INFERRING THE INTENTION.
OR, WHAT LAW THE LEGISLATURE COULD HAVE INTENDED TO MAKE[*]

Damiano Canale and Giovanni Tuzet
Bocconi University, Milan

> Now the intention of the legislator is always supposed to be equity: for it were a great contumely for a judge to think otherwise of the sovereign.
>
> (T. Hobbes, *Leviathan*, Ch. 26)

1. *The Argument from Legislative Intention*

Some celebrated Roman maxims say that the law perfectly reflects what the law-maker wanted to do: *Quod lex voluit, dixit*; or, *Ubi lex voluit, dixit, ubi noluit, tacuit*. According to these maxims, one has to infer the law-maker's intention from the letter of the law, since the letter states what the law-maker wanted to do, while it does not state what the law-maker did not want. Unfortunately, there are also maxims that give the legal interpreter a different advice: extensive interpretation is justified when *Minus dixit lex quam voluit* (when the law says less than the law-maker wanted), and restrictive interpretation is justified when *Magis dixit lex quam voluit* (when the law says more than the law-maker wanted). According to these latter maxims, it is not true that the law always reflects the law-maker's intention. So there are cases where one cannot simply infer the law-maker's intention from the letter of the law; other interpretive arguments are needed.

These old issues are still a subject of legal and philosophical dispute, especially in the contemporary field of legal interpretation and argumentation. According to the so-called argument from legislative intention, a judicial decision is justified if it is based on the law-maker's intention. In particular, on the basis of this argument, the interpretation of a statute should express the law that the legislature intended to make. This 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[1]. Politically speaking, it is required by the democratic principle[2]; or, more in general, it can be derived from the reasons to comply with legal authorities and from the very idea of legislative power[3]. However, the argument from legislative intention faces several theoretical and practical problems.

Firstly, the notion of legislative intention give rise to what we might call the *Ontological Problem*: What is the entity we are talking of? Many legal writers claim that, on the one hand, the intention of the legislature as a collective body does not exists, and that, on the other, the intention of the individual legislators is practically undiscoverable and, in any case, irrelevant[4]. Moreover, it is claimed that attributing an intention to a certain group amounts to a fallacy: the fallacy of composition[5].

---

[*] Published in "Dignitas", n. 47-48, 2010, pp. 254-272.

[1] See e.g. Goldsworthy (1997) and (2005).

[2] See e.g. Campbell (2001).

[3] "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, p. 258). See also Marmor (2001, p. 90).

[4] Cf. e.g. Radin (1930, p. 870 ff.), Campbell (2001, p. 292), Boudreau *et al.* (2007, p. 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.

[5] 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

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[6]. The so-called *travaux préparatoires* often provide insufficient evidence to that effect, especially when various documents, subjects and institutional bodies are concerned.

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[7]. Consider the content of the equal protection clause of the United States Constitution (am. XIV, sec. 1): did 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. These are the cases referred to by the Roman maxims *Minus dixit lex quam voluit* and *Magis dixit lex quam voluit*[8]. 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[9].

Fourthly, in those systems where legislative decisions are *de facto* in the hands of the executive, we face a *Political Problem*[10]: What 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 determine the content of the legislation"[11].

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 claim it is transcategorical, since in their view the appeal to legislative intention can range over all possible contents of each of the other kinds of legal argumentation[12]. Against this view, one may claim at least that doing something *intentionally* is different from doing something *on purpose* and doing something *deliberately*, and, in particular, that having an intention is different from having a purpose[13].

---

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, pp. 250-251).

[6] See e.g. Marmor (2005, chaps. 8-9), Pino (2008, pp. 401-403), MacPherson (2010, p. 2 ff.).

[7] See Stoljar (1998, pp. 36-37). Cf. Williams (2001, pp. 326-329).

[8] In the contemporary AI and law debate, cf. Boella *et al.* (2010).

[9] Moreso (2005, p. 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.

[10] Cf. Greenawalt (2000, pp. 1645-1646). See Bernatchez (2007) on this problem in the Canadian system.

[11] MacPherson (2010, p. 17).

[12] MacCormick & Summers (1991, p. 522). This might find a confirmation in the distinction of various kinds of legislative intentions: for instance, according to Marmor (2005, pp. 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").

[13] "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, p. 275). Cf. Bratman (1987) and (1999).

