conclusion

In this chapter, I have argued that critiques of two key notions in my Hegelian reading of Dworkin provided by Nancy and Fanon also provide the means for re-thinking how these concepts can be re-read in defense of a social ontology that can support the deployment of these
concepts in the manner I have argued for. By engaging with Nancy’s later ontology of being singular plural, I hope to retain the idea of singularity that undergirds any talk of a subject or particularity within the social ontology posited by this dissertation. Perhaps this identification of singularity with the deployment of Hegelian negativity as key to human dignity comes dangerously close to doing violence to Nancy; still, given Nancy’s own admiration for and celebration of the “restlessness of the negative” in Hegel’s thought, any such violence is minimal if present at all (Nancy 2002; cf. Faust 2021). Again, as stated earlier in this chapter, I am not attempting to make Nancy into a Hegelian; I am instead using Nancy’s insights to sharpen this project’s conception of a social ontology that remains ontologically open. That said, the concern of this dissertation is a socio-legal ontology that retains a capacity to ground human dignity in singularity in order to theorize a legal interpretation that understands the legal subject to be an achievement of sociality, for good or for ill—and crucially, as a normative artefact that cannot be separated from its constitutive ground as the site and medium of normativity. Fanon’s sociogeny is well-placed to carry forward these concerns due to his theoretical commitment to creating new experiences of community in pursuit of achieving liberation, as well as his theoretical orientation of thinking from the position of “the wretched,” les damnés, as the agents of creating this new historical community. In the next chapter, I will argue that many of these insights can be used to reorient legal interpretation toward a similar—albeit more discrete—recognition-based ideal of justice through an engagement with Paul Ricœur’s hermeneutics.
Chapter IV

A New Skin for Recognition: Fanon’s Affective Sociogeny and Ricœur’s Carnal Hermeneutics

C’est par un effort de reprise sur soi et de dépouillement,
c’est par une tension permanente de leur liberté
que les hommes peuvent créer
les conditions d’existence idéales d’un monde humain.

It is through an effort to recapture oneself and to slough off one’s skin,
by a permanent tension of their freedom
that men and women can create
the ideal conditions of existence for a human world.

—Frantz Fanon,
Peau Noire, Masques Blancs
(my translation)

1 Introduction

In the last chapter, I responded to critiques of two key elements of the social ontology I am proposing to re-ground and expand Dworkin’s theory of legal interpretation and human dignity. I argued that both Nancy and Fanon are each concerned with specific problems of social meaning-making; and more particularly, the problem of ossified and oppressive forms of social identity and political subjectivity. For Nancy, the totalitarian threat posed by attempts to make an essential, transhistorical group identity immanent can be countered by re-focusing on the liminal spaces in-between specific singularities that “exist-with” each other plurally. I argued that Nancy’s focus on singular beings that pluralistically co-exist embeds a relationality of alterity that can ground the account of human dignity I argue for in Chapter 2. What this ontological sociality provides as well is an understanding of spacing that allows singular voices to enunciate their singularity and to co-construct a shared sense of the world through communicating their mutual exposure to each other.

1 A slightly different version of this chapter has been published as Faust (2022).
On the other hand, Fanon posed a more significant challenge to my account’s reliance on a Hegelian ontology of mutual recognition, due to his argument that such recognition is impossible under conditions of coloniality as well as his methodological suspicion toward any theory of a general ontology. Although Fanon challenges the very possibility of a politics of recognition within coloniality by denying that colonizer and colonized share an ontology, I argued that he does not abandon the possibility of mutual recognition, since it informs his later account of collective meaning-making. Indeed, I have argued that, for Fanon, creating the conditions for the possibility of healthy relations between presently racialized peoples was a central concern in his analysis. What concerned him was understanding the material, institutional, and cultural processes of subjectivization that formed historically specific political subjects, so that practices of resistance could be developed to formulate new histories for new political subjects in pursuit of liberation. Part of that paradigm of the “new skin” for a new human includes creating the communal relations that allow for healthy encounters of mutual recognition.

In this chapter, I will continue articulating the social ontology that will inform my interpretivist theory of legal interpretation by placing Fanon into conversation with Paul Ricœur concerning the role of embodiment in collective meaning-making, to argue that recognition can still operate as a viable, non-oppressive political goal due to its intimate relationship with intersubjective social relations and practices. Despite living on opposite ends of the colonial divide, Frantz Fanon and Paul Ricœur directed their energies toward similar ethical and political ends. As befitting Francophone philosophers of their day, both were indebted—to various degrees—to the phenomenological work of Edmund Husserl, Maurice Merleau-Ponty, and Jean-Paul Sartre; the psychoanalytic insights of Sigmund Freud; and the dialectical tradition inaugurated by Hegel, including the powerful Marxist influence exuded by the French
Communist Party and present in the global decolonial movement. Another shared influence, often underappreciated in Fanonian scholarship, was that of Karl Jaspers (Bernasconi 2020: 391). Not only does Fanon explicitly refer to Jaspers’ notion of “historicity” in *Black Skin, White Masks*, but based on the contents of his library, at least some of his familiarity with Jaspers came through Ricœur’s 1947 text co-written with Mikel Dufrenne (Fanon 2008; 2018). Describing historicity, the co-authors emphasize that humans are bound to “situations and restrictions while taking them up and adopting them, so that they are constantly in question and subject to revocable decisions” (Bernasconi 2020: 391–92, cit. Dufrenne and Ricœur 1947: 182).

This concern with historicity likewise describes the grounds and limits for Fanon and Ricœur’s own analyses of social and political questions—although in another sense, the possibilities for novel social imaginaries are only as limited as the literary production of collective meaning. In other words, while there is in principle no limit to the variations of how human relations can be ordered, the inescapable ground of practices and norms is within the material, historically-specific social relations within which subjects are subjectivized. What both Fanon and Ricœur offer is way of theorizing new relations of normativity that remain responsive to—without being pre- or over-determined by—these material, historically-specific conditions through their analyses of collective meaning-making, grounded in an ontological sociality.

Here, I will argue that the analysis of specific aspects of narrativity—that is, “legends, stories, history”—occupies a similar place in the thought of both men; and further, that the different ways that each deployed their respective analyses of these notions sheds crucial light onto the material limits of these analyses (Fanon 2008: 112). To do so, I will show how the sociogenic analyses offered by Fanon and the embodied hermeneutics of action in the work of Ricœur can supplement each other’s accounts without detracting from their power or diminishing
their merits. More specifically, Fanon aids Ricœur in theorizing across the socially-mediated asymmetries (such as between colonizer and colonized), while Ricœur provides Fanon with the conceptual tools to narratively actualize the utopic end of liberation—i.e., mutual recognition unimpeded by racial or colonial hierarchies. This chapter therefore offers a “creolizing” account of constructing a liberatory national political identity, arguing that members of a national/political community are actively engaged in constructing the community’s own history against and beyond the asymmetric social conditions imposed by the logic of coloniality (e.g., Monahan 2011, J.A. Gordon 2014, Sealey 2020; see also Anzaldúa 2007).

My argument in this chapter will proceed as follows. First, I will argue that Fanon’s sociogeny and Ricœur’s carnal hermeneutics share the following attributes: 1) a focus on a phenomenology of embodiment; 2) an account of ontology that is irreducibly social; and 3) the necessity of mutual recognition as an ethico-political ideal. I will then examine Fanonian sociogeny, arguing that it can be understood as a logic explicating how new forms of social meaning are produced through intersubjective social relations—a necessary component for building a “national consciousness,” a process of collective meaning-making that occurs in revolutionary decolonial praxis, and a crucial step toward the aforementioned end of “making a new skin.” However, because Fanon remains vague on how this production of meaning can lead to this new skin, I will argue that a Ricœurian hermeneutics of embodiment can advance the meaning-making that accompanies such action, through his understanding of narrative, imagination, and their respective relation to ideology and utopia. For Ricœur, embodied activity always implies a horizon of valuation that concretizes possibilities of future projects already embedded in the symbolic order created by that activity; however, Ricœur himself was neither a thinker of political revolution nor of the liminality between normative regimes. Due to the
lacunae that each philosopher can fill in the other’s thought, I will propose that a creolizing reading of their accounts alongside each other pushes each to their phenomenological limits: hermeneutics is forced to confront the interpretive challenges involved in thematizing liberation “from below” the auspices of established normative systems, while sociogeny must engage utopian imaginaries to construct new “genres of the human” beyond its immediate context (Wynter 2003: 269). Accordingly, I will argue that a carnal hermeneutics can aid in fashioning a new skin for humanity, but that an affective sociogeny is necessary to generate the narrative components necessary for fashioning it. I will conclude that the thought of Fanon and Ricoeur can together further theorize how new collective meanings—and new understandings of normativity—can be exercised both inside and outside social institutions; and further, that taking the decolonial “view from below” offers an important methodological perspective from which to theorize normativity in pursuit of fostering better relations of mutual recognition.  

Importantly for the ontological sociality of legality that I am arguing for in this dissertation, this creolizing reading will shape the sort of legal interpretation that can and ought to be done if a legal system is to claim that it operates in service of justice. More concretely, if a legal system claims to operate on behalf of every member of the legal community, then it is obligated to consider the perspective of persons at the limits or margins of the community—that is, those least capable of exercising their rights and thus most vulnerable to abuse—and to recognize their perspective as essential to legal reasoning as authorized and legitimated by that community. The argument will be made in the next chapter that failing to consider these vulnerable members of the community is to therefore fail to recognize the singular dignity of these legal claimants, thereby undercutting the legal system’s claims to adjudicate justly.

---

2 Shared theoretical concerns

In this section, I will give an overview of shared concerns between Fanon and Ricœur to set up the analysis for the remainder of the chapter. Tracing these concerns sets up what is complementary about their respective analyses as well as what is distinctive, thereby creating the space for a productive encounter toward complementary ends without one subsuming the other. Each attempts to philosophize through the historicity of their respective subjects: for Ricœur, the idea of the “capable human being” situated historically and politically within the (European) liberal democratic state; for Fanon, the means to colonial liberation, situated historically and politically within the colonized territories of Martinique and Algeria. What this overview intends to show is that their respective analyses respond to the conditions of historicized subjects, particularly those wounded by history or by the double-bind of antiblack racism—or, in the case of coloniality, both.

2a Embodiment as social medium

The most striking similarity between the two philosophers is their concern with embodiment. For Fanon, the lived experience of the Black person is structured by the historico-racial schema, an explicit replacement of the “corporeal schema” proposed by Merleau-Ponty (2008: 90–91). Axelle Karera argues that, while the Merleau-Pontian schema is still taken to be “ancestral and reciprocal and reveals a perpetual relation between body and world,” the Fanonian racialized body is instead “forcefully relegated to the realm of mere ‘things’ that occupy space differently than a body-subject would and is exposed to the instrumental will of another” (2020: 289–90). This historical schema both alienates and disfigures the racialized being through a racial epidermal schema that “violently divides racialized subjectivity to such an extent that one can hardly provide an account of oneself” (id. 291). Critiquing Sartre’s claims in his infamous Black Orpheus, Fanon reminds Sartre that “the black man suffers in his body quite differently from the
white man” (2008: 117). However, as Mathieu Renault notes, Fanon does not thematize singular bodies, but “the bodies; for him, the body only exists in relation with another body, in confrontation with other bodies” (2011: 51). Renault argues that Fanon’s conception of the body is “fundamentally a conception of the ‘corps à corps,’” such that the body is “always-already integrated in a political field, that it is always a body politic” (id.). For this reason, amongst others, Fanon concludes both Black Skin, White Masks and The Wretched of the Earth\(^3\) with calls for freedom as dépouillement, as sloughing off of one’s (racialized) skin in pursuit of a “new skin” of common humanity (2004: 239, 2008: 231; see also Bernasconi 1996).

Embodiment—as “the flesh”—has a similarly intersubjective character for Ricœur, even if he focused less on role of the body so prominent in his early work as his phenomenological thought became more hermeneutical and textual (Kearney 2015: 49). Still, Richard Kearney points out that corporality and textuality became (re-)entwined later in Ricœur’s career, beginning with Oneself as Another (id. 50). There, Ricœur follows P.F. Strawson in taking human bodies as the “first particulars” for establishing one’s identity (1992: 33, cit. Strawson 1959). The concept of the person for Ricœur is “no less primitive than that of the body,” because bodies are “eminently identifiable and reidentifiable as being the same” (id. 33). Importantly, Ricœur disqualifies mental events as basic particulars; instead, they are predicates attributed to the person-body (id. 34). With the body as the “first particular,” Ricœur dissociates the notions of the person as a public entity and consciousness as a private one (id.). He finds, too, that the discourse of agential action refers to “an ontology of one’s own body, that is of a body which is also my body and which, by its double allegiance to the order of physical bodies and to that of persons, therefore

\(^3\) The Wretched of the Earth will be referred to in the remainder of this chapter as “Les damnés,” to retain and emphasize the sense of existential condemnation—or better, the “subterranean being” (Ciccariello-Maher 2017: 58)—of the colonized evoked in the original French title.
lies at the point of articulation of the power to act which is ours and of the course of things which
belongs to the world order” (id. 111). Indeed, for Ricœur, the “primitive datum” of the power to
act can only be definitively established by “this phenomenology of the ‘I can’ and in the related
ontology of the body as one's own” (id.).

Ricœur thus maintains that body is “one’s own as a dimension of oneself”; that “in virtue of
the mediating function of the body as one’s own in the structure of being in the world, the feature
of selfhood belonging to corporeality is extended to that of the world as it is inhabited
corporeally” (id. 150). In this sense, this existential invariant of corporeality and worldliness
structures not only our narrative identity, but our ethical identity as well (id. 151). In his final
chapter, Ricœur describes a “triad of passivity” that links selfhood and otherness first of all
through the experience of one's own body “as the mediator between the self and a world which is
itself taken in accordance with its variable degrees of practicability and so of foreignness” (id.
318). He subsequently defines “one’s own body” as “the flesh,” as “the mediator between the
self and a world which is taken in accordance with its various degrees of foreignness” (id. 319).

Explicating this concept, Kearney describes flesh as “the place where we exist in the world as
both suffering and acting, pathos and praxis, resistance and effort” (2015: 51). Importantly, and
like Fanon’s corps à corps, Ricœur’s flesh “can only appear in the world as a body among bodies
to the degree that I am myself already an other among others—a self-with-another ‘in the
apprehension of a common nature, woven out of the network of intersubjectivity—itself
founding selfhood in its own way’” (id. 52, cit. Ricœur 1992: 326).

2b Irreducibly social ontologies

Neither Fanon nor Ricœur is concerned with articulating or defending a fundamental
ontology as understood in its classically metaphysical sense as a “mind-independent reality.” I
have already discussed Fanon’s critique of general ontology as well as my reading of his sociogeny in the previous chapter; for present purposes, it will do to recall that Fanon locates his analysis of coloniality and decoloniality within the *sociality* of the colonized, rather than in a Eurocentric ontology that subjugates blackness to raise up whiteness.

In contrast, from his position in the French metropole, Ricœur had more theoretical sympathy for thinking the ontological. But this sympathy did not make ontology a primary philosophical concern for Ricœur’s hermeneutical investigations: Christopher Watkin has characterized the Ricœurian *long détour* as akin to Merleau-Ponty’s indirect, “diplopic” ontology (2009: 95). Indeed, in *The Conflict of Interpretations*, Ricœur casts the ontological in terms of utopia, of a promised land that can be approached by the philosopher but not entered (1974: 24). Watkin thus describes Ricœur’s ontology as relying on “the shifting sands of a range of discourses and a fragile commitment to a meaning to be found in their midst,” such that Ricœur himself should comment:

> Not that I have ever found my ontological feet in any final or absolute sense. It is no accident that the title of the last chapter of *Oneself as Another* is in the form of an interrogation rather than an assertion – “Towards which Ontology?” (2009: 98, cit. Kearney 2004: 167)

Ricœur’s final chapter—or “study,” as he refers to it in the book—presents what Watkin calls his “attestatory ontology” (2009: 95), or what Ricœur somewhat hesitantly describes as an “analogical unity of human action” (Ricœur 1992: 20). Given the historical variations in understanding both action and the potential for action, Ricœur proposes a polysemic account of

---

4 Notably, Ricœur struggles to propose such unity, since he admits that evaluating a meaning of being is “too often sacrificed to being-as-substance” and as such “can take place only against the backdrop of a plurality more radical than any other, namely that of the meanings of being” (1992: 20). Hence, the hermeneutic problem arises since an ontology of act and of potentiality “open up variations of meaning difficult to specify because of their multiple historical expressions” (*id.*).
otherness to prevent such an ontology of act and potentiality from becoming “enclosed within a tautology,” that is, “the frozen language of an ontology” (id. 21; 298).

A key feature of this hermeneutic, quasi-ontological account is the type of certainty to which the moral agent it proposes may aspire. Instead of the foundational self-certainty ascribed to the Cartesian cogito, Ricœur offers the notion of *attestation* to characterize “the alethic (or veritative) mode of the style appropriate to the conjunction of analysis and reflection, to the recognition of the difference between selfhood and sameness, and to the unfolding of the dialectic of the self and the other” (id.; cf. Purcell 2013). For Ricœur, attestation retains verification as a necessary epistemic moment in reflection; however, it is fundamentally opposed to the notion of scientific *epistēmē* in the sense of “ultimate and self-founding knowledge” (id.). Further, he maintains that attestation is a belief in the grammar of “I-believe-*in*” rather than the doxic “I-believe-*that*,” which therefore links attestation with the etymologically related “testimony” (id.). What attestation lacks in terms of the “hypercertainty” of the cogito is the “assurance of being oneself acting and suffering,” that is, attestation of self (id. 22). In this sense, attestation brings to light the necessity of credence and trust. Additionally, this attestative ontology depends on the embodiment referred to in the previous subsection as the ontology of the body as one’s own that is experienced in the phenomenology of “I can,” which contributes to an ontology of the self “as an acting and suffering subject” (id. 112).

Of course, Ricœur recognizes that the linked notions of credence and testimony associated with “attestation” convoke its contrary: *suspicion*. Still, he maintains that suspicion is not simply the contrary of attestation, but “also the path toward and the crossing within attestation. It haunts attestation, as false testimony haunts true testimony” (id. 302). Due to the “uneasy balance” between these contraries, Ricœur links attestation to an ontology of selfhood, as mediated
through the dialectic of sameness and otherness (*id.*). What the hermeneutics of the self contributes is a “change of orientation of the celebrated dialectic of the Same and the Other”: drawing from his earlier splitting of identity between the immutable *idem* and the self-constant *ipse*, Ricœur argues that the pole of the Same further loses its univocity when revealed to the polysemy of the Other (*id.* 318). This otherness at the heart of selfhood, he claims, signals a phenomenological *passivity*—a term that Ricœur has linked with affect (*id.* 66), accepting a normative constraint (*id.* 215), receptiveness and even powerlessness (*id.* 275)—that is the correlate of activity (*id.*). Crucially, in addition to the relation of “the flesh” mentioned above, the remaining prongs of the “triad of passivity” are “the relation of the self to the foreign, in the precise sense of the other (than) self, and so the otherness inherent in the relation of intersubjectivity,” and the “relation of self to itself,” which he calls “conscience” (*id.*). These various relations of passivity support Ricœur’s earlier claim there is “no world without a self who finds itself in it and acts in it; there is no self without a world that is practicable in some fashion,” while also grounding the need for attestation (*id.* 311; 318).

More will be said about corporeality in the following chapter; for now, it suffices to note that this ontology of attestation is the closest Ricœur comes to a definitive ontology: instead of dealing “in facts and substances, being and nothingness, escape from or collapse into textualty,” this logic concerns “testimonies and witnesses, commitments and suspicions” (Watkin 2009: 88). And yet, Ricœur maintains that this ontology of attestation is “primordially injunction,” else it risks losing all ethical or moral significance for individual conscience:

The profound unity of self-attestation and of the injunction coming from the other justifies the acknowledgment, in its irreducible specificity, of the modality of otherness corresponding, on the plane of the “great kinds,” to the passivity of conscience on the phenomenological plane. (1992: 353)
So, for Ricoeur, an ontology of attestation does not determine any necessary essences that set the conditions for all possible articulations; rather, it is a fundamental call to articulate oneself as a capable, vulnerable moral agent who bears certain responsibilities toward other capable moral agents. In this light, both he and Fanon can be understood as “social ontologists” in that their respective ontological accounts are fundamentally social—intersubjective and intercorporeal—and therefore resistant to fixed or static accounts of being, such as those imposed by coloniality.

2c Recognition as an end, not a state

Lastly, recognition is a key component of the respective ethical teoi for both thinkers. While Fanon asserts there is no ontological resistance for the black man in the colonized world, I have argued that this argument should not be taken as an indication that an ontology that enables and facilitates recognition is impossible, let alone undesirable. As mentioned earlier, Fanon wishes to make healthy encounters between differently racialized individuals possible by moving beyond the Manichean categories imposed by coloniality. But he also maintains that this recognition cannot be obtained through classical (Hegelian) means, because such recognition is conditioned on accepting whiteness as the only register for self-actualization: the position of the colonized within the “zone of nonbeing” disables the dialectic of recognition (Ciccariello-Maher 2017: 53). The form of recognition that must be struggled for is distinct from the classical formulation, as the colonizer is a different master that wants “not recognition but work” from the slave; and likewise, “the black slave wants to like his master” (2008: 195, n. 10). This observation accords with Fanon’s claim that “the true disalienation of the Black implies a brutal awareness of the social and economic realities” (id. xiv). The economic realities of colonialism germinated in the

---

5 Phillipe Van Heute (2020) has recently—and convincingly—argued that Fanon is not critiquing Hegel per se, but Alexandre Kojève’s rereading of the more conceptual lordship/bondage struggle as a historicized liberation of slave over master. I am grateful to Ernst Wolff for pointing me to this chapter.
Manichean racial order that prevents interracial recognition. In response, Fanon argues that “black consciousness is immanent in itself,” such that “[t]he dialectic that introduces necessity as a support for my freedom expels me from myself” (id. 114). What appears to be a dialectical short-circuit is revealed to be a dialectical reversal of the epidermalization imposed upon the Black subject: Nigel Gibson describes “a displacement, or a ‘retreat’ to a mind of one’s own, Black consciousness as a possible ground for mutual reciprocity” (2003: 35). He further articulates Fanon’s position: “Because Black consciousness cannot look to the White world for recognition, and because ‘belonging’ or not belonging to a particular race structures one’s social position, Fanon’s phenomenological speculations eventually yield to an imperative of praxis” (id. 82). Hence, the end goal of national liberation through decolonial struggle is only realized though the complex transformation of the colonized, since “to venture beyond Manicheanism is to transform the native into an active thinking historical subject: ‘to rise above this absurd drama that others have staged around me ... to reach out to the universal’ of reciprocal recognition” (id. 180, cit. Fanon 2008: 174).

In contrast to Fanon, Ricœur does not prioritize struggle as the only or preeminent mode of recognition; but like Fanon, he seeks to think beyond the prevalent Francophone understanding of the Hegelian struggle for recognition. The ninth study of Oneself as Another mentions the term only in passing, as the requisite for accepting various universals contained in “so-called exotic cultures” and as “a structure of the self reflecting on the movement that carries self-esteem toward solicitude and solicitude toward justice” and “introduces the dyad and plurality in the

---

6 While Fanon is responding to Kojève’s reading of the struggle for recognition in Hegel’s Phenomenology of Spirit (1807), Ricœur focuses on the struggle described in the Jena manuscripts of 1802-1806, prior to what he sees as the progressive loss of recognition’s “density of presence” and “subversive virulence” that culminates in the Elements of the Philosophy of Right (2004: 173–74). I am grateful to Ernst Wolff for calling my attention to the different readings of recognition utilized by Fanon and Ricœur.
very constitution of the self” (1992: 289, 296). In The Course of Recognition, Ricœur claims that the Hegelian struggle for recognition would be impossible without the “actual, albeit symbolic, experience of mutual recognition” that accompanies the struggle, which he models on the reciprocal ceremonial gift (2007a: 153). Working from this model, Ricœur argues that mutual recognition must be possible outside of the struggle itself—but not completely detached from it—in contexts that he calls “states of peace” (id. 218–19). What interests him is how meaningful, intersubjective, interactive circulation emerges from the interplay between the level of exchange itself and how the metalevel “incarnates” reciprocal relations “through a process of self-transcendence,” whereby (self-)identification transitions to mutual recognition in these practices (id. 230, cit. Dupuy 1994: 45). For Ricœur, there must be some sort of relationality that grounds the possibility of recognition. Following this insight, Gonçalo Marcelo has proposed that Ricœur’s gift-structured notion of recognition generates an “ethical utopia of recognition,” a state of peace that has “an empirical ground in everyday practices and a normative surplus of meaning that projects them as a kind of utopia or regulative ideal” (2011: 121). Linking recognition with a utopic end—one that is not actualized beyond intersubjective activity but which possesses a normative salience which can be apprehended within such activity—provides fertile theoretical space for thought and action directed toward that end, derived from the lived experience of actors. Ricœur locates this idea in the optative language of wish and hope (2007a: 245); later in this chapter, I will argue that Fanon’s account of revolutionary praxis and the concomitant emergence of national consciousness likewise falls within this mode, as the hope for

---

7 Ricœur explicitly denies that such an alternative mode of recognition delegitimizes the necessity of struggle in some contexts: “Experiences of peaceful recognition cannot take the place of a resolution for the perplexities raised by the very concept of a struggle, still less of a resolution of the conflicts in question. The certitude that accompanies states of peace offers instead a confirmation that the moral motivation for struggles for recognition is not illusory” (2007: 218).
liberation. Importantly as well, there is no *terminus* implied by this telic structure: recognition and the justice that obtains from its processes remain ongoing, as sociality itself can be nothing other than (inter)activity amongst and with others.

