Doubting Legal Language: Interpretive Skepticism and Legal Practice

Nicola Muffato

Abstract The present paper revisits and critically reconstructs one central tenet of interpretive legal skepticism, which I will label the "equivocity thesis". According to this thesis, each statutory provision and judicial opinion can be constructed or interpreted in many ways, due to the plurality of the admissible hermeneutic techniques, methods, doctrines, and normative theories ("plurality thesis") and their equal legal value ("parity thesis"): this leaves the interpreter with the discretional power to choose the legal solution he deems more correct ("normative unbindingness thesis"). The main purpose of this essay is an investigation of the scope of these theses and their philosophical and rhetorical/strategic relations with a more general semiotic skepticism, according to which the belief that communication requires both mutual understanding and shared linguistic meanings is unjustified. More precisely, I will first explore how interpretive legal skepticism can be grounded on Quine's and Davidson's indeterminist arguments (Sect. 3) and on deconstructionism (Sect. 4), and then test the possibility of employing a criticism of these conceptions against interpretive legal skepticism, based on Wittgensteinian arguments and developed along various lines by "practice-based" conceptions of meaning (Sect. 5).

Keywords Meaning-skepticism • Legal realism • Critical legal studies • Interpretation • Practice-based conceptions

1 Introduction

Skepticism is a philosophical attitude that consists in doubting the possibility of justifying theoretical or practical commitments. It can be global or local, lead to a denial of beliefs and practical attitudes, to a suspension of judgment (ἐποχή) or to

N. Muffato (✉)
IUSLIT Department, University of Trieste, Trieste, Italy
e-mail: nmuffato@units.it

non-deductive reasoning[1]. Communicational (or semiotic) skepticism treats the belief that communication requires both *mutual understanding* and *shared linguistic meanings* as unjustified. Yet, if there are no independent foundations/justifications for this claim, there are not even foundations/justifications for our linguistic uses: meanings turn out to be necessarily indeterminate, while understanding a piece of oral or written communication would be a solipsistic act (or status) which depends entirely on the particularistic operant conditioning, psycho-physic predispositions, and intentionality (beliefs and preferences) of each individual immersed in a social environment.

In this essay I will focus on the relations between this general "external" skepticism about communication and one of its local "internal" varieties[2]: interpretive legal skepticism. The latter conception transplants the doubt about mutual understanding and meaning sharing into the analysis of legal language, denying the determinacy of legal norms and the objectivity of legal interpretation. The skeptic about legal interpretation relaxes the concept of justification and emphasizes the discretion of the individual interpreter/adjudicator, who becomes either the *master* or an *automatism* in the process of signification – depending on one's preference for a free-will or deterministic conception of agency.

Such a view, however, is very rarely pushed to the extremes of an "anything goes" claim: discretion is conceptually linked with justification – even when the latter is intended in a weak sense – so it can never be reduced to pure arbitrariness. But the existence of hermeneutic boundaries obliges the skeptic about legal interpretation to solve a tension between her use of the indeterminacy arguments and the necessity to provide a positive account of these very boundaries. In fact, in order to face this challenge, it is not sufficient for the skeptic to invoke the causal determinacy of the interpretive decisions as opposed to their justificatory indeterminacy: it is necessary either to explain how there can be *unjustified* legal interpretations and solutions or to explain away the very concept of justification without giving up other useful notions (*in primis*, that of "*ratio decidendi*"[3]).

According to Talbot Taylor, the force of skeptical rhetoric rests on a characteristic of the forms of theorizing it serves to criticize: the implicit assumption that our linguistic intuitions, what we consider commonsensical platitudes about language and express through practical/pre-theoretical meta-discourses (discourses about other discourses, meaning, understanding, etc.), can be treated as general (albeit folk) *empirical* hypotheses – justifiably affirmable only if and when certain underlying "facts of language" obtain[4] – which the theories of language should test, fix,

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[1] For an interesting criticism of skepticism about practical reason in ethics, literature and law, see Nussbaum 1994.

[2] I take the distinction between internal and external skepticism from Dworkin 1986, 78–80.

[3] Note, however, that in many legal systems there is no a general obligation to give reasons for a judicial decision. For a survey, see Dyzenhaus and Taggart 2008.

[4] For example: the communicational and cognitive "relevance principle"; the homogeneous, "negative" meaning holism of an abstract *langue* internalized in the minds of language users; the existence of objective mind-independent thoughts that language users can grasp learning language (see

improve and make systematic at the level of theoretical/intellectual meta-discourse[5]. As the author correctly remarks, «there is an *internal relation* between treating [such] locution[s] as […] empirical hypothes[e]s and the rhetorical opposition between believing and doubting [their] justification»[6]. The main target of doubt is the idea of the determinacy of meaning and interpretation, where «Determinate […] means settled, complete in and of itself, and therefore in no need of further elaboration or addition. Determinate rules perform as barriers or walls on which is written "beyond this point interpretation cannot go"»[7].

Were Taylor's diagnosis correct, interpretive legal skepticism could be seen as a reaction against the claim that there are some recognizable, underlying facts about legal language (which we can grasp through our common sense and express through practical meta-discourses) that fix and determine the meanings of constitutional or statutory provisions and judicial opinions. Both the "internal" and the "external" skeptic bring into question the theoretical admissibility of such a view. But note the difference: the external skeptic tries to exploit the similarities between ordinary language and legal language in order to export her indeterminacy arguments from the philosophical analysis of the former to that of the latter; the "internal" skeptic, on the contrary, argues that since language in legal contexts is pragmatically very different from natural languages as used in conversations and written communications[8] (see *infra* §4), we'd better give up our intuitions (and practical meta-discourses) or observations about the latter and replace them with empirically testable claims about the former[9].

In the following sections, I will focus on the philosophical and rhetorical contact points between general communicational skepticism and interpretive legal skepticism. I will try to highlight the main theses defended by these positions, their similarities and the relations they entertain with the idea that legal interpretation and application face limits that transcend theorizing about the language of constitutions, statutes and judicial opinions, and finally depend on the education of future legal professionals.

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the next sections) or of a transcendent canonical text that constraints interpretation. See *infra*, §§ 3–4.

[5] See Taylor 1992, 14–15.

[6] Taylor 1992, 17. See also Quine 1975, 67: «[The skeptic] is quite within his rights in assuming science in order to refute science; this, if carried out, would be a straightforward argument by *reductio ad absurdum*. I am only making the point that skeptical doubts are scientific doubts».

[7] Fish 1988, 885.

[8] See Jori 1993, 2119–2121. Jori, however, rejects any kind of skeptical conclusion.

[9] What the skeptic must avoid is replacing intuitions about ordinary language with intuitions about legal language and treating the latter as empirical hypotheses: for this would give rise to a second-order skepticism about the grounds of first-order skeptical conclusions.

2 Humpty Dumpty in Robes? On the Scope of Interpretive Legal Skepticism

I shall begin by trying to characterize some of the kinds of skepticism haunting jurisprudence and legal practice. To be fair, this task was already faced by Herbert L.A. Hart in chapter VII of his seminal work, *The Concept of Law*. There, he distinguished five main varieties of "rule-scepticism"[10]: (1) the idea that talk about legal rules is a myth created to hidden the truth that law consists solely of judicial decisions and the prediction of them; (2) the thesis according to which there are not duty imposing legal rules but – once again – just judicial decisions and jurisprudential predictions of those decisions; (3) the contention that it is impossible to circumscribe the area of open texture of legal concepts and rules; (4) the assertion that in many cases judges decide in an intuitive way and only after deciding they pretend they acted on a rule; (5) the idea that final judicial decisions are infallible.

However, one need not be a legal realist to remark that Hart's reconstruction of legal skepticism is at least incomplete (if not to say uncharitable), and its subsequent dismissal too quick. Leaving aside Hart's option for not taking into account what Jerome Frank called "fact-skepticism", legal realists (followed by critical legal theorists) developed at least a sixth skeptical thesis – call it the "equivocity thesis"[11]. The equivocity thesis results from combining three ideas. First, *each* legal text (constitutional and statutory provisions, international treaties, administrative regulations, written judicial opinions, etc.) *can always* be constructed or interpreted *in several* (at least two) manners, in *each* context of application of the relative norm, by following the ordinary linguistic rules and employing the variety of alternative interpretive methods[12] and techniques[13], legal doctrines[14] and normative theories[15] available to lawyers in their interpretive community. I shall call this premise the "plurality thesis". The plurality thesis doesn't exclude by itself the possibility of elaborating hierarchies of interpretive methods (and outcomes), but it commits to

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[10] See Hart 1994, 136–141.

