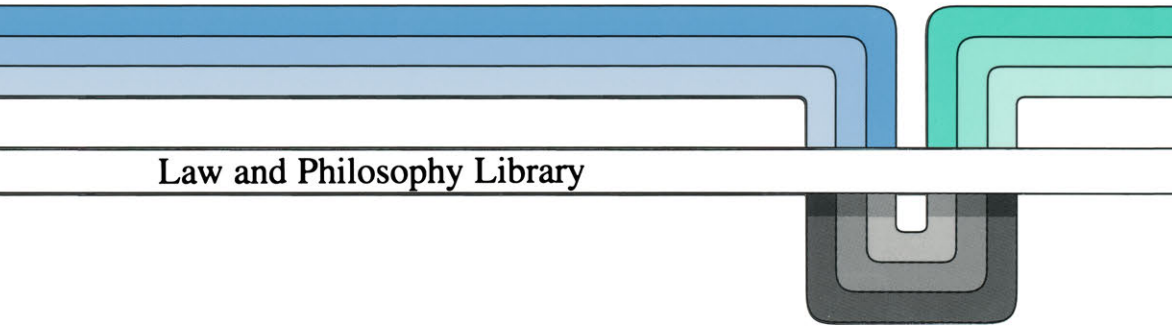

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José Juan Moreso

Legal Indeterminacy and Constitutional Interpretation

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Putnam (1981, 1983, 1987, 1990, 1995) has called *internal realism*. Against a metaphysical realism that accepts the metaphysical and the semantic thesis and assumes an externalist perspective (the point of view of God's Eye), Putnam sets internal realism, according to which the question 'What objects does the world consist of?' only makes sense within some conceptual scheme. For this conception, truth is a kind of (idealized) rational acceptability — a kind of ideal coherence of our beliefs with each other and with our experiences, as represented in our belief system — and not a correspondence with states of affairs that are independent of the mind or of discourse.

Putnam's *internal realism* makes the metaphysical and semantic considerations underlying Dworkin's theory plausible; but the question remains whether the logical thesis of bivalence and the legal thesis of the one right answer can be justified with the arguments of internal realism. I will come back to it in the critical part of this section.

c) Critique

The *Noble Dream* of metaphysical realism is based on the truth of moral realism. For this conception, the truth of legal propositions depends on the existence in the world, independently of human activities, of moral facts those propositions may correspond to. Actually, as Hurd's conception shows, it is not only that legal propositions could then be true or false; according to this moral universe, legal norms themselves would be directly true or false. Thus, the most straightforward criticism against this position is to question moral realism.

Moral realism has been criticized with — in my opinion — convincing arguments (Mackie 1977a, Harman 1977). According to Moore, however, moral realism is the conception that best reconstructs our evaluative practices and our moral discourse. When two persons disagree, for example, about whether or not it is cruel to hold someone in solitary confinement for ten days, they disagree about some (perhaps supervenient) characteristics of the world. Skeptical (emotivist, prescriptivist, projectivist, quasi-realist, etc.) conceptions of moral judgments cannot account for this objectivity requirement for moral judgments. Moral realism has problems when it comes to explaining the motivating capacity, the practical force attributed moral judgments are assumed to possess. Sometimes, realists reply that knowing what is good does not have any motivating capacity (Moore 1982, 1122 f., Brink 1989, 37-50). By this, they try to avoid Mackie's argument of the 'queerness' of moral judgments which describe objective characteristics of the world and, at the same time, prescribe — constitute reasons for — how we should behave. In my view, however, the skeptics' reasons about moral realism, i. e., the moral antirealists' reasons, are convincing. When we genuinely disagree about moral questions, i. e., when our disagreements are not based on a lack of information about non-moral facts, we do not disagree in our *beliefs* about, but in our *attitudes* towards the world.

Yet, I do not want to argue here in favour of moral antirealism, in favour of the inexistence of moral facts in the fabric of the universe. I only wish to point out two problems which the conception of metaphysical realism about legal propositions, in my view, cannot solve:

(i) The causal theory of reference, even if considered true, is no solid argument for metaphysical realism.

(ii) Moral realism does not succeed in showing its relevance for the analysis of legal propositions.[16]

(ad i) Before commenting on the relations between the causal theory of reference and realism, it should be said that the causal theory of reference confronts severe problems. Kripke's and Putnam's examples are always of indexical expressions like proper names, e. g. 'Kelsen', or of general natural kinds, like 'water' or 'gold'. But even in these cases, it is highly questionable whether the referent can be held stable by way of a naming ceremony. Evans (1985, 10-11) has presented the following counterexample: Apparently, 'Madagascar' was the name of a place on the African continent; and because of a misunderstanding, Marco Polo converted it into the name of that big African island. Now, does that mean that 'Madagascar', in spite of actual linguistic usage, is not the name of that big African island, since the chain of reference cannot be kept intact? Thus, one can argue that not even for proper names the causal theory of reference is adequate.

On the other hand, the link between the causal theory of reference, and the analysis in terms of natural kinds, and metaphysical realism also is questionable. More specifically, Putnam, the main advocate of that analysis, rejects (1981, 22-48) metaphysical realism (cf. Bix 1993, 167). What's more, it has even been suggested that some aspects of the analysis in terms of natural kinds are compatible with an antirealist conception and with a theory of linguistic meaning as use (a theory Moore holds to be completely wrong). Marmor (1992, 138-146) suggests to pay attention to Wittgenstein's distinction between *criteria* and *symptoms* (Wittgenstein 1953, sect. 354). Take the case of the meaning of 'rain'. We know that, when the barometer falls, it rains; but we also recognize rain through certain sensory experiences like humidity and coldness. While the fall of the barometer is a symptom of rain and, in that sense, is not part of the meaning of 'rain', our sensations of humidity and coldness — remember that for Wittgenstein all criteria can be revoked — are criteria of the use of 'rain', and they define, as a matter of linguistic convention, what 'rain' means. According to Marmor, we can draw two conclusions from the distinction between criteria and symptoms:

„First, that the most plausible examples of indexical predicates the theory of whose reference can change without causing any changes in meaning, do not constitute counter-examples to Wittgenstein's analysis at all, as they involve a revision of symptoms rather than criteria. Second, that according to Wittgenstein, a change in criteria carries with it a respective change of meaning." (Marmor 1992, 143)

(ad ii) Moral realists often argue that the obvious fact that there is moral disagreement is no argument for moral skepticism. We also have important disagreements in other areas (e. g., about the origin of the universe, or of certain diseases, or about the true

16 I will not go into another way of looking at Moore's theory here: Schauer (1991, 215-218; cf. Bix 1993, 154-157) has suggested an interpretation of Moore's conception not as a metaphysical and semantic theory, but as a normative theory of rule-application according to which rules should be applied in accordance with their purpose (a theory similar to that of Fuller 1969) rather than in accordance with their meaning.

identity of Shakespeare), but that does not lead us to confuse an intersubjective agreement with objectivity (Moore 1982, 1089 f.). Now, to clarify the difference between an intersubjective agreement and objectivity does not imply that moral disagreements too can be resolved through some kind of objectivity. In the natural sciences and the social sciences, there are epistemic procedures that enable us to resolve our disagreements and to revise our beliefs. Obviously, there is no absolute agreement about these procedures and methods. But in moral matters, there isn't even anything remotely comparable to those procedures (Waldron 1992, 170-176). If *convergence* is a mark of truth (Wiggins 1987, 147-151), and the best way to explain a broad convergence in some belief is that there is something that makes it true, then it is more difficult in moral matters to speak of true or false moral judgments.

When two persons disagree about whether or not it is humiliating to forcefeed hunger-striking prisoners (or whether the death penalty is cruel; cf. Richards 1983 for the discussion about the U. S. Constitution), once all non-moral aspects of the matter have been settled it is hard to imagine what procedure could make them change their views. In the writings of moral realists, there is nothing to be found on this epistemic procedure besides a general suggestion to 'look and see' and, in most cases, the adoption of a consistency-oriented epistemology for moral judgments. Consistency, however, is a necessary, but not a sufficient condition for truth. Astrology, witchcraft, and many other superstitions can be presented in the form of perfectly consistent systems, but that does not make them true.

The problem with disagreements about legal propositions that contain some kind of moral evaluation is to find a procedure to resolve them. Since moral realists have little to say about this, the truth of moral realism is irrelevant for analyzing legal propositions. Besides, there is no reason why moral realism should be the best reconstruction of our judicial practice. If judges do not have an epistemic instrument enabling them to know that moral reality, then its existence cannot be of any help for them to overcome their doubts. Thus, since metaphysical realists lack good arguments for defending either the metaphysical or the semantic thesis, the logical thesis of the bivalence of legal propositions and the legal thesis of the one right answer are left unsupported too.

