Legislative Intentions and Counterfactuals

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> It is obvious that an imagined world, however different it may be from the real one, must have something — a form — in common with it.
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> (L. Wittgenstein)

1. *Dworkin on Legal Positivism*

In 1889 the New York Court of Appeals had to decide whether Elmer Palmer could inherit under the will of his grandfather even though Elmer had murdered him to do so. The Court admitted that the New York statute of wills, if literally construed, gave the property to the murderer. But the Court also claimed that all laws shall be controlled in their operation and effect by general, fundamental principles of law. Since, according to these principles, "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong", the murderer did not received his inheritance.[1]
This case has become worldwide famous since Ronald Dworkin made use of it to show that law consists not only of legal rules but of principles also (Dworkin 1967).[2] As a result, Elmer's case would undermine three main tenants of Hartian legal positivism (Dworkin 1978 and 1986):

(a) The set of valid legal rules is exhaustive of the law;
(b) When a case is not covered by a legal rule, judges have strong discretion in deciding the case;
(c) There is a rule of recognition taking the form of conventions among officials, that determines the set of valid legal rules in a legal system.

As to claim (a), in Dworkin's opinion, the decision of Elmer's case shows that the law includes legal principles, whose nature is different from that of legal rules. As to claim (b), Elmer's case makes it clear that in hard cases judges do not exercise strong discretion but are bound to general principles of law. As to claim (c), if the law consists both of rules and principles, it turns out that some norms belong to the legal system not for conventional reasons but on the basis of their moral merits.
All this is clearly displayed, according to Dworkin, by the Court's argumentation in Elmer's case. In Dworkin's opinion, the Court meant that "judges should construct a statute so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law" (Dworkin 1986: 19). As a consequence, "the dispute about Elmer was not about whether judges should follow the law or adjust it in the interest of justice. ... It was a dispute about what the law was, about what the real statute the legislators enacted really

[1] *Riggs v. Palmer*, 115 N.Y. 506 (1889).
[2] For a different reading of the case, see Cardozo (1921: 40-43) who thinks that *two principles* conflict there: "the principle of the binding force of a will" and "the principle that no man shall profit from his own inequity or take advantage of his own wrong" (41).

said" (Dworkin 1986: 20). To put it another way: it was a matter of interpretation, when this is conceived as an effort to find out what the law is.

2. *Elmer's Case: A Closer Look*

If one considers the arguments used in Elmer's case more in detail, it is easy to realize that the Court had recourse to *three different arguments* to justify the conclusion of the decision.
At first the Court, in the words of Judge Earl writing for the majority, took into consideration a *literal reading* of the statute:

> It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed … give the property to the murderer.[3]

According to this canon of construction, for sure, Elmer was permitted to inherit his grandfather's estate.
On the contrary, the second argument of the Court is based on a counterfactual reconstruction of *legislative intent*:

> It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. *If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.*[4]

On the basis of these considerations, the Court affirmed that it was a familiar canon of construction that "a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers".[5]
Therefore the Court claimed that the benefit for a donee who murdered the testator was not within the statute because it was not within the intention of its makers, even though it was within the letter of it.
It was so, in particular, because a literal reading of the statute would have lead to "absurd consequences",[6] i.e. consequences that the legislators could not have wanted.[7]
According to this argument, hence, Elmer was not permitted to inherit his grandfather's estate.
Finally, the Court used an argument from *principle* (or "maxim", as Earl put it) supporting the argument from counterfactual intention just outlined: since (i) it was a general maxim of the common law that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime", and since (ii) Elmer tried to profit by the murder he committed, he was not permitted to inherit.[8]

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[3] *Riggs v. Palmer*: 509.
[4] *Id.* (emphasis added).
[5] *Id.*
[6] The Court claimed that the literal meaning should be restrained so that to avoid "absurd consequences manifestly contradictory to common reason" (*id.*: 511).
[7] See also *United States v. Katz*, 271 U.S. 354, 357 (1926).
[8] "The murdered lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and

There is room for thinking that the key-argument used by the Court, that is the argument settling the case, is the second one. In the first place, the argument from wording is defeated by the argument from counterfactual intention, according to which Elmer was not permitted to inherit. It is so on the basis of the meta-canon of construction the Court appeals to, which provides that intended meaning ought to prevail over literal meaning. In case of divergence between the two canons, the content of the law is determined by what the legislature intends to say, not by what a legal text actually states. Secondly, the argument from principle is not presented in *Riggs* as an autonomous argument which justifies the decision of the Court. It rather supports the counterfactual reconstruction of legislative intent. The maxim of the common law according to which no one shall be permitted to profit by his own fraud etc. simply provides evidence to the effect that, in the Court's opinion, if the legislature had considered the case, it would have ruled it so to avoid "absurd consequences".
Now, our question is: Under what conditions does the argument from counterfactual intention justify a judicial decision? More generally, what discursive commitments are undertaken by a lawyer or a judge, in an exchange of legal reasons, when using this argument? Have these commitments been met by the New York Court in Elmer's case?
By addressing these issues we hope to be able, at the end of the following analysis, to assess Dworkin's criticism against legal positivism, as far as the dispute about Elmer is concerned.