Notwithstanding these problems, the argument from intention is an important argument deserving our understanding and discussion[14]. But this paper will only deal with one aspect of this argumentative technique: the role of *unexpressed intentions*, or the intentions that can be inferred from the *silence of the legislature* (what is sometimes called "hypothetical" or "counterfactual intentions"). The maxim says that *Ubi lex lex noluit, tacuit*, but, as we shall see, things are much more complicated than this. Such topic, which is relatively neglected in the scholarly literature, is in our opinion an interesting and challenging one, since, on the one hand, the appeal to unexpressed intentions, or intentions inferred from the silence of the legislature, is frequent in legal practice and can be rhetorically effective, but, on the other hand, it is often hard to justify. We hope that throwing some light on the uses of this argument will help us understand what its structure and justification conditions are. Notice, however, that here we will mainly deal with statutory interpretation and leave aside considerations related to constitutional interpretation and argument.

2. *On Silent Legislatures*

What can be inferred from the silence of the legislature about a certain circumstance which might fall under the law, although it is not explicitly ruled? Compliance with existing legislation? Acquiescence with recent adjudication? Desire to leave the problem fluid? What kind of intention, if any, can be attributed to the silent legislature? And what does the legislature's silence implicitly say, if anything, about a circumstance which might constitute an exception to the law, although it is not explicitly treated as such? Different answers are plausible[15]. We will try to show that even contradictory rulings can be inferred from the silence of the legislature, depending on the assumptions that one uses as major premises of the argument about it.

An important presupposition of the argument is that the legislature can be considered as silent on the basis of the wording of a legal text. So, the argument from silence is in a sense parasitic on the argument from literal meaning: it presupposes that a certain case does, or does not, *prima facie* fall under a rule according to the literal meaning of the relevant text.

Now consider, first of all, the cases that *prima facie* fall under a rule but might constitute an *exception to it* (according to some argument other than the argument from literal meaning, for instance an argument from purpose). Suppose that the legislature is silent on case C_1: one could infer that C_1 is not a relevant exception, since the legislature would have mentioned it if it had the intention to treat it as such. But one could also draw the opposite conclusion, namely that C_1 is a relevant exception, since the legislature would have treated it as such if it had the opportunity to take it into consideration. The two versions of the argument can be schematized as follows:

> (*a*) If the legislature had the intention to treat the case as an exception to the rule, it would have done it; but it did not. Therefore, the case falls under the rule.
>
> (*b*) If the legislature had the opportunity to take the case into consideration, it would have treated it as an exception to the rule. Therefore, the case does not fall under the rule.

Similar considerations can be made about the cases that do not *prima facie* fall under a rule but might *fall under it* (according to some argument other than the one from literal meaning, of course). Suppose that the legislature is silent on case C_2: on the one hand, one might infer that if the legislature had the intention to treat C_2 as such, it would have mentioned it. On the other, one might

[14] 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).

[15] Cf. Levi (1948, pp. 538-539).

claim that if the legislature had the opportunity to take it into consideration, it would have included C_2 within the cases so ruled. The two versions of the argument can be schematized as follows:

> (*c*) If the legislature had the intention to rule the case, it would have done it; but it did not. Therefore, the case does not fall under the rule.
>
> (*d*) If the legislature had the opportunity to take the case into consideration, it would have included it within the regulation. Therefore, the case falls under the rule.

In each of these situations we deal with unexpressed intentions inferred from the legislature's silence. The difference lays in the fact that the argument is used, in versions (*a*) and (*d*), to include a case within the scope of a rule and, in versions (*b*) and (*c*), to exclude it from it. The first kind of unexpressed intentions can be labeled *Inclusive Intentions*: they refer to the cases taken to fall under a rule either because, in version (*a*), the legislature did not treat a certain case as an exception or because, in version (*d*), it would have included it within the regulation if it had the opportunity to do that. Instead, we will call the second kind of unexpressed intentions *Exclusive Intentions*: they refer to the cases taken *not* to fall under a rule either because, in version (*b*), if the legislature had the opportunity to take a certain case into consideration it would have treated it as an exception or because, in version (*c*), the legislature did not explicitly rule it.

What we have been considering so far shows that Fuller was right in claiming that "deciding what the legislature would have said if it had been able to express its intention more precisely, or if it had not overlooked the interaction of its statute with other laws already on the books, or if it had realized that the supreme court was about to reverse a relevant precedent – these and other like questions can remind us that there is something more to the task of interpreting statutes than simply 'carrying out the intention of the legislature'"[16].