[11] I choose this particular label to avoid using here the more general term "indeterminacy", which covers different phenomena such as vagueness, linguistic ambiguity, contestability. The literature on legal indeterminacy is vast: see Yablon 1985; Kress 1989; D'Amato 1990; Drahos and Parker 1991; Rosenfeld 1992; Bix 1993; Kutz 1993; Coleman and Leiter 1993–1994; Fowler 1995; Perry 1995–1996; Lawson 1996; Tushnet 1996; Solum 1987, 1999; Endicott 2001.

[12] E.g., canons of construction such as the "plain meaning" rule (where the plain meaning is inferred from statutory definitions, case law, administrative regulations, legislative history), the "whole act" rule, the rule to avoid surplusage, the presumption of consistent usage and meaningful variation, the contextual "*noscitur a sociis*", "*eiusdem generis*" and "*expressio unius*".

[13] E.g., distinguishing, overruling, and the creation of legal fictions and presumptions to avoid applying the plain meaning rule (see Gottlieb 1968, 44).

[14] I hereby mention just some potentially conflicting doctrines: "*caveat emptor*" vs. "*caveat venditor*"; "castle doctrine" vs. "duty to retreat"; "*quantum meruit*" vs. "*quantum valebat*"; "spider in the web" vs. "*lex loci*".

[15] E.g., textualism, originalism, instrumentalism, "moral reading" theory, "living tree" doctrine. Of course, each version of these "theories" of interpretation can be articulated in several ways.

the thought that it is always possible to reconstruct many competing hierarchies[16]. Second, all the interpretive outcomes obtained by employing the admitted legal arguments, methods and doctrines are always *equally justified* – call it the "parity thesis". Third: since all interpretive outcomes are equally justified, the judge – more generally: the adjudicator – is, from a legal point of view, normatively free to choose among them the one she prefers to solve the case she's facing. I shall label this third claim the "(legal) normative unbindingness thesis". Note how the unbindingness thesis follows from the parity thesis (and the *non liquet* prohibition).

It is important to remark that the equivocity thesis is intended to avoid a kind of anti-skeptical reply that warms the cockles of the moderate's heart. The objection at stake is the one Hart directed against the third and fifth variety of rule-skepticism: even if legal concepts are unavoidably affected by a more or less extended (actual or potential) vagueness, which allows interpreters to exercise their discretion in applying the rule, there are always "easy" cases that fall under the settled "core" of these concepts. In such easy cases «subsumption and the drawing of a syllogistic conclusion […] characterize the nerve of the reasoning involved in determining what is the right thing to do»[17]. The application of legal language, concepts, and rules presupposes the logical possibility of error or incorrect application: if the judge could always resort to her discretion and never be wrong in interpreting and applying legal rules, her decisions could never count as correct uses of an already practiced legal language, as correct applications of previously existing legal concepts and rules. Her position would be very similar to that adopted by Humpty Dumpty in Lewis Carroll's tale *Through the Looking Glass*. In sum, a judge, a lawyer, a legal interpreter/adjudicator would become a sort of Humpty Dumpty in robes.

In a skeptical account of legal interpretation, however, the indeterminacy of legal language depends more on equivocity than on open texture[18]. While the latter is a property of concepts, the former is a property of meaningful actions or, for the case, their symbolic traces and marks: written provisions and opinions. A text is equivocal when it can be interpreted in at least two ways, when it carries at least two meanings – which can moreover be gradually or combinatorially, actually or potentially vague. True, the great majority of concepts or combination of concepts (meanings) have a settled core of clear and relevant conditions of application: the problem is that any interpreter can always ascribe more than one meaning to each legal text.

Nonetheless, several readings of the equivocity thesis are possible, depending on the scope of the unbindingness thesis. According to a first, strong reading, the plurality and parity of interpretive techniques, methods, doctrines and normative

[16] Just think about Hart's preference for literal meaning (as limited by the common sense and reasonableness assumptions of laymen and lawyers), Lon Fuller's insistence on functional interpretation, and Ronald Dworkin's claims that statutory construction and the interpretation of precedent must respect historical consistency and coherence.

[17] Hart 1994, 127. For a more qualified statement, see Hart 1983b, 105–108.

[18] See Llewellyn 1931a, b, 1230–1231, 1238–1239; Llewellyn 1949–1950, 395–396; Llewellyn 1951, 66–69, 72–75; Gray 1921, 260–261; Ross 1958, §29; Wróblewski 1992, 105–107; Tushnet 1996, 344–349; Chiassoni 2000, 2005; Guastini 2006, 2011. *Contra*, see Hart 1983a, 7–8.

theories allow an interpreter to reach almost whatever hermeneutic outcome she likes, so that she's *de iure* unbound. As we shall see, this view is very similar to some radical skeptical theses about communication. According to a second, moderate reading, the interpreter's freedom is limited and relative to a set of admissible interpretive techniques and outcomes, even when this set is extremely wide: there are always interpretive outcomes – let us call them "easy negative interpretive solutions" – an adjudicator cannot justify resorting to the admitted legal arguments[19].

This distinction can be refined once two other aspects are considered: time and uncertainty about the availability of some interpretive instruments. Both the strong and the moderate readings can indeed be understood synchronically or diachronically, and as taking or not into account the fuzziness of the set of interpretive instruments. A synchronic, radical version of the strong unbindingness thesis affirms that whenever (and wherever) a subject happens to interpret a legal text, she can reach and justify any hermeneutic outcomes she likes. To my knowledge, despite the rhetorical exaggerations of some authors, no one has really ever maintained this conception: nonetheless, it has been the main target of anti-skeptical criticism. A diachronic version of the strong reading – which can be reconciled with a synchronic version of the moderate reading – says instead that even if the interpreter's normative freedom is not absolute, the set of interpretive instruments and contextual constraints is both fuzzy and historically variable[20]: synchronically, there are easy negative interpretive decisions; but diachronically, even these decisions may become hard – that is susceptible to multiple competing justifications.

The equivocity of every legal text is generally defended on the grounds of the following arguments: (1) the identification of the relevant text to be interpreted is not a mechanical operation: it is neither conventional nor customary, but results form an interpretive decision and consists in the reconstruction of the appropriate context (in a broad sense, covering the "co-text", the "inter-text" constituted by other statutes, the constitution and past decisions, and the extra-linguistic context)[21] for textual interpretation; (2) the meaning of the relevant text (thus reconstructed) is neither conventional nor customary: it depends on the decision to apply one (or some) of the relevant interpretive techniques, methods, doctrines and/or theories admitted in a legal community, which are in turn related to the interpretive choices that lead to the selection of the relevant context; (3) both contextual reconstruction and textual interpretation are ultimately based on strategic, political and ethical choices; (4) in the appropriate circumstances, it is possible to enrich the set of

[19] I believe that, at least synchronically, negative easy interpretive decisions are very rarely relevant in legal practice, and even less so in judicial decision-making. Advocates and officials form a sort of barrier against the discussion in courtrooms of cases which would be easily dismissed (or sanctioned as *lites temerariae*).

[20] See Tushnet 1996, 345–349.

[21] See Stone 1964, 35–36; Stone 1985, 124–129 (as regards the difficulty of distinguishing between holding and *obiter dicta*); Altman 1986 (as regards the identification of the relevant precedent); Poggi 2013 (as regards the identification of the text to be interpreted in statutory construction).

interpretive options questioning the reasonableness of the exclusion of some hermeneutic techniques and outcomes.

Does this mean that interpretive agreement is impossible? Legal realists and critical legal theorists have an answer to this concern: despite the plurality thesis, lawyers can *converge* on the same interpretive outcomes; but in virtue of the parity and normative unbindingness thesis, this convergence cannot amount to an agreement or a consensus determined by communal interpretive methods and doctrines alone. So they are committed to denying the very existence of (legal) meaning conventions or hierarchies of meaning-rules and interpretive methods shared by lawyers – especially by judges. Moreover, since these theorists also tend to reject the very possibility of an objective (true) morality which determines the proper solutions to practical problems, the kind of convergence in question can only depend on social, cultural, educational, ideological, economical and psychological factors and their dynamics[22].

Two well-known, general ways of making sense of this conclusion are the following. The first one calls for a reduction of the normativity of meaning to factual properties of human behavior: this aim can be pursued by naturalizing legal meaning and jurisprudence[23]. Brian Leiter presents the main consequence of this methodological turn in the following way: «Why not replace […] the "sterile" foundational program of justifying some legal outcomes on the basis of the applicable legal reasons, with a descriptive/explanatory account of what input (that is, what combinations of facts and reasons) produces what output (i.e. what judicial decision)?»[24]. The task of a naturalized jurisprudence – whose epistemological correctness is checked against utility and pragmatic considerations – consists thus in providing an accurate explanation of social and psychological factors which fall into causally determined patterns of behavior in order to allow lawyers (and laymen) to predict judicial decisions. The second way of making sense of meaning indeterminacy calls for a deconstruction of legal texts and talk, a critical enterprise that analyzes and makes explicit the categories, procedures, decisions, power relations and tensions by which these texts are constituted. I shall explore both strategies in the next two sections.

