

Contents

| | | |
|----------|---|----|
| 1 | Introduction: The Path of Analytical Realism | 1 |
| 1.1 | On “Realism” and “Scepticism” in Jurisprudence | 1 |
| 1.2 | Overview | 8 |
| 1.3 | Conceptual Analysis | 10 |
| 2 | Interpretation, Truth, and the Logical Forms of Interpretive Discourse | 17 |
| 2.1 | A Haunting Problem | 17 |
| 2.2 | Legal Interpretation | 18 |
| 2.2.1 | Interpretation Proper to a Practical Purpose | 19 |
| 2.2.2 | Interpretation Proper to a Cognitive Purpose | 27 |
| 2.2.3 | Interpretation Improper | 31 |
| 2.3 | Truth | 34 |
| 2.3.1 | Empirical Truth | 35 |
| 2.3.2 | Pragmatic Truth | 37 |
| 2.3.3 | Systemic Truth | 38 |
| 2.3.4 | Taking Stock | 43 |
| 2.4 | The Problem Unravelling | 44 |
| 2.5 | Truth and the Nature of Judicial Interpretation | 46 |
| 3 | Interpretive Games | 49 |
| 3.1 | Big and Small(er) Problems | 49 |
| 3.2 | The Challenge of Linguistic Theories | 50 |
| 3.2.1 | The Word-Meaning Theory | 51 |
| 3.2.2 | The Sentence-Meaning Theory | 52 |
| 3.3 | The Failure of Linguistic Theories | 53 |
| 3.4 | Interpretive Games | 59 |
| 3.4.1 | Simple v. Complex Games | 63 |
| 3.4.2 | Open v. Well-Designed Games | 64 |
| 3.4.3 | Cognitive v. Practical Games | 64 |
| 3.4.4 | Privileged Rule-Making v. Universal Rule-Making Games | 65 |

| | | |
|----------|---|------------|
| 3.4.5 | External Rule-Making v. Contextual Rule-Making Games | 65 |
| 3.4.6 | No-Reinterpretation, Unlimited Reinterpretation, Limited Reinterpretation Games | 66 |
| 3.5 | The Conversation Game | 67 |
| 3.5.1 | The Principle and Maxims of Conversation | 68 |
| 3.5.2 | The Principle and Maxims of Conversational Interpretation | 69 |
| 3.6 | The Statutory Interpretation Game | 70 |
| 3.7 | A Concluding Note | 74 |
| 4 | Taking Context Seriously | 75 |
| 4.1 | A Kantian Reproach | 75 |
| 4.2 | Two Theories of Legal Interpretation | 79 |
| 4.2.1 | Semantic Formalism | 79 |
| 4.2.2 | Pragmatic Realism | 83 |
| 4.3 | Literalism v. Contextualism | 86 |
| 4.3.1 | Literalism | 87 |
| 4.3.2 | Contextualism | 92 |
| 4.4 | What a Jurist Can Learn | 98 |
| 5 | Frames v. Containers | 103 |
| 5.1 | A Demarcation Problem | 103 |
| 5.2 | The Frame of Interpretations Theory | 104 |
| 5.3 | The Container-Retrieval Theory | 112 |
| 5.4 | A Few Virtues of the Frame Theory | 115 |
| 5.4.1 | <i>Ab posse ad esse non valet consequentia</i> | 115 |
| 5.4.2 | Two Misfired Critiques | 117 |
| 5.4.3 | The Competitive Advantage of the Frame Theory | 122 |
| 6 | Towards Pragmatic Realism | 125 |
| 6.1 | The Problem About Judicial Interpretation | 125 |
| 6.2 | A Conceptual Framework | 126 |
| 6.3 | Three Theories | 130 |
| 6.3.1 | Cognitivism: Integral and Limited | 130 |
| 6.3.2 | A Few Perplexities | 132 |
| 6.3.3 | Non-Cognitivism | 134 |
| 6.4 | Pragmatic Formalism | 135 |
| 6.5 | Pragmatic Realism: The Critical Side | 141 |
| 6.5.1 | Pragmatics and the Theory of Legal Interpretation | 142 |
| 6.5.2 | The Interpretive Relevance of Linguistic Meaning | 144 |
| 6.5.3 | Art, Law and Ordinary Conversation | 145 |
| 6.5.4 | Which Easiness Easy Cases? | 147 |
| 6.5.5 | The Sting of Normative Conflicts | 149 |
| 6.5.6 | The Sting of Pragmatic Indeterminacies | 151 |
| 6.6 | Pragmatic Realism: The Proposal Side | 153 |

| | | |
|----------|--|-----|
| 7 | Legal Gaps | 159 |
| 7.1 | Two Traditions | 159 |
| 7.2 | The Civil Law Side | 160 |
| 7.2.1 | Normative Gaps Proper | 163 |
| 7.2.2 | Switchover Gaps | 164 |
| 7.2.3 | Adding-Up Gaps | 165 |
| 7.3 | The Common Law Side | 166 |
| 7.3.1 | Schauer | 167 |
| 7.3.2 | Bix | 169 |
| 7.3.3 | Coleman and Leiter | 171 |
| 7.3.4 | Dworkin | 172 |
| 7.3.5 | Raz | 175 |
| 7.4 | Comparative Jurisprudence | 177 |
| 7.4.1 | Puzzle-Theories v. Servants-Theories | 177 |
| 7.4.2 | Jealous Statutes v. Generous Codes | 178 |
| 7.4.3 | Philosophers v. Watch-Repairers | 179 |
| 8 | Judicial Fictions | 181 |
| 8.1 | The Need for Clarification | 181 |
| 8.2 | A Few Extant Characterizations | 182 |
| 8.2.1 | Kelsen | 182 |
| 8.2.2 | Ross | 184 |
| 8.2.3 | Gottlieb | 185 |
| 8.2.4 | Schauer | 186 |
| 8.2.5 | Del Mar | 187 |
| 8.3 | Characterizations Analysed | 188 |
| 8.4 | A Further Characterization | 194 |
| 8.4.1 | Solving an Axiological Gap Without Fiction: The Sweeping Abortion Prohibition | 195 |
| 8.4.2 | Solving an Axiological Gap Without Fiction: Mothers' Parental Leave | 197 |
| 8.4.3 | Solving an Axiological Gap by Fiction: The Macallister Case | 198 |
| 8.4.4 | Solving an Axiological Gap by Fiction: The Minorca Case | 199 |
| 9 | Precedent | 201 |
| 9.1 | The Philosophy of Precedent: Two Varieties | 201 |
| 9.2 | "Judicial Precedent" | 202 |
| 9.3 | "Ratio Decidendi", "Obiter Dictum" | 203 |
| 9.4 | "Interpreting Precedents" | 208 |
| 9.4.1 | Interpreting the <i>Ratio Decidendi</i> : Textual Techniques .. | 209 |
| 9.4.2 | Interpreting the <i>Ratio Decidendi</i> : Meta-Textual Techniques | 210 |
| 9.4.3 | Models for Determining the <i>Ratio Decidendi</i> of a Case | 211 |

| | | |
|-----------|--|------------|
| 9.5 | The Practical Relevance of Judicial Precedents | 211 |
| 9.5.1 | A Few Distinctions | 212 |
| 9.5.2 | The <i>Bielefelder Kreis</i> | 213 |
| 9.5.3 | Eight Ideal-Typical Systems | 215 |
| 10 | Defeasibility and Legal Indeterminacy | 221 |
| 10.1 | The Problem | 221 |
| 10.2 | Legal Indeterminacy | 221 |
| 10.2.1 | Indeterminacy in Law and Its Sources | 222 |
| 10.2.2 | Five Notions of Legal Indeterminacy | 227 |
| 10.3 | Defeasibility in Law | 229 |
| 10.3.1 | Objects and Sources | 231 |
| 10.4 | Explicit v. Implicit Norm-Defeasibility | 246 |
| 10.5 | Norm-Defeasibility and Axiological Gaps | 247 |
| 10.6 | A Tentative Reconstruction | 248 |
| 10.7 | Defeasibility and Legal Indeterminacy | 251 |
| 11 | Legislation | 255 |
| 11.1 | The New Science of Legislation | 255 |
| 11.2 | Legal Realism | 257 |
| 11.3 | Legal Realism and Legislation | 258 |
| 11.4 | The Realistic Theory of Legislation | 259 |
| | References | 267 |