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Legal Interpretation and the Objectivity of Values

1. *Marmor's Theory of Interpretation: Descriptive or Prescriptive?*

Andrei Marmor's *Interpretation and Legal Theory* focuses on some philosophical aspects of legal interpretation which have been somewhat neglected by legal theory in recent years, such as the communicative function of legal texts and the dependence of their content upon what they have been intended to communicate. By analyzing these aspects, Marmor gives an original and challenging picture of the relation between interpretation and intentionality, as well as between interpretation, authority, and the rule of law. It is a picture which aspires to be original in content but traditional in method. Along the lines of Hart's legal positivism, Marmor sets out to provide a better understanding of legal interpretation drawing a straightforward line between the law as it is and the law as it ought to be. He aims not at *prescribing* how to interpret the law but at *describing* the very nature of legal interpretation.

In this essay I will argue that Marmor's understanding of legal interpretation might be more coherent if he would admit that his is not a descriptive theory of legal interpretation in a genuine sense<sup>1</sup>. Marmor is not concerned with interpretation as a matter of fact that needs to be accounted for. He is concerned with interpretation as a means to realize some objective values: the values which interpretation ought to instantiate if legal officials are playing the social game called democracy and the rule of law.

In this sense, I propose to label Marmor's view "conceptual prescriptivism": the law ought to be such as to fit the concept we have of it. It is a concept depending on the objective, although conventional values, the law is taken to be bound to realize.

I think that this admission would neither drain Marmor's analysis of its philosophical interest nor imply a dismissal of legal positivism. In fact I do not maintain that it is not possible to give a genuine description of legal interpretation, nor that legal positivism is necessarily bound to such an account. I am simply claiming that Marmor's theory of legal interpretation does not offer a genuine descrip-

<sup>1</sup> In this essay I take a statement to be genuinely descriptive if, and only if, it has a language-to-world direction of fit (whatever the world is taken to be), and I take a statement to be genuinely prescriptive if, and only if, it has a world-to-language direction of fit (whatever the world is taken to be). Cf. Anscombe 1963; Searle 1975; Searle and Vanderveken 1985.

tion of his subject<sup>2</sup>. It offers a description of how officials are bound to interpret the law if they strive to realize a set of social and political values: the values identifying the social practice officials take part in.

This essay is divided into three parts. First, I will show that Marmor's theory of legal interpretation has been worked out in opposition to the picture of constructive interpretation yielded by Ronald Dworkin, and I will point out what the consequences of this argumentative strategy are from a philosophical point of view. Secondly, I will claim that there is something in common between Dworkin's and Marmor's arguments on interpretation. It is the implicit premise consisting in making reference to objective values. Finally, I will try to reconstruct Marmor's argument on interpretation making explicit this premise.

## 2. *A Literalist Approach to Semantics*

Marmor's theory of legal interpretation is conceived as an assault on Dworkin's account of interpretation and legal theory. At the very beginning of his theoretical path, Marmor points out that "one of the main purposes of this book is to provide a critical assessment of [Dworkin's] methodological turn, and of some of the substantive issues it gives rise to" (Marmor 2005, p. 2).

But what are these issues? According to Marmor, Dworkin's substantive argument on legal interpretation might be schematized as follows (Marmor 2005, p. 27):

- (1) Each and every conclusion about what the law is in a given case is a result of interpretation.
- (2) Interpretation is essentially an attempt to present its object in the best possible light.
- (3) Therefore, interpretation necessarily involves evaluative considerations.
- (4) And therefore, every conclusion about what the law is, necessarily involves evaluative considerations.

Marmor's main points on legal interpretation are set out, first, by denying these claims and, second, by justifying such a negation by means of alternative claims. In so doing, Marmor's argument runs parallel to Dworkin's, although the former denies the content of both premises and conclusions of the latter. What does this unusual argumentative strategy imply? In order to answer this question, it is worth considering Marmor's moves in detail. The starting point of his argument is the following:

<sup>2</sup> In general, I maintain that conceptual analysis does not aim at *describing* its subject in a genuine sense but at *explaining* it. Conceptual analysis makes explicit the relations between conceptual constituents, it does not restrict to enumerate them.

(1') Not every conclusion about what the law is in a given case is a result of interpretation.

What does justify such a claim? It is the distinction between *interpretation* and *understanding*, i.e., the core of Marmor's insight into interpretation.

According to Marmor, if (1) is taken to be true, it is not possible to account for some problems that one faces in using language as a means to communicate directives of action. Sometimes officials grasp what a legal sentence prescribes without any effort or doubt, because they are familiar with the way the language of the law is used; but sometimes they do not and have to search for what the legal sentence prescribes. Sometimes linguistic communication in legal domain can be drafted as a rule-governed activity; sometimes it cannot, because officials do not succeed in grasping the law by following any rule or convention. Sometimes grasping the law seems to be a matter of semantics: it flows from the linguistic competence of the speakers; sometimes it seems to be a matter of pragmatics: it flows from what the law has been intended to communicate, often beyond what the law actually says.

In order not to obscure the difference between these phenomena, Marmor suggests making a clear distinction between understanding and interpretation. The concept of understanding applies to "those aspects of (linguistic) communication which are rule or convention governed". The concept of interpretation, on the contrary, applies to those aspects of (linguistic) communication which are not determined by semantic rules or conventions but depend upon "the paradigms of interpretation prevalent in a certain interpretive community" (Marmor 2005, p. 15). If this distinction is sound, then a legal text has to be interpreted if, and only if, there are no available semantic rules or conventions determining its semantic content. Since in most cases the semantic content of a legal sentence is determined by rules or conventions, not every conclusion about what the law is in a given case is a result of interpretation. Is the first step of Marmor's argument therefore justified? I will look at this important step more closely by considering its implicit premises.

Marmor's conclusion shows his thesis to be inspired by the famous interpretation of Wittgenstein's rule-following argument suggested by Gordon Baker and Peter Hacker. According to Baker and Hacker, understanding is an ability: the ability to follow a rule, whereas interpretation is an activity: the activity one is forced to undertake when understanding breakdowns. In this sense, understanding and interpretation are not necessarily related. In most cases one understands a rule without interpreting it: as Baker and Hacker pointed out, the ability to follow a rule depends upon the "internal relation" between the rule and its instantiations, not upon the mysterious job of something else<sup>3</sup>. Interpretation takes place either

<sup>3</sup> "It is *in language* that a rule and the act in accord with it (or a rule and its 'extension') make contact" (Baker and Hacker 1985, p. 91).

in the case of lack of understanding, due to vagueness of legal provisions, or if one has to choose which of several ways of understanding is sound.

There is a lot to be said about Baker and Hacker's analysis of the rule-following argument and its many-sided impact on legal theory<sup>4</sup>. But here I shall just restrict myself to show that Marmor's account of interpretation radicalizes the point made by Baker and Hacker, firstly pairing understanding exclusively with semantics, rule-governed behaviour and conventions, secondly pairing interpretation exclusively with pragmatics, paradigm-governed behaviour and non-conventional agency. This position triggers at least two unwelcome consequences. On the one hand, it splits the study of language into two separate domains, creating a crippling philosophical tension between some aspects of both which are actually related. On the other hand, it undermines Becker and Hacker's thesis on meaning and rule-following, making Marmor's argument incoherent.

First of all, the pragmatic dimension of language is (partially) rule-governed. Contemporary pragmatics has shown that the relation between linguistic expressions and those who use them in communicating the content of beliefs, desires, intentions and so on<sup>5</sup>, is not simply governed by impulses or habits, but also by rules and conventions. Gricean conversational maxims are a well known example of this. A conversational maxim expresses a rule and not merely a "paradigm" in Marmor's sense, "which can be respected and emulated but not followed" (Marmor 2005, p. 15). It is a rule that can be even generalized, i.e. generated by default apart from the particular context of communication<sup>6</sup>. Take for instance a conversational maxim such as the quantity maxim, according to which a contribution to communication ought to be adequately but not overly informative (Grice 1989, pp. 26-27). The legal definition "Cars are four wheel vehicles with an upper frame" normally implicates that an upper framed vehicle ought to be taken as a car only if it has neither more nor less than four wheels, although the legal definition is compatible with cars having ten wheels. This implication is valid regardless of the particular context of communication or the interpretive paradigm emu-

<sup>4</sup> See, among others, Narváez Mora 2004, pp. 99 ff.; Endicott 1994, pp. 463 ff.

<sup>5</sup> This is the traditional definition of pragmatics that we find, for instance, in Charles Morris and Rudolf Carnap. Notice, however, that Marmor uses the word "pragmatics" in a narrower sense, which is more common among linguists than among philosophers of language. Pragmatics is taken to concern the "attempt to fill this gap between literal meaning and what is actually being communicated", searching for the necessary and sufficient contextual knowledge which is required to understand an utterance (cf. Marmor 2005, p. 17). On the several ways to define pragmatics and to distinguish it from semantics see, in particular, Sperber and Wilson 2008; Recanati 2004; Carston 2000; Bach 1999.

<sup>6</sup> Notice that if a conversational implicature is generalized it tends to become intuitively indistinguishable from semantic content, since it is carried by use of a certain form of words: generalized implicatures, like conventional implicatures, are taken to be linguistically encoded through the condition of use conventionally associated with an expression: see Grice 1989, p. 37; Bach 1994, pp. 143 ff.; Levinson 2000.

lated by the speakers: it holds if one follows the rule expressed by the quantity maxim when interpreting the legal definition considered above<sup>7</sup>.

Secondly, the semantic dimension of language – in our context, the sense and the reference of a legal provision – is (partially) determined by the pragmatic implications of its use. One of the most important achievements in pragmatics over the past thirty years has been to point out that what is said, i.e., the explicit content of a sentence, is largely undetermined by the linguistic encoded sentence meaning. Its determination involves what is implicated by the utterance of the sentence, i.e., the pragmatic elements and inferences that fix the utterance meaning. This explanation holds not only in the familiar cases of indexicality, ambiguity, vagueness, non-truth-conditional content, implicature, presupposition, illocutionary force, and so forth. It does so in *every* communicative process. To put it differently, the semantics-pragmatics distinction assumed by Marmor – which is taken to justify the existence of a straightforward line dividing the understanding of a legal provision from its interpretation – does not give justice to the general context-dependence of language. Understanding a sentence is not just a matter of knowing the semantic content of what is said. There is always a pragmatic element in what is said which is taken into account to fix the sense and the reference of the sentence. Take for instance the expression “use of a firearm”. This expression can mean the use of a firearm as a weapon, the use of a firearm as an item of barter, the use of a firearm as a knick-knack, and the rest<sup>8</sup>. The legal provision in which such an expression occurs expresses a definite norm, and has hence a semantic content, only when the relation between a certain firearm and the activity of using it has been contextually determined.

Even endorsing the Gricean framework, which is at the core of Marmor’s point on interpretation, the semantics-pragmatics distinction cross-cuts the understanding-interpreting distinction, with pragmatics contributing both to what is literally (or conventionally) prescribed and to what is contextually (or non-conventionally) prescribed by a legal provision<sup>9</sup>.

In so saying, I am obviously not claiming that it not *possible* to distinguish

<sup>7</sup> What has just been said does not imply, obviously, that the rule here considered is not defeasible according to the context. In any case the implicatures governed by conversational maxims, conventional maxims, speaker’s presuppositions and other contextual constraints are implicitly or explicitly cancellable: see Grice 1975, p. 44. For a critical analysis of the Gricean cancellability test see, however, Weiner 2006. On the notion of conventional implicature see Bach 1994, pp. 143 ff.

<sup>8</sup> Cf. *Smith v. United States*, 113 S. Ct. 2050 (1993). On this case see Neale 2007 and Soames 2007.

<sup>9</sup> According to François Recanati, for instance, “*semantic composition itself is a context-dependent process*: in the course of deriving the semantic value of a complex expression, one optionally modulates the semantic values of the parts, and it is the context which determines which pragmatic function, if any, comes into play and yields the modulated value that undergoes semantic composition” (Recanati 2006, p. 53). Cf. also Poggi 2008.

understanding from interpretation, nor that such a distinction is not *desirable* in the legal domain. I am simply claiming that radicalizing the semantics-pragmatics distinction is not a consistent way to accomplish this task.

Obviously, Marmor is perfectly aware of this problem. In his recent essay *What Does the Law Say? Semantics and Pragmatics in Statutory Language*, he points out that the semantic content of an expression is basically “a combination of what is contributed to the content of communication by the literal meaning of the words/sentences uttered and objective features of the utterance, such as who is speaking, time, place, and other relevant contextual facts” (Marmor 2008). In this sense, Marmor seems not to be simply committed to distinguishing semantic content from pragmatic content. His task is rather to give a correct account of the interface between these two aspects of content.

In the light of the contemporary debate among linguists and philosophers of language, in fact, the context-dependence of language might be roughly accounted in two opposite ways. According to the “moderate contextualism”, on the one hand, the sense and reference of a sentence are determined by purely linguistic rules or conventions, whose content generally expresses the intended sense and reference of the speaker/writer. Context comes into play when linguistic rules and conventions underdetermine the sentence content, and contextual constraints are of help in ascertaining what the sentence has been intended to communicate. This approach carries on Grice’s program in a consistent way, conceives pragmatics as parasitic to semantics, and aims at solving interpretive problems modelling pragmatics closely on compositional semantics and generative grammar<sup>10</sup>. According to the “radical contextualism”, on the other hand, contextual constraints come directly into play whatever has been said, are not simply a function of the speaker’s intention, and change along with the context itself<sup>11</sup>. How can that be the case? Firstly, the context-sensitivity<sup>12</sup> of nouns, definite descriptions, predicates, and so on, is neither linguistically encoded nor determined by sentence-types. The ways of contextual dependence depends upon the context itself: it is the situation of use of a sentence which singles out what sentential constituent is in need of disambiguation or reference assignment, and how that can be done<sup>13</sup>. Secondly, the relation between content and context is seen to be two-way rather than one: the content ascribed to a sentence itself changes the context of communication once the sense and the reference of the sentence have been fixed<sup>14</sup>. This

<sup>10</sup> Cf. Atlas 2005, Horn 2004 and 2005, Gazdar 1979, Levinson 2000.

<sup>11</sup> Cf. Travis 1985, Recanati 1991, Sperber and Wilson 1986.

<sup>12</sup> Roughly, a sentential constituent is context-sensitive if, and only if, its contribution to the semantic value of the sentence varies across occasions of use even if its standing or literal meaning in the language remains fixed.

<sup>13</sup> For an analysis of these phenomena cf. Canale and Tuzet 2007, pp. 35 ff.; Bianchi 2002, pp. 262 ff.

<sup>14</sup> Cf. Kamp 1985, p. 240.

approach still stems from the Gricean framework but departs from it considerably.

Marmor's position belongs to the former approach: he couples a literalist account of semantics with a Gricean account of pragmatics, without paying attention to the pragmatic contribution to semantic content. But this line of inquiry seems to me at odds with Marmor's purpose to provide an ordinary-language-philosophy-based picture of understanding and interpretation, seen as alternative to the truth-conditional approach associated with formal semantics.

According to Marmor, the understanding of a legal text is obtained when semantic rules or conventions are available and correctly followed. Interpretation comes into play when this is not the case. But this picture undermines the rule-following argument as accounted for by Backer and Hacker. On the basis of this argument, expressions have a straightforward semantic content only against a background of "normal circumstances" corresponding to the context in which they were used in the past. It is obviously true that there is no rule or convention to guide the interpreter as to whether or not a particular expression applies in some extraordinary situation. But this is not because the semantic content of the expression is intrinsically undetermined on the basis of its linguistic encoded meaning. It is because the application of a sentence ultimately depends on there being a sufficient similarity between the new context of use and the usual one<sup>15</sup>. Thus it is the context of application that pragmatically determines which dimension of similarity is relevant, whether a sentence (or a sentential constituent) is apt to be understood or in need of interpretation, and hence which conditions have to be met for a given legal provision to apply to the case.

This being so, why does Marmor insist on coupling the understanding-interpretation distinction with "moderate contextualism", against the background of a use-theory of content?

I argue that the philosophical tension we have been looking at so far is due to Marmor's argumentative strategy in *Interpretation and Legal Theory*, based on the negation of Dworkin's substantive thesis. That can be shown by analyzing the following steps of Marmor's argument against Dworkin's.

### 3. *Intention Fulfilment*

According to Marmor, if (1) is false, i.e., if Dworkin is wrong when maintaining that every conclusion about what the law is in a given case is a result of interpretation, it follows that

(2') Interpretation is not an attempt to present its object in the best possible light, but in the light which emphasizes the author's communication intention.

<sup>15</sup> Cf. Hart 1994, Ch. 5. See also Stravropoulos 2001, pp. 96-97.

What justifies such a claim, and thus the negation of Dworkin's corresponding claim? It is Marmor's unreserved endorsement of the moderate contextualist version of the semantics-pragmatics interface, according to which legal interpretation is a matter of *author's communication intention*<sup>16</sup>.

We have seen that philosophers of language and linguists agree today at least on one point: what is said by a sentence is not fully determined by the sentence's linguistic encoded meaning. The gap between linguistic encoded meaning and what is said is filled by something called "context". Now, moderate and radical contextualism differ, firstly, as to what is contextually relevant, and secondly, as to how contextual constraints influence semantic and pragmatic content. Radical contextualism takes in general to be contextually relevant not only some facts about the utterance of a sentence<sup>17</sup>. It is first of all contextually relevant the articulation of communication processes: the inferences governing the hearer or reader's reasoning by selection of the piece of information conveyed by a sentence<sup>18</sup>. Broadly speaking, the content of a sentence is here conceived of as a set of inferential moves: the moves connecting the utterance of the sentence to contextual facts so as to justify the assignment of semantic and pragmatic values to the sentence<sup>19</sup>.

According to moderate contextualism, in contrast, it is contextually relevant whatever the hearer or the reader have to take into account to ascertain the author's communicative intention. As Grice himself pointed out, a sentence has a content if, and only if, the author of the sentence intended its utterance to produce some effects in the addressee by means of the recognition of this intention (Grice 1989, p. 220). If we accept such a psychological account of content, it follows that contextual information comes into play when it is intended to be taken into account by the speaker/writer and leads to recognize her intentional attitudes. The content of a sentence is here conceived of, therefore, as a matter of intention-fulfilment, which consists precisely in being recognized by the addressee.

<sup>16</sup> "[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" (Marmor 2005, p. 23)

<sup>17</sup> I am here referring to those facts which typically permit the reduction of ambiguity and vagueness, fix the reference of indexicals, proper names and demonstratives, or are of help in solving issues concerning presuppositions

<sup>18</sup> Cf. Sperber and Wilson 1986, pp. 46 ff. and 65 ff.

<sup>19</sup> A fact is here taken to be contextually relevant if it is implicated by the utterance of a sentence, i.e., if it specifies either the circumstances or the consequences of the utterance: "Learning to use a statement of a given form involves, then, learning two things: the conditions under which one is justified in making the statement; and what constitutes acceptance of it, i.e., the consequences of accepting it" (Dummett 1973, p. 453). According to radical contextualism, therefore, propositional attitudes like beliefs, desires, intentions, expectations, presuppositions, etc., will be assigned to the sentence author moving from the performed speech act and its contextual consequences.

This being the case, Marmor's point against Dworkin holds, on the one hand, if it is supported by an account of the semantics-pragmatics interface based on the notion of intention-fulfilment, and, on the other hand, if it does not fall into the traps of radical contextualism, which is at odds with Marmor's defence of literalism and intentionalism.

Marmor's argument meets these conditions in running as follows: It is true that interpretation presents its object "in a certain light" (Marmor 2005, p. 32) as claimed in (2). This is because interpretation is committed to highlight those contextual aspects which fix both the semantic and the pragmatic content of a legal provision. Nevertheless, it is not necessary, and sometimes even not possible, that interpretation presents its object in the "best light", as supposed by Dworkin's constructive model<sup>20</sup>. It is not necessary – following Marmor – because an interpretation might be meaningful and worth paying attention to although it does not render the text better than other interpretations do. And it is sometimes even not possible, because not in each and every case is the interpreter able to identify what makes the text the best possible example of the genre it is taken to belong. Interpretations of the same text are often incommensurable: "there is simply no such thing as *the best*"<sup>21</sup>. But all this does not imply that interpretation presents its object in whatever light, i.e., that interpretation is simply a matter of officials' discretionary power. Quite the opposite: since interpretation is concerned with pragmatic aspects of content, and – according to the moderate contextualism – these aspects are a matter of author's communication intention fulfilment, then interpretation is the attempt to present its object in the light which emphasizes the author's communication intention, leading to its fulfilment.

The theoretical priority accorded to the notion of author's intention fulfilment is further confirmed by the way in which Marmor characterizes the author's intention as a criterion of interpretation. If the intention of the *real* author cannot be ascertained, "the meaning of an act is understandable in terms of *counterfactual intentions*, that is of the intentions one could attribute to a *fictitious author* characterized in certain ways"<sup>22</sup> (Marmor 2005, p. 23). In other words, if the interpreter has no direct information about what effect the author of the sentence intended its utterance to produce, the interpreter is not allowed to take into account further contextual information to fix the sentence meaning. She has to fulfil the author's intention by means of counterfactual reasoning.

This move takes Marmor to the first conclusion of his argument:

<sup>20</sup> On Dworkin's opinion unless the interpreter does not purport to present a text in its best light, "we are left with no sense of why he claims the reading he does" (Dworkin 1986, p. 421).

<sup>21</sup> Marmor 2005, p. 32. On the problem of incommensurability between the interpretations of the same text see also Finnis 1987, p. 371.

<sup>22</sup> Marmor 2005, p. 23.

(3') Therefore, interpretation does not necessarily involve evaluative considerations.

What justifies such a claim? If legal interpretation is concerned with the pragmatics of communication, which is taken to be, in turn, a technique to ascertain the intention of a real or fictitious author, then interpretation involves only contingently evaluative considerations. Obviously, the characterization of the author will be presented at various levels of abstraction, and "the more abstract the characterization of the fictitious author, the greater amount of creativity the interpretation allows"<sup>23</sup>. Nevertheless, Marmor correctly points out that the creativity of interpretation should not be confused with the creativity of the interpreter. The former strives to determine the meaning of a text for its real or fictitious author, and is in this respect objective; the latter aims at determining the meaning of a text for its reader (or, for some community of readers interested in the text), and is in this respect subjective: "interpretation purports to be a statement *about the object interpreted*, not about the subject who offers the interpretation" (Marmor 2005, p. 22).

Marmor's appeal to the objectivity of interpretation leads directly to the second conclusion of his argument:

(4') And therefore, the conclusion about what the law is, does not necessarily involve evaluative considerations.

What justifies such a claim? If interpretation depends on the author's communication intention, i.e., if it is a technique to preserve the objectivity of legal contents and not to open the way to the subjectivity of legal officials, a line can be clearly drawn between the law as it is and the law as it ought to be. In this sense, even in the case of interpretation the conclusion about what the law of the case is involves only contingently evaluative considerations.

#### 4. *In-between Remarks*

In the light of our foregoing remarks, we may return to the starting-point of this essay: Do Marmor's claims refer to interpretation as it is or as it ought to be? To put it another way: are Marmor's claims a description of their subject or do they relate to it in a different way?

In order to answer this question, two points have to be made here. The first one is concerned with the content of Marmor's claims, the second one with the structure of Marmor's argumentation.

<sup>23</sup> Marmor 2005, p. 25. On the problem of providing independent evidence of legislator's intention, see Brink 1988, pp. 127 ff.

We have shown that Marmor tries to transplant a literalist approach to semantics and an intentionalist approach to pragmatics into ordinary language philosophy tradition, on which Hartian legal positivism takes its root. But this project triggers off some philosophical tensions which show Marmor's argument to be incoherent or, at least, inconsistent.