That criticism, however, does not apply to Dworkin's conception, since he tries to justify the logical and the legal thesis *without* adopting the metaphysical and the semantic thesis.

Now, if Dworkin's metaphysics and semantics are constructivist, then how does he justify the logical and the legal thesis? Dworkin seems to argue that his special kind of internal realism is sufficient for the truth of the logical and the legal thesis. Putnam, in contrast, does not think that internal realism can justify bivalence for all propositions. The notion of truth of internal realism is that of justification under ideal epistemic circumstances. And according to Putnam,

„the two ideas of the idealization theory of truth are (1) that truth is independent of justification here and now, but not independent of *all* justification. To claim a statement is true is to claim it could be justified. (2) truth is expected to be stable or 'convergent'; if both a statement and its negation could be 'justified', even if conditions were as ideal as one could hope to make them, there is no sense in thinking of the statement as *having* a truth-value" (Putnam 1981, 57).

Putnam (1995, 6) therefore refers to Dworkin's doctrine of the one right answer as 'fantastic'. Since the notion of truth as justification does not guarantee bivalence for any field of knowledge, internal realism permits us to speak of the truth of legal propositions and even of moral propositions, but it does not permit us to say that all legal and all moral propositions have a truth-value.

Hart (1983, 139 f.; cf. also 1994) already felt that the thesis of the one right answer was to become the most disputed point in Dworkin's work. For Hart, the claim that whoever wants to give an answer to an evaluative question must assume that there is one single, objective right answer in all cases, if those questions are to make any sense at all, is implausible. This is just the same in the law.

As Greenawalt observed,

„discretion exists as long as no practical procedure exists for determining if a result is correct, informed lawyers disagree about the proper result, and a judge's decision either way will not widely be considered a failure to perform his judicial responsibilities" (Greenawalt 1975, 386).

Let us go back to the literary exercise proposed by Dworkin: If, from Flaubert's novel, there is no way to determine the colour of Madame Bovary's eyes, then it does not help to assume that there is a better way of reconstructing the novel that would give a truth-value to the proposition about the colour of Madame Bovary's eyes.[17] Since there are various ways of reconstructing the novel with respect to this, it is better to say that propositions about the colour of Madame Bovary's eyes have no truth-value.[18] The same can be said with respect to legal propositions: if a case does not have a unique normative solution and can be resolved in different ways, then it does not help to insist that there must be a reconstruction that is *better* than all others.

The conclusion on this point is that internal realism is insufficient for justifying the thesis of bivalence and the thesis of the one right answer (cf. Munzer 1985, Moore 1987, and a defence of Dworkin in this point by Presby 1994). If Dworkin wants to justify the thesis of bivalence for legal propositions and the thesis of the one right answer, he must adopt metaphysical realism. Thus, Dworkin faces the following dilemma: Ei-

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[17] For a funny and instructive discussion of this matter, cf. the novel by Julian Barnes, Flaubert's Parrot, London: Jonathan Cape 1984, ch. 6.

[18] J. L. Borges has given a brilliant representation of this conception of literary criticism in his 'Nueve ensayos dantescos' (1982), in: Obras completas, vol. IV, Barcelona: Círculo de Lectores 1993, 253-255. In discussing the interpretation of verse 75 of the penultimate *canto* of Hell in the *Divina Commedia*, where Ugolino de Pisa, after speaking about the death of his sons in the Prison of Hunger, says 'Poscia, piú che'l dolor, potè il digiuno', Borges admonishes us not to confuse art with reality. It is a historical question — now impossible to ascertain — whether Ugolino ate his sons' flesh; and the interpretation of Dante's Ugolino can remain indeterminate on this point (i. e., indeterminate between the possibility that he did eat his sons' flesh or that, while the pain did not kill him, hunger did), and according to Borges, that is the best interpretation of this verse of Dante's. In Borges's own words (ibid., p. 235): „In real time, in history, whenever a man has several alternatives, he chooses one and eliminates and loses the others; this is not so in the ambiguous time of art which resembles that of hope and that of oblivion ... In the darkness of his Tower of Hunger, Ugolino does, and does not, devore the beloved corpses, and this oscillating imprecision, this uncertainty, is the strange material it is made of."

ther he adopts metaphysical realism, and thus has bivalence and the right answer, or he adopts internal realism, and thus has legal propositions without a truth-value and no right answer, i. e., the law is — sometimes — undetermined, and judges therefore have discretion in some cases. Internal realism is, so to speak, too weak a nail for carrying the weight of the thesis of the one right answer.[19]

On balance, then, the *Noble Dream* comes out as follows:

If metaphysical realism were true, the thesis of the one right answer would also be true. That means that the metaphysical and the semantic thesis of the *Noble Dream* imply the logical and the legal thesis. Metaphysical realism, however, is — to use Wright's adjective — much too presumptuous to be an acceptable doctrine. Now, if we stick to more modest internal realism, like Dworkin, then we cannot deduce the logical and the legal thesis from the metaphysical and the semantic thesis anymore. Therefore, the *Noble Dream* is not an adequate conception of legal propositions and constitutional interpretation. In its most presumptuous version, that of metaphysical realism, it presupposes an excessively robust Platonic metaphysics; in its more modest version, its basis is too weak a foundation for what characterizes the *Noble Dream*, i. e., the thesis that the law determines all behaviour and that, therefore, judges, instead of ever creating the law they apply in solving cases, can always discover it.

3. The Nightmare

The *Nightmare* is a conception of the law according to which judges never apply pre-existing law to the cases they solve, but always create the law. The *Nightmare* is commonly linked to American legal realism the best-known versions of which are the most extreme ones. Here, I will present the conception of Frank (1930) as the supreme representative of the *Nightmare*. Recently, however, the authors of the movement known as *Critical Legal Studies* have presented a more sophisticated version of that radically skeptical position, heavily relying on certain interpretations from the philosophy of language of the second Wittgenstein (about the idea of rule-following). I will also look at a certain tradition in continental legal thinking that subscribes to that skeptical version of the law.

The skeptical conception of the *Nightmare* insists that, if at all, only applicative legal propositions have a truth-value, and that that truth-value does not depend on what certain general norms may say, but only on what certain judicial decisions (individual norms) stipulate. Thus, in order to answer the question of whether some individual — say, Gaius — has the obligation to pay for the thing he bought from Ticius one must wait until there is a judicial decision about the case. As long as there is no such decision, the proposition expressed in the statement that 'Legally, Gaius has the obligation to pay for the thing he bought from Ticius' has no truth-value. Likewise, the

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[19] Obviously, there are many other interesting theses in Dworkin that deserve discussion. I will mention only two: the strange nature of Dworkin's legal propositions which, at the same time, describe what the law stipulates and prescribe how we ought to behave (cf. Bulygin 1982a); and his questionable insistence on the virtue of consistency that leaves no room in his theory for the incommensurability of values (cf. Mackie 1977b, Finnis 1987, Raz 1992, and a defence parallel to that of Dworkin in Hurley 1989, 193-212).

proposition expressed in the statement 'Constitutionally, Claudia has the right not to reveal her religious beliefs' (cf. art. 16.2 of the Spanish Constitution) has no truth-value as long as that right has not been stipulated by some court.

The law, then, is nothing but the set of individual norms (judicial decisions) which establish the rights and duties of citizens. Before there is a judicial decision, legal propositions are only a kind of predictions, propositions about the future, about the decisions the judges will make.[20] Thus, since, according to this view, what establishes the truth-value of legal propositions is the authoritative decisions of judges, judges cannot err when they stipulate the rights of the parties in a lawsuit (cf. Woozley 1984, Bix 1993, 78-88).

a) Skepticism as therapy: Jerome Frank

Although the conception of the *Nightmare* can be attributed to many authors of American legal realism[21] and can also be found, in particular, in the work of K. N. Llewellyn (1930, 1962; cf. Twining 1973), here I will present its most extreme version, from the work of Jerome Frank.

Frank's conception of the law, in his own words, is the following:

„We may now venture a rough definition of law from the point of view of the average man: for any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects the particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide." (Frank 1930, 46)

This passage in Frank shows that he accepts the *Nightmare's* legal thesis *4a)* according to which the courts always create and never apply law. The opposite position, i. e., that of the *Noble Dream*, Frank holds to be irrational, „an illusion or a myth" (Frank 1930, 13) and „a partial substitute for the Father-as-Infallible-Judge" (Frank 1930, 19). The *ex ante* determination of all behaviour by the law is an illusion of which mature persons should free themselves, just as, according to Freudian psychology, they should free themselves of a certain image of the father as an infallible authority (Frank 1930, 125, 264, 277). Frank urges us to recognize such a conception as a myth, and, therefore, to give it up and to accept reality: the law is created by the judges through their decisions.

Thus, legal propositions about cases that have not yet been judicially decided cannot be true or false, they are mere conjectures.

But, what is the philosophical conception of language underlying these skeptical conclusions by Frank? Why should we abandon the image of a previously established law that determines the rights and duties of citizens? There are not very many argu-

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[20] This is how one can understand Holmes's famous phrase (Holmes 1920, 173): „The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

[21] Cf. the presentations of American legal realism in Tarello 1962, Summers 1982.

ments for it to be found in our author's work. Sometimes, however, he suggests positions that come close to an antirealist philosophical conception. Thus, he says:

„Words ... become our masters because the very nature of language fosters a belief in the independent reality of what are merely verbal contrivances." (Frank 1930, 91)

„The cause of certainty-illusion and other obstructions to realistic thinking about law is the crystallization of primitive attitudes in the language which children learn and grown men employ." (Frank 1930, 94)

The philosophical foundation of skepticism about the capacity of general rules to determine behaviour has, however, been enriched by certain interpretations of the philosophy of the second Wittgenstein. The *heirs* of American legal realism, the representatives of *Critical Legal Studies*,[22] have expressed this new foundation. Therefore, I now go on to consider their conception.

b) Skepticism in Critical Legal Studies*: „Law is Politics"*

The legal theory of *Critical Legal Studies* has underscored the dependence between a certain image of the law and its foundations in the theory of political liberalism (cf. Unger 1975). However, I will not go into this aspect of the movement, which insists on the so-called *fundamental contradictions* of liberalism[23] and asserts that the *rule of law* is a liberal myth that should be given up in favour of the recognition that there is no possible distinction between law and politics.

Rather, I will try to analyze the thesis, often called the thesis of *radical indeterminacy*, according to which it is never possible to give meaning to general rules, because general rules are only „empty vessels" (cf. Altman 1990, 91). The thesis of radical indeterminacy is usually grounded in a certain interpretation of the second Wittgenstein's reflections about rule-following.[24] The interpretation of Wittgenstein as a skeptic goes back to Kripke (1982) and is based on the following paradox:

„This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here." (Wittgenstein 1953, par. 201)

According to Kripke (1982, 7), this is perhaps the central problem of the *Philosophical Investigations*. It is a new skeptical challenge that affects the philosophy of mathematics and logics as well as the philosophy of language and of meaning.

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[22] For the relationship between American legal realism and Critical Legal Studies, cf. Casebeer 1977, Schlegel 1979, Gordon 1982, Livingston 1982, Tushnet 1986, Altman 1986, Pérez Lledó 1996, ch. IV.

[23] Cf., for example, Kennedy 1979, Kayris 1982, Unger 1983, Kelman 1987, Calsamiglia 1992, Carrino 1992, as well as a defence of liberalism against these critiques in Altman 1990.

[24] Cf., for example, Caracciolo 1982 — who at an early time already pointed out some of the skeptical conclusions from Wittgenstein's reflections on rule-following for legal theory —, Tushnet 1983, Yablon 1987, Langille 1988, Patterson 1992a.

Kripke (1982, 8 f.) offers the following example of a mathematical rule (examples of this kind had been used by Wittgenstein 1953, pars. 185-187): someone who knows the rules of addition knows that the expression '68 + 57' has the result '125' (even if he has never before solved that equation). This is the right answer in an arithmetical sense, since the metalinguistic meaning of '+' ('plus') denotes a function that, when applied to the numbers '68' and '57', leads to that result. The challenge of the skeptic, now, is precisely that he questions that metalinguistic meaning. Perhaps '+' denotes another function, of which we were not aware in our past usage; perhaps it reconstructed our usage only for numerical expressions smaller than 57, and the result of adding 68 and 57 could be 5.[25] Perhaps in the past we used 'plus' and '+' in order to denote a function we can call 'quus' and symbolize by ⊕. Let's define it as follows:

$$x \oplus y = x+y, \text{ if } x, y < 57$$
$$= 5 \text{ in all other cases.}$$

According to Kripke, there are reasons for taking the challenge of the skeptic seriously. And, obviously, this does not only affect mathematics but also applies to all meaning-related uses of language, and to all instances of rule-following, whether mathematical, linguistic or legal. Kripke compares this form of skepticism with Hume's skeptical argument about causality (Hume 1740, 269):

„Both develop a sceptical paradox, based on questioning a certain *nexus* from past to future. Wittgenstein questions the nexus between past 'intention' or 'meanings' and present practice: for example, between my past 'intentions' with regard to 'plus' and my present computation '68+75=125'. Hume questions two other nexus, related to each other: the causal nexus whereby a past event necessitates a future one, and the inductive inferential nexus from the past to the future." (Kripke 1982, 62 f.)

The conclusion of Kripke's Wittgenstein has devastating consequences for the law. General rules do not determine behaviour at all, since any behaviour can be performed in accordance with any rule. That is, there is no way in which to attribute a unique meaning to a norm formulation. It is here where the skeptical theses about legal propositions have a more solid foundation — although, as I will try to show below, not a completely solid one — than in the work of Frank. Since norm formulations have no *meaning*, the metaphysical and the semantic thesis of the *Nightmare* become plausible. Objective knowledge of norms turns out to be impossible (Caracciolo 1982) and, therefore, our legal propositions (which refer to norms) have no truth-value (the logical thesis of skepticism). And, what's more, there is never a right answer for legal cases (nei-

[25] Cf. also another example of a representative of Critical Legal Studies: Tushnet (1983, 822 — taken from the Wittgensteinian Winch 1958, 29-32): „Consider the following multiple choice question: 'Which pair of numbers come next in the series 1, 3, 5, 7? (a) 9, 11; (b) 11, 13; (c) 25, 18.' It is easy to show that any of the answers is correct. The first is correct if the rule generating the series is 'list the odd numbers'; the second is correct if the rule is 'list the odd prime numbers', and the third is correct if a more complexe rule generates the series. Thus, if asked to follow the underlying rule — the 'principle' of the series — we can justify a tremendous range of divergent answers by constructing the rule so that it generates the answer that we want. As the realists showed, this result obtains for legal as well as mathematical rules."

ther for easy nor for hard ones) and, therefore, the law is always created by the judges (or, perhaps, by the organs entrusted with the execution of the law), in assigning rights and obligations on an individual basis. In the semantic sense, the constitution does not exist.

For the skeptic, there are no clear legal cases, and this conception is used in the context of *Critical Legal Studies* to maintain that the idea that the law normatively determines behaviour is an illusion and that, therefore, all judicial decisions obey non-neutral, political criteria, i. e., criteria that presuppose the use of value judgments on the part of the judges.

c) Interpretation as creation

In the legal literature of continental Europe, the skeptical conception of rules is usually regarded as foreign to the legal tradition. I will try to show, however, that that conception, although minoritarian, has also been present there.

Thus, for example, it was defended by Ascarelli (1959, 140). For Ascarelli, the object of interpretation is not a norm, but only a text; a norm exists only when it is applied.

In the words of Satta:[26]

„Ascarelli's solution ... is simply the following: that the norm, as it is understood by jurists and even in ordinary language, does not exist. What does exist is what he calls a text (or a behaviour): the norm is created in the very moment of its interpretation; but that happens only in one almost indescribable moment, since immediately thereafter, the norm suddenly becomes a text again — a text that will need another interpretation, in relation with another particular case, in order to become again, and only for a short moment, a norm ('another norm', to be precise), and so on ad infinitum." (Satta 1968, 496 f.)

This conception has been presented in great clarity, and apparently adopted, by Guastini (1992, 109 f.; 1993, 336-338). In his view, the skeptical theory holds that interpretation is an activity, not of acquiring knowledge, but of evaluation and decision. This is so because there is no such thing as the proper meaning of words, since every word can have a number of different meanings. Thus:

„It follows that interpretive statements ('text T means M') are neither true nor false. Such statements have the same deep structure as so-called stipulative definitions, that is, those definitions that do not describe the actual use of a term or expression, but propose to give a term or expression a certain meaning rather than another one. That stipulations are neither true nor false is uncontroversial.
Thus, it is understandable that, from this point of view, legal norms do not exist before interpretation, but are its result." (Guastini 1992, 109)

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[26] Satta advocated a conception of lawsuits known as a *monistic* conception, according to which the law is stipulated by judicial decisions and does not exist prior to them. Thus, he says (1968, 23): „ That French writer who said that the law is what the judges say it is thought to be contributing a skeptical note, but instead he expressed a profound truth, perhaps the only truth that can be expressed about the definition of law." The quoted sentence is similar to that passage of Bishop Hoadly so often quoted by American realists (cf. Gray 1902, 102, 125, 172): „Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them."

And in a recent paper on norm propositions in which an interesting form of skepticism is defended, Mazzarese writes:[27]

„Truth-values do not seem to apply to the statements of an interpretive set. That is so since the function of an interpretive statement — because of the variety of criteria of legal interpretation together with their particular features — does not amount to a description but rather to a proposal and/or to an ascription. Furthermore if moral and/or social and/or political evaluations are conceived as significant elements which either have to interplay, or even, indeed, do interplay with legal interpretation, then there are no theoretical grounds for applying truth-values to interpretive statements." (Mazzarese 1991, 55 f.; cf. also Vernengo 1993)

In summary, then, since the results of interpretation are never propositions that can be true or false, and since legal propositions presuppose an interpretive activity — for the attribution of meaning to certain norm formulations —, the logical thesis of skepticism is adequate, and this implies the legal thesis: there is never a right answer for any case, that is, judges always create the law, and never apply it to particular cases.

d) Critique

Before taking on the core of the skeptical challenge, i. e., the paradox of rule-following, it seems useful to make some remarks about three aspects skeptics tend to overlook:

> *(i)* an almost obsessive (cf. Hart 1983, 123), and unjustified, emphasis on lawsuits;
> *(ii)* the distinction between the *context of justification* and the *context of discovery* of judicial decisions; and
> *(iii)* the distinction between the *definiteness* and the *infallibility* of judicial decisions.

(ad i) The temptation to turn legal theory into a theory of the application of the law distorts a great part of North American legal theory. Legal norms regulate many aspects of our daily life, and only a very small number of them ever become legal cases. Most of us, e. g., comply with the duty to pay taxes, and when we are asked to justify that behaviour, we do so by pointing out that there are certain legal norms requiring us to do so. Excessive attention to the problems of the application of the law can lead skeptics to think that all cases are controversial (because, by definition, all cases of *lawsuits* are) and that, therefore, the law is not about being governed by rules (Schauer 1991, 181-196). But of this distortion, Hart had already warned:

„The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that is is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules." (H. L. A. Hart 1961, 135)

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[27] For a critique of this kind of skepticism, cf. Mendonca 1996.

On the other hand (as Hart 1961, 133, and Schauer 1991, 169-171, have pointed out), the claim that the assumption that human behaviour is governed by legal norms is a myth is inconsistent with the assertion that there is such a thing as judicial decisions. The existence of judicial decisions presupposes the existence of some kind of norms (secondary rules of adjudication, for Hart; jurisdictional rules, for Schauer) which confer jurisdictional competence on some set of individuals and, thus, give their decisions legal authority. As Hart (1961, 133) has added: „In a community of people who understood the notions of a decision and a prediction of a decision, but not the notion of a rule, the idea of an *authoritative* decision would be lacking and with it the idea of a court."

(ad ii) Often, an argument realists tend to use in favour of skepticism is the plurality of the facts that lead a judge to take a certain decision in a particular case. The judges' prejudices, their education, their social class, their reactions to witnesses, etc. (cf. Frank 1930, 114 f.) determine the decision at least as much as their beliefs about what is required by legal norms. That argument, however, can be countered with the distinction between the context of discovery and the context of justification. The distinction comes from philosophy of science (Reichenbach 1951, 7) where the activity consisting in the discovery or expression of a scientific theory — an activity that must be studied by historians and sociologists of science, in order to show what factors play a role in the development of scientific knowledge (the system of the selection of scientists, their process of education, the structure of scientific communities, etc.) — is distinguished from the obviously different activity consisting in the justification of such a scientific theory — an activity where logic and the rules of scientific methodology play the most important role. That distinction can be transferred to judicial decisions (Wasserstrom 1961, Golding 1987, Atienza 1991, 22 f.): the procedure by which a decision is reached is one thing, and the procedure by which such a decision is justified is quite another. Many of the arguments of American realists are useful in the sphere of the context of discovery of judicial decisions. It is, indeed, important to know the motives that can explain the decision taken by a judge: her social class, her ideological prejudices, her legal education, etc. Now, the reasons that justify (cf. Nino 1985, 126, for the distinction between explanatory and justificatory reasons) a decision are the reasons the judge appeals to for grounding the decision in the law. If one takes this distinction into account, it becomes clear that an appeal to the plurality of reasons that explain judicial decisions is no argument for skepticism.[28]

(ad iii) In Hart's opinion (1961, 137-141), the most interesting form of skepticism is the one that argues that, since under certain circumstances the decisions of the courts are irrevocable, to say in those cases that the court erred has no consequences in the legal system, because it does not change the rights or duties of anyone. If the Spanish Constitutional Court, for example, decides that a particular opinion expressed by a particular person is not protected by the right to freedom of expression (for instance, because it violates someone else's right to privacy), then the skeptic would say

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[28] Some skeptics reject that distinction; e. g., that is how Golding (1987, 135) argues with respect to Frank, and how Mazzarese (1996) argues in general.

that nothing is gained by saying that the court erred. And insofar, the skeptic would conclude, the constitution is what the Constitutional Court says it is. Hart, however, has clearly distinguished the definiteness from the infallibility of judicial decisions: That the decision of a court is definite does not mean that it is infallible. This is just as in tennis, where the decision of the umpire about whether or not a service was good is definite, without there fore being infallible (Greenawalt 1992, 45). The game of tennis is not a game of the umpire's arbitrary will, but a game governed by the rules of tennis. Similarly, the law is not what the courts say it is, although what the courts decide is definite (cf. also Moreso 1994b).

Here, it should be recalled that a *wrong* decision of a court cannot make an unconstitutional (and, therefore, invalid) norm constitutional (or valid). Rather, such decisions can, at best, make such norms applicable (cf. Chapter III on this point).[29]

The skeptics' most important argument, however, is Kripke's argument about rule-following. Now, Kripke's interpretation of Wittgenstein is far from uncontroversial, and it has been extensively criticized.[30]

The following passage in Wittgenstein (1953, par. 201), where he explains the paradox of rule-following, says:

„What this shows is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases.
Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another."

Obviously, this passage requires a detailed analysis that I cannot deliver here. But we can at least extract some ideas from it that will turn us away from the paradox, and thus from skepticism.

Wittgenstein does not question that the idea of rightness is applicable to rule-following. What Wittgenstein questions is that there must be some mediating entity between our understanding of a rule and our following it. Platon's (mechanical, as an extreme formalist would assume) image of rules as rails is what is in question here. But Wittgenstein's position can be understood as intermediate one between such a hypostazation of rules and the negation of their existence (Wright 1989, 297; Bix 1993, 41). Wittgenstein does not deny that rules can determine their correct application, as indeed they do in cases that are clear. Rather, according to Wittgenstein, the concepts of *same (gleich)* and *agreement (Übereinstimmung)* depend on the notion of rule-following (Wittgenstein 1953, pars. 224 and 225):

„The word 'agreement' and the word 'rule' are *related* to one another, they are cousins. If I teach anyone the use of the one word, he learns the use of the other with it."

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[29] Although it has been said (Schauer 1991, 119) that validity is a necessary condition for applicability, in Chapter III I have argued that validity is neither necessary nor sufficient for applicability.

[30] By philosophers (Blackburn 1981; McDowell 1981; McGinn 1984; Backer/Hacker 1985; Wright 1989, 1993) and legal theorists (Bjarup 1988; Schauer 1991, 1992a; Bix 1992, 1993, 1995; Marmor 1992; Radin 1992; Smith 1992; Endicott 1996).

„The use of the word 'rule' and the use of the word 'same' are interwoven. (As are the use of 'proposition' and the use of 'true')."

For Wittgenstein, certainty in clear cases derives from certain fundamental facts concerning agreement in judgments, agreement in social context and stability of the world:

„If the language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements. This seems to abolish logic, but does not do so. — It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call 'measuring' is partly determined by a certain constancy in results of measurements." (Wittgenstein 1953, par. 242)

According to Wittgenstein, the agreement that exists in clear cases of rule application does not depend on an agreement in opinion, but on an agreement in the *form of life* (Wittgenstein 1953, par. 241). I cannot analyze here the complexities of the notion of 'form of life' in Wittgenstein's work (for its use in legal theory, cf. Aarnio 1986 and 1987, ch. 4; Niiniluoto 1981). Suffice it to say that it refers to the common background that makes human communication possible.

Thus, to interpret a rule is only to substitute one symbol for another. Without the support of a set of shared practices, this does not guarantee that the new symbol will be understood and will make rule-following possible. That a rule is understood is shown in the acts of following it (cf. Kress 1989). Therefore, one should be cautious about the position of Schauer (1991, 64-68) according to which following formulated rules (as in the case of legislated law) must be distinguished from following rules that are not canonically formulated (as in the case of judges' law or precedent). For Schauer, the skeptics' considerations have force in the latter, but not in the former case. However, even in the case of following formulated rules we need the notion of semantic rules that stipulate the meaning of the formulated terms; and, therefore, even in this case agreement in the forms of life is necessary. In Marmor's words:

„A rule, in other words, is a sign and its meaning cannot be determined by another sign; the meanings of rules, like those of all symbols, must be determined by the actions themselves, that is, by the way the rules are *used*." (Marmor 1992, 149)

The conclusion from all this is that Wittgenstein's notion of rule-following is not a good foundation for skepticism. The metaphysical and the semantic thesis of the *Nightmare* do not seem well-founded, and therefore we should also abandon the logical and the legal thesis. In particular, there is no reason for maintaining that in all the cases they decide judges create the law, and that the application of the law is always a political question. Actually, as Radin (1930, 866) — an author sometimes associated with American legal realism — said: „Words are not crystals, [...], but they are after all not portmanteaus. We can not quite put anything we like into them."

I do, however, wish to underscore three lessons to be drawn from this analysis of rule-following in Wittgenstein:

(i) First, the question of legal interpretation — of the convenience of trying to substitute one symbol for another — arises when we have doubts about the application of some rule to a particular case (Wroblewski 1985, 22, 26, 35, and 1992, 91 f.; Marmor 1992, 153; Schauer 1992b, 740, 1993, xii; Endicott 1994). This takes us back to the old legal saying that *interpretatio cessat in claris* (or *in claris non fit interpretatio*). In clear cases, there is basically an *understanding* of the rule manifested in the acts of following it.

(ii) Meanings are not platonic entities, existing independently of our linguistic usage. Nor are they mental entities that reside 'in our heads'. Rather, on the contrary, meanings are, or perhaps one should better say: supervene (Williamson 1994, 205-209), our linguistic uses.

(iii) Finally, cases can also be controversial because of a lack of agreement in judgment, reflecting a lack of agreement in the most fundamental forms of life. That is the reason why the distinction between clear cases and hard cases is not always completely determined.

4. The Vigil

The *Vigil* represents a moderate constructivist position like that of Hart (1961, ch. VII), according to which, although there is no legal world independently of our ability to know the law as it is constructed by human beings (*metaphysical* thesis), we can determine the meaning of constitutional propositions by showing that certain consequences follow from the constitution (*semantic* thesis), and although this does not guarantee that all constitutional propositions are true or false (*logical* thesis), sometimes there is a right answer for constitutional cases and, therefore, sometimes the courts have a right to, and legally ought to, apply it, although they can, of course, err in doing so (*legal* thesis).

This is a position that can explain decisions like that contained in the statement of the Spanish Constitutional Court STC 341/1993 of November 18, 1993, on the constitutionality of art. 21.2 of Organic Law 1/1992, on the protection of public safety,[31] in relation with art. 18.2 of the Spanish Constitution which reads: „Private homes are inviolable. They may not be entered or searched without the consent of the dweller or a judicial warrant, unless a crime is in the act of being committed." The right of inviolability of private homes was discussed only for the three cases mentioned in art. 18. The meaning of the phrase „in the act" was questioned. That is, it was questioned whether

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[31] Here is the text of the first paragraphs of art. 21 of the law in question:

„1. The agents of the Security Forces may enter and search a private home only in the cases permitted by the Constitution, and within the terms stipulated by the law.

2. To the effect of the provisions of the previous paragraph, it will be a legitimate reason for entering and searching a private home on the grounds that a crime is in the act of being committed, if the Public Security Forces have well-founded information leading to the certain belief that one of the crimes sanctioned in the Criminal Code concerning toxic or hallucinogenic drugs or psychotropic substances is being, or has just been, committed, on the condition that the immediate intervention of the agents is necessary for preventing the crime, the escape of the perpetrator, or the disappearance of the effects or instruments of the crime."

the members of the Public Security Forces are *constitutionally* authorized to enter and search private homes when they have information that leads them to believe with certainty that a crime related to drug-trafficking is being, or has been committed, if and when their immediate intervention is required for preventing the crime, the escape of the perpetrator, or the disappearance of evidence. Art. 21.1 of the implicated Organic Law was declared unconstitutional by the Constitutional Court.

Here, a short analysis of the reasons given by the Court for the unconstitutionality of the provision, insofar as they refer to the question of whether or not the legislator's notion of 'in the act' is in accord with the constitutional concept, can be of interest. The text of the Constitution contains no definition of 'in the act', but as the Court observes, „the Constitution surely does not arise from a legal vacuum, but out of a legally organized society" (legal foundation 8° and STC 11/1981), and the concept of 'in the act', like other concepts, is „rooted in a legal culture in which the Constitution is embedded and [in the context of which it] must, therefore, be identified, without forgetting what this Court has earlier called the 'generalized ideas and beliefs generally accepted among jurists, judges and legal experts in general' (STC 11 /1981)". For the Court, the core of the concept of 'in the act' consists of two aspects: evidence or sensorial perception of the crime, and the urgency of police action. But while the urgency of police action is provided for in the article under scrutiny, well-founded information and certain belief are not exactly the same as the knowledge based on evidence or perception that, according to the Court, forms an integral part of the notion of 'in the act'.[32] As the Court asserts:

„If the language of the Constitution is to keep its meaning — which is the firm premise of any interpretation — one cannot but recognize that these connotations of 'in the act' (evidence of the crime and urgency of police action) form part of the concept mentioned in art. 18.2 of the Basic Norm, which, using the traditional notion, has drawn the limits of a fundamental right, and at the same time, of the infringement of that right by the public powers."

Thus, the unconstitutionality of the provision is grounded in the fact that the language of the Constitution is *meaningful*, and that the meaning of 'in the act', in the context of the practice of interpreting and applying the law, excludes some of the cases included by the legislator. Here, it is interesting to note that the Court uses, if I may say so, a *Wittgensteinian* notion of meaning; the meaning of 'in the act' is a function of the use — in this case, since it is a *terminus technicus*, the legal use — of that expression.

Although this was a controversial issue (that has provoked heated debates not only in the legal community, but in Spanish society at large), it is not clear whether it

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[32] In epistemology, sentences like '*x* knows (that) *p*' are usually analyzed as follows:

1) *x* believes that *p*.
2) *x* is justified in believing that *p*.
3) *p* is true.

The requirement contained in 3) is perhaps excessive for the purpose of defining 'in the act', and what really matters here is justified belief. The difficulty is that the justification of the belief in the case of 'in the act' must be based on sensorial data, and belief can obviously be based on other kinds of evidence.

was, in fact, a *hard* case. Jurists actually agreed that the use of the expression had been *followed* in the past with sufficient regularity for one to say that it was a reasonably clear case. And that is also what the Court says — in my view, correctly. Therefore, one can say that, according to the point of view of the *Vigil*, this is a case where things are sufficiently objective and determined, i. e., where one can show that the norm deriving from the Constitution contradicts the norm expressed in art. 21.2 of the Organic Law under scrutiny: the norm deriving from the Constitution is that in cases where there is well-founded information by other means than sensorial perception, the agents of the Public Security Forces are *not authorized* to enter and search a private home.

In order to argue in favour of this conclusion, we do not need any of the premises of the *Noble Dream*: neither that 'in the act' designates a natural kind, nor that there is a reconstruction of the notion of 'in the act' that best reconstructs the corresponding legal practice and solves all doubtful cases. The notion of 'in the act' solves this (as can be seen: generic) case, but that does not mean that there could not be doubtful cases, located in the twilight zone of the concept. The *Nightmare*, in contrast, would leave the Court with the responsibility of having *stipulated* a meaning of 'in the act' as the result of an evaluation. It would not be the Constitution that would have determined this result; the Constitution would not determine any result at all.

I think that none of these versions adequately reflects the habitual interpretive practice of the courts and that one can say that in this case, the answer of the Court was right, according to well-established communicative practice. But that does not mean that there will always be a right answer.

In that sense, the *Vigil* maintains a conception of the interpretation of the law — and, in fact, of interpretation *tout court*, since the interpretation of the law does not present too many particular problems (cf. Bulygin 1992, 29) — that is grounded in the obvious fact that the language of the law lives in the web of rules, conventions and practices natural languages consist of. The only form of giving sense to norm formulations is to attribute it to them in the sphere of this web. And since this web is not completely stable, because of the open texture of the expressions used, their ambiguity, etc., doubts about the application of these norm formulations arise. Thus, the organs of application that must justify their decisions with such norm formulations do have discretion in resolving cases.[33]

A possible explanation for the instability of the web supporting human communication can be given in accordance with ch. V of Lewis' influential book *Convention* (1969). According to Lewis, our natural languages actually are only a hybrid resonance of the possible languages of which they are part (169, 201). That means that our communication does not take place in one single language, with a set of interpreted expressions, but in a number of overlapping languages that, thus, allow for stable communication as well as for flexibility:

„The different languages of the cluster may have different virtues and vices, and hence may be differently suited to individual opinions, tastes, and conversational purposes. If everyone can pick from the cluster,

[33] Kelsen (1960, 349-356), Ross (1958, ch. IV), Hart (1961, ch VII) or Bulygin (1992) adopt this point of view.

incompatible preferences among languages may be all satisfied. Moreover, by not committing ourselves to a single language, we avoid the risk of committing ourselves to a single language that will turn out to be inconvenient in the light of new discoveries and theories; we allow ourselves some flexibility without change of convention." (Lewis 1969, 202)

Based on these ideas, the constitution can be regarded as a convention representing not a single interpretation, but rather a number of interpretations of the text of the constitution (Bobbit 1991, 32). If that is so, then we can understand controversies about interpretation (cf. Dworkin 1986, 43-46) as well as, even more importantly, agreements based on a broad overlap of different interpretations (cf. Bayón 1991, 712-715; Kutz 1994).

We can, then, also understand a number of *platitudes* about constitutional interpretation that would otherwise seem mutually incompatible. Campos (1993) recently tried to show the inconsistencies arising from the following three assertions:

1. The meaning of the text of the constitution has changed and keeps changing.
2. These changes are caused by controversies about the meaning of the text.
3. Such controversies are desirable because judges sometimes make mistakes in their interpretations, and controversies help to distinguish wrong interpretations from correct ones.

For Campos, the first assertion is comprehensible as long as the second is understood in the sense that the meaning of the text is stipulated by each interpretation (as a skeptic would say). But then, the third assertion becomes untenable. If all meaning is stipulated by interpreters, then it certainly makes no sense to speak of the correctness of an interpretation.

However, if we keep in mind that the constitution is only a *hybrid resonance* of several possible interpretations of the text, then we can understand the three assertions without any inconsistency. That the text of the constitution changes only means that in different historical stages, different ones of the possible interpretations are more privileged than the others, and these changes are caused by controversies over the meaning of the text, in the sense that not all constitutional *actors* have used the same interpretation out of the group of relevant interpretations. Thus, judges can make mistakes, for example when they use interpretations that are clearly outside of the range of admitted interpretations, i. e., that are not really interpretations of the constitution.

If our natural languages do not have a, so to speak, stable semantics it is not surprising that the constitution, which is part of a natural language, lacks it too. But that it has no stable semantics does not mean that is has no semantics. There may even be doubts about whether or not some particular interpretation belongs to the range of admissible interpretations of the text; but the fact that sometimes we have this doubt does not mean that we always have it.

The *Vigil* represents that moderately objective conception of legal interpretation (Fiss 1982, Coleman/Leiter 1995) according to which, even though the law does not firmly determine all human behaviour, we can formulate a conception of legal propositions that makes it possible to assign a truth-value to them on many occasions.

In that sense, the *Vigil* is compatible with many philosophical assumptions, without thereby implying severe ontological or semantic commitments for their adherents. As I said in Chapter II, only certain extreme versions of metaphysical realism and of skepticism are excluded. As we have seen, the *Vigil* can also account for many of our platitudes about the law: that the normative qualification of actions depends on actions of the authorities (a thesis hardly compatible with metaphysical realism) or that judges can be mistaken in establishing the rights and duties of persons (a thesis incompatible with skepticism).

However, there are two very relevant questions in the recent literature on constitutional interpretation that deserve a more detailed analysis. They are the role of the authorities' intentions in interpretation, and the justification of judicial review of the constitutionality of the laws. The next two sections will be dedicated to the discussion of these points.

5. Intention in Constitutional Interpretation

One of the most controversial questions about legal interpretation is the role of intentions in interpretation. As is well-known, the traditional distinction was that between *subjective* theories that attribute an important role to the legislator's intention, and *objective* theories emphasizing the so-called 'will of the law'. Besides, in the area of constitutional interpretation, a version of the subjective theory called 'originalism' has recently been defended, according to which the text of the constitution should be interpreted in accordance with the intentions of the text's authors (cf. Brest 1980).

In the United States, this conception is accompanied by a particular justification of the procedure of judicial review. In the originalists's view, what justifies judicial review of constitutionality is the appeal to the intentions of the authors of the Constitution; which means that in this view the only restriction imposed on democratic legislators is that which unequivocally arises from the intentions of the authors of the constitutional text; with respect to matters that do not arise from those intentions, the courts must defer to the legislator. Any conception that legitimates some other kind of restrictions on the democratic legislator is said to be unjustified (Bork 1971, Scalia 1989). I am not interested here in the politico-theoretical aspects of that conception, but only in the fact that it emphasizes that a constitution can only acquire meaning through the intentions of its authors.

The most radical version of this thesis about intention — the *Radical Intention Thesis* (cf. Raz 1996a) — is the one that says: „An interpretation is correct in law if and only if it reflects the author's intention."

In Chapter I, when I discussed intentionalist theories of meaning (like that of Grice), I already questioned the scope of a theory of the meaning of language that relies on the notion of intention. Many statements have never been uttered by anyone, so if meaning would depend on the intentions of the persons uttering them, such statements would be meaningless. Something similar applies to constitutional interpretation: A constitution has normative consequences (derived norms) that have never been explicitly prescribed by an authority and which, therefore, are not backed by any intention.

Thus, at least for such derived norms, the thesis of intention is inadequate. That alone is reason enough for restricting the thesis as, for example, Raz (1996a) has done by replacing it by what he calls the *Authoritative Intention Thesis*:

„To the extent that the law derives from deliberate law-making, its interpretation should reflect the intentions of its law-maker."

This thesis — which in the case of Raz (1986b, chs. 2 and 3; cf. also Marmor 1992, ch. 8; Marmor 1995; Alexander 1995; for an exploration of the thesis with respect to constitutional interpretation, cf. Feldman 1992) depends on an elaborate theory of authority which I cannot go into here — strictly limits the scope of intentionalist theories. In the case of legal interpretation, not only do derived norms not depend on deliberate promulgation by their authors; there are also other norms not covered by the thesis of intention: It does not apply to common law, nor — it seems — to foreign law, because although statutes of a foreign state *A* may be applicable in another state *B*, the authors of the legislation of state *A* are not authorities of state *B*.[34] Something similar happens with norms that are prior to the constitution (which I have called '*received* norms' in Chapter III): for such norms, the clause that they should be applied *in accordance with the constitution* must be understood to mean that, since the authorities that issued them are not authorities of the new legal order that arose with the new constitution, the intention of those authorities must be regarded as irrelevant; they must be interpreted as if they had been issued after the constitution became valid.[35]

But the weak thesis of intention, i. e., the thesis that interpretation consists basically in *retrieving* the intentions of the author of the interpreted object (for a discussion of interpretation as retrieval, cf. Raz 1995 and 1996b), also is plagued by a number of problems.[36]

I will mention only four of them:

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[34] This idea can explain why those norms, in order to be applicable, must pass some filter, as, for example, the so-called *public-policy clause*.

[35] This is perhaps what can be replied to assertions like the following (Hernández Marín 1989, 471): „According to the philosophy of language, the meaning of an expression depends on the context in which it is formulated, not on any other context. However, E. García de Enterría, and with him many other jurists, hold that in order to interpret a legal sentence created 100 years ago (for example, some of our Civil Code) one must take into consideration the context given by the Constitution, which was created only 10 years ago." The assertion that some provision of the Civil Code should be interpreted in accordance with the Constitution must be understood in the following sense: The courts which apply that provision (and, therefore, justify their decisions with it) must, in accordance with the Constitution, disregard the intentions of its authors and take it into account only if one of its meanings is compatible with the Constitution (otherwise, the provision would be derogated by the Constitution). There is nothing strange here, just as it is not strange at all to adopt a sentence pronounced by someone else, regardless of the intentions that other person had in pronouncing it.

[36] This thesis has been widely criticized: cf. Radin 1930; MacCallum 1968; Tarello 1980, 364-369; Moore 1985; Dworkin 1986, 53-76; Hurd 1990; Posner 1990, 261-269; Schauer 1991, 218-221; Freeman 1992; Shiner 1992, 35-38; Bix 1993, 183-190; Lyons 1993, 141-163; Nino 1994, 88-92; Endicott 1994; Waldron 1995.

(i) The first problem concerns the question whose authors' intentions are the relevant ones.
(ii) Secondly, we must find out which intentions are relevant.
(iii) The third problem has to do with the question to what extent counterfactual circumstances should be taken into account when determining the relevant intentions.
(iv) And, finally, we must determine the level of abstraction that should be used in describing the intentions of norm-authorities.

(ad i) Legal texts, and constitutions in particular, usually are not the work of one single author, but of a collective organ (a constitutional convention, or a constitutional assembly, as in the case of the Spanish Constitution of 1978). Now, in the case of an assembly it is much less clear what its intentions are than in the case of an individual uttering a statement. If we want to refer to the intentions of a collective organ without committing ourselves to the questionable metaphysical position implied in speaking of such an organ as if it had a mind where its intentions are located, we must refer to the intentions of the majority of the members, i. e., to the intentions of those members who voted for the corresponding text. In order to do this, we must assume that some intentions can be shared (a common assumption in law, where we often refer to the will expressed by a company or by a jury, for example) and that in this sense there are collective intentions; but that brings us to another problem: not that of *whose* intentions, but that of *what* intentions.

(ad ii) Now, assume that during dinner I say to a friend 'Could you please give me some more wine?' What are the intentions relevant for attributing meaning to that sentence? It seems that, besides a knowledge of English, all my friend needs to understand is that I am making a request. Of course, in order to understand that sentence correctly, participation in a set of practices is required (we must, to say it somewhat pedantically, share a *form of life*). Usually, throwing the bottle of wine across the table or pouring the wine directly into my mouth would not be considered correct ways of reacting to my request; they would not show an adequate *understanding*. Other intentions I may have are irrelevant for the meaning of the sentence; e. g., I may wish to have more wine *in order to* relax and ignore the boring conversation one of the dinner guests is engaging me in; or I may wish to be served the wine that is left in the bottle *in order to* avoid that another friend, who is driving, will drink it, or to avoid that someone else whom I don't like very much will get it, etc. None of these intentions is relevant for giving meaning to my sentence.

In this example, there are two aspects that are relevant for the intention behind legislated texts. On the one hand, there is the distinction between intention and purpose (MacCallum 1968, 240 f.). The (intentional) purposes of legislators (or members of a constituent body) are often irrelevant for determining the meaning of those texts. Sometimes, we know nothing about the purposes of the legislators; and those purposes also may not even be the same for all those who voted in favour of the respective text. Normally, legislators issue certain texts with the purpose of causing certain changes in soci-

ety. But the meaning of the texts must be understood independently of the purposes, because unless we know the meaning, we will not be able to assess their capacity for causing those changes. On the other hand, intention is relevant for determining what kind of speech act I am performing, and that depends on the context in which a sentence is uttered, and on certain linguistic conventions.

In the previous example, although the sentence superficially looks like a question, an affirmative answer without further action would usually mean that the sentence was misunderstood. The intention is part of the *force* in the theory of meaning; and in the above case, the intention that can be attributed to the speaker is what converts this speech utterance into a request. Similarly, the texts issued by legislators are given in certain contexts, and are subject to certain linguistic and legal conventions (determining the required size of a majority, etc.). Thus, the intention required of legislators is minimal: all that is required is that in legislating one intents, under some description, to effect that that which is being legislated becomes law (Raz 1996a). A *performative* kind of utterance is issued, certain contents are converted into law through certain acts. Intentions do not serve to determine what the meaning of the text is, for the obvious reason that only sometimes (some) legislators really know well the text they are voting for. Not even in the case of the text of a constitution is it worth trying to find out what intentions the legislators had in issuing it, because surely even in that case not all of them had the same understanding of the texts they voted for (as was already said earlier, the constitutional text actually contains not a single, but several constitutions).

As Raz says:

„A person is legislating (voting for a Bill, etc.) by expressing an intention that the text of the Bill on which he is voting will — when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country — be law." (Raz 1996a, 267)

This minimal thesis of intention is, I think, all we can concede to intentionalist theories. But it is important to note that from this intention (which can plausibly be assumed to be shared by all those who voted for some text, as, e. g., the text of a constitution) of the norm-authorities it depends that certain contents are regarded as law in a society. Whether this minimal thesis is extended to include other additional intentions clearly expressed in declarations of motives, preambles, or parliamentary debates is a *contingent* question for every legal order and will, therefore, not be analyzed here (but cf. Ezquiaga 1987, ch. 7, on this question in the doctrine of the Spanish Constitutional Court).

(ad iii) Because of the empirical and other difficulties in discovering the intentions of others, it is sometimes said that, actually, the notion of 'author' is a fictitious notion, and that we do not refer to the intention of an actual, historical author, but to the intention some author might have had under certain, counterfactual circumstances. Thus, for instance, Marmor thinks that

„meaning is assigned through a counter-factual statement. [...] an interpretive statement is either a statement on the communication intentions of the actual speaker, or else it must be a counter-factual statement, characterizing the communication intentions of a fictitious speaker" (Marmor 1992, 31).

The intentions of a fictitious speaker, however, are of no help in interpretation (Endicott 1994, Raz 1996a). There are no criteria for guiding the construction of such a fictitious speaker. Thus, in this way, *Hamlet* could be interpreted as if it had not been written by Shakespeare but, say, by Woody Allen, or by one of its readers. That idea makes the thesis of the author's intention *(intentio auctoris)* collapse with the thesis that privileges the reader's intention *(intentio lectoris)* (cf. Eco 1995, Levinson 1982). And although that is a thesis cherished by the advocates of radical indeterminacy, it is unjustified. As Kelsen (1979, n. 170) wrote:

„Diese Identifizierung des Gesetzes mit seiner Interpretation ist unhaltbar. Auch die Bibel oder Shakespeare's Hamlet wird interpretiert; aber niemandem wird es einfallen zu behaupten, die Bibel sei von ihrem Interpreten oder Hamlet nicht von Shakespeare, sondern von seinem Interpreten geschrieben."

When, sometimes, we have doubts about the intention of an author, these doubts do not go away by inventing a fictitious author and making certain counterfactual assertions about his fictitious intentions. That may be an attractive task for certain kinds of literary criticism, but it is not very helpful in the sphere of legal interpretation.

(ad iv) Finally, we must turn to the degree of abstraction the intentions of the authorities must be described with. This is especially important in the case of constitutional texts, since they usually contain terms whose content is rather dense. I am referring here to terms like 'human dignity', 'liberty', 'equality', 'inhuman and humiliating treatment', etc. What happens with such terms is that linguistic conventions tend to leave them more indeterminate than other terms whose content is not as dense. The meaning of those terms depends on people's moral-political attitudes. Now, does that mean that those terms must be understood as they were understood by the authors? To begin with, we must remember how difficult it is to find out how the authors did understand these clauses. Even among those who voted in favour of a constitutional text, some may have thought that certain treatments are humiliating, while others thought that they are not. Also, some kinds of treatments they possibly never thought of at all (e. g., force-feeding prisoners on a hunger strike), or didn't know what to think of, etc. But even assuming that all agreed about some particular point, e. g., that two weeks of solitary confinement is not a humiliating treatment, we must ask what consequences this has.

Advocates of originalism maintain that especially in those cases, the constitution must be interpreted and applied by restricting these clauses to the meaning they had for those who formulated them. Thus, they believe that it is applicable only to the kinds of cases *(paradigms)* the authors included in those clauses. That is rather strange: According to it, if the authors never thought that (through the use of a new technology) a new method of torture could be invented, then such a new method of torture would not be a humiliating treatment. Why should the language of the constitution be interpreted in this way? Why should those clauses be interpreted at such a low level of abstraction? When we use terms of this kind, we expect to be understood in a wide, flexible sense. Thus, if I invite a friend to dinner, together with other guests on whom I would like to make a good impression, and I say to him 'Please, watch your behaviour', I hope he understands that request in a flexible way. I do not ask him to guess my intentions,

which may be vague if I do not know my guests' customs; rather, I ask him to develop his own understanding of what it means to behave properly in that new situation.[37] For example, I may not know whether the wife of one of my guests is a Moslem, or a Jew, or a vegetarian, etc. I hope that my friend understands my request in a rather abstract way, and not that he follow exactly the good-conduct rules we were taught as children in Catholic school. Another interesting example was presented by Dworkin:

„Suppose that my mother, now dead for many years, told me when I was young never to do anything unfair in business, and that I am eager to keep faith with her instruction. Suppose I know that she herself, managing her own business, drove small competitors to the wall by undercutting them and then raising prices when they were gone, a practice common in her day and widely thought fair. Suppose I myself, like most people today, find this an unfair business practice. What shall I do? How would it help if someone told me that I should give full effect to her intentions as well as to what she actually said? She had at least *two* relevant convictions: the first was her desire that her son should do nothing that really is unfair in the conduct of his business; the second was her belief that ruining competitors by temporarily driving prices below cost is not unfair. I now find that I cannot both satisfy the desire and accept the belief, and so I cannot reach a decision simply by resolving to follow her convictions. I must decide *which* of my mother's convictions — the more abstract or the more detailed — is the right one to follow." (Dworkin 1993, 136)

Obviously, Dworkin leans towards the more abstract interpretation, and he grounds this inclination on his distinction between *concept* and *conceptions* (Dworkin 1986, 70-73) according to which a concept like *justice* (Hart 1961, 155-159; Rawls 1971, 5) can be understood as that which different conceptions of justice, different sets of principles, have in common. Here, I will not discuss whether the distinction really holds (cf., e. g., Munzer/Nickel 1977), i. e., whether different conceptions do not, in fact, reflect different concepts. But I want to underscore that the constitutional clauses under scrutiny do entail a number of possible interpretations, and that the fact that such abstract clauses were used is sufficient reason for not trying to interpret them in their more detailed version.

Changes in the world may bring about new types of actions that constitute humiliating treatments. But since the concept of humiliation is an evaluative concept, i. e., presupposes the use of moral rules in order to be applied, a change in our moral theories (which for moral realists means truer theories about moral reality, whereas for moral constructivists it only means a change in our attitudes, projected on the world) also can affect our concept of humiliating treatment. Thus, the constitutional clauses in question must be interpreted in their more abstract form, in order to allow for such changes of meaning.

By way of conclusion, we can say that the role of the authors' intentions in the interpretation of the law is limited. Intentions should be integrated in a global theory of linguistic meaning, but they should be located in the theory of force rather than in the theory of sense. There is hardly anything to be added to this; but perhaps one should keep in mind a restriction of interpretation that comes from the so-called *principle of*

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[37] Wittgenstein (1953, 33) writes: „Someone says to me: 'Show the children a game'. I teach them gaming with dice, and the other says 'I didn't mean that sort of game'. Must the exclusion of the game with dice have come before his mind when he gave me the order?"

charity (Quine 1960, 59; Davidson 1984, 136 f., 152 f., 168 f., 196 f., 200 f.; Dworkin 1986, 53), according to which an adequate theory of interpretation maximizes agreement, i. e., that one should select, from among the different possible interpretive hypotheses, that which produces the attribution of the most adequate meaning in the direction word-world (since in the case of prescriptive language, we have no notion of truth, we cannot say that a hypothesis produces a greater number of true statements). That means, e. g., that one should discard as much as possible interpretive hypotheses that would lead us to qualify as obligatory things which are impossible (for logical or for empirical reasons).

Before ending this section, I want to make a comment — partly linked to the relevance given to authors' intentions in interpretation — about a question that refers not to the interpretation of the law, but to that of certain texts regarded as sacred by certain religions. Because we do speak of interpretation not only in the case of legal texts. For instance, we speak of the interpretation of conversation when, in daily life, we interpret what others tell us. We also use the expression 'interpretation' in order to refer to the interpretation of literary, religious or other texts. We even speak of the 'interpretation' of a play or a symphony, where we mean the performance of the respective work. And we say that data are 'interpreted' (scientific interpretation), or historical or social facts (interpretation in the social sciences), or paintings and sculptures (interpretation of art) (cf., e. g., Betti 1990). This shows that 'interpretation' actually does not mean one concept, but a *family* of concepts. And perhaps the family resemblance with theological interpretation can show some interesting similarities with the interpretation of the law.

Levinson (1988; cf. also Grey 1984) has pointed out an analogy between constitutions and sacred texts, as, e. g., the bible for Christians. In both cases, Levinson (1988, 5) suggests, those texts are seen as constituting the identity of a community — a political community in the first, a religious community in the second case. Now, he says, there are different concepts of constitutionalism, just as there are different concepts of Christianity (as well as of other religions). These different concepts can be classified according to two criteria: *(1)* Should 'constitution' be understood as meaning only the constitutional text, understood in the detailed version that reflects the intention of its authors, or should it be understood as the text *plus* the different interpretive traditions that arise in the course of its application? *(2)* Is the authority to interpret the Constitution, in the Spanish case, conferred exclusively on the Constitutional Court which, therefore, is infallible, or can all of us to some extent take part in that interpretive practice?

If these questions are applied to the bible, according to Levinson (1988, 29) we obtain positions that neatly divide Protestants and Catholics. Protestants reply to the first question with the textualist answer: *sola scriptura*, whereas Catholics reply differently: *scriptura et traditio*. And Catholics answer the second question by attributing infallibility in the interpretation of the scriptures to the schoolmen and, in the last instance, to the Pope. Protestants, in contrast, reply with the notion of the right to private judgment according to which all Christians can interpret the holy scriptures.

If we apply these criteria to the interpretation of the constitutional text, we get four possible models of constitutionalism:

(1)	Protestant-1	—	Protestant-2
(2)	Protestant-1	—	Catholic-2
(3)	Catholic-1	—	Protestant-2
(4)	Catholic-1	—	Catholic-2

I will leave to others the task of fitting the different conceptions of constitutionalism into those classes.[38] But I do wish to point out that the peculiar version of the *Vigil* defended above corresponds to position *(3)* — Catholic-1, Protestant-2. That means that, while it holds that the application of the constitution should take into account the practices and interpretive conventions added to the text (Grey 1975, Munzer/Nickel 1977), rather than only the text with the intentions of its authors, since it is those practices and conventions which delimit the set of admissible interpretations that *de facto* make up the meaningful content of the constitutional text, it does not hold that the decisions of any court are infallible; rather, the meaning of the constitutional text in many cases determines the right answer to constitutional cases; the Constitutional Court is subject to the Constitution and is, therefore, itself fallible in the determination of constitutional rights and duties.

6. Judicial Review of the Constitutionality of Laws

The question of the justification of the control of constitutionality has become a topic of political theory and, more precisely, democratic theory. Since many democratic states have judicial organs with the competence to examine the constitutionality of provisions enacted by democratically elected legislatures, the foundation for this counter-majoritarian power is often questioned. Some say that judicial organs ought to be limited exclusively to declaring unconstitutional provisions whose unconstitutionality is plainly visible, and that in all other cases they ought to defer to the legislator (that is perhaps what Bork 1990 had in mind). Some degree of deference to the legislator can also be found in other theories of judicial review, like those of Wechsler (1959), Bickel (1962), Ely (1980) or Choper (1980), where it is grounded in the protection of basic values of constitutional democracy, or in reinforcing the representation of minorities and the transparency of the procedures of representation. Still other theories advocate a more substantive theory of rights that leaves more room for the activity of jurisdictional organs (Tribe 1985, Michelman 1988), or that can produce a constructive conception of constitutional interpretation in which to ground even the most innovative decisions of the courts (Dworkin 1977c, 1986), or that distinguishes constitutional opportunities from normal political opportunities for changing one's positions (Ackerman 1991), or that holds that any theory of judicial review is either impossible (because disagreements about existing conventions are so radical that the latter never succeed in restricting ju-

[38] Some authors have taken an explicit stand, though. Thus, Dworkin (1986, 413) has defined his attitude towards the interpretation of the constitution as a Protestant one: „It is a protestant attitude that makes each citizen responsible for imagining what society's public commitments to principle are, and what these commitments require in new circumstances."