Identification of Legal Content, Legal Nihilism and Propriety of Methods of Interpretation

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Abstract

How do we ensure agents formulating legal statements are not systematically in error? In this paper I assume that the success of legal statements follows from the fact that propositions expressed by legal statements adequately represent legal reality. I argue that the content of legal statements hinges implicetly on the sources of law and methods in which we attribute meaning to these sources. In this regard, I identify the primary obstacle to the success of actions that consist of asserting legal statements as a systematic failure to refer to the proper method of interpretation by the agents formulating these statements. The paper explores several solutions to this challenge, focusing on the solution explaining the success in referring to the proper method of interpretation in virtue of meta-interpretive considerations. Subsequently, the paper discusses a challenge to this solution following from the claim that there are many different theories of meta-interpretation, and there is no fact (neither natural, nor conventional or intentional, anchored in the collective consciousness of society), determining that one of them is more accurate than the other ones. Given all the intricacies, this study focuses on exploring a coherent framework for understanding how different interpretive methods and meta-interpretative theories can be evaluated and applied in legal practice. It seeks to articulate a model that accommodates the diversity of interpretations while striving for a reasoned consensus on how legal texts should be understood and applied.

1. Introduction

The process of identifying legal content is a complex and nuanced task that lies at the heart of inquiries by legal philosophers. This process has its reflection in legal discourse—the identified content of the law is conveyed by legal statements, which assert, "It is the law that L". In this context, my central inquiry revolves around the threat of systematic error by agents asserting legal statements. This inquiry invites us to explore the multifaceted nature of legal interpretation and the philosophical underpinnings that influence it. Beyond mere academic curiosity, these considerations significantly impact legal practice and theory. They affect not only the understanding of the processes underlying the formulation of legal statements but also the broader legal landscape, including how rights and obligations are defined and enforced.

This research positions itself within the debate concerning legal statements by adopting a descriptivist semantics of legal statements provided by Finlay and Plunkett. It argues that the success of legal statements follows from the fact that propositions expressed by legal statements adequately represent legal reality. However, it revisits the Hartian assumption made by Finlay and Plunkett that the content of legal statements includes the conventional rule of recognition. Departing from the Hartian assumption, I argue that legal statements inherently depend on the

sources of law and the proper method of interpretation, without prejudging their foundation in the conventional rule of recognition.

At the core of this study is the challenge of systematic error among agents asserting legal statements. This challenge follows from the fact that if legal statements inherently refer to the proper method of interpretation, then there should be some legally relevant facts determining the answer to the question of which method of interpretation is the proper one. However, many scholars argue that there is no legally relevant support that favors the method of interpretation M_1 over its alternatives $M_2 \ldots M_n$, suggesting there is no proper method of interpretation. In this regard, I identify the primary obstacle to the success of actions that consist of asserting legal statements as a systematic failure to refer to the proper method of interpretation by the agents formulating these statements.

Given all the intricacies, this study focuses on exploring a coherent framework for understanding how different interpretive methods and meta-interpretative theories can be evaluated and applied in legal practice. It seeks to articulate a model that accommodates the diversity of interpretations while striving for a reasoned consensus on how legal texts should be understood and applied.

This paper is structured as follows. In Section 2, I delve into the descriptivist semantics of legal statements, as proposed by Finlay and Plunkett. My analysis leads me to a crucial claim: legal statements inherently rely on both the sources of law and the proper method of interpretation. Importantly, we avoid prejudging their foundation solely on the rule of recognition. Section 3 introduces a significant challenge stemming from my account outlined in Section 2: the challenge of systematic error among the agents who assert legal statements that follows from a failure to refer to the proper method of interpretation. In Section 4, I discuss three responses to the problem highlighted in Section 3. The first response explores the referential interpretation of legal statements, suggesting that the success in referring to the proper method of interpretation by agents formulating legal statements hinges on the speakers' intention. The second response delves into the appeal to established law, suggesting that the success in referring to the proper method of interpretation relies on more or less explicitly established legal norms indicating how to interpret the sources of law. The third response centers on meta-interpretive considerations, suggesting that the success in referring to the proper method of interpretation depends on the fact that a particular method of interpretation is favored by the proper theory of meta-interpretation. I identify flaws in both the first and second responses; therefore, I focus on the third response. Based on this, Section 5 introduces a challenge to the explanation of the success in referring to the proper method of interpretation in virtue of meta-inderpretive considerations, suggesting that there there is no fact

determining that one of theories of meta-interpretation is more accurate than the other ones. In response to this challenge, in Section 6, I explore two approaches: 1) the "Easy Way," which posits that with a reasonable amount of effort, we can demonstrate that *T* is better than alternative theories of meta-interpretation (or, at least as good as them); 2) the "Hard Way," which acknowledges the insuperable difficulty in proving that alternatives to T are worse than T, but maintains that choosing T still falls within the realm of practical reason.

In this context, I argue that the threat of agents formulating legal statements being in systematic error, due to their failure to refer to the proper method of interpretation, can be countered. This can be achieved by explaining the success in referring to the proper method of interpretation in virtue of methods of interpretation favored by theories of meta-interpretation that are at least on a par.

2. Legal statements and methods of interpretation

In this section, I will focus on providing a descriptivist semantics for legal statements[1] – a semantics that identifies the semantic content of the target sentences with some propositions. Therefore, it inquires as to what properties, relations, states of affairs, etc., legal statements are about[2]. In this regard, I argue that legal statements, while grammatically complete, are in fact logically incomplete – they have one or more open argument-places in their logical form.

A grammatically complete sentence can still be logically incomplete, in which case it fails to express a proposition by semantic convention and, therefore, lacks a truth value. To determine their truth value, we need to supply them with proper relata. However, I endorse the view that such a sentence may still be used to communicate a proposition by virtue of the audience's ability to identify, from contextual cues, the intended elements of the logical form that the speaker has left

[1] It is noteworthy that in "The Concept of Law," one of the most important books on the philosophy of law in the 20th century, H.L.A. Hart introduced the concept of internal legal statements, distinguished from external ones.[1] External legal statements are often defined as those that provide information or describe a legal rule from the perspective of an external observer. Conversely, internal legal statements are made from the perspective of someone within the legal system – someone endorsing the rule or criticizing deviations from it. I endorse a view that a difference between internal and external legal statements should be place dat the level of pragmatics, rather than their semantics. Therefore, I assume that considerations of this paper apply to both internal and external legal statements.

[2] Stephen Finlay and David Plunkett provide such a descriptivist semantics in an explicitly Hartian direction. According to them, legal statements refer to a rule of recognition that specifies the criteria for a rule to be a part of a given system of rules. In consequence, they argue that a statement of the form "It is the law that L (in X)" semantically expresses the proposition that L is a rule (requiring, permitting, or empowering some kind of behavior) satisfying the criteria of the rule of recognition *R* of legal system X. See Stephen Finlay and David Plunkett, "Quasi-Expressivism about Statements of Law: A Hartian Theory," in *Oxford Studies in Philosophy of Law Volume 3*, ed. John Gardner, Leslie Green, and Brian Leiter (Oxford: Oxford University Press, 2018), 53.

implicit. In such cases, we'll say that the logically incomplete sentence is used as *elliptical* for another, logically complete sentence in which the intended proposition is fully explicit[3].

Therefore, the question is: what are the implicit relata actually provided as part of the content of legal statements? In response to this question, I propose an approach that emphasizes the "grammar" of legal statements. In this regard, my approach is based on recognizing the role of legal statements within the argumentative framework employed by participants in legal practice to show the truth of these statements[4]. In my view, this framework reveals that the truth of legal statements depends on the sources of law and proper method of interpretation. Based on this, I argue that the content of legal statements – and, respectively, the legal content of the sources of law identified by agents formulating such statements – hinges implicetly on the sources of law and methods in which we attribute meaning to these sources[5], without a priori settling whether these relata are determined, for example, by the convention or not.

One might question whether legal statements do indeed refer to methods of interpretation. In this regard, they may argue that methods of interpretation sometimes provide a correct identification of legal content and sometimes not. I view this differently – I argue that we should not question whether a given method accurately captures the content of law; instead, we should posit that any outcome derived from this method is, by definition, the content of law. Therefore, given the terminology of Crispin Wright, when it comes to legal content, the proper method of interpretation is not fact-tracking; rather, it is fact-constituting – such a method, as applied to the

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[3] An example of such elliptical use of incomplete sentence is: if somebody says 'She put her shoes on', he is most likely using it as elliptical for 'She put her shoes on *her feet*.' Stephen Finlay provides a similar analysis of moral statements suggesting that sentences of the form 'n is good' are used as elliptical for 'n is good to φ'. See Stephen Finlay, *Confusion of Tongues: A Theory of Normative Language*, Oxford Moral Theory (Oxford, New York: Oxford University Press, 2014), 8.

[4] Aulis Aarnio, *The Rational as Reasonable* (Dordrecht: Springer Netherlands, 1986); Robert Alexy et al., *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford, New York: Oxford University Press, 2009); Luís Duarte d'Almeida, "On the Legal Syllogism," in *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence*, ed. David Plunkett, Scott J. Shapiro, and Kevin Toh (Oxford: Oxford University Press, 2019); Luís Duarte d'Almeida, "What Is It to Apply the Law?," *Law and Philosophy* 40, no. 4 (August 1, 2021): 361–86; Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005); Dennis Patterson, "Normativity and Objectivity in Law," *William & Mary Law Review* 43, no. 1 (2001): 325–63; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, New York: Oxford University Press, 2009); Jerzy Stelmach, *Methods of Legal Reasoning* (Dordrecht: Springer, 2006); Jerzy Wróblewski, "Legal Decision and Its Justification," *Logique et Analyse* 14, no. 53/54 (1971): 409–19; Jerzy Wróblewski, "Justification of Legal Decisions," *Revue Internationale de Philosophie* 33, no. 127/128 (1979): 277–93.

[5] Such methods were developed by legal theorists across different legal cultures. See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: West Thomson, 2012); Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," *Harvard Law Review*, no. 2 (1989): 405–508; William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (St. Paul: Foundation Press, 2016); Jerzy Wróblewski, *Zagadnienia teorii wykładni prawa ludowego* (Warszawa: Wydawnictwo Prawnicze, 1959); Maciej Zieliński, *Interpretacja Jako Proces Dekodowania Tekstu Prawnego* (Poznań: Wydawnictwo Naukowe UAM, 1972); Maciej Zieliński, *Wykładnia prawa. Zasady - reguły - wskazówki* (Wolters Kluwer, 2008).

sources of law, not so much reflects or tracks the pre-existing content of the sources of law, but rather creates the subject of inquiries of agents seeking to identify legal content[6].

3. The problem of determining the proper method of interpretation

The preceding section lead to the conclusion that participants in legal discourse identify legal content by implicitly appealing to the proper method of interpretation. What is particularly noteworthy, however, is the remarkable diversity of methods of interpretation. Textualism[7], intentionalism[8], purposivism[9], integral theory of law[10], dynamic interpretation[11], derivational theory[12], approaches that refer to feminist jurisprudence[13] or the economic analysis of law[14] are just a few examples. Significantly, the content of law as identified by various methods of interpretation can vary greatly. A method based on the author's intentions may thus assign a different meaning to a legal text than a theory referring to the common understanding of this text[15]. To illustrate, with regard to the Eighth Amendment to the US Constitution, textualism offers an interpretation that permits capital punishment, whereas living constitutionalism provides an interpretation that prohibits it.

Given the variations among methods of interpretation, we must confront the following issue: What is "the proper method of interpretation" that we refer to when formulating legal statements? The claim that our legal statements refer to the proper method of interpretation seems to imply the existence of legally relevant facts that determine the propriety under discussion. Nonetheless, many authors argue that there is no such a fact. Henry M. Hart and Albert Sachs,

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[6] Accordingly, see Zieliński, *Interpretacja Jako Proces Dekodowania Tekstu Prawnego*, 31; Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, 419; Sunstein, "Interpreting Statutes in the Regulatory State," 411.

[7] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law*, by Antonin Scalia, ed. Amy Gutmann, The University Center for Human Values Series (Princeton: Princeton University Press, 1997), 3–48; Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*.

[8] see Bernard W. Bell, "Legislative History without Legislative Intent: The Public Justification Approach to Statutory Interpretation," *Ohio State Law Journal* 60 (1999): 62.

[9] see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2007); Marek Smolak, *Wykładnia celowościowa z perspektywy pragmatycznej* (Warszawa: Wolters Kluwer, 2012).

[10] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), 52.

[11] William N. Eskridge, "Dynamic Statutory Interpretation," *University of Pennsylvania Law Review* 135, no. 6 (1987): 1479–1555.

[12] Zieliński, *Wykładnia prawa. Zasady - reguły - wskazówki.*

[13] Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103, no. 4 (1990): 829–88; Qudsia Mirza, "Islamic Feminism and the Exemplary Past," in *Feminist Perspectives on Law and Theory*, ed. Janice Richardson and Ralph Sandland (Londyn: Routledge, 2000), 187—208; Daphne Barak-Erez, "Her-Meneutics: Feminism and Interpretation," in *Feminist Constitutionalism: Global Perspectives*, ed. Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana (Cambridge: Cambridge University Press, 2012), 85–97.

[14] Mario J. Rizzo and Frank S. Arnold, "An Economic Framework for Statutory Interpretation," *Law and Contemporary Problems* 50, no. 4 (1987): 165–80.

[15] To capture the differences between these theories, one can refer to the distinction proposed by Lawrence Solum between interpretation and construction of a legal text. See Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27, no. 1 (2010): 95–118.

while describing the practice of legal interpretation in the United States, observed that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation"[16]. They note that this practice is particularly complicated in the field of constitutional law. The United States Supreme Court is divided between those who believe that the original intention of the framers of the Constitution is the basis for its interpretation and those who try to interpret it in accordance with the contemporary needs of society. Accordingly, John F. Manning suggests that the propriety of a particular method of interpretation is not settled by legal considerations since choosing among such methods inevitably involves considerations of political theory[17].

These observations may suggest that there is no legally relevant support that favors the method of interpretation M_1 over the methods of interpretation $M_2 \ldots M_n$. However, given relevant jurisprudential values, such as legal autonomy, legal certainity etc., it seems intuitive that, for a method of interpretation M_1 to be considered proper, there must be legally relevant support favoring M_1 over alternative theories $M_2 \ldots M_n$, which leads to the conclusion that there is no proper method of interpretation. This argument may be illustrated as follows:

(1) For a method of interpretation M_1 to be considered proper, there must be legally relevant support favoring M_1 over alternative theories $M_2 \ldots M_n$.

(2) There is no legally relevant support that favors the method of interpretation M_1 over methods of interpretation $M_2 \ldots M_n$.

(C) There is no proper method of interpretation.

Therefore, legal statements – taken as implicitly referring to the sources of law and the proper method of interpretation – fail to refer to this method. This, in turn, imply legal nihilism – a claim that legal statements aiming to identify legal content are systematically false, and agents formulating such statements are systematically in error[18].

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[16] Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William Eskridge Jr and Philip Frickey, 1st edition (Westbury, New York: Foundation Press, 1995).

[17] John F. Manning, "What Divides Textualists from Purposivists?," *Columbia Law Review* 106, no. 1 (2006): 96.

[18] It follows from the fact that legal statements, such understood, pressupose the existence of the proper method of interpretation. As Peter F. Strawson notes, the failure of such a presupposition, implies reference-failure. However, the question is whether reference-failure implies falsehood of statement or rather a deficiency so radical as to deprive it of the chance of being either true or false. Following Strawson, I endorse a view that it depends whether the failure of reference does affect the topic of the statement, or whether it affects what purports to be information about its topic. In this regard, I argue that the reference-failure concerning the proper method of interpretation affects what purports to be information about the topic of legal statements, implying falsehood of such statements. See P. F. Strawson, "Identifying Reference and Truth-Values," *Theoria* 30, no. 2 (1964): 96–118.

4. Answering the problem of determining the proper method of interpretation

In this section, I argue that we should reject the claim that legal statements – taken as implicitly referring to the sources of law and the methods by which we attribute meaning to those sources— fail to refer to that method, togerher with the legal nihilism that follows from this claim. I will consider three responses to the above claim. Each of these responses aims to provide an account of the success in referring to the proper method of interpretation by agents formulating legal statements, implying the refutation of the legal nihilism. The first response posits that legal statements implicitly refer to the method of interpretation regarded as proper by the speaker. The second response asserts that legal statements implicitly refer to the method of interpretation that is legally binding. The third response maintains that legal statements implicitly refer to the method of interpretation that is favored by the proper theory of meta-interpretation. In light of the shortcomings inherent to both the first and second responses, I conclude that the third response is the most appropriate course of action. Consequently, I will devote the subsequent sections of this text to a detailed examination of this response.

4.1. Referential interpretation of "the proper method of interpretation"

One might posit that the question of "what is the proper method of interpretation" that we refer to when formulating legal statements does not require any legally relevant facts determining the proper method of interpretation. Rather, such a requirement arises from the misunderstanding of the use of legal statements. In this regard, it can be argued that an analysis of the content of legal statements must take into account the *referential/attributive* ambiguity. Consider the sentence:

(1) Smith's murderer is insane.

Keith Donnellan (1966) pointed out that a description like *Smith's murderer* in (1) has two uses. A speaker using it attributively predicates insanity of whoever murdered Smith. On the referential use the speaker predicates insanity of a particular individual, and the description is just a device for getting the addressee to recognize which one it is. (1) has therefore two different meanings corresponding to the attributive and the referential use of the description, and it expresses a different proposition in each of the two cases[19].

[19] It is noteworthy that Saul A. Kripke (1977) argued (though with a good deal of ambivalence) that Donnellan's distinction has no *semantic* relevance. His main arguments were directed at establishing that what Donnellan called the referential use of descriptions was actually nothing more than a speaker's wishing to convey something about a particular entity, a purely pragmatic phenomenon. See Saul A. Kripke, "Speaker's Reference and Semantic Reference.," in *Midwest Studies in Philosophy Vol. II: Studies in the Philosophy of Language.*, ed. Peter A. French, Theodore E. Uehling, and Howard K. Wettstein (Morris: University of Minnesota, 1977), 255–76. However, George M. Wilson has responded convincingly to most of Kripke's arguments. See George M. Wilson, "Reference and Pronominal Descriptions," *The Journal of Philosophy* 88, no. 7 (1991): 359–87.

The referential interpretation of legal statements suggests that the content of these statements is sensitive to the relata directly intended by the speaker – if the relata is the proper method of interpretation, then the content of legal statement asserted by an agent *S* is constituted by the method of interpretation considered proper by *S*. In this regard, the referential interpretation of legal statements responds to the problem outlined in the previous part by suggesting that the success in referring to the proper method of interpretation by agents formulating legal statements hinges on the speaker's intent. Therefore, there is no need for any legally relevant facts to determine the answer to the question of which method of interpretation is the proper one.

It is noteworthy that the referential interpretation of legal statements seems intuitive and is shared among many theorists[20]. However, this approach faces at least two serious issues: it struggles to account for disagreement about „what is the law" and it struggles to explain why speakers are willing to retract earlier legal statements when their beliefs about which method is the proper one have changed.

When it comes to disagreement, if the truth of my claim that norm N „is the law" depends on the method of interpretation I directly favour, while the your claim that the same norm „is not the law" depends on the method of interpretation you directly favour – as referential reading of legal statements suggest – then our claims are compatible, and we do not disagree in making them. For example, „It is the law that the capital punishment is prohibited" when formulated by textualist, expresses a proposition that norm prohibiting the capital punisment results from the application of *textualism* to the 8th Amendment of the U.S. Constitution, while „It is *not* the law that the capital punishment is prohibited", when formulated by purposivist, expresses a proposition that norm prohibiting the capital punisment does not result from the application of *purposivism* to the 8th Amendment of the U.S. Constitution. However, this approach predicates the following dialogue between Herbert and Ronald:

Herbert: It's the law that the capital punishment is prohibited, isn't it?
Ronald: I agree, but it's not the law to me.

[20] Stephen Finlay and David Plunkett endorse this position by stating that participants in legal discourse, while formulating legal statements, refer to the rule of recognition they intend to. So when A asserts that *L* is "the law", she implicitely refers to a rule of recognition R_1 which she accepts as uniquely determining authoritative law in the jurisdiction, and when B asserts that *L* is not "the law", she implicitely refers to a rule of recognition R_2 which she accepts as uniquely determining authoritative law in the same jurisdiction. Accordingly, Iza Skoczeń argues that participants in legal discourse, while identifying legal content, take into account only the content that conforms with their goal. This seems to imply that when A asserts that *L* is "the law", she implicitely refers to an implicature I_1 that conforms with her goal, and when B asserts that *L* is not "the law", she implicitely refers to an implicature I_2 that is concordant with her moral or political reasons. See Finlay and Plunkett, "Quasi-Expressivism about Statements of Law: A Hartian Theory," 66; Izabela Skoczeń, *Implicatures within Legal Language* (Cham: Springer, 2019), 157–58.

The problem is that the above dialogue sounds flawed. Contrary to the referential reading of legal statements, it seems more intuitive to say that Herbert and Ronald do disagree while making their claims. In response, proponents of the referential interpretation might argue that phrases like "No," "You're mistaken," and "That's false" can target something other than the asserted proposition. In this regard, they may vindicate disagreement only in a relatively weak sense – a disagreement in attitude[21]. However, there is good reason to think that disagreements involving "it is the law that…" are deeper – that is, they extend beyond mere disagreements in attitude. The *deep* disagreement problem involving "it is the law that…" is that the disagreement in attitude only explains why Ronald can disagree with Herbert by saying, 'it is not the law that the capital punishment is prohibited', but it does not allow that Ronald can disagree with Herbert by saying that what Herbert said was false, as, provided that Herbert favors textualism, what he said *was* true[22]. Yet, participants in legal discourse often declare statements they disagree with it as false. Thus, to explain the deep disagreement, proponents of the referential reading seem to be committed to abandoning the philosophical orthodoxy suggesting that propositions are the primary bearers of truth[23], thus highlighting a fundamental flaw in the referential interpretation[24].

A second challenge for the referential interpretation of legal statements is the issue of retraction. I argue that when our preferences or beliefs about the proper method of interpretation change – perhaps a method once deemed proper is now seen as flawed – we may conclude that we were mistaken in our earlier legal statements. Consider Herbert, who, during his first year of law school, was a textualist, and claimed then: "It is the law that capital punishment is prohibited", as

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[21] Two men will be said to disagree in attitude when they have opposed attitudes to the same object – one approving of it, for instance, and the other disapproving of it – and when at least one of them has a motive for altering or calling into question the attitude of the other. See Charles L. Stevenson, *Ethics and Language* (New Haven London: Yale University Press, 1944), 3.

[22]This is how Mark Schroeder distinguishes the "shallow" disagreement problem, which can be met by invoking disagreement in attitude, from the "deep" problem. See Mark Andrew Schroeder, *Being For: Evaluating the Semantic Program of Expressivism* (New York: Oxford University Press, 2008), 17.

[23] See Clas Weber, "Eternalism and Propositional Multitasking: In Defence of the Operator Argument," *Synthese* 189, no. 1 (2012): 199–219; Nathan Salmon and Scott Soames, eds., *Propositions and Attitudes*, First Edition (Oxford ; New York: Oxford University Press, 1989); Robert Stalnaker, *Context and Content: Essays on Intentionality in Speech and Thought* (Oxford,: Oxford University Press, 1999).

[24] It is noteworthy that the analogous points can be made about agreement. Suppose Herbert is textualist and Ronald is purposivist, but both state „It's the law that the capital punishment is prohibited". We will naturally report them as having agreed: „Herbert and Ronald agree that it's the law that the capital punishment is prohibited". On the referential interpretation of legal statements, a claim that Herbert and Ronald agree that it's the law that the capital punishment is prohibited must be interpreted as (1) Herbert and Ronald agree that it's the law that the capital punishment is prohibited to Herbert, or (2) Herbert and Ronald agree that it's the law that the capital punishment is prohibited to Ronald, or (3) Herbert and Ronald agree that it's the law that the capital punishment is prohibited to Herbert and Ronald both. But we can easily construct a case in which „Herbert and Ronald agree that it's the law that the capital punishment is prohibited" seems true while (1-3) are all false. Just imagine that Herbert and Ronald both assert that It's the law that the capital punishment is prohibited, but neither thinks the other does. They seem to agree, not about it's the law that the capital punishment is prohibited to some person or persons, but about whether it's the law that the capital punishment is prohibited – where that is something different. See John MacFarlane, *Assessment Sensitivity: Relative Truth and Its Applications* (Oxford, 2014), 13.

he recognized that a norm prohibiting capital punishment results from applying textualism to the sources of the law, for example, the 8th Amendment to the US Constitution. Now, having explored a broader spectrum of methods of interpretation, he believes he was wrong. He's changed his mind about which method of interpretation is the proper one, and he realised that a norm prohibiting capital punishment does not result from applying this method to the sources of law. In this situation. if confronted with his past statement, we may expect Herbert to answer not by saying, "It was the law that the capital punishment is prohibited then, but it is not the law any more", but rather retracting his initial statement. Nonetheless, the referential reading of legal statements faces difficulties explaining why a retraction of previous statement would be reasonable for Herbert: if his initial claim was a true claim about the norm prohibiting capital punishment and method of interpretation he favoured, then retraction should not be required.

Based on the above remarks, I argue that the referential reading of legal statements makes disagreement about what is "the law", along with the retraction of early claims about what is "the law", unintelligible[25]. Instead, I endorse the attributive interpretation of legal statements. I argue that the speaker that asserts legal statement talks about *whatever* has the attribute of being a proper method of interpretation, given the common criteria of such propriety. This account makes both disagreement about what is "the law," and retraction of earlier claims about what is "the law" intelligible. First, it easily vindicates the following dialogue between Herbert and Ronald:

Herbert: It's the law that the capital punishment is prohibited, isn't it?
Ronald: I disagree, it's not the law that the capital punishment is prohibited.

It follows from the fact that propositions implicitly expressed in this dialogue, read attributively, are not compatible. They both involve the same norm and the same method of interpretation: the method of interpretation – one or the other, *whatever it is* – that satisfies the common criteria of propriety. This incompatibility provides a suitable grounds for disagreement between Herbert and Ronald. The attributive reading vindicates retraction as well. Consider again Herbert, a staunch textualist, and his earlier statement "It is the law that capital punishment is prohibited," following

[25] It is worth noting that strong support for the norm of retraction as applying to certain cases is, in general, not found. See Niels Skovgaard-Olsen and John Cantwell, "Norm Conflicts and Epistemic Modals," *Cognitive Psychology* 145 (2023): 1–30; Markus Kneer and Neri Marsili, "The Truth About Assertion and Retraction: A Review of the Empirical Literature," in *Lying, Fake News, and Bullshit*, ed. Alex Wiegmann (London: Bloomsbury, 2024). In response, some authors argue that even retraction is not mandatory, it is still appropriate. See Joshua Knobe and Seth Yalcin, "Epistemic Modals and Context: Experimental Data," *Semantics and Pragmatics* 7 (2014): 1–21; Dan Zeman, "Relativism and Retraction: The Case Is Not Yet Lost," in *Retraction Matters*, ed. Dan Zeman and Mihai Hîncu (Cham: Springer, 2024). It is therefore an open question to what extent the norm of retraction applies to legal statements. On this basis, one should bear in mind that the argument from retraction against the referential interpretation of legal statements is persuasive, but not decisive.

from his initial belief that this norm results from applying textualism to legal sources. Once Herbert realizes that purposivism, rather than textualism, aligns with the common criteria of propriety for methods of interpretation, and that a norm prohibiting capital punishment does not result from applying purposivism to these legal sources, Herbert may be expected to admit that his previous assertion was false.

The conclusion of this section is that there is some serious evidence for the claim that the referential interpretation of legal statements is flawed. However, if attributive interpretation is the correct approach, the threat of the failure of reference to the proper method of interpretation, and, consequently, the threat of systematic falsehood of legal statements, remains. Therefore, further inquiries concerning the success to refer to the proper method of interpretation by agents formulating legal statements are required.

4.2. Legally binding method of interpretation

A second potential solution to the challenge of failure of reference to the proper method of interpretation and, consequently, a systematic falsehood of legal statements, is the institutional settlement of interpretive considerations. The idea behind this solution concerns legal norms establishing a specific theory of interpretation as legally binding. Notably a significant number of scholars specialising in the field of statutory construction have recently advocated for lawmakers explicitly establishing a specific theory of interpretation as legally binding. Adrien Vermeule contends that every judge should adopt and follow a fixed interpretive doctrine[26]. Meanwhile, Gary O'Connor argues for a restatement as an authoritative formulation of permissible rules of interpretation[27]. Moreover, Nicholas Quinn Rosenkranz argues for the adoption of statute-like rules of interpretation[28].

Nevertheless, the appeal to explicitly established law does not provide a suitable basis for determining the proper method of interpretation and, consequently, an explanation of the success in referring to the proper method of interpretation by agents formulating legal statements. This follows from the fact that it is uncommon for a particular method of interpretation to be explicitly designated as binding through the enactment of legislation. Therefore, the proposal under consideration does not offer a definitive response to the issue under discussion, as it can, at best, be regarded as a hypothesis for potential future institutional developments.

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[26] Adrian Vermeule, "Interpretive Choice," *NYU Law Review*, no. 1 (2000): 74–149.

[27] Gary E. O'Connor, "Restatement (First) of Statutory Interpretation," *New York University Journal of Legislation and Public Policy*, no. 7 (2003): 333–64.

[28] Nicholas Quinn Rosenkranz, "Federal Rules of Statutory Interpretation," *Harvard Law Review* 115, no. 8 (2002): 2085–2157.

Nonetheless, Baude and Sachs argue that even if a particular method of interpretation is not explicitly designated as binding through the enactment of legislation, there is still an unwritten "law of interpretation" that determines what a particular provision "means" in our legal system. Such a law of interpretation consists of interpretive rules that govern the interpretation not only of private instruments, but also of new statutes and of the U.S. Constitution. Notably, the main point of this approach is that these interpretive rules are actually part of the legal system.

However, the appeal to the unwritten law of interpretation to determine the proper method of interpretation and, consequently, explain the success in referring to the proper method of interpretation by agents formulating legal statements seems flawed as well. As Baude and Sachs themselves admit, whether particular legal system is textualist, intentionalist, purposivist, or something else, is a legal question, that cannot be answered solely on the basis of the unwritten sources of law – ultimately, the appropriate theory of jurisprudence must be involved.

It can be argued, then, that the appeal to the law, whether explicitly established or unwritten, does not provide a suitable foundation for determining the proper method of interpretation. Consequently, the success to refer to the proper method of interpretation by agents formulating legal statements remains unexplained.

4.3. Theories of meta-interpretation

The third response to the challenge of the systematic failure to refer to the proper method of interpretation by agents formulating legal statements, and, consequently, systemic falsehood of legal statements, relies on the fact that in order to justify the choice of a particular method of interpretation M_1 over alternative theories $M_{2...}M_n$ as the proper one, we usually refer to theories of meta-interpretation. In the literature, the following methods of meta-interpretation are most commonly discussed: conventionalism, the law as integrity, and the planning theory of law.

4.3.1. Conventionalism

According to the conventionalist theory of meta-interpretation, to demonstrate that a particular method of interpretation is the proper one, one must establish which social facts support it. This can be done, for example, by indicating that courts are accustomed to applying this particular method of interpretation rather than another[29]. Thus, choosing the right method of interpretation requires that: 1) a given method of interpretation is explicitly recognized as the proper tool for identifying the content of by a significant majority of legal officials; or 2) a given legal interpretation

[29] Scott J. Shapiro, *Legality* (Cambridge, MA: Belknap Press, 2013).

theory fulfills the criteria of propriety for methods of interpretation established by a significant majority of legal officials[30].

Let us analyze the first possibility. It states that given method of interpretation is explicitly recognized by the convention of legal officials as the proper one. Consequently, it states that there is a consensus among legal officials that this method, and not another, is responsible for identifying the legal content of the sources of law. Nonetheless, few scholars support this position, as disputes between supporters of various methods of interpretation testify that there is no convention explicitly favoring a particular method of interpretation as being responsible for identifying the legal content of the sources of law[31].

A proponent of conventionalism, however, may argue that even if the convention does not directly determine which method of interpretation is the proper one, it does so indirectly, by establishing the common criteria of such propriety[32]. This position thus assumes that the convention among legal officials resolves the issue of the propriety of methods of interpretation. Even if there is no consensus among legal practitioners as to which method of interpretation is responsible for determining the legal content of legal sources, there is a consensus among them, for example, as to certain values, policies, etc. And it is thus these values that are responsible for deciding which method of interpretation is the proper one. Any disputes between supporters of various theories would in this context have only an empirical character – the parties to this dispute would agree as to what criterion resolves their dispute, but would not be able to accurately assess at a given moment which method of interpretation is the proper one in light of this criterion[33].

4.3.2. Law as integrity

Ronald Dworkin proposes an alternative to the conventionalist theory of meta-interpretation as part of his "law as integrity" approach. Dworkin's theory of meta-interpretation implies that the propriety of a particular method of interpretation depends on the constructive interpretation of the legal practice of the community. Constructive interpretation aims to present the legal system in the best possible light[34]. Therefore, method of interpretation *M* is the proper one if it finds the best justification in the principles, values, etc., that present the legal system in the best possible light[35]. In this regard, Dworkin points out that a set of principles puts legal practice in the best possible light when it both "fits" and "justifies" it better than any competing set. We may state that an

[30] Dworkin, *Law's Empire*, 124–26.
[31] Dworkin, 124–25; Shapiro, *Legality*, 283.
[32] see Dworkin, *Law's Empire*, 126–27.
[33] Dworkin, 5.
[34] Dworkin, 90–91; see Shapiro, *Legality*, 305.
[35] Dworkin, *Law's Empire*, 90–91; see Shapiro, *Legality*, 305.

interpretation "fits" an object to the extent that it accepts the existence of that object or its properties[36]. For example, in the case of legal practice, a given political or moral principle fits better than another when it recommends behavior that is closer to the actual behavior of participants in legal practice than the behavior recommended by a competing principle or value. The justification of a given object or practice, on the other hand, involves recognizing them as desirable.

A proponent of this theory, seeking the optimal interpretation of legal practice, must therefore balance these two factors, where the increasing value of a given practice often leads to the opposite trend in terms of fitting this interpretation[37]. This is certainly not an easy task. A given interpretation may evaluate legal practice higher than other interpretations, but at the same time, it may fit less because the number of judicial decisions recognized by it as wrong is significantly higher than in competing interpretations. Conversely, an alternative interpretation may better "fit" legal practice if it recognizes a larger number of judicial decisions as falling within the "norm". Yet, as a result, it may rate the moral quality of this practice lower because the decisions recognized by it as correct will only minimally realize important moral values. In conclusion, to demonstrate that a particular method of interpretation is the proper one, one must establish that it finds the best justification in a set of values and principles that both "fit" and "justify" legal practice better than any competing set of values and principles.

4.3.3. Planning theory of law

According to Scott Shapiro, the author of the so-called planning theory of law, the law should be regarded as a shared plan that is applied and enforced by legal institutions, regardless of the moral merits of its norms and those institutions. The main reason for this approach is a claim that the law is meant to respond to problems arising from the moral diversity of members of a given community, determining the content of the law cannot at any stage be based on moral considerations[38].

One of the most important parts of the planning theory of law is its meta-interpretative dimension. Shapiro points out that every plan is based on a certain system of trust management: if a given plan (or rather its creators) demonstrates a significant amount of trust towards a particular entity in a specific situation, then this entity will be authorized to refine the plan. Conversely, if the plan assumes that a given entity in a particular situation is not sufficiently trustworthy, it then assigns them a more limited role of blindly implementing the presented plan[39]. According to

[36] see Shapiro, *Legality*, 295.
[37] Dworkin, *Law's Empire*, 90.
[38] Shapiro, *Legality*, 275.
[39] Shapiro, 353.

Shapiro, it is this economy of trust that grounds the propriety of the method of interpretation[40]. For entities endowed with greater trust, the proper method of interpretation will be one that gives them more interpretive freedom, while those endowed with less trust should use methods of interpretation that limit their freedom.

However, it is worth noting that the planning theory of law needs to address how to determine the economy of trust within a specific system. Shapiro notes in this context that "a meta-interpreter should not assess her own trustworthiness, but rather defer to the views of the system's planners regarding her competence and character. Her task is to extract the planners' attitudes of trust as they are embodied by the plans of the legal system, and then to use these attitudes to determine how much discretion to accord herself"[41]. However, the planning theory must clearly identify who these „planners" are. In this regard, Shapiro distinguishes between two types of legal systems: authority systems, and opportunistic systems. In authority systems, the economy of trust is essentially established by the original planner – the legislator. In opportunistic systems, in turn, it is explained in terms of „the attitudes of trust shared by the bulk of the current participants of the system"[42].

Notably, Shapiro recognizes that the economy of trust alone does not suffice to determine the proper method of interpretation. It follows from the fact that different methods of interpretation, even those offering similar levels of freedom, can lead to diverse outcomes. In response, Shapiro suggests that the choice of an interpretive theory should also consider the role an agent plays within a particular plan[43]. Therefore, method of interpretation *M* is the proper one for an interpreter *S* just in case *M* best furthers the objectives *S* are entrusted with advancing[44].

Consequently, Shapiro distinguisges three basic stages of meta-interpretation, which Shapiro calls "specification," "extraction," and "evaluation." In the specification stage, the actor determines what competence and character are needed to implement different sorts of interpretive procedures.[45] During the extraction stage, the actor identifies what competence and character that the planners believed actors possess led them to entrust actors with the task that they did, and which systemic objectives did the planners intend various actors to further and realize[46]. In the final stage – the evaluation stage – the agent assesses which interpretative procedure best furthers and

[40] Shapiro, 311.
[41] Shapiro, 275.
[42] Shapiro, 350.
[43] Shapiro, 359.
[44] Shapiro, 359.
[45] Shapiro, 360.
[46] Shapiro, 361–63.

realizes the systemic objectives that the actors were intended to further and realize, assuming that they have the extracted competence and character[47].

5. No proper theory of meta-interpretation?

Given the variations among theories of meta-interpretation, we need to confront the following issue: If legal statements refer to the proper method of interpretation, and the proper method of interpretation is determined by meta-interpretive considerations, which theory of interpretation is the one that determines the method of interpretation we refer to while formulating legal statements? The question arises: is there any legally relevant support favoring theory of meta-interpretation T_1 over alternative theories $T_2 \ldots T_n$? The stake of this question is high. It follows from the fact that it is quite an intuitive that:

(1) for a theory of meta-interpretation T_1 to be considered proper, there must be legally relevant support favoring T_1 over alternative theories $T_2 \ldots T_n$.

However, many scholars tend to accept a theoretical isosthenia thesis:

(2) there are many different theories of meta-interpretation, and there is no fact (neither natural, nor conventional or intentional, anchored in the collective consciousness of society), determining that one of them is more accurate than the other ones[48].

However, if there is no legally relevant support that favors T_1 over T_2, then, given (1), the following conclusion can be drawn:

(C) There is no proper theory of meta-interpretation.

I have argued that in order to justify a choice of a particular *method of interpretation* M_1 over alternative theories, we usually refer to the proper theory of meta-interpretation. Therefore, if there is no proper theory of meta-interpretation, then there is no fact determining that the method of interpretation M is the proper one. Consequently, no method of interpretation can be considered the proper one. This argument may be illustrated as follows:

(1) For a method of interpretation M_1 to be considered proper, there must be a proper theory of meta-interpretation T favoring M_1 over alternative methods $M_2 \ldots M_n$.

[47] Shapiro, 370.
[48] Adam Dyrda, *Spory teoretyczne w prawoznawstwie* (Warszawa: Scholar, 2018), 482.

(2) For a theory of meta-interpretation T_1 to be considered proper, there must be legally relevant support favoring T_1 over alternative theories $T_2 \ldots T_n$.

(3) There is no legally relevant support that favors the theory of meta-interpretation T_1 over theories of meta-interpretation $T_2 \ldots T_n$.

(4) There is no proper theory of meta-interpretation favoring M_1 over alternative methods $M_2 \ldots M_n$.

(C) There is no proper method of interpretation.

Consequently, agents formulating legal statements fail to refer to the proper method of interpretation. This, in turn, implies legal nihilism – a claim that legal statements aiming to identify legal content are systematically false[49].

6. Which theory of meta-interpretation?

In the previous sections, I outlined three responses to the challenge posed by legal nihilism, which arises from the failure of agents asserting legal statements to refer to the proper method of interpretation. I suggested that the most promising is the one relying on the meta-interpretive considerations. However, this approach commits us to respond to the objection that there is no legally relevant support that favors the theory of meta-interpretation T_1 over theories of meta-interpretation $T_2 \ldots T_n$, and, consequently, that there is no proper theory of meta-interpretation favoring M_1 over alternative methods $M_2 \ldots M_n$. In this section, I discuss two responses to this challenge: 1) the "Easy Way" positing that we can, with a certain amount of effort, establish that alternatives to the theory of meta-interpretation T are worse than T; 2) the "Hard Way", which acknowledges the insuperable difficulty in proving that alternatives to T are worse than T, but maintains that choosing T still falls within the realm of practical reason. In this regard, I argue that the Easy Way is flawed, and that we should understand this choice as a „hard choice", where the notion of the "hard choice" is best explained in terms of parity.

6.1. Easy Way

According to the „Easy Way", selecting a proper theory of meta-interpretation is an easy choice – we can, with a certain amount of effort, establish that T is *better* than alternative theories of meta-interpretation $T_1 \ldots T_n$ (or, at least, as good as $T_1 \ldots T_n$). In this regard, we may argue that particular

[49] See footnote 18.

theory is a binding law[50], or it provides a better explanation of particular phenomena than alternative theories. However, I believe that the Easy Way is flawed.

The idea that particular theory of meta-interpretation is a binding law is flawed for the same reasons already established in 4.2 concerning the legal binding of methods of interpretation. It is uncommon for a particular theory of meta-interpretation to be explicitly designated as binding through the enactment of legislation, and it seems that the "unwritten" sources of law, without further considerations on the proper theory of jurisprudence, are not sufficient to answer the question of what theory of meta-interpretation is the proper one.

Nevertheless, it can still be argued that meta-interpretation theory *T* provides a *better* explanation of certain phenomena than alternative theories (or, at least *as good* as them). In this respect, the following arguments for/against particular theories of meta-interpretation can be considered. First, the major argument that Dworkin's integralist theory is better than conventionalism, states that the former vindicates theoretical disagreements, while the latter does not. Nevertheless, in response, conventionalists may adopt several strategies. Scott Shapiro indicates that conventionalists may argue that legal participants who engage in theoretical disagreements are simply acting insincerely and opportunistically. They are aware, in other words, that there is a settled solution for these disputes, but nevertheless engage in them in an effort to bamboozle others into accepting the methods that they favor from a political perspective[51]. In this context, disputes over which method of interpretation is the proper one do not simply demonstrate a lack of convention; rather, they reveal that one party in this dispute seeks to alter this convention. In turn, Brian Leiter suggests that conventionalists may take theoretical disagreements seriously. They may these disagreements are so deep that they indeed undermine the existence of any convention in this area. Leiter argues that in such a situation, the conventionalist faces two possibilities for explaining such disputes: in terms of error or in terms of disingenuity. The Error Theory account, as Leiter notes, attributes a pure mistake to the parties: they *genuinely* think there is a right legal answer regarding, for example, which method of interpretation is the proper one, even though there is no convergent practice (no social rule) supporting such an answer[52]. Consequently, agents referring to the proper method of interpretation, in the absence of a suitable convention determining this issue, are systematically in error[53]. The Disingenuity account states that legal actors are disingenuous in arguing *as if* there were a clear criterion of, for example,

[50] One may refer in this regard to Baude and Sachs who argue that there is also unwritten "law of interpretation" that is a part of legal system and that determines what a particular provision "means" in our legal system. See William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review*, no. 4 (130) (2017): 1084.
[51] Shapiro, *Legality*, 290–91.
[52] Brian Leiter, "Explaining Theoretical Disagreement," *University of Chicago Law Review*, no. 3 (2009): 1224.
[53] Leiter, 1226.

propriety for methods of interpretation operative in a dispute, while in fact they know (or, at least, have an unconscious or preconscious awareness) that, in fact, there is no such criterion[54].

However, in my opinion, conventionalists cannot take theoretical disagreements seriously without consequences for their position, because, as I showed previously, an error theory regarding theories of meta-interpretation recurs at lower levels of legal discourse. Nevertheless, they may still adopt a "bamboozlement" response provided by Shapiro[55].

Another argument suggests that the planning theory of law is better than conventionalism. A strong argument in favor of the planning theory is the fact that it allows – without engaging in considerations of a moral and political nature – to determine which method of interpretation is the proper one, even when there is no convention regulating this issue[56]. However, Leiter remains skeptical of the discussed theory as based on identifying the legal system with a plan. In this regard, Leiter points out that legal power arises, often enough accidentally, from a non-legal customary practice. But it implies that the idea of "planning" (the centerpiece of Shapiro's alleged alternative to Hart) is irrelevant to explaining legal statements about the law[57]. Consequently, there is no good reason to argue that the economics of trust – as a mechanism directly resulting from the idea of a plan – decides which method of interpretation is the proper one.

Nonetheless, Leiter's objection does not appear to be conclusive. In this regard, the advocates of the planning theory may defend their position by arguing that the fact that legal authority originated from non-legal, unplanned practices does not imply that the concept of planning fails to offer a sound explanation for actual legal practices, along with the explanation of success to refer to the proper method of interpretation.

Shapiro claimed that his planning theory is better than Dworkin's integralism as well. Shapiro states that if Dworkin is right about how law works, then to figure out what the proper method of interpretation is, we have to take up a moral inquiry. Nonetheless, there are at least two problems with this claim. First, such a theory of meta-interpretation is overly demanding, as it requires meta-interpreters to engage in highly abstract and intricate thought processes in order to determine the proper method of interpretation[58]. Second, this claim gets things backwards. As Shapiro states: "Having to answer a series of moral questions is precisely the disease that law aims

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[54] Leiter, 1224–25.

[55] In this regard, one should bear in mind objections to this response outlined by Shapiro. See Shapiro, *Legality*, 291. In my view, however, Shapiro's comments on this matter are not decisive.

[56] Shapiro, 382.

[57] Brian Leiter, "Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence," 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700513.

[58] Shapiro, *Legality*, 312–13. In fact, Shapiro states that it is so philosophically demanding that it is appropriate only for legal systems inhabited by extremely trustworthy individuals – for all other regimes, it would likely lead to organizational disaster.

to cure"[59]. Meanwhile, Shapiro argues that since the existence and content of a plan cannot be determined by facts whose existence the plan aims to settle, and since the primary task of the law, understood as a plan, is to solve problems arising from the deficiencies of morality and politics, the proper method of interpretation must be identifiable without the need to engage in moral and political considerations.

In response to Shapiro's objections, Mark Greenberg argues that "once we are in the business of imputing or constructing the content of the relevant plan, we cannot avoid relying on values to do so"[60]. Therefore, Greenberg challenges the idea that identifying the proper method of interpretation needs to avoid moral considerations, suggesting that there is no compelling reason to believe that moral considerations do not provide some form of determinate answers.

On the basis of these considerations, the claim that a proper method of interpretation can be settled by demonstrating that T is *better* than alternative theories of meta-interpretation $T_1 \ldots T_n$ is at least question-begging. It follows from the fact that it is overly simplistic and potentially misleading to claim that one theory is categorically better across all dimensions. However, the fact that each theory of meta-interpretation has strengths and weaknesses, excelling in explaining certain aspects while falling short in others, suggests that a claim that T provides as good explanation of particular phenomena as alternative theories of meta-interpretation $T_1 \ldots T_n$ is misplaced as well.

6.2. Hard Way

Considerations in 6.1. show that „Easy Way" of determining the proper theory of meta-interpretation is flawed. In this section, I want to argue that the choice of the proper theory of interpretation is not easy – despite a high amount of effort, the difficulty in proving that T is better than alternative theories of meta-interpretation (or, at least, as good as them) remains. Based on this, I assume that in order to explain the success to refer to the proper method of interpretation by agents formulating legal statements, an answer to the question of which theory of meta-interpretation is the proper one should explain both the rationality of choosing a proper theory of meta-interpretation, and why it is hard to make such a choice. In this regard, several seemingly attractive explanations of such a rationality come to mind[61].

The first is the idea that reasons run out in choices regarding theories of meta-interpretation because of our uncertainty or *ignorance*. After all, the legal domain is particularly complex and multidimensional. Thus, how can we, limited creatures that we are, determine an answer to such

[59] Shapiro, 310.
[60] Mark Greenberg, "Law Through the Prism of Planning," JOTWELL, September 12, 2011, https://juris.jotwell.com/law-through-the-prism-of-planning/.
[61] see Ruth Chang, "Hard Choices," *Journal of the American Philosophical Association* 3, no. 1 (2017): 1–21.

an abstract question as which theory of meta-interpretation is the proper one? One may claim, then, that, at some level of considerations, it is possible to settle that theory of meta-interpretation *T* is better than alternatives – we simply do not have access to the necessary knowledge at this moment, but it is accessible under suitable conditions. Therefore, our disputes about the proper method of interpretation are solvable, but we need to advance our considerations to achieve the proper level of reflection. Nonetheless, this answer seems to be *ad hoc*.

The second is the idea that in choices regarding theories of meta-interpretation there is no common metric in terms of which the values of the alternatives can be measured, and the lack of measurability by a unit makes the choice hard. Therefore, the choice between theories of meta-interpretation is hard because the theories at stake in the choice are *incommensurable*[62]. Nonetheless, as Ruth Chang aptly notes, even if there is no unit by which we can measure, for example, the contribution to your well-being of apple pie as opposed to a lifetime achievement, it is clear that the latter is better than the former[63]. For one thing, we can have merely ordinal comparability between incommensurable items – we can rank order them and, based on this, we may state that one of them is better than the other. Therefore, the choice between incommensurables could be easy: choose the better alternative. Thus, incommensurability explains the rationality of choosing a proper theory of meta-interpretation, but it does not explain why we struggle with choosing it.

Thirdly, it might be thought that choices between theories of meta-interpretation are hard because the alternatives cannot be compared with respect to what matters in the choice. Reasons run out in hard choices because the alternatives are *incomparable*. Two items are incomparable with respect to V just in case no "basic" relation – the relations that exhaust the conceptual space of comparability between two items (typically 'better than', 'worse than', and 'equally good') – holds with respect to V. In this view, the reasons run out in that there are no all-things-considered reasons for choosing either of the alternatives. This is why choosing a proper theory of meta-interpretation is hard. The problem with this position is that, according to Chang, incomparable alternatives are not ones left standing in the arena of reasons; rather, they have not even gained entry to it. Consequently, in the case of incomparability, there is no *rational* response. One's selection in that choice situation is arbitrary, but – contrary to the situation where alternatives are equally good – it is not made within the scope of practical reason.[64] Consequently, the incomparability of alternative

[62] Chang.
[63] Chang.
[64] Ruth Chang, "Value Incomparability and Incommensurability," in *The Oxford Handbook of Value Theory*, ed. Iwao Hirose and Jonas Olson (Oxford University Press, 2015), 218.

theories of meta-interpretation in a choice situation blocks the possibility of a justified between them[65].