On the one hand, as we have seen, Marmor's account of the understanding/interpretation distinction cannot be supported by moderate contextualism, even regardless of the theoretical weakness of the latter. On the other hand, Marmor's treatment of the author's communication intention reintroduces implicitly that form of contextualism he explicitly refuses to advocate. As Michael Woods keenly pointed out, "it is misguided to analyse tendencies or dispositions in terms of counterfactuals, since a correct semantic account of them already presupposes that things in the world have them" (Woods 2003, p. 90). Characterizing a fictitious author's intention counterfactually implies taking into account those wide range contextual facts and inferences that this interpretive strategy aims at putting aside.

Thus, if Marmor is really committed to describe interpretation as it actually is, he is also committed either to leave the traditional, philosophical background of Hartian legal positivism or to revise his own intentionalist approach to the semantics-pragmatics interface. On the contrary, if Marmor is not really committed to describe interpretation as it is, there might be a implicit, normative premise of his argument that makes it sound.

This leads us to the second point I would like to make. In Section 2 I argued that Marmor's claims about interpretation aim at justifying the negation of Dworkin's corresponding claims. But Dworkin's picture of interpretation does not purport to be descriptive: Dworkin is not concerned with the law as it is but with the law as it ought to be. Therefore Marmor's claims cannot be as descriptive as he assumes they are. The negation of a prescriptive sentence does not reverse the direction of fit of the sentence, i.e., its relation to the world. It changes only the semantic content of the sentence, i.e., how the world ought to be in order to fulfil the sentence.

Imagine that a philosopher of law addresses judges and other officials as follows: "Interpret the law so as to present it in the best possible light", and that another philosopher of law replies to this: "Do not interpret the law so as to present it in the best light, because interpretation is actually a matter of legislator's intention fulfilment". Now, is this reply genuinely descriptive as Marmor claims it is? At least to my intuition, this seems not to be the case. In running parallel to Dworkin's, namely, Marmor's argument ends up by sharing some aspects of the relation to social and political reality that the former argument assumes to have.

To clarify what these aspects are and in what respect Marmor's argument really differs from Dworkin's, it is worth looking not only at Marmor's criticism of Dworkin, but also at what claims about interpretation they both take to be true.

### 5. *A Matter of Evaluations*

Although Marmor articulates his own theory of interpretation moving from, first, the negation of Dworkin's insight and, second, from the implicit commitments of these negative claims, Dworkin's and Marmor's arguments converge at least in one point: the implicit premise connecting interpretation to values and evaluative judgements.

That can be shown coming back to statement (2) and (2'). According to (2), interpretation is an attempt to present its object in the best possible light. But (2) consists of two different moves<sup>24</sup>:

- (5) Interpretation depends on evaluative judgments;
- (6) An evaluative judgment counts as interpretation if, and only if, it presents its object in the best possible light.

Now, (2') is taken by Marmor to be the negation of (6) but not of (5). To put it differently, Marmor's does not deny that interpretation depends on evaluative judgments. He simply denies that the only evaluative judgment which counts as interpretation is the judgment presenting its object in the best possible light.

In *Interpretation and Legal Theory*, Marmor clarifies this aspect as follows: "Dworkin's starting point is very similar [to my own]. He also maintains that interpretation is concerned with intentions and purposes, and takes the construction of such purposes as essential to what interpretation is all about" (Marmor 2005, p. 28). In other words, Dworkin's mistake does not consist in claiming interpretation to be the result of evaluative judgments, i.e., to be concerned with interpretive intentions and purposes. Dworkin is wrong as to what interpretive intentions and purposes are. Now the question is: what determines such intentions and purposes? Marmor's answer is still quite similar to Dworkin's: "Without having some views about the values inherent in the genre to which the text is taken to belong, no interpretation can take off the ground"<sup>25</sup>. Legal interpretation is possible if, and only if, officials have a view about the values inherent to the genre "legal text". And a value is inherent to legal texts such as statutes and constitutions only if it meets two conditions: firstly, if its content does not depend on the interpreter but is, in a sense, objective. Secondly, if the instantiation of the value is a necessary condition of the authority of law<sup>26</sup>. The first condition is implied in Marmor's concept of interpretation and is merely formal. The second condition flows from Joseph Raz's conception of practical authority – on which Marmor declaredly draws his

<sup>24</sup> I am grateful to Andrei Marmor for this clarification.

<sup>25</sup> Marmor 2005, p. 31. Cf. Dworkin 1986, p. 52.

<sup>26</sup> "Legitimacy is a primary moral criterion for appraising an institution, while there may be other values the institution instantiates that are only secondary and parasitic on its legitimacy" (Marmor 2007a, p. 686)

own thesis – and is a material condition. According to it, a value is inherent to a legal text if, and only if, the instantiation of this value makes more likely that a person subjected to the law will do better by following its provisions than by relying on her own judgment<sup>27</sup>. The instantiation of this value is namely taken to be a necessary condition of the legitimate authority of the law.

What social and political values satisfy these conditions? The foremost value inherent to legislation should be democracy. The content of this value is taken to be objective, and without being recognized as the (indirect) expression of citizens' beliefs, desires and will, i.e., as the result of a democratic choice, no legal provision is able to hold its claim to legitimate authority within most contemporary legal systems<sup>28</sup>. As to a constitutional provision, on the other hand, the inherent set of values should be the rule of law. In fact, the content of this set of values is usually taken to be objective too. Furthermore, since constitutions remove certain principles of government and moral-political rights from ordinary democratic decision making, constitutions wield legitimate authority if, and only if, their normative content permits at least the law to function as law, whatever other good or value it instantiates<sup>29</sup>. To put it differently, a necessary although not sufficient condition of the practical authority of constitutions is that the content attributed to their provisions preserves the "inner morality of law"<sup>30</sup>.

On the basis of this argument, it is plain that Marmor's appeal to values plays a quite different role than Dworkin's. According to Dworkin, interpretation is a normative-based practice which exists only if it serves some interest or purpose, i.e., enforces some principles and realizes some political values<sup>31</sup>. According to Marmor, on the contrary, interpretation is not a normative-based practice. Nevertheless, literal meaning and author's intention are suitable criteria of interpretation if, and only if, there is a set of values inherent to legal texts which make the use of such criteria a necessary condition of the instantiation of these values<sup>32</sup>.