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[22] Jules Coleman and Brian Leiter (1993–1994, part I, §A) presented this point by distinguishing 1) the determinacy of *reasons* from the determinacy of *causes* and 2) the legal indeterminacy from the extra-legal determinacy. According to the authors, the fact that legal rules and principles are not sufficient to justify or to cause court's decisions doesn't mean that these decisions cannot be predicted by applying a scientific explanation of extra-legal causes. More about indeterminacy in Leiter 2007, 10–12.

[23] See Leiter 2007, especially chapters 1 and 5 and the Postscript to Part II.

[24] Leiter 2007, 41. Leiter explores the vantage points and shortcomings of the analogy between legal realism and the project of a naturalized jurisprudence at 40–46; 54–58.

3 Radical Legal Interpreters? On the Illusion of Sharing Legal Meanings

The project of semantic naturalism developed by Willard v. O. Quine stems from his criticism of the analytic/synthetic distinction and the notion of synonymy, which led him to focus on the interdependence of meaning and belief (conceived in a behaviorist fashion[25]) and pursue a flight from intensions. Given the theoretical necessity of identifying simultaneously the meaning and beliefs expressed by our utterances in order to understand a piece of communication, Quine proposed employing a methodology connected with the thought-experiment of "radical translation"[26]. The task of translating an unknown language must begin with spotting patterns of stimulations that prompt the language users' attitudes of assent or dissent to occasion sentences. However, since not all sentences are directly tied to invariant stimulation patterns, the theorist must rely also on collateral information, dependent on parallel and prior observations, and on "analytical hypotheses" to construct her translation manual. According to Quine, even if the conjectures about the meaning of native utterances ultimately rely on observation sentences, the freedom of the linguist in formulating her tentative translation is enormous. Of course, this freedom will be limited by some methodological constraints: continuity, charity (based on more or less refined psychology and empathy), simplicity. But since the room for a different analytical hypothesis is still substantial, no matter how much evidence fits the translation manual, it will always be possible to elaborate an alternative translation manual that can account equally well for the same evidence. The meaning of a sentence, then, depends on the choice of a translation manual, a choice which is limited only by behavioral evidence and pragmatic considerations (so called "indeterminacy of translation").

Quine extends the results of his theses to all linguistic practices. Radical indeterminacy is thus a necessary feature of our language, but it doesn't lead to nihilism: «Indeterminacy means not that there is no acceptable translation, but that there are many. A good manual of translation fits all checkpoints of verbal behavior, and what does not surface at any checkpoint can do no harm»[27]. Quine's main object of criticism is the idea that communication requires "sameness of meaning". The point of his argument is that in order to understand each other, there's no need for people to share a translation manual or a background theory of meaning: it is sufficient that the same empirical cues be available to language users «under publicly recognizable circumstances»[28]. Quine is also careful to distinguish *underdetermination* from *indeterminacy*, arguing that the latter is not a consequence of the former. The difference is the following: while (in his opinion) every theory of nature is underdetermined

[25] See Quine 1987.

[26] See Quine 1960, ch. II; Quine 1987; Quine 1992, ch. III.

[27] See Quine 1987.

[28] Quine 1992, 27.

because of the relative meagerness of observational data[29], a translation manual (a theory of meaning for a language) «remains indeterminate, even relative to the chosen theory of nature»[30]. In fact, two translators can disagree on the translation of a sentence even when their observations coincide.

Were we to apply these ideas to legal language, we might conclude that statutory construction and the interpretation of precedent are radically indeterminate: two legal interpreters could build different and incompatible doctrines or theories (the jurisprudential equivalent of translation manuals) to ascribe meaning to statutes and written opinions (the jurisprudential equivalent of the unknown language) even if they were to rely on the same behavioral evidence coming from legislators, officials, lawyers, and laymen[31] – an evidence, moreover, which is very meager and presents few "behavioral checkpoints". However, a difference between, say, two judicial reconstructions of the same *ratio decidendi* and, more importantly, the legal solutions they justify, would not prevent legal practice from working: in order to make sense of legal interpretation, legal theory doesn't require to assume a Platonic foundationalist stance – the idea that legal communication consists in the sharing of semantic content between the framers or legislators and the officials (and between the officials and the barristers and/or citizens): insofar as the proposed reconstructions and solutions fit the evidence offered by past behavior, there's no need to worry about meaning skepticism.

Donald Davidson accepts many Quinean insights – *in primis* meaning holism – in elaborating his own methodology and research program. According to this author too, sharing linguistic rules or conventions is neither a necessary nor a sufficient condition for successful communication[32], as is showed by the phenomenon of malapropism[33]. Malapropisms are mistakes about meaning, misuses of words by confusion with others of a similar pronunciation or written form. Since the frequency of linguistic errors and deviations from standard usage doesn't seem to affect the very possibility of understanding, Davidson infers that our interpretive practices do not require conformity to a previously established meaning convention. In order to communicate, language users must be able to construct a theory of interpretation for each idiolect by collecting a finite base of oral or written sentences used by the interpreted subject and formulating hypotheses about her intended meanings in a way that tends to maximize the similarity between the webs of beliefs of the inter-

[29] The underdetermination thesis has been efficaciously criticized in Laudan 1990. Laudan distinguishes several versions of this thesis, showing that «neither logical *compatibility* with the evidence nor logical *derivability* of the evidence is sufficient to establish that a theory exhibiting such empirical compatibility and derivability is rationally acceptable» (276), that is, that the theory is empirically supported by or explains the evidence.

[30] Quine 1987, 10. The same point is made in Davidson 1991, 164.

[31] A behaviorist conception of legal interpretation and adjudication is developed by Underhill Moore and Gilbert Sussman (1931). The authors argue that once it has been discovered a regularity in the behavior of the officials belonging to a specific institution, "measured" the deviations from this regularity and determined at which point the officials intervene to correct the deviation, it is possible to predict which deviations will cause the reactions of the officials.

[32] See Davidson 1985.

[33] See Davidson 1986.

preter and the interpreted subject (such methodological constraint is called "principle of charity")[34]. To individuate the relations between idiolects, Davidson – following Quine – proposes to map the sentences held true by the language users resorting to a Tarskian-style convention T. The application of this recursive device generates T-sentences, which correspond to interpretive hypotheses expressing extensional equivalences between sentences belonging to different idiolects[35]. According to Davidson, then, interpreting another person's speech acts consists in elaborating a "passing theory" of truth for an idiolect.

However, as in the case of radical translation, the ascription of an idiolect to a speaker is always indeterminate: it is always possible to assign different truth-conditions to the speaker's utterances[36]. Davidson maintains that interpreting is a process that links a "first meaning" to the speaker's intended meaning, but he denies the conventionality of the first meaning: from his point of view, the latter can amount to a provisional and independent *ad hoc* assumption, grounded in the general knowledge of the world (encyclopedic knowledge) and some reasonable expectations – governed by the principle of charity – about the communication partner's behavior. This specification, which can be seen as a qualified version of the unbindingness thesis, is made to avoid falling into Humpty Dumpty's extreme subjectivist semantics: even if a sentence were to mean what the interpreted subject intended it to mean, this intention could count as a communicative intention only insofar as it satisfies a reasonableness requirement and manifests itself in providing the interpreter with sufficient linguistic hints related to the context of the utterance. In ordinary conversations, the speaker commits to making the interlocutor adjust her prior theory of meaning (for the speaker's idiolect) until it overlaps with the passing theory she intends the interlocutor to use. What successful communication really needs is the kind of convergence produced by the mutual adjustments of previously independent (in the sense of not being shared) theories of meaning. However, according to Davidson, the ability to interpret, correct, re-interpret a sentence (and so on) doesn't involve the mastery of a linguistic code: it is just – to use a phrase from Quine – a "social art" performed by substantiating very broad principles of rationality in each actual context[37]. In the end, the platitude about the existence of a common (shared) language proves to be a philosophical myth.

Davidson's radical semantic conception of ordinary language interpretation seems to have as its legal counterpart a pragmatic contextualist view about legal interpretation. In fact, a prominent legal scholar such as Alf Ross is very clear in

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[34] See Davidson 1973.

[35] See Davidson 1967, 1970.

[36] See Davidson 1970, 186: «Quine is right, I think, in holding that an important degree of indeterminacy will remain after all the evidence is in; a number of significantly different theories of truth will fit the evidence equally well». Davidson, however, distances himself from Quine's "proximal" theory of meaning, which led him to radical semiotic skepticism, in a later essay: see Davidson 1990. A clear limit of Davidson's communicational skepticism is his assumption of a massive agreement in beliefs about the world between the interpreter and the interpreted subject.

