

Bruno Celano  
Legal Reasoning: Three Key Issues,  
and What Philosophy Can(not) Do about Them

1. *Introduction*

Three issues are, I think, crucial to our understanding of legal interpretation and legal reasoning generally. First, how does the interpretation of cultural, linguistic artifacts fare within non-cooperative interpretive games (sect. 3)? Second, how can a game in which the pronouncements of the umpire are final as to whether the rules defining the game itself have been complied with – how can such a game be a coherent enterprise at all (sect. 4)? Finally, granted that legal rules and principles are usually, albeit implicitly, regarded as defeasible in the light of moral considerations, what is the structure of the reasons leading, in such cases, to their revision (sect. 5)?

I shall only sketch the contours of these three issues, pointing to some of their implications and underlying assumptions, in the hope of giving the feeling of how important they are, and how central their role is in structuring our various puzzlements about legal interpretation and reasoning. In so doing, I shall avail myself of some philosophical tools (respectively, an informal understanding of strategic interaction and its various forms; the theory of constitutive rules; a particularistic view of reasons for action). I am not going to suggest, however, that philosophy (specifically, the deployment of these conceptual tools) does lead to a solution to the puzzles. On the contrary, resort to philosophical tools is only meant, here, to contribute to our awareness of the depth of the issues themselves. No “solution” – *a fortiori*, no “philosophical” solution – is in the offing.

2. *The Many Faces of Legal Interpretation*

Our first theme is, how does the interpretation of cultural, symbolic artifacts, such as law, fare under non-cooperative conditions, i.e., within non-cooperative interpretive games? Let me explain what I mean by this.

It is tempting to think of law as a form of communication: somebody tells somebody else how to behave. (I shall call this the “communication aspect” of

law, or, more simply, “law as communication”<sup>1</sup>.) According to this way of seeing things, legal interpretation comes very close to conversational interpretation. Law as communication mandates, or so it seems, quite a simple picture of legal interpretation: law-givers tell law-subjects (be they officials or ordinary citizens) how to behave; law-subjects are supposed to (try and) understand what law-givers meant by their utterances (i.e., the messages law-givers addressed to them).

Now, there are many reasons why legal interpretation is not like conversational interpretation<sup>2</sup>. Law is a cultural, symbolic – nowadays, mainly linguistic – artifact. Under many respects, the understanding of such artifacts differs from mutual understanding in ordinary linguistic communication<sup>3</sup>. The main difference is, it seems to me, this. In conversational interpretation, the task the interpreter has to accomplish is to retrieve what the speaker meant by his utterance<sup>4</sup>. Where symbolic works (cultural artifacts) are concerned, on the other hand, both the author and the interpreter face a problem (be it an aesthetic, or a scientific, an ethical, a technical, etc., one) – there is something at issue between them, they are both engaged in an attempt at grasping and articulating something intelligible (an idea) – and the understanding of the work depends, in part, on a correct understanding of the problem itself, its structure and its possible solutions – on an understanding, that is, of the subject matter itself. In the production and the fruition of symbolic works, in short, the author and the interpreter are both striving at understanding, as best they can, something they deem worth understanding.

I do not claim that what I have just said about the interpretation of cultural artifacts straightforwardly applies to legal interpretation. But I think that, due qualifications allowed, something of the sort is indeed at work in legal interpretation and reasoning (here the problem under scrutiny, the issue debated between authors and interpreters, is, roughly, how a given area of conduct is to be regulated). My point, here, is simply that this is one of the main reasons why legal interpretation is not merely conversational interpretation.

Another important reason – one which does not easily harmonize with the former, by the way – is that, nowadays at least, law is in large part made out of texts – of syntactical entities. What the law is, is, first of all, sentences, and sets

<sup>1</sup> By this phrase I do not mean to suggest that law is, “at bottom”, communication, nor that communication is the “basic function” of law, or any similarly implausible doctrine. What is suggested is that law has a communicative aspect, i.e., that it is *also* meant, and understood, as involving communication.

<sup>2</sup> See generally Dworkin 1986, pp. 53-65.

<sup>3</sup> See Gadamer 1960, part II, ch. II.