3. *Legislative Intentions*

Before considering counterfactual intentions in particular, we need to make some preliminary points on legislative intentions in general.[9] The argument from legislative intent is considered a reasonable and politically sound requirement on judicial interpretation and decision-making, especially in the systems governed by the principles of separation of powers and legislative supremacy.[10] Politically speaking, it is required by the democratic principle;[11] or, more in general, it can be derived from the reasons to comply with legal authorities and from the very idea of legislative power.[12] However, the argument from legislative intention faces several theoretical and practical problems.
First, the notion of legislative intention gives rise to what we might call the *Ontological Problem*: What is the entity we are talking of? Many legal scholars claim that, on the one hand, the intention of the legislature as a collective body does not exists, and that, on the other hand, the intention of the individual legislators is practically undiscoverable and, in

enforcement of legal rights of ownership" (Cardozo 1921: 43). See also Kellogg (2007: 114) stressing the difference between a moral principle and a maxim derived from applicable precedent.
[9] Some of these points have already been made in Canale & Tuzet (2010). See also Guastini (2011: 272-276).
[10] See e.g. Goldsworthy (1997) and (2005). "It is a short step from accepting that legitimacy of the legislature to interpreting its enactments with regard to the enactors' intentions" (Allan 2000: 110).
[11] See e.g. Campbell (2001).
[12] "It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make" (Raz 1996: 258). See also Marmor (2001: 90).

any case, irrelevant.[13] Moreover, it is claimed that attributing an intention to a certain group amounts to a fallacy: the fallacy of composition.[14]
Secondly, this notion faces an *Epistemic Problem*: How are we to know the legislature's intention once we assume that something of this kind exists? Apart from the cases in which it is clearly expressed in legislative texts and provisions, legislative intent is not easily discoverable, in particular when we deal with old statutes and constitutions.[15] The so-called *travaux préparatoires* (records of legislative debates and similar documents) often provide insufficient evidence to that effect, especially when various documents, subjects and institutional bodies are concerned. Moreover, some jurisdictions restrict the use of such documents because it could undermine the principle of the law's publicity: if the law should be knowable in advance the use of such documents to determine its contents should be limited, it is argued, because they are not readily available to the people to whom the law is directed.[16]
Thirdly, if we assume that the intention of the legislature exists and can be discovered, an *Abstraction Problem* is to be considered: What is the relevant level of abstraction in singling out the legislative intent? Should we seek for the abstract legislature's intention or rather for its details? Sometimes this issue is addressed in terms of the distinction between enactment intentions and application intentions.[17] Consider the content of the equal protection clause of the United States Constitution (am. XIV, sec. 1): does it include (as an application intention) the permissibility of racial segregation, since the framers believed that it was consistent with the protection of equality articulated in the clause? Sometimes the same theoretical issue is addressed in terms of levels of generality: the wording of the relevant legal text might suggest a less general or a more general regulation than the legislature wanted. When problems of this sort arise, how are we to determine the class of things to which the law has to be applied? We need criteria guiding us to more or less abstract, or general, answers.[18]
Fourthly, in those systems where legislative decisions are *de facto* in the hands of the executive, we face a *Political or Institutional Problem*:[19] Which is the relevant intent? The legislature's or the executive's? Some claim that the notion of proxy agency can be helpful here: legislation can be interpreted in accordance with the intentions of proxies – groups or individuals acting on behalf of the majority party – insofar as "the reasons for interpreting legislation in accordance with the intentions of legislatures are also reasons for interpreting legislation in accordance with proxy groups, when those groups

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[13] Cf. e.g. Radin (1930: 870 ff.), Campbell (2001: 292), Boudreau *et al.* (2007: 972). But see Greenawalt (2000) for a mental states version of legislative intent: what is relevant are the mental states of (actual or reasonable) legislators.
[14] For instance, sometimes it is said that the American people do not like to have the same party holding executive and legislative power at the same time. "A group as amorphous as the American people cannot be held to form intentions of any kind, let alone such a sophisticated intention as that which is here attributed to them. The only sense in which we might speak of the intention of such a group is the metaphorical or summative sense in which we say that a group has any intention that is supported by a majority of its members" (Pettit 2001: 250-251).
[15] See e.g. Marmor (2005, chaps. 8-9), Pino (2008: 401-403), MacPherson (2010: 2 ff.).
[16] This is traditionally the case of Australia and New Zealand, for instance. See Goldsworthy (1997: 10-15) and Allan (2000: 110-111).
[17] See Stoljar (1998: 36-37). Cf. Williams (2001: 326-329) and Goldsworthy (1997: 30-31).
[18] Moreso (2005: 136) supports the following criterion: if the text is detailed, an interpretive doubt must be solved at the same detailed level, looking for the precise legislative intention; if the text has an abstract formulation (as many constitutional provisions have), a doubt must be solved in the abstract, leaving room for contextual considerations from time to time. Cf. Williams (2001: 337-338).
[19] Cf. Greenawalt (2000: 1645-1646). See Bernatchez (2007) on this problem in the Canadian system.

determine the content of the legislation." (MacPherson 2010: 17) But this solution is institutionally controversial insofar as the role of the legislature cannot be reduced to that of the majority party or some proxy group (Ekins 2012).
Finally, as far as legal argumentation theory is concerned, an *Autonomy Problem* can be raised: Is the argument from intention an autonomous or a "transcategorical" argument? MacCormick and Summers claimed it is transcategorical, in that the appeal to legislative intention can range over all possible contents of each of the other kinds of legal argumentation.[20] Against this view, one may claim, among other things, that doing something *intentionally* is different from doing something *on purpose*, and, for the same reason, that having an intention is different from having a purpose.[21] With a closer look on legal matters, one may add that we should not conflate the enacted legislative choice with the legislature's purposes or reasons for action, since the chosen plan of action does not collapse to the legislature's purposive ends.[22]
Notwithstanding these problems, the argument from intention is an important canon deserving our understanding and discussion, since it is widely used in legal reasoning.[23] If any, for the reason that the intention of the law-maker is a distinguishing feature of law: law, unlike morality, is largely intentional (Gardner 2010). Notwithstanding some exceptions as customary law, law, unlike morality, is made by someone through normative acts and texts whose contents depend at least in part on the intentions of the law-makers.[24] But this paper will only deal with one aspect of this argumentative technique, and moreover an especially controversial one: the role of *counterfactual legislative intentions*.