[37] Davidson, however, does not undervalue the practical (as opposed to the theoretical) importance of other factors, such as time, opportunity, linguistic conditioning, intuition, luck, taste and sympathy (see Davidson 1985, 24–25).

asserting that legal «interpretation has no independent linguistic starting point but […] from the beginnings it is determined by pragmatic considerations in the form of "common sense"»[38]. This can be translated in Davidson's vocabulary by saying that first meaning depends on the reasonable expectations of the interpreter and the relevant details of the context. Although Ross – unlike Davidson – doesn't deny mutual understanding in ordinary linguistic interactions and explicitly accepts the conventionality of ordinary language syntax and semantics[39], he emphasizes the irrelevance of customary or conventional "literal" meaning for the purposes of statutory construction: «One often comes across the view that statutory interpretation can or must take as its starting point the ordinary meaning of the words as warranted by usage. This view is illusory. No such meaning exists. Only the context and the desire to find "good" or "reasonable" meaning in relation to a given situation determines the meaning of the individual words. But the function of the context is often so taken for granted that it escapes attention»[40]. Note how the author refers to the "contextual determination" of meaning. This thought, however, is further précised in a skeptical fashion – more akin to Quine's and Davidson's indeterminist conclusions.

Ross admits that reasonableness and common sense are limits to judicial discretion[41], but he says that these kinds of considerations are insufficient to bind a court to a certain decision in a certain context. True, interpretive methods and doctrines determine «the area of justifiable solutions»[42]: but since these "maxims" «are unsystematic sets of catch phrases (often couched in proverbial forms) and so imprecise in meaning that they can easily be operated in a way that leads to conflicting results»[43] and since «no objective criteria exist to show when one maxim rather than another should be applied, they offer great scope for the judge to arrive at the result he deems desirable»[44].

Another similarity between Davidson's theory of radical interpretation and Ross' account of pragmatic interpretation concerns the weak, "technical" normativity of interpretive directives ("maxims" or "arguments", in Ross' vocabulary, semantic "rules" or "conventions", in Davidson's language), an idea which stands at the core of the unbindingness thesis. Davidson does not deny that two (or more) people can contingently have conventions and share a language[45]; he denies, instead, that con-

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[38] Ross 1958, 146. See also Chiassoni 2006, 124.

[39] See Ross 1958, 113.

[40] Ross 1958, 117–118. Compare with Davidson 1986, 446: «there are no rules for arriving at passing theories».

[41] See Ross 1958, 145.

[42] Ross 1958, 153. This "area" may be conceived as delimited by a "frame": see Kelsen 1967, 351: «the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame».

[43] Ross 1958, 153.

[44] Ross 1958, 153–154.

[45] See Davidson 1985, 25: «Knowledge of the conventions of language is […] a practical crutch to interpretation, a crutch we cannot in practice afford to do without – but a crutch which, under

ventions are (and help explain what is) necessary for linguistic communication. It is simply not true that conventions precede and regulate our linguistic skills rather than bending preexisting linguistic habits to public norms: they cannot even «formalize the considerations that lead us to adjust our theory to fit the inflow of new information»[46]. Moreover, even if such meaning conventions were in play, they could only function as rules of thumb or summaries of previous judgments, useful until proven wrong. Ross, in turn, borrows the idea from Max Radin that interpretive maxims «are not actual rules, but implements of a technique which – within certain limits – enables the judge to reach the conclusion he finds desirable in the circumstances, and at the same time to uphold the fiction that he is only adhering to the statute and objective principles of interpretation»[47]. In Ross' opinion, «it would be a mistake to accept the technical arguments as the true reasons [of a legal solution]. The true reasons must be sought in the legal consciousness of the judge or the interests defended by the counsel»[48].

As we've seen, the naturalized and interpretive theories of meaning proposed by Quine and Davidson offer some arguments for not discarding a qualified skeptical view, quite different from the idiosyncratic one adopted by Humpty Dumpty, in a hurry. Moreover, the underlying theoretical commitment of these conceptions has something in common with the strong empiricist methodological approach adopted by legal realists. In fact, both Quine's radical translator and Davidson's radical interpreter – let us call them "radical linguists" – take on the external point of view described by Hart[49]. The radical linguists adopt a third-person detached perspective: they observe people's behavior and formulate hypotheses about the beliefs and intentions of the language users according to the principle of charity. They don't necessarily accept and follow meaning rules nor do they assume critical reflective attitudes (even if they may mimic these reactions for the purposes of communication). Rather, radical linguists elaborate theories of interpretation that allow them to predict the consequences of linguistic interactions and take part in the social linguistic practice (be it a conversation, a literary interpretation, a statutory construction, etc.).

Similarly, Ross' lawyer doesn't follow interpretive conventions, but constructs statutes and interprets precedents by elaborating on more or less rough linguistic materials, trying to predict the social consequences of her arguments and decisions. Ross' theory is an example of the resemblance between an "external" skeptical view about natural language and ordinary interpretation and an "internal" skeptical approach to legal language and interpretation. Both conceptions undermine the pretheoretical commonplaces of the sharing of legal meanings and the mutual under-

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optimum conditions for communication, we can in the end throw away, and could in theory have done without from the start». See also Davidson 1994.

[46] Davidson 1985, 25.

[47] Ross 1958, 154. The reference is made to Radin 1945, 219. See also Oliphant 1993, 200; Chiassoni 2006, 117–119; Guastini 2006; 2011, 144–149.

[48] Ross 1958, 153.

[49] Hart 1994, 89, 291.

standing between legal drafters and adjudicators, but the second cannot be seen as a local application of the first because it rests on a statement of the differential traits of legal linguistic practice.

4 A Free Play of Legal Interpretations? On the Openness of Legal Contexts

Now, it is time to turn to deconstructionism. As it is well known, this philosophical movement owes its main guiding lines to Jacques Derrida's critical analysis of Western metaphysic tradition. The polemic targets of Derrida's arguments are "logocentrism" and the "metaphysics of presence", both of which conspire in conceiving communication in terms of the *presence* and crucial importance of three elements: the communicating subject (or her intention), seen as the centering origin of meaning, the object she's referring to in her speech acts, and the addressed audience. On this conception, written language is considered as something derivative and parasitic: understanding a written text is depicted as remounting to its animating authorial intention and originating context (the so called "context of production"), which set the linguistic conventions and necessary and sufficient conditions for a successful communicational exchange.

According to Derrida, on the contrary, the absence of the receiver in writing, the sender in reading, and (potentially) the object referred to in the discourse in both writing and reading contexts, is a typical feature of written communication that cannot be treated nor idealized as a kind of "modification of the presence", as a mere, powerful extension of spoken or gestural communication. More drastically: when the writer addresses her text to a receiver or makes her text public, she cannot be sure that the receiver will read it (or wish to read it); she may change her mind and intentions after sending or publishing the text; when the receiver reads the written text, the sender may have disappeared or already changed her mind; the objects referred to in the text may have been destroyed, and so on.

Derrida contends that the absence of an intentional subjectivity and a convention dominating a complete communication context – the *différance* (difference and deferral at once) – is general and characterizes each "language event". The legibility and intelligibility of a written text depends on the structural iterability of the sign, but this last feature can be projected onto spoken language (and particularly performative speech acts): «this is the possibility on which I want to insist: the possibility of disengagement and citational graft which belongs to the structure of every mark, spoken or written, and which constitutes every mark in writing before and outside of every horizon of semio-linguistic communication; in writing, which is to say in the possibility of its functioning being cut off, at a certain point, from its "original" desire-to-say-what-one-means [*vouloir-dire*] and from its participation in a saturable and constraining context»[50].

[50] Derrida 1988a, 12.

Derrida reverses thus the traditional order of explanation, conceding some sort of philosophical priority to written language and showing how its alleged *differentiae specificae* are indeed extensible to spoken language. The main consequences of this move are linguistic indeterminacy and the loss of a stable normativity of the rules and conventions established in (and for) normal contexts of communication, which cannot bind language users and interpreters. The author insists that «Every sign, linguistic or nonlinguistic, spoken or written (in the current sense of this opposition), in a small or large unit, can be *cited*, put between quotation marks; in so doing it can break with every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable. This does not imply that the mark is valid outside of a context, but on the contrary that there are only contexts without any center or absolute anchoring [*ancrage*]»[51]. If meaning is conventional, and if conventions dress the communicative intentions of the speaker once the context satisfies some "normality" conditions, stressing the iterability of arbitrary signs and the discontinuity between their contexts of use serves to undermine the default presumption of normality and the idea of meaning pre-determinability.