In the next section I will try to analyze the difference between Dworkin's and Marmor's account of the objectivity of values. For the time being, it is enough to

<sup>27</sup> See Raz 1988, Ch. 2 and 3; Marmor 2001, pp. 90 ff.

<sup>28</sup> For a critical analysis of the argument from democracy see Marmor 2005, pp. 132 ff.

<sup>29</sup> Cf. Marmor 2007a, pp. 38 ff. This claim is the conclusion drawn from Marmor's criticism to constitutionalism in general, and to judicial activism on constitutional issues in particular.

<sup>30</sup> Cf. Marmor 2004, p. 41. Marmor maintains here correctly that the traditional appeal to the inner morality of law does not imply the endorsement of some kind of natural law theory, although this appeal has frequently been interpreted so.

<sup>31</sup> Dworkin 1986, p. 47. As John Gardner has recently pointed out, "the aim of the constructive interpreter is to improve, transform [the object of interpretation] into a better object of the same kind" (Gardner 2006, p. 21).

<sup>32</sup> "Whether it makes sense to defer to such intentions [i.e., to legislator's intention in statutory interpretation and the constitution] must also depend on a theoretical argument about *where value lies* in the relevant genre, namely, the authority of legislation (or of a constitution)" (Marmor 2005, p. 31, emphasis added).

show that this appeal to values is a necessary premise of Marmor's argument. In case this premise does not hold, Marmor's argument leads to a certain lack of coherence within his theory of interpretation. And this premise holds if the values at stake, i.e., the evaluative judgments about what the law of the case is, are taken to be objective. In this sense, according to Marmor, the objectivity of values is a necessary condition not only of the authority of law, but also of legal interpretation. If the values inherent to statutes and constitutions were not objective, the law would not wield any practical authority, and speaking of legal interpretation would be nonsense: In case of lack of understanding, the law of the case would be the result of an arbitrary invention of the judge.

So, if all this is true, Marmor's argument might be finally reconstructed as follows:

- (7) Democracy and the rule of law embody the values of the genre "legislation" and "constitution".
- (8) These values are instantiated by legal practice if, and only if, the law of the case consists in what was said and communicated in enacting a legal or constitutional provision.
- (9) The law of the case consists in what was said and communicated in enacting a legal or constitutional provision if, and only if, its content corresponds either to the literal meaning of the sentence (in case of understanding) or to the legislator's communication intention (in case of interpretation).
- (10) If the condition formulated in (9) is met, the conclusion about what the law is involves only contingently evaluative considerations, and hence it is in any case possible to draw a line between the law as it is and the law as it ought to be.

To sum up, Marmor's insight into interpretation seems to be the following: if interpretation instantiates the values inherent to legal texts, then the law consists in what was said by enacting a legal sentence, the content of such a sentence corresponds either to its literal meaning or to the legislators' intention, and, even in the case of interpretation, the determination of legal content involves only contingently evaluative considerations.

#### 6. *Conceptual Prescriptivism*

Marmor's implicit assumptions about legal interpretation, once made explicit, lead us finally to answer the question which guides this analysis: Do the moves from (7) to (10) build up a descriptive argument?

On the one hand, Marmor's argument seems to be descriptive: it gives an account of the nature of legal interpretation moving from the values taken to be inherent to legal texts<sup>33</sup>. According to this, each and every interpretive conclusion

<sup>33</sup> From this point of view, Marmor's argument on interpretation "does not purport to jus-

about what the law of the case is comes from evaluative judgments, and since these judgments rest on some values that we are able to know and to describe, i.e., that we take to be objective, then Marmor is right in asserting his argument to be a descriptive theory of interpretation.

On the other hand, the moves from (7) to (10) seem not to be genuinely descriptive: the argument they compose does not have a language-to-world direction of fit. Firstly, in “describing” the nature of legal interpretation Marmor actually formulates some rules which officials have to follow so as to instantiate the values inherent to legal provisions. In claiming that statutory interpretation is a matter of legislator’s intention fulfilment, for instance, Marmor does not claim that officials really take interpretation to be such a matter. He claims that in most cases officials ought to take this to be true so as to make their conclusion about the law of the case a statutory interpretation and not an arbitrary invention<sup>34</sup>. Secondly, it is not conceptually relevant that these rules are really accepted and followed by officials: it is conceptually relevant that without accepting and following these rules one cannot make sense of law within a constitutional democracy. If we do not accept and follow these rules, in other words, we are not playing the social and political game called democracy and the rule of law. Recalling a famous metaphor proposed by Herbert Hart, we would be rather playing the paradoxical game of the “scorer’s discretion” (Hart 1994, p. 141).

At least in this sense, Marmor’s argument has a world-to-language direction of fit and is therefore prescriptive<sup>35</sup>: the law ought to be such as to fit the concept we have of it. It is a concept depending on the objective, although conventional values, the law is asked to realize. If all this is true, Marmor’s analysis of the concept on interpretation is a form of conceptual prescriptivism rather than a form of conceptual descriptivism as he assumes it is.

tify or legitimize any aspect of its subject matter” and is in this respect descriptive (Marmor 2006, p. 683).

<sup>34</sup> To put it differently, Marmor claims that “the parties of a legal dispute [have] a *justified* expectation that the relevant statute be interpreted according to the legislators’ intentions” (Marmor 2005, p. 132).

<sup>35</sup> If all that is true, does Marmor’s theory of interpretation collapse into evaluative judgments? Marmor would deny this: on the one hand, he admits that “It would be difficult, and in any case, pointless, to deny that descriptive theories, particularly about such a normative domain as law, are often motivated by the normative assumptions of their authors” (Marmor 2006, p. 11). But this does not amount “to the conclusion that any understanding of evaluative reasoning collapses into [evaluative] judgment” (Marmor 2006, p. 25). There is a remarkable difference between grasping a value or a rule, and expressing an evaluative judgment about it: see Marmor 2005, p. 42.

I agree with Marmor on this. But my point is here a different one. Marmor does not describe the rules which officials really accept and follow in using a legal text. He rather tries to show what these rules are by showing that we cannot make sense of the law without accepting and following them.

In order to clarify this point, however, Marmor's appeal to the objectivity of values is worthy of a closer look. I will briefly address this issue moving from the analysis of the concept of objectivity yielded by Marmor himself.

### *7. The Objectivity of Values: A Sketch*

"Do we value things because they are valuable, or are things valuable only in so far as we value them?" (Marmor 2001, p. 160). This basic dilemma opens Marmor's reflection on the objectivity of values, an issue that, in the recent years, has increasingly drawn the attention of moral and legal philosophers, and to which also Andrei Marmor has devoted some insightful pages. I will not consider how Marmor answers the puzzling question formulated above. The question I will try to answer is rather the following: according to Marmor, how can a value be objective? In what sense are democracy and the rule of law objective values, such as to make Marmor's account of legal interpretation coherent? In order to sketch Dworkin's and Marmor's conceptions of the objectivity of values, it is instructive to start by considering the preliminary analysis of the concept of objectivity yielded by the latter.

Marmor suggests distinguishing between three different concepts of objectivity: (1) semantic objectivity, (2) metaphysical objectivity, and (3) discourse objectivity. The first concept of objectivity concerns the type of "object" a statement is about, independently of the statement being true or false, justified or unjustified. A statement is semantically objective, on the one hand, if it concerns a fact, a state of affairs, an event. A statement is semantically subjective, on the other hand, if it concerns the propositional attitude it expresses. In this sense, the statement "grass is green" is semantically objective if it refers to the grass' property of being green; it is semantically subjective if it refers to the speaker's belief that grass is green (independently of any further ontological commitment).

The second concept of objectivity concerns the fact that there is an object or a state of affairs in the world with the property attributed to it by a statement. Metaphysical objectivity is concerned, namely, with "the relation between types of statement and the existence of the appropriate category of objects" (Marmor 2001, p. 116). The statement "grass is green" is in this sense objective if, and only if, there exists a class of objects in the world having the property of being green. In particular Marmor points out that metaphysical objectivity is often conflated with ontological realism, although the two are not identical. In fact, the ordinary tenet of realism presumes "the existence of an objective reality which is ontologically independent of our knowledge"<sup>36</sup>, whereas metaphysical objectivism would be less demanding. "The reference of concepts like inflation, chess, or the legal

<sup>36</sup> Marmor 2001, p. 117. Here Marmor endorses Dummett's account of ontological realism: see Dummett 1973, p. 434.

speed limit, and so on cannot be conceived as ontologically independent of our knowledge and culture” (Marmor 2001, p. 118). It follows that the statement “Barack Obama is the new President of the United States” is metaphysically objective (although false, at the time being) even if the property Barak Obama is claimed to instantiate is “conceiving-dependent”, i.e., it is conferred on him by our cognitive activity.

The third concept of objectivity considered by Marmor applies to those statements which have a truth value although there is no fact, state of affairs or event in the world which makes them true<sup>37</sup>. In this sense, the statement “grass is green” is objective if it is taken to be true within our linguistic interaction, independently from the property “greenness” pertaining to any object in the world. According to this view, therefore, non-descriptive statements like evaluative or moral statements might be considered as truth-apt, and the ascription of a truth value to these statements does not imply a form of moral realism. For the objectivity of moral statements is here taken to be a matter of ethical views being susceptible of reasons. In this sense, the value “democratic” might be truly attributed to a political regime even if we maintain that democracy does not exist as an entity which is independent from what we happen to believe and to desire about it.

On the one hand, Marmor’s account of objectivity is of great interest because it cross-cuts some traditional distinctions philosophers are used to referring to by analyzing this concept. This is the case of the distinction between metaphysical and epistemic objectivity, internalism and externalism, cognitivism and anti-cognitivism, realism and anti-realism. In so doing, Marmor’s approach admits, for instance, cognitivism about values even if one endorses anti-realism in ethics and epistemological externalism<sup>38</sup>.

On the other hand, Marmor’s proposal raises a number of questions that are not easily answered. For instance, how can a moral property be a subject of knowledge without being in a sense “real”, i.e., without making a causal or conceptual difference in our experience? Is moral realism necessarily a metaphysical thesis, or are there “pragmatic” versions of this thesis which are not contemplated by Marmor’s analysis<sup>39</sup>? How can be singled out the domain of reasons which fixes the truth conditions for an evaluative sentence in that domain?

Of course even a tentative answer to these questions would far exceed the scope of this essay. In any case, Marmor himself admits that “the distinctions between the various senses of objectivity are basically a matter of theoretical convenience”<sup>40</sup>, i.e., a means to accomplish a theoretical task.

<sup>37</sup> Cf. Marmor 2001, pp. 119-124.

<sup>38</sup> “The denial of realism about a given class of statements does not necessary amount to the denial of objectivity, even in its metaphysical sense, about that class of statements. Objectivity without realism, as we have seen, makes perfect sense” (Marmor 2001, p. 128).

<sup>39</sup> Cf., for instance, Railton 1986.

<sup>40</sup> Marmor 2001, p. 119.

I think that the best way to make explicit Marmor's theoretical task here is to apply his analysis to the problem of the objectivity of values. That will permit to clarify Marmor's and Dworkin's position in this respect and, thus, the evaluative premise of Marmor's argument on interpretation.

The concepts of objectivity considered above lead to the formulation of three different theses about the objectivity of values and evaluative judgments. Each of them might be considered as a way of reacting to "moral subjectivism", i.e., to the thesis according to which moral statements would all be false by definition if there existed no experiencing subject. Their tentative formulation might be the following:

(1) *The Semantic Thesis about the Objectivity of Values*: a value is semantically objective if, and only if, it is taken to be a property of a fact, a state of affairs, an event. A value is semantically subjective if, and only if, it is taken to be a property of a mental state: that is, the expression of desires, beliefs, intentions, etc.

(2) *The Metaphysical Thesis about the Objectivity of Values*: a value is metaphysically objective if, and only if, there exists a fact, a state of affairs or an event in the world which instantiates such a value, i.e., which has the extensional property intensionally expressed by the value in question. A value is metaphysically subjective if no such fact, state of affairs or event exists in the world.