4. *Counterfactual Intentions*

Counterfactual reasoning has been traditionally seen with suspect by logic and argumentation theory. The reason of this is obvious: counterfactuals resist any standard truth-functional analysis that tries to determine their semantic content.[25]

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[20] MacCormick & Summers (1991: 522). This might find a confirmation in the distinction of various kinds of legislative intentions: for instance, according to Marmor (2005: 127-132), intentions manifest in the language of the law itself, intentions concerning the purposes of the rule enacted ("further intentions"), intentions concerning the application of the law ("application intentions").
[21] "I needed money to play the ponies, so I dipped into the till. Of course, I *intended* (all the time) to put it back as soon as I had collected my winnings. That was my intention: I took it with the intention of putting it back. But was that my *purpose* in taking it? Did I take it for the purpose of, or on purpose to, put it back? Plainly not" (Austin 1979: 275). Cf. Bratman (1987) and (1999).
[22] "The legislature does not just choose purposes, which interpreters are then free to choose the means to attain. Instead, the legislature chooses a complex plan and while reflection on the end or ends may be highly relevant to determining the legislative choice and working out its consequences, it is the chosen plan that is authoritative." (Ekins 2012: 251)
[23] However, we don't want to say that this argument is *more* important than others. There is a standard distinction between subjective and objective methods of interpretation: in EU law, for instance, the latter are presently preferred (literal meaning, purposes, principles); but making appeal to legislative intentions is sometimes required by positive law itself regulating legal interpretation (see art. 12 of the "Preleggi" to the Italian Civil Code, for instance).
[24] Some might claim that the content of normative texts rather depends on meaning-ascriptions made by interpreters. But, on the one hand, it is unreasonable to believe that the intentions of the texts' authors don't play any role in the determination of their content and, on the other, the ascription argument simply shifts the focus from legislators' to interpreters' intentions.
[25] Cf. Chisholm (1946: 289 ff.); Goodman (1954/1983: 1-27); Woods (1997: 3 ff.); Johnson-Laird & Byrne (2002: 652); *.

According to Quine (1950/1982: 23), in particular, counterfactual conditionals cannot be analyzed truth-functionally, for ordinary usage demands that some of them be true and that others be false, whereas truth-functional analysis makes any of them equally true (given the falsity of its antecedent). So, they do not have logically determinable truth-values and an adequate analysis of them must "consider causal connections, or kindred relationships, between matters spoken of in the antecedent of the conditional and matters spoken of in the consequent".[26] Take his famous example of the Bizet-Verdi case, with the following counterfactual statements:

(1) If Bizet and Verdi had been compatriots, Bizet would have been Italian;

(2) If Bizet and Verdi had been compatriots, Verdi would have been French.

What are the truth-values of (1) and (2)? It is hard to say, at least for the reason that both (1) and (2) seem to be true but they contradict each other (if Bizet had been Italian and Verdi had been French, they would not have been compatriots).

Also Elmer's case is troublesome in this respect. It seems likely that "the New York legislators did not have the case of murderers in mind at all", as Dworkin (1986: 19) has pointed out. The legislature had actually no active intention either way. Now, without further information and evaluation, from the silence of the New York legislators we can infer two different counterfactual statements at least:

(3) If the legislature had considered the case, it would have prohibited a murderer to inherit.

(4) If the legislature had considered the case, it would have permitted a murder to inherit.

The antecedent being true, the consequent of both (3) and (4) might be true, although the two contradict each other (since what is prohibited is not permitted and vice versa). On the basis of this, it might be tempting to dismiss counterfactual reasoning altogether as a misleading gibberish that cannot justify any legal conclusion.[27]

Yet this claim seems to be too radical.[28] After all, counterfactual statements occur in many situations of everyday life and in scientific research, and are of help for prediction and practical reasoning. As Quine himself put it, between the scientifically acceptable counterfactuals and the wild ones there is no sharp boundary but only a gradation of acceptability.[29]

Moreover, some counterfactual statements are considered obviously true in the legal discourse, such as:

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[26] Quine (1950/1982: 23). Cf. Quine (1941/1980: 21), (1960: 222-226) and (1976: 71-73); see also Goodman (1954/1983: 8-9).

[27] Cf. Stoljar (1998), (2001a) and (2001b). But Guastini (2011: 275-276) claims that the argument from counterfactual intention is a technique of legal construction aimed at filling gaps; as such, its justificatory power rests upon a form of reasoning by analogy.

[28] Greenawalt (2000: 1637-1640) observes that the confidence we may have about judgments on "hypothetical intentions" is a question of degree; in other words, we are pretty sure that some counterfactuals are true and some others are false, but on some of them we are hesitant to some degree.

[29] "Between subjunctive conditionals in a reasonably dispositional spirit and subjunctive conditionals at their wildest there is no boundary, but only a gradation of better and worse" (Quine 1960: 225).

(5) If the murderer had entered the room while the witness was there, the latter would have seen the former.

(6) If the legislature had the intention to prohibit A, it would have not permitted A.

(7) If the legislature had not enacted statute S, S would not express a valid legal rule.

Before rejecting the argument from counterfactual intention used by the New York Court in Elmer's case as based on some unjustified counterfactual statement, it is worth considering a different approach to this argumentative device.
In the contemporary philosophical debate, the standard analysis of counterfactual statements makes use of possible worlds theories (Lewis 1973; Stalnaker 2003). This approach starts from the idea that when a counterfactual statement is used, we imagine a possible situation or state of affairs, different from the actual one, in which the antecedent is true, and say that in *that* situation, the consequent is true also.
This appears straightforward if we consider the schema of the Argument from Counterfactual Intention (ACI) given by the Court:

(ACI-1) If the legislature had considered that case, it would have ruled it thus-and-so.

The addressee of this claim typically assumes that the speaker/writer, first, imagines a state of affairs in which the New York legislators took into consideration, in drafting and enacting the statute of wills, the kind of situation that occurred in Elmer's case, and, second, claims that on the basis of such consideration the legislature would have ruled it in a certain way.
It is beyond question that, to reach a definite conclusion about the truth of the consequent, we need to sketch the possible situation in sufficient detail for the consequent's truth-value to be fixed. We have to imagine not only that the legislature had considered murderers' inheritance, but also other aspects of the political and social scene that are such to lead the legislature to intend what is claimed in the consequent.
The best way to do that is to introduce, instead of the notion of possible situation (which refers only to some aspects of reality), the notion of *possible world*: a way the world might have been in every possible aspect. A possible world typically coincides with the way things are in reality under some respects, and diverges in others; yet it will have all its details perfectly fixed.[30] The idea underlying this kind of analysis is that if we accept a counterfactual conditional as justified, we envisage a world in which the antecedent is true and at the same time we provide some definite reasons for the consequent's being

[30] But see Kripke (1980: 15 ff.), who conceives of possible worlds as conceptual tools and wants to avoid further commitments, especially metaphysical. Haack (1978: 191) thinks there are three approaches to possible worlds: 1) *linguistic* (Hintikka), where possible worlds are maximally consistent sets of sentences; 2) *conceptualist* (Kripke), where they are ways in which we could conceive the world to be different; 3) *realist* (Lewis), where they are abstract entities independent of language and thought. See also Engel (1989: 185-187).

true as well, that is, we establish a pertinent connection between the antecedent and the consequent.[31]

Obviously, the problem is that there is no single world in which the antecedent is true. We can imagine countless worlds which agree in the feature that New York legislators considered the murderer case by enacting the statute of wills, and differ in other respects. Moreover, in some of these worlds the consequent will be true and in others will be false. We can imagine a possible world *i* in which the legislators subscribed to that maxim of the common law and prohibited a murderer to inherit. But also a possible world *j* in which the legislators permitted a murderer to inherit because, using the argument actually advanced by Judge Gray in his dissenting opinion, a prohibition "would involve the imposition of an additional punishment or penalty"[32] upon the murderer. So, one might think, anything goes with this argumentative technique.

A first suggestion to resist such a conclusion might be that the *context* determines which possible world has to be considered in assessing a counterfactual statement. As Michael Woods has pointed out, in the case of several counterfactual conditionals "there seems to be no determinate way of settling the question of their truth-value if they are considered outside a context which makes more determinate what counterfactual supposition is being entertained" (Woods 1997: 42). Is it true or false that if the legislature had considered the murderer's case, it would have ruled it thus-and-so? It seems that only a contextual scenario will yield a definite answer.

Now, in legal argumentation there are at least three discursive contexts in which this issue can be addressed. Their features depend on the content we ascribe to the term "legislature". Actually, in the legal discourse this term is ambiguous. It is mainly used to refer to:

(a) The *historical* legislature (the collective body that actually enacted a statute).

(b) The *coherent* legislature (a fictitious legislature that warrants for the consistency and coherence of the present legal system).

(c) The *good* legislature (a fictitious legislature that rules the case so that to avoid unfair, unjust, or absurd consequences).[33]

These three concepts of legislature implicitly make reference to different contextual backgrounds, which have to be taken into consideration in assessing counterfactual reasoning and which are both factual and normative.

As to the historical legislature, in our case, the pertinent context is constituted by the social, political and legal circumstances that actually led the New York legislators to enact the statute of wills. As to the coherent legislature, the pertinent context is composed by the other legal norms belonging to the legal system and the interpretive canons of consistency and coherence. As far as the good legislature is concerned, the relevant

[31] "'Possible worlds' are *stipulated*, not *discovered* by powerful telescopes" (Kripke 1980: 44). Cf. Woods (1997: 47); note also that Woods argues against the attempt to explain counterfactual conditionals in terms of possible worlds.

[32] *Riggs v. Palmer*, at 519.

[33] Note that both (b) and (c) are fictitious legislatures, because there is no actual legislative body ruling the matter; the difference between them is that (b) operates (counterfactually) on the basis of the present legal materials, while (c) operates (counterfactually again) on the basis of substantive evaluations. Moreover, both legislatures can be said to be "rational". Legislature (b) is rational insofar as it avoids legal antinomies and gaps; legislature (c) is rational because it matches what practical rationality dictates. See on this Ratti (2012: 179).

context is constituted by the current or expected consequences of the ruling, plus their assessment as good/bad, fair/unfair, just/unjust, reasonable/absurd, etc.
Now, even if reading the opinion you may have the impression that the Elmer's Court refers to the historical New York legislature, the argument is basically centered in what we call *coherent* and *good* legislature, namely the legislative body that, on the one hand, warrants for the consistency and coherence of the system and, on the other hand, avoids absurd consequences. Both legislatures (b) and (c) would rule the case against Elmer, (b) in virtue of the precedents and the maxim pointed out, (c) in virtue of the absurd consequences of the alternative ruling.

> What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable.[34]

This argumentative passage in the majority's decision follows from the consideration of some scholarly authorities (including Bacon, Pufendorf and Blackstone) who claim that statutes are to be interpreted "rationally", given that their letter is not always reliable. "The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called *rational interpretation*".[35]
In some of his writings Dworkin is skeptical on counterfactual questions: he says it is better to ask *political* questions, not what the legislature would have decided but what *should have done*.[36] Instead of speculating about counterfactuals, he says, it is more fruitful and direct to draw the consequences that follow from our political convictions. In fact our counterfactual questions are driven in his view by our political concerns. But in our analysis this is not an objection to counterfactual reasoning in adjudication, it is a preference for the good or the coherent legislature over the historical one.

