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On the Wrong Track: Andrei Marmor on Legal Positivism, Interpretation, and Easy Cases

Foreword

I will focus on three points from Andrei Marmor's book *Interpretation and Legal Theory*¹:

- 1) Marmor's view of legal positivism;
- 2) Marmor's view of interpretation;
- 3) Marmor's view of easy cases.

As to the first point, I will make two claims:

(i) Marmor's understanding of legal positivism – though he apparently identifies it with “legal positivism” as a whole (legal positivism *tout-court*) – is quite different from the understanding of legal positivism that has been defended, *e.g.*, by Herbert Hart and by Norberto Bobbio;

(ii) Marmor's understanding of legal positivism apparently misleads him into the wrong track of a theoretical inversion (*i.e.*, into an attempt, so to speak, to make the world fitting with theory, rather than the other way round).

As to the second point, I will make two claims:

(i) Marmor's two-stages model of (legal) interpretation – the understanding-interpretation model – provides no support at all for Marmor's own positivistic theory of law;

(ii) Marmor's concept of interpretation is at odds both with the basic tenets of Hartian and Continental “methodological” legal positivism, on the one hand, and with the actual practice of legal interpretation in the Western world, on the other hand. To support this latter claim, I will consider a couple of alternative concepts of interpretation that, from a strictly theoretical point of view, seem to fare better (a better choice) than Marmor's own concept.

As to the third, and last, point, I will argue that Marmor's concept of an easy case is likewise objectionable. I will support this claim, again, by comparing Marmor's own concept of an easy case with a few alternative concepts, which, in my view, are more in tune with legal thinking and legal practice, than Marmor's.

¹ A. Marmor, *Interpretation and Legal Theory*, Revised Second Edition, Oxford and Portland, Oregon, Hart, 2005.

1. *Misplacing Stakes*

As both the title – *Interpretation and Legal Theory* – and a few lines at the very beginning of the book do make clear, Marmor’s concern about (legal) interpretation is not, one may say, for (legal) interpretation’s sake.

On the contrary, Marmor’s dealing with (legal) interpretation is a by-product of a higher concern. It is, in fact, a means to secure a bigger stake: rescuing a cherished legal theory – “legal positivism” – from the attacks launched by a rival legal theory, “law as interpretation”, as championed by Ronald Dworkin. To quote Marmor’s own words²:

Law as interpretation calls into question the main tenets of its positivist rival, in substance as well in method. This book sets out to re-examine legal positivism in the light of this interpretative challenge.

In his *Postscript to The Concept of Law* – that was published in-between Marmor’s first and second edition of *Interpretation and Legal Theory* –, Herbert Hart argued that Dworkin’s legal theory does not really pose any serious threat to his own legal theory: neither «in substance», nor «in method», to repeat Marmor’s aptful words. For – as Hart argues – the two legal theories do actually belong to two very different intellectual realms.

On the one hand – Hart claims – his own positivistic theory of law is a sample of a general and descriptive jurisprudence, in the wake of Bentham’s, Austin’s, and Kelsen’s works.

On the other hand – Hart claims – Dworkin’s interpretivist theory of law is a sample of a particular and normative (justificatory) jurisprudence³.

Perhaps, Hart is too hasty in classifying Dworkin’s legal theory as a whole in that way. But there are sound grains of truth in his view.

Indeed, we may distinguish, within Dworkin’s “theory of law”, not less than four different sorts of claims:

(i) *genuine legal-theoretical claims* – like, *e.g.*, the claim that law is an interpretive enterprise; or, in plainer words, that interpretation is a basic ingredient, perhaps the most basic ingredient, in our legal systems, and is a value-laden activity;

(ii) *deontological claims* – like, *e.g.*, the claim according to which, *if* the law is an interpretive enterprise (if the law *is* interpretation), *then* the *proper* way for lawyers (legal theorists, jurists, judges, etc.) to do their job is to mimic Hercules J. along the path, and the ideal model, of constructive interpretation⁴;

² A. Marmor, *Interpretation and Legal Theory*, p. 8.

³ H.L.A. Hart, *The Concept of Law*, Second Edition, With a Postscript edited by P.A. Bulloch and J. Raz, Oxford, Oxford University Press, 1994, pp. 238-276, 306-307.

⁴ More precisely, *deontological claims* are about what legal theorists, jurists, and judges *cannot but do* – and, apparently, *ought to do* –, *if* they want to do their job *properly*, *i.e.*, in

(iii) *moral claims* – like, *e.g.*, the claim that law’s exercise of coercion upon its subjects is morally justified if, but only if, its overall principle is integrity;

(iv) *epistemological claims* – like, *e.g.*, the claim that one cannot provide a theory about what the law is, without performing acts of constructive interpretation, *i.e.*, without being a player in the law-as-interpretation game.

Tacitly rejecting Hart’s suggestion (though it may have been originally advanced on shaky reasons), Marmor maintains that law as interpretation *does* in fact *pose* a serious threat to legal positivism, both in substance and in method.

Why is that so?

According to Marmor, for the following reasons:

(1) legal positivism is committed to «the conceptual separation between law as it is and law as it ought to be»;

(2) the «separation thesis necessarily involves the assumption that judges can (at least in some standard sense, that is) *identify* the law and *apply* it without reference to considerations about what the law ought to be in the circumstances»;

(3) accordingly, legal positivism «is committed to the thesis that a distinction exists between (so-called) “easy cases”, where the law can be simply understood, and applied straightforwardly, and “hard cases”, where the issue is not determined by the existing legal standards»;

(4) law as interpretation, on the contrary, maintains that interpretation (*a*) is general all over legal practice, and (*b*) is a value-laden, law-making, activity;

(5) if the claims law as interpretation makes are correct, the separation thesis – as set forth at points (2) and (3) above – collapses;

(6) hence, legal positivism «cannot accept the view that law is always subject to interpretation»⁵.

Apparently, Hart and Marmor subscribe two different views about legal positivism. That is why Marmor looks at it as an endangered deity; while Hart, on the contrary, assumes a confident, Olympian, stance about its being unscathed by law as interpretation’s arrows.

The bewildered reader may ask: who is right?

Obviously, there is no absolutely “right” way of understanding “legal positivism”. In fact, several different conceptions of legal positivism have been patronized since Bentham’s times.

Nonetheless, Marmor’s and Hart’s positions suggest that the choice among different ways of understanding legal positivism is by no means a pure matter of tastes.

tune with the interpretive nature of the law. By the way, from the standpoint of a Continental lawyer, what Dworkinian lawyers have to do – the “constructive” (purposive), value-laden, three-stages, interpretation of the legal materials of their own legal system – shows deep resemblances with the holistic interpretation and “construction method” designed by the old masters of Continental legal dogmatics – Friedrich Carl von Savigny (1779-1861) and (the so-called “first”) Rudolf von Jhering (1818-1892) – for their fellow jurists.

⁵ All the quotations in the text are from A. Marmor, *Interpretation and Legal Theory*, p. 95.

In the following, I will try to show where the difference lays between Hart's and Marmor's understanding of legal positivism, and why, in my opinion, Marmor's understanding fares worse than Hart's, from a theoretical point of view.

Marmor identifies legal positivism by its commitment to «the separation thesis», *i.e.*, to the idea of «the conceptual separation between law as it is and law as it ought to be».

There are, however, several different ways of understanding the so-called separation thesis⁶. I will focus upon two of them, for they seem particularly useful to capture the difference between Hart's and Marmor's views about “legal positivism”.

(1) *The separation thesis as an epistemological thesis.* To begin with, the separation thesis («the conceptual separation between law as it is and law as it ought to be») may be understood as laying down, though in the delusive form of a shibboleth, the basic principle of a *peculiar line of inquiry about the law*: namely, a line of inquiry purporting to bring about genuine “descriptions” (explications) of the “law as it is” *in general* – either by accounting for the meaning of the basic terms of legal discourse across the different legal cultures in the Western tradition (Bentham), or by accounting for those notions, principles, and distinctions that are common to all developed (“mature”) legal systems (Austin), or even by accounting for the general “forms” and “structures” of what we are used to call “the law” (Kelsen, Bobbio, Hart).

On this reading, the separation thesis is *not* a *theoretical, first-order, claim about the law*. It is, rather, a *meta-theoretical* – methodological and epistemological –, *second-order*, claim about a way of scholarly inquiry about the law, purporting to promote a clear-cut distinction between the job of the Expositor, on the

⁶ See, for instance: H.L.A. Hart, *The Concept of Law*, Ch. IX; N. Bobbio, *Aspetti del positivismo giuridico*, 1961, in Id., *Giusnaturalismo e positivismo giuridico*, Milano, Comunità, 1965, pp. 101-126; H.L.A. Hart, *Legal Positivism*, 1967, in *The Encyclopedia of Philosophy*, 2nd ed., Detroit etc., Thomson Gale, 2006, vol. 5, pp. 237-239; 1967; N. Bobbio, *Il positivismo giuridico*, Lezioni di filosofia del diritto raccolte dal dott. N. Morra, 1961, n.e., Torino, Giappichelli, 1979; K. Füsser, *Farewell to 'Legal Positivism': The Separation Thesis Unravelling*, in R.P. George (ed.), *The Autonomy of Law. Essays on Legal Positivism*, Oxford, Clarendon Press, 1996, pp. 119-162; J.C. Bayón, *El contenido mínimo del positivismo jurídico*, in V. Zapatero (ed.), *Horizontes de la Filosofía del Derecho: Homenaje a Luis García San Miguel*, Alcalá de Henares, Servicio de Publicaciones de la Universidad de Alcalá, 2002, pp. 33-54; J. Morauta, *Three Separation Theses*, in “Law and Philosophy”, 2004, pp. 111-135; A. Schiavello, *Il positivismo giuridico dopo Herbert L.A. Hart. Un'introduzione critica*, Torino, Giappichelli, 2004, pp. 2-3; M. Barberis, *Filosofia del diritto. Un'introduzione teorica*, Seconda edizione parzialmente ridotta e interamente rivista, Torino, Giappichelli, 2005, pp. 15-21, 34-41; P. Chiassoni, *L'utopia della ragione analitica. Origini, oggetti e metodi della filosofia del diritto positivo*, Torino, Giappichelli, 2005, pp. 29-30.

one hand, and the job of the Censor, on the other hand – to recall a familiar, and basic, distinction Jeremy Bentham insisted upon since his *Fragment on Government* (1776), as the centrepiece of the revolution in legal studies he deemed necessary to foster the radical law reform he thought badly needed for England (and elsewhere).

By inviting jurists to keep the “description” of the law separate from its moral evaluation (and justification), this version of the separation thesis is by no means committed to the idea of “there being a full-fledged law out there”, in the form of a set of clear legal norms, simply waiting to be *identified* (discovered) and described by any *legal theorist* (or any jurist, lawyer, or judge whatsoever) in some *direct way*, *i.e.*, without paying attention to participants’ attitudes, evaluations, and interpretations.

Furthermore, from this perspective, the “law as it is” in any given society, or set of societies, may even be in a messy state, thriving with disagreements about the “proper” way of “getting to” the “right” contents of its authoritative norm-formulations (constitutions, statutes, regulations) and pieces of unwritten law (customs and precedents). Such a messy state, however, is nonetheless something a positivistic theorist may describe: for she may plainly account for participants’ – *i.e.*, legislators’, jurists’, and judges’ – moves, evaluations, interests, ideologies, interpretations, decisions, pieces of “law-making” and “law-application”, etc.

This latter point was made clear – an attorney would say, beyond any reasonable doubt – by Herbert Hart in a crucial passage of his *Postscript to The Concept of Law*⁷:

Moreover, even if the judges and lawyers of all the legal systems of which the general and descriptive legal theorist had to take account themselves did in fact settle questions of meaning in this interpretive and partly evaluative way, *this would be something for the general descriptive theorist to record as a fact on which to base his general descriptive conclusions as to the meaning of such propositions of law [...] Description may still be description, even when what is described is an evaluation.*

If we read these lines on the background of Hart’s jurisprudence as a whole, I think we may gather the following, concluding, points concerning (what may be regarded as) the Hartian view of the separation thesis:

- i) the basic tools of a positivistic legal theory, as a general and descriptive enterprise, are conceptual analysis *and* descriptive sociology;
- ii) conceptual analysis is meant to provide people – lawyers and laymen alike – with better legal concepts (of “law”, “legal rules”, “legal right”, “legal duty”, “validity”, etc.) than their ordinary ones;
- iii) conceptual analysis is a matter of re-definition, or rational recon-

⁷ H.L.A. Hart, *The Concept of Law*, p. 244, italic added. See also Id., *Legal Positivism*, pp. 237 ff.

- struction, of ongoing legal concepts, to be performed in view of explicatory purposes – accordingly, legal concepts ought to be defined in a clear and value-free way;
- iv) descriptive sociology is meant to provide legal theorists with basic information about the social phenomenon they are inquiring about, as a starting point for conceptual analysis and theory-building;
 - v) from the point of view of descriptive sociology, the fact that interpretation, as a value-laden way of drawing norms out of norm-formulations and other legal materials, may be general all over legal practice is a fact to be recorded, like any other fact within the field of given legal realities;
 - vi) it is *not* the business of the legal theorist to establish, by way of a direct inquiry on a par with legal professionals, which legal norms do “exist” (are valid) in a given legal order, and what is their content; indeed, the positivist legal theorist, on Hart’s view, is no player; rather, she is somebody looking at players, and how they play, to get a clear(er) view of the structure and working of the game, in order of bettering (refining, improving) players’ own understanding of what they are doing.

A similar outlook concerning “legal positivism” and the separation thesis was set out by Norberto Bobbio, in a few essays dating from the early 1960’s.

Bobbio’s analysis of “legal positivism” turns on two basic points.

First, the phrase “legal positivism” stands for three different things, namely:

(a) a set of normative theories, claiming the existence of a moral duty to obey positive law, *qua* positive law (*ethical positivism, ethical legalism, positivism as ideology*);

(b) a set of theories purporting to account for the basic aspects of positive legal orders, like sources, norms, relationships to coercion, completeness, consistency, interpretation, adjudication, and the nature of doctrinal study of the law (*theoretical positivism, positivism as theory*);

(c) a view about the possibility and usefulness of making positive legal orders the subject-matters of scientific investigations, centred on the meta-theoretical requirement of accounting for the law as it is, in a value-free way, *i.e.*, without blurring the line between legal knowledge and legal politics (*methodological positivism, positivism as an approach to the study of law*).

Secondly, there is no logical connection between the three forms of “legal positivism” considered above. As a consequence, one may be a staunch methodological positivist, without being necessarily committed either to some specific positivistic theory of law, or to any form whatsoever of ethical positivism.

(2) *The separation thesis as a theoretical thesis.* The separation thesis («the conceptual separation between law as it is and law as it ought to be»), however,

may also be understood differently, as a *theoretical claim* about *the law* (*actual legal orders*): *i.e.*, as the idea according to which, for anything we are used to call “a legal system” or “a legal order”, there *is* – and *must be* – a set of full-fledged, clear, legal norms, which may be simply and directly identified by observers (legal theorists) and participants alike, and may be straightforwardly applied by the latter to any individual case at hand.