We will try to point out, in the following, on what inferential conditions such diverse and even opposite uses of the argument from legislative silence are justified in the domain of legal interpretation and argumentation. Even if contradictory rulings can be inferred from the fact that the legislature is silent on a certain matter, once a certain premise is included in the argument reconstructing legislative intention the path of justification is bound to a set of pragmatic constraints, which need to be specified. Here these constraints will be conceived in terms of *commitments* and *entitlements* to a certain claim[17]. The first kind of constraints, or deontic statuses in an argumentative practice, amounts to the situation in which an interpreter is assumed, by the participants in the practice, to have the *duty* to accept a certain claim or the *duty* to give a reason for what she claims[18]. The second kind of constraints amounts to the situation in which an interpreter is assumed to be *authorized* to perform a certain claim, on the basis of what the others have been previously claiming and acknowledging. The analysis of the interplay between pragmatic commitments and entitlements in an argumentative practice permits to figure out what rules of inference govern the uses of this argument in a given context, and thus the conditions under which those uses are sound.

3. *Inclusive Intentions*

In *Smith v. United States*[19], the U.S. Supreme Court had to decide whether exchanging a firearm for narcotics is "using a firearm", since the legislature did not explicitly regulate such a circumstance.

[16] Fuller (1969, p. 231).
[17] Cf. Brandom (1994) and Canale & Tuzet (2007).
[18] Those are different duties, of course. One thing is being committed to accept a claim, another is being committed to give a reason for a claim.
[19] 508 U.S. 223 (1993).

The facts were as follows. After petitioner Smith offered to trade an automatic weapon to an undercover officer for cocaine, he was charged with numerous firearm and drug trafficking offenses. Title 18 U.S.C. 924(c)(1) required the imposition of specified penalties if the defendant, "during and in relation to" a drug trafficking crime, "uses a firearm". In affirming Smith's conviction and sentence, the Court of Appeals held that 924(c)(1)'s plain language imposed no requirement that a firearm be "used" as a weapon, but applied to any use of a gun that facilitates in any manner the commission of a drug offense.
So, the issue was whether "using a firearm" covered *any use* of a firearm in relation to a drug trafficking crime or just the uses of a firearm *as a weapon*. The Supreme Court affirmed the judgment of the Court of Appeals. Some crucial passages of the decision refer to unexpressed legislative intentions. Consider the following:

> Section 924's language and structure establish that exchanging a firearm for drugs may constitute "use" within 924(c)(1)'s meaning. Smith's handling of his gun falls squarely within the everyday meaning and dictionary definitions of "use." *Had Congress intended 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner – as a weapon – it could have so indicated in the statute*. However, Congress did not[20].

This passage contains two arguments: an argument from literal meaning ("the everyday meaning and dictionary definitions of 'use'") and an argument from legislative silence. According to the second, since the legislature was silent on the circumstance of exchanging a firearm for narcotics, the Court argues that such a case does not constitute an exception to the rule, for, had Congress intended to treat it as an exception, it could have so indicated. Congress did not, and, continues the Court, there is no reason to suppose that it had a different intent.

> There is no reason why Congress would not have wanted its language to cover this situation, since the introduction of guns into drug transactions dramatically heightens the danger to society, whether the guns are used as a medium of exchange or as protection for the transactions or dealers[21].

In the opinion of the Court, written by Justice O'Connor, it is also said the following:

> *Had Congress intended the narrow construction petitioner urges, it could have so indicated*. It did not, and we decline to introduce that additional requirement on our own[22].
>
> We […] see no reason why Congress would have intended courts and juries applying 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity[23].

Therefore, according to the opinion, exchanging a firearm for narcotics is "using a firearm" within the legislature's unexpressed *inclusive* intention. Now the Court used version (*a*) of the argument. This version, as presented here, is worth being considered more closely. Its structure can be seen to be made up by the following inferential moves:

(*a*1) Had Congress intended that the statute should be given narrow meaning N instead of broad meaning M, "it could have so indicated".
(*a*2) Congress did not indicate that the statute should be given meaning N.
(*a*3) Therefore, Congress intended that the statute should be given broad meaning M.

[20] Point (a) of the decision; our emphasis.
[21] Point (b) of the decision.
[22] Part II.A of the opinion; our emphasis.
[23] Part II.C of the opinion.

Under what conditions is this conclusion justified? In order to answer this question, it has to be clarified what pragmatic duties and authorizations can be ascribed to the Supreme Court as far as a use of the argument from legislative silence is concerned, i.e., what commitments and entitlements were undertaken here by the judges from the point of view of the addressees of their decision.