> If, in a hard case, one decision follows more naturally from the principles that the legislature served in enacting the statute, then the judges should take that decision, even though it is true that, as a matter of historical fact, the legislature itself would have taken the other one if it had taken either. The legislature endorses principles by enacting legislation these principles justify. The spirit of democracy is served by respecting these principles. It is not served by speculating whether the legislature itself, on some particular occasion, would have kept faith. (Dworkin 1985: 22)

A preference for (c) or (b) is implicit in Dworkin's claim against speculating about (a): obviously (c) is important for Dworkin insofar as principles of political morality matter, but also (b) is important as far as fit with the chain of previous decisions matters.
These considerations highlight a first general constraint on the use of the argument from counterfactual intention: This argument is highly context-dependent. On the one hand, a counterfactual statement can be considered true or false only in the light of the set of possible worlds in which its antecedent is true. On the other hand, a possible world is relevant for assessing the statement not only if the antecedent is true in it, but also if some relevant contextual assumptions make it true. In order to show this, further arguments are needed: in particular, an argument from actual intention as to the historical context; a systemic argument as to the second context; a practical or political argument as to the

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[34] *Riggs v. Palmer*, at 511.
[35] *Id.* at 509. But against the use of hypothetical intentions of postulated or fictitious authors (it undermines the plausibility of intentionalism), see Stoljar (2001b).
[36] See Dworkin (1985: 15-16, 20-23) and (1986: 325-328, 351-352).

last one. Moreover, the "pertinence" of one context over the others (i.e., of one kind of legislature over the others) could be disputed in the exchange of reasons and thus being in need of further justification. Therefore, the argument from counterfactual intention is not an autonomous argument.[37] This being the case, a new, more perspicuous formulation of the argument at stake shall be considered, that makes explicit the discursive commitments assumed by using it:

(ACI-2) In the possible world where the legislature considers that case, and the pertinent contextual background leads the legislature to consider it, the legislature rules the case thus-and-so.

5. *Relevant Similarity between Possible Worlds*

The fulfillment of the constraints just outlined is necessary but not sufficient, however, to fix the truth-value of a counterfactual statement such as in Elmer's case. By claiming that "If the legislature had considered the murderer's case, it would have ruled it thus-and-so" the Court implicitly undertook further discursive commitments, that it might have been requested to fulfill.

Imagine a set of possible worlds in which the antecedent is true in a given context (the historical legislature considered the murderer's case in enacting the statute of wills) and the relevant contextual features make the antecedent true (the political or social situation was such to lead the legislature to consider the case). Despite these conditions are met, it might be the case that the consequent is true in some worlds and false in others. In world *i* the legislature subscribes to such maxim of the common law and prohibits a murderer to inherit. But in *j* it permits a murderer to inherit because a prohibition "would involve the imposition of an additional punishment or penalty". And in *k* the legislature considers the case but a political revolution overthrows the government before some statute is enacted. What consequent are we entitled to infer?

Lewis suggested a general, non context-dependent, procedure for choosing among worlds in which the antecedent is true. This procedure leads us to find out a further commitment assumed by claiming that a counterfactual statement is true. Here it is Lewis' first example:

> "If kangaroos had no tails, they would topple over" seems to me to mean something like this: in any possible state of affairs in which kangaroos have no tails, *and which resembles our actual state of affairs as much as kangaroos having no tails permits it to*, the kangaroos topple over.[38]

Lewis' "resemblance" condition can be explained this way. Actually there is no possible world where everything is exactly as it is in the actual one apart from the truth of the antecedent.[39] By assessing a counterfactual statement, it is natural to imagine a world like the actual one as it is allowed by the difference in truth-value of the antecedent. If

[37] By this we do not refer to the point made by MacCormick & Summers (1991: 522) (see above § 3), but simply mean that the argument is insufficient to justify a judicial decision.

[38] Lewis (1973: 1); emphasis added.

[39] Such a world must differ in other ways also. See Woods (1997: 43): "any world in which (contrary to fact) I arrive at my appointment on time instead of two hours late will have to be one that differs from the actual worlds in *other* ways; either I left earlier or the time of the appointment was later or technology was more advanced so as to allow a drastically faster journey or the laws of physics were different or …".

kangaroos had no tails, there should be some other aspects of reality that would make this possible, aspects that are not included in the actual world as well.[40]
From this intuition comes up the idea that possible worlds can be ordered with respect to their similarity to the actual one. The more a possible world (where the antecedent is true) is similar to the actual one, the easier is to fix the truth-value of the counterfactual statement relative to that world.[41] Assuming that Lewis' principle is sound, the argument from counterfactual intention shall be formulated as follows:

(ACI-3) In the nearest possible world where the legislature considers the case and the pertinent contextual background leads the legislature to do this, the legislature rules the case thus-and-so.

This formulation of the argument, despite the fact that it seems intuitively sound, does not account for a relevant implication of Lewis' principle, however. There is not a *single* possible world closest to the actual one where the antecedent is true (*Uniqueness Assumption*).[42] We might imagine several possible worlds equally close to the actual one. The Bizet-Verdi example shows this clearly. Our commonsensical knowledge does not give us any clue as to whether the world in which Bizet and Verdi are Italian is closer to the actual one than the world in which both composers are French. These worlds seem to be equally distant. Moreover, as Lewis has shown, even if we find out a set of worlds that appears *prima facie* the nearest in which the antecedent is true, we cannot exclude that a possible world which does not belong to this set is nearer to the actual one in some respect.[43]
If it is so, there might be two equally closest worlds such that in one of them the consequent is true and in the other it is false.[44] Moreover, it follows from this that Lewis' counterfactual logic admits that, without further specification, neither the statement "If the legislature had considered the murderer's case, it would have ruled it thus-and-so" nor the statement "If the legislature had considered the murderer's case, it would *not* have ruled it thus-and-so" will come out true.
One way to address these tricky issues is to *better specify the resemblance condition*. Possible worlds may be similar in quite different respects. But as to our purpose here, only the *relevant* similarity shall be taken into account, i.e., the similarity concerning those aspects which affect the causal or conceptual or normative relationship between the antecedent and the consequent.[45] For instance, if the pertinent discursive context is that of the historical legislature, the level of similarity between the possible world (in which the antecedent is true) and the actual one depends on those aspects of reality which might

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[40] See on this Rescher (2007: 217).
[41] "A nuanced account of our handling of counterfactuals is likely to predict that we are more reliable in evaluating some kinds than others. For example, we may well be more reliable in evaluating counterfactuals whose antecedent involve small departures from the actual world than in evaluating those whose antecedents involve much larger departures" (Williamson 2007: 164).
[42] The Uniqueness Assumption is criticized, in particular, by Stalnaker (1980: 89). Cf. Woods (1997: 43 ff.).
[43] The thesis that, for a given antecedent φ, there is a unique set of worlds where φ is true (*Limit Assumption*), admits of exceptions according to Lewis (1973: 20-21).
[44] "The counterfactual will be genuinely indeterminate if there are at least two possible worlds which are equally similar to our world, in which the antecedents of the counterfactual are true, yet in which the consequents are, respectively, true and false" (Stoljar 1998: 43).
[45] On similarity and relevance, cf. Lowe (1995: 55). See also Goodman (1954/1983: 15) on the need of *making explicit* the relevant conditions.

influence the construction of the legislature's intention. In the light of these considerations, the argument can be specified as follows:

(ACI-4) In *all* possible worlds nearest to the actual one in the *relevant respects* where the legislature considers the case, and the pertinent contextual background leads the legislature to do this, the legislature rules the case thus-and-so.

If all of that is true, ACI-4 makes explicit what kind of discursive commitments were undertaken by the Court in Elmer's case. These commitments express the conditions under which a counterfactual statement of this kind can be considered as true or false. Of course, if these conditions are not satisfied, it does not follow that the correspondent counterfactual claim is false and the relative argument does not justify the Court's conclusion. It simply follows that the statement lacks the required justificatory power: who uses it to justify a legal conclusion is eliciting no reasons at all, or no sufficient reasons.

6. *Elmer's Case Reconsidered*

In the light of the foregoing analysis, we shall finally come back to Dworkin's assessment of Elmer's case and consider its alleged critical implications against Hartian legal positivism.

Much has been already said on this subject over the last thirty years.[46] Many positivists rebutted those critical implications, and many Dworkinians contended that these replies were insufficient to dismiss the critique. Be as it may, in *Law's Empire* Dworkin claims that the dispute about Elmer was not about the law as it ought to be, but about the law as it was, namely, "about what the real statute the legislators enacted really said" (Dworkin 1986: 20).

It seems to us that the argumentation of the New York Court allows two different readings in this respect. According to the first reading, Dworkin's reconstruction is flawed and his attack on legal positivism is off target.

What the statute of wills really said from a literal point of view was not disputed in *Riggs*: the literal meaning of the statute was considered straightforward by the parties and the judges.[47] Rather, they discussed about the opportunity to restrict the language of the statute. The argument from counterfactual intention was actually used by the Court to justify an exception to the rules of the statute, due to the "absurd consequences" of a literal construction of it. At first the Court made a distinction between Elmer's case and those cases that were generally covered by the statute in accordance with its literal meaning (that is an instance of the distinguishing judicial technique). The judges argued that the material facts of the case were relevantly different from those regulated by the statute. The Court then resorted to the argument form counterfactual intention to justify a distinct regulation. If the legislature could have considered such a difference, it would have ruled the case differently, so that to avoid unacceptable consequences. How would the

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[46] For an overview of the Hart-Dworkin debate see Shapiro (2007) and Leiter (2003).

[47] Consider again this part of the decision: "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer" (*Riggs v. Palmer*: 509).

legislature have regulated cases like Elmer's? According to the common law principle that "no one shall profit by his own fraud, or take advantage of his own wrong".
If this picture is sound, it follows that Dworkin's criticism against Hartian legal positivism does not meet its target, at least as far as Elmer's case is concerned.
First, the dispute about Elmer clearly shows that law is also made of legal principles, but these principles are not used by the Court as having different logical or moral properties than those of the legal rules. That principle or maxim of the common law is used by the Court, in this reading of *Riggs*, as a legal rule that is applied to the case on the basis of the interpretive method of distinguishing. Secondly, the Court used strong discretion in Elmer's case: it decided that a valid legal rule had to be defeated on the basis of a discretionary [legislative-like] evaluation of its consequences. Moreover, the Court decided that Elmer's case was similar to other cases (the considered precedents) as to a relevant aspect of it. Finally, according to the Court the principle applied to the case did not belong to the legal system because of its moral merit, or at least this was a secondary consideration of the Judges. The principle had to be applied in Elmer's case because it had been previously applied as a valid legal norm to cases that were similar. But this fact is still perfectly explained by Hart's idea of a rule of recognition governing the practice of officials, i.e., a rule which governs officials when determining what counts as law in a legal system. Of course, all this does not demonstrate that Dworkin's criticism against legal positivism is wrong. It simply shows that Elmer's case is not the best support for it.
A different assessment of Dworkin's criticism could be made, however.
The Court faced a genuine interpretive problem in *Riggs*. According to a literal construction of the statute, Elmer was entitled to his grandfather's property in accordance with the dictate of his grandfather's will. A reading of the statute based upon the counterfactual intention of the good legislature, on the contrary, justified an opposite conclusion: Elmer was not entitled to inherit.[48] Which interpretation was to prevail? As noticed in the outset, to answer this question the Court applied a meta-canon of interpretation providing that intended meaning ought to be preferred to literal meaning. Accordingly, the argument from counterfactual intention gave a conclusive reason in *Riggs*. But what about the argument from principle, on which Dworkin's criticism is based?
This argument was actually used by the Court to strengthen the argument from counterfactual intention, given the weaknesses [ambiguity] of the latter. In particular, by appealing to a maxim of the common law the Court claimed that Elmer was prohibited to inherit not only in the light of the intention of an ideal legislature but also according to the intention of a different fictitious legislature, which takes care of the coherence and consistency of the legal system. In other words, in this reading the assessment of legal consequences justifies the claim "If a good or ideal legislature had considered the case, it would have prohibited a murderer to inherit", whereas the maxim of the common law justifies the claim "If a coherent legislature had considered the case, it would have prohibited a murderer to inherit". Both fictitious legislatures would have got the same intention.
Does this alternative reconstruction has an impact on the assessment of Dworkin's argument against Hartian legal positivism?