<sup>4</sup> In fixing, more or less firmly, what the speaker means by his utterance, both the literal meaning of the sentence(s) uttered and the speaker’s intentions are relevant. What their respective role is, and how they work together (when they do) in determining what is meant, is a vexed issue in the theory of meaning (see Strawson 1960).

of them<sup>5</sup>. “Law-givers” are usually groups of individuals with diverse interests and opinions (if and when they have any concerning the debated issue); it is extremely difficult plausibly to attribute any communicative intentions to such groups<sup>6</sup>. What is agreed upon may often be merely a form of words, rather than its meaning, or one of its possible meanings (and this may be the very reason why an agreement was reached in the first place). Sometimes, sentences agreed upon are the expression of «incompletely theorized agreements», deferring to the future crucial choices concerning their content and import<sup>7</sup>. What may safely be taken as the products of the activities of such legislative assemblies and groups are strings of words (“dead” letter), and we had better take them as such, rather than quickly run to their “spirit”<sup>8</sup>.

A third reason why legal interpretation is not simply conversational interpretation is well known: lawyers find available to them a rich panoply of forms of interpretive argument, patterns of inference, interpretive methods and techniques. They also draw, in understanding the law, on elaborate doctrines and – in civil law systems – on what is usually called “legal dogmatics”<sup>9</sup>.

Now, it must be stressed that conversational interpretation – the understanding of messages in ordinary linguistic communication – also draws on a rich variety of forms of argument, patterns of inference, methods and techniques. Understanding what somebody told you is no simple task, and there is no simple way of accomplishing it. Many things, loosely defined, are required, ranging from a charitable attitude to our interlocutor to the successful exploitation of conversational maxims, from the ascription to the speaker of a significant amount of agreement with us to the ability jointly to invent new ways of talking, or to reinterpret old ones<sup>10</sup>. There is no fixed order in which these tools are to come into play, and no guarantee of success. (Misunderstanding is a standing possibility.) But, as it happens, lawyers find available a *further* set of similar tools, partly different in different legal cultures, which further contribute to making legal interpretation different from conversational<sup>11</sup>.

<sup>5</sup> For what follows see Tarello 1980, pp. 101-2, 366-7; Waldron 1999, part I; Guastini 2004, p. 63.

<sup>6</sup> This is not only because of conceptual, or metaphysical, reasons concerning collective intentions, or the ascription of propositional attitudes to collective bodies. There are also important political reasons why this is so, both factual and normative. For a discussion of H. Kelsen’s and R. Dworkin’s views about this issue see Paulson 1998.

<sup>7</sup> Sunstein 1996, ch. 2.

<sup>8</sup> See, again, Tarello 1980, *passim*; Waldron 1999, esp. ch. 6; Guastini 2004, *passim*.

<sup>9</sup> Tarello 1980, chs. II, VIII; Diciotti 1999, chs. 4, 5; Guastini 2004, ch. 9.

<sup>10</sup> Davidson 1973, 1986; Grice 1989, part I.

<sup>11</sup> True, many of the tools lawyers resort to are adaptations from forms of argument, etc., structuring ordinary communication as well. Some, however, are peculiar to legal culture,

These, then, are some of the ways in which legal interpretation differs from conversational interpretation – some of the reasons why the “law as communication” picture of legal interpretation proves inadequate. To recapitulate, (1) law is under many respects similar to other cultural artifacts, like works of art, scientific writing, etc., and there are differences between conversational interpretation, where communication is paramount, on the one hand, and the interpretation of symbolic works, on the other, where what matters is understanding what is involved in a given issue, or grasping and articulating an idea. (2) Law is in large part made up of syntactical entities – e.g., statutes passed by a legislative assembly are, first of all, words. (3) In interpreting legal provisions, lawyers avail themselves of a rich and diverse array of forms of argument, patterns of inference, methods and techniques, and of theoretical constructions. (These different grounds, it should be noticed, do not fit easily with each other. Do they somehow make a coherent whole? I shall leave this question aside here.)

All this granted, however, law should nevertheless be understood, I think, as being *also* an enterprise of (linguistic) communication<sup>12</sup>. Law indeed has – and it is standardly understood as having – a communicative aspect. In thinking about the law, we cannot but think of it *also* along the lines of the “somebody tells somebody else how to behave” picture (how to behave *sans phrase*, or perhaps in order to pursue some goal of theirs). In short, law as communication captures, I claim, an essential aspect of law. We cannot do without the idea that law is *inter alia* (meant to be, and understood as being) communication.