On this version of the separation thesis, this set of full-fledged, clear norms is what makes meaningful any distinction between “the law as it is” and “the law as it ought to be”. Accordingly, if there were not such a set of full-fledged, clear, directly discoverable (through simple understanding), legal norms in any legal system, the distinction would be pointless. This, in turn, would make legal positivism to collapse: being a theory of law grounded on a distinction – “the law as it is/the law as it ought to be” distinction – that would appear utterly unsound in the face of facts.

It goes without saying, in the light of the preceding remarks, that there is no need to identify “legal positivism” with *this* peculiar version of the separation thesis – as it was made clear, I think, by its founders and masters, from Bentham onwards.

On the contrary, “legal positivism” may settle on the safer ground of the meta-theoretical (methodological, epistemological) version of the separation thesis I considered above, using it as the basic principle of inquiries carried out, for instance, by means of descriptive sociology and conceptual analysis (and reconstruction), as was masterly done by Hart.

According to Marmor, however, “legal positivism” is thoroughly committed to the second reading of the “law as it is/law as it ought to be” distinction. I think, however, this is a mistake.

Why such a mistake?

Three explanations may be provided.

(i) Marmor apparently endorses a quite crude view about legal positivism: paradoxically, a pre-Hartian view (see, again, Hart’s entry *Legal Positivism* for the *Encyclopedia of Philosophy*), where there is no sign of the distinction Bobbio brought clearly to the light, between three sorts of “legal positivism”, namely: methodological positivism, theoretical positivism, and ideological positivism.

(ii) Marmor apparently endorses a quite crude view about legal knowledge: a naïve view, if I may say so, according to which “to know the law” is to know its norms, by means of a direct access to them – a view that makes a must having *legal norms* out there, waiting to be known somehow by anybody, whatever her social or institutional role.

While “knowing the law” is a wholly different enterprise, if we look at it from the point of view of any ordinary practitioner in the Western legal world: it is knowing that there are certain authoritative texts that jurists and judges usually interpret to get norms for regulating cases; it is knowing how certain texts have been in fact interpreted by law professors in their hornbooks and review essays; it

is knowing how certain texts have been in fact interpreted and applied by judges in such-and-such a case; it is knowing that a certain text has never been interpreted and applied so far; it is knowing that a certain text has been interpreted in different, and incompatible, ways by different judges and jurists at different times; it is knowing which interpretive methods and “theories of interpretation” have been used in fact by jurists and judges to interpret certain texts, and may be safely used in the future; it is knowing which interpretations of a text are likely to be provided by which court in the future; etc. Accordingly, *this*, and nothing else, is a sound notion of “knowing the law” (as a knowing-that knowledge).

(iii) Marmor apparently overlooks the helpful suggestions coming from legal realism and Continental analytical jurisprudence, as to the sources of law and the business of *legal* interpretation and application, among which the distinction between “norms” and “norm-formulations” is paramount, for it suggests to distrust any loose talk about “the law” (“the law says”, “the law requires”, “according to the law”, etc.).

To sum up what I have been considering so far:

1. Law as interpretation is a threat for the specific version of “legal positivism” defended by Marmor: *i.e.*, for the specific positivistic theory of law (a sample of *theoretical positivism*) characterized by a specific – and objectionable – view about the separation thesis (as a theoretical thesis about the *contents* of any *positive legal order*).

2. Contrariwise, law as interpretation is no threat whatsoever for the specific version of “legal positivism” endorsed, *e.g.*, by Herbert Hart and Norberto Bobbio (*methodological positivism*).

3. There is no necessary connection between the specific version of methodological legal positivism endorsed by Hart and Bobbio, on the one hand, and the specific version of theoretical legal positivism defended by Marmor, on the other hand.

4. Consequently, what is at stake (if anything), when law as interpretation is afoot, is not “legal positivism” as a whole, but only a peculiar version of it: *i.e.*, Marmor’s version.

5. Marmor’s version of legal positivism, however, leads on the wrong track of a theoretical inversion, as I suggested at the outset. Indeed, provided “legal positivism” *needs* that there be “objective” legal norms out there (norms that judges can simply *identify*), otherwise the separation between the law as it is and the law as it ought to be would collapse, positivism *must* find out a way to claim that, in any legal order, there are *in fact* “objective” *legal norms*. This way, as we shall see in a moment, has to do with interpretation and easy cases. But, as I will suggest, we are apparently, here again, on the wrong track.

2. Marmor on Interpretation

In Chapter 2 of *Interpretation and Legal Theory*, Marmor lays down the conceptual foundations of his theory of legal interpretation.

The core of Marmor's theory consists of two basic ingredients:

- (i) the distinction between "understanding" and "interpretation";
- (ii) a communication-intention characterization of interpretation.

The present section contains two parts.

In the first one (§§ 2.1, 2.2), I will provide a swift account of Marmor's views on the two points above.

In the second, and final, part (§ 2.3), I will set out a few critical remarks.

2.1. Understanding v. Interpretation

After a careful analysis of Donald Davidson's radical theory of interpretation ("radical interpretation") and Paul Grice's theory of meaning, Marmor establishes at the core of his theory of (legal) interpretation the conceptual distinction between *understanding* and *interpretation*.

In Marmor's view, there are apparently six basic differences between these two items.

<i>Understanding</i>	<i>Interpretation</i>
(1) an unreflective process, not an <i>activity</i> properly so-called;	(1) a (reflective) <i>activity</i> ;
(2) that is <i>determined</i> by linguistic rules/conventions (followable rules);	(2) that is <i>guided</i> by paradigms (respect, emulation);
(3) from (perceived/read) sentences to semantic meanings;	(3) from unclear, indeterminate, semantic meanings to clear, determinate, meanings;
(4) that represents the whole story in linguistic transactions, when language works smoothly;	(4) that occurs when there is a crisis in communication, <i>i.e.</i> , when language has run out;
(5) an original and independent process;	(5) a parasitic activity: it always presupposes a previous understanding;
(6) a general process.	(6) an exceptional activity.

While establishing the distinction between understanding and interpretation, on the above terms, Marmor rejects the “radical interpretation” view set forth by Donald Davidson, among other things, for its broad and, in Marmor’s view, confusing, notion of “interpretation”: a notion that does not pay attention to keeping “interpretation” carefully separate from “understanding”.

2.2. Interpretation

According to Marmor, as we have seen, interpretation has to be properly understood as a parasitic, exceptional, activity.

Which activity, however?

Here you are the basic points of Marmor’s view on the subject.

(1) «[I]nterpretation is essentially a matter of *attributing intentions*, that is, in the pragmatics sense of ‘meaning’, [...] *meaning that* such-and-such by an act or an expression».

(2) «[I]nterpretations need not be based on the intentions of *actual* authors; the meaning of an act is [also] understandable in terms of *counterfactual intentions*, that is of the intentions one could attribute to a *fictitious author* characterized in certain ways».

(3) The «characterization of “the author” constitutes a certain *framework of reference*, as it were. It defines the *parameters* employed throughout the interpretation in question».

(4) «[W]hile these parameters are potentially variable, *the logic of interpretative statements* is such that they are typically reducible to the attribution of intentions. Hence there is *no need for a third meaning* of “meaning” to explicate the concept of interpretation», beyond linguistic meaning (that depends on linguistic rules), on the one hand, and intentional meaning (that depends on author’s intentions), on the other hand. This is so, because the «grammar of interpretation» encompasses both the activities of meaning-determination that are oriented to the actual intentions of actual authors, on the one side, and those that are oriented to the fictitious intentions of fictitious or stipulated authors, on the other side.

(5) The characterization of a fictitious, or stipulated, author may vary along several dimensions, and different levels of abstraction. In fact, one may regard as “the author’s intention” the several, quite different, items below:

(a) the actual communication-intention of a flesh-and-blood author (say, William Shakespeare), about the meaning of a certain text of his own (say, a given character, or a given passage, from *Hamlet*);

(b) the counterfactual communication-intention that a flesh-and-blood author

(say, William Shakespeare) would recognise as his own intention, had he been aware of a certain point or issue;

(c) the counterfactual communication-intention one may ascribe to a flesh-and-blood author (say, William Shakespeare), as to a certain text of his own (say, a given character, or a given passage, from *Hamlet*), assuming, for instance, that the author had written the text in a different age from his own (say, in the XXth century), or had been aware of certain ideas unavailable at his time (say, Freud's psychoanalytic theories, Derrida's literary theory, Nietzsche's nihilism, Henri Rousseau's aesthetics, etc.);

(d) the communication-intention about the meaning of a certain text (say, a given character, or a given passage, from *Hamlet*), as it may be ascribed to an idealized author (like «some ideal representative of a certain genre»)⁸.

2.3. *Why Marmor's theory of (legal) interpretation?*

Suppose Marmor's theory of interpretation – with its distinction between understanding and interpretation, and the peculiar notion of interpretation above – is a widget on the shelf of a plushy, downtown, shop.

Should we buy it? Are there any – apparent or hidden – flaws we, the customers, should be aware (and beware) of?

To deal with this problem, I will proceed as follows.

First, I will briefly analyse the understanding-interpretation model, both as a general model, and as a model for legal interpretation.

Secondly, I will briefly analyse Marmor's proposal as to the concept of “interpretation”: again, both in general and as a notion suitable for the legal field.

2.3.1. *On Marmor's Understanding-Interpretation Model*

According to Marmor, the determination of the meaning of any piece of linguistic communication (say, an oral or written sentence) *necessarily* involves a process of *understanding*.

Such a process is determined by the linguistic rules of the relevant language, and may disclose a fully determinate (linguistic) meaning for the sentence at hand.

Whenever the (simple) understanding of a sentence does not point to a determinate meaning, the hearer/reader cannot avoid *interpreting* the sentence: *i.e.*, she cannot avoid determining its meaning on the basis of the intention of its author, given a certain characterization of the author's intention the hearer/reader has previously decided to act upon.

Linguistic meaning is a matter of discovery, by means of the hearer/reader's

⁸ All the quotations in the text come from A. Marmor, *Interpretation and Legal Theory*, pp. 23, 23-24, and 24.

linguistic skills. Contrariwise, intentional meaning is a matter of creation (decision), for it is the hearer/reader that ultimately sets the relevant «parameters» and «framework of reference».

The understanding-interpretation model is a *general* model: it purports to provide a proper account of what is loosely called “interpretation”, not only in ordinary linguistic transactions (say, on the Greenwich bus or at Cindy’s Restaurant), but also within the law.

In fact, it is precisely on the basis of such a general model that Marmor claims to be able to vindicate legal positivism’s separation thesis (as a *theoretical* claim), or the idea that it is possible to distinguish, for any legal order, between the law as it is and the law as it ought to be.

Why? Because the law as it is corresponds precisely to the clear and determinate linguistic meanings of norm-formulations as they are – and can be – grasped by way of simple understanding; while, whenever interpretation is needed, the line between the law as it is and the law as it ought to be fades away, due to the fact that interpretation depends on the interpreter’s conception of the author’s intention.

Marmor’s understanding-interpretation model, however, is objectionable on (at least) two counts.

First of all, the understanding-interpretation model, by itself, is not capable of supporting Marmor’s purported vindication of legal positivism (in his own version).

Secondly, the understanding-interpretation model, as an explicatory model concerning “legal interpretation”, faces powerful rivals⁹.

As to the first count, the only one I am going to deal with here: suppose we look at the law and legal practice through the glasses of Marmor’s understanding-interpretation model.

What do we get out of it?

⁹ The understanding-interpretation model is a *psychological model*: it purports to account for the essential structure of the “interpretation” processes in the mind of people who hear/read sentences (this is made clear, for instance, by Marmor’s characterization of understanding as *unreflective*, while, on the contrary, interpretation is a *reflective, conscious*, activity). From this perspective, so far as legal interpretation is concerned, a widely more sophisticated model, on the same tune as Marmor’s, has been outlined by Carlos E. Alchourrón and Eugenio Bulygin in their masterwork *Normative Systems*, Wien - New York, Springer, 1971 (see P. Chiassoni, *Presentazione*, § 3. *Le disavventure dell’interpretazione*, in E. Bulygin, *Il positivismo giuridico*, Milano, Giuffrè, 2007). There are also very different psychological models, though, where linguistic meaning has not such a pride of place: see, e.g., H. Kelsen, *Reine Rechtslehre*, 1960, Wien, Europa Verlag, 2000, Ch. VIII; R. Alexy, *Juristische Interpretation*, 1993, in Id., *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie*, Frankfurt, 1995, pp. 71-85. Along with psychological models, two other types of models may be singled out, namely, *methodological models*, concerned with the *tools* of legal interpretation (interpretive arguments, interpretive directives or canons, interpretive codes), and *sociological models*, concerned with social and cultural limits to what could otherwise be achieved at a purely methodological level.

I think we do not get anything more than the following, trivial, output: *sometimes* norm-formulations (constitutional clauses, statutory clauses, etc.) *do have* in fact a clear and determinate linguistic meaning; *sometimes* they *do not have* it.

Marmor, however, claims that the clear and determinate linguistic meanings of norm-formulations amount, at any given moment, to “the law as it is” for any given society.

Unfortunately, in order to get to *that* conclusion, a further premiss is needed: *i.e.*, the definitional premiss according to which “the law as it is”, for any legal order whatsoever, is tantamount to the clear and determinate linguistic (literal) meanings of its norm-formulations.

Such a premiss, however, is by no means a matter of course.

On the one side, from a theoretical point of view, *i.e.*, from the viewpoint of a general and descriptive jurisprudence *à la* Hart, the premiss is clearly false.

On the other side, from a normative point of view, *i.e.*, from the viewpoint of a theory about what *ought* to be considered as the law as it is, for any legal order whatsoever, the premiss is highly controversial. Indeed, it purports to make the literal rule of interpretation as paramount over any other interpretive canons, and a basic ingredient of every legal order’s rule of recognition.

To the present purpose, it is not necessary to analyse such a definitional premiss any further.

It is enough having brought to the light that the understanding-interpretation model *needs* it; and consequently that, by itself, the model cannot do the job Marmor expects it to do for him.

2.3.2. *On Marmor’s Concept of Interpretation*

Let’s turn now to Marmor’s concept of interpretation, and ask the usual, overwhelming, question: Why should we buy it?

Apparently, Marmor provides just one basic argument in support of his view: namely, that what he is doing, while claiming “interpretation” to be such-and-such (*i.e.*, the contingent activity of ascription of a communication-intention to an actual or fictitious author) is tantamount to an «explication of the grammar of interpretation»¹⁰.

Marmor’s argument, however, is far from convincing. At least for the following reasons.

(1) *Undercover arbitrariness*. “Interpretation” is used in many different ways. In fact, in many more ways than the ones Marmor swiftly mentions at the beginning of Chapter 2 of his book¹¹. Accordingly, Marmor’s “explication” of “the”

¹⁰ A. Marmor, *Interpretation and Legal Theory*, pp. 23-25.

¹¹ In a recent essay, for instance, M. Ferraris, *Interpretare discorsi: ermeneutica*, in C. Bianchi, N. Vassallo (eds.), *Filosofia della comunicazione*, Roma-Bari, Laterza, 2005, pp. 90-110, points to seven different meanings of the word “interpretazione” (interpretation).

grammar of “interpretation” is the explication of just one of the several meanings which the term “interpretation” is being used to convey, in ordinary language as well as in legal and philosophical essays.

Since there is not one “grammar” of (just one concept of) “interpretation”, but many grammars for many different concepts, Marmor’s argument is no argument at all. It is, rather, the expression of his preference about a certain meaning of “interpretation” he deems better, for some (good or bad) purpose of his own.

(2) *A pointless fiction.* Suppose we want to assess the value of Marmor’s concept of interpretation in its own right.

In the wake of Grice, Marmor selects a communication-intention view about the sort of meaning “interpretation” is meant to determine. Being aware of recent trends in literary criticism and (perhaps) lawyers’ ways of looking at legal interpretation, however, Marmor makes clear that “the author” may also be an utterly stipulated or fictitious entity.

When the author is fictitious, the success of any piece of interpretation depends – as Marmor makes clear – on the correspondence of the outcome of any piece of interpretation to the «parameters» making up the fictitious author (for instance: what a good, rational, upright, coherence-oriented, completeness-oriented, common-weal promoting, wise, not-vicious, legislator would have meant by a certain norm-formulation).

In these cases, the parameters of interpretation are clearly what the interpreter thinks proper: they correspond to the interpreter’s view about the correct way to interpret a text all the way through.

We have moved from *intentio auctoris* to *intentio operis* and, above all, to *intentio lectoris*. This fact, which Marmor clearly avows, is not a marginal phenomenon: it suggests that interpretation is basically an interpreter’s game. It is the interpreter who sets the rules (the “parameters”): it is the interpreter who establishes *which* author, and *which* intention, are to be deemed relevant for a “proper interpretation of a text”.

In the light of these remarks, one may wonder why Marmor did not choose a concept of interpretation that would bring this crucial point to the fore in a more direct way.

In other words: why should we buy a concept of interpretation, like Marmor’s, with a built-in allowance for fictions?

Apparently, a different concept of interpretation would be more honest and fruitful – and, I claim, more in tune with the basic tenets of methodological positivism I have recalled above (§ 1).

Consider, for instance, the following two concepts of interpretation, as widgets in the sober windows of a rival shop.

Here you are a first concept.

Interpretation is the ascription of meaning to a text according to the parameters of interpretive correctness selected by the interpreter.

These parameters, as a matter of fact, may include reference to the literal meaning of the text, and/or reference to the actual communication-intention of the actual author of the text, and/or reference to a counterfactual communication-intention of the actual author of the text, and/or reference to a wholly made-up communication-intention of a fictitious author, and/or reference to values like reasonableness, no-nonsense, coherence, completeness, justice, integrity, the common good, wealth-maximization, moral perfection, etc.

This concept saves a lot from Marmor's, except for two basic points.

On the one hand, the concept suggests that the literal (linguistic) meaning of a sentence – though it may be a psychologically necessary item in the mind of the interpreters – needs not having any pride of place, from the perspective of interpreters and interpretive “theories” (and methods), within the parameters of (all-things-considered) interpretive correctness.

On the other hand, the concept shows no exclusive commitment to a communication-intention view of sentence-meanings and, accordingly, no commitment to a notion of interpretation with a built-in allowance for fiction.

Notice, in passing, that the concept of interpretation above is not necessarily connected to any form of interpretive nihilism whatsoever. In fact, the selection, by a given interpreter, of the proper parameters of interpretive correctness may not be free. In fact, it may be a choice tightly controlled, for instance, by public opinion at large, the opinion of fellow interpreters (the interpretive community), or even the wise will of the Dear Leader.

Coming now to the law, and taking into account the ways jurists, judges, and lawyers go about when they “interpret” a constitutional clause, a statutory proviso, etc., a second concept of interpretation – again quite different from Marmor's – may be outlined. Consider the following.

Interpretation is the ascription of meaning to a legally authoritative text according to the parameters of interpretive correctness selected by the interpreter.

These parameters are represented by clusters of interpretive directives (interpretive codes), that, as a matter of fact, may include reference to the literal meaning of the text, and/or reference to the actual communication-intention of the actual author of the text, and/or reference to a counterfactual communication-intention of the actual author of the text, and/or reference to a wholly made-up communication-intention of a fictitious author, and/or reference to values like reasonableness, no-nonsense, coherence, completeness, justice, integrity, the common good, wealth-maximization, moral perfection, etc.

As a matter of fact, interpretive codes may be selected by interpreters out of a given set of interpretive directives, either in an *ad hoc* way, *i.e.*, according to a particular outcome at hand to be secured, or according to a basic and relatively stable methodological option, depending on value-judgments about the proper way for an interpreter to perform her job within a such-and-such legal order.

Whenever legal orders do contain norm-formulations concerning (constitutional, statutory) interpretation, these are usually formulated in such a loose way as to leave to the interpreters the ultimate responsibility about the “proper” set of interpretive directives to be used generally, or on an *ad hoc* basis.

This latter concept of interpretation I take as particularly suitable, in explicating the way lawyers (judges, law-professors, barristers, etc.) think about legal interpretation.

It is, furthermore, a general and value-free theoretical concept, in tune with the tenets of methodological positivism.

3. *Marmor on Easy Cases*

The last piece of Marmor’s theory I would like to discuss here is, as I said in the “Foreword”, Marmor on easy cases.

Like in the previous section, I will proceed as follows. First, I will analyse Marmor’s concept of an “easy case” (§ 3.1). Secondly, I will outline a couple of alternative concepts that, in my opinion, fare better than Marmor’s, from the viewpoint of the basic tenets of methodological legal positivism (§ 3.2).

3.1. *Marmor’s View*

We have already seen why Marmor attaches such a special importance to easy cases¹², suggesting that he may be on a wrong track.

Here, I am interested in assessing the theoretical value of Marmor’s concept of an easy case in its own right, *i.e.*, apart from the peculiar theoretical jobs it was meant to do.

Marmor characterizes an “easy case” as follows¹³:

An ‘easy case’ [...] means that the relevant legal norm *can* simply be understood, and applied to the particular case without the mediation of the interpretation of the norm; we just understand what the law says, and know that it applies, or not, to the case at hand.

¹² A. Marmor, *Interpretation and Legal Theory*, pp. 95-96: «Legal positivism cannot accept the view that law is always subject to interpretation [...] Legal positivism is committed to the thesis that a distinction exists between (so-called) “easy cases”, where the law can be simply understood, and applied straightforwardly, and “hard cases”, where the issue is not determined by the existing legal standards [...] To a greater or lesser extent, judges participate, through their interpretive activities, in the process of modifying and creating law. First, however, *there must be a law there to interpret*».

¹³ A. Marmor, *Interpretation and Legal Theory*, p. 97.

By way of a tentative analysis, Marmor's concept of an easy case is liable to different readings. Indeed, the relevant legal *norm-formulation* (in Marmor's terms "legal norm") "can" «simply be understood and applied» in not less than three different ways.

(1) *Linguistic-can*: the relevant norm-formulation is liable, by means of a simple understanding (literal reading), to provide the judge with a legal norm under which a case at hand clearly may (or may not) be subsumed.

(2) *Methodological-can*: if a judge limits herself (*a*) to a literal reading of the relevant norm-formulation and (*b*) to the application of the literal norm to a case at hand, her way of proceeding may be regarded as fully justified according to a set of interpretive directives (interpretive theory, interpretive code), the judge herself may invoke as the "proper" set.

Notice that from this perspective, stopping at the simple understanding of a norm-formulation is not only a linguistic possibility (linguistic-can); it is also allowed, and justified, by a set of interpretive directives (interpretive theory, interpretive code) the judge deems proper.

(3) *Sociological-can*: if a judge limits herself (*a*) to a literal reading of the relevant norm-formulation and (*b*) to the application of the literal norm to a case at hand, her way of proceeding will be praised as reasonable, good, proper, fully justified, etc., by fellow judges, and/or competent jurists, and/or society-at-large, etc.

Notice that from this perspective, stopping at the simple understanding of a norm-formulation is not only a linguistic possibility (linguistic-can), nor a simple methodological possibility (methodological-can); it is also a course of action that is in tune with (and allowed, approved, justified by) the methodological normative attitudes of the generality of the relevant interpretive community, the public opinion, etc.

A few remarks are in order.

Marmor's notion of an easy case apparently mirrors the first view (linguistic-can). Accordingly, his concept of an easy case purports to be a purely linguistic one, fully detached from interpretive directives, ideologies, and social attitudes. These latter ingredients, however, are part of the stock-in-trade of the legal interpretation business, at least in our present legal cultures. Accordingly, a theoretically proper concept of an easy case should somehow account for them.

From the methodological perspective of the tools of legal interpretation and so-called interpretation theories, simple understanding (literal meaning) needs not to be – and rarely is – the whole story about the reading of norm-formulations.

Accordingly, Marmor's conceptual proposal about "easy cases" faces the following dilemma.

Either it is a genuine theoretical definition of an "easy case", purporting to capture judges' and jurists' general idea about it; but, in such a case, it is clearly false.

Or it is tantamount to a claim – *to a piece of a normative theory of legal interpretation* – according to which, when a norm-formulation, by a literal reading (simple understanding), is applicable to a case at hand, it *ought* to be applied to it, comes what may: even though it is at odds with constitutional principles or other higher norms, it carries unwelcome consequences, or, in the negative case, it presents the law as gappy.

3.2. *Two Alternative Concepts*

Marmor's concept has a few competitors, which, from a theoretical viewpoint, may be regarded as preferable.

Let's have a very quick look at them.

Methodological easy case:

- (a) the relevant norm-formulation has a clear and determinate literal meaning;
- (b) the clear and determinate literal meaning is all-things-considered justified from the point of view of the proper set of interpretive directives (interpretive code);
- (c) the clear and determinate literal meaning does clearly fit (not fit) with a case at hand.

Sociological easy case:

- (a) the relevant norm-formulation has a settled meaning within the legal profession (and/or society-at-large) – which, by the way, may also be quite different from its literal meaning;
- (b) the settled meaning can be discovered by looking at the past interpretations of the norm-formulation by judges and jurists;
- (c) the settled meaning does clearly fit (not fit) with a case at hand;
- (d) any different interpretation of the relevant norm-formulation would be regarded by the legal profession (and/or society-at-large) as the outcome of ignorance, mistake, unreasonableness, or sheer arbitrariness on the part of the legal practitioner.

Both concepts take into account a wider set of features from legal thinking and legal experience than Marmor's. Both concepts are value-free from the perspective of normative theories of interpretation. Both, in my view, fare better than Marmor's, from the point of view of the basic tenets of methodological positivism.