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[48] To put it as Dworkin does, the problem originates from *our* concerns: "Does it become unclear whether Nazis may inherit if we think the original authors of the statute would not have wanted Nazis to inherit if they had anticipated them? It is only because *we* think the case for excluding murderers from a general statute of wills is a strong one, sanctioned by principles elsewhere respected in the law, that we find the statute unclear on that issue." (Dworkin 1986: 352)

On Dworkin's view, *Riggs* shows that the set of valid legal rules is not exhaustive of the law. Our analysis could justify the same conclusion but on the basis of different reasons than Dworkin's. By looking at *Riggs*, one could argue that the law, in a broad sense, is not simply a set of legal norms, understood to include what Dworkin calls "principles", but also encompasses the standards of legal justification that determine under what conditions a judicial decision is in accordance with the relevant norms. The argument from counterfactual intention displays one of these standards, and the analysis proposed so far identifies the application conditions thereof within a justification process. On this view, the law is constituted by (i) authoritative legal texts, (ii) the contents of these texts and (iii) the interpretive standards that actually justify content ascription.
The second point made by Dworkin is that judges do not [necessarily] exercise strong discretion when deciding a hard case. In other words, in case of interpretation courts can establish what the law requires by means of criteria that are provided by the law.[49] Now, our analysis shows that in *Riggs* the Court had discretion in the sense that alternative solutions of the case could have been justified on the basis of legal reasons (argument from wording, arguments from intention, argument from principles). But in a concrete justification process the interpretive standards applied by the judges put genuine constraints on judicial discretion. Once a court has taken on a certain justification path by applying a given interpretive standard – a standard which is justified, in turn, by some meta-criteria of interpretation – then this court is committed to a finite set of inferential moves in its reasoning.[50] The analysis of legal reasoning can identify these commitments and determine whether a court complies with them. In case of non-compliance, a court is not entitled to draw the conclusion: the answer to the legal dispute will be against the law.[51]. As to the argument from counterfactual intention, our analysis has shown that who makes use of it undertakes some strong commitments that can be satisfied only by means of further argumentative tools. Accordingly, Dworkin is right in claiming that judges do not exercise strong discretion when deciding a hard case, but this is not due to the fact that law includes principles of political morality guiding legal interpretation. It is so because law includes conventional standards of legal justification, such as the standards of the argument from counterfactual intention.
Finally, Dworkin claims that if the law consists both of rules and principles, it turns out that some norms belong to the legal system not for conventional reasons but on the basis of their moral merits. Is this true as far as Elmer's case is concerned?
We have seen that the argument from principle was used by the Court to determine under what *relevant* respect a possible world in which the legislature considers the case was the nearest to the actual one. As a matter of fact, the relevance condition has both a legal and a moral content in *Riggs*. It has a legal content insofar as the principle was a maxim of the common law identified on the basis of its pedigree. It has a moral content since the Court

[49] See Hart (1994: 127). On Dworkin's view judicial discretion has rather a *weak* character that is related to the interpretive process leading courts to work out a legal answer. At least in the most relevant cases, this process does not consist in determining the meaning of legal terms. It rather requires of courts to weight and balance those legal principles that explain a significant portion of the prior institutional history, in order to make the decision that best justifies that history as a matter of political morality. Judicial discretion comes here into play, but this merely means that "an official must use judgment in applying the standard set him by authority, or that no one will review that exercise of judgment" (Dworkin 1978: 32).
[50] See on this Canale & Tuzet (2010). Cf. Canale & Tuzet (2007).
[51] See on this Canale (2013) and Fiss (1985). This does not mean that that Dworkin's theory of judicial discretion is sound but simply that Dworkin's criticism agains strong discretion leads to highlight a significant aspect of legal interpretation that Hart did not consider.

saw in it the expression of "natural justice".[52] But this moral content was not presented by the judges as a part of the law. It rather determined what the legislative intention could have been. In this sense, the Court did not consider morality as an ingredient of legality. The moral considerations of the Court settled the content of a justification standard conventionally fixed in the legal community. As a result, *Riggs* does not show that the law includes principles having moral contents; it simply shows that the justification of a legal decision may require moral evaluations, which affect the choice of a justification standard and its content.
Which of the two readings of Elmer's case is to be preferred cannot be fully discussed here. For sure, the second one calls for a partial revision of Hartian legal positivism.

References

Allan, J. (2000). "Constitutional Interpretation v. Statutory Interpretation. Understanding the Attractions of 'Original Intent'". *Legal Theory* 6: 109-126.

Austin, J.L. (1979), *Philosophical Papers*. 3rd ed. by J.O. Urmson and G.J. Warnock. Oxford: Oxford University Press.

Bernatchez, S. (2007). "De la représentativité du pouvoir législatif à la recherche de l'intention du législateur: les fondements et les limites de la démocratie représentative". *Les cahiers de droit* 48: 449-476.

Boudreau, C. *et al.* (2007). "What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation". *San Diego Law Review* 44: 957-992.

Bratman, M.E. (1987). *Intention, Plans, and Practical Reason*. Cambridge and London: Harvard University Press.

Bratman, M.E. (1999). *Faces of Intention*. New York: Cambridge University Press.

Campbell, T. (2001). "Legislative Intent and Democratic Decision Making". In Naffine *et al.* (2001), 291-319.

Canale, D. (2013). "Discreción Judicial y Estado de Derecho", *.

Canale, D. & Tuzet, G. (2007). "On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation?". *Ratio Juris* 20: 32-44.

Canale, D. & Tuzet, G. (2010). "Inferring the Intention. Or, What Law the Legislature Could Have Intended to Make". *Dignitas* 47-48: 254-272.

Cardozo, B.N. (1921). *The Nature of the Judicial Process*. Reissued in 1991. New Haven: Yale University Press.

Chisholm, R. (1946), *The Contrary-to-Fact Conditional*, Mind, vol. 55, pp. 289-307.

Dworkin, R.M. (1967). "The Model of Rules". *The University of Chicago Law Review* 35: 14-46. Now Chap. 2 of Dworkin (1978).

Dworkin, R.M. (1978). *Taking Rights Seriously*. Cambridge and London: Harvard University Press.

Dworkin, R.M. (1985). *A Matter of Principle*. Cambridge and London: Harvard University Press.

Dworkin, R.M. (1986). *Law's Empire*. Cambridge and London: Harvard University Press.

Ekins, R. (2012). *The Nature of Legislative Intent*. Oxford: Oxford University Press.

Engel, P. (1989). *La norme du vrai*. Paris: Gallimard.

Fiss, O.M. (1985). "Conventionalism". *Southern California Law Review* 58: 177-197.

[52] "Under the civil law evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered" (*Riggs v. Palmer*, at 513).

Gardner, J. (2010). "Ethics and Law". In *The Routledge Companion to Ethics*, ed. by J. Skorupski, 420-430. London: Routledge.
Goldsworthy, J. (1997). "Originalism in Constitutional Interpretation". *Federal Law Review* 25: 1-50.
Goldsworthy, J. (2005). "Legislative Intentions, Legislative Supremacy, and Legal Positivism". *San Diego Law Review* 42: 493-518.
Goodman, N. (1954/1983). *Fact, Fiction and Forecast*. 4th ed. Cambridge and London: Harvard University Press.
Greenawalt, K. (2000). "Are Mental States Relevant for Statutory and Constitutional Interpretation?". *Cornell Law Review* 85: 1609-1672.
Guastini, R. (2011). *Interpretare e argomentare*. Milano: Giuffrè.
Haack, S. (1978). *Philosophy of Logics*. Cambridge: Cambridge University Press.
Hart, H.L.A. (1994). *The Concept of Law.* Second Edition. Oxford: Clarendon Press.
Johnson-Laird, P.N. & Byrne, R.M.J. (2002). "Conditionals: A Theory of Meaning, Pragmatics, and Inference". *Psychological Review* 109: 646-678.
Kellogg, F.R. (2007). *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*. Cambridge: Cambridge University Press.
Kripke, S. (1980). *Naming and Necessity*. Oxford: Basil Blackwell.
Leiter, B. (2003). "Beyond the Hart/Dworkin Debate. The Methodology Problem in Jurisprudence". *The American Journal of Jurisprudence* 48: 17-51.
Lewis, D.K. (1973). *Counterfactuals.* Reissued in 2001. Oxford: Basil Blackwell.
Lowe, E.J. (1995). "The Truth About Counterfactuals". *The Philosophical Quarterly* 45: 41-59.
MacCormick, D.N. & Summers, R.S. (eds.) (1991). *Interpreting Statutes. A Comparative Study*. Aldershot: Dartmouth.
MacPherson, J.A.E. (2010). "Legislative Intentionalism and Proxy Agency". *Law and Philosophy* 29: 1-29.
Marmor, A. (2001). *Positive Law and Objective Values*. Oxford: Clarendon Press.
Marmor, A. (2005). *Interpretation and Legal Theory*. 2nd ed. Oxford and Portland: Hart Publishing.
Moreso, J.J. (2005). *Lógica, argumentación e interpretación en el derecho*. Barcelona: Editorial UOC.
Naffine, N. *et al.* (eds.) (2001). *Intention in Law and Philosophy*. Aldershot: Ashgate-Dartmouth.
Pettit, P. (2001). *Collective Intentions*. In Naffine *et al.* (2001), 241-254.
Pino, G. (2008). "Il linguaggio dei diritti". *Ragion pratica* 31: 393-409.
Quine, W.V.O. (1941/1980). *Elementary Logic*. Revised ed. Cambridge and London: Harvard University Press.
Quine, W.V.O. (1950/1982). *Methods of Logic*. 4th ed. Cambridge and London: Harvard University Press.
Quine, W.V.O. (1960). *Word and Object*. Cambridge: The MIT Press.
Quine, W.V.O. (1976). *The Ways of Paradox and Other Essays*. Revised and enlarged ed. Cambridge and London: Harvard University Press.
Radin, M. (1930). "Statutory Interpretation". *Harvard Law Review* 43: 863-885.
Ratti, G.B. (2012). *Diritto, indeterminatezza, indecidibilità*. Madrid-Barcelona-Buenos Aires-São Paulo: Marcial Pons.
Raz, J. (1996). "Intention in Interpretation". In R.P. George (ed.), *The Autonomy of Law. Essays on Legal Positivism*, 249-286. Oxford: Oxford University Press.
Rescher, N. (2007). *Conditionals*. Cambridge: The MIT Press.

Shapiro, S. (2007). “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed”. In A. Ripstein (ed.), *Ronald Dworkin*, 22-55. Cambridge: Cambridge University Press.

Stalnaker, R. (1980). “A Defense of Conditional Excluded Middle”. In W. Harper, R. Stalnaker, G. Pearce (eds.), *Ifs: Conditionals, Belief, Decision, Chance, and Time*, 87-104. Reidel: Dordrecht.

Stalnaker, R. (2003). *Ways a World May Be. Metaphysical a Anti-metaphysical Essays.* Oxford: Clarendon Press.

Stoljar, N. (1998). “Counterfactuals in Interpretation: The Case Against Intentionalism”. *Adelaide Law Review* 20: 29-59.

Stoljar, N. (2001a). “Vagueness, Counterfactual Intentions, and Legal Interpretation”. *Legal Theory* 7: 447-465.

Stoljar, N. (2001b). “Postulated Authors and Hypothetical Intentions”. In Naffine *et al.* (2001), 271-290.

Williams, J. (2001). “Constitutional Intention: The Limits of Originalism”. In Naffine *et al.* (2001), 321-341.

Williamson, J. (2007). *The Philosophy of Philosophy*. Oxford: Blackwell.

Woods, M. (1997). *Conditionals*. Oxford: Oxford University Press.