The French philosopher reaches this conclusion also through a criticism of the Saussurean conception of linguistic structure (*la langue*). According to Ferdinand de Saussure, the identity of a sign (the unified duality of a concept – the *signifié* – and an acoustic image – the *signifiant*) is not only arbitrary, but also purely differential and relational, in that it depends on its place in the linguistic system and is negatively defined by its difference from other signs. This makes meaning never immediately present in a (use of a) sign, but disseminated along the whole system of the signifiers: the internal cross-referential structure of dictionaries mirrors the circularity of the process of signification. Saussure, however, maintains that «the statement that everything in language is negative is true only if the signifier and the signified are considered separately; when we consider the sign in its totality, we have something that is positive in its own class»[52]. Derrida contests this assumption, charging the Swiss linguist of surreptitiously assuming the existence of a transcendental signified, a concept independent of language. From a deconstructionist standpoint, when an interpreter ascribes a meaning to a text she gets caught in a never-ending "play": to interpret a sign she must consider those signs to which the former is opposed; but to interpret the latter she must know to what signs they are opposed to, and so on, up to the closure of the circle. This prevents the interpreter from identifying a "real" "positive" meaning of an expression.

Derrida distinguishes then two conceptions of interpretation, advocating for the second: «There are thus two interpretations of interpretation, of structure, of sign, of play. The one seeks to decipher, dreams of deciphering a truth or an origin which

[51] Derrida 1988a, 12. See also Derrida 2001, 365–366. Note the resemblance between Derrida's thesis and what Davidson (1979, 13) calls "the autonomy of linguistic meaning": «Once a feature of language has been given conventional expression, it can be used to serve many extra-linguistic ends; symbolic representation necessarily breaks any close tie with extra-linguistic purpose». An opposite conception about meaning and context is expressed by Frederick Schauer (1991, 55–57).

[52] De Saussure 1966, 121.

escapes play and the order of the sign, and which lives the necessity of interpretation as an exile. The other, which is no longer turned toward the origin, affirms play and tries to pass beyond man and humanism, [where the man is] that being who, throughout […] his entire history, has dreamed of full presence, the reassuring foundation, the origin and the end of play»[53]. The second conception of interpretation is «a field of infinite substitutions only because […] there is something missing from it: a center which arrests and grounds the play of substitutions»[54]; it is a Nietzschean hermeneutical view that leads to «the affirmation of a world of signs without fault, without truth, and without origin»[55], that «surrenders itself to *genetic* indetermination»[56].

This apparently strong synchronic version of the equivocity thesis has been subscribed by other deconstruction theorists. Paul de Man, for example, focusing on literary interpretation, translates the notion of free play into that of undecidability of meanings within a text, undertaking both the plurality and the parity thesis: «Two entirely coherent but entirely incompatible readings can be made to hinge on one line, whose grammatical structure is devoid of ambiguity, but whose rhetorical mode turns the mood as well as the mode of the poem upside down […]. [The reader can't] in any way make a valid decision as to which of the readings can be given priority over the other; none can exist in the other's absence»[57]. In the field of legal interpretation, similar conclusions have been reached by several authors from the "Critical Legal Studies" movement. A good example is the following statement by Charles M. Yablon: «The experienced advocate knows that the doctrinal regime is sufficiently complex that there will always be some set of authoritative materials which, through skillful manipulation of the level of specificity and characterization of the facts, he can declare to be 'controlling' of the case at bar»[58].

In the literature about legal deconstructionism much ink has been spilled to discriminate strong and weak readings of the equivocity thesis[59]. Indeed, its scope depends on the way one understands the unbindingness thesis and the related problem of the normativity of meaning. Derrida points out «The perhaps paradoxical consequence of […] having recourse to iteration and to code: the disruption, in the last analysis, of the authority of the code as a finite system of rules; at the same time, the radical destruction of any context as the protocol of code»[60]. If one rejects the representation of language as an abstract monolithic system of prefixed meaning rules which govern actual uses inscribing them in typical/normal contexts, then the

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[53] Derrida 2001, 369–370.

[54] Derrida 2001, 365.

[55] Derrida 2001, 369.

[56] Derrida 2001, 369.

[57] de Man 1979, 12. *Contra*, see Hirsch 1967

[58] Yablon 1985, 917–918. See also Kairys 1982, 15; Balkin 1987; D'Amato 1990.

[59] See Solum 1987, 470–471. Timothy Endicott (2001, 13–17) shows with abundance of details that many unqualified versions of the equivocity thesis are indeed mere *façons de parler*: in fact, when under attack, critical legal theorists retreat to more moderate thesis.

[60] Derrida 1988a, 8.

abstract normative constraints inherited at each change of (actual) context can be questioned. Moreover, since context and meaning are not separated and independently delimited "entities" (or "areas", a metaphor already employed by Gottlob Frege) to be discovered as final points of arrest for interpretation, the task of ascribing sense to linguistic behaviors and traces is open-ended. Still, the concept of "openness" is ambiguous, in that it can recall an "absolute/unlimited discontinuity of contexts" or a "contextual/limited openness".

Some critics of Derrida equate his deconstructionism to a work of decontextualization that produces an unwarranted interpretive freedom from the historical chain of meanings and contexts. This diagnosis may well be justified by Derrida's frequent obscurities, but, if not further cleared, it results misleading and unfair. It is surely incorrect to charge the French author of invoking unconstrained decontextualization as a crucial aspect of an alternative picture of language. In fact, Derrida explicitly affirms that «one cannot do anything, least of all speak, without *determining* (in a manner that is not only theoretical, but practical and performative) a context»[61] (my emphasis) and that the main aim of deconstruction is «the effort to take this limitless context into account, to pay the sharpest and broadest attention possible to context, and thus to an incessant movement of recontextualization»[62]. Does all this imply a complete freedom from interpretive constraints, a strong synchronic reading of the unbindingness thesis?

Derrida wishes to avoid this conclusion. On one side he states that his way of thinking of the context as indefinite, unsaturated, non-totalized «does not, as such, amount to a relativism, with everything that is sometimes associated with it (skepticism, empiricism, even nihilism)»[63]. In fact, such a conception of context is not maintained as an absolute overview which claims for its independent (transcendent?) criteria of correctness: on the contrary, it is an interpretation rooted in its own context – a discussion about meaning and signification. On the other, he argues that «there is always something political "in the very project of attempting to fix the contexts of utterances". […] Such an experience is always political because it implies, insofar as it involves determination, a certain type of non-"natural" relation to others […] In short, [the author does] not believe that any neutrality is possible in this area»[64]. Derrida admits that in some contexts, which are «extremely vast, old, powerfully, stabilized or rooted in a network of conventions (for instance, those of language)»[65] – the paradigmatic case is represented by hard sciences – objectivity and truth impose themselves for several reasons. This is not necessarily the case in other kinds of context, whose shaping may be guided by other kinds of relevance considerations: but even there nothing imposes the absence of local and provisional constraints.

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[61] Derrida 1988b, 136.

[62] Derrida 1988b, 136.

[63] Derrida 1988b, 137.

[64] Derrida 1988b, 136.

[65] Derrida 1988b, 136. See also Derrida 1981, 133.

Michel Rosenfeld, who tries to extend such conclusions to the legal domain, is more explicit in advocating a moderate reading of the equivocity thesis based on contextual openness: «Conducted at the proper level of abstraction […] intertextual interpretive practice does not culminate in aimless conflict and hopeless indeterminacy. Whereas it cannot avoid conflict, such interpretive practice can reveal particular conflicts which invite a finite range of possible solutions. Similarly, such interpretive practice unavoidably leads to indeterminacy, but not to the kind of indeterminacy which justifies virtually every conceivable meaning»[66]. Rosenfeld claims that there's a kind of "constrained indeterminacy" which results from the inter-subjective re-contextualization ("rewriting", in a deconstructionist sense of "writing" which includes oral speech acts) of past writings in new cases expecting a legal solution. But, according to this author, the provisional constraints to re-contextualization can only come from the ethical assumptions inscribed in sequences of contexts as parts of processes of historical formation of inter-subjective (social) relations.

To conclude and summarize this sketch presentation, it may be useful to stress that, once again, two strategies are available for the interpretive legal skeptic: she may either assume absolute discontinuity and radical equivocity as features of whatever communicational chain of contexts, or admit that different contexts synchronically present different degrees of openness and indeterminacy, trying to characterize in a pragmatic and contextualist way the central aspects of legal language that avoid falling down to an infinite loop of interpretations.

5 Second-Order Skepticism? From Theorizing to Enculturation

Until now I've offered a tentative picture of some philosophical views that seem to lend support to a qualified version of legal skepticism grounded on the equivocity thesis. The theories elaborated by Quine, Davidson, and deconstructionists have three philosophical features in common: they are interpretive, point out the necessity for a contextualization of meaning-ascriptions, and underscore a commitment to semantic anti-Platonism. Nonetheless, it is important to remark that none of these features – neither separately nor conjunctly taken – are sufficient to justify skepticism. As we've seen (§1), the doubts concerning mutual understanding, sharing a semantic content, and meaning determinacy can arise when their justifications rest on common sense assumptions or pure stipulations. But what if the theorist were to abandon a reifying picture of meaning and a concept of determinacy declined in terms of already given necessary and sufficient conditions? What if a conception of meaning were interpretive, contextualist, anti-Platonic and opted for a replacement of the idea of an absolute, "petrified" determinacy with that of correctness and

[66] Rosenfeld 1992, 159–160.

legitimacy of certain uses and interpretations in specific or particular contexts? Finally, what if the anti-skeptic were to justify her reconstruction not on the basis of its conformity to common sense, but on its interpretive (in the sense of "explanatory") relation with the observable public behavior of language users?

I shall here recall just three conceptions which pursue this strategy.

(i) Meaning contextualism is the view that the content of an utterance – what is said – is context-dependent in ways which go beyond the ordinary processes of saturation (fixation of the reference of indexicals, demonstratives, pronouns, etc.) and disambiguation[67]. The conventional (or encoded) meaning of an utterance is a mere scheme of semantic representation (a logical form), not sufficient to express an explicit proposition with specific truth-conditions. The identification of an ostensive stimulus involves deploying this conceptually articulated scheme that provides an access to encyclopedic entries, plays the role of a hint of what is explicitly and implicitly meant, and stands in need for pragmatic inferential completion, enrichment (so called "explicatures") and reconstruction of the intended contextual assumptions of the speaker that allow reaching the intended information (so called "implicatures")[68]. According to this view, then, (1) the conventional meaning of a linguistic expression is an emergent concept product of many concrete uses in similar contexts; (2) it is better not to classify meaning along the axis "literal-non literal", but in terms of frequency and familiarity of linguistic usages.

The most developed version of semiotic contextualism is relevance theory, according to which the interpretation of the pragmatic unarticulated constituents of a token-sentence is guided by cognitive and communicative relevance principles[69]. The speaker manifestly intends that the utterance be considered by the hearer sufficiently relevant as to deserve an interpretation. To secure this communicational goal, the speaker chooses the utterance she assumes will be interpreted in the most immediate way by the hearer, sparing her the cognitive costs of complex interpretive efforts. On the other hand, the hearer will maximize the relevance of the utterance[70], assuming that the most easily accessible interpretation will be the correct one. The more an interpretive hypothesis is easy to access and satisfies the relevance expectations of the hearer, the more it will plausibly reflect the speaker meaning. Of course, since contextual assumptions are not necessarily shared by speaker and hearer, and pragmatic inferences are non-demonstrative, communication may fail[71]: but it will be always possible to check the correctness of the pragmatic reasoning (explicatures and implicatures) in the subsequent linguistic interactions.

Relevance theory rejects Quinean indeterminacy of translation and assumes that the results of cognitive sciences, which describe more and more accurately our bio-

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[67] See Travis 1975; Searle 1978; Sperber and Wilson 1995; Carston 2002; Récanati 2004.

[68] See Sperber and Wilson 1995, §§ 4.2. and 4.3.

[69] See Sperber and Wilson 1995, §§ 3.1. and 3.2.

[70] According to Sperber 2005, the process of "calculating" the relevance of a linguistic stimulus is automatic and subconscious, and depends on a functional property of specific innate modules of our mind that react only to that kind of input.

[71] See Recanati 2004, 54.

logical processes and the epistemic and practical bottlenecks that limit the amount of information we're able to manage at each communicational exchange, allow the theorist to calculate the meaning of a token-sentence in a specific context[72]. The principle of relevance is taken to offer a schematic formulation of these natural constraints and is clearly at odds with the parity thesis: there cannot be more than one (correct?) interpretation of a token-sentence that satisfies the principle.

(ii) Ronald Dworkin's jurisprudence, the "law as integrity" and "as interpretation" approach[73], is moderately contextualist and generally interpretive, in a sense, not so far from that assumed by deconstructionism. In fact, Dworkin also denies that the law is a set of given data "out there", waiting for discovery, and acknowledges that the interpretation of a legal text doesn't take place in a vacuum, but is part of a practice aimed at reconstructing the historical sequence of contexts leading to and justifying the actual one. However, contrary to critical legal theorists, he grants that there are stable constraints binding the development of such an enterprise. To clarify this point, he draws an analogy between the tasks of interpreting the law and writing a chain novel, a literary work in which each chapter is written by a different individual author. According to Dworkin, in both cases the author/interpreter is constrained by the anterior acts (the plot of previous chapters; the relevant line of judicial precedents) of the other members of the collective enterprise and the sense of adequacy and consistency of her contribution with the (aesthetic or moral/politic) values of the practice embedded in those acts. Thus each legal interpretation must fit past ones, but must also do so better than its rivals, justifying its object: it must take into account the central aspects of the practice and illuminate them and the case at hand with the best light to preserve the integrity of the legal process, that is, the values of equal respect and concern.

Dworkin thinks that the concept of "interpretive objectivity" is not a *contraditio in adiecto*. Understanding the law in general, as a practice, and its particular manifestations – a constitutional provision, an enactment, an opinion stated in a past decision – involves engaging in the Herculean task of elaborating a normative (political and moral) theory which links a coherent set of general principles (justice, fairness, equality) and a body of institutionally created provisions[74]: since, according to the author (and against the parity thesis), it is always possible to identify some consistent (formal and substantial) requirements to establish which normative theory is better, adjudication can be a constrained constructive activity too, leading to correct interpretations of legal texts and *univocal* right answers to legal questions.

(iii) Another contextualist conception of meaning has been proposed by the literary critic Stanley Fish. According to this author, Dworkin's metaphor of the chain-novel is seriously misleading: on one hand, the interpretive alternatives do not decrease as the serial novel/line of precedents evolves through time; on the other, it is impossible to separate the interpreter's understanding of the previously established practice and her grasp of the facts of the case. In his words: «It is tempting to

[72] See Sperber and Wilson 2002; Sperber 2005; Wilson 2005.

[73] See Dworkin 1982, 1986.

[74] See Dworkin 1986, 243.

think that the more information one has (the more history) the more directed will be one's interpretation; but information only comes in an interpreted form (it does not announce itself). No matter how much or how little you have, it cannot be a check against interpretation, because even when you first "see it", interpretation has already done its work»[75]. So Dworkin's chain simply doesn't exist: there only are discrete interpretive activities performed by different courts and lawyers.

A consequence of this view is that the search for an a-contextual literal meaning of a text (e.g., a statute) is doomed to failure: «any reading that is plain and obvious in the light of some assumed purpose (and it is impossible not to assume one) is a literal reading; but no reading is *the* literal reading in the sense that it is available apart from any purpose whatsoever […] It is not that we first read the statute and then know its purpose; we know the purpose first, and only then can the statute be read»[76].

Fish, however, doesn't subscribe to the equivocity thesis. On the contrary, he believes that legal interpreters don't choose between those which, from a-contextual perspective, seem to be real hermeneutic alternatives. He grants that meaning is not text-dependent, but reader-dependent, and that no reading of a text is inherently impossible: if we were playing with logical possibilities, the plurality thesis would in fact hold. But since interpreters are taking part in a cooperative practice, the distinction between ambiguous and unambiguous sentences and the idea of an uninterpreted text are senseless: interpretation is itself a structure of constraints; the correctness of a legal solution to a case will depend on the degree of persuasiveness of the proposed justification within the professional/intellectual interpretive community. As the author writes, «Interpreters are constrained by their tacit awareness of what is possible and not possible to do, and what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed»[77]. Thus, the only "facts" that allow participants to say that certain legal interpretations are admissible are not rules imposed on the interpreters from outside, but the concepts/categories, arguments, styles and standards supplied by the practice itself and internalized through training.

As the reader will have noticed, the above exposed views all deny the parity thesis and conceive the meaning of precedents and statutory provisions as the correct linguistic outcome of a complex, communal, interpretive and argumentative practice. How does then the skeptic react to these alternative reconstructions of legal practice? The "external" communicational skeptic may contend that her opponents' arguments either don't have sufficient empirical basis or deploy too vague and/or contested concepts (e.g., "integrity", "persuasiveness", "relevance") to make them testable (if meaningful at all). The "internal" skeptic, instead, can insist that the anti-skeptic description of the legal practice is inadequate: she then puts on the carpet an

[75] Fish 1983, 274. See also Fish 1988, 891.

[76] Fish 1980, 279.