First of all, the Courts undertakes a *duty* to give a reason to accept (*a*1). The standard way to do this is referring to the ideal legislature rather than to the historical one, namely to the legislature which has coherent and exhaustive intentions and makes them explicit. According to such an ideal picture applied to this case and decision, if the legislature intended to rule only the uses of a firearm as a weapon, it would have (or "could have" in the prudent wording of the opinion) so indicated. But the historical legislature did not. So, if the historical legislature behaved as an ideal one, there is no reason to suppose that it intended to rule only the uses of a firearm as a weapon.

Suppose then that the Court is entitled to claim (*a*1); what about the rest of the argument? If one considers the theoretical distinction presented in the foregoing section, it is easy to show that the present use of the argument is governed by an *entitlement-preserving relation*, which can be schematized as follows: If the Supreme Court is entitled to (*a*1) and (*a*2), then it is *prima facie* entitled to (*a*3).

Indeed the argument at stake relies on the undisputed epistemic premise according to which the legislature kept silence as to the narrow content the statute might be given. This assumption is inferred, in turn, from the wording of the statute itself, since the circumstance concerned by the disputed requirement (using a firearm as a weapon) is not explicitly mentioned by it. This being the case, the Supreme Court is *entitled* to claim that (*a*2), for it is authorized to perform such a claim on the basis of the available textual evidence. Nevertheless, conclusion (*a*3) is only *prima facie* justified according to the argument in hand, for this conclusion could be revised. In fact, even if (*a*1) and (*a*2) were true, it might be the case that Congress intended that the statute should be given narrow meaning N: such an intent might be actually reconstructed from other textual or meta-textual legal materials – such as the *travaux préparatoires* or further legal provisions belonging to the same legal system – or it might be inferred from the purpose of the statute (*ratio legis*).

To sum up, an inferential analysis of this version of the argument leads us to argue that it is not an autonomous argumentative technique. It is parasitic on the postulate of an ideal legislature and on a textual argument (the wording of the statue). Furthermore, its conclusions are only *prima facie* justified, since they can be revised in the face of further textual or meta-textual evidence enabling us the reconstruct a different unexpressed legislative intention, namely an exclusive intention inferred from other textual materials or from the purpose of the statute[24].

In fact, was (*a*) the only admissible version of the argument in this case? The Court could have used other versions as well. Before coming to the uses which infer some excluding intention, let us consider version (*d*). Here the starting assumption would be different; it would be that the case does not fall under the rule according to the argument from literal meaning, for "using a firearm" means something like "using it for its intended purpose". From this starting assumption, the Court could have developed the following argument: Although the case is *not* explicitly ruled by Section 924, if Congress had considered it, it would have ruled it according to Section 924; therefore, the case is ruled by that Section. The inferential steps of the argument can be schematized as follows:

(*d*1) Had Congress considered the case of using a firearm as a means of barter, it would have ruled it as using a firearm as a weapon.
(*d*2) Therefore, such case falls under the actual rule.

Under what conditions is this conclusion justified? A supporter of it would undertake two major commitments related to (*d*1): first, she would have to explain why Congress did not consider such a

[24] This is what happens, for instance, in *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892); on this case see Feteris (2008).

case; second, she would have to explain why, if it had considered it, it would have ruled it in such a way. Sometimes, fulfilling these commitments is not difficult if the law-maker was in the objective impossibility of considering a certain case and if considerations of purpose, or of principle, support an extension of the regulation. Take the clause of the American Constitution empowering Congress to raise and regulate "land and naval forces" (art. I, sec. 8): the framers could not have an opinion on "air defence" given that it did not exist, but one may reasonably claim, on considerations of purpose, that Congress is empowered to raise "air defence" as well. Then the crucial role would be played by an argument from purpose[25] rather than by an argument from intention. Other times, fulfilling such commitments represent a quite difficult task (as we shall see below discussing the topic of counterfactual statements). However, even if (*d*1) were true, conclusion (*d*2) would be problematic in those parts of the law which resist an extension of its content by the interpreters. In fact, the present argument would be in tension with the prohibition of reasoning by analogy in criminal law, and a supporter of it would undertake the commitment to show that it is not a form of analogy but rather a form of extensive interpretation.

Now, both versions (*a*) and (*d*) conclude to the inclusion of the case in hand within the meaning of the statutory provision. But other uses of the argument from legislative silence lead to the opposite conclusion, namely that the case is not included within the scope of the rule.