2d **Intercorporeal sociality directed toward utopian recognition**

Certainly, there remain significant differences in the political orientations and sensibilities of the two men: Fanon was an active decolonial revolutionary and resistance fighter in Algeria, while Ricœur—even if not a completely silent observer of French colonialism—was a lifelong academic committed to understanding rather than overthrowing. Still, Fanon and Ricœur shared a common concern with corporeality, sociality, and recognition such that both philosophers can be read alongside each other as thinkers of *ontological sociality*—as distinct from a fundamental or general ontology that is independent of sociality—concerned with the intersubjective practices that gesture toward a utopian end of mutual recognition. Hence, I will take the field of embodiment to be the common site of social meaning for both philosophers, such that collective meaning-making can be thematized cross-culturally through—and due to—the intercorporeality that all humans share, even if different social contexts—such as institutions, histories, ideologies, and practices—will “shape” them differently and inscribe different meanings on different (groups of) bodies. I will understand both Fanon’s sociogeny and Ricœur’s hermeneutics to always be located and at work within this shared conceptual field of embodied action and social meaning. Additionally, if an ontological sociality defined by “the flesh” is the shared field from

---


9 This is not to say that the common existential cast of embodiment makes social domination or oppression any easier to live under or overcome. Rather, as Fanon’s sociogenic analysis has shown, the affective components of intercorporeality link social meaning even more intimately with the subject, such as with the effects of the racial-epidermal schema. In other words, the malleability of social meaning through embodiment does not diminish its effects on differently socially situated subjects; what it does do, however, is render social meaning even more deeply responsive to collective capacities of a people.
and against which social meaning emerges through individual and/or collective action, then the ends of recognition and liberation must likewise be similarly conditioned by embodiment, even if not fully realized in presently-existing social reality. In other words, the meaning-making capacity of intercorporeal beings links social forms and practices across space as well as through time; therefore, I will use the phrase “utopic end of mutual recognition” to refer to how intersubjective, embodied practices of sociality gesture toward an end-goal of making a “new skin” for a new human. For the more limited purposes of this dissertation, however, it will be sufficient to argue that this ontological sociality can provide the ground for interpreting the lived experiences of legal claimants as both produced and conditioned by past intersubjectively-generated practices—whether these practices exist(ed) at the material, ideological, or institutional levels, although I will argue that all three frequently overlap and intersect.

3 Ricœur’s hermeneutics: carnal texts, imaginative variations, and real utopias

In the previous chapter, I examined Fanon’s concept of sociogeny as the groundwork for making this new skin—one inscribed with new meaning beyond the Manichean dichotomies of colonizer/colonized and white/black—through creating a liberatory national consciousness. Unfortunately, Fanon remains silent as to what such a positive project would entail; here, I will use Ricœur’s hermeneutic analyses of narrative imagination—and particularly its ideological and utopian capacities—to theorize how this process of national self-creation may be facilitated from the revolutionary praxis of decolonization itself. That is, a carnal hermeneutic inspired by Ricœur will be used to explore the imaginative possibilities of theorizing this new skin, where the ideological and utopian power of narrativization serves as the basis of collective meaning-making. Likewise, Fanon’s analyses of decoloniality will reveal the social and political work that precedes Ricœur’s reflections within the (post-revolutionary) state. I will conclude by arguing
that both approaches are necessary for theorizing utopic ends of liberated mutual recognition, both within a colonized territory as well as within coloniality more broadly. More importantly for the purposes of this dissertation, it will help to articulate why a focus on the Nancian singularity of the legal person *qua* political subject ought to be given the same regard as conventionally accepted sources of legal norms.

For both Fanon and Ricœur, lived suffering is impetus for action. In his late text “Memory, History, Oblivion,” Ricœur argues that “the wounds left by history” demand a “call to justice owed to the victims of history” (2015: 154). For Richard Kearney and Brian Treanor, this late essay calls for a new hermeneutic of the suffering body, in continuation with the retrieval of the flesh as other (2015: 5). This account tracks with Fanon’s sociogenic analysis of the epidermalization imposed by the historic-racial and the racial-epidermal schemata. Still, he reminds us that revolutionary praxis requires more than the felt pain of living under colonialism: “Racism, hatred, resentment, and ‘the legitimate desire for revenge’ alone cannot nurture a war of liberation […] day by day, leaders will come to realize that hatred is not an agenda” (Fanon 2004: 89). As argued in the preceding chapter, Fanon’s sociogenic analysis detailed the collective, affective forces at play within revolutionary activity and its aftermath. A paramount concern during decolonization is channeling these affects through the development of a national consciousness. Here, I will argue that a Ricœurian “carnal hermeneutic” can provide the narratological tools for theorizing how such praxis generates the history of this new humanity through developing a national consciousness.

Kearney and Treanor describe “carnal hermeneutics” as “the surplus of meaning arising from our carnal embodiment, its role in our experience and understanding, and its engagement with the wider world” (2015: 1). Following the hermeneutic circle means realizing that “text is body
and body is text. If there is nothing outside of the text it is because there is nothing outside of the flesh. *Word is flesh*” (*id*. 2). As stated earlier, Ricœur began his career by investigating the embodied, fallible, and free subject, before turning toward the text as he delved more deeply into the symbolic mediation of language and how it orders the polysemy of meaning through narrative (cf. Pellauer 2014). Despite this shift away from explicit engagement with flesh, Ricœur’s persistent concern with text was its relation to human action; in his hermeneutic analyses, he maintained that phenomenology was “the unsurpassable presupposition of hermeneutics,” even as he claimed that a hermeneutical presupposition is necessary for phenomenology to constitute itself (1991: 26). Ricœur thus re-thought hermeneutics as “the explication of the being-in-the-world displayed by the text. What is to be interpreted in the text is a proposed world which I could inhabit and in which I could project my ownmost possibilities” (*id*. 36). This rethinking reverses the traditional priority of subjectivity within phenomenology: it no longer initiates, but terminates understanding, for the subject “must assume for itself the ‘imaginative variations’ by which it could respond to the ‘imaginative variations’ on reality that literature and poetry, more than any other form of discourse, engender” (*id*. 37). In this sense, Ricœur’s notion of the text testifies to (the distance from) the historicity of the human subject; and yet, in our capacity for imaginative variation, the lifeworld (*Lebenswelt*) becomes its own, embodied text against which these variations can be measured: “the reservoir of meaning, the surplus of sense in living experience, which renders the objectifying and explanatory attitude possible” (*id*. 43). The medium for this distanitation and variation is the intersubjectively-constituted social world, with these relations both structuring particular social ontologies as well as constructing correspondingly particular horizons of meaning for its subjects.
Such imaginative variation from the *Lebenswelt* allows collective meaning-making to emerge. For Ricœur, imagination diffuses itself in all directions, retrieves former experiences, and awakens dormant memories—a process of *retentissement*, or reverberation, that allows for a “free play of possibilities in a state of noninvolvement with respect to the world of perception or action” (*id.* 173–74). This process allows for the movement from sense (*Sinn*) to reference (*Bedeutung*) in fiction, which endows the imaginative product with a heuristic force that creates a new “reference-effect” that re-describes reality (*id.* 175). Ricœur argues that certain fictions lend themselves to the narrative form, which ties together both *muthos* and *mimēsis*, fiction and redescription, into a single artefact: “Between what could be a logic of narrative possibilities and the empirical diversity of action, narrative fiction imposes a schema of human action” (*id.* 177). Importantly, Ricœur maintains that narrative allows imagination a projective function in meaning-making, while imagination renders narrative intersubjectively transposable across different egos (*id.* 179–81). This intersubjectivity is possible due to what Ricœur, following Karl Mannheim, calls a “common criterion of noncongruence with respect to historical and social reality,” which presupposes that individuals as well as collective entities (such as groups, classes, or nations) are “always already related to social reality other than that of immediate participation, following the figures of non-coincidence, which are, precisely, those of the social imaginary” (*id.* 182). Essentially, the space of social meaning also denotes a space for (possible) action, at both the subjective and intersubjective levels.

Given Fanon’s concern with building a national consciousness that can sustain revolutionary struggle as well as bridge the post-revolutionary transition to a social and political consciousness, Ricœur’s *Lectures on Ideology and Utopia* are instructive. There, Ricœur argues that ideology—in its primitive, positive sense—constitutes identities for both groups and individuals; at this
level, he maintains, the imagination is both ideological and utopian (1986: 158). At the most basic level of society, the negative sense of ideology captures a distortion of its fundamental symbolic structure of action (id. 182). Drawing from Clifford Geertz, Ricœur claims that ideology—whether distorting, legitimating, or constituting—always has the function of “preserving an identity, whether of a group or individual” (id.). Even as constitutive, ideology acts to make us repeat our identity; the imagination thus has a staging or mirroring function (id.). However, ideology “operates at the turning point between the integrative function and resistance,” since it seeks to conserve what already exists within an identity in preserving it; utopia has the opposite function, of opening the possible by taking “the glance form nowhere” (id. 266). In its utopic capacity, the imagination has a disruptive function, as the production of an elsewhere that nonetheless calls back to the conditions that produced it (id.). Within sociality, the dialectical reverberation between these poles is also implicated in the dialectic between text and flesh, as well as narrative and activity, that impacts one’s practical life and decision-making. In other words—and especially significant for the decolonial concern with overthrowing the vestiges of totalizing coloniality—this integrative function of ideology places the decolonial struggle for a new national identity within the same register as the struggle for (mutual) recognition (Savage 2013: 202).

Robert W.H. Savage notes that Ricœur understands ideology and utopia as operating within the same motivational framework: the symbolic modes by which a society represents itself reflect and characterize the socio-political imagination, which congruently shapes the horizons of expectations (id. 205). In the work of utopian socialist Henri de Saint-Simon, Ricœur confirms his hypothesis that “both ideologies and utopias deal with power; ideology is always an attempt to legitimate power, while utopia is always an attempt to replace power by something else”
(1986: 288). Still, according to Ricœur, Saint-Simon merely asserts the transfer of power in utopia, since he provides “no practical means for implementation of the dream is set forth” (id.). In contrast, Charles Fourier lays out a more affect-laden path toward utopias, as well as an “intermediary margin” between the realizable and the possible, positive fiction and pathologized fantasy (id. 301–2). Also of interest is Fourier’s emphasis on inverting the present reality of “civilization” through liberating emotional potentialities (id. 302–4). Ricœur describes this essential conflict as between power and love, such that the utopian element is “the denial of the problematic of work, power, and discourse—three areas all undermined by Fourier's problematics of passion” (id. 309). In this manner, he affirms that the emotive, affective aspects of sociality play a key role in utopian thought—or more prosaically, in directing activity toward a particular ethical or political end to be realized through social practice.

What is important for Ricœur is that utopia has the fictional power to rewrite reality; due to this power, he places “utopia” within the register of rhetoric (id. 310). Although much has been written about the distorting effects of ideology, Ricœur emphasizes that “where ideology is legitimation, utopia is an alternate to the present power. It can be either an alternate to power or an alternate form of power. All utopias, whether written or realized, attempt to exert power in a way other than what exists” (id.). Since there is always some reference to the ideological and the utopian within practical social life; within the revolutionary context, then, subjective and intersubjective action effectively work to radically alter both the initial conditions for the imagination, and thus for what the (social) imaginary renders possible.

4 A utopic shared skin of recognition? The wager and its risks

In the previous two sections, I have described the approaches that Fanon and Ricœur, respectively, advocate when thinking through a sociality marked by intercorporeal relations.
Given the themes shared between the two philosophers I described in Section 2, a complementary relationship between these theoretic concerns can now be sketched, one that I argue points toward a utopic end that each seems to presume. The relation that I argue for in this section takes seriously both the dynamic self-creation that Fanon advocates for decolonial struggle, and the more conventional categories of political thought that Ricœur probes in his hermeneutic investigations. The creolizing methodology that I will use to lay out this relationship prioritizes neither approach as superior in and of itself; rather, it seeks to capture the process by which both approaches depend upon and inflect one another, in pursuit of the mutual goal of collective capability—i.e., liberation. Because such a state of collective being has not been actualized or realized, it remains—of necessity—a utopic end, one that does not presently exist but can be theorized and imagined, if not completely worked out in advance. That is, the horizons of possibility shift as we re-make the symbolic context in which our theorization and imagination of utopian ends takes place through our praxis; after all, genuinely revolutionary movements will make possible theorizations and imaginations of the future that were simply not present prior to that movement, even as the actors remain more or less the same.10 Indeed, following Fanon and Ricœur, these ends must be created through shared action within a common frame of history: the difference lies in whether that history is simply inherited through the existing social imaginary, or radically created in genuine revolutionary praxis.

Bringing the previous sections of this chapter together, the shared thematic concerns I have drawn between the two figures provides a rich theoretical terrain in which resistance and liberatory struggles are theorized according to the affectively-charged narratives of (collective) self-creation, which become the germs of a new political—and thus, historical—community.

10 I am grateful to Mike Monahan for pushing me to emphasize the effects of genuinely revolutionary movements on the political imaginary.
Following Fanon, the decolonial struggle itself creates these new narratives, which in turn alter the horizons of the struggle; the utopian end of liberation changes form—and hopefully becomes clearer—as these narratives and mythologies proliferate amongst the colonized, gelling into the national consciousness necessary for overthrowing the colonial regime. Following Ricœur, this consciousness becomes ideological in that it binds the colonized together, disrupting the colonial reality by uniting them in one voice that demands liberation, on the basis of their legitimacy as a nation that possesses its own power of self-determination. This shared task of collective meaning- and history-making through decolonial revolutionary activity, in pursuit of a utopic end of a post-colonial recognition, is what I take to be the “new skin” for a new man that Fanon calls for at the conclusion of *Les damnés*.\(^1\) Put succinctly, Ricœur’s hermeneutics allows for thematizing Fanon’s decolonial concerns beyond the immediate context of a specific colonized territory to global coloniality more broadly; while Fanon allows for thinking the production of social and political meaning antecedent to the formal structures of the liberal democratic state that concern Ricœur, in spaces outside the concentrated sites of political power and privilege, but over which the state still claims authority.

Now that this creolizing reading of Fanon and Ricœur has been laid out, certain differences between the two that have so far been elided must be addressed. The first is their respective understanding of recognition. Recognition is often taken to be a static state, no doubt in part due to once-prevalent, reductive readings of Hegel’s lordship/bondage struggle as culminating in “the” achievement of self-consciousness—as if either self-consciousness or recognition was a

---

\(^1\) Of course, Fanon analyzed how a colonized peasantry can collectively construct a postcolonial national identity through their liberatory struggle. However, I have attempted to show that his intercorporeal account of collective meaning-making shares enough thematic resonance with the hermeneutic thought of Ricœur such that Fanon’s lessons can be thematized beyond his immediate colonial context using Ricœur’s thought, and—importantly—without attempting to assimilate either philosopher’s thought to other’s.
one-off accomplishment. Where Fanon and Ricœur move beyond such static, restricted readings of Hegel is in their extension of recognition as part of a dynamic, ongoing process, one defined within sociality more broadly; and thus, in terms of building a national consciousness in Fanon, and of symbolic reciprocity in Ricœur. For Fanon, a national consciousness emerges through a liberatory struggle for the mutual recognition actively denied to the colonized; his call at the conclusion of Les damnés describes the “new skin” of humanity in those terms (2004: 178, 239). As noted earlier, Ricœur affirmatively denies that the struggle for recognition is the sole means for its achievement, even if he admits that in certain cases it is the appropriate action. Although no thinker of revolution, he still acknowledges that the struggle for recognition may be endless; that even casting the gift as its “ideal type” remains paired with the struggle, such that recognition remains an end to be striven toward (2007a: 245–46). Since both Fanon and Ricœur characterize mutual recognition as a telos to be aimed at and driven toward—even if they each provide drastically different means to achieving it due to their specific political concerns—juxtaposing their particular approaches in order to work through their differences yields a more concrete understanding of the meaning of liberation as a social production within a global context, from both within the colony and from the metropole.

The question of recognition directly implicates the question of citizenship, more specifically the question of the difference between membership in a nation and membership in a state. The process of building national consciousness is key to Fanon’s project of decolonization, precisely because such a collective identity must be forged against the colonial regime that refuses to

---

12 Certainly, the eradication of all forms of global coloniality—the new skin for the new humanity—will require some new concept of the human to emerge that includes (former) colonizers and the citizens of the metropole as well as the liberated colonized. Realizing such a global end will involve a much broader coalition of actors across greater divergences than can be found in a single colonized nation; hence, a new sociogenic principle that supersedes the present one of Euromodernity that was built by colonial conquest and remains intact through coloniality will require moving beyond—without forgetting or diminishing—Fanon’s specific insights into decolonial praxis.
recognize the incipient nation (2004: 170). Despite this necessity, Fanon recognized the fragility of the decolonized nationhood; hence his concern to link national identity to the community of citizens rather than to the precise form that a nation’s state took. He describes the need to elaborate a society through building and ascertaining values, so that “[t]he glowing focal point where the citizen and individual develop and mature” might exist (id. 40). To use Homi Bhaba’s phrase, the “psycho-affectivity” of the colonized both belies the universalist pretense of French citizenship and impels the liberatory struggle, by channeling the misrecognition imposed by the colonizer (2004: xix–xxiv). Crucially, then, the decolonized subject becomes a citizen of the new nation, not by instituting a new state-form, but through directing their (dis)affections in the collective struggle for liberation.

Although a consummate thinker of state citizenship, Ricœur likewise recognizes that the fragility of human affects and institutional endeavors—such as political organizations—demands from citizens a political responsibility (1991, 1998; see also Dauenhauer 2002 and Savage 2021: Ch. 3). For Ricœur, the state is the organ through which the historical community can make decisions; yet he also maintains that there is an ineliminable “discordance between the pretension of the State and the true state of affairs” (1965: 259; 1991: 330–34). The paradox of politics is that the state requires relations of domination in order to govern, even as it must create and enable “power-in-common” among citizens (Dauenhauer 2002: 237). Still, one cannot simply disengage from politics: the irresolvability of this paradox means that there is a continuing obligation amongst citizens to subordinate the domineering dimension to the power-in-common dimension (id., cit. Ricœur 1965: 261). To the extent that Ricœur ties citizenship to a political responsibility for a historical community, the Fanonian construction of a new communal history through building a national consciousness is the inauguration of a similar responsibility—that of
the decolonial revolutionaries for the fledgling postcolonial nation whose history they themselves are (re-)writing. Recall, too, that for Ricœur, the optative mood of a “state of peace” actualizes an “actual, albeit symbolic, experience of full, mutual recognition.” Fanon articulates this mood in terms of the “brotherly solidarity and armed struggle” that unites former enemies in the initial spontaneous uprisings against the colonizers (2004: 85). Although such spontaneous acts must give way to the more future-oriented guerilla tactics, these initial sporadic moments nonetheless symbolically disclose the ends (between the colonized) sought (by the colonized) through more organized revolutionary activity as the struggle for liberation continues (id. 134–35; Sealey 2020: 149; cf. Loute 2013). The very possibility of “the good life with and for others in just institutions” that Ricœur finds within the model of the gift also resides within the spontaneous anticolonial violence that Fanon defends in the struggle for liberation; in the “manifestation of a transcultural, transhistorical capacity,” native combatants begin the process of “purging and cleansing the nation of all that forecloses” thinking the possibility of decolonial future (1992: 240, Loute 2013: 118, Sealey 2020: 152, cit. Fanon 2004: 134–35). In this sense, the unity of the colonized fighters manifests the first glimmers of the utopic end of the struggle for liberation and inaugurates the history of the new nation toward that end. Further, the

---

13 Ernst Wolff has pointed to a crucial ambiguity that inheres in acts of violence, even if these violent acts are the only ones available to an actor or group of actors. Drawing from sociological analyses of labor conflicts in South Africa, Wolff argues that violence carries contradictory implications for citizenship and democracy—while there can be a valid distinction between strategic means and normative ends, these two dimensions cannot be separated (2021: 232–34). Wolff’s point is well-taken: violence cannot be purely determinative or discretely intentional, and even the decision to refrain from violence need not necessarily be the better option, whether strategically or normatively. However, the sociological studies that Wolff uses to formulate his analysis are conducted in the “violent democracy” of South Africa, which possess a constitution that guarantees certain formal rights for all citizens but has mutually conditioned its democracy with violence (id. 226–28, 230–31). In contrast, for Fanon, the oppressively pervasive violence of the Manichean colony demands and justifies revolutionary decolonial violence. Additionally, the moments of solidarity that Fanon observes are particularly crucial for the eventual task of building a new nation among colonized groups that have been divided by the colonizers. As Fanon observes, the moments serve as the narrative building blocks for the new national history that can coalesce into the national consciousness. Admittedly, this is not a “state of peace” between colonized and colonizer; it is, however, such a state between the colonized natives. In this sense, the optative mood seems apt to characterize these moments of unified struggle toward the end of collective liberation.
preconditions for thinking citizenship reside within thinking of the incipient nation as a collective with a common political history—one that is being written as the colonized resist the colonizers—and thus, a shared political responsibility for the well-being of fellow citizens of the nation. While these further preconditions may not be found within Fanon, they can nonetheless be found within Ricœur. Such a collective national and political responsibility is congruent with the ideal of mutual recognition that both Fanon and Ricœur see as the end of national-consciousness-building and the struggle for recognition, respectively.

5 Conclusion

In this chapter, I have argued that Ricœur’s investigations into narrative, imagination, ideology, and utopia can be read alongside Fanon’s descriptions of the sociogeny of nation-building through decolonial revolution, to better theorize how a “new skin” for humanity might emerge through constructive, collective self-(re)creation. While a legitimate question is whether Ricœur’s thought can touch the distance between the (racialized) colonized and colonizer, I have argued that he and Fanon share similar theoretical concerns, directed toward a similar end of enabling mutual recognition, such that a creolizing reading of the two can contribute to this end. What Fanon contributes to Ricœur is a rich understanding of how vast divergences in social location can be overcome through liberatory action that posits a new logic of sociality; likewise, Ricœur provides Fanon with an account of how liberatory horizons are produced through this praxis, based on the narrative power of the imagination. Taking these accounts together, I have argued, can provide a more complete understanding of what it means to make a “new skin.”

Both the ideological and utopian functions of the imagination are germane when considering Fanon’s sociogeny of national consciousness. As Fanon argues, this consciousness both impels revolutionary action prior and up to the overthrow of the colonial regime, as well as to permit the
creation of a distinct “social and political” consciousness for the young nation. This activity of revolutionary praxis seeks to go beyond a mere reversal of the colonial order: much like Ricœur’s observations on Fourier, there is an affective component to the realization of this utopia, one that derives from the felt, lived suffering of the colonized. Fanon notes that the sublimation of the colonized affectivity within the old stories ceases, such that new narratives follow from the advent of the revolution, sustaining the people in their praxis. A Ricœurian analysis can provide an explanation of how the horizon of meaning shifts based on the production of a new national culture that is developed alongside revolutionary praxis, that there are shared referents to the pre-colonial culture that are semiotically transformed through the decolonial process of nationhood-building.

What this creolizing reading of Fanon and Ricœur musters toward is a more profound recognition of the stakes in liberatory decolonial struggle—understood not in terms of an already-given axis of recognition proscribed by coloniality, but in terms of the new concept of humanity that is created through the decolonial process itself. The form of the political that emerges in decolonial struggle cannot be proscribed within a protracted “politics of recognition” in the manner proposed by Charles Taylor, precisely because decoloniality is a rupture of these political forms in pursuit of collective liberation. The authors examined in this chapter affirm that the terrain for the utopic end of the nation is within the intercorporeality of those struggling for liberation, as the members of a new historical community. The liberatory struggle for the incipient nation forges the national consciousness through the narratives generated, which unite the people and point toward the utopic end of liberation. The memories of those who fought for liberation are thereby inscribed in and improvised on by the national culture, as the forebears to whom future generations will be held responsible in the politics of remembrance and of
forgetting. The citizens of the new nation therefore find themselves responsible for continuing the struggle for the “new skin” of mutual recognition—that is, of a new, common humanity.

As stated previously, this is not to say that such struggles are guaranteed to attain their ends. There is always a possibility that national consciousness becomes a narrow nationalism that fails to serve the nation, or that a community will forgo its political responsibility and allow the state to dominate rather than empower its citizens. Yet, near the conclusion of his ideology and utopia lectures, Ricœur notes that “we cannot eliminate from a social ethics the element of risk. We wager on a certain set of values and then try to be consistent with them; verification is therefore a question of our whole life” (1986: 312). To that, we must also pair Fanon’s dictum: “Each generation must discover its mission, fulfill it or betray it, in relative opacity” (2004: 145). Such is the risk—and responsibility—of collective liberation, toward an end where the citizens of every nation might become their own capable beings within their co-created historical community.

But what do these reflections on revolution and collective liberation have to do with the law, with its institutional concern for precedent and procedure? By thinking Fanon with Ricoeur, and vice versa, I have argued that intercorporeal intersubjectivity is the fundament of social meaning, which includes its norms and values; that the self (as a subject) is a product of social institutions and practices that cannot be generalized outside its historic specificity; and that the self (as a moral agent) therefore cannot be dissociated from its embeddedness in material social relations with others. Ricœur understands this agentic capacity in terms of historically mediated action, which Fanon likewise accepts but focuses instead on the material, socio-cultural limits to that capacity. If rights can only be said to exist to the degree that their holders can actually exercise them or enjoy their protections, a legal decision-maker must therefore consider whether those
citizens “from below”—the people positioned as most vulnerable in a given legal community and therefore least likely to have their rights and dignity protected—will be adversely affected as a consequence of whatever legal decision is made. Even if one takes legality to be a more proscribed space of normative social inquiry à la Ricœur than the full-scale transvaluation called for in a Fanonian revolution, there is a clear resonance between this creolizing reading and Dworkin’s contestation of the strict line that positivists often draw between legal and non-legal norms. This resonance will be explored in more detail the next chapter, where the carnal legal hermeneutic will be laid out.
Chapter V

Dignity in the Flesh: A Ricœurian Legal Hermeneutic

[A] combination of toleration and imagination that to me is the epitome of all good government.

—Judge Learned Hand, *The Bill of Rights* (1958)

1 Introduction

In the previous chapters, I have argued the following: that Dworkin’s understanding of law as concerned with adjudication provides a compelling account of the link between legality and sociality (Ch. I); reading Dworkin’s understanding of dignity in the framework of Hegelian *Sittlichkeit* re-situates the concept as dependent on a robust account of intersubjective social recognition (Ch. II); that Nancy and Fanon’s respective challenges to “community” and “ontology/recognition” can be overcome through an embodied social ontology that emphasizes how plurality and intersubjectivity undergird social meaning-making (Ch. III); and that Fanon and Ricœur can be read together as sketching the contours of this embodied and social ontology (Ch. IV). The ontological sociality that emerges is one that casts subjects within a legal community as co-constituting each other—not only in public life, but in their very constitutions as singular beings in possession of human dignity. Importantly, following Nancy, respecting this dignity means allowing the embodied singularity of the subject through the voice to be heard; on my account, one’s dignity subsists in their capacity to deploy thinking—that is, to exercise and enjoy the protections of their rights—which necessarily depends on their embodied existential condition. However, as Fanon reminds us, what this embodiment *means* for singularities in plurality—in community, in sociality—is generated from the social manifestations of this ontological condition. Hence the risks of this ontological sociality are laid out as a question of
recognition: how well or poorly does a society (fail to) recognize this singular dignity when its members are living plurally? The way to answer this question, I argued, resides in how vulnerable to harm a legal claimant is, as a specific legal subject, with an emphasis placed on reasoning “from below,” that is, for those most vulnerable/least capable of exercising their rights and enjoying the law’s protections. To adequately comprehend the stakes involved for a legal subject’s dignity, the question becomes how to interpret the totality of circumstances that subjectivize the legal subject. The answer, I argue, lies in taking their phenomenological self-reports to carry at least as much normative force in legal reasoning as legal precedent and principle.

In this chapter, I continue my argument that an intersubjective, intercorporeal sociality both enacts and exceeds law by returning to Dworkin’s (Hegelian) account of dignity, and then incorporating Ricœur’s (creolizing) carnal hermeneutics. Again, I am not arguing that Dworkin necessarily shared the same ontological concerns that I am arguing for here; rather, in keeping with the other thinkers that I have engaged, I am arguing that the social ontology at work in his political and legal thought lends itself to this framework. Because his theory of legal adjudication rests ultimately within a notion of human dignity by way of an integrative political morality, Dworkin’s jurisprudence affirms that normative sources of legal authority reside within sociality—not as disembodied social facts, but as norms that are articulated, enacted, performed, and contested by embodied subjects embedded within the political and legal community. Expanding this concept of dignity to account for intersubjectivity through Hegel’s theory of social recognition opens the way to reading the embodied singularity of each legal subject as intimately intertwined with others as co-habitants and co-constituters of a shared social and political world bounded by the law. In this sense, following the carnal hermeneutics inspired by
the thought of Paul Ricoeur, I argue that the textuality of law that allows for legal interpretation extends to the phenomenological experiences of legal subjects as distillations of those material communal relations. Crucially, I will make clear how “textuality” for Ricoeur applies not only to interpreting written texts, but to the interpretation of human action as well. I conclude by considering how this theory of legal interpretation alters our understanding of constitutions, as well as the power of a people to alter them through the Ricœurian notion of “attestation.”

2 Dworkin’s “moral reading” of the American constitution

In this section, I will describe how Dworkin articulates his theory of legal interpretation, particularly his “moral reading” of the United States Constitution. Most references will be to his “middle-late” works—that is, commentaries and analyses given after presenting his “mature” theory in Law’s Empire, but before Justice for Hedgehogs. In the earlier text, Dworkin explained how a legal decision-maker would use their theory of legal interpretation when deciding cases that hinge on common law, statutes, and constitutional law. This “moral reading” of the Constitution establishes the link between his theory of interpretivism and his contentions about dignity’s foundational role in normative thinking broadly. Given my rereading of Dworkin as working within a Hegelian ontology, the intersubjective account of sociality that undergirds Dworkin’s moral reading hinges on an interactive co-embodiment that is both bound up with the normative schemes that inhere in sociality but still retains the capacity to alter these norms and their associated practices. The question of whether a specific legal claimant is capable of exercising this capacity therefore becomes a concern of legal reasoning—a point that will be made through reference to a recent critical race theoretical analysis of the “rule of law.” I will

1 Support for the necessarily embodied character of the Hegelian subject can be found in Russon (1997), particularly chapters 3–4 and 5.3.
argue further that, given that a legal claimant is one link on the chain of sociality that legitimizes a legal system, the attestations of a legal claimant must be allotted judicial respect comparable to that given to constitutions, case law, and other, more conventional legal texts.

2a How to read law through norms

Although Dworkin maintains that the moral reading is most appropriate for constitutional disputes, he begins his analysis with the sort of law most frequently encountered by legal decision makers: the common law. Given that his analysis is set within the Anglo-American context, Dworkin begins with an egalitarian political theory to justify the place of market-based reasoning in tort and contract law, areas of law concerned with adjudicating private wrongs. He posits that governments make decisions regarding the production, distribution, and ownership of property, as well as the uses people are entitled to make of the property they own; but he also maintains that governments have a basic obligation to treat citizens with equal care and concern (1986: 296). He argues against utilitarian accounts of wealth maximization to advocate his previously mentioned theory of equality of resources, which requires government to “make an equal share of resources available for each to consume or invest as he wishes” (id. 297).

For Dworkin, this requires a conception of public duty that the government to treat people as equals in its scheme of property without requiring people to treat each other as equals in using whatever the scheme assigns them—a duty in politics that does not carry over into public life (id. 299). Importantly, this understanding of the division of responsibility argues for a compatible, rather than a competing, conception of equality as defining public responsibility (id.). This conclusion is key for interpreting common law, Dworkin claims, because it helps to explain why we have a duty to treat others with equal concern in cases of nuisance and negligence—that is, in cases where abstract rights conflict—but not in general (id. 300). The division of responsibilities
musters toward an egalitarian interpretive attitude to resolve these conflicts, such that each citizen must refine and apply “the compatible conception of equality he believes supplies the best interpretation of the main structure of the settled scheme” (*id.*). In this way, Dworkin argues that accident law connects with a conception of equality that provides and interprets “market-stimulating rules” in a way that fits our moral and legal practices. Notably, Dworkin concedes that he has assumed that his preferred moral reading—equality of resources—is the superior approach on the grounds that it fits with moral and legal practice no worse than the libertarian conception but is a better abstract theory (*id.* 301). While this claim can be contested, it does not undermine Dworkin’s larger point: that some moral theory of equality that takes both public virtue and personal responsibility seriously as part of a more-or-less integrated moral worldview must underlie discrete instances of legal decision-making in the common law (*id.* 309).

Dworkin continues to refine his account by confronting issues of statutory interpretation. Under his conception of “law as integrity,” he maintains that the judge ought to treat the legislature as an earlier author in the chain of law, and to see their own role as that of a creative partner continuing to develop, in what they believe is the best way, the statutory scheme enacted by the legislature (*id.* 313). The judge must ask themselves which reading of the act shows “the political history including and surrounding that statute in the better light” (*id.*). While this reading will depend on what certain legislators said when debating the law as a bill, Dworkin rejects the idea that judges ought to take statements of specific legislators as indicating the intention of the legislator in enacting the statutes (*id.* 313–14). His major target is the argument—frequently made in American legal discourse—that judges should read unclear statutes according to the intentions of the legislators who promulgated them, as if the legislators were attempting to communicate their mental states through their vote, which Dworkin calls the “speaker’s
meaning” view of legislative intent (id. 315). Instead, Dworkin argues that a statute’s purpose or intention must be understood by taking the interpretive attitude toward the political events that include the statute’s enactment (id. 316). On adopting this attitude, a judge would certainly take note of official statements that legislators made in the process of enacting a statute but would also treat these statements as political events important in themselves, not as evidence of any mental state behind the enactment (id.). By parsing the difficulties in the “speaker’s meaning” view—which involves determining “who” authored the bill, “how” different mental states come together, and “what” mental states count as intentional—he demonstrates how such difficulties can be addressed by adopting the interpretivist approach he lays out, which focuses instead on the political convictions that are at play in the legislative process as a whole (id. 317–37).

Hence, in deciding cases involving statutory interpretation, Dworkin argues that a judge will be constrained by the usual concerns of integrity and fairness: integrity will require the judge to construct some justification that best fits and flows through that statute and is (ideally) consistent with other legislation (id. 338–40); and fairness will require the judge to consider what state of affairs is better, not only for the specific parties to the particular case, but the political community as a whole (id. 340–41). He maintains that the latter consideration helps explain why

---

2 Earlier in the text, Dworkin distinguishes his account of “constructive interpretation” from interpretation that seeks to retrieve “the actual, historical intentions of its authors” (1986: 53–62). Interestingly, although he approvingly cites Hans-Georg Gadamer’s “crucial point that interpretation must apply an intention,” Dworkin explicitly distances himself from the hermeneutic debate between Gadamer and Jürgen Habermas, specifically the debate’s assumption that “the only alternative to cause-and-effect understanding of social facts is conversational understanding on the model of verstehen” (id. 55; 420, n. 2).

3 As an example, in the following chapter, the congressional record leading up to the 2006 reauthorization of Voting Rights Act, will not be used by either the majority or the dissent to ascertain the “intention” of Congress, whether as composed from adding individual congresspersons’ intentions or as a collective “we-intention” Instead, when citations to its contents are made by any member of the Court, the record is only taken to be evidence of what information Congress used to pass the reauthorization, as well as the reasons why Congress thought that the Act as reauthorized would pass constitutional muster. At no point does any member of the Court attempt to use this record to ascertain what Congress’ intention was in passing the reauthorization, except as stated in the text of the reauthorization itself.
judges will pay “considerable attention” to the concrete convictions that legislators express, arguing that such statements should be treated as “themselves acts of the state personified” because they are “themselves political decisions, so the chief command of integrity, that the state act in a principled way, embraces them as well as the more discrete decisions captured in statutes” (id. 342–43). For Dworkin, the practice of formal declarations of general institutional purpose and convictions made on behalf of the state itself confirms his claim that legislation flows from the community’s present commitment to a background scheme of political morality (id. 346). Also important is that this practice protects the democratic aspect of the community of principle, by encouraging citizens to rely on a particular account of the public scheme when they develop and enforce it themselves (id.). Dworkin’s judge must therefore take these formal statements into account when deciding which story of the legislative enactment of the statute is the best, by which Dworkin means the one that assumes that the state has not misled the public (barring contrary evidence) and matches the formal statements of legislative purpose (id. 347). However, because he rejects the speaker’s view, Dworkin argues that his judge will be sensitive to the passage of time regarding the impact that legislative history and statements will have on their interpretation. the judge “interprets not just the statute’s text, but its life, the process that begins before it becomes law and extends far beyond that moment” (id. 348). In other words, for Dworkin’s judge, a legislator’s official statements made amidst the process of legislative enactment is important only insofar as it provides insight into the moral and political justification for the statute’s enactment at that moment in time, for the subsequent political and legal history of the statute must also factor into judicial interpretation (id. 348–50).

Dworkin offers two further points regarding the question of when such interpretation is required. In cases of ambiguous or vague language, Dworkin claims that a lack of clarity is a result rather than the occasion of legal interpretation (1986: 352). That is, “unclarity” only emerges when there are “decent” arguments for each of at least two competing interpretations for the language (id.). Responding to criticism that his interpretative methodology is
This temporal dimension to statutory interpretation has clear implications for Dworkin’s theory of constitutional interpretation, particularly the “originalist” reading first propounded by Robert Bork (1971) and later expanded by Antonin Scalia (1997) that places considerable weight on the intentions and understanding of the framers of the U.S. Constitution.\(^5\) Such readers, which Dworkin labels “historicists,” tend to limit eligible interpretations of the Constitution to “principles that express the historical intentions of the framers” (1986: 360). He likens this interpretive strategy to the speaker’s meaning theory of legislative intention and likewise dismisses it, contending that the historicist will encounter the same difficulties and therefore be forced into Dworkin’s theory of law as integrity (\textit{id.} 360–65). Even if one grants to the historicist that the Constitution is meant to be a stable foundational document rather than a simple statute, Dworkin contends that this argument still demands that an interpreter take account of subsequent constitutional history and development, including rights recognized by the Supreme Court that were never contemplated by the framers (\textit{id.} 366). But if this is the case, then the argument from stability becomes another argument of political morality, a claim that “a political community with a written constitution will be better in the long run […] if it secures stability by making the correct interpretation of the constitution depend on the concrete opinions of its authors” (\textit{id.} 366–67). Dworkin concedes that certainty and predictability in legal rules can provide a strong argument in certain quotidian cases; however, he points out that this stability argument is substantially weaker in cases where certainty is relatively important, such as when the courts decide novel “cases of first impression” (\textit{id.} 367). Further, he claims, concerns with stability

\(^5\) For additional critiques of originalism, see Ch. 5 of Dworkin (2006), as well as Mootz (2017).
must sometimes lose out to substantive matters of principle, such as interpreting fundamental individual rights against the state and nation: to freedom of speech, to due process in criminal procedures, and to treatment as an equal in the disposition of public resources such as education (id. 368).

The final general point Dworkin makes about his theory of constitutional interpretation is against the twin issues of judicial activism and what he calls judicial “passivism.” He notes that partisan critics tend to portray a judge who declares unconstitutional the actions of other branches of government an “activist” (and therefore tyrannical) whenever they disapprove of such decisions, but a “passive” judge whose decisions show great deference to other branches is instead considered statesmanlike (id. 369). Dworkin argues that this position “muddles” three different questions: who should make constitutional law, which institution has the authority to decide what the Constitution requires, and what does the constitution (properly interpreted) require (id. 370). The second question, for Dworkin, has been settled since Marbury v. Madison (1803), wherein Chief Justice John Marshall declared that the Supreme Court has final review power over the constitutionality of legislation (id.). Following this precedent, the passivist will argue that the Court must adopt the legislature’s answer as its own, but only if it follows from the right answer to the third question (id.). But if the correct answer is that the Constitution (properly interpreted) does not permit a legislature to enact a certain law, then deferring to the legislature in this instance means amending the Constitution—in violation of the passivist position (id.). Further, if the answer to the first question is that the people in a democracy—through the legislature—must make fundamental law, then a particular answer to the third question is presupposed (id.). So, if the Constitution (properly interpreted) does not permit a state to enact some specific legislation, then a judge that declared such legislation constitutional would be
changing the Constitution *(id. 370–71).* But if the Constitution (again, properly interpreted) *does* permit a state to enact the specific legislation, a judge who continued to strike down such statutes would *also* be changing the Constitution *(id. 371).* In other words, Dworkin concludes, the question of interpretation is inescapable; to accept the passivist position is “to declare as a matter of law the abstract clauses of the Constitution grant citizens *no* rights except concrete rights that flow uncontroversially from the language of these clauses alone” *(id.)*. In which case, given the lack of consensus even among constitutional lawyers on how constitutional questions are to be resolved, *nothing* could clarify constitutional controversies except the cumbersome process of adding a constitutional amendment. Unless these partisan critics of “judicial activism” are willing to accede to this *extremely* limited view of legal rights, their complaints about judicial usurpation are thus irrelevant to legal practice.⁶

Dworkin concludes his theory of constitutional interpretation in *Law’s Empire* by emphasizing the type of judgment he described earlier in the text *(id. 374).* Using the political virtues of justice as law’s goal and fairness as its measure, he argues that an interpretation of a legal issue is *pro tanto* better 1) if it comes closer to realizing what justice “actually requires” and 2) if it “reflects convictions that are dominant or at least popular in the community as a whole than if it expresses convictions unpopular or rejected there” *(id.)*. Against the passivist deference to legislatures, Dworkin maintains that any competent interpretation of the Constitution must recognize “that some constitutional rights are designed exactly to prevent majorities from following their own convictions about what justice requires,” and that the Constitution insists that fairness “must yield to certain fundamental rights” *(id. 376).* Dworkin clarifies that fairness in the constitutional context “requires that an interpretation of some clause

---

⁶ Oddly, Dworkin does not consider the other option: that such indignation is simply political theater.
be heavily penalized if it relies on principles of justice that have no purchase in American history and culture, that have played no part in the rhetoric of national self-examination and debate” (*id.* 377). Such fairness demands “deference to stable and abstract features of the national political culture” (*id.*). Hence, Dworkin asserts that law as integrity condemns judicial activism because it insists that judges “enforce the Constitution through interpretation, not fiat, meaning that their decisions must fit constitutional practice, not ignore it” (*id.* 378). Legal interpretation on this account does engage political morality but gives effect to justice as well as a variety of other political virtues, some of which conflict and check each other, thereby requiring “fine-grained and discriminating judgment, case by case” (*id.*).

**2b Later constitutional theory: The moral reading**

In his later writing on constitutional issues, Dworkin refines his approach to give what he calls the “moral reading” of the Constitution: “that we all—judges, lawyers, citizens—interpret and apply these abstract clauses [of the Constitution] on the understanding that they invoke moral principles about political decency and justice” (1996a: 2). To use Dworkin’s example, the First Amendment of the United States Constitution prohibits Congress from abridging “the freedom of speech;” Dworkin argues that the amendment recognizes a moral principle—that it is wrong for the government to censor or control what individual citizens say or publish—and incorporates this principle into American law (*id.*). Similarly abstract moral language can be found in the Fifth Amendment’s guarantee of “due” process and the Fourteenth Amendment’s similar “equal” protection (*id.* 7).

According to the moral reading, such clauses must be “understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on the government’s power” (*id.*). Echoing his earliest ideas about principles,
Dworkin argues that it falls to people “who form an opinion” to decide how this abstract moral principle is best understood; and most importantly, for novel or controversial issues, such as whether the First Amendment prohibits restrictions on pornography or hate speech. That is, they must decide “whether the true ground of the moral principle that condemns censorship” applies to these cases and controversies (id. 3). In this manner, he continues, the moral reading “brings political morality into the heart of constitutional law,” because “any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative” (id.). Although he recognizes that political morality is inherently uncertain and controversial, Dworkin denies that this means that judges simply impose their personal moral convictions on the public. Rather, he maintains that we already recognize that judges engage in this practice: we easily classify judges as “liberal” or “conservative” based on their differing patterns of decision-making, because these differing patterns lie in different understandings of the abstract moral values embedded in the Constitution’s text (id.). For Dworkin, such an understanding allows us to identify and explain the “large-scale patterns” in court rulings, but also “more fine-grained differences in constitutional interpretation that cut across the conventional liberal-conservative divide” (id. 3).

The moral reading admits room for disagreement about the right way to restate these abstract moral principles, Dworkin concedes, but this serves to make their force clearer for us and to help us to apply them to more concrete political situations that generate constitutional controversies (id. 7). To use his example, the Equal Protection Clause of the Fourteenth Amendment—that no state shall deny any person “equal protection of the laws”—describes a “very general principle,” which in turn asks for different elaborations of the clause that attempt to describe which principle is being described (id. 9). Each of these constructions, Dworkin argues, should be recognizable
as a principle of political morality that might have been captured by the phrase “equal protection of the laws,” because the next task is to ascertain which of those elaborations it makes the most sense to attribute to framers of the Amendment (id.). Crucially, he maintains, each of those possibilities must be recognizable as a political principle, since a statesman’s efforts to lay down a particular principle cannot be captured by misattributing some position or value to them (id.).

Again, he emphasizes that constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended; so, however strong or weak the framers might have intended the Equal Protection Clause to be, subsequent legal precedent has settled that the political principle incorporated in its language is quite robust: that “government must treat everyone as of equal status and with equal concern” (id. 9–10). Dworkin therefore highlights two important restraints on the latitude accorded to judges: namely, that constitutional interpretation 1) must begin in what the framers said or intended to say—but not what they expected or even hoped to happen as a result; and 2) is disciplined by the requirement of constitutional integrity, which means that judges must see themselves as partners with other officials, past and future, who must together elaborate a coherent constitutional morality that fits with other principles articulated by the rest (id. 10). Importantly, Dworkin thinks that the constitutional structure commits judges to adjudicating only “basic, structural, political rights,” because their deciding substantive political issues—whether following their own conscience or group interests—would violate constitutional integrity (id. 11). Hence, Dworkin affirms: “Our constitution is law, and like all law, it is anchored in history, practice, and integrity” (id.).

This anchor, however, still admits different interpretations based on competing accounts of political morality, prompting Dworkin to argue that the question of constitutional interpretation is essentially a question “about what democracy, accurately understood, really is” (id. 15).
Against what he calls the “majoritarian premise,” Dworkin posits the “constitutional conception of democracy.” This conception denies the majoritarian premise that a defining goal of democracy is that collective decisions always or normally be those that a majority of citizens would favor if fully informed and rational (id. 15–17). The constitutional conception instead takes the defining aim of democracy to be “that decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect” (id. 17). With this alternative account, Dworkin shifts the purpose of democratic governance from a commitment to preserving “majority rule” to a concern for the equal status of citizens, and specifically for the “democratic conditions” of such equal status (id.). How are these democratic conditions to be ascertained, and crucially, by whom? Dworkin offers a variant on his earlier account of the role of community in adjudication by proposing an account of collective action that is communal rather than “statistical.” In doing so, he once again shifts the sense of the values under discussion: while advocates of negative accounts of liberty wish to restrict government action to protect the liberty of individual citizens, Dworkin argues that the liberty of “the people” is best understood positively as a matter of “the relation between government and the whole citizenry understood collectively” (id. 21). Shifting the focus from the individual to the communal raises the question of what it means to be “a genuine member of a political community,” which in a democracy means that there must be some connection between the individual and the group that makes it fair and sensible to treat the individual as a moral member of the community—as well as a citizen with certain rights and protections guaranteed under the law (id. 23). Through this series of distinctions and qualifications, Dworkin makes the case that any majoritarian claim based on the idea of self-government must satisfy these basic
democratic conditions; this way, he argues that moral membership in a community can promote a positive account of liberty (id. 24).

What is notable about these conditions is their blending of both historical and intersubjective factors: it is not enough that the government itself guarantee the conditions of moral membership, because social relations more broadly must also support the notion of community and its legal operations. The “structural” conditions that Dworkin asserts are essentially historical, or at least “more than nominal,” as they concern the character of the enti**re** community if it is to count as a “genuine” political community (id.). Although he mentions other conditions such as a shared culture or language, the structural condition he seems to hold as more or less key is establishment by a historical process that has produced generally recognized and stable territorial boundaries (id.). Dworkin is more concerned, however, with the “relational” conditions that describe how an individual must be treated by a genuine political community to be considered a moral member of that community: the only ones that count as such members are persons who have a part in a collective political decision, a stake in it, and independence from it (id.). The first attribute musters in favor of universal suffrage, with both effective elections and representation, but not to the exclusion of other collective decision-making avenues (id.). It also insists on interpreting certain constitutional provisions, such as freedom of speech and expression, in terms of how decisions would impact processes of self-government (id. 24–25). The second attribute must express some equal concern for the interests of all members, meaning that political decisions that affect the wealth, benefits, and burdens of citizenship be consistent with equal concern for all (id. 25).

Moral membership, Dworkin reminds us, involves reciprocity: a person is not truly a member unless that person is treated as such by others, so a communal conception of democracy
entails constitutional interpretation with a concern for asymmetries in distribution (id.). The third aspect recalls Dworkin’s earlier account of associative obligations, that members of a political community can appropriately regard themselves as partners in a joint venture of shared self-governance (id. 25–26). Dworkin therefore claims that people who take personal responsibility for deciding what kind of life is valuable for them can nonetheless accept that issues of justice must be decidedly collectively, so that one decision is authoritative for all (id. 26). Whether every person will agree with the specific decision made by the state or its actors is a different question, but allowing the space for contestation in the courts is what makes them the “fora of principle” for Dworkin. In other words, for the legal system of a democratic society to have a legitimate moral claim to its authority—let alone render a correct decision in line with political morality—it must both allow individuals to act according to their own best understanding of what is right and take account of the intersubjective, social, and legal limits on those actions.

2c Final constitutional comments—and a critical reorientation

In Justice for Hedgehogs, Dworkin describes an understanding of constitutions as “constructivist” political instruments, in the sense that John Rawls used the term to describe his own metaethical theory (cf. Rawls 1971). Constitutions, on Dworkin’s account, function as a way for people of good will in political community who disagree in their ethical and moral convictions to live together with self-respect in a coercive state (2011: 64). In this conceptual fable, people gather “what is sufficiently common among them, by way of strictly political principle, and construct a political constitution that appeals only to such principles,” such that everyone in the community can accept the constitution as falling within an “overlapping consensus” (id. 64). According to this Rawlsian constructivist account, Dworkin argues everyone can accept “the basic structure of a society ordered by those common principles and so can form
a political community that is ‘well-ordered’ in the sense that each member accepts and serves the same principles of justice” (id. 65). While understanding such an account to be an idealization, Dworkin nonetheless contends that any interpretive account is idealized, albeit with a “background moral theory” that orients that idealization; hence he admits that asking the present justices of the United States Supreme Court to describe the principles embedded in American constitutional history will yield “nine different answers” (id. 66). Dworkin thus draws the conclusion that “any acceptable theory of [legal] justice must be drawn from a plausible interpretation of the traditions of the community for which it is designed” (id.). He tempers this account somewhat with his “partnership conception” of democracy, which requires members to all accept “a standing obligation not only to obey the community’s law but to try to make that law consistent with his good-faith understanding of what every citizen’s dignity requires” for a democratic state to claim legitimacy (id. 384).