[77] Fish 1983, 283.

alternative account of the differential pragmatic features of legal language as opposed to ordinary language-games. Here are the main points she may highlight:

(i) even if legal language borrows the great majority of its words from natural languages, (a) the meanings of these words in legal speech acts may well be different, for they don't depend on the semiotic cooperation of all its users (or on rational expectations plus the principle of charity), but on the definitions and interpretive decisions of legal authorities which are given the responsibility of solving semiotic – and, of course, practical – conflicts; (b) there are also many technical linguistic expressions introduced by legal scholarship, legislators and judicial practice, but here again their function doesn't depend on a common aim or a peaceful methodological agreement between language users – as it happens, for example, in mathematics. In fact, it is difficult to extend to legal language a two-phase Carnapian model of analysis inspired by artificial languages, in which one first *institutes* meaning rules by stipulative definitions that fix connections between meanings, expressions and extensions, and then *applies* these rules to formulate theories about the world: «One cannot make sense of the notion of instituting conceptual norms apart from the notion of applying them, and vice versa. *Institution* and *application* are reciprocally dependent conceptions, and reciprocally dependent processes»[78];

(ii) the disparity of semiotic power between kinds of legal language users is much neater than that between the users of natural languages. The speech acts of the different, socially defined participants (framers, legislators, judges, other officials, barristers, jurisprudents, legal scholars, laymen) to the various legal language-games have very different effects on the linguistic and non-linguistic behavior of the participants: some language users are authorities, others are merely influential users; some are elected by citizens and draft canonical texts, others are selected on different grounds and decide controversies applying general rules; etc.[79] Moreover, to identify the "institutional" participants, it is necessary to follow legal rules;

(iii) the law guides people's behavior in some cases by facilitating the emersion of coordinative equilibria (think to the traffic rules) and, in other cases, by interfering through sanctions and invalidities with the expected payoffs of the conducts of citizens in "conflict games", where disagreements and the "fight" for the meaning of certain actions or texts are characteristic features of the global practice. In fact, interpretive legal practice admits that the advocates of the parties of a controversy (a) give opposite descriptions of the facts employing legal language and invoking different interpretations of the legal rules of evidence; (b) affirm the applicability to the case at bar of different provisions or (lines of) precedents; (c) offer conflicting interpretations of the same provision or reconstructions of the rationale of a decision, and so on. On the other hand, according to the same practice, the adjudicators have the last word in establishing

[78] Brandom 2014, 23.

[79] See Chiassoni 2000.

"what the law says", even when no specific rule for the case is available and it is necessary to elaborate it relying on more general principles. When deciding a case, the adjudicators normally mention or make reference to statutory provisions and precedents, and generally try to avoid that their sentences be reversed by superior courts: but they can always use techniques such as distinguishing or invoke some general legal principle to justify a new interpretation;

(iv) it generally makes no sense to look for a specific intention behind legal texts, because (a) they are normally drafted by collegial bodies and institutions, (b) there aren't any reliable procedures for reconstructing the individual intentions of the members of these bodies or isolating a single *ratio iuris* backing a rule, (c) very often the decision to promulgate a specific text is the product of incompletely theorized agreements[80]; (d) very often, to construct a statutory provision, the interpreter resorts to the meaning ascribed to provisions belonging to statutes enacted by different institutional bodies, not to mention common law doctrines, the concepts elaborated and systematized by legal dogmatics, and international, supernational and transnational law. These remarks seem to preclude the extension of the Gricean "Maxims" (Quality, Quantity, Relation, and Manner) – which presuppose an intentionalistic picture of linguistic interactions – to legal interpretation;

(v) according to the plurality thesis, there are much more ways to interpret legal texts than those employed to ascribe meaning to speech acts in ordinary conversation. This is in part due to the writtenness of legal speech acts: in fact, the temporal and spatial distance between the context of production and the context of use of a written text often causes a "presuppositional" distance between the encyclopedic information – which, in legal practice, includes statutes, dogmatic systematizations, doctrines, etc. – of the sender and the receiver. But even when the object of the interpretation is not, strictly speaking, a "text" – think to legal customs, unwritten principles or the rationales of past judicial opinions[81], which merely make explicit, by non-canonical linguistic expressions, norms implicit in the practice – several canons, methods, and normative theories are available to (and are employed by) interpreters and adjudicators. Furthermore, while in the context of literary criticism the plurality of readings and the disagreements between participants are generally seen as a praiseworthy richness of the practice, in legal contexts, which are practical and where interpretive decisions weigh on economic and personal interests and rights, they clash with a powerful push towards univocity.

According to the internal skeptic, all these features point to the conclusion that legal practice is indeterminate in ways ordinary communication is not.

At this stage, the anti-skeptic might pause to evaluate what appears to be a stalemate between opposite reconstructions of the same practice. On one hand, none of the competing views has produced sufficient evidence to dispel a second-order

[80] See Sunstein 1995.

[81] See Moore 1987, 1995, 24–25.

skepticism about their descriptive adequacy: mentioning isolated examples of hard cases is not sufficient to prove interpretive legal skepticism; and the same can be said as regards the anti-skeptic's appeal to negative easy interpretive decisions and easy subsumption cases, which doesn't affect the strong, diachronic reading and the weak synchronic version of the equivocity thesis. On the other hand, it is not clear what would count as a counterexample: the interpretive agreements stemming from conventions (or customs) are accommodated in a skeptical framework by qualifying them as extra-legally caused convergences (or regularities) caused by extra-legal factors, while skeptic's insistence on the parity thesis is rejected replying that plurality does not entail parity, and that *de facto* parity does not entail *de iure* parity – i.e., that skeptic decision-makers may well be wrong in not detecting that, at least in some cases, there's only one admissible solution.

To avoid the impasse, the anti-skeptic could try to apply to legal practice some general arguments against communicational skepticism. Consider a *locus classicus* of anti-realism about meaning, norms, and interpretation: Ludwig Wittgenstein's analysis of rule-following. As Robert Brandom aptly explained[82], Wittgenstein wants us to abandon a picture of (the normativity of) meaning which is presupposed by two opposed reifying conceptions: "regulism" and "regularism". According to the first, actions are liable to normative assessment insofar as they are governed by explicit permissions, prohibitions, and prescriptions. Regulism is a form of Platonism: it assumes that in order to grasp the meaning of a linguistic expression a language user must grasp – through some sort of ostensive definition – an intermediary, an ideal sample (e.g., a sortal) of what the expression is to be correctly applied to. This assumption, however, leads to the infinite regress of interpretations: whatever it is the ideal entity the language user grasps, it can only be something that stands in need of another interpretation – i.e., the postulation of another ideal sample of what the first sample is to be correctly applied to. And so on, *ad infinitum*. The objection applies well to interpretivism and the radical deconstructionist thesis of the absolute openness of contexts to reinterpretation.

According to the second conception, an action is correct if it fits a regularity of behavior or if an agent has a disposition to perform it. Regularism is a kind of naturalism, it presupposes the existence of some fundamental natural/empirical facts which determine certain uses or interpretations of linguistic expressions[83]. Yet, regularism is incapable of accounting for the difference between what *is in fact* regularly done or what some subject has a disposition to do – which may well include systematic mistakes – and what *ought to be* done[84]. Moreover, Wittgenstein points out that every (actual or potential) finite regularity of behavior can be extended in

[82] See Brandom 1994, 18–29.

[83] Quine's view is a dispositional kind of regularism: it aims at replacing inexistent Platonic meanings with natural facts (stimuli).

[84] See also Taylor 1992, 137: «The rhetorical characteristic which is most distinctive of […] this determinist strategy is the "slippage" between the type of necessity governing the *explanans* and that said to be governing the *explanandum*». The first is logical (or, more generally, normative), while the second is natural.

an infinite number of respects (so called "gerrymandering" objection). Since regularities and dispositions are not self-identifying, there's no way of discriminating between them and isolating the relevant ones without using some normative criteria. This problem seems to be fatal for both Quine's semantic naturalism and relevance theory.

The consequence of Wittgenstein's double criticism, however, is not radical communicational skepticism, as many authors have thought[85]. Wittgenstein stressed in several passages of his works[86] that *tertium datur*: there is a way of grasping a rule that does not consist in an interpretation nor in the explicit/propositional knowledge of a natural fact, but in an implicit/practical know-how, constituted by normative attitudes instilled trough conditioning, training, education, and enculturation[87]. In fact, a practice-based account of rule-following and meaning seems to be better equipped to enlighten language learning and linguistic competence than any causal/behavioral and interpretive explanations. The main aspect missed by these conceptions is the transition from stimulation and conditioning to heteronomy and, finally, to autonomy. This gradual shift cannot be explained (*pace* Quine and Davidson) merely in terms of *theorizing*, i.e., of inductive generalizations based on the observation of a connection between words and objects, and procedures of confirmation/falsification which would allow, once integrated with the principle of charity, contextual information, and analytical hypothesis, a radical translation or interpretation. The reason is that these abilities presuppose that the language learner already masters concept use. Moreover, these conceptions can't account for those behaviors that represent "participative attitudes"[88], such as *ascriptions of responsibility* to those subjects who deviate from regular usage, *critical reactions* to these deviations, and for the possibility of reacting to these ascriptions and reactions, that is, of *disagreeing*. In sum: since the beginning, a language user participates in a social practice, so her point of view cannot be external and merely theoretical, as that of a radical linguist.