4. *Exclusive Intentions*

The Court could have used in *Smith* version (*b*) of the argument from legislative silence, arguing as follows: If Congress had considered the case of using a firearm as a means of barter, it would have treated it as an exception to Section 924; therefore, the case is not ruled by this Section[26]. Here the inferential steps would be the following:

(*b*1) Had Congress considered the case of using a firearm as a means of barter, it would have treated it as an exception to the actual rule.
(*b*2) Therefore, such case does not fall under the actual rule.

The commitments undertaken with this version would be similar to those of the previous: as to (*b*1), one would have to explain, first, why Congress did not consider such a case, and, second, why it would have ruled it as an exception to the rule if it had considered it. But remember that this version of the argument starts from the assumption that the case does *prima facie* fall under the rule according to the literal meaning of the relevant text; so, to be entitled to conclusion (*b*2), one would have to provide reasons of different kind pointing to that conclusion and outweighing the argument from literal meaning. Then, most of the times, a crucial role would be played by an argument from purpose or by an argument from principle[27].

The Court could have also used version (*c*) of the argument, claiming this: Assuming that the case is *not* ruled by Section 924, if Congress had the intention to rule it, it would have done it; but it did not; therefore, the case is not ruled. This was in fact Justice Scalia's argument in his dissenting

[25] Or by an argument from principle in other cases. On purposive interpretation cf. Barak (2005), Feteris (2005), Canale & Tuzet (2010).

[26] To take another example, consider the following passage from *Riggs v. Palmer* (1889), 115 N.Y. 506, 22 N.E. 188: "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*" (our emphasis).

[27] As the *Holy Trinity* Court put it, "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character".

opinion in *Smith*. He contended that "using a firearm" ordinarily means *using it for its intended purpose*. If we construct the legislative provision according to this, we should conclude that it does not cover all possible uses of a firearm in relation to a drug trafficking crime, but restricts to the uses of it *as a weapon*.

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?", he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon[28].

This passage contains an argument from literal (ordinary) meaning: to use an instrumentality "ordinarily means" to use it for its intended purpose. So, using a firearm means using it as a weapon. Scalia claims that the words "as a weapon" are *implicit* in the statute. From this, one can draw an inference to the effect that the legislature had an *exclusive* unexpressed intention with regard to such uses of a firearm as exchanging it for narcotics. This can be put in counterfactuals terms: Had Congress the intention of including such uses within the meaning of the statute, it would have so stated; but Congress did not. Or, had it intended that the statute should be given a less narrow meaning, it would have so indicated; but it did not. This is version (*c*) of the argument. Let us give a closer look at the inferential moves which are taken to justify it.

(*c*1) Had Congress intended that the statute should be given broad meaning M instead of narrow meaning N, broad language would have been used.
(*c*2) Congress did not use broad language expressing meaning M.
(*c*3) Therefore, Congress intended that the statute should be given narrow meaning N.

What are the inferential commitments and entitlements that justify this conclusion? First of all, claiming (*c*1) one is committed to the idea of an ideal legislature which has coherent and exhaustive intentions and makes them explicit[29]. According to such an ideal picture applied to this case, if the legislature intended to rule also such uses of a firearm as using it as an item of barter, it would have so indicated. But the historical legislature did not. So, if the historical legislature behaved as an ideal one, there is no reason to suppose that it intended to rule also such uses[30].
Then, claiming (*c*2) one is committed to a certain (literal) interpretation of the relevant provision or text according to which the legislature did not use broad language. However, conclusion (*c*3) is only *prima facie* justified according to the argument in hand. In fact, even if (*c*1) and (*c*2) were true, it might be the case that other textual or meta-textual legal materials reveal the legislative intent of covering such uses of a firearm as using it as an item of barter, or it might be the case that arguments from purpose or principle point to that direction.
To sum up, each version of the argument from legislative silence is parasitic on some other legal argument and does not provide conclusive reasons for its outcome. Moreover, it seems that more than one version of it is admissible in a legal dispute.

---

[28] From Scalia's dissenting opinion.
[29] Remember a similar commitment with version (*a*) of the argument, but to the opposite conclusion of (*c*).
[30] To take another example, in *McBoyle v. United States* (283 U.S. 25, 1931) the Supreme Court had to decide whether the National Motor Vehicle Theft Act applied to aircrafts (which were not explicitly mentioned in the text). The opinion delivered by Justice Holmes stated the following: "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that *if the legislature had thought of it, very likely broader words would have been used*" (our emphasis). Consider also what Circuit Judge Cotteral said in his opinion dