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The role of pragmatics in (re)constructing the rational law-maker

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The recent debate on pragmatics and the law has found ways to circumvent an important distinction, originally drawn by Dascal and Wróblewski (1991), between the historical law-maker, the current law-maker, and the ideal/rational law-maker.[1] By insisting on the relationship between the rational law-maker and contextualism and textualism (see Manning 2005, 2006), I want to redress this fault in current discussions. In this paper, I start with general considerations on pragmatics, intentionality in ordinary conversation, and intentionality in the context of judiciary proceedings and legal texts. I then move on to considerations on rationality as a prerequisite for understanding the law and on the rational law-maker, an ideal construct proposed by Dascal and Wróblewski (1991). I argue that contextualism (of the moderate kind) is the best way to carry out the program by Dascal and Wróblewski on interpretation and the rational law-maker (also see considerations by Fish 2005); (on contextualism see Dascal and Weizman 1987). I argue that bearing in mind the rational law-maker postulated by Dascal and Wróblewski is a guidance to interpretation of statutes whose texts create interpretative difficulties. I conclude by saying that the considerations on the rational law-maker constitute a compromise between Scalia's (1997) textualism and contextualism (see Manning 2005, 2006 on the divide between textualism and contextualism).

Keywords: Contextualism, Gricean pragmatics, pragmatics and the law, rational law-maker

1. Introduction

Despite strong winds and the preponderant influence of formal paradigms in linguistics, socio-pragmatics (Wittgenstein 1953; Leech 1983; Verschueren 1999; Capone 2003, 2010b, 2012, 2013; Cimetti 1999; Geis 1995; Lo Piparo 2013; Huang 2000; Mey 2001, 2013; Dascal 2003; Culpeper 2011; Kecskes 2014, to mention just a few titles) has recently attracted the interest of many authors. This paper must

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be considered an exercise in socio-pragmatics, with emphasis on language and the law, language serving as the basis for creating order and maintaining and regulating social ties in society (on this Aristotelian thesis, see Lo Piparo 2003).

In this paper, I start with general considerations on pragmatics, intentionality in ordinary conversation, and intentionality in the context of judiciary proceedings and legal texts. I then move on to considerations on rationality as a prerequisite for understanding the law and on the rational law-maker, an ideal construct proposed by Dascal and Wróblewski (1991). I argue that contextualism (of the moderate kind) is the best way to carry out the program by Dascal and Wróblewski on interpretation and the rational law-maker (see also considerations by Fish 2005); (on contextualism see Dascal and Weizman 1987). I argue that bearing in mind the rational law-maker postulated by Dascal and Wróblewski is a guidance to interpretation of statutes whose texts create interpretative difficulties. I conclude by saying that the considerations on the rational law-maker constitute a compromise between Scalia's (1997) textualism and contextualism.

2. Dascal and Wróblewski on the rational law-maker

Pragmatics deals with utterance interpretation and with the speaker's meaning. In ordinary language, there is no guarantee that the sentential meaning will also ascend to become utterance meaning. As Bach says, in ordinary speech (or in ordinary conversation), the coincidence of sentential meaning and speaker's meaning is itself subject to pragmatic processing (Bach 2001, 2007; Kecskes 2014 echoes Bach and brings such ideas to extreme consequences). However, the law (and judiciary proceedings, in general) are context(s) in which the coincidence of the speakers' meaning and of sentential meaning can be assumed in the sense that ironic, humorous, non-serious uses or similar transformations of the sentential meaning can be excluded *a priori*. This is also a context in which language use is regimented as much as possible (Dascal and Wróblewski 1991; see also Dascal 2003), subject to the filter of rationality considerations, and where the speaker (the institution that speaks or write) does her best to express herself as clearly as she can, to reduce interpretative ambiguity, vagueness, etc. unless she deliberately chooses to be vague in order to reach some general agreement on the part of all the parties involved in writing and approving the legal text. One of the features of the legal text is that the speaker or writer (or the law-maker) does not correspond to a single person, but is usually an ideal entity that includes various parties and expresses a synthetic text, a synthesis of opinions of people having different, often opposite points of view (see Marmor 2013). This paper is not a discussion of the problems posed by such abstract, multi-party entities and of whether they can

express collective intentionality. If they can express collective intentionality, this is based on agreement which is obtained by creating a text that is the result of compromise and whose vagueness can reflect such a compromise (see Endicott 1994, 2001, 2013). So, it should be clear that, on the one hand, the law-maker has to be careful in crafting a text that avoids interpretative ambiguities; on the other hand, when trying to accommodate compromise, she must include interpretative ambiguity or vagueness, which is in any case 'strategic' rather than fortuitous. Thus, at least it should be clear that the law maker must do her best to avoid fortuitous ambiguity, vagueness, unclarity, following the principle (Dascal 2003) that the speaker's duty is to ensure mutual understanding. Dascal's principle is of course a communicative constraint on conversation and an important one. To give a simple example, it would be totally uncommunicative to speak and utter sentences which are meaningful, without checking that the potential hearer actually hears the message. A speaker who does not care whether the hearer has heard her voice or has taken the message in the right way has not fulfilled the duty of making herself understood. The same considerations apply to the law-maker.

In this paper, I take two principles formulated by Lewis (1974) and brought to our attention by Dascal and Wróblewski (1991) to be of crucial importance in the interpretation of the legal text. The *Principle of Charity* says that the rational agent must be represented as believing what she ought to believe (Lewis 1974). A consequence of the Principle of Charity is that the law-maker should be represented as believing and desiring what she ought to believe and desire. Furthermore, the beliefs and desires to be ascribed to the rational law-maker should be such as to provide good reasons for her behavior in making the law. One of the most trivial consequences of accepting this is that if two statutes are in apparent contradiction, they should be harmonized. The *Principle of Truthfulness* (Lewis 1974) tells us to ascribe to the rational agent beliefs and desires that are in accord with a 'truthful' use of his language, beliefs and desires that are in accord to the meanings of the words she uses in describing what she believes or desires. A consequence of the Principle of Truthfulness is that the laws enacted by the rational law-maker should be assigned meanings on the basis of the sentences she uses and the normal communicative intentions associated with use of these sentences.

In an important article on "the rational law-maker", Dascal and Wróblewski (1991:427–428) write:

> The law-maker is rational precisely in so far as the process whereby he/she takes his/her decisions is supposed to be entirely guided by explicit and deductive justificatory arguments. Nevertheless, even the rational law-maker has to take into account the fact that the laws s/he makes will serve as the basis for law-applying decisions performed not by ideal, but real people in real circumstances. This

> means that the law-applying decisions will necessarily involve *interpreting* the law in unforeseen situations, according to rules that are not deductive in nature.

The considerations above seem to indicate that reading, understanding, and interpreting a legal text is to take into account the point of view of the rational law-maker and the objectivity of the reasons which ground his/her decision. Understanding the law is also understanding the process which leads to the law, the explicit and deductive justificatory arguments that lead to a certain decision by the law-maker that is expressed in a certain text. However, the law-maker, according to Dascal and Wróblewski, has to take into account the fact that a legal text has to be interpreted in contexts or situations that are unforeseen by the law-maker (the interpretation of the law seems to be some kind of Wittgensteinian language game (Wittgenstein 1953). The law-maker has to grant that the context of interpretation may change the variables on the basis of which the decision was taken to shape the text of the law. It is possible that the context of interpretation may involve a variable that might have led to a slightly different decision, a modification of the actual law, perhaps a small modification resulting in addition or subtraction of meaning. Since it would not be possible to modify the law in every subsequent circumstance, some general mechanisms must be available to the law-maker for providing a law that is of general guidance but which is also sensitive to the case at hand. A way to make a law sensitive to the context of interpretation is to defer authority to the local court which has to decide on a case by using the law which pertains to the case, by using previous cases that have a relevance to the case at hand (to see how the law was interpreted in similar cases) and by interpreting the law by adapting it to the case at hand. How can a law be adapted to a concrete case, if it is not flexible enough to allow for adaptation? If we follow Dascal and Wróblewski (1991), in new circumstances a local court must interpret the law "according to rules that are not deductive in nature". We can largely deduce that, for Dascal and Wróblewski, adapting the law to local circumstances is tantamount to "interpreting" the law according to rules that are not deductive in nature (and this phrase evokes the power yielded by pragmatics in settling a legal case). If a law can be interpreted in such a way that it can be adapted to unforeseen circumstances, then it must be the case that the law-makers are provided for the possibility of adapting the law to new and unforeseen circumstances. A way of putting things is more than interesting; it is illuminating: "the laws he makes will serve as the basis for law-applying decisions performed not by ideal, but real people in real circumstances". Since the laws are the basis for decisions by (local) courts, the degree of explicitness with which they are crafted must match the degree of implicitness which is needed to cover the cases which might arise in unforeseen circumstances. In other words, there must be a match between the explicitness and the implicitness of a certain

statute. Its explicitness must constrain interpretation, by posing constraints beyond which interpretation cannot venture (a number of interpretations can be excluded 'a priori'). Its implicitness must complement its explicitness, by providing for interpretative options which are not explicitly contemplated by the law and by the law-maker, these interpretative options (or latitude) serving as a basis for decisions by the local courts, whose duty is to adapt the statute to a certain context and its demands. The legal reasoning we have embarked on reveals a view of the law in which the role of the law-maker is complemented by the law of the court, which has the knowledge required to adapt the law to a concrete case by working out the deductive justificatory arguments which the law-maker could have used in resolving the present case by taking into account new variables, in particular the ones introduced by the unforeseen circumstances with which the local court is dealing. As Endicott (1994, 2001, 2010, 2013) says, a statute can have some strategic vagueness, which will allow the local courts to adapt a case to new unforeseen circumstances. However, with due regard to the importance of Endicott's considerations, I am inclined to say that, in general, it is not vagueness but the practice of contextualizing sentences which allows the court to complement the law-maker in adapting a statute to an unforeseen circumstance, the court being delegated power to do so if the law is not sufficiently clear, if an interpretation problem occurs and if the circumstances are exceptional.

Contextualizing meaning (equating meaning with use, à la Wittgenstein) is an important defensive principle for the law, since it allows the law to be applied even if the trespassers have modified their conduct to escape the consequences of the law — if a law were applicable only literally, then potential trespassers could modify their conduct in such a way that the law, intended literally, could not be applicable to their conduct (their intention to evade the law). However, inferring the purpose of the law and giving up (mere) literalism is the only way to defend the general applicability of the law when one is faced with cunning law-breakers who want to take advantage of the literal scope of the law. When Dascal and Wróblewski speak of "*interpreting* the law in unforeseen situations, according to rules that are not deductive in nature" (a sentence which reminds us of Endicott's work, even if Endicott's work is posterior), they are certainly contrasting the process of codification (how the law-makers come to the law by using explicit and deductive justificatory arguments) to the process of interpretation (the court has to deliberate on the intentions of the law-maker by using pragmatic inference); however, in my opinion, this way of putting things should not be taken as a way of saying that justificatory arguments do not play a role in the decisions by the court. They still play a role, but the arguments need to be expanded so as to take into account new variables, those introduced by the new, local, unforeseen situation. The pragmatics of interpretation includes taking into account the new context, seeing

how it is similar to the old one (the context leading to the original decision by the law-makers), seeing how it differs from the previous context, and bridging the gap between the two contexts. Interpretation is pragmatic through and through because it happens in a new context, but also because it may use an imaginative effort to work out how a rational law-maker would react to the newly encountered situation. A court may ask the following question: how would the rational law-maker think or deliberate if he had knowledge of the current context and its new variables? In particular, how would he modify the text of the law to take into account the new variables? Such modifications could be explicit or implicit, in case the law still has a general appeal. In any case, if modifications involve addition or subtraction of semantic features and this can be done through contextualizing the law, then no modification of the literal text is needed. And the law can be kept the way it is. However, in some cases modifications in the literal text may be required. We will not go into this, which is clearly of pertinence to the subject-matter of the law considered 'stricto sensu'. We will only confine ourselves to the similarities between communicative processes and the process of law-interpretation. When we interpret other people's intentions as expressed through their words or their actions, we may be busy in reflective inferential processes trying to reconstruct what the agent/speaker thinks and her motivations for saying what she is saying. When faced with a sentence whose meaning is a bit vague or obscure, we can eliminate the interpretative ambiguity by putting ourselves into the shoes of the speaker. What could she mean? In trying to reconstruct her mental processes through reflective inferences, we might arrive at her intentions. Now a similar case can be made for the law. The court may attempt to work out the justificatory arguments usable by the original law-makers in settling a case (in deliberating on a case) by adding new variables and by imagining what the law-makers would say by considering those variables. Now, the reconstruction process is clearly something that proceeds under severe constraints imposed by the semantics of the law that exclude certain interpretative options. It is not even necessary to follow all the arguments which the historical law-maker used in deliberating on a certain law (it is not necessary to go through parliamentary debates, reports of committee meetings etc. (in other words, delving into the history of a certain legal decision) to work out what decision the original law-makers would take on a borderline case which does not seem to be covered by a certain statute unless some pragmatic enrichment of the text of the statute is offered. One may simply calculate what their decision might be on the basis of the law and the constraints which it imposes on interpretation. But now it is clear that a terminological distinction imposes itself. Following Dascal and Wróblewski (1991), we are discussing the notion of the rational law-maker and not of the historical law-maker. Although the two entities may coincide in practice, the rational law-maker may differ in principle from the

historical-law maker. One way to reflect on the difference might be to remind readers that although justificatory arguments can be fully explicit and fully rational, they need not be exhaustive. It is always possible to revise those arguments by adding something. Not only is it possible to take into account the new variables deriving from unforeseen circumstances including attempts of law-infringers to make use of the literality of the law for their own purposes; it is possible in theory to add and evaluate new justificatory arguments which might lead to a different direction. *A priori* we can say that the rational law-maker is a theoretical construct, which embodies maximal rationality — maximal rationality can be reached in theory but not in practice. Now, this d-tour seems of importance to me because it allows us to think that the courts are not only mere interpreters but may themselves add to the rationality of the law and even if they cannot replace the actual law-maker, they can act from the point of view of the rational law-maker and improve the law by adding contextual meanings in the light of a more exhaustive list of justificatory arguments.

Dascal and Wróblewski (1991: 430) distinguish between the historical, the actual, and the ideal and rational law-maker:

> First, the law-maker is viewed as a historical agency enacting the law. He/she is thought of as a person or collective body having some knowledge and a more or less determined axiological attitude expressed in his/her evaluative statements. Especially in the traditional language of legal discourse, one refers to the 'will of the historical law-maker', treated as a past historical fact which has to be reconstructed with the help of various heuristic instruments.
>
> Secondly, the law-maker is thought of as the actual law-maker, i.e., as the agency which enacts the law at the time of making a legal interpretative decision. This law-maker is also a real entity, having his own 'will'. But he/she is not that of the past, but of the present. He/she supports all currently valid law, considered as a consistent and coherent set of enacted rules. The reconstruction of his/her will is centered on the present, and depends on the use of adequate instruments for this purpose (ibid.).
>
> Thirdly, the law-maker is treated neither as the past nor as the present law-enacting agency, but as a construct used for justificatory and eventually heuristic purposes. On this view, the two preceding conceptions of the law-maker are considered as inadequate and naïve, for they assume that the law-maker has a definite intention and a knowledge of the future which it is impossible to have, displays full consistency and coherence in his/her opinions and evaluations, and possesses perfect mastery of the language. This would be impossible for any single law-maker and, a fortiori, for any corporate body such as parliament. The upshot of this critique is that the law-maker referred to in legal reasoning cannot be real, past or present, agency, but is rather a construct, which functions as an ideal point of reference for the purpose of defining the rationality of a decision. In short, such a law-maker is either a rational or a perfect law-maker (ibid.).

The critique by Dascal and Wróblewski is cogent. There is clearly an ambiguity when we interpret the phrase 'the law-maker', as that appears to refer to the historical law-maker or to the court deliberating on a difficult interpretative issue (if the expression is interpreted 'de re'). The rational law-maker Dascal and Wróblewski have in mind abstracts away from the 'de re' reading and is closer to the attributive reading 'whoever is the law-maker'. The attributive reading (see Capone 2001, a discussion of Donnellan), by abstracting away from the 'de re' reading focuses on ideal qualities which the law-maker has to possess, such as rationality, the ability to avoid self-contradiction, and above all impersonality and the ability to deal with cases that belong to the past as well as to the future. He has got an atemporal dimension. Furthermore, it must have a perfect mastery of the language (whether past or current or future uses).

Contextualism is what allows the rational law-maker to exist, to be a reference point. This is my claim. The historical law-maker brings in an atemporal dimension when he relies on contextualism and pragmatic interpretation to ensure that a statute will be able to apply to current as well as to future and unforeseen cases. Furthermore, the law-maker relies on contextualism to make sure that, even if language changes in limited respects, such as connotations, narrowings or broadenings of lexical meaning (see Carston 2002; Wilson and Sperber 2012; Hall 2013; Allott 2013), the law is still interpretable. Historical changes in language will allow rejuvenation of the law (or of a constitution, as I said in Capone Forthcoming, referring to a discussion in Perry 2013). The law-maker resorts to contextual clues and cues to deliberate on a controversial interpretative case. The context will allow the law-maker to make sense of changes in the meanings of lexical items, due to narrowings or broadenings (see Carston 2002). The context will allow the law-maker to make sense of changes of connotations which have some bearing on important cases. Contextualism resolves the paradox of the rational law-maker, since his perfect mastery of the language is due to adjustments based on contextual clues. Furthermore, his atemporal dimension, being capable of dealing with past as well as future unforeseen cases is due to contextualism. As Endicott (1994, 2001, 2010, 2013) says, the court resolves difficult interpretative cases by adapting the law (the statute in question) to new circumstances, which were unforeseen by the statute. The possibility of contextualizing the sentence through which a statute is expressed allows the atemporal characteristics of the rational law-maker. There is one further pragmatic feature which is connected with the rational law-maker. The court who have to deliberate on a difficult interpretative case can reconstruct the intentions of the rational law-maker (which the original law-maker makes an effort to approximate) by working out a) what the historical law-maker probably intended to say, when he enacted a statute; b) what a rational law-maker would have to say about the interpretation of the law

in question. Working out (a) and (b) are connected, since in working out law-making by the original law-maker, we presumably want to approximate what the ideal law-maker could say on the case.

3. Working out how the rational law-maker would decide a certain case

In this section, I want to ponder on whether it is possible and feasible to apply simulation theory to the law-maker in the attempt to reconstruct his intentions. Although the application of simulation theory (Goldman 2006) may appear to be a fruitful enterprise, there are substantial reasons for pessimism. Suppose that our aim is to reconstruct the intentions of the historical law-maker. The historical law-maker enacted a statute to resolve a specific problem (the description of which ought to be seen in the proceedings of the relevant committee meetings, parliamentary debates, etc.). However, the adoption of a statute went through debates, votes etc. and thus it does not reflect the will of a person or of a homogenous institution. Rather it looks like a compromise, with some residual vagueness which will leave an issue on which there was no agreement open. To simulate the will of the historical law-maker to extract the real intention of the statute is not a good idea, since all the frictions, tensions and uncompromised ideas that undermined to adoption of an unequivocal statute will be reconstructed through the simulation. The interpretation of the law, on the contrary, has greater chances of success if we abandon the enterprise of simulating the historical law-maker's decisions.

As Dascal and Wróblewski (1991: 433) say:

> The third type of construction of the meaning of a legal text is based on the idea of a rational law-maker. The receiver here reconstructs the sender's meaning, by projecting onto the sender (or the text) a notion of rationality. S/he asks not what the sender would have meant, but what the sender should have meant (Regarding his/her epistemic premises, the rational law-maker believes in facts which he ought to believe.

This process of reconstruction, in other words, conflates features of the historical law-maker with features of the rational-law maker. I propose to go further. While we can adopt a double stance to the phrase 'the law-maker', intending now a referential interpretation, now an attributive interpretation, I propose that we interpret 'the law-maker' as having only an attributive interpretation when we are dealing with the interpretation of the law. This 'ipso facto' justifies using the notion of the rational law-maker in reconstructing the meaning of a statute. In interpretation, much more than in codification, we are interested in the rational law-maker, qua abstract construct, not qua historical law-maker. It is just an incident, a fact of life

that the statute came from a historical law-maker. However, when we interpret the law, we must maximize rationality. We use a principle of charity and avoid contradictions, if there are any apparent ones, and we purge them by making appropriate contextualizations of the legal texts. Since the rational law-maker cannot be self-contradictory, it does not matter whether the historical law-maker contradicted herself at various points. We interpret the text in such a way so as to avoid contradiction. And there is a lot of work to be done by the contextualist interpreter. Since simulation theory à la Goldman (2006) does not have many chances of success in reconstructing the decisions of the historical law-maker, it is reasonable to apply rational reconstruction of certain decisions not to the historical law-maker but to the rational law-maker. In reconstructing hypothetical decisions by the rational law-maker, a judge can contextualize the statements of the law in such a way that these now fully contextualized statements can answer the criteria of rationality which the rational law-maker must bear in mind. Contextualizing a statute will mainly involve reconstructing the purpose of the statute and extend the statute in such a way that it will be held to encompass a current case which was not clearly contemplated by the historical law-maker when s/he enacted the statute. The current case was unforeseen, but now considerations of justice, rationality and efficiency will characterize the decision by the court which will apply and extend the meaning of a certain statute. As Dascal and Wróblewski say "the rational law-maker would always choose legal rules which are the best suitable ones for implementing the purposes he sets for the law" (1991:436).

One of the problems which simulation theory faces when (or if) we try to apply simulation theory (Goldman 2006) to the reconstruction of the rational law-maker is that here we are not simulating someone's mind (say the historical law-maker's mind), but we are trying to reconstruct an abstract mind, that of the rational law-maker. But this does not look like applying simulation theory, but rather it seems to involve a process of rational reconstruction. If we were simulating an irrational mind, we would have serious problems, as first of all we would have to know that that mind is irrational (e.g., it accepts contradiction), then we would have to know how its irrationality has to be characterized (e.g., selfishness prevails over altruism and rational allocation of resources which considers the *alter* a positive rather than a negative entity). Minds can be quite peculiar and to follow a particular train of thought might be quite a laborious process for mind-reading and, in particular, simulation theory. However, the attempt to apply simulation theory to an actual mind would make sense. One would have to imagine how that mind would react to a problem by a simulated projection. Things are quite different when we attempt to reconstruct a rational agent (above all a maximally rational agent). This is a theoretical construction, not a specific mind: thus reconstructing the rational law-maker is not like mind-reading at all.

Dascal and Wróblewski (1991: 434) provide us with a profile of the rational law-maker:

> 1. The rational law-maker is a rational agent, who has good reasons for his decisions (ibid.).
> 2. The good reasons in question fulfill certain formal criteria: e.g. no good reasons can be inconsistent (epistemic premises) or incoherent (axiological premises): the decisions are reached through the application of valid rules of legal reasoning etc (ibid.).

The reader can check the other clauses in the text for herself. It does not appear to me that simulation theory has much to say about the rational law-maker. We construct the rational law-maker through rationality. It looks like a theoretical construction, rather than an imaginative projection of the speaker's mental processes. In a sense, reconstructing the rational law-maker requires transcending the ego.

There may be points of contact between the theory of the rational law-maker and simulation theory à la Goldman. An analogy is striking. Reconstructing the rational law-maker involves *quarantining* beliefs and desires that belong to the self and which interfere with the reconstruction of the rational law-maker.

> (…) it is often important to the success of a simulation for the attributor to quarantine his own idiosyncratic desires and beliefs (etc.) from the simulation routine. If the attributor has desires or beliefs that aren't shared by the target, allowing them to sleep into the routine could contaminate it. (Goldman 2006: 29).

It is difficult to quarantine one's own personal beliefs, such as political or religious convictions. However, the rational law-maker is a construction which is superior both to the historical and to the current law-maker because of this emphasis on quarantining. The law-maker, if ideal enough, has to transcend the ideas of the actual law-maker. But this is like reasoning through another person's mind, like being transplanted a mind that is not one's own (see Recanati 2007). In other words, this process does'nt look like simulation (although quarantining may be a point of contact).

How is it possible to reason through another person's mind? How can one reason through another person's mind (however abstract, the mind of the rational law-maker should be)? I don't think that Dascal and Wróblewski are asking for what is impossible or implausible. We reconstruct the rational law-maker in so far as we make every effort to transcend ourselves and our limits. For example, when I teach philosophy, I have my favorite philosophers. Kant is one of them. The rational lecturer who provides a survey of philosophy will not indulge in personal preferences, but will do her best to study and understand the topics which she dislikes. This is only an example of how easy or difficult it is to transcend oneself. The conscientious judge, who knows that she has to set aside her political convictions

and religious persuasions, but must allow her rational side to prevail, will be able to provide justifications for her decisions which are likely to persuade people of opposite persuasions, who will be able to sense the effort of objectivization.

4. Conclusion: The rational law-maker as a synthesis of textualism and contextualism

We may ask ourselves where this discussion leaves us concerning the debate between textualists and contextualists. Textualists like Scalia (1997) only recognize the text and do not accept that the legal theorist should delve into parliamentary debates, proceedings of committee meetings, etc. in order to come to a deliberation on the interpretation of a statute. There is something illuminating in this approach. Since the text is the focus of the textualist (together with knowledge of ordinary language and the meanings which certain words carry in ordinary usage), the law-maker for Scalia becomes abstract enough, almost as abstract as the rational law-maker of Dascal and Wróblewski. The author of the text (and his history) is invisible — even if he can be reconstructed, for Scalia one should NOT attempt to reconstruct him. This is very close to an attributive interpretation of the phrase 'the law-maker'. We try to understand the words and the potentially intended meanings of whoever uttered those words. Help could come from canons of construction, according to Scalia. But this does not involve delving into personal history or into the history of a statute (the various steps in the passing of a statute). However, it is notorious that canons of construction (as pointed out by Carston 2013) can lead to contradictory results and the next question is how to resolve the contradiction. Knowledge of the purpose of a statute would not do harm, since if we know what a statute is for, we know whether it can encompass some controversial cases. Scalia or his supporters may reply that when we want to see whether a statute applies to a certain (controversial) case, we do not need to know what the purpose of the law was in the mind of the historical law-maker, but it suffices to know or guess what the purpose of the law might be and whether this statute can be applicable to a case which is controversial. After all, we start from a concrete case and we want to know which statute can best deal with that case (in case there are two statutes potentially capable of dealing with that case, we need to decide which statute has greater affinity to the case at hand). We do not need to reconstruct the purpose of the law from what the historical law-makers had in mind; but we can extract it either from the text of the law or from our case plus the contextualizations needed to bring the statute to deal with that case. So, Scalia seems to favor a picture of the law-maker similar to the one by Dascal and Wróblewski. He can be said to support the idea of the rational law-maker.

However, contextualists can say that, on the contrary, they are best equipped to support the notion of the rational law-maker, since in a number of contextualizations, inferences drawn from the legal text through pragmatics employ rational considerations of the Gricean type (Grice 1989; Leonardi 1992) and, thus, contextualism is the closest ally to Dascal and Wróblewski on the issue of the rational law-maker. It is, I think, true that Dascal and Wróblewski do indeed dwell on Gricean pragmatics and its maxims as a way to connect interpretation with a rational agent. But the rationality of the interpreter and of the law-maker is best seen when the interpreter and the law-maker reconcile conflicting canons of construction and place greater emphasis on a canon rather than on another by dwelling on rationality considerations (this element is missing in Carston 2013). When the result of a certain way of placing emphasis on a certain canon is not satisfactory since it conflicts with the explicit purpose of the law or with some other belief or desire by the law-maker which it is legitimate and rational to have, then the result must be given up and the alternative canon must be adopted. It looks like an interpretative business where the procedure is controlled by the results. This is surely unlike a mathematical procedure, but why should it be like it? After all, a statute must maximize benefits to the beneficiaries and if it does not do so, its interpretation surely cannot be the right one. There has, furthermore, been a debate on whether moral considerations ought to enter the deliberative process and some scholars argue that indeed moral considerations should have a bearing (see Hart 1958). On this point, I think that Dascal and Wróblewski (1991: 434) should count as scholars who place moral considerations into the assessment of the rationality of an interpretative decision. In fact, they say:

> Regarding her/his axiological premises, the rational law-maker should accept or desire what he ought to desire.

The rational law-maker should also take into account certain cultural changes into his deliberations, given that meanings can change (e.g., connotations, meaning applications (see Perry 2013). As Dascal and Wróblewski (1991: 434) say:

> Regarding his/her epistemic premises, the rational law-maker believes in facts which he ought to believe.

The unique blend of contextualism and rationality makes the notion of the rational law-maker appealing for those who interpret the law, as that involves the awareness that the deliberator must make an effort to transcend herself by quarantining those elements of personal biography which threaten to bias the inquiry and by making the inquiry maximally rational. Contextualism, in this essay is not seen as threatening literal meanings. Literal meanings, in the context, of the law are presupposed. It is just a matter of going beyond the literal meanings and to proceed

towards the intentions. But the intentions are not there in one mind (only). This is the core of this interpersonal business. The intentions lie at the intersection of rational minds.

Note

1. For a review of this debate, see Carston (2013). However, it is amazing that in this review there should be no discussion of the rational law-maker.

References

Allott, N. 2013. "Relevance theory". In A. Capone, F. Lo Piparo, and M. Carapezza (eds.), *Perspectives on Linguistic Pragmatics*. Heidelberg: Springer.

Bach, K. 2001. "Semantically speaking". In *Perspectives on Semantics, Pragmatics, and Discourse. A Festschrift for Ferenc Kiefer*. I. Kenesei, and R.M. Harnish (eds.). Amsterdam: John Benjamins, 146–170.

Bach, K. 2007. "Regressions in pragmatics and semantics". In N. Burton-Roberts (ed.), *Pragmatics* (Advances in Linguistics). Houndmills: Palgrave-Macmillan, 24–44.

Butler, B.E. Forthcoming. "Transparency and context in legal communication: pragmatics and legal interpretation". In J.L. Mey and A. Capone (eds.), *Perspectives on Pragmatics, Culture, and Society*. Dordrecht: Springer.

Capone, A. 2009. "Are explicatures cancellable?". *Intercultural Pragmatics* 6(1): 55–83. DOI: 10.1515/IPRG.2009.003

Capone, A. 2010b. "On the social practice of indirect reports" (further advances in the theory of pragmemes). *Journal of Pragmatics* 42: 377–391. DOI: 10.1016/j.pragma.2009.06.013

Capone, A. 2012. "Indirect reports as language games". *Pragmatics and Cognition* 20(3): 593–613. DOI: 10.1075/pc.20.3.07cap

Capone, A. 2013. "The pragmatics of indirect reports and slurring". In A. Capone, F.L. Piparo, and M. Carapezza (eds.), *Perspectives on Linguistic Pragmatics: Perspectives in Pragmatics, Philosophy and Psychology (Volume 2)*. Heidelberg: Springer, 153–183.

Capone, A. Forthcoming. "What can pragmatics learn from the law?". In J.L. Mey and A. Capone (eds.), *Pragmatics, Culture and Society*. Heidelberg: Springer.

Carston, R. 2002. *Thoughts and Utterances. The Pragmatics of Explicit Communication*. Oxford: Blackwell.

Carston, R. 2013. "Legal texts and canons of construction. A view from current pragmatic theory". In M. Freeman and F. Smith (eds.), *Law and Language: Current Legal Issues*. Oxford: Oxford University Press, 8–34. DOI: 10.1093/acprof:oso/9780199673667.003.0010

Cimatti, F. 1999. "Fondamenti naturali della comunicazione". In S. Gensini (ed.), *Manuale della Comunicazione*. Roma: Carocci, 53–88.

Culpeper, J. 2011. *"Impoliteness: Using Language to Cause Offence"*. Cambridge: Cambridge University Press. DOI: 10.1017/CBO9780511975752

Dascal, M. and Wróblewski, J. 1991. "The rational law-maker and the pragmatics of legal interpretation". *Journal of Pragmatics* 15: 421–444. DOI: 10.1016/0378-2166(91)90047-2

Dascal, M. and Weizman, E. 1987. "Contextual exploitation of interpretation clues in text understanding: an integrated model". In J. Verschueren and M. Bertuccelli-Papi (eds.), *The Pragmatic Perspective*. Amsterdam: John Benjamins, 31–46. DOI: 10.1075/pbcs.5.08das

Dascal, M. 2003. *Interpretation and Understanding*. Amsterdam, John Benjamins. DOI: 10.1075/z.120

Endicott, T. 1994. "Putting interpretation in its place". *Law and Philosophy* 13: 451–479. DOI: 10.1007/BF02350479

Endicott, T. 2001. "Law is necessarily vague". *Legal Theory* 7(4): 379–385. DOI: 10.1017/S135232520170403X

Endicott, T. 2010. *Law and Language*. Stanford Encyclopedia of Philosophy.

Endicott, T. 2013. "The value of vagueness". In A. Marmor and S. Soames (eds.), *Language in the Law*. Oxford: Oxford University Press, 14–30.

Endicott, T. Forthcoming. "Interpretation and indeterminacy". *Jerusalem Review of Legal Studies*.

Fish, S. 2005. "There is no textualist position". *San Diego Law Review*, 629–650.

Geis, M.L. 1995. "On Meaning. The meaning of meaning in the law". *Washington University Law Quarterly* 73: 1124–1144.

Goldman, A. 2006. *Simulating Minds*. Oxford: Oxford University Press. DOI: 10.1093/0195138929.001.0001

Grice, H.P. 1989. *Studies in the Way of Words*. Cambridge, MA: Harvard University Press.

Hall, A. 2013. "Relevance theory, semantic content and pragmatic enrichment". In A. Capone, F. Lo Piparo, and M. Carapezza (eds.), *Perspectives on linguistic pragmatics*. Heidelberg: Springer.

Hart, H.L.A. 1958. "Positivism and the separation of law and morals". *Harvard Law Review* 71(4): 593–629. DOI: 10.2307/1338225

Huang, Y. 2000. *"Anaphora"*. Oxford: Oxford University Press.

Kecskes, I. 2014. *Intercultural Pragmatics*. Oxford: Oxford University Press.

Leech, G. 1983. *Principles of Pragmatics*. London: Longman.

Leonardi, P. 1992. "Grice: significare come atto". *Lingua e Stile* 27(4): 487–503.

Lewis, D. 1974. "Radical Interpretation". *Synthese* 27: 331–344. DOI: 10.1007/BF00484599

Lo Piparo, F. 2003. *Cosa fa di una lingua una lingua*. Bari: Laterza.

Lo Piparo, F. 2013. "Truth, negation and meaning". In A. Capone, F. Lo Piparo, and M. Carapezza (eds.), *Perspectives on Pragmatics and Philosophy*. Heidelberg: Springer. DOI: 10.1007/978-3-319-01011-3

Manning, J. 2005. "Textualism and legislative intent". *Virginia Law Review*. 91(2): 419–450.

Manning, J. 2006. "What divides textualists from purposivists". *Columbia Law Review* 106(1): 70–111.

Marmor, A. 2013. "Can the law imply more than it says? On some pragmatic aspects of strategic speech". In A. Marmor and S. Soames (eds.), *Language in the Law*. Oxford: Oxford University Press, 83–104.

Marmor, A. Forthcoming a. "Meaning and belief in constitutional interpretation".

Marmor, A. Forthcoming b. "What does the law say".

Mey, J.L. 2001. Pragmatics. *An introduction*. Oxford: Blackwell.

Neale, S. 2008. "Textualism with intent"". (Manuscript. Discussion at the Law Faculty, University of Oxford).

Perry, J. 2013. "Textualism and the discovery of rights?". In A. Marmor and S. Soames (eds.), *Language in the law*. Oxford: Oxford University Press, 105–129.

Recanati, F. 2007. *Perspectival Thought*. Oxford: Oxford University Press. DOI: 10.1093/acprof:oso/9780199230532.001.0001
Scalia, A. 1997. *A Matter of Interpretation*. Princeton, NJ: Princeton University Press.
Verschueren, J. 1999. *Understanding Pragmatics*. London: Arnold.
Whiting, D. Forthcoming. "Languages, language games, and forms of life". In Glock, H-J. and Hyman, J (eds.), *The Blackwell Companion to Wittgenstein*. Oxford: Wiley-Blackwell.
Wilson, D. and Sperber, D. 2012. *Meaning and Relevance*. Cambridge: Cambridge University Press. DOI: 10.1017/CBO9781139028370
Wittgenstein, L. 1953. *Philosophical Investigations*. G.E.M. Anscombe and R. Rhees (eds.), G.E.M. Anscombe (trans.), Oxford: Blackwell.

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