Where does this lead us? As I have said, there are many respects (not necessarily coherent with each other) under which legal interpretation differs from mutual understanding in ordinary communicative contexts. So, if – as I have just claimed – communication is, nonetheless, an aspect of law we cannot do without, a question arises, namely, how does the communicative thread in legal interpretation fit with its other different, and diverging, dimensions? (It is easy to predict that it will not fit comfortably.) I shall now focus my inquiry on a particular aspect of this issue, amounting, in fact, to a further, more specific, reason why legal interpretation differs from ordinary conversational interpretation. What I am going to stress is a deep antithesis between law as communication, on the one hand, and a central dimension in legal interpretation and reasoning, its conflictive, or non-cooperative, dimension, on the other hand. The tension – or better, the conflict – between them sharpens the difficulty we encountered a few lines above (“How does the communicative thread in legal interpretation fit with its other different dimensions?”). In fact, it seems to me, it seriously threatens the

and, on the other hand, adaptation often implies significant modifications (see Tarello 1980, pp. 387-91).

<sup>12</sup> Fuller 1964, ch. II.

very possibility of understanding what goes on in legal interpretation and reasoning as instantiating a coherent interpretive and argumentative practice.

### 3. *Communication, Coordination, and Non-Cooperative Interpretive Games*

Legal interpretation raises problems pertaining to communication generally (thus, problems bearing on conversational interpretation as well); problems pertaining to the understanding of cultural artifacts; and, finally, problems stemming from the availability of a multifarious array of forms of argument, etc.<sup>13</sup>. But there is a further source of interpretive controversy which is, I think, crucial.

Pierluigi Chiassoni has persuasively shown that lawyers, judges and other officials play, in different contexts (in the courtroom, in the classroom, and so on), different «interpretive games» defined by different (sets of) goals, attitudes, methodological rules, forms of argument and interpretive techniques<sup>14</sup>. Given one and the same interpretive issue, different games may, and often do, lead to different conclusions. So, part of what matters, so far as the interpretation of legal sentences and, more generally, reasoning to legal conclusions are concerned, is what kind of game is being played, or is to be played in the relevant context.

Chiassoni's concept of an interpretive game is built on the model of Wittgenstein's concept of a linguistic game<sup>15</sup>. It draws on an intuitively clear, although undefined, notion – our ordinary concept of a game. I have no objection to this. I find the idea of a variety of legal interpretive games, so understood, illuminating. It seems to me, however, that Chiassoni's insight may be further developed in a promising direction, by resorting to a different concept of a game, namely, the one developed in strategic interaction theory (i.e., game theory).

The idea is simple. Communication may be understood as a strategic interaction situation (a “game” in the game-theoretical sense), specifically, as a coordination problem (or, better, as a set of recurrent coordination problems). Problems of legal interpretation, too, may be understood in terms of strategic interaction. (The parties involved include law-givers, different kinds of interpreters, different officials, etc.) But – Chiassoni's insight – legal interpretation, as a general field, is in fact made up of games of different kinds, having a variety of structures. Crucially, some of them are *not* coordination problems. The parties involved have deeply divergent interests. (These games are, in this sense, “non-cooperative”.) So, the question arises, how do the different kinds of games, cooperative and non-cooperative, legal interpretation is made up of fit with each other (if and when they do)? Do they form a coherent whole?

<sup>13</sup> Cf. Tarello 1980, p. 103.

<sup>14</sup> Chiassoni 1990, 2000, 2004. See also Guastini 1993, pp. 339-40, 2001, pp. 132-3, 2004, pp. 23-5.

<sup>15</sup> Chiassoni 2000, p. 86; see Barberis 2002, p. 288.

A strategic interaction problem (or a “problem of interdependent decisions”) is a choice situation, involving two or more agents, such that the outcome of the choice made by each agent depends on what the other agents involved choose to do, and this is common knowledge between them (each one of them knows that the outcome of each one’s choice, including his own, depends on the others’ choices, each one knows that each one knows this, and so on for an indefinite series of higher-order mutual beliefs). Each agent, then, has to choose among alternative courses of action (i.e., he has to decide what to do) on the basis of what he expects the others’ choices will be, knowing that each one of the other agents involved finds himself in the same predicament (i.e., that he, too, is trying to figure out what the others will choose to do, and to make his choice accordingly). In trying to figure out (to form an expectation about) what the others will choose to do, then, each agent has to try to figure out what the others expect him to choose to do, which in turn depends on what the others expect him to expect them to choose to do, and so on. Each agent’s choice depends on what he expects the others to expect him to expect the others to expect him (and so on) to do. In deliberating, each party has to (try to) replicate the others’ deliberation, which includes an attempt to replicate the others’ attempt at replicating his own deliberation, and so on.

Strategic interaction situations may belong to two fundamentally different kinds: (1) choice situations where the interests of the agents involved deeply conflict (in the limiting case, when one of them wins, the other loses; I shall label these “non-cooperative” games)<sup>16</sup>; (2) choice situations where coincidence of interests between the parties is predominant (at bottom, either all of them win, or all of them lose). Coordination problems are problems of the latter kind. More precisely, a strategic interaction problem is a coordination problem if and only if (1) there is rough coincidence of interests between the agents involved; (2) each one of them, then, prefers to conform to a given course of action (i.e., to do his part in a given pattern of common action) if the others do; (3) more than one solution to the problem (i.e., more than one pattern of common action, satisfying the interests of all) is available. (A coordination problem has, by definition, more than one possible solutions.) It is indifferent – or nearly so – to the parties which one among the different solutions available is selected, provided the same one is selected by all of them. Each one prefers to follow suit, if the others do.

Linguistic communication – achieving mutual understanding in ordinary conversation – may illuminatingly be understood as having the structure of a coordination game (or as a series of recurrent coordination problems)<sup>17</sup>. The parties share a prevailing interest in understanding each other, i.e., each one prefers to

<sup>16</sup> The label “non-cooperative” is not used, here, in the standard game-theoretical sense (meaning that the parties cannot communicate with each other). What I mean by a “non-cooperative” game is a game where divergence of interests between the parties prevails.

<sup>17</sup> Lewis 1969.

take a given expression as having a given meaning, if and when the others use it in this very same way. The parties (both speakers and interpreters) have no independent preferences as to which expressions (words and sentences) are to be used, or what the meaning of the expressions used should be. They only aim at understanding each other, no matter what the expressions used will be, no matter what the meaning attributed to them will be. They are ready to use any available expression, with any suitable meaning, provided its use will lead them to mutual understanding.

So, each one of the parties involved prefers sentence S to mean M1 rather than M2, if and only if the others do as well. None of them has an independent interest in that S should count as meaning M1 rather than M2, or vice versa – no preference independent of what the others' preferences thereabout are. Nor is there any independent interest in that M should be meant by S1, rather than S2, or vice versa. Conventions – linguistic conventions – are solutions to this kind of problems, communication coordination problems<sup>18</sup>.

Communication problems are, thus, a kind of interpretive games, where coincidence of interests (“interpretive interests”; i.e., interests as to what a given expression should be taken as meaning, or how a given meaning should be expressed) predominates. To the extent that it does in fact have a communicative aspect, law lends itself to this kind of interpretive game – to such an extent, understanding legal sentences is participating in a coordination game.

Lawyers and officials, however, often play utterly different interpretive games, which do *not* exhibit the structure of a coordination game. Such games are not aimed at mutual understanding, no matter what the forms of words leading to such understanding may be. Rather, they are aimed at showing that a *given* form of words – a set of given legal provisions, taken as barely syntactical entities – does have a certain meaning rather than another. Or they are aimed at showing that a given meaning is to be expressed through the use of a certain form of words, rather than a different one. Interpreter I1 will aim at showing that S means M1, I2 will aim at showing that S (the same form of words) means M2, different and incompatible with M1. Or, I1 will aim at showing that M is to be expressed by using S1, while I2 will claim that it is to be expressed by using S2.

Interpretive games having these features are not coordination games. They are, rather, non-cooperative strategic interaction situations. We may label them “struggles for the text”. The parties' interpretive interests (i.e., their preferences as to what a given expression should be taken to mean, or as to what the proper expression of a given meaning should be) conflict. Each one of them wins, or loses, according to whether the meaning he prefers to see attached to pre-

<sup>18</sup> This is the main claim about language made in Lewis 1969. Many (e.g., T. Burge, D. Davidson) have disputed this view of communication. I shall not discuss their objections here.

existent, given form of words does in fact end up as counting as its meaning, or whether a certain form of words is or is not taken to be the proper expression of a given meaning. What is at stake is not the attainment of mutual understanding, by using whatever syntactical means are available. What is at stake is, rather, the text – a fixed stock of sentences and words. The issue is not mutual understanding; it is, rather, having the text on one's side (i.e., showing that a given set of sentences is to be taken as having a certain meaning, or that a given meaning should be expressed through the use of certain expressions). In short, participants struggle in order that the text be taken as meaning what they want it to mean<sup>19</sup>.

The reasons grounding the – by hypothesis, conflicting – interpretive interests of different parties may be of various kinds. I list some of them: a preference for literal interpretation (interpretation according to the literal, be it ordinary or technical, meaning of the relevant words); deference to legislators; specifically, deference to the legislator's (real or supposed) intentions, as somehow contrasted to the letter of its pronouncements; moral or political convictions; interests of various kinds, private, professional, etc. The patterns of inference, methodological rules, forms of argument and techniques deployed are different and multifarious – the panoply of tools hinted at above (sect. 2). The parties are, in fact, caught in a strategic interaction problem, but it is not – not necessarily – a coordination problem<sup>20</sup>. Communication is not paramount.

So, how does the interpretation of this peculiar cultural artifact, law, fare under such mixed conditions – i.e., as torn between coordination and non-cooperative interpretive games? What are the relationships between the cooperative and the non-cooperative dimensions in legal interpretation? Do they (or can they) form a coherent whole, or are we doomed to conclude – a skeptical conclusion – that understanding law is, at the same time, a matter of plain communication and its opposite?

#### 4. *The Place of Nomodynamics*

Let us now come to our second issue. The question I want to ask is, how can a game in which the pronouncements of the umpire are final as to whether the rules have been complied with be a coherent enterprise at all?

A thought-experiment will introduce – and, unfortunately, almost exhaust – my discussion here. Take Euclidean geometry, with its definitions, postulates, and rules of inference. Suppose we add to the rules determining, in Euclidean geometry, what does count as a theorem, a further rule, to the effect that what-

<sup>19</sup> The point is clearly, though informally, stated in Guastini 2004, p. 39.

<sup>20</sup> The picture given by G. J. Postema (1982, sect. 4) isedulcorated. It only holds to the – limited – extent that law is, in fact, communication.

ever X (a given person or body of persons) declares to be a theorem will in fact count as a theorem (i.e., whenever X declares a well-formed formula of Euclidean geometry to be a theorem in Euclidean geometry, it thereby *is* a theorem in Euclidean geometry), as far as the prosecution of the game (i.e., the chain of subsequent theorem-demonstration) is concerned. We shall be allowed to assume the formula as a premise in drawing further conclusions about squares, circles, etc., their properties and relations, and so on.

Can Euclidean geometry, so modified, be understood as a coherent conceptual enterprise? The answer is, I think, no. The relevant process – proving theorems – will be exposed to the possibility of taking utterly incoherent, conflicting directions, getting us to inconsistent conclusions.

Suppose, further, that (1) it is understood that X is to declare a formula, p, to be a theorem if and only p is in fact a theorem according to the rules of unamended Euclidean geometry (this is what he is granted the power to do, and he is required to give his pronouncements under this constraint), and that (2) we empower a further person, or body of persons, X1 (and so on, for a finite number of steps) to review X's pronouncements (in general, it is for Xn to review Xn-1's pronouncements), and to declare them invalid (i.e., effectively to declare p *not* to be a theorem in Euclidean geometry, contrary to X's pronouncement) just in case what X has declared to be a theorem is not, in fact, a theorem, according to the rules of unamended Euclidean geometry (i.e., just in case X's pronouncement went beyond the power conferred to him). The series of review agencies must, however, be of finite length, because we need to get in reasonably short time answers to questions of the relevant kind (i.e., questions as to whether a given candidate, p, is in fact a theorem according to Euclidean geometry).

Given these further assumptions, Euclidean geometry becomes an even messier job. Establishing whether a given candidate is a theorem will be exposed to indeterminacy, conflicts, and pervasive uncertainty. Notice that, in our modified Euclidean geometry, the power granted to our nested Xs is the power to declare a given formula, p, to be (or not to be) a theorem *just in case it in fact is (or is not) a theorem according to unamended Euclidean geometry*. (The italicized clause specifies the content of the power.)

This is, I think, how things stand *vis-à-vis* legal interpretation and legal reasoning generally. The analogy is only partial, of course. The rules of unaltered Euclidean geometry ground logically valid (i.e. deductive) inferences; they warrant determinate, deductively grounded results. The Protean, messy heap of inference patterns, forms of argument, rules, paradigms and standards competent speakers resort to in order to establish the meaning of natural language expressions is far from warranting, in this way, determinate results. This is an obvious point. To the – limited – extent that law may be understood as being a communicative enterprise, this point applies to legal interpretation as well (see above, sect. 2). Moreover, the further panoply of forms of argument, methodological criteria, techniques, and doctrines competent lawyers resort to – the nuts and

bolts legal culture makes available to legal interpreters – may plausibly be thought to inject a further, significant amount of indeterminacy and conflict in the “law game” (see, again, sect. 2 above). There is, however, a further step to be taken – and here is where the analogy comes into play.

What should be added to the picture sketched in sects. 2 and 3 above is the empowerment of some individuals, or groups of individuals, as authorities as to whether or not legal rules have been complied with – the pronouncements of these people are, at the end of the day, final. (We cannot go *ad infinitum* in resorting to appellate authorities.)

Law, in other words, has a nomodynamic face: what is law depends, in part at least, on empowering rules, the empowerment of authorities<sup>21</sup>. Establishing the meaning of natural language expressions is, as already stressed in sect. 2 above, no easy task – we ordinarily manage, for better or worse, to accomplish it, but we also sometimes (always, perhaps, to some extent) fail. Communication through the use of a shared natural language may, and often does, break down. More so, when – as in legal interpretation – a further set of diverse criteria, forms of argument, techniques and doctrines are available. And, as we have seen in sect. 3 above, lawyers often play non-cooperative interpretive games (what they are engaged in, is not mutual understanding; it is, rather, struggling for the text). To all this, law adds a further complication. The pronouncements of interpretive authorities count, so far as the game is concerned (so far as, for instance, attributing legal properties and relations – rights, duties, powers, immunities, and so on – to people is concerned), as law. (We cannot appellate forever.)

I am not claiming that law unnecessarily complicates what could otherwise have been a much simpler practice. On the contrary, there are obvious reasons why resorting to authorities – introducing a nomodynamic element in the enterprise of establishing what the law is – is, in human affairs, a necessity. (I list some of them: limitations on how long we can reasonably wait for answers to legal questions; the need for a decision which finally settles controversy, the need to have standards that count as standards of the community as a whole, where individuals disagree; and so on.) But the problem remains, how can such a decision-making practice be understood as a coherent enterprise? Or, in other words, how can a game in which (1) the pronouncements of the umpire are final, and authoritative, as to whether the rules which define the game itself have been complied with, but which (2) all the same, is not the umpire’s discretion game (remember that the power granted to the umpire is so constrained: it is the power

<sup>21</sup> The term «nomodynamics» comes from the Pure theory of law (see e.g. Kelsen 1945, part I, chs. X-XI). It epitomizes the idea that law regulates its own production, i.e., that empowerment (granting an individual, or group of individuals, satisfying certain conditions, the power to perform acts having as their consequence the coming into existence of legal norms) is an essential aspect of law. (In Kelsen’s words, law is a «dynamic normative system».)

finally and authoritatively to declare that the rules have been violated *just in case they have, in fact, been violated*), be a coherent enterprise at all<sup>22</sup>? A game such as chess is, let us assume, defined by a set of constitutive rules (rules of the form “X counts as Y in C”), defining what counts as a move in the game, what counts as a stalemate, etc.<sup>23</sup>. Suppose that A and B are playing chess, and that, unawares to both of them, A makes a mistaken move, i.e., no move at all (for instance, he moves the knight diagonally; what the parties are unaware of, is that the move is a mistaken one). What happens, then? The game stops, I think. No further move will ever be made (in that game of chess), however things may go between the players. And now suppose it is for an umpire to declare, finally and authoritatively, whether the rules have been complied with or not. What he has the power to do is *to declare whether the rules have been complied with*. His pronouncements may, however, be wrong. (And we can envisage only a finite series of appellate umpires; the show must go on.) On the one hand, the game at hand is not the umpire’s discretion game: it is chess. But, on the other hand, when (1) the game stops because what a player has done is no move at all, and (2) the umpire mistakenly declares the purported move to be one, the game goes on all the same. This *is*, I think, incoherent. It is, however, how things go, both in games, and in the law<sup>24</sup>.

There is a reply to this line of argument, due to R. Guastini. Guastini does acknowledge that there is a problem, here. But, he claims, it is not a problem in the theory of legal interpretation. It is, rather, a problem arising «from the viewpoint of positive law»<sup>25</sup>.

<sup>22</sup> It will be obvious that I am here merely elaborating on a well-known Hartian point: although law is not the game of umpire’s discretion, the umpire’s pronouncements are, in the last resort, final. See Hart 1961, pp. 38-44; see also Celano 2002a, pp. 114-38.

<sup>23</sup> Searle 1969, pp. 33 ff.. I am not claiming that *all* games can be so defined (the ordinary concept of a game is open-ended), nor that any single game is *exhaustively* so defined (maybe in the definition further elements are needed; maybe “winning” cannot wholly be understood in terms of constitutive rules, etc.).

<sup>24</sup> Thus, we cannot conceive of law (nor of games, when umpires play their role) as “closed” practices, in the following sense. In these practices, there always remains open, for conceptual reasons, the possibility of passing a judgment, from outside the practice itself, as to whether it has been played correctly or not (i.e., as to whether the rules have been complied with or not). “From outside the practice”, that is, from a non-official standpoint. In short, the possibility remains open, as a conceptual matter, for the layman meaningfully to ask whether the officials’ pronouncements – even, and especially, the final ones – are right or wrong, and meaningfully to give a negative answer to this question. (I am assuming, here, that the law is not wholly indeterminate: that indeterminacy, in law – or, for that matter, in many games – is circumscribed. Those who do not share this assumption will find the argument in the text otiose – though not, I think, invalid.)

<sup>25</sup> Guastini 2004, p. 56.

I have no objection to this way of putting things. Whether the issue is labelled as one concerning legal “interpretation” is, up to a point, a matter of stipulation. There is no substantive disagreement, here, provided two points are granted. First, that the problem at hand, be it a problem concerning “interpretation” or a matter of “positive law”, is not a contingent one, one we could ever get rid of. Law is like that; it has a nomodynamic, empowering dimension. Thus, it seems to me, the problem indeed *is* a matter of “positive law”, provided this is understood in the following way: it is a problem stemming from the very concept “positive law” itself – nomodynamics is what the “positivity”, so to speak, of positive law amounts to. And, second, given a question of the form “What does the law say about this (kind of) case?” (“What is the content of the law *vis-à-vis* such situations?”, “How does the law answer to this question?”, and so on), the phenomenon I have been pointing to is of crucial importance to our understanding of whether, and to what extent, such questions may be answered, and whether, and in what sense, answers to them may be regarded as right or wrong. And, I think, “interpretation” is a good name (but I do not want to place any serious weight on words, here) for the enterprise of answering such questions, and its results.

##### 5. *Defeasibility, Particularism*

Legal rules and principles are usually, albeit implicitly, regarded as defeasible on moral grounds. We sometimes allow them to be defeated by moral considerations (i.e., we allow moral reasons to prevent the application of legal standards)<sup>26</sup>. This is, in fact, the old, vexed issue of equity (*epieikeia*). The question I want to ask is, what is the structure of the reasons leading, in such cases, to the revision of legal standards, and what difference does this make, as far as legal interpretation and reasoning are concerned? Or, in other words, what form does practical reasoning take, when the application of legal standards is prevented in the name of previously unspecified moral reasons, acting as defeaters of those standards?

The phenomenon I have in mind is, it seems to me, pervasive. Conditional legal rules, attaching a reasonably determinate legal consequence to a reasonably determinate descriptively specified antecedent, are usually thought of as defeasible in peculiar or exceptional circumstances. (“No vehicles in the park”; an ambulance is, though, urgently needed.) This is one of the ways in which moral considerations come into play in legal reasoning. There are others, however, more or less closely related to it. Some legal standards are – be it implicitly or explicitly – qualified by a *ceteris paribus*, or *rebus sic stantibus*, clause. Legal

<sup>26</sup> For a straightforward, lucid statement of this point see Sunstein 1996, p. viii.

standards having a dimension of “weight” (“principles”, or perhaps any legal standard whatever) lend themselves to being put to test in the light of moral considerations. “Balancing” legal principles (especially constitutional ones) often, maybe always involves moral considerations and evaluations. Some legal provisions include “open”, undetermined clauses (“unjust enrichment”, “reasonable man”, “grossly excessive”, etc.) or thick ethical concepts (“fault”), whose application requires moral argument. These are further, different ways in which moral reasons find their path into legal interpretation and legal reasoning generally.

What difference does this make? Let us consider defeasible conditional rules. A recalcitrant experience (an instance of «over-inclusion», in F. Schauer’s terminology<sup>27</sup>) may lead us to amending the rule – an exception is now specified. It is sometimes said that, similarly, the upshot of “balancing” conflicting principles is a rule<sup>28</sup>. What we get is, apparently, a specification of the conditions under which one of the conflicting principles prevails. Generally speaking, moral considerations may lead to revisions of legal standards; the revised standard specifies the conditions under which the previously unspecified standard applies, or the conditions under which one of the formerly conflicting standards prevails over the other. The same, it is assumed, holds in the case of *ceteris paribus* and “open” clauses.

All this granted, however, the crucial question still remains to be asked. What is the status of such revised standards? Specifically, are they – or, generally, might they ever become – immune from further revisions (in the light of further, previously unspecified, moral considerations)? Can revised standards prevent further intrusions of further moral considerations, subverting, once again, their application (i.e., acting, once again, as defeaters)?

Unless the answer to this question is in the affirmative, we shall never envisage a stable set of legal standards. The answer, however, depends on the structure of the moral reasons we appeal to in amending the legal standards at hand.

It is here, I think, that the current debate between particularists and generalists in the field of reasons for action, and moral reasons specifically, comes into play<sup>29</sup>. Particularism holds – very roughly – that any generalization as to what counts as a reason (be it even a *pro tanto* reason) for what is always liable to revision, in the light of the features of the present case. Projections and extrapolations, from the present to the future, or from the actual to the possible, may always be disappointed by recalcitrant experiences. If particularism is right, and if legal standards are, indeed, regarded as defeasible in the light of moral reasons,

<sup>27</sup> Schauer 1991, ch. 2.

<sup>28</sup> Alexy 1994, pp. 146 ff (but see, more recently, Alexy 2003, p. 439); Atienza, Ruiz Manero 1996, pp. 24, 31, 44.

<sup>29</sup> See generally Hooker, Little (eds.) 2000; Dancy 2004. I have argued in defense of a particularist conception of practical reasoning in Celano 2004.

then, these reasons – and, thus, our revisions of legal standards – will take a particularist shape.

Let us now return to the question asked above (“Could ever revised legal standards be immune from further revision in the light of further, previously unspecified moral considerations?”). What would be required for an affirmative answer is (the availability, or at least the conceivability, of) an exhaustive, final specification of all the sets of properties (i.e., sets of features of possible situations) which can possibly make a moral difference. We may call this, following C. E. Alchourrón and E. Bulygin, a final, or ultimate, «relevance hypothesis» for a given legal system<sup>30</sup>. Now, is an ultimate relevance hypothesis possible? Is this even a coherent, or sensible notion?

I think that the answer is no. Unsurprisingly, the notion of a final relevance hypothesis turns out to be conceptually flawed, for a variety of reasons<sup>31</sup>. Unconstrained practical reasoning – specifically, moral reasoning – is particularist in structure. No ultimate relevance hypothesis is ever available; in morality – and, by consequence, in law – we have to live with the standing possibility of previously unspecified and unspecifiable subversions of our (precariously) entrenched prescriptive generalizations<sup>32</sup>.

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<sup>30</sup> Alchourrón, Bulygin 1971, pp. 103-5.

<sup>31</sup> See Celano 2004, sect. 8, and 2005, sect. 3.

<sup>32</sup> This means that attempts at dealing with the phenomena listed at the beginning of this section by resorting to a logic of defeasible conditionals such as the one built by C. E. Alchourrón (1996a, 1996b, 1996c) – a strategy proposed by J. J. Moreso (2002a) – cannot but postpone particularist conclusions. In Alchourrón’s logic of defeasible conditionals a «revision operator» is defined, as satisfying a set of intuitively plausible formal constraints; its job is to lead us to revisions of the antecedents of defeasible conditionals. The result of such revisions, it is assumed, are strict (thus, non-defeasible) conditionals. It can be shown, however (Celano 2002b), that in dealing with the relevant phenomena non-defeasible conditionals could only be had just in case an ultimate, final relevance hypothesis were available. This is not the case. So, revisions of legal defeasible conditionals themselves remain defeasible (unless an arbitrary restriction on the domain of cases dealt with, and on the set of properties assumed to be morally relevant in deciding these cases, is imposed; see Moreso 2002b).

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