Wittgenstein's arguments have been applied to the analysis of legal language by several authors, such as Andrei Marmor, Dennis Patterson, Timothy Endicott and Brian Langille[89]. The main point of their analysis is that *understanding* legal rules is something different from and conceptually prior to *interpreting* the provisions or opinions which contribute to make them explicit. Understanding a rule is not a mental act or state, something that could be propositionally expressed: on the contrary, it is the *ability* to specify on request which actions are correct, i.e., in accord with the rule in normal circumstances, and it can only be *exhibited* in action (use, application). Linguistic competence requires a sense of how to preserve the implicit

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[85] See Kripke 1982, ch. II; 55–56; Tushnet 1983, 824–827; Stroup 1984, 358; Boyle 1985, 709–710; Brainerd 1985; Radin 1989, 815–816.

[86] See at least Wittgenstein 1958, §§ 201, 208, 238.

[87] For an excellent introduction to these themes, see Medina 2002, ch. 6; Medina 2006, ch. 1.

[88] See Strawson 2008.

[89] See Langille 1988; Endicott 2001, 167–181; Patterson 1996, ch. 5 and 6; Marmor 2005, 112–118.

agreement in judgments and actions (which is quite different from the explicit agreement in opinions and interpretations[90]) and the normative expectations of normalcy of the other participants to the practice[91]. Interpreting a token-sentence, instead, is not an ability: it is an *activity* which consists in choosing between the different ways we have understood that token-sentence, substituting one expression of the rule for another more perspicuous – that is, better understood. According to the above mentioned authors, legal interpretation, even if it is very frequent, is a *parasitic* activity: the necessity of interpretation raises only when understanding is problematic. In conclusion, it is conceptually necessary that there exist easy cases in which the adjudicator understands the rule and needs not to interpret its linguistic expression in order to apply it.

The practice-based conception of meaning can be expanded in several directions. For example, Brandom emphasizes the importance of common law for the articulation of an apparatus of legal concepts that constrains decisions in virtue of the fact that the judges reciprocally acknowledge their authority and responsibility: «each judge is recognized (implicitly) as authoritative both by prior judges (the ones whose decisions are being assessed as precedential or not) and (explicitly) by future judges (the ones who assess the current decision as authoritative, that is precedential, or not). And each judge recognizes the authority both of prior judges (to whose precedential decisions the judge is responsible) and of future judges (on whose assessments of the extent to which the present judge has fulfilled his responsibility to the decisions of prior judges the present judge's authority depends)»[92]. Brandom urges then legal theory to describe the judge as engaged in a progressive social practice that requires her to become responsible to the tradition by appealing to the authority of the past decisions she's rationally reconstructing and integrating in deciding the new cases.

Another anti-skeptical strategy consists in re-shaping and couching Fish's intuitions in non-interpretive-terms. One may stress that the adjudicator's reconstruction of the context for statutory construction and the interpretation of precedent depends on her "sense" of the facts of the case, which is already concept-driven: the concepts she learns to apply as a student and/or beginner in the legal practice constrain her understanding and normative qualification of the facts (as a lawyer, public prosecutor or judge), which in turn lead her to understand the applicable rule without the need of interpreting (or at least to circumscribe the range of possible interpretations).

Finally, José Medina has elaborated a sophisticated normative polyphonic contextualism which aims at dismantling the traditional opposition between individual-

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[90] See Medina 2006, 35, where a criticism is developed against «the idea that *agreement can fix meaning*. […] This naïve semantic conventionalism or collectivism would make meaning utterly arbitrary and, therefore, it would be open to a social version of the Humpty Dumpty objection of semantic vacuity […]. On this view, there is no room for semantic constraints of any kind; linguistic communities […] are not bound by anything».

[91] See Medina 2006, 39–46.

[92] Brandom 2014, 33.

istic, subject-centered, voluntaristic models and sociological, community-centered, deterministic (or automatistic) accounts of discursive agency. On the first models, «which lure us into the illusion that discursive agency falls fully under the control of speaker»[93], «the powers of intentionality of individual speakers were considered the primary motor of communication; and everything else […] (intersubjectivity, consensus, linguistic conventions, etc.), were considered secondary and derivative, thus becoming subordinated to the individualistic and intentional domain»[94]. On the second accounts, which also involve an illusion that «portrays speakers and their speech acts as deprived of all subjectivity and spontaneity»[95], «It is only by virtue of some sort of social consensus, of agreed-upon norms and conventions»[96], and of social mechanisms of conditioning that our speech acts do acquire meaning.

According to Medina, these alternatives aren't conjunctly exhaustive and each disjunct presents serious flaws. On one hand, against voluntarism, the positions and perspectives that language users happen to occupy are not always chosen, and their normative attitudes are not always the result of a reasoned process. On the other hand, against the community-centered view, «Through externalization processes subjective elements that are initially idiosyncratic and pertain to the inner workings of individual minds become reflected in speech and behavior […] [thus] enriching, modifying, and sometimes even radically transforming the social milieu»[97]. Medina warns us against equating discursive agency to the *control* of our words, of the perlocutionary effects of our speech acts: such control is impossible. This is due to some structural aspects of communication: (a) meaning is contextual and interactional; (b) the different contexts of use are never reciprocally independent: each context is part of a historical sequence, and is defined by its relations with other (precedent, subsequent, parallel) contexts; (c) the chain of contexts is incomplete and unfinished, a "totalized speech situation" is an unachievable ideal: this doesn't merely depend on our cognitive limitations, but on the very possibility of new future uses that cannot be predicted, limited, or ruled out in advance. Discursive agency is thus hybrid: it merges freedom and constraint. The meaning of our speech acts depends on citational chains, on a constant process of re-contextualization that repeats and echoes past uses in new circumstances, but in ways that admit the possibility of modifications and eccentric innovations, which can in turn be echoed. Every speech act is thus at the same time linked to and partially constrained by past uses (contexts for use, interpretation, and adjudication are not created *ex nihilo*) and susceptible of innovative re-signification.

These ideas could be deployed to describe the functioning of legal precedent. New judicial decisions are citationally linked to (and echo) past holdings: but every new reconstruction of the norms implicit in the practice is also innovative, even if the degree of innovation may vary (up to reach the limit of overruling).

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[93] Medina 2006, 120.

[94] Medina 2006, 118.

[95] Medina 2006, 121.

[96] Medina 2006, 118.

[97] Medina 2006, 122.

6 The Remains of the Interpretation…

Is the interpretive legal skeptic silenced by such philosophical arguments? Perhaps not. In fact, she may contend that the above exposed practice-based conceptions miss the scope and the point of her worries, because they neglect the differential features of legal practice, and this undermines their appeal to understanding and enculturation[98]. The skeptic may argue that one can indeed learn "legal" language-games only after having learned "ordinary" language games. Insistence on the priority of understanding and the exceptionality of interpretation may well be accepted if it is referred to the majority of language-games in extra-legal contexts: but it does not *per se* exclude that legal language could be a constellation of "interpretive games"[99], in which the understood meaning of each custom, opinion, provision is made *problematic* (by lawyers and legal theorists), and stands in need of a justified (or at least justifiable) interpretive (and subsumptive) solution.

According to the skeptic, however, such a justification is only conceptually possible when the adjudicator moves beyond an ordinary understanding of the legal rules and draws interpretive arguments from the arsenal of the admitted competing canons, techniques, doctrines, and normative theories learned through legal enculturation. In other words, it is true that lawyers are trained and educated to frame cases in conformity with the concepts and categories of their legal culture: but they're also trained to bring into question the applicability of each legal concept (or pattern of concepts) and the soundness of each legal justification (of statutory constructions or interpretations of the precedents).

This legal contestability is not, from a synchronic point of view, completely unlimited: on one hand, it must fit what lawyers consider a reasonable "interpretive challenge" (claims that are generally deemed unreasonable are dismissed in negative easy interpretive solutions). Reasonableness, of course, is a vague and essentially contested concept: but its provisional core of clear cases of application may be taken back to the emphasis on understanding of practice-based views. Furthermore, given the conceptual impossibility to sever all citational links to previous contexts of use and the implicit wholesale agreement on the availability of certain hermeneutic instruments, absolute interpretive freedom remains an illusion.

These conclusions, however, are not incompatible with interpretive legal skepticism. The skeptic needs not deny that in the process of resignification and (re)contextualization of legal sentences some aspects of the past uses (interpretations and applications) are preserved; or that judicial decisions tend often to converge on certain interpretive justifications and outcomes; or that interpretive outcomes which are clearly unreasonable cannot be legally justified. Her point is that the legal system never provides a single justification or compel a uniquely warranted outcome in a particular case, because there's always room – given some significant social circumstances – for some reasonable innovations and departures from traditionally estab-

[98] See Arulanantham 1998.

[99] See Chiassoni 2000.

lished hermeneutic lines. The intrinsic openness of each legal interpretation to semiotic alternatives suffices to take the parity thesis and moderate interpretive skepticism seriously.

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