In response, I endorse a fourth option – that the difficulty in choosing between theories of meta-interpretation arises from the fact that they are on a par. Chang introduces the concept of parity by noting that most philosophers have assumed the Trichotomy Thesis, the claim that the trichotomy of relations, "better than", "worse than", and "equally good", forms a basic set of value relations; if none of the trichotomy holds between two items with respect to V, it follows that they are incomparable with respect to V.[66] Nonetheless, Chang thinks that there is a *fourth* basic value relation beyond the standard trichotomy of "better than," "worse than," and "equally good," what Chang calls "on a par".[67] In other to explain the concept of parity, Chang refers to the notion of *evaluative difference*.[68] As Chang notes, evaluative differences can be typically analyzed along two dimensions: (1) whether they have "bias" or "direction," and (2) whether the magnitude of the difference is zero or nonzero.[69] When one item is better than another, there is a biased, nonzero difference between them. When the difference between them is unbiased and the magnitude of the difference is zero, they are equally good. The notion of parity depends on the possibility of unbiased, non-zero evaluative differences. In this regard, Chang discusses a choice between a thimbleful of lemon sorbet and a generous slice of apple pie. Perhaps the quantity and quality of pleasure of the apple pie as it interacts with the quantity and quality of the pleasure of thimbleful of sorbet is such that the evaluative difference favors the apple pie. Having a tiny bit of tart and refreshing pleasure, as manifested by the thimbleful of sorbet, is overall worse in pleasurableness than having a generous amount of sweet, comforting pleasure, as manifested by a big slice of pie. Just as the quantitative and qualitative manifestations of two alternatives can give rise to a biased evaluative difference between them, so too can they give rise to an unbiased evaluative difference between items. Although a thimbleful of sorbet is worse than a large slice of apple pie, a nice-sized bowl of sorbet and a regular slice of apple pie are "in the same neighborhood" of overall pleasurableness. There is some magnitude of difference between them, but the difference does not favor one over the other. As Chang notes, being qualitatively very different in V and in the same neighborhood of V overall, taken together, are sufficient conditions for parity with respect to V.

On this basis, we may argue that the specification of choosing a proper theory of meta-interpretation is best explained in terms of parity of alternative theories. In order to achieve this

[65] Chang, 216–17.
[66] Chang, 212.
[67] Chang, 213.
[68] Chang, "Hard Choices," 11.
[69] Chang, 12.

goal, we need to demonstrate that it is plausible to state that there are 1) unbiased, and 2) non-zero evaluative differences between theories of meta-interpretation under discussion. In this regard, I will start with a claim that all significant general legal theories are products of analyses of the concept of law and as such are dependent upon shared folk theories of law.[70] Therefore, limits of theoretical disagreements in jurisprudence are fixed by the same shared set of truisms of folk theory.

Based on this, the magnitude of the difference between theories of meta-interpretation may be non-zero, as these theories may be qualitatively very different with respect to the *folk* "understanding" of law – various truisms of folk theory of law may be fulfilled to varying degrees by particular theories of meta-interpretation. For example, conventionalism may be seen as resonating with the folk platitude regarding legal stability, whereas the integralist theory may be regarded as aligning with the folk platitude that associates law with justice.

Regarding the bias of evaluative difference between theories of meta-interpretation, if conventionalism was recognized for offering much greater stability than integralism offers justice, such a bias may emerge, leading to a preference for conventionalism over integralism. However, these manifestations could give rise to the unbiased evaluative difference between these theories as well. If the amount of stability provided by conventionalism were in the same neighborhood of truisms of the folk understanding of law as the amount of justice provided by integralism, the difference between them would not favor one over the other. In such a case, quantitative and qualitative manifestations of truisms give rise to an unbiased evaluative difference between theories of meta-interpretation under discussion.

Therefore, it seems that the notion of parity provides a viable explanation for both the rationality of choosing a proper theory of meta-interpretation, and why it is hard to make such a choice. Such a choice is rational, as it responds to the quantitative and qualitative manifestations of particular theories of interpretation in respect of the folk understanding of law. At the same time, this choice is hard because competing theories of meta-interpretation are in the same neighborhood of the folk understanding of law, yet they are qualitatively very different in respect to this understanding.

The issue is how to accommodate the parity of theories of meta-interpretation to the explanation of success to refer to the proper method of interpretation by agents formulating legal statements. First, we need to accept that the parity between theories of interpretation is sufficient to regard these theories "the proper ones". Therefore "parity" is sufficient to fullfil the common

[70]Adam Dyrda and Tomasz Gizbert-Studnicki, "The Limits of Theoretical Disagreements in Jurisprudence," *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 35, no. 1 (2022): 130–31.

criteria of "propriety" for methods of interpretation. Second, we need to accept the inheritance of parity – a claim that the parity between theories of interpretation implies the parity between methods of interpretation they favor. Therefore, if 1) conventionalism favors textualism; 2) integralism favors purposivism; 3) conventionalism and integralism are on a par in respect to legality; then 4) textualism and purposivism are on a par. Third, we need to embrace a view that legal statements express a kind of disjunctive propositions. In this regard, the explanation of the content of legal statements such as "it is the law that capital punishment is prohibited" involves these methods of interpretation that are on a par. Consequently, the content of "prohibition of capital punishment is the law" expresses a proposition that norm prohibiting capital punishment, based on sources of law, satisfies either the interpretive procedure set by the method of interpretation M_1 or the interpretive procedure set by the method of interpretation M_2. Therefore, even if there is no fact that makes one theory of meta-interpretation better than other ones, it does not inevitably lead to legal nihilism if we are ready to admit that legal statements may express such disjunctive propositions. Let's then assume that Dworkin's theory of meta-interpretation indicates interpretive method M_1, while conventionalist meta-interpretive theory indicates interpretive method M_2. Let us also assume that Dworkin's theory and conventionalist theory are on a par. Derivatively, M_1 and M_2 are on a par. Based on this, we may argue that agents formulating legal statement succed to refer to the proper method of interpretation, because there are methods of interpretation that are favored by theories of meta-interpretation that are at least on a par.

The main conclusion of this section is thus that even if there is no legally relevant support that favors the theory of meta-interpretation *T*1 over theories of meta-interpretation *T2…Tn, the threat of failure* to refer to the proper method of interpretation by agents formulating legal statements, and, the challenge of systematic error among participants in legal discourse asserting legal statements that follows from it may be refuted. It is so, because the success to refer to the proper method of interpretation by agents formulating legal statements may be explained in terms of methods of interpretation that are favored by theories of meta-interpretation that are on a par. This approach commits us to admitting that sometimes there is no one right answer to legal questions, and that officials are afforded a certain scope of freedom. Nonetheless, this freedom is still exercised within the space of legally relevant reasons.

7. Conclusions

This paper explores the pivotal issues surrounding the identification of legal content and the correct approach to interpreting legal statements. It delves deeply into the philosophical debates over the

proper method of interpretation and the implications of different interpretive methodologies within legal practice.

The central inquiry of this paper revolved around determining the content of legal statements and identifying which entities or concepts such statements reference. I argued that legal statements inherently depend on the sources of law and the proper method of interpretation, without prejudging their foundation in the conventional rule of recognition. In this context, my central inquiry revolved around the threat of systematic failure to refer to the proper method of interpretation and the following threat of legal nihilism – a claim that legal statements aiming to identify legal content are systematically false, and agents formulating such statements are systematically in error. I discussed three solutions to this challenge, endorsing the one that centers on the meta-interpretive considerations. After that, I discussed a challenge to this solution, stating that there is no fact determining that one of theories of meta-interpretatopm is more accurate than the other ones. In response to this challenge, I explored two approaches: 1) the "Easy Way" positing that we can, with a certain amount of effort, establish that theory of meta-interpretation *T* is better than its alternatives; 2) the "Hard Way," which acknowledges the insuperable difficulty in proving that alternatives to T are worse than T, but maintains that choosing T still falls within the realm of practical reason. In this regard, I argued that the threat of failure to refer to proper method of interpretation by agents formulating legal statements, and, consequently, the threat of legal nihilism implying that agents formulating legal statements are in a systematic error, may be refuted. It follows from the fact that we may explain the success to refer to the proper method of interpretation by agents formulating legal statement in terms of methods of interpretation that are favored by theories of meta-interpretation that are at least on a par in respect of the folk understanding of law.

The major contribution of this paper is a strong case for embracing a pluralistic and inclusive approach to the identification of legal content, advocating for an interpretive flexibility that respects both the diversity of theoretical perspectives within legal philosophy and objective evaluability of acts of interpretation. The conclusion stresses the importance of ongoing scholarly engagement with meta-interpretative theories to continually refine the understanding and application of law.

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