This account recalls his earlier work on what constitutes a “genuine” political community depends on how its members recognize each other as moral members. In recalling the idea of political community in his conceptual fable of how constitutions form, Dworkin again raises the specter of who belongs to the community—and as such, who can rely on the coercive state to protect their rights and welfare against others. As has been shown throughout this dissertation, Dworkin allows ample space in his political and legal thought for conflicts of interpretations and convictions to occur. But his allowance that interpretive accounts are idealized seems to undercut the egalitarianism he argues for as well as his claim that democracy “confirms that equal concern and respect in its most fundamental constitution” (id. 390). After all, the history of the United States, for one, has been marked by the persistence of moral theories that declare that some people have less moral standing—and therefore less political and legal standing—than others,
often based on specious claims of inferiority due to one’s race, ethnicity, gender identity, sexual
orientation, or membership in some other social category. Further, even if one accepts that all
members of the legal community are moral and legal equals, allowing for idealization in
interpretation means allowing interpreters to abstract away from the historically and morally
salient features of one’s social identity that impact how they can exercise or enjoy their rights.
And if this egalitarianism is undermined, then the claim that “constitutional interpretation aims at
making best sense of the Constitution’s words as provision for just government” seems far less
credible as well (id. 415). If this aim is what characterizes constitutional interpretation, what are
we to make of interpretations that exclude the specific circumstances or contexts that condition
whether a legal subject can exercise their rights or enjoy their legal protections—especially the
concerns of vulnerable or marginalized peoples? In other words, can interpretation on the moral
reading remain actualized enough so that its idealizations do not abandon the specificities of
legal subjects that give rise to their claims?

This problem suggests that a modified methodological orientation might improve Dworkin’s
interpretivism. Constitutional theorist Paul Gowder has recently argued that the idea of the “rule
of law” in the United States is the history of a constant struggle of who is to be included within
the protections of legal order, of conflicts that revolve around race as well as race-adjacent
categories such as ethnicity and nationality (2021: 2).7 Alongside this conflict is the idea of
property as a “propulsive” if contradictory force in American rule of law, “sometimes serving as

7 Gowder explicates further: “At the founding, the enslaved were completely outside the ambit of the law –
prohibited from testifying in court, holders of no rights. Likewise, Native Americans were represented as foreigners
rather than members of the legal community and, until 1871, the objects of treaty rather than regulation (although
the Native American case is somewhat more complicated, as, of course, the independence of the Native American
nations was valuable to them as well, whereas the outlawry of the enslaved was a pure disadvantage). Both Black
Americans and Native Americans ultimately became at least partially included in the legal community as the
American rule of law has progressed” (2021: 2).
the foundational basis for other legal rights-claiming, but other times as the signal of a person’s status as beyond or beneath the protections of law” (id. 3–4). Under these two lodestones of American rule of law, Gowder argues that the inegalitarian implications of America’s property-first conception of the rule of law are its greatest weakness (id. 5). In exploring what the rule of law means given this property-first conception, the methodological lesson that Gowder takes is to focus on the role of subordinated groups in the development and articulation of American rule of law—particularly the Black American struggle for inclusion (id. 9). Hence, Gowder focuses on critical race theories of the rule of law that deploy a “cynical legalism” that accepts the rhetorical power of the concept even as it critiques its historical abuse against Black Americans (id. 9–10). Importantly, Gowder’s conjoining of “rule of law ideology with extreme inequality – which is most vividly manifested in the United States on the dimension of race, and on race conjoined with class – can help us see the unavoidable dependence of rule of law ideals on genuine social equality” (id. 10). What matters in ascertaining the moral status of legal concepts is how these ideas are actualized in the legal community.

Although not the aim of his book, Gowder’s methodology provides an essential orientation toward legal decision-making, particularly if one accepts Dworkin’s moral reading of the Constitution. Given the inequality that is permitted—rightly or wrongly—under the American legal system as it stands at any given moment, such socio-economic outcomes are as much its effects as subsequent jurisprudential history. Of course, the role of the judicial system is not to act as factfinders for sociological or economic investigations into the general welfare of the society.

---

8 Interestingly, Gowder refers to his account as “critical Hegelianism” due to his contention that what matters is not legal texts alone, but “the boundaries where the rule of law has been tested and contested in that country: where some have been denied access to the forms of law to vindicate their claims to rights and status, and how they have understood that denial as contrasted with how those who did the denying understood it. In those interstices, the ‘law on the books’ and the ‘law in action’ meet one another, as state and society are forced to resolve a conflict over the scope of the legal system’s protections, and, in doing so, more fully articulate for themselves what those protections mean” (2021: 7).
American public; but since legal issues are so intimately intertwined with socioeconomic and other politically-charged issues, there is little reason to deny their relevance to legal decision-making if one disputes a hard metaphysical distinction between legality and sociality—which Dworkin’s legal interpretivism does. So, if Dworkin’s egalitarian moral reading is taken as the preferred interpretive scheme to decide issues of political morality, then Gowder’s methodological focus on the law’s treatment of the most vulnerable to the failures of the rule of law—those that have been subject to discrimination and oppression—must feature as a crucial component of legal decision-making (id. 11). As Gowder succinctly puts it: “To the extent the US Constitution is democratically legitimate, it is so because the Constitution is rooted in the authorial autonomy of the people” (id. 12). One way to ascertain that authorial autonomy, I will argue in the next section, will draw together the argumentative threads of this dissertation to propose a legal hermeneutic that gives concrete form to the conditions of moral membership in the legal community using Dworkin’s theory of dignity and the embodied, intersubjective relations of citizens.

3 Constitutional interpretation in terms of embodied dignity

The conditions of moral membership that undergird the moral reading of the United States Constitution flow into Dworkin’s later assertion in Justice for Hedgehogs that human dignity is the fundament of his normative enterprise. Recall that Dworkin claimed that Kant’s principle informs his account of human dignity; however, in Chapter II, I argued that a better reading of this account drew upon a Hegelian understanding of human will embedded within and shaped by human sociality rather than a commitment to a Kantian duty to enact rational maxims. Tellingly, Dworkin casts his own theory of moral responsibility within a general scheme of interpretation, since he asserts that “any argument that either supports or undermines a moral claim must
include or presuppose further moral claims or assumptions,” and “that interpretation knits values together” (2011: 99, 101). Integrity, on his account, is the nerve of responsibility for both individuals and collectives, and interpretation is the way that the morally responsible person comes to know the values and principles that compel action or condemn omission (id.). For Dworkin, human dignity is a basic requirement for one’s moral responsibility and agency; hence, to recognize a person’s dignity is to understand how and why one acted or chose not to act, based on their interpretation of their value system—their own sense of moral integrity—in the circumstances under which the action or omission was made.

This contention therefore invites the question of judgment: how does one respect the dignity of another when rendering a judgment? Returning to Dworkin’s account of dignity, I have argued that his two principles are realizable within the ethical reality of Sittlichkeit as objective determination—that is, as actualized in the social practices of the community’s citizens—and as the power of the will to dissolve the determinations of Sittlichkeit in social organizations and political institutions—that is, to exercise one’s moral independence. Importantly, this rendering of dignity decenters the subject as an individual, instead reaffirming that the subject is a product of the intersubjective co-constitution of the ethical community. Further, dignity itself becomes a function of the intersubjective recognition of the subject’s capacities to act and to abstain from acting, as determined (in Hegelian terms) or conditioned (in more prosaic language) by the specific contextual circumstances of the legal subject. On this Hegelian reading of Dworkin’s account of dignity, to respect the dignity of another is to affirmatively recognize the capacity of the individual to enact their interpretations; on the institutional level, it means creating the space in political and legal decision-making procedures for a subject 1) to speak to the lived experiences that generated and conditioned their interpretation, and 2) to have their
interpretations—especially those given by people belonging to historically marginalized groups within the legal community—receive comparable normative weight as that given to the legal norms embedded in constitutions, statutes, and case law—and particularly so when discerning the political morality of the legal community.

The latter point is certainly the more controversial, so it requires further explanation. Following Dworkin, the text of the constitution or statute is essentially set, providing one—but only one—set of coordinates for legal interpretation. When novel cases of first impression arise, judges must refer to the political morality of the legal community, which—under our Hegelian reading of Dworkin—means that they must consult the intersubjectively-constituted norms within the community. These norms cannot be reduced to mere social “facts” or “practices” however, because their significance is not simply a predicate of these activities; rather, they are only legible as significant based on the normatively-inflected interpretive schema used to analyze those activities.\(^9\) What is distinctive about each subjective will is the distinct manner by which the community impacts, conditions, and determines it, based on the subject’s specific context within the community. As Nancy reminds us, community is only ever the shared experiences of singular beings; indeed, it is the spacing between such beings that allows for communicating, and thus for collective world-building. Likewise, Fanon details how the process of political and socio-cultural subjectivization encodes institutional and ideological norms into the very body schemata of subjects—a point confirmed by Ricœur’s work on ideology and the imagination. Further, as the creolizing account of Fanon and Ricœur has shown, the capacity to create collective norms arises only through collective action directed toward an end of reciprocal mutual recognition. Such recognition is quite literally fleshed out in terms of the intercorporeal

\(^9\) For more about how reflection on past lived experience through interpretive schemata is what endows such experiences with significance, see Schütz (1967). I am grateful to Mike Monahan for suggesting this title.
relations of members of a society; likewise, following Gowder’s insight, the more discrete question of who \textit{belongs} to a legal community—that is, who can enjoy the rights guaranteed under the community’s legal system and can regularly rely on institutional backing to enforcing those rights—depends on the degree of recognition afforded to the legal claimant.

In this sense, a social ontology of \textit{embodied} dignity, wherein the degree to which one’s dignity is recognized is indexed to bodily capability to act and to enjoy one’s rights, is crucial for two reasons: 1) indexing bodily capacity captures the so-called “suspect” social categories of race, sex/gender, ability, and class that have historically and contemporaneously acted to co-determine (and sometimes completely incapacitate) one’s capabilities to act and enjoy their rights; and 2) the focus on embodiment and its associated vulnerabilities provides a material link for legal reasoning that prevents it from falling into abstract discussion divorced from lived realities, such that violations of one’s rights or dignity will always depend on institutional or intersubjective relationships, and very often both. In this way, embodied intersubjectivity both conditions and is conditioned by institutional forms and their norms; the specific way that these practices and institutions impact specific individuals will reveal the limits of the community’s protections—and thus, how well or poorly that individual’s dignity is recognized by the legal community. If, according to Dworkin, the legitimacy of a government depends on the popular acceptability of the justifications it gives for using or forbearing its power based on a communal, constitutional conception of democracy, then the lived experiences of its citizens must play at least a co-equal determinative role in adjudicating legal claims as the legal texts that claim legitimacy based on their protection of citizens’ rights and freedoms.

Such an argument also musters toward why a more equitable approach to legal reasoning is necessary when adjudicating claims by members of historically marginalized groups within a
legal community. Within the United States, for example, a great deal of research has thoroughly
detailed the persistence of *de facto* antiblack racism at the institutional, infrastructural, and
ideological levels well beyond the end of *de jure* racial order and the establishment of statutory
civil rights legislation in the late 1960s.\textsuperscript{10} The previous chapters on Fanon have described the
sociogeny of the colonized within the French colonies; the centuries of discriminatory policies
and practices in the United States have likewise left such a deep mark on American society that
unequal treatment remains a very real part of the daily lives of millions of formally equal Black
Americans. And yet, the persistence of this *de facto* antiblack racism creates institutional and
ideological blinders to this lived reality, particularly within the legal system—in effect, an
inability to comprehend outside the formal logic of the law. Alfred Schütz succinctly notes that
since our manner of attending to our experiences is dependent on our specific meaning-context,
everything that we know about the conscious life of another is really based on our knowledge of
*our own* lived experiences (1967: 106). Accordingly, we can only synchronize our past
experiences of others with their past experiences because our lived experiences of others are
constituted in simultaneity or quasi-simultaneity with their lived experiences—and, as Nancy
reminds us, *communication* across this spacing is the only way that we can so relate (*id.*). Hence,
to achieve more morally just results for these and other legal claimants, legal decision-makers
must take the lived experiences of claimants into account as co-equal with case law and other
legal texts when adjudicating their claims.

To summarize, Dworkin’s theory of legal interpretivism, understood as consistent with
Hegel’s *Sittlichkeit*, provides an account of sociality grounded in the intersubjective recognition
of human dignity that is well-positioned to take advantage of the creolizing account of embodied

\textsuperscript{10} See, e.g., Lawrence 1987; Gotanda 1991; Powell 1992; Kennedy 1997; Blackmon 2009; Alexander 2010; Fields
and Fields 2012; Patterson and Fosse 2015; Rothstein 2017; Shelby 2018, amongst many others.
meaning-making provided by Fanon and Ricœur. That said, Dworkin’s moral reading is limited to the extent that its interpretive practices allow interpretations to rest on idealizations of legal history and the political community, even if they are buttressed by a moral framework. Echoing Hegel, Nancy, and Fanon, Gowder’s reading of the history of American “rule of law” jurisprudence through a critical race lens demonstrates that the measure of how well the ideals espoused by a legal system are actualized in its community—especially in terms of the rights and privileges enjoyed its citizens—lies in its treatment of the marginalized and the vulnerable of its legal community, both throughout history and as presently experienced. Essentially, despite the utility of Dworkin’s phenomenology of legal interpretation, it lacks a similar phenomenological account of legal subjectivity that can aid the interpretive process. Such a lack threatens to undercut his account of justice as well as egalitarian democratic commitments, especially given the relational concept of dignity that he takes to be the fulcrum of his interpretive moral reading. So, if Dworkin is correct that political or legal justice lies in equitable distribution of public resources, moral justice requires that the legal claimant be allowed to justify themselves by reference to their specific meaning-context; that is, legal judgment must respect their dignity by allowing their lived experience to be given weight in the legal decision-making process. Such an interpretive practice is particularly crucial for adjudicating claims brought by members of historically marginalized groups, whose voices and interests have been—and continue to be—negatively impacted by unjust treatment by both state and private actors. Doing so, I argue, will better orient legal justice toward morally just outcomes. Following the account of embodied dignity and collective meaning-making that I have argued for in this dissertation, fashioning an adequate legal interpretation scheme will require a hermeneutics of the lived body—an account of which can be provided by appeal to Paul Ricœur.
4 Ricœur’s carnal legal hermeneutics

In the last chapter, Ricœur’s hermeneutic concerns were gestured at for their role in constructing meaning at the social, intersubjective level; in this chapter, they will be explored more in-depth, in order to stage a conversation with Dworkin’s work in legal interpretation. Although Ricoeur wrote in a more phenomenological vein in his early career, I will focus more on Ricœur’s late work, wherein his concerns with practical life and embodiment emerge out of his reflections on the relation between hermeneutics and phenomenology. More specifically, Ricœur’s notion of the aporetic “anchoring” of the legal subject as their body and embodied experiences, such that his previously encountered concept of “attestation” will be paired with “appresentation” to build this new theory of legal interpretivism—one that I will argue is well-poised to actualize the account of embodied dignity that I have articulated. In this way, I will argue, the embodied legal subject functions as text alongside other legal texts and thus ought to be treated as a similarly esteemed source of legal norms in legal analysis and decision-making.

4a Explanation and understanding in service of interpretation

The first question to address when approaching the question of a legal subjectivity is, why a hermeneutic phenomenology? After all, phenomenology is supposed to investigate the first-person conscious experience of a subject in order to explain or describe the structures of consciousness, while hermeneutic investigations seek to understand or interpret texts. For Ricoeur, however, hermeneutics and phenomenology call for each other, such that a hermeneutic phenomenology is best equipped to explicate his notion of the capable human subject. The “homology” that he finds between text and action is therefore crucial for this dissertation’s argument that an embodied legal subject is well poised to orient legal interpretation toward the lived experiences of legal subjects that is consistent with respecting their dignity. As this
subsection will show, while the danger of the text lies in its ability to create a world divorced from the world it is supposed to reference, its promise resides in its capacity to ground interpretation more deeply in the world. Taking this approach to legal subjectivity, I will argue, will render legal interpretation more closely bound to the lived reality of its subjects. In this subsection, I will argue that Ricœur’s interpretive approach can do so due to his methodological “graft” of hermeneutics onto phenomenology and his dialectic integration of explanation and understanding through his hermeneutics.

Before his so-called “linguistic turn” to hermeneutics with *Freud and Philosophy* (1970), Ricoeur was best known as a Husserlian phenomenologist who had been explicitly concerned with articulating a phenomenology of the human will in texts such as *Freedom and Nature* (1966) and the companion volumes *Fallible Man* (1986) and *The Symbolism of Evil* (1967). Through these texts, as well as his subsequent hermeneutic investigations, he situates himself within the traditions of reflexive philosophy and Husserlian phenomenology—including a tradition that aims to be what he calls a “hermeneutic variation” of the latter (1991: 12). The subject of reflexive philosophy, which he locates in the “I think” of Descartes as later modified by Kant, can only come to know or recognize itself through the radical transformation realized in phenomenology (*id.*). Within phenomenology, Ricoeur claims that the radical self-grounding aimed for in the *epochē*, when applied to itself, reveals that the horizon of immediateness of the lifeworld (*Lebenswelt*) is “forever out of reach” (*id.* 13–14). This “paradoxical result” is what allowed hermeneutics to “graft” itself onto these phenomenological roots, as for both “the fundamental question was the same, namely, that of the relation between *sense* and *self*, between the *intelligibility* of the first and the *reflexive* nature of the second” (*id.* 14). The *Lebenswelt* thereby becomes a prior condition, *Verstehen* in Heideggerian fundamental ontology, and
interpretation likewise becomes the “making explicit of this ontological understanding […] always inseparable from a being that has initially been thrown into the world” (id. 14–15). But this subversion necessitates another reduction that takes on a derived epistemological meaning: it is a move of distanciation that comes second—and, in this sense, a move by which the primary rootedness of understanding is forgotten, a move that calls for all the objectivizing operations characteristic both of common and of scientific knowledge. This distanciation, however, presupposes the involvement as participant thanks to which we actually belong to the world before we are subjects capable of setting up objects in opposition to ourselves in order to judge them and to submit them to our intellectual and technical mastery. (id. 15)

For Ricoeur, the results of this reversal—the discovery of the precedence of being-in-the-world—are considerable; the most significant epistemological consequences he draws are summarized as follows: “there is no self-understanding that is not mediated by signs, symbols, and texts; in the last resort understanding coincides with the interpretation given to these mediating terms” (id.). In other words, any being-in-the-world is always hermeneutical.

From these phenomenological roots, Ricœur reconfigures the task of hermeneutics into a twofold endeavor: “to reconstruct the internal dynamic of the text, and to restore to the work its ability to project itself outside itself in the representation of a world that I could inhabit” (id. 18). Crucially, he theorizes with the conviction that “discourse never exists for its own sake, for its own glory, but that in all of its uses it seeks to bring into language an experience, a way of living in and of Being-in-the-world which precedes it and which demands to be said […] there is always a Being-demanding-to-be-said (un être-à-dire) that precedes our actual saying” (id. 19).

But, in contrast to the face-to-face conversational model privileged by Hans-Georg Gadamer, Ricœur’s interpretation is a process by which, “in the interplay of question and answer, the interlocutors collectively determine the contextual values that structure their conversation” (id. 32). He explains:
The “short” intersubjective relation is intertwined, in the interior of the historical connection, with various “long” intersubjective relations, mediated by diverse social institutions, social roles, and collectivities (groups, classes, nations, cultural traditions, etc.). The long intersubjective relations are sustained by a historical tradition, of which dialogue is only a segment. Explication therefore extends much further than dialogue, coinciding with the broadest historical connection. (id.).

In this regard, Ricœur’s signal contribution to hermeneutics is his attempt to mediate between understanding and explanation through a phenomenology of the lived body, but not a Husserlian idealist phenomenology.11 For Ricœur, the central question of phenomenology is that of meaning, thus justifying the placement of phenomenology above the “naturalistic-objectivistic” attitude; after all, he claims, the choice “in favor of meaning” is “the most general presumption of all hermeneutics” (id. 38). The other affinity Ricoeur finds is the methodological distanciation enacted by phenomenology whereby, “when, not content to ‘live’ or ‘re-live,’ we interrupt lived experience in order to signify it,” by taking a distance from “lived experience” as “purely and simply adhered to” (id. 40). Ricœur likewise claims that the “lived experience” phenomenology raises to the level of meaning corresponds to the hermeneutic exposure of consciousness to “historical connection, mediated by the transmission of written documents, works, institutions, and monuments which render present the historical past” (id.).12 Lastly, he argues that Husserl’s concept of Auslegung—variously translated as “explication,” “exegesis,” or “interpretation”—is a necessarily hermeneutic ground for a phenomenological methodology (id. 43–52).

As early as The Rule of Metaphor, Ricoeur had claimed that interpretation “functions at the intersection of two domains […] On one side, interpretation seeks the clarity of the concept [i.e.,

---

11 Certainly, Ricœur is not saying that an idealist phenomenology is the only way to read Husserl; rather, he is working against a certain kind of phenomenology founded in subjective idealism that can be found in Husserl’s work (1991: 234).

12 Ricoeur also notes an equivalence between this “historical lived experience” and what Hegel called the “substance” of ethical life—that is, Sittlichkeit (1991: 40; cf. Hegel PhR § 156).
explanation]; on the other, it hopes to preserve the dynamism of meaning [i.e., understanding] that the concept holds and pins down” (1977: 303). Ricœur attributes the distinction to Wilhelm Dilthey, who sought to describe the fundamental difference between the natural and the human sciences. However, Ricœur argues that Dilthey’s notions of explanation and interpretation have since been displaced, such that the former refers to linguistic models of scientficity rather than those of the natural sciences, while the latter has encompassed more than Dilthey’s psychological sense of understanding (1991: 105). Ricoeur therefore disputes the claim that explanation and understanding are distinctive epistemological investigations; rather, they are dialectical, wherein understanding is a “nonmethodical moment that, in the sciences of interpretation, combines with the methodical moment of explanation. This moment precedes, accompanies, concludes, and thus envelopes explanation. Explanation, in turn, develops understanding analytically” (id. 142).

Still, since explanation and understanding describe distinct approaches to texts on the basis that some texts are sufficiently distinct from others to warrant different analytic approaches, Ricoeur explores the question of what a “text” is. He proposes that it is “any discourse fixed by writing,” a definition that implies that writing is discourse that has not been said (id. 106). In this way, he does not simply fall into the “psychological and sociological priority of speech over writing,” since the appearance of writing suggests a radical change in our relation to statements within a discourse (id.). Fixation by writing takes the place of speech, he claims, “occurring at the site where speech could have emerged” (id.). For Ricoeur, this implies that a text is really a text only when it is not restricted to transcribing an anterior speech, when instead it inscribes directly in written letters what the discourse means” (id.). With writing, there is no longer a proximity between speaker and answerer, due to the division between the act of writing and the act of reading, a “double eclipse” of reader and writer. The emancipation of the writing from the
author, such that writing is “direct inscription” of the “intention-to-say,” is the birth of the text (id. 107). So, in addition to preserving discourse and making an archive available for individual and collective memory, the linearization of symbols in writing “permits an analytic and distinctive translation of all the successive and discrete features of language and thereby increases its efficacy” (id. 107–8). Further, dialogue is interrupted by the text, and the moment of reference to showing present in speech is intercepted in writing, effecting a distanciation that will be so crucial for Ricœur’s theory of interpretation (id. 108–9). Reading qua interpretation fulfils the reference, leaving the text free to enter into relation with all the other texts that come to take the place of the circumstantial reality referred to by living speech” (id. 109). Hence for Ricœur, the text engenders an “upheaval that affects discourse itself, when the movement of reference toward the act of showing is intercepted by the text. Words cease to efface themselves in front of things; written words become words for themselves” (id.). Finally, the text institutes the author—not as an analogue to a speaker, but as the first reader, due to the distance already embedded in the text as a writing (id.).

Importantly, then, interpretation is a process of reconstruction, concerned with texts rather than the face-to-face dialogue privileged by hermeneuts such as Gadamer. For Ricoeur, the text is much more than a particular case of intersubjective communication: “it is the paradigm of distanciation in communication,” that is, “communication in and through distance” (1991: 76). In this sense, the text for Ricoeur testifies to the “positive and productive function of distanciation at the heart of the historicity of human experience” (id.). The text’s problematic is organized around five themes:

(1) the realization of language as discourse; (2) the realization of discourse as a structured work; (3) the relation of speaking to writing in discourse and in the works of discourse; (4) the work of discourse as the projection of a world; (5) discourse and the work of discourse as the mediation of self-understanding. (id.)
These “criteria of textuality” include the projection of a world, what Ricoeur calls “the world of the work,” which he takes to be the center of gravity of the hermeneutic question. The distance between the saying and the said, for Ricoeur, invites a broad definition of “meaning” as “all the aspects of and levels of the intentional exteriorization [that] renders possible the exteriorization of discourse in writing and work” (id. 78–80). As a structured work, discourse becomes the object of praxis and technē, as a “relation between the situation and the project in the process of reconstruction” (id. 81–82). The objectification of discourse in the composed work and the structural character of its composition both generate distanciation by writing, inviting structural analysis to the discourse such that “explanation becomes the obligatory path of understanding” (id.). As already noted, the separation of the author from their writing allows the text a certain autonomy from the author’s intentions; hence, distanciation is constitutive of the phenomenon of text as writing as well as the condition of interpretation (id. 83–84). However, Ricoeur distinguishes his hermeneutic approach from that of his Romantic forebears and then-dominant forms of French structuralism by refusing to orient his interpretive approach toward discerning authorial genius or analyzing structural components; he instead focuses on the reference of the discourse, the way it is supposed to apply to reality (id. 84–85).

The abolition of a first-order reference in fiction or poetry, Ricoeur maintains, cannot fully escape some connection with reality; what abolishing first-order reference of ordinary language—the reference of one-to-one correspondence with the world—conditions is the possibility of reaching the world “at the level that Husserl designated by the expression Lebenswelt and Heidegger by the expression being-in-the-world” (id. 85–86). This referential dimension that his interpretation targets is “the type of being-in-the-world unfolded in front of the text” (id. 86). In this sense, what must be interpreted in the text for Ricoeur is “a proposed
world that I could inhabit and wherein I could project one of my ownmost possibilities,” what he calls “the world of the text, the world proper to this unique text” (id.). This projection, Ricoeur proposes, inaugurates the subjectivity of the reader, and thereby allows the reader to “appropriate” the text—that is, to self-interpret and understand themselves better or differently, or simply begin to do so (id. 118). This occurs because, Ricoeur claims, reflection through cultural signs allows for self-formation and explanation takes place as an intermediary part of a self-understanding (id. 118–19). The self-construction that occurs through interpreting a text is contemporaneous with the constitution of meaning in the text, since “we understand ourselves only by the long detour of the signs of humanity deposited in cultural works” (id. 87, 119). What Ricoeur calls the “world of the work” is a proposed world that is not hidden inside the text, but unfolds in front of it, through the interpretation of the reader (id. 87–88). Interpretation therefore “‘brings together,’ ‘equalizes,’ renders ‘contemporary and similar,’ thus genuinely making one’s own what was initially alien,” thus alters interpretation from a subjective act of the reader on a text to an objective process that is an act of the text (id. 119, 122). By placing interpretation within the register of appropriation, Ricoeur anchors the hermeneutic arc in the ground of lived experience, as mediated “by the series of interpretants that belong to the work of the text upon itself,” which loosens appropriation from its arbitrariness insofar as it “recovers that which is at work, in labor, within the text” (id. 124).

Ricoeur’s emphasis on texts and textuality should not be taken as limiting his hermeneutic approach to linguistic texts, since he argues that his account of interpretation applies to the textuality of both action and history as well. In terms of the philosophy of action, Ricoeur finds two debates within the analytic philosophical literature on the topic to be particularly salient to his theory: that of the relationship between motive and cause, and that of the conditions by which
action intervenes in the world. Regarding the first debate, Ricoeur finds the “properly human order” in between the language-games of causation that must be explained but not understood, and of motivation that belongs to a purely rational understanding (id. 134). But in everyday reality, he claims, human motivation is “at one and the same time the motion of wanting and its justification” (id.). Considered in this milieu, linguistic analysis would have to break down in favor of reflection “upon the very position of the human body in nature: it is at once one body among others (a thing among things) and a manner of existing of a being capable of reflecting, of changing its mind, and of justifying its conduct” (id. 135). Regarding the second debate, Ricoeur draws on the work of G.H. von Wright to argue that conceiving of action as an “intentional intervention” into the course of things becomes synonymous with the initiative of an agent (id. 135–37). “Acting” is “doing something so that something happens in the world,” but there is no action “without the relation between knowing how to do something (being able to do something) and that which the latter brings about” (id. 137). In delineating the same aporias and same necessity for a dialectical solution, Ricoeur affirms that “the text is a good paradigm for human action,” and “action is a good referent for an entire category of texts” (id.). Hence, the dialectic of explanation and understanding through interpretation of texts allows human action to be similarly interpretable—which opens the possibility of treating the embodied legal subject as a legal text in its own right.

Admittedly, some Ricoeur scholars have claimed that the turn to hermeneutics evinced a turn away from the phenomenological analysis of the lived body (see, e.g., Kearney 2015, 2016; Moran 2017; but see also Pellauer 2014). However, Gonçalo Marcelo (2019) challenges this reading by pointing to two loci that suggest Ricœur’s concern with the link between body and meaning continued within his “linguistic turn,” albeit not as explicitly as in his more
phenomenological investigations. The first locus is Ricœur’s contention that there is a “semantics of desire” in his analysis in *Freud and Philosophy*; but the more important for this dissertation’s purposes is Ricœur’s analyses of fragility and suffering, which serve as a thread connecting his philosophical anthropology as marked by *Fallible Man* and *Oneself as Another* (2019: 60). Notably, Marcelo calls attention to the themes of affective fragility and corporeal suffering that persist across the development of Ricœur’s philosophical anthropology (*id.* 62–63). Similarly, legal theorist Marc de Leeuw has described the itinerary of Ricœur’s thought as “plac[ing] interpretation and meaning in the gap, the non-identity, between subject and self; it is in the poetic will, the potential of the transcendental imagination, that Ricoeur discovers the resources not only for the creation of meaning but, subsequently, also for human self-creation” (2022: 2). Like Marcelo, de Leeuw points out that Ricœur replaces his earlier dichotomy of voluntary-involuntary with the anthropological dyad of capability-incapability, which likewise correspond to the difference between human action and human suffering (*id.* 146, n. 46). Hence, questions of our moral and ethical standing demand a fundamental response “towards the permanent possibility of our own otherness, and an equally permanent responsibility triggered by the appeal of Others” (*id.* 2). With these readings in mind, Ricœur’s hermeneutic trajectory can be understood as an interpretive account not only for texts in the restricted sense, but *textuality* in the broader sense of interpretable human sociality—and especially embodied human action. In the following subsection, I will make the case that the lived human body of the legal subject can likewise be thought of as a legal text.

### 4b The body as engaged legal text

I argued in Chapter IV that Ricœur—especially when informed by Fanon—understands embodied, intersubjective human action to be generative of social meaning; this chapter has
argued that Ricœur’s hermeneutic phenomenology can be grafted onto Dworkin’s moral reading of law. As seen in the preceding subsection, Ricœur maintains that human action is homologous with texts, as both expose the limits of the allegedly clear dichotomy of explanation and understanding by calling out for interpretation considering past interpretations; likewise, here, I will bring these claims together to argue that Ricœur articulates a carnal hermeneutic—particularly his concepts of appresentation and attestation—that can broach the lifeworld of the legal subject by encountering it as a text-engaged-in-the-world; that is, as an embodied agent whose capacities are delimited by intersubjective, ideological, and institutional relations.

Building on the homology he finds between text and action, Ricoeur describes four features of texts to create a paradigm for socially meaningful action: 1) the fixation of the meaning, 2) its dissociation from the mental intention of the author, 3) the display of nonostensive references, and 4) the universal range of its addressees (id. 157). Applying this rubric to meaningful action, Ricoeur finds that 1) action becomes meaningful through “a kind of objectification similar to the fixation that occurs in writing” that re-constitutes the action as “a delineated pattern that has to be interpreted according to its inner connections” (id.). Like a text detached from its author, Ricoeur notes that 2) action is detached from its agent and develops consequences of its own, which constitute its “objective” social dimension (id. 153). This social dimension of action therefore leaves a “trace” or makes a “mark” that contributes to the emergence of social patterns and habits, thereby inaugurating the concepts of responsibility, blaming, and—over time—institutions that sediment such practices in social memory and, thus, history (id. 153–54; cf. Ricoeur 1966, 2004). Relatedly, 3) the importance or significance of meaningful action goes beyond its relevance to the initial situation; Ricoeur explicitly invokes Hegel to convey the relevance of this feature for cultural phenomena and their social conditions, that “institutions (in
the largest sense of the word) that ‘actualize’ freedom as a second nature in accordance with freedom. This ‘realm of actual freedom’ is constituted by the deeds and works capable of receiving relevance in new historical situations” (id. 155). Finally, 4) like a text, human action is an open work, the meaning of which is “in suspense.” It is because it “opens up” new references and receives fresh relevance from them, that human deeds are also waiting for fresh interpretations that decide their meaning. All significant events and deeds are, in this way, opened to this kind of practical interpretation through present praxis. (id.)

Seemingly providing an aid to this interpretive endeavor, Ricoeur sketches a hermeneutic of “initiative,” what he calls “the living, active, operative present answering to the present that is gazed upon, considered, contemplated, reflected” (id. 208). Here, the body re-emerges as crucial vector for the analysis of action. For Ricoeur, “my own body” (le corps propre) is “the coherent ensemble of my powers and my nonpowers; starting from this system of possibilities of the flesh, the world unfolds as the set of hostile or docile instrumentalities, of permissions and obstacles” (id. 215). In this light, he gives four phases of this concept of embodied initiative:

first, I can (potentiality, power, ability); second, I act (my being is my doing); third, I intervene (I inscribe my act within the course of the world: the present and the instant coincide); fourth, I keep my promises (I continue to act, I persevere, I endure). (id. 217)

Such a multivariable approach to analyzing the textuality of human action is crucial for providing an interpretation not only of socially meaningful acts, but of the human body itself as a text whose authorship is an ensemble of one’s will, one’s body, one’s relations, and one’s milieu—social, material, and historical. On this textual model, understanding the specificity of

---

13 In the original French version of this essay, what is translated here as “my powers and nonpowers” is “de mes pouvoirs et de mes non-pouvoirs,” which carries connotations of a person’s abilities or capacities (cf. 1986: 269). Later in the same passage, Ricoeur describes the notion of “circumstance” as articulated “on that of powers and nonpowers, as that which surrounds my power of acting, offering the counterpart of obstacles or of workable paths for the exercise of my powers” (1991: 215). Here, “power” translates “pouvoir” in every occurrence, except “my power of acting,” which translates “ma puissance d’agir” (cf. 1986: 269). “Puissance,” in contrast, connotes impersonal force, intensity, or efficacy. Hence, “powers and nonpowers” for Ricoeur are linked to embodied human capacities, whereas “power of acting” is conditioned or constrained by the particularities of specific circumstances.
an embodied legal subject is “entirely mediated by the whole of explanatory procedures that precede it and accompany it,” such that the counterpart of the reader or interpreter’s appropriation is “the dynamic meaning released by the explanation which we identified earlier with the reference of the text, that is, its power of disclosing a world” (*id.* 167).

The hermeneutic power of a text to disclose a world obtains a special significance in ethical relations, wherein the textuality of human action can be read alongside the narrative identity of an *embodied* self. As stated in the previous chapter, Ricœur takes human bodies to be the “first particulars” for establishing one’s identity, but also dissociates the notions of the person as a public entity and consciousness as a private one (1992: 33–34.). From this dissociation, he argues that the concept of “person” consists in the predicates that we ascribe to a body, such that sameness and selfhood “are two kinds of problems that mutually conceal one another”; that is, he claims that “the problem of identifying reference, where the sameness of the logical subject is promoted to the fore, requires merely a marginal sui-reference to ‘the one,’ which is ‘each one’” (*id.* 36). Each individual may assert “*this body as mine,*” but Ricœur maintains that this possession poses “the enigma of an untransferable property, which contradicts the common notion of property” (*id.* 37). Further, because mental states are predicates, they retain the same sense whenever they are attributed to oneself or to others: “the logical force of the same eclipses the that of the self” (*id.*). Reorienting the body as the site of identity formation means rejecting the Cartesian starting point of a pure consciousness: “there is no self alone at the start; the ascription to others is just as primitive as the ascription to oneself. I cannot speak meaningfully of my thoughts unless I am able at the same time to ascribe them to someone else” (*id.* 38). In this sense, even the aspects of ourselves that we compile to make ourselves in ourselves, are never truly *ours.*
This notion of an embodied self, that cannot be self-referential without reference to others, underlies Ricœur’s narrative theory of identity. Citing Wilhelm Dilthey’s notion of “the connectedness of life” (Zusammenhang des Lebens) as equivalent to the concept of a life history, he claims that “this preunderstanding of the historical significance of connectedness” is what the narrative theory of personal identity attempts to articulate, albeit at a higher level of conceptuality (id. 141). In these terms, the identity of an individual can be called the identity of the character, which Ricœur argues is comprehensible through “the transfer to the character of the operation of ‘emplotment,’ first applied to the action recounted” (id. 143). Ricœur holds that there is a correlation between action and character in narrative, which results in a dialectic internal to the character that is also a correlate of the “concordance and discordance” of the “emplotment” of action (id. 147). Equally importantly, Ricœur maintains that body is “one’s own as a dimension of oneself”; that “in virtue of the mediating function of the body as one’s own in the structure of being in the world, the feature of selfhood belonging to corporeality is extended to that of the world as it is inhabited corporeally” (id. 150). In this sense, this existential invariant of corporeality and worldliness structures not only our narrative identity, but our ethical identity as well (id. 151). As such, for Ricœur, this shared ontological plane of (inter)corporeality demands “precepts addressed to persons as acting and suffering” (id.). For Ricoeur, the capacity of narrative to “emplot” action is crucial to cultivating character, “the set of lasting dispositions by which a person is recognized,” where “dispositions” refers both to habits and acquired identifications (id. 121–22).

Since, according to Ricoeur, we constitute ourselves through practices of self-narrativization, using cultural tools that are—to varying degrees—also shared by others within our community, our distinctive intercorporeality constitutes the distinctive intercorporeality of others as well.
Recall that, for Ricœur, narrative orients the body toward others, and thus, toward (ethical) action. He describes the experience of one’s own body as flesh, “the mediator between the self and a world which is take in accordance with is various degrees of foreignness” (Ricœur 1992: 318). However, Ricoeur notes that “my own body, my flesh, cannot serve as the first analogon for an analogical transfer if it is not already held to be a body among bodies” (id. 332). Drawing on Husserl’s notion of Verflechtung, “intertwining,” Ricoeur argues that making a world requires recognizing that intercorporeality and its limits, since “[o]nly a flesh (for me) that is a body (for others) can play the role of first analogon in the analogical transfer from flesh to flesh” (id. 333).

However, the failure of an egological transcendental phenomenology to constitute others leads to a discovery parallel to the difference between flesh and body, that “of the paradoxical character of the other’s mode of givenness: intentionalities that are directed to the other as foreign, that is, as other than me, go beyond the sphere of ownness in which they are nevertheless rooted” (id.). This authentic givenness differs from the representations of signs or images because “unlike the orginary, immediate givenness of the flesh to itself, the givenness of the other never allows me to live the experiences of others and, in this sense, can never be converted into originary presentation” (id.). Similar to how the series of memories of others can never find a place in the series of my own memories, Ricoeur claims that the gap can never be bridged between the presentation of my experience and the appresentation of your experience (id.). In this sense, appresentation is best understood as a sort of primordial passive synthesis that grasps “the body over there” as flesh (id. 334); Richard Kearney articulates this relation further by arguing that every body, “in the deepest intimacy of flesh, is exposed to otherness” (2016: 28). That is,

The other is revealed to my flesh as both inscribed in my embodied relation through flesh and as always already transcendent. Or to put it in more technical terms, the other is not reducible to the “immediate givenness of the flesh to itself” in originary presentation, but only in appresentation—as another’s body. (id.)
This appresentation therefore “combines similarity and dissimilarity in a unique manner,” that cannot cross the barrier separating presentation from intuition (1992: 334). Further, he writes, the “transgression of the sphere of ownness” constituted by appresentation is valid only “within the limits of a transfer of sense: the sense of ego is transferred to another body, which, as flesh, also contains the sense of ego” (id.). The sense of the alter ego, however, still does not eliminate the space between the ego and its other, even as they co-constitute each other on the same metaphysical plane. Hence, Ricoeur argues, the resemblance based on the pairing of flesh with flesh works to reduce a distance, to bridge a gap, in the very place where it creates dissymmetry (id. 335).  

This shared intercorporeal albeit asymmetrical relation described by appresentation indicates that the attestation discussed in the previous chapter must accompany this concept. Recalling its definition as “the assurance of being oneself acting and suffering,” and thus serving as a crucial component of Ricœur’s phenomenology of “I can,” adding the corporeal dimension to attestation emphasizes its narrativity, fragility, and conditionality. De Leeuw describes our ability to attest to our self as signifying “the emplotment of multiple subjective experiences in a singular subjectivity that is able to testify of its ‘self’ for others,” thereby binding ontology, embodiment, and Otherness (2022: 62–63). Importantly, Ricœur’s move from identity as sameness to identity as selfhood signifies “a shift from absolute self-reference and the quest for a cognitive core to a quest for hermeneutical self-expression—a search for a ‘surplus of meaning’ we can attest to” (id. 76). As Christopher Watkin puts it, “The fragility of the attested self is accompanied by the

---

14 Notably, in comparing Husserl and Hegel on intersubjectivity, Ricoeur praises Husserl for his “uncompromising refusal to hypostatize collective entities” and “tenacious will to reduce them in every instance to a network of interactions,” which protects “the minimal criteria of human action,” “of being able to identify this action through the projects, intentions, and motives of agents capable of imputing their action to themselves” (1991: 244). In this sense, Ricoeur seeks to preserve sociality as intersubjective relation, but without dissolving the subject into a totalizing whole (as some poor readers of Hegel might attempt).
fragility of attestation, the attestation of the broken cogito with an attestation which is itself broken” (2009: 101). It is in this standing-for that occurs in attestation, as a communicative deployment of an ego appresented to other egos, that alterity of the embodied subject to its interpreters—whether they are conversants, critics, or cross-examiners—might be broached.

In this way, too, attestation allows embodied subjects to speak to the material, ideological, and historical conditions of their subjectivization within their communities. As Shaun Gallagher observes, “one agent’s autonomy is always defined (constrained or enhanced) not only by others, but by another (extra-individual) autonomy—that of the larger relational unit. The autonomy of the interaction itself depends on maintaining the autonomy of both individuals” (2020: 245). In a similar vein, Michael Roy Hames-Garcia describes the socio-cultural and political significance of corporeality as a limiting factor on autonomy:

Bodies do not have inherent meanings. Yet, given the physical properties of bodies and the historical sediment of their intra-actions with ideologies and politico-economic practices, one cannot attach just any meaning to any body. In other words, the body is something more than an inert, passive object on which ideology inscribes meaning, but rather it is an agential reality with its own causal role in making meaning. (2008: 327).

Ricœur describes a similar homology between embodiment and memory:

One does not simply remember oneself, seeing, experiencing, learning; rather one recalls the situations in the world in which one has seen, experienced, learned. These situations imply one’s own body and the bodies of others, lived space, and, finally, the horizon of the world and worlds, within which something has occurred. Reflexivity and worldliness are indeed related as opposite poles, to the extent that reflexivity is an undeniable feature of memory in its declarative phase: someone says “in his heart” that he formerly saw, experienced, learned. (2004: 36)

In this way, the legal subject is not only shaped by the legal community in terms of the institutional and ideological effects of legal decision-making as effected in policies and case law, but also in the “heavy histories” of past injustice that weigh different subjects down (Ahmed 2015). Justice, then, involves fostering a plurality of autonomies (Gallagher 2020: 245).
Hence, the embodied subject as a legal actor—embedded within and mediated by its legal community—exists as an “unsubstitutable singularity” of a first-person perspective within that community (1992: 119; cf. Depraz 2011). Such singularity, I have argued previously with Hegel, Nancy, and Fanon, can be institutionally comprehended through analyzing the degree to which a specific legal subject can exercise their capabilities as guaranteed or protected under the law—or, in other words, by reading how well (or poorly) a subject’s embodied dignity is intersubjectively recognized by its community’s social and political institutions.15

5 Conclusion

In this chapter, I have argued that a Rícœurian reading of Dworkin—informed by Hegel, Nancy, and Fanon—can yield a fruitful legal hermeneutic, one based in the ineliminable embodiment of legal subjects. The embodied co-existential constitution of the legal subject by other legal subjects performs two crucial re-orientations for legal analysis: 1) it renders the legal subject into a social artefact, inseparable from the interpersonal, material, historical, cultural, and ideological structures that constitute its subjectivity, whilst also 2) retaining its singularity as a distinctive source of normativity, as a site wherein sociality and its norms are refracted in virtue of that unique placement within the social. The utility of such an approach to legal interpretation has already been seen in the work of George Taylor (2000, 2011, 2017); this study complements that and other previous work through vesting the embodied legal subject with a normative power to attest to the limits and exclusions of the rule of law within the legal community.

15 In a similar albeit Deleuzian/Luhmannian vein, Andreas Philippopoulos-Mihalopoulos has argued for what he calls the “lawscape,” a material metaphor that attempts to capture and move beyond the standard corporeal and spatial legal metaphors and contains the semiotic as well as the material in one epistemological and ontological tautology (2015; 2016). Although our projects differ in that I focus on the specifically phenomenological aspects of sociality and legality as texts, I think that his situating of these components on the same eco-ontological framework is helpful understanding the hermeneutic approach I advocate in this dissertation. That is, I take his concept of the lawscape to similarly implies no hard metaphysical distinction between legality and sociality, such that intersubjective intercorporeality manifests both aspects of the social world without either reducing to the other.
In this way a Ricœurian analysis can provide a legal hermeneutic that can take account of the “resources of conditionality” that either limit human capability or increase human suffering (or both) under the authority of law (2004: 355). Articulating his vision of the just, Ricœur describes facing in two directions: “toward the good, with respect to which it marks the extension of interpersonal relationships to institutions; and toward the legal, the judicial system conferring upon the law coherence and the right of constraint” (1992: 217). In the following chapter, I will demonstrate that Dworkin’s interpretivism, with the graft of Ricœur’s carnal hermeneutics, can draw these faces closer, even when the legal dispute does not directly concern legal limits on bodily capacities.
Chapter VI

Interpretivism through Embodiment: Shelby County v. Holder

[T]he act of judging has as its horizon a fragile equilibrium of these two elements of sharing: that which separates my share or part from yours, and that which, on the other hand, means that each of us shares in, takes part in society.


1 Introduction

This dissertation has argued that a theory of legal interpretation—one truly in service to justice—requires taking dignity seriously: not a dignity that functions as one right among many like others or a flourish of legal rhetoric, but as a robust, intersubjective mutual recognition of singular value. I have argued that this recognition should be indexed to the embodied capacity of legal subjects to enact and exercise their legally-guaranteed rights; and further, that when adjudicating cases of competing legal rights-claims in keeping with recognizing this intersubjective legal dignity, legal reasoners should refer to the attestations of these claimants alongside—and to the same degree of deference as—past legal decisions and relevant legal provisions. The crux of this argument rests in the claim that there is no sense of collective meaning—no norm, no social fact, no rule—that does not derive in some way from the embodied intersubjectivity of persons living in political association. Again, this is not to claim that every person in political association is always allowed the full exercise of their legally-guaranteed rights; rather, it is an argument that, if a state or government claims political authority over someone—that is, if it claims jurisdiction over them—then it must already recognize that dignity and must therefore provide some legal reason for why that dignity ought to be ignored or violated. The measure of this dignity, I have argued, is the degree to which the embodied
capabilities of specific legal claimants, the sources of the voices from behind the mask of the legal persona, must be heard. But to fully hear the singularity from which this voice emerges, the law must take account of the full situation that generates that voice: not simply the facts of the case or the relevant case law, but the phenomenologically derived attestations of those who will be impacted by the court’s rulings in the case.

In previous chapters, I have argued that this account of legal interpretation brings legal justice closer to moral justice precisely because it seeks to do justice to the dignity of legal subjects. This approach is most clearly applicable to legal disputes involving legal rights concerning one’s bodily autonomy, such as the right to obtain an abortion, to refuse unwanted medical treatment, to move freely between states and reside where one wants, and to undergo euthanasia. While these and related issues would certainly be covered under this analysis, to restrict this embodied approach to such issues would ignore the fundamental intercorporeality at the heart of human sociality, and therefore remove an important anchor for legal discourse if the gap between legal justice and moral justice is to be drawn more closely. So, in this chapter, I will demonstrate that this account does so by using it to critique the Supreme Court’s decision in *Shelby County v. Holder* (2013), wherein the majority held that §4(b) of the Voting Rights Act of 1965 (the “VRA”) was facially unconstitutional. There are at least three reasons to focus this analysis on such a case: 1) doing so reveals how a seemingly purely procedural legal right is nevertheless shaped by an intercorporeal sociality; 2) more specifically, it demonstrates the continuing relevance of historical *de jure* racism due to its *de facto* imprint on the socio-political and legal makeup of the United States, and therefore of the need to look beyond the body (*Körper*) of the law to the bodies (*Leiber*) that constitute it; and 3) it also permits those excluded from political and other institutional processes to have their perspective not only heard, but
privileged, and thus heightens the stakes of ensuring the democratic legitimacy of American rule of law. This last point is especially crucial since in the United States, unlike other countries, elected members of the state legislatures draw the election districts for their constituents.

This chapter will proceed as follows: I will first present the facts surrounding the case and the relevant legal issues involved before drawing out the key arguments made to arrive at the ruling, focusing especially on the claim that §4(b) of the VRA violated the “fundamental principle of equal sovereignty” of the states, and then do the same for the dissenting opinion. Then, I will argue how the embodied interpretivist strategy I proposed in previous chapters provides a critique not only of the majority’s holding, but also of the dissent. My main contention will be that neither opinion considers the effects of the ruling based on the attestations of persons who will be affected by the court’s decision. That is, while there are references to the ruling’s effects in general terms, there is no testimony cited that either indicates the disregard for racialized subjects’ dignity that will follow their striking down §4(b) or acknowledges the limitations of simply upholding the subsection as written due to other widespread structural impediments to fully recognizing that dignity. Both deficiencies, I will claim, could be avoided by reasoning from the position of the person(s) least capable of exercising those rights. In addition to the arguments and concepts developed in previous chapters, I will draw on the amici curiae, “friends of the court,” briefs filed by parties interested in the outcome of the court proceedings, particularly those provided by organizations advocating for the interests of minority ethnic and racial groups. Crucially, these briefs carry forward attestations of the lived experience of the concrete persons most likely to be detrimentally affected by a finding that the coverage formula in §4(b) is unconstitutional and therefore provide crucial insights in the process that shape the subjectivities of those affected.
A related methodological note: although there has been extensive empirical social-scientific research done in the wake the Shelby County decision that demonstrates the deleterious effects of rendering §5 inapplicable, I will not consider the results of such research in my analysis. My claim is that the case could (and should) have been decided differently based on the attestations contained in the amici briefs sent to the Court. Importantly, I am not arguing that every and all amicus briefs will always reflect the concerns with embodied dignity that I am advocating.¹ Instead, I am arguing that, in certain contexts, amici are the best tools to convey the attestations of embodied legal subjects, especially in cases such as Shelby County, where there is no named party in the lawsuit whose corporeally grounded dignity or capacity to exercise their legally protected rights are in jeopardy. Hence, special attention will be paid to the amicus briefs that seek to convey the lived experiences of those least able to secure their legally-protected rights—that is, the people most vulnerable to having their capacity to exercise these rights diminished or even eliminated—as a reasonably directly foreseeable result of the decision.

2 Shelby County v. Holder dissected

In this section, I will give an overview of the relevant facts and laws underlying the opinions handed down in Shelby County before examining these opinions themselves. What is important to recognize going forward is the tension between the framing of state sovereignty as the most pressing legal question at issue in the case—especially the principle of “equal sovereignty” between the states—and the voluminous evidence of likely harm to minority voters. It will also be important to note that, despite its criticisms of the holding, the dissent still fails to present an alternative interpretation of the case, because it remains within the framing set by the majority.

¹ Due to the sharp increase in the use of amicus briefs in the latter half of the twentieth century, there is a sizable literature on the multitude of issues that accompany these briefs. See, e.g., Lowman 1992, Solimine 2013; Larsen 2014; Anderson 2015; Garces et al. 2017.
2a Background and facts

The roots of the Voting Rights Act of 1965 lie in the historical failure of the federal and state governments to enforce the protections offered in the Fifteenth Amendment; namely, that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude” (U.S. Const., Amdt. 15, §1). The Amendment also gives Congress the power to enforce this article by appropriate legislation (id. §2). Despite a promising start during Reconstruction, voting rights were severely curtailed by the end of federal oversight and the political retrenchment of Confederate apologists in Southern legislatures, often aided and abetted by the Supreme Court itself (cf. du Bois 1935; Foner 2019; see, e.g, Plessy v. Ferguson 1896). After over a century of this disenfranchisement, Congress finally passed the VRA due to political pressure exerted by civil rights activists.

While the Act itself has several important prohibitions, only a few are relevant to the case at hand. Section 2 of the Act forbids any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” This provision is permanent and applies nationwide, so it was not challenged in this case. Section 5 of the Act requires certain jurisdictions “covered” by the Act to submit all new voting laws for review by federal authorities to determine whether their use would perpetuate or facilitate voting discrimination. What determines whether a jurisdiction is “covered” under the Act is determined by the “coverage formula” in §4(b). When the bill was first enacted into law, a jurisdiction is covered if 1) it maintained a “test or device” on November 1, 1964, and 2) less

---

2 Much of this subsection is drawn from the case law, procedural history, and legislative history provided in Part I of the majority’s opinion (570 U.S. 536–42).

3 In the very recently decided case Brnovich v. Democratic National Committee, 594 U.S. ___ (2021), the Court held that §2 can be used to strike down voting restrictions only when they impose substantial and disproportionate burdens on minority voters—that is, those sufficient to overturn the state’s interest in preserving the integrity of its election procedures—absent evidence of racially discriminatory intent.
than 50 percent of its voting-age residents either were registered to vote on November 1, 1964, or cast a ballot in the November 1964 presidential election (§4(b), 79 Stat. 438). Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like (§4(c) (id., at 438–39). A covered jurisdiction could only obtain “preclearance” from either the Attorney General or a three-judge panel only by proving that the proposed changes had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.” Importantly as well, §4(a) of the Act provided that §§4 and 5 were set to expire five years after its passage by Congress.

The first major challenge to the Act was brought in South Carolina v. Katzenbach (1966). In its decision, the Court looked to the extensive congressional record of race-based discrimination in voting. Writing for the majority, then-Chief Justice Earl Warren noted that the House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses, and between the two chambers a solid month was spent discussing and debating the bill (Katzenbach 308–09). The Court noted two points that “vividly” emerged from the Act’s “voluminous” legislative history:

First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. (id. 309)

The Court went on to deny South Carolina’s constitutional challenge to the Act, holding that it was justified to address “voting discrimination where it persists on a pervasive scale” (id. 308). The Court also found that while the 1957 and 1960 Civil Rights Acts empowered the Department of Justice (DOJ) to bring suit on behalf of individuals, the “variety and persistence” of laws disenfranchising minority voters confounded these efforts, as Southern states “merely switched
to discriminatory devices not covered by the federal decrees” in response (id. 311, 314). This finding also highlighted the need to place the burden for compliance on the covered jurisdictions, rather than the individual citizen who seeks to bring a claim against the jurisdiction.

Additionally, the Court in *Katzenbach* explicitly permitted Congress the authority to draw distinctions between states to remedy racial discrimination in voting so long as the distinctions have “some basis in experience” (id. 331).

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in §4(b) to include jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968 (VRA Amdts. of 1970, §§3–4, 84 Stat. 315). Due to this change, several counties in California, New Hampshire, and New York became covered and therefore required federal preclearance to pass changes in their voting laws. Congress also extended the ban in §4(a) on tests and devices nationwide. These changes were challenged in *Georgia v. United States* (1973), but the Court upheld this reauthorization.

In 1975, Congress reauthorized the Act for seven years and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration; it also amended the definition of “test or device” to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English (§203, 89 Stat. 401–402). As a result of these amendments, the states of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions and therefore subject to §5 preclearance. Congress also amended §§2 and 5 to forbid voting discrimination based on membership in a language minority group, in addition to discrimination based on race or color (§§203, 206; 89 Stat. 401, 402). Finally, Congress made the nationwide ban on tests and devices permanent.
§102; id., at 400). The Court upheld these changes in its decision City of Rome v. United States (1980).

In 1982, Congress reauthorized the Act, this time for 25 years, without changing its coverage formula (96 Stat. 131). However, it amended the bailout provisions to allow political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit in the ten years prior to seeking bailout. (§2, id., at 131–33). Again, the Supreme Court upheld this reauthorization in Lopez v. Monterey County (1999).

Surveying the state of voting rights in Alabama from 1982 to 2006, James Blacksher, et al., found that the Department of Justice objected to 46 submissions under Section 5 and sent observers to the state 91 times, while federal courts found “several times” that the state of Alabama and/or its political subdivisions have engaged in intentional discrimination (2008: 249, cit. DOJ 2003, 2020). Though they note significant progress in electoral access and equality for Alabama’s Black citizens, the authors claim that this progress has largely been as the result of extensive voting rights enforcement and voting remains largely racially polarized, with Black candidates rarely elected in majority-white districts (id.). They report that twenty-two enforcement actions under Section 5, in which the DOJ or private plaintiffs filed suit alleging that a voting change had not been submitted for preclearance, were successful (id. 256). The authors also note that, in two referenda during this period, Alabama voters refused to remove segregationist and discriminatory provisions of the Alabama constitution (id.).

In 2006, after undertaking an extensive fact-finding investigation that produced a record of some 15,000 pages, Congress reauthorized the Act for an additional 25 years—without changing its coverage formula. Congress amended §5 to prohibit more conduct than before, providing 1)
that an election change motivated by racially discriminatory purpose may not be precleared, whether or not the change is retrogressive; and 2) that pre-clearance should be denied if an electoral change diminishes, on account of race, citizens’ ability “to elect their preferred candidates of choice” (42 U.S.C. 1973c(b)-(d)). The House Judiciary Committee requested, received, and incorporated into its record eleven reports documenting the continuation of discrimination after 1982 in covered jurisdictions (Sensenbrenner et al. 2013: 16). Each report describes numerous examples of discrimination that prompted §5 objections or litigation; one of the reports detailed nearly 300 cases of voting discrimination (id.). Some of the techniques documented include discriminatory annexations, de-annexations, and consolidations; redistricting plans; and polling place relocations (id. 16-19.) The record also showed that between 1982 and 2004, the rate of objections from the Department of Justices remained almost constant when compared to the period between 1965 and the 1982 reauthorization, with more than 600 objections being interposed (id. 19-20). Congress ultimately concluded that although the “first generation” barriers eliminated by the passage of the Act in 1965 led to greater voter turnout and participation as well as more equal representation, not all vestiges of the de jure discriminatory regime against minority citizens were eliminated; that in addition to continuing to submit proposed voting law changes that the Attorney General declines to approve and challenging every reauthorization of the Act, covered jurisdictions still attempt to pass “second-generation barriers” that aim to dilute minority voting power (Shelby Co. 563). It also concluded that Section 5 deterred jurisdictions from proposing discriminatory voting changes in the first place (Sensenbrenner et al. 2013: 20; see also Pitts 2005). Lastly, Congress also considered but rejected proposed amendments to the VRA that would have altered Section 5’s coverage formula
and bailout procedures, partially due to the “flexibility” allowed through the bailout provisions (id. 23, 25–26).4

In 2009, the Supreme Court decided the case of Northwest Austin Municipal Util. Dist. No. One v. Holder (557 U.S. 193). There, a small administrative district that had no history of racial discrimination brought suit to bail out of its covered status within Travis County, Texas. The holding for the case allows for political subdivisions of covered jurisdictions to bail out of the Act’s preclearance requirement. More importantly for Shelby County, however, several members of the Court used their opinion in this decision to convey its concerns about the constitutionality of certain sections of the Act. Writing for the Court, Chief Justice John Roberts conceded the improvements that resulted from the Act but warned that “[p]ast success alone, however, is not adequate justification to retain the preclearance requirements” (id. 202-03, cit. Issacharoff 2004).

Most notably, Roberts charged that the Act differentiates between the states, despite “our historic tradition that all the States enjoy ‘equal sovereignty’” (id. 203, cit. United States v. Louisiana, 363 U.S. 1, 16 (1960)5 and Lessee of Pollard v. Hagan, 3 How. 212, 223 (1845)). This “fundamental principle of equal sovereignty” prompted the Chief Justice to worry that “[t]he evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance,” which he found likely “since the statute’s coverage formula is based on data that

4 Nathaniel Persily makes the case that part of the reason Congress did not alter the coverage formula was due to uncertainty about the applicability of a new standard for Congressional enforcement of civil rights, which rendered any reformulation a jurisprudential gamble on what the Court would find important (2007: 192–94). He also notes that the political hurdles of adding jurisdictions, most of which “likely would have been Republican,” to the preclearance regime made retaining the by now well-approved coverage formula the safest political option (id. 194–95). However, Roberts defends his claim that the coverage formula is out-of-date by citing Persily’s later statement that “[t]he most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would […] disrupt settled expectations (Northwest Austin at 204, cit. Persily 2007: 208).

5 The full relevant text of this citation is: “This Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission.”
is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions” (id. 203). But, although he concluded that the Act’s preclearance requirements and its coverage formula raised “serious constitutional questions,” Roberts declined to address the constitutional challenge to §5 (id. 204–05). His opinion was joined by all other members of the Court except Justice Clarence Thomas, who concurred that utility district could bail out but issued a dissent to indicate his willingness to find §5 unconstitutional (id. 212).

The case of Shelby County v. Holder itself began in April 2010, when petitioner Shelby County, Alabama, filed suit against Eric Holder, then the Attorney General of the United States, in the District Court for the District of Columbia, which hears cases involving claims against federal officials and agencies. With the 2012 federal elections looming, Shelby County claimed that §§4(b) and 5 of the Act were facially unconstitutional. The District Court and its appellate court both rejected Shelby County’s claims, upholding the constitutionality of the Act. On November 9, 2012, the Supreme Court granted certiorari, agreeing to hear briefs and arguments on the question: “Does the renewal of §5 of the Voter Rights Act under the constraints of §4(b) exceed Congress’ authority under the Fourteenth and Fifteenth Amendments, and therefore violate the Tenth Amendment and Article Four of the Constitution?”

2b The majority opinion

Chief Justice Roberts authored the majority opinion, holding that §4 of the Voting Rights Act is unconstitutional, which was joined by four other members of the Court. Roberts’ opinion begins by claiming that the Act “employs extraordinary measures to address an extraordinary

---

6 The Tenth Amendment holds that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” It is often taken to be a key statement of the principle of federalism. Article Four generally details the relationships between the states as well as the states and the federal government. Most important for this dissertation’s purposes is Section 4: “The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”
problem,” calling the preclearance requirement of §5 “a drastic departure from basic principles of federalism,” as well as a violation of the “fundamental principle of equal sovereignty” first described in *Northwest Austin* four years earlier (570 U.S. 529, at 530). This case provided the crux of the Court’s analysis of the coverage formula in §4 (id. 542), an analysis which found that “current conditions” rendered the formula unconstitutional (id. 550).

Roberts’ analysis begins by reaffirming that, while the Constitution and laws of the United States are “the supreme Law of the Land,” the States retain broad autonomy in structuring their governments and pursuing legislative objectives—including elections (id. 542–43, cit. U.S. Const. Art. VI, cl. 2, and Amdt. 10). Of course, the federal government retains significant control over federal elections—for example, Congress is authorized under the Constitution to establish the time and manner for electing federal representatives—but states have broad powers to determine matters such as the conditions under which the right to vote may be exercised, the qualifications of its officers and the manner of their choosing, and the drawing of lines for congressional districts (id. 543; other citations omitted). Along with this retained sovereignty, Roberts invokes the “‘fundamental principle of equal sovereignty’ among the States” he first described in *Northwest Austin* (id. 544). However, Roberts’ notion of the “fundamental principle of equal sovereignty” is not well-supported by the cases he cites. The earlier case, *Pollard’s Lessee*, stands for the principle that new states be admitted with equal sovereignty to the original thirteen; the latter case, *U.S. v. Louisiana*, cited it in support of this principle. However, this specific history is not mentioned by Roberts, although he does refer to precedent that calls the nation “a union of States, equal in power, dignity and authority” that depends on the “constitutional equality of the states” for the “harmonious operation of the scheme upon which the Republic was organized” (id.). Again, these precedents concern the admission of new states,
even as Roberts concedes that the holding in Katzenbach rejected the idea that this principle was a bar to differential treatment outside that context (id.). Still, Roberts concludes that the Voting Rights Act “sharply departs from these basic principles” because it suspends “all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.” (id.). Once again citing his decision from four years before, Roberts asserts that the Act constitutes “extraordinary legislation otherwise unfamiliar to our federal system” (id. 545, cit. *Northwest Austin* 211).

Conceding that this differential treatment was justified in 1966, Roberts finds that “things have changed dramatically” in the last 50 years (id. 547). For example, he notes, voter turnout and registration in covered jurisdictions “now approaches parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels” (id.). Roberts admits that there is no doubt that these improvements are “in large part because of the Voting Rights Act,” but also chides Congress for failing to ease the restrictions in §5 or narrow the scope of the coverage formula in §4(b) (id. 549). Since the provisions of §5 apply only to the jurisdictions “singled out by” the coverage formula in §4, Roberts turned his attention to whether “the coverage formula is constitutional in light of current conditions” (id. 550). Using *Northwest Austin* as precedent, Roberts contended that the continued use of “decades-old data and eradicated practices”—that is, the literacy tests and low voter registration and turnout in the 1960s and 1970s originally used to determine coverage—was no longer “sufficiently related” to the problem it was meant to target (id. 551, cit. *Northwest Austin* 203).7

---

7 Interestingly, Roberts argues that the states in 1965 could be divided based on whether or not the state had a “recent history of voting tests and low voter registration and turnout” (*Shelby County* 551, emphasis added). Since this characteristic seems to have been his own creation, he ignores the possibility that this description could simply be reformulated as whether or not a state had a “pervasive history of voting tests and low voter registration and turnout” and therefore avoid his criticism.
Echoing the arguments made by the petitioner Shelby County, Roberts finds the government’s defense of the formula to be “limited,” disputing that Congress’ reliance on original “reverse-engineering” of the formula based on conditions on the ground in 1965 could still be justified in 2013 (id. 551–52). What Roberts implies is that Congress in 2006 failed to adjudge the constitutional propriety of the Act “with reference to the historical experience which it reflects,” contending that “history did not end in 1965” (id. 552, cit. Katzenbach 308). Because he claims that Congress failed to adequately consider developments in the wake of the Act’s passage in 1965, Roberts concludes that the unaltered coverage formula reauthorized in 2006 that continues to hold states to different standards due to their history of voter discrimination is unconstitutional (id. 552–53).

In his closing sections, Roberts takes aim at the government and dissent’s reliance on the congressional record to argue that the disparate treatment is still justified using the coverage formula. “Regardless of how to look at the record,” he argues, “no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time” (id. 554). This argument is curious, as Roberts just argued that historical developments after 1965 mean that the coverage formula should have been altered in light of those changes. He argues that Congress’s reliance on these developments to keep the formula in place was impermissible, because it was not grounded in

---

8 Roberts cites to the Brief of the Respondent, which presents a different picture than what the Chief Justice paints. Contrary to the opinion, the federal government argues that the relevant question in the 2006 reauthorization debate was not “what modern objective criteria could be substituted for the criteria included in Section 4(b) in order to describe the same covered jurisdictions,” but “whether Section 5 is still needed in the covered jurisdictions—a question Congress answered overwhelmingly in the affirmative” (id. 49–50). Further, the government presents evidence from the legislative record that Congress relied on national indicators such as “successful Section 2 suits, disparities in registration and turnout rates, and the prevalence of racially polarized voting,” and finding evidence for each indicator that minority voters still “remain worse off in jurisdictions covered by Section 5” (id. 50).
“current conditions.” Instead, it “reenacted a formula based on 40-year-old facts having no logical relation to the present day,” while denying that “second-generation barriers” are impediments to the casting of ballots, since they are “rather electoral arrangements that affect the weight of minority votes” (id. 555). What Roberts argues is that a valid coverage formula can only pick out jurisdictions that engage in only the discriminatory activity prohibited by the law; but that once those jurisdictions stop doing that prohibited activity because it is now prohibited, any downstream discriminatory activity not specifically prohibited cannot be used to justify keeping the prohibitions in place. In other words, “history did not end in 1965” in terms of federal preclearance coverage, but history did end in terms of the discriminatory activity that can be preempted by federal oversight. Finally, Roberts scolds the dissenting opinion for analyzing the question without considering Northwest Austin’s emphasis on the principle of equal sovereignty of the states and its novel insistence that “disparate geographic coverage” be “sufficiently related” its targeted problems (id. 555–56).9

2c The dissenting opinion

Justice Ruth Bader Ginsburg authored the dissent, which was joined by the Court’s remaining members. In her opinion, the question of whether §§4(b) and 5 are constitutional rests on Congress’ determination that continuing the bill coverage 1) would facilitate completion of the impressive gains thus far made; and 2) continuance would guard against backsliding (id. 559–60).

Ginsburg’s dissent calls attention to the pervasiveness of anti-Black voting discrimination prior to the VRA’s enactment in 1965, citing Katzenbach’s description of the “variety and

---

9 Recall that the reauthorization of the Act occurred in 2006, while Northwest Austin was decided in 2009 and this suit was brought in 2010. Certainly, it is possible that Congress could have proposed and passed a new formula between 2009 and 2013; whether it would be likely to occur, on the other hand, is another question, one the Court often recognizes and uses to delimit its own political role.
persistence” of laws that attempted to stymie the exercise of this fundamental right (id. 561). In addition to congressional record, she cites Supreme Court precedent holding that the effect and results of outright prohibitions on voting and dilution of voting power are “the same: namely, a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates” (id. 564, citing Shaw v. Reno 1993; Allen v. State Bd. of Elections 1969; Reynolds v. Sims 1964). She also notes the long-held recognition of the fundamental right to vote as “preservative of all rights,” which prompts her to characterize Congress’ power to legislate on such matters as “at its height” and therefore deserving of Court’s deference (id. 566, cit. Yick Wo v. Hopkins 1886). To this Ginsburg adds the context that the Civil War Amendments—the 13th, 14th, and 15th—used “language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality” and provided “sweeping enforcement powers [...] to enact ‘appropriate’ legislation targeting state abuses” (id. 568, cit. Amar 2005: 363, 399). She therefore avers that “the stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States” (id.). To effect this protection, she argues, means that Congress’s power to do so is only limited to the extent that it has rationally selected means appropriate to a legitimate end; citing a subsequent Court decision on the VRA, she asserts: “It is not for [the Court] to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did” (id., cit. Katzenbach v. Morgan 1966: 653). In this manner, Ginsburg reproaches the majority for its failure to take account of the legislative record that Congress used to justify its decision.
Following this defense of deference to Congress, Ginsburg argues that legislation reauthorizing an existing statute is “especially likely” to satisfy this rational basis test, and therefore ought to be left intact by the Court—particularly given the substantial record of contemporary evidence assembled by the houses (id. 568–70; cf. Weeden 2014). She provides a more thorough review of Congress’ findings prior to the 2006 reauthorization than presented in the majority’s holding, drawing attention to the “subtler second-generation barriers” of contemporary voting discrimination that the coverage formula deters (id. 571–76). Referencing Roberts’ claim that “history did not end in 1965,” Ginsburg makes the case that “current needs” still justify the formula, including the finding that racial discrimination in voting remains “concentrated in the jurisdictions singled out for preclearance” (id. 577–80, cit. Northwest Austin 203). In challenging the Court’s grant of certiorari to Shelby County’s challenge, she notes the extensive evidence that racist sentiments—and political exclusion through racism—remain entrenched at all levels of Alabama government, from the high echelons of state government down to county and city officials (id. 581–85). More importantly, she takes aim at the “fundamental principle of equal sovereignty” on which the Court pins its ruling: first by citing Katzenbach’s explicit finding that this principle “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared” (id. 587, cit. Katzenbach 328–29), then by critiquing the Court’s use of Northwest Austin to extend this limited principle outside its “proper domain” of the admission of new states (id. 588). Ginsburg indicates, too, that Congress relied on the Court’s ruling in Katzenbach to reauthorize the VRA, and specifically that the Act’s limited geographic scope—that is, to states that have a proven history of racist voting discrimination—was taken to weigh in favor of constitutionality (id. 589, cit. Persily 2007: 195). In other words, she criticizes the Court’s opinion for diverging...
radically from the established precedent on which Congress has consistently relied, then taking Congress to task for failing to take this radical divergence into account when reauthorizing the Act in 2006.

Ginsburg concludes her dissent by reiterating the Court’s discounting of the legislative record that provided Congress’ justification for retaining the coverage formula of §4(b), including the risk of retrogression should the coverage cease (id. 590). More precisely, she takes issue with the majority’s claim that it is “irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time,” because it ignores that second-generation barriers are continuous with the first-generation barriers explicitly prohibited by the Act (id. 591–92). In fact, Ginsburg characterizes these barriers as “attempted substitutes” for the first-generation discrimination now prohibited, arguing that their existence evinces an “evolution of voting discrimination into more subtle” practices (id. 592–93). She ends by invoking Congress’ authority to enforce the Civil War Amendments “by appropriate legislation,” which she asserts merits the Court’s “utmost respect” (id. 593–94). However, only three other justices joined Ginsburg’s opinion.

3 The critique from embodiment: doing justice to (and with) dignity

In this section, I will offer a critique of the decision in Shelby County as well as the framing implicitly accepted by the dissent, using Dworkin’s interpretive framework as informed by the considerations I have argued for in the preceding chapters of this dissertation. What I will focus on is the lived experience of citizens to be affected by the Court’s decision, as communicated to it through the amici curiae for the Respondent, which I argue should have constituted an
important part of the Court’s decision-making. Even if the majority’s focus on the federalism question was ultimately decisive and no amount of outside information could have swayed it otherwise, I will maintain that an opportunity for reframing the analysis of the coverage formula’s constitutionality was still available in the dissent.

A short summary of the carnal legal hermeneutic that I have argued for would be helpful before delving into my critique of the opinions. For Dworkin, when there is no clear answer provided by either the text of the statute or relevant case law, judges may—even must—rely on their judgments of political morality of the legal community. Such a political morality, he continues, must be based on an individual’s human dignity; only then can the individual realize their freedom in that community. Hegel similarly reminds us that such a community requires intersubjective, reciprocal recognition of its members for this freedom to be actualized. In this manner, the dignity of the legal subject depends on the intersubjective recognition of the political and legal community. However, whatever norms may collectively coalesce into conventional morality and sense of community, these are all essentially contestable by the singular voice: as Nancy argues, community is a limit experience of singular beings mutually exposed to each other that share in their embodied co-existence. Community constitutes singular beings as co-

---

10 The only amicus brief provided in support of petitioner Shelby County that represents those most likely to be negatively affected by finding §§ 4(b) and 5 unconstitutional is that of the National Black Chamber of Commerce (“NBCC”). In the brief, the NBCC disputes the “assumption” underlying Congress’s 2006 reauthorization of the Act; namely, that “the exceptional circumstances which justified close federal oversight of the electoral practices of many states and localities in 1965 and 1975 persist today” (NBCC Br. 1). The government officials that the Chamber and its members work with on a day-to-day basis “are people of good faith” that “do not deserve to be labeled and treated as presumptive discriminators” (id.). In addition to undermining the flexibility of these officials, the NBCC claims that §5 has been abused “to enforce stereotypes regarding minority voters’ preferences and affiliations, preventing voters who do not embody these stereotypes from electing their candidates of choice (id. 1–2, emphasis in original). The brief gives no evidence of §5 enforcing stereotypes, however, because it is more concerned with arguing that alternative remedies to §5 are available in the Act. In other words, the lived experiences of its members are only relied upon in political contexts outside the issues covered in this case. While these attestations are certainly valuable to understand the full context of the minority-voter experience in covered jurisdictions, they are equally certainly not dispositive of other attestations—particularly those voters more vulnerable to disenfranchisement than business owners.
existing at a fundamental ontological level; however, Fanon cautions that the production of subjectivity often impedes or occludes this basic co-existence, even at the level of one’s embodied relationship to the world. Writing from the context of racialized coloniality, he provides a sociogenic analysis informed by the embodied, lived experience of specific subjects to understand how subjects are formed and how they can thereby contribute to collective meaning-making. In this regard, such analysis can be further thematized using Ricœur’s hermeneutics of the lived, intercorporeal body as the focal point for thinking ethics and capable action. In terms of legal analysis, this argument means that only a phenomenologically-informed investigation into the subjectivity of the concrete legal claimant and the processes of its subjectivization—the institutional and intersubjective formation of the legal subject—can fully recognize the legal claimant’s dignity, by comprehending the circumstances that delimit the claimant’s capacities for legally-protected action.

Using this phenomenological hermeneutic approach to guide my interpretation, I argue that the key for adjudicating the Shelby County case that keeps these concerns at the fore lies in the amici curiae briefs filed by respondent-interveners and interested third parties to the case. Crucially, the case is framed by the majority as a potential violation of states’ rights, and thus the question becomes that of the limits of federal authority to compel the states to pursue specific policy goals. Unfortunately, the dissent follows the framing by the majority, simply countering that Congress had a rational basis for concluding that the challenged sections of the Act were well within the limits of federal authority. While this conclusion is well-supported based on both the weight of case law and the congressional record, Ginsburg relies on only one amicus brief in her opinion—the one supplied by the States of New York, California, Mississippi, and North Carolina. However, I contend that other briefs provide compelling personal accounts of what the
harm were prior to the passage of the Act, and what the resulting harms of failing to find its provisions constitutional will likely be. Of the many briefs filed in support of the respondent, I have selected those that rely on the lived experiences of the people who will be most detrimentally affected by finding the challenged provisions of the Act unconstitutional. In this regard, following a phenomenologically-informed sociogenic analysis of these briefs provides strong ground for the constitutionality of the challenged provisions. To do so, I will argue, is to give due regard to the dignity of legal subjects.

3a Which principles (of dignity) at play?

The first part of the Dworkinian analysis calls for an analysis of fit and justification, understood in terms of political and legal integrity. Recall that, for Dworkin, moral and political principles are ultimately what judicial decisions rest upon, so to analyze these opinions means to try to understand what principles are at play in the decision. The Court’s opinion in Shelby County presents a what seems to be a new legal principle, based on one that it claims to have established in its previous ruling in Northwest Austin. In fact, it is the principle the Court espoused in Northwest Austin that is the source of disagreement in terms of the opinion’s “fit” in terms of statutory voting discrimination. Since the question of fit often flows directly into the question of justification in terms of integrity, these will each be examined before turning to the question of dignity which will invite the hermeneutic phenomenological analysis of those who will be affected by the decision.

Reading Roberts’ opinion for the Court in Shelby County, he takes the decision in Northwest Austin to describe a “fundamental principle of equal sovereignty” amongst the states. This equal sovereignty principle is used to highlight the federalism concerns that existed in the Court’s previous rulings on the Voting Rights Act, which Roberts cites in the earlier opinion, although
these concerns were expressed only in non-binding dissenting or concurring opinions (Northwest Austin at 202; cf. Katzenbach 358–62; Allen at 586 n. 4; Georgia 545; City of Rome 200–06, 209–21; Miller v. Johnson 1995: 626; Lopez 82, 288, 293–98). What this means is that, despite the length of this jurisprudential record, the “serious misgivings about the constitutionality” of federal preclearance that Roberts cites had never swayed the Court to declare §5 to be unconstitutional. However, he derives the novel principle of “equal sovereignty” of the States from the three cases he cites, which had never been taken to apply to states already admitted to the union.\textsuperscript{11} Recall that Ginsburg criticizes this extension of the equal sovereignty principle in her Shelby County dissent; she also calls into question the necessity of this principle to decide the legal question that the Court faced in Northwest Austin, especially since the Court raised the federalism concerns with the VRA in its precedent-setting opinion (Northwest Austin 201–206) but nonetheless resolved the specific legal question on separate grounds (id. 206–211).\textsuperscript{12} Hence her surprise that the Court seems to have taken apparently non-controlling statements from Northwest Austin to have “silently overruled” Katzenbach’s explicit limitation of the equal-sovereignty doctrine—especially since Katzenbach was cited “in the course of declining to decide” the constitutionality of the Act (Shelby County at 588; emphasis in original). In this regard, the Court’s holding regarding the federalism concerns raised by the VRA does not “fit” well with its own precedent. Or, perhaps more accurately, the principle of “equal sovereignty”

\textsuperscript{11} Notably, the most recent case that Roberts claims draws on this historic tradition, United States v. Louisiana (1960), was decided only five years before Katzenbach, with seven of the nine justices who decided the former case still on the Court. In fact, nowhere in his dissent in Katzenbach does the otherwise staunch textualist Hugo Black cite U.S. v. Louisiana, despite writing his own concurring and dissenting opinion in it as well (id. 85–101).

\textsuperscript{12} Lawyers refer to the comments that judges make when delivering an opinion that are unnecessary to the decision in the case itself as “dicta,” from the Latin obiter dictum, “something said in passing (Garner 2006: 499-500). These statements are generally not taken to be binding as precedent, although in practice such statements are often used to formulate new legal rules.
among the States on which the Court relied is less embedded in the nation’s legal tradition than Roberts claims.

Notwithstanding the question of the opinion’s fit with precedent raised by the dissent, the Court in *Shelby County* seems to hold that the equal sovereignty principle in *Northwest Austin* supports a further principle, which could be phrased as something like, “Congress can only infringe on the sovereign powers of some States to a greater degree than it does on other States if those infringements are sufficiently related to ameliorating current unconstitutional conditions in the infringed States.” On its face, this potential principle seems to be justifiable, especially given the majority’s concern with limiting federal power and preserving state sovereignty. But as the preceding discussion of fit has shown, the question of whether the coverage formula in 4(b) is “sufficiently related” to current conditions is fraught: does this mean deferring to Congress’ judgment to keep the formula intact based on its own extensive findings, or does it mean examining the legislative record to discern whether Congress overstepped its constitutional authority? Certainly, this is the legal issue over which the Court heard its arguments, as framed by the members of the Court who agreed to hear the case when it granted certiorari to Shelby County; and of course, that is the legal problem to which both the majority and the dissent directed their opinions. But the alternatives offered by this potential principle invite a further question, one that underlies both opinions: that of whether a state’s sovereignty should be given greater weight than its citizens’ *actual capacities* to exercise their constitutionally protected rights when a court decides legal questions directly related to those rights.

The Court concludes that the dilution of minority voting power through second-generation barriers is insufficient to justify the continued infringement on state sovereignty by the preclearance formula—despite the evidence gathered by Congress showing a causal relationship
between coverage under the Act and the emergence of these new barriers. Although the Court correctly notes that “history did not end in 1965,” it fails to recognize that history is more than dates and data that can be compared outside of their context. The majority’s abstract analysis of whether the continued use of the coverage formula offends federalism by contrasting how widespread race-based discrimination was in covered jurisdictions in 1965 as compared to 2006 ignores the stakes involved for the people affected by the decision that the Court will make; in other words, according to the Court, history will now end in 2013.\(^\text{13}\) The majority opinion therefore does not seem to take these potential detrimental effects to be relevant to the question of whether Congress has overstepped its constitutional authority and impermissibly infringed on the sovereignty of certain states. So, the principle as understood by the Court in *Shelby County* needs to be further modified, “Congress can only infringe on the sovereign powers of some States to a greater degree than it does on other States if those infringements are sufficiently related to ameliorating current unconstitutional conditions in the infringed States, *regardless of the effects on citizens’ capacity to exercise their rights.*” Perhaps the final clause is not the way that Roberts would phrase it; however, reading his opinion, one cannot deny that the legal question is framed in terms of the federalism concerns first cited in *Northwest Austin*, and that the success in protecting minority voting rights he attributes to the VRA ultimately does not defeat the federalism concerns that he highlights. Likewise, the massive legislative record assembled to demonstrate a continuing need for §5 coverage does not defeat these concerns, even though democratically elected representatives from multiple covered jurisdictions voted in favor of continuing coverage. So, if this statement captures the principle that can best justify the reasoning in the Court’s opinion, then—at best—it seems to detract from the idea of democratic

\(^{13}\) It is notable that Roberts, in his majority opinion, twice invokes the dignity of the states (*Shelby County* at 543, 544), while the dissent refers to the dignity of persons (*id.* 565).
governance at the federal level to safeguard state sovereignty against federal overreach. Such a principle therefore seems to deeply offend the notion of the integrity of the legal community; still, despite these issues regarding fit and justification, the opinion, and the principle embedded within, is now binding precedent as the law of the land.

This criticism is not to say that the principle as unmodified is necessarily preferable. In her dissenting opinion, Ginsburg seems to implicitly accept the Court’s framing of the question as well as the principle the majority used to decide this case, only really disagreeing with its disregard for the evidence compiled in the congressional record. On the one hand, a dissent is bound to respond to the legal question that the Court agrees to hear, and thus to the same legal issue; on the other hand, however, dissenting opinions are not restricted to following the majority’s reasoning and remain persuasive authority that can be cited in later decisions, as seen above in *Northwest Austin*. This means that dissenting opinions offer an important venue for opening future jurisprudential interventions. In this regard, Ginsburg’s dissent missed an opportunity to reframe the analysis of the question presented to the Court; still, her reference to the *amicus* brief provided by the State of New York and the assorted state attorneys general points to a way the dissent could have better utilized the resources provided to it. In the following subsection, I will make the case that the briefs from the *amicus curiae* for the respondent—that is, the federal government, as represented by then-Attorney General Eric Holder—provide crucial supplements for such an analysis.

3b **The *amicus curiae*: voices of the indignified**

Recalling Nancy’s discussion in Chapter III, the voice of the legal subject comes through only in the gap between one’s political subjectivity and one’s legal persona. In a more phenomenological register, the singular voice can be heard only in the spaces between these
identities—not in the sense that the “true” voice is somehow “buried” underneath these layers of social meaning, but that its singularity is expressed through these layers as an intersubjective social production. To comprehend the voice requires understanding the conditions and processes of the subjectivization of the appropriate legal claimants. Here, the relevant lived experiences are those of minority voters within state and local jurisdictions covered by §5 of the Act, as conveyed by the amici provided by minority interest groups—that is, groups whose role is to present concerns and arguments that are grounded in the specific lived experiences of similarly-situated individuals. In this sense, these amicus briefs serve as instruments of attestation for marginalized legal subjects.

Speaking to the larger social and political context of voting covered states, the amicus brief of the Alabama Legislative Black Caucus and Alabama Association of Black County Officials (“ALBC”) is particularly striking. In their brief, these organizations describe their interest in the Shelby County case by describing themselves as

engaged in the day-to-day struggles to advance the interests of their constituents, particularly black Alabamians, in a social, political and legal environment that is still dominated by vestiges of official racial discrimination and still is governed by the 1901 Alabama Constitution that was adopted for the purpose of disfranchising black citizens and preserving white supremacy. (ALBC Br. 1)

Given this social and political context—as well as their proximity to power at the state and county level—these organizations consist of individuals who can provide crucial insights into the present effects that preclearance coverage has in Alabama, in addition to what will happen to them and their constituents should coverage be lifted. Indeed, they aver certainty that

a decision by this Court ending Alabama's coverage under Section 5 of the Voting Rights Act would open the door for state laws that would suppress the right to vote of African Americans and Latinos and repeal the remedies black Alabamians obtained through federal litigation that provide them equal opportunities to elect members of their state, county and municipal governments. (id., cit. Blacksher et al. 2008)
In making their arguments to the Court, the *amici* highlight two points that muster in favor of keeping coverage under §5. First, the 2006 reauthorization of the Act was the first “to be enacted with the participation of African-American members of Congress elected from all nine of the covered states in the South,” a direct role in the Act's passage that the *amici* argue “came as close to inclusion of African Americans in an agreement of constitutional stature as has yet to occur in our history” (*id.* 2). Speaking for the African American citizens of Alabama in particular, the *amicus* organizations emphasized to the Court “the importance of giving due respect, at last, to the political voices of representatives sent to Congress by African Americans in the South” (*id.* 5). The brief also reminds the Court that the state government of Alabama opposed the VRA’s 2006 reauthorization, but emphasize that

black Southerners and the members of Congress they elected were able to convince the vast majority of other members of Congress that the need for the exercise of power granted Congress by Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment still outweighs the sovereignty objections of the Southern states that the Reconstruction Amendments were intended to overcome. (*id.* 6).14

Further, should the Court remove coverage from §5 of the Act, the *amicus* organizations have “no doubt that the efforts of majority-white state and local governments to isolate and minimize the political influence of black Alabamians will advance rapidly and far outstrip our resources to combat them” (ABLC Br. 6–7). The brief also indicates that, even with the added protections of the Act, parts of Alabama have continued to discriminate by denying equal powers to officials elected by African Americans, and sometimes supported by the Court itself (*id.* 11). As an example, the ABLC brief cites the 1992 decision *Presley v. Etowah County*, where the Court held that the voting rights of black Etowah County citizens were not affected when white

14 Those representatives in the Congressional Black Caucus, as well as their colleagues in the Congressional Hispanic and Asian American Caucuses, also filed a brief attesting to the continuing need for §5 coverage, citing post-2006 challenges (Fudge et al. Br. 19–28).
commissioners voted to give themselves continuing control over the road and bridge shops in their respective districts, while assigning the sole Black commissioner the duty of supervising the janitorial staff at the courthouse (id.). The brief concludes by arguing that, given the continuing history of such disparate treatment of Black voters and their representatives, such discrimination will almost certainly intensify should white-majority control in Alabama no longer be constrained by §5 of the Act (id. 11–12).

One of the Black representatives in Congress included in the brief, John Lewis, was a veteran of the civil rights struggles in Alabama prior to the passage of the Act. He submitted an amicus brief to the Court in Shelby County “to attest personally to the high price many paid for the enactment of the Voting Rights Act and the still higher cost we might yet bear if we prematurely discard one of the most vital tools of our democracy” (Lewis Br. 1–2). It goes on to state that the congressman and other men and women of his generation, “put their bodies in the path of armed troopers mounted on horses and club-wielding mobs yelling for murder, in order to secure the right to vote for all Americans” (id. 2). Citing Rep. Lewis’ amicus submitted in Northwest Austin, the brief asserts that his own family history proves “that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made” (id. 9). It explains that the congressman’s great-great-grandfather was part of the first generation of former slaves to register and vote in Alabama, as a “direct result of the federal government's presence throughout the southern United States” (id. 9–11). However, once federal oversight of Reconstruction ended in the wake of the 1876 elections, Southern states began implementing the discriminatory voting laws ultimately outlawed in the VRA, successfully disenfranchising the only recently enfranchised former slaves—including Rep. Lewis’ grandparents (id. 12). Recounting his family history in this brief alters the inaccurate narrative
that the history of voting rights in this country is one of linear progress; instead, the brief more accurately presents this history as “a cycle of retrenchment and reconstruction” (id.). The brief recites the congressman’s family history to caution against backsliding, arguing that democracy “is not a state. It is an act. It requires the continued vigilance of us all to ensure that we continue to create an ever more fair, more free democracy” (id. 13). Recounting these historical events in the context of one family’s history and the still-living memory of one of its members highlights the persistence and reality of the past, as well as the precarity of present legal protections. As Rep. Lewis said during the reauthorization debate in 2006, “We cannot separate the debate today from our history and the past we have traveled” (id. 15).

Likewise, the brief submitted by State Senators C. Bradley Hutto, Gerald Malloy, John L. Scott, Jr., Representative Gilda Cobb-Hunter, and the League of Women Voters of South Carolina attest to how the potency of §5 of the Act “protects minority voters and the courts’ flexibility and restraint in applying it to covered states, in deference to state sovereignty (Hutto et al. Br. 3). As a direct result of this coverage, the brief argues, “legislators and election officials closely scrutinized the realities of racial discrimination in South Carolina voting with respect to both current practices and the lingering socioeconomic effects of past state-sponsored discrimination” (id. 5). Most importantly for this dissertation’s argument, the brief presented the Court with a fuller picture of how state-sponsored racial discrimination continues to impact the lives of Black voters today, whether in terms of a higher poverty rate, a lower level of educational attainment, less access to a vehicle and none to public transportation, and even the

15 This testament is echoed in the brief submitted on behalf of the Veterans of the Mississippi Voting Rights Movement, which claims that the petitioners ask the Court to “elevate deference to states' rights over careful respect for the role of the federal government in protecting the dignity and political voice of all Americans” (VMVRM Br. 3). The amicus group describes the activism of their own members, which they describe as “the story of young men and women who, in the teeth of violence and terror and sometimes at the price of their own lives, made sure our Nation would honor the dignity and political voice of all Americans” (id. 14). Notably, the brief also includes biographical vignettes of some members of the VMVRM (id. 1a–5a).
lack of a birth certificate (id. 13–15). Since legislation had to be crafted to survive preclearance, the brief claims that, without §5, “130,000 registered voters, who were disproportionately African-American, would have faced significant—and in many cases, prohibitive—obstacles in exercising their constitutionally guaranteed right to vote” (id. 16).

Similarly, the brief of Professor Patricia A. Brouchard on behalf of named students and student organizations at Florida A&M University College of Law explain their interest in Shelby County as grounded in the fact that:

many students are descendants of slaves and disenfranchised African Americans, and they believe it is vitally important that they advocate that the right to vote, the main source of political empowerment in this country, be preserved, protected, and closely guarded by this Court to protect against voter intimidation, dilution of the vote, or at worst abrogation of the right to vote. These students have an inter-generational stake in protecting the right to vote which was denied so many of their ancestors. This right is grounded in morality, but more importantly, this right is constitutionally guaranteed. (Brouchard Br. 2)

A second interest derives from the amici feeling an obligation “to protect the rights of those who are silenced by intimidation, by lack of funds, by disenfranchisement, and by entities who would seek to suppress their vote” (id.). This vulnerability is further highlighted by the brief’s reference to the fact that, between 2011 and 2012 alone, at least eight States—California, Florida, Illinois, Michigan, Mississippi, Nevada, North Carolina, and South Carolina—introduced legislation to restrict voter registration drives (id. 16). The brief also notes that these photo identification laws could prevent nearly 700,000 minority voters from registering to cast their ballots (id. 16–17).

In addition to the Black and African American experience in covered jurisdictions in the South, other amici briefs submitted to the Court convey the experience of minority voters elsewhere in the United States, as well as what the VRA has meant for protecting a plurality of voters’ rights. The briefs submitted on behalf of National Latino Organizations (“NLO”), Asian American Public Interest Groups (“AAPIG”), the Navajo Nation, et al. (“Navajo Nation”), and

251
the Alaska Federation of Natives et al. (“Alaska Federation”) all demonstrate the pervasiveness of race- and ethnicity-based discrimination in voting across different non-white groups, directly linking the concrete harm that will result from removing §5 preclearance with racialized social and political vulnerability. These briefs all detail how other minority populations faced—and continue to face—similar barriers to civic participation as Black Americans based on race and ethnicity, from racial hostility to violent racial terror, segregation in living space and education, denied access to local government services and private employment, socio-economic exploitation, gerrymandering, and language discrimination in English-only voting materials (NLO Br.1–25; AAPIG Br. 3–12, 26–33; Navajo Nation Br. 4–27; Alaska Natives Br. 7–25).

The NLO brief provides an appendix with an expert report from Dr. Andres Tijerina, who concludes that the historical discrimination against them in Texas means Mexican Americans “still bear the effects of this discrimination which hinders their ability to participate effectively in the political process [and] that the lower rates of voter registration, voting, and running for elective office are directly related to this discrimination” (NLO Br.App. 59). And, in contrast to claims by the Court, the Alaska Natives brief makes clear that Alaska Natives still suffer from the first-generation barriers to voting, such as unequal voter registration opportunities, including English-only registration materials and poll workers who fail to register voters; unequal access to election materials (some due to a lack of Internet) or election information through lack of native language voting assistance; unequal early voting opportunities; unequal polling place access that requires some to travel by plane to vote; and unequal in-person voting opportunities or voting assistance, including lacking a polling place in some Native villages (Alaska Natives Br. 20–22).

This overview of the amici curiae submitted to the Court for the Shelby County case is not, nor is it intended to be, exhaustive; in fact, several others have not been included in this
overview because they were concerned solely with presenting a traditional legal case by reference to statute and precedent. By instead focusing on these lived experiences and their contexts, these amici have been selected to argue that focusing on the question of the concrete persons whose dignity—whose very capacity to participate in their governing and the political process at the most basic level—will be threatened by this decision rather than the far more abstract federalist concerns with the equal dignity of states’ rights, could have yielded a much different—and more just—decision by the Court. Admittedly, this reasoning almost certainly would not have swayed hardline textualists like John Roberts, Antonin Scalia, or Clarence Thomas; but given Anthony Kennedy’s concerns with human dignity in his judicial opinions—such as United States v. Windsor, which declared the federal refusal to recognize same-sex marriages unconstitutional the same year as Shelby County—it is possible that reframing the answer to the legal questions raised by Shelby County in such terms might have swayed him.

However, the argument in this dissertation does not rest on satisfying the idiosyncrasies of particular justices or their judicial philosophies. Instead, the argument here is that these briefs have provided substantial insight into the effects of a statute based on the specific attestations of the experiences of barriers to casting a vote in this country. Hence, whether the Court would have decided differently given the reframing from lived experience is ultimately incidental; rather, my argument is that it could have done so, and in the future, should do so. To do so, I will argue, is to employ a carnal hermeneutic built on a phenomenological analysis of the lived experience of those most vulnerable to the Court’s decisions.

3c Critical legal phenomenology on the Court

The preceding subsection has laid out the contours of the larger normative landscape of lived experience that the Court could have referred to in rendering its decision in Shelby County. Here,
I will provide a sketch of how a carnal legal hermeneutic could have taken advantage of these features to argue for a more just result. Because legality—like all forms of sociality, as I have argued—is always mediated intersubjectively, allowing state governments to curtail the exercise of these rights entails a concrete curtailment of one’s dignity. By recognizing the historically threatened and presently precarious dignity of minority voters, taking a proper account of these attestations could have allowed the Court to render a more just decision and to avoid inflicting the indignities that resulted. Additionally, against the potential objection that such an embodied phenomenological analysis is beyond the scope of legal decision-making, I present an argument that Sonia Sotomayor has offered a similar phenomenological approach to contest jurisprudence related to racial policing, based on a recent (dissenting) opinion that she authored. This argument will also provide a helpful opportunity to distinguish my approach from that of Sotomayor.16

The amici briefs presented above have added a great deal of texture to the problem that the Court considered in Shelby County, context that demands a more holistic—and thus, more just—adjudication than what either the majority or the dissent performed. I posited the principle that seemed to justify the Court’s opinion included the apparent disqualifier “regardless of the effects on citizens’ capacity to exercise their rights.” The dissenting opinion essentially challenged this final clause: that is, it accepted the majority’s claim that Congress must show a substantial relation between the coverage formula reauthorized under §4(b) of the Act and the harm it is meant to prevent to justify its encroachment on state sovereignty through §5 preclearance, but argued that the legislative record compiled by Congress in the course of its reauthorization hearings—which included data from social scientists and testimony from historians and constitutional scholars—provided such justification. What the dissenting opinion missed an

16 I am grateful to Brandon Hogan for prompting me to distinguish my approach more fully from that employed by Sotomayor.
opportunity to do, however, was to use the *amici* briefs to bring the lived experiences of those most vulnerable to removing §5 preclearance from the covered jurisdictions. Considered from the point of view of those people most vulnerable to a ruling that preclearance coverage under the Act was unconstitutional, the effects of such a decision would severely curtail the capacity of concrete, clearly identifiable people to exercise their right to vote, and therefore their ability to participate in self-governance. Further, given the historical memory of racial discrimination that persists beyond the end of *de jure* discrimination and manifests in *de facto* present-day relations, both individual memories and present experiences of discriminatory treatment demand serious consideration by legal decision makers. In other words, giving the attestations of the historically-marginalized and still-vulnerable a place alongside the conventional sources of legal norms—that is, the very instruments and institutions that both excluded them as full members of the legal community but included them as subject to their political authority—fundamentally alters the power relations between government and citizen. Under such an analysis, the marks of historical misrecognition will therefore become badges of a march toward greater mutual recognition—and thus, a more equal and just society.

Perhaps it could be argued that accepting the ontology argued for in this dissertation—such that intersubjective embodiment renders the distinction between legality and the norms embedded within sociality less a matter of hard conceptual boundaries and more a flexibility toward sources of legal norms—requires too much on the part of the legal decision-maker. While such ontological “buy-in” would certainly help facilitate legal analysis toward such legal recognition, the argument can be understood in terms of giving full legal effect to the form of mutual recognition that the law embeds within its own logic. Even in this case, the grounds of such intersubjective recognition can be found in recognizing the singularity of the legal claimant
by reference to their human dignity. Recall that dignity has been described in this dissertation as mediated through intersubjectivity, such that it can only be actualized, made real, through social—and thus, institutional—recognition. To admit that dignity is actualized only through social and institutional recognition is not to say that institutions or societies always adequately recognize the dignity of every member of the community, whether in terms of giving full effect to legal protections or treating others like equal members of the community. Either way, however, the process of (mis)recognition is the result of constructing various senses and forms of the legal community, some of which are more exclusive than others. To recognize how such notions of community come to delineate social norms and inscribe certain subjectivities through reifying sameness and difference is also to recognize that differently subjectivized persons will have different perspectives on what it means to be a part of the same society, and that their attestations will reveal different aspects of that society that are no less real than others. Even Ginsburg’s dissent gives credit to this notion through her reliance on the congressional record, which is composed of generalizations that are either derived from or indicate to some degree the lived experience of minority voters in covered jurisdictions. A legal analysis that takes advantage of these attestations obtains fuller insight into both why voters in covered jurisdictions (feel they) are particularly vulnerable to removing coverage and how a vulnerable voter’s capacities will be directly impeded and detrimentally affected by such a decision. Hence, even if one questions the ontological commitments that ground the analysis, the overlap of the legal, political, and moral registers in these legal questions—as Dworkin argues—requires at least some buy-in to the idea of an underlying sociality of the legal community from which legal norms are derived—whether one admits to such reliance or not.
What about the possibility of embedding such an approach on the Court, let alone the potential to reverse the legal framing used by the majority? John McMahon has recently argued that Sonia Sotomayor’s dissent in *Utah v. Strieff* (2016) constructs an “emergent legal phenomenology that works to incorporate into the core of Fourth Amendment jurisprudence [#BlackLivesMatter] rhetorics and, most of all, the bodily experiences of people of color subject to being stopped and searched” (2021: 719). Most notably for McMahon, Sotomayor centers her legal analysis on the “feeling, moving, restrained, invaded prodded, racialized subject of the police stop instead of an abstract raceless subject” (*id.*). In this case, Edward Strieff was stopped while exiting a house that was under surveillance for drug activity—but without reasonable justification, which was admitted by Utah, in violation of the Fourth Amendment’s protection against “unreasonable searches and seizures” (*id.* 721). Based on an outstanding arrest warrant for a traffic offense, he was arrested and searched; the police found methamphetamine and drug paraphernalia, which led to a charge—and conviction—of unlawful possession (*id.; Strieff* 235–36). Strieff challenged the evidence’s admission in his trial by arguing that it originated from an illegal police stop and was therefore inadmissible at trial; ultimately, the Court held that an even unconstitutional detention that led to a valid arrest warrant did not render the evidence obtained inadmissible in court (*id.; Strieff* 236–37). McMahon argues that Clarence Thomas, writing for the majority, isolates and abstracts the case from broader contexts of racial policing, effectively “disembody[ing] the searched person” in keeping with much existing Fourth Amendment jurisprudence (*id.* 722–23). Crucially, Thomas claims that there was “no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in
connection with a bona fide investigation of a suspected drug house” (Strieff 242). On this point, Sotomayor strongly disagreed.

Targeting Thomas’ characterization of the illegal stop, Sotomayor asserts instead that “nothing about this case is isolated” (2021: 725; Strieff 249). Citing several reports from the DOJ’s Civil Rights division—including the one into Ferguson, Missouri, undertaken in response to the police killing of Michael Brown—as well as from non-governmental organizations, she details “the expansive network of outstanding criminal warrants in the United States at federal and local levels, most of which relate to minor offenses, ordinance violations, and/or traffic violations” that can be used by police to stop people without cause otherwise (id.; Strieff 250–51). That is, her dissent sets out the institutional, juridical context that provides the conditions for these stops to open into greater, more fundamental rights violations beyond the “isolated” incident under consideration in the Strieff case itself. Part IV of Sotomayor’s opinion is the most interesting, for both McMahon and this dissertation, because it is there that she sets out her embodied phenomenological critique. Although the respondent Strieff is himself white, she explicitly acknowledges her shift to other racialized subjects by noting that while “the white defendant in this case shows that anyone’s dignity can be violated in this manner,” “it is no secret that people of color are disproportionate victims of this type of scrutiny” (id. 726, cit, Strieff 254). Doing so breaks the illusion of color-blindness that admits of disparate treatment by claiming to see no difference; McMahon thus reads in Sotomayor’s opinion the claim that “foregrounding the situation of those most affected by mass incarceration, police violence, and the effects of the majority decision in Strieff, is crucial to understanding the implications of the decision for the institution of policing” (id. 728).
To do so, Sotomayor presents what McMahon calls her emergent phenomenological analysis of what it means to be stopped, as “the mere naming of the stop in an opinion does not capture its reality: conventional legal rhetorics are not enough to grapple with how law is lived” *(id. 730).* Sotomayor recognizes that being stopped and searched by the police is differentially distributed based on race and other social-identity markers; hence, “conceptualizing the encounter with police requires grounding it in the lives of the people disproportionately targeted by police” *(id.)*.

McMahon summarizes Sotomayor’s observations in her opinion:

In the span of Part IV alone, she describes the rampant stop and search practices as: “degrading”; an “indignity”; causing one to feel “helpless”; placing one under an “officer’s control”; effecting “civil death”; subjecting one to “humiliation” and to a “violation” of one’s “dignity”; producing a “double consciousness”; and making one’s “body . . . subject to invasion.” This language suggests that those subject to being stopped at any time, for no particular reason, experience a loss of personhood and bodily integrity. *(id. 731; cit. Strieff 253)*

In this way, he continues, “the effects of the Court’s decision do not remain in the realm of the abstract, hypothetical, or disembodied for Sotomayor. Instead, they imprint upon the bodily experiences of stopping, materially leaving their trace on the body of the person being stopped” *(id. 732–33).* Hence, McMahon offers that Sotomayor’s dissent demonstrates Sara Ahmed’s claim that the embodiment of subjects is a site where the power relations of hegemonic jurisprudence are “contested through specific practices of law, and through specific conceptualizations and definitions of what constitutes the law” *(id. 734, cit. Ahmed 1995: 69).* In other words, embedding embodiment in legal reasoning offers the potential to disrupt the rigid ideological formations or ossified worldviews that might blind legal decision makers to the lived realities of legal claimants—particularly when those lifeworlds are radically different from those

---

17 McMahon tellingly notes that Ruth Bader Ginsburg, who joined the first three parts of Sotomayor’s dissent, does *not* join the fourth part of the opinion, which is where Sotomayor begins her phenomenological analysis (2021: 730; *Strieff 252*).
of the decision maker. Thus, when Sotomayor claims that the majority’s decision in *Strieff*
“implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting
to be cataloged,” she implies that the onus falls on the legal decision maker to adjudicate from
the position of those made more vulnerable, the people who will suffer most, because of their
legal decision (*Strieff* 254).

McMahon concludes his article by conceding that, despite its evident promise as an
alternative to hegemonic jurisprudence, Sotomayor’s dissent also reveals the limits of American
law, as well as the potential pitfalls that it cannot avoid. Even if Sotomayor’s phenomenology is
“more deeply attuned to the social and political context of racism than standard modes of legal
discourse,” it still cannot surmount the antiblackness structurally or ontologically encoded in
American policing and law (2021: 738; see, e.g., Hesse 2017, Warren 2018: Ch. 2). This
potentially insurmountable limit poses a criticism that could be levelled against this dissertation’s
project: that neither Sotomayor’s phenomenology nor my carnal legal hermeneutic can stand
outside the legal system that it contests. In response to this challenge, McMahon concedes that
Sotomayor’s phenomenology, at least as he has articulated it, cannot construct a remedy outside
the legal system that it contests (*id.* 739).

For my part, I claim the challenge that McMahon argues Sotomayor’s phenomenology poses
to conventional constitutional jurisprudence—its assumptive logics, its cold, technical
rationalities, its inability to grasp lived experience (*id.* 739)—is likewise posed by the carnal
legal hermeneutic argued for in this dissertation but that it surpasses her approach by overcoming
its key limitation: the presumption that the legal system is a closed system. In contrast, the open
ontological approach on which this phenomenological hermeneutic is based—derived from
Hegelian *Sittlichkeit* and informed by Fanonian sociogeny—troubles not just the conventions of
legal interpretation, but the very distinction between legality and sociality itself. In this sense, the carnal legal hermeneutic that I propose does not claim its legitimacy from residing within the legal system alone; rather, its legitimacy derives directly from the embodied intersubjectivity that undergirds and grounds the legal system itself, as well as shapes its institutional contours and the subjects over whom it claims authority. While similarly concerned with the lived experiences of concrete, embodied legal subjects, Sotomayor’s approach lacks the critical edge that indexing embodiment to dignity as the capacity to exercise one’s rights provides. Without this critical edge, it also lacks a compelling textual justification for elevating these lived experiences to similar jurisprudential esteem as case law, statutes, and—crucially—the constitution itself.

4 Shelby County reconsidered: protecting the actual capacity to vote

I have claimed that the critical legal phenomenology that Sotomayor deployed in Section IV of her Strieff dissent, as interpreted by McMahon, has come closest to the account of legal interpretivism that this dissertation has defended; in this section, I will more fully articulate how this analysis goes beyond Sotomayor’s approach. To offer an alternative resolution of the legal issues presented in Shelby County based on a carnal hermeneutic of dignity, I will begin with the principle that seems to have been espoused by the majority. In doing so, I will also broach more fully the objection posed in Section 3 of this chapter, that this critical, carnal hermeneutic would demand too much of the legal decision-maker. In articulating this hermeneutic, I will follow Dworkin in arguing that legal interpretivism is both descriptive and normative: it attempts both to capture the method by which legal decision makers arrive at their decisions, and to offer guidance on how to render better decisions in line with the interpretive framework that he offers. In a similar vein, I will argue that while the hermeneutic presented here provides more substantial grounding for legal interpretation, it proscribes judicial discretion more than
interpretivism by rendering judgments more beholden to concrete conditions attested to by the legal claimant. What this hermeneutic proposes is not an addition to the epistemic burdens of judging, but simply shifting its epistemic practices to attempt to better comprehend the lifeworld of the people most vulnerable to the legal decision.

As stated in the previous section, the principle that Roberts’ opinion in *Shelby County* seems to settle on is that “Congress can only infringe on the sovereign powers of States to a greater degree than it does on other States if those infringements are sufficiently related to ameliorating current unconstitutional conditions in the infringed States, *regardless of the effects on citizens’ capacity to exercise their rights*.” Although it could be argued that it rejected this principle’s final clause, I have argued that Ginsburg’s dissenting opinion nonetheless implicitly accepted this framing of the case; that, despite the relative lack of constraints on legal analysis offered by the form of a dissent, as demonstrated in Sotomayor’s *Strieff* dissent, Ginsburg essentially contested only the Court’s application of the principle, rather than the formulation of the principle itself. To reframe the legal question posed in *Shelby County* in terms of an embodied dignity defined by intercorporeal and intersubjective recognition, the first question to ask is always “whose dignity is at risk or under threat?” Even in cases where the named parties in the case are not threatened by the question posed, such as *Shelby County*, the legal issues involved nonetheless directly touch on the fundamental rights of citizenship and civic belonging within the legal community. In this case, the people whose civil rights are being threatened are not simply abstract legal persons; rather, these are concrete, easily-identifiable people who are not only members of historically-marginalized groups, but also live in jurisdictions that have historically as well as very recently attempted to disenfranchise them—jurisdictions, it should be noted, whose officials explicitly claim the legal authority to do so and implicitly invoke the
political legitimacy of doing so. In other words, beginning the analysis of relevant legal issues from a principle based in the dignity of these jurisdictions, rather than in the dignity of citizens whose very capacity to participate in elections—to be citizens in a democratic society in the most fundamental sense of the term—would be diminished or diluted, is to effectively declare these citizens *personae non grata* for the legal community. Further, to reject the reports, findings, and testimonies of those best-placed to speak to and articulate these threats to the dignity of specific social groups is to ignore the histories that have shaped and continue to determine the capacities of these citizens to act not only as citizens, but as full members of the legal community.

Framing legal analysis in terms of *indignity*, of potential yet clearly foreseeable impediments to the exercise of one’s legally guaranteed rights, troubles the putative divide between social fact and legal rule, because it recognizes that both are mediated through the ethical-political life of the legal community. Hence, what a Dworkinian legal interpretivism grounded in *Sittlichkeit* and articulated in terms of an ontological sociality of embodiment offers is a concrete account of how social norms are generated through intersubjective relations; theorizing how these relations enable and limit capabilities provides additional texture to legal analysis by rejecting the claim that legal norms can (or ought to) be distinct or separable from other norms. Accepting the ground of *Sittlichkeit* in legal decision-making endows legal analysis with a critical edge: by using the lived experiences of those subject to the presently-existing legal order as the actual reference point against which the claims of law can be contrasted—its effectiveness contested, its proscriptions altered—the legal decision maker acquires the tools of immanent critique of the legal order, from both an internal and an external perspective—*without* leaving their role as a participant in the legal system itself. Following Dworkin’s integrated unity of value thesis but adopting Gowder’s critique of the rule of law allows the legal decision maker to comprehend the
ontological sociality that delimits who is (not) treated as a full member of the legal community. If dignity and indignity alike are understood to be functions of social (mis)recognition, which in turn condition and determine the agential capacity of citizens, then legal analysis must concern itself with the social, cultural, and material conditions that render specific legal claimants to be more (or less) vulnerable to concrete threats to their dignity, to their capacities to exercise or enjoy their legal rights. Once subjects who risk indignity have been identified, a legal phenomenology akin to that deployed in Sotomayor’s dissent in Strieff can be used to sketch the contours of those indignities.

The focus on (in)dignity as embodied capability mediated by intersubjective (mis)recognition draws on the specific vulnerabilities of concrete subjects and therefore requires attestation of the singular being of such subjects—a scope beyond conventional legal analysis (even Sotomayor’s dissent), but nonetheless consistent with legal interpretivism’s reliance on the norms as already present within the legal community. Echoing criticism that Dworkin received regarding the scope of legal inquiry that his approach would require of legal decision makers, as its focus on integrity seems to demand much more than conventional legal analysis, the carnal legal hermeneutic defended in this dissertation is no more onerous—and is likely less so—on the part of the legal decision maker. Dworkin illustrated his method of adjudication using the model of Hercules, a judge of “superhuman intellectual power and patience who accepts law as integrity,” but he always insisted that Hercules only works more quickly than other judges and has more time to consider the full range of cases that in a line of inquiry (1986: 239, 265; cf. 1967: Ch. 4). Otherwise, he maintained, Hercules “has no vision into transcendental mysteries opaque to them. His judgments of fit and political morality are made on the same material and have the same character as theirs. He does what they would do if they had a career to devote to a single
decision” (id. 265). In other words, Dworkin concedes that legal decisions are made with imperfect, partial understandings of both legal precedent as well as the facts that surround and generate the legal issue being argued before the decision-maker. In a similar way, the carnal legal hermeneutic defended here does not necessarily demand a greater amount of information than what is normally provided in anticipation of adjudication; what would likely change instead would be the kind of information provided to legal decision makers by attorneys representing their clients or interested third parties to the suit.

In *Shelby County*, for example, the attestations presented in the *amici curiae* briefs that speak on behalf of the minority groups whose dignity as citizens and members of the legal community is directly threatened by the decision can provide the information necessary for this hermeneutic. While Sotomayor’s legal phenomenology as described by McMahon examines only the experience in the moment of the legal subject whose rights and interests are under adjudication, the carnal legal hermeneutic propounded here examines not only this phenomenology but the contextual conditions that gave rise to and determine those experiences. Such an analysis for *Shelby County* would use the *amici* discussed in this chapter to weave together the immediate threats faced by minority voters with the language of the statute and the legal precedent. In considering these threats, a decision informed by this hermeneutic would cast the rights and dignity of these citizens as a key source of legal normativity alongside those texts, drawing on the singular voices of specific subjects to reframe the question presented as a legal issue into one of human capability. The new principle that could be fashioned to justify a different outcome could therefore be: “Congress can infringe on the sovereign powers of some States to a greater degree than it does on other States if those infringements can be shown to ameliorate current unconstitutional conditions that threaten the dignity of citizens in the infringed States.” Again,
even if this analysis would not have carried the Court as it was composed in 2013, both the majority opinion in *Shelby County* and Sotomayor’s dissent in *Strieff* demonstrate that today’s dissents can become tomorrow’s binding precedent. Hence, the carnal legal hermeneutic defended here demands only that legal decision makers hew closely to the text: not just the text of case law, statues, or constitutions, but that of the embodied subjects whose dignity might be concretely harmed depending on the decision made.

5 Conclusion

In this chapter, I have argued that the critical, carnal legal hermeneutic that I have defended in this dissertation could have productively altered the Supreme Court’s reasoning in *Shelby County v. Holder* toward a more just result. As argued above, the majority opinion seems to have been made based on a principle of equal sovereignty among the states, a doctrine that places state control over their electoral processes above the very likely risk of disenfranchising their minority voters. Based on this principle, the Court in *Shelby County* ruled that the federal preclearance coverage promulgated under the Voting Right Act unconstitutionally infringed on state sovereignty. Despite its poor fit with and weak justification based on the Court’s past rulings that the Act and its coverage formula was constitutional, this principle is not fundamentally challenged in the dissent, as it focuses *only* on whether Congress’ reauthorization of the Act was constitutional. By elevating the lived experiences of minority voters who would have been detrimentally affected by finding the Act’s coverage formula unconstitutional, as attested to by the *amici* briefs for the case as sources of legal norms alongside the text of the VRA and its own jurisprudence on the Act’s constitutionality, the Court had all resources at its disposal to adjudicate on the basis of this clear and concrete threat to voters’ dignity in covered jurisdictions. Against the possible claim that my approach is not feasible for judicial opinions, I presented an
analysis of a recent dissent by Sonia Sotomayor to demonstrate that a critical phenomenological approach is not only feasible, but well-suited for dissents; and further, to argue that the carnal legal hermeneutic I propose is more adequate to the task of adjudication due to its use of an embodied phenomenology that is in service to justice. But toward what sort of justice does this proposed hermeneutic point? This question will be addressed in the conclusion.
Conclusion:

Enacting Corporeal Justice

Perhaps I am no one.
True, I have a body
and I cannot escape from it.
I would like to fly out of my head,
but that is out of the question.
It is written on the tablet of destiny
that I am stuck here in this human form.
That being the case
I would like to call attention to my problem.

—Anne Sexton,
from The Poet of Ignorance

I introduced this dissertation by stating that it was concerned with justice. In the preceding chapters, I have argued that the lived experiences of embodied legal subjects can render law more just—in a broader sense than legal justice is often understood to consist, but not divorced from it. Drawing the practice of legal reasoning more closely to the lifeworld of its subjects, I have argued, would do justice to the dignity of the legal claimant as well as to the idea of the rule of law. In my introduction, I characterized the sort of justice that this project was aiming toward to be a “corporeal justice”; to conclude, I will say a few more words about this idea of justice, and how I see this project as contributing to its furtherance—or rather, perhaps more accurately, to its enactment through legal interpretation.

The concept of a “corporeal justice” originates in an essay by Pheng Cheah and Elizabeth Grosz. Starting from Derrida’s idea of justice as the impossible experience of absolute alterity, Cheah and Grosz argue that the exteriority that constitutes the legal subject must be understood as the shifting processes that give the subject an embodied identity (1996: 23). Because the body cannot be fully captured by legal discourse, it remains on the “exterior” of a legal logic that can only seek its own consistency—an echo, too, of Holmes’ dictum that inaugurated this project as
an epigraph. However, even if the body is not fully capturable by the logic of the law, that does not mean it is unaffected by law’s operation; hence, Cheah and Grosz argue that embodiment “incarnates the ontological violence which characterizes our relationship with the absolutely other” and is therefore “the site of the co-implication between normativity and violence” (id.). Further, since embodiment is the site of the relationship between phenomenological symmetry and ethical asymmetry—as indicated earlier by Ricœur—a corporeal justice demands that “we account for differences in the bodily makeup of subjects before the law, even as and because the à venir of our embodiment stains the limits of empirical knowledge” (id. 25; cf. Derrida 1992). Like this dissertation, Cheah and Grosz place the material, social-embedded body, rather than the abstract subject-mind of the Cartesian-Kantian tradition, at the center of legal inquiry to alter the notion of legal justice, both as a procedure and as a procedural result.

The phrase “à venir” (“to-come”) comes from Derrida and is used to indicate that justice is a “perhaps” without a “horizon of expectation” (1992: 27). This “unpresentability” of justice, for Derrida, is in part due to the “structural urgency” of justice; where Cheah and Grosz alter this reading is in their locating of the body in the same “dimension of events irreducibly to come” while still insisting on the structural urgency of addressing embodied need (id.). If justice is only ever a “perhaps” and embodiment is similarly “to-come” in the law, then this dissertation has sought to articulate a way for lived experience to speak to both in the legal domain: not because the two poles can be mediated through embodiment, but because corporeality and justice each demand each other. One cannot consider “justice” without being vulnerable to one’s body and to the bodies of others, just as one cannot think “the body” without being concerned with what might be the “proper” share of material resources for oneself and others. Corporeal legal justice, then, would require that the law attend to “[t]he relata—persons, and their circumstances of
things, institutions, practices, affordances, and so on, are intertwined/entangled—as in an eco-
system based on principles closer to biological organization, in contrast to instrumental or
efficient distributions of objects or machines” (Gallagher 2020: 249). And yet, as Derrida
reminds us:

> Not only must we calculate, negotiate the relation between the calculable and the
> incalculable, and negotiate without the sort of rule that wouldn't have to be reinvented
> there where we are cast, there where we find ourselves; but we *must* take it as far as
> possible, beyond the place we find ourselves and beyond the already identifiable zones of
> morality or politics or law, beyond the distinction between national and international,
> public and private, and so on. (1992: 28)

In this spirit, in pursuit of this corporeal justice, I have extended Dworkin’s theory of legal
interpretivism using Hegel’s concept of *Sittlichkeit* and Dworkin’s own concept of dignity, by
drawing on Cornell and Friedman’s Hegelian rereading of Dworkin’s “legal community of
principle.” Part of this extension re-articulated Dworkin’s concept of dignity into an *embodied*
dignity, rendering it to be a function of the intersubjective recognition of one’s capacity to act in
accordance with one’s will (*Wille*). However, critically examining the notion of community at
play in both Dworkin and Hegel through Nancy’s critiques prompted a re-thinking of the social
ontology at work in the argument; by examining Nancy’s account of singular being and his
investigation into the relation between myth and literature, Fanon’s sociogeny was found to
render many of Nancy’s insights actionable within an ontological sociality that prioritized the
embodied, intersubjective capacity of collective meaning-making to define community through
its embodied activity. Performing a creolizing reading of Fanon’s sociogeny with Ricœur’s
carnal hermeneutics allowed for embodied action to be interpretable as text, which opened the
possibility of a carnal legal hermeneutic that could be grafted onto Dworkin’s interpretivism.
Doing so resulted in the embodied dignity defended earlier becoming indexed to a legal subject’s
embodied (in)capability to exercise their legally guaranteed rights; this grafting also reoriented
legal analysis toward the members of the community most vulnerable to having their capabilities either frustrated or incapacitated, through attestation of their lived experiences. To demonstrate the critical power of this carnal legal hermeneutic, I showed how the majority and the dissent in the *Shelby County v. Holder* decision failed to consider the attestations of minority voters who will be detrimentally affected by removing federal preclearance coverage. From that critique, I argued that a more just decision could have been reached if the attestations of these citizens—whose very status as citizens was directly under threat—had been considered by the Court as worthy of comparable esteem as sources of legal norms alongside case law and statutes.

Of course, the legal system is not the only venue for social or political change; in fact, many would argue that the courts are exceptionally ill-suited to facilitate any such change. But to focus only on the limits of the legal system for effecting social or political change through the law is to limit the range of possibilities for effecting such change that are afforded by the law. Hence, this dissertation has argued that the only limitations on what the law can do are only ever the ones that we impose on it; since the law is imbricated with even if not identical to sociality, it is always a work-in-progress working under the exigent demands of both justice and embodiment. Dworkin’s fundamental interpretivist insight was that we can only ever interpret, to the best of our abilities and in accordance with our own convictions; Ricœur adds a notion of “critique” to sharpen those convictions. Echoing the Derrida text above, the legal theorist Peter Fitzpatrick closed his reflections on law and sociality by affirming that “[t]here is always more to be done” (2018); such is the double bind—and wager—of a corporeal justice.
REFERENCES


Ricœur, P. 1947. « La question colonial », IIIA015, Fonds Ricœur. URL: <https://bibnum.explor e.psl.eu/s/psl/ark:/18469/1z0z0>.


Schönecker, D. 2015. “Bemerkungen zu Oliver Sensen, Kant on Human Dignity, Chapter 1.”


Amicus briefs

Alabama Legislative Black Caucus and Alabama Association of Black County Officials.
Alaska Federation of Natives, Alaska Native Voters and Tribes.
Asian American Public Interest Groups.
Fudge, Marcia, Ruben Hinojosa, and Judy Chu.
Hutto, C. Bradley, Gerald Malloy, and John Scott, Jr.; Representative Gilda Cobb-Hunter; and the League of Women Voters of South Carolina.
Lewis, John.
National Black Chamber of Commerce.
National Latino Organizations.
Navajo Nation, Leonard Gorman, Anthony Wounded Head, Sr., and Oliver J. Semans, Sr.
Sensenbrenner, Jr., F. James, John Conyers, Jr., Steve Chabot, Jerrold Nadler, Melvin L. Watt, and Robert C. Scott.
Veterans of the Mississippi Civil Rights Movement.

Supreme Court Cases

City of Rome v. United States, 446 U.S. 156 (1980).