(3) *The Discourse Thesis about the Objectivity of Values*: a value is discursively objective if, and only if, it is taken to be instantiated by a fact, a state of affairs, an event or a relation, although they do not occur in the world. Nevertheless, each person is required to invoke those values in any bedrock justification of choice or action in the public domain. A value is discursively subjective if, and only if, a person is not required to invoke it in any bedrock justification of choice or action in the public domain.

Now, it is possible to sketch Dworkin's and Marmor's stance on this issue by means of the theses formulated above.

Dworkin's theory of legal interpretation and adjudication presupposes the Discourse Thesis. From Dworkin's point of view, the answer to a legal dispute necessarily involves evaluative considerations: it follows from the principle that explains some significant portion of the prior institutional history and provides the best justification for that institutional history as a matter of political morality<sup>41</sup>. Such evaluative considerations lead to the "right answer" in the sense that this answer instantiates an objective, political value<sup>42</sup>. What I have just said does

<sup>41</sup> Cf. on this Dworkin 1986 and Dworkin 2006, p. 141.

<sup>42</sup> See Dworkin 1996. Cf. also Leiter 2001.

not imply, however, that such a value corresponds to a property existing in the world. It simply implies that the judge is required to invoke this political value in any bedrock justification of her decision.

It might be objected here that Dworkin's view is actually closer to the Metaphysical Thesis (in its realistic version) than to the Discourse Thesis. In fact, Dworkin maintains there are "instructive similarities" between natural kind concepts, whose content depends simply on the way the world is, and political concepts expressing values like "democracy", "liberty", "equality" and the rest. But Dworkin does not maintain that political concepts *are* natural kind concepts<sup>43</sup>. While the deep structure of natural kinds is physical, "the deep structure of political values is not physical – it is normative" (Dworkin 2006, p. 155), i.e., political values rule the *justification* of institutional practices such as legal interpretation. According to Dworkin, in other words, by applying political concepts like democracy, liberty, equality and so on, we assign values and purpose to legal interpretation, determining the truth conditions of the particular claims that lawyers, judges and other legal officials make within that practice in the light of the purposes and values that we assign to it<sup>44</sup>.

Marmor's theory of legal interpretation, on the contrary, presupposes the Metaphysical Thesis (in its anti-realist version). From Marmor's point of view, the answer to a legal dispute involves only contingently evaluative considerations: it follows either from the literal meaning of a legal sentence or from the legislator's communication intention. However, these criteria of assessing legal content "explain" the nature of legal interpretation in the sense that they ought to be used by officials in order to instantiate a set of objective values: the values, or evaluative properties, which characterize the social practice officials take part in. In other words, these values belong to the "grammar" of a constitutional democracy: they correspond to a property of a rule-governed human activity existing in the world, although the existence of such a practice depends on a set of deep conventions<sup>45</sup>. In this sense, Marmor endorses an anti-realist version of the Metaphysical Thesis. The properties singled out by values such as democracy and the rule of law are relational properties: "Values are not qualities *of* objects, or aspects of the world; rather they are *conclusions* we draw from situations, from our interaction with certain aspects of the world"<sup>46</sup> (Marmor 2001, p. 165). Conclusions which are nevertheless taken by Marmor to be metaphysically objective, i.e., which constitute the practice officials and we all take part in.

<sup>43</sup> "Can philosophers hope to discover what equality or legality really is by something like a DNA or chemical analysis? No. That is nonsense [...] So philosophical analysis of political concepts cannot be shown to be descriptive on the model of scientific investigation into natural kind" (Dworkin 2006, pp. 152-153). Cf. on this Patterson 2006.

<sup>44</sup> Cf. Dworkin 2006, p. 12.

<sup>45</sup> On the notion of deep convention see Marmor 2007b.

<sup>46</sup> Marmor 2001, p. 165. On the here supposed inferential nature of relational moral properties see McDowell 1987.

Of course, determining how to single out these objective relational properties within a complex rule-governed practice, and providing criteria for settling the conflicts between the values they express, is another story completely, that Marmor has not yet told and that we cannot discuss here.

### 8. Conclusion

The issue we have just traced leads to the completion of our analysis of Marmor's view on legal interpretation.

In the previous sections I argued that Marmor's picture of legal interpretation is not descriptive. Marmor is not concerned with his subject as it actually is. He is concerned with legal interpretation as it ought to be so as to instantiate the objective values which are the core of legal practice. These values are objective in the sense that they express some relational properties of a social and institutional practice which are necessary to make that practice a legal one, i.e., to make law capable of acting as an authority (in Razian sense).

Now, what are the consequences of this prescriptive stance for the *understanding* of legal interpretation?

To warrant legal interpretation to be a means for realizing a set of objective values, Marmor is compelled to give a very disputable picture of the concept of interpretation. From a philosophical point of view, interpretation seems hardly to be reducible to a not-rule-governed activity. As much disputable is Marmor's account of the understanding/interpretation distinction when drawn on the basis of the semantics/pragmatics interface. Furthermore Marmor's endorsement of moderate contextualism, due to his purpose to preserve the legislator's intention from the threats of radical contextualism, seems at odds with both the philosophical framework of Hartian legal positivism and the counterfactual thesis on author's intention.

To sum up, Marmor shows how interpretation ought to be in order to realize some political and legal values, but in so doing he also shows that such values cannot be realized by means of interpretation as it actually is. This is due to the nature of this complex activity, as we have tried to point out so far, which seems to be quite different from what Marmor would like it to be.

It follows that Marmor's argument might be turned upside down. The study of legal interpretation as it is, and not as it ought to be, casts doubt upon the weight and content of the values taken by Marmor to be at the core of the authority of law. To put it differently, Marmor's *Interpretation and Legal Theory* displays, against its author's intentions, that sometimes the reality of the law is not able to fit the concept legal theorists have of it. And this is not because the reality of the law is wrong, but because our concept of it is inadequate. If all this is true, our standard understanding of democracy and the rule of law are only partially useful for giving an account of the authority of law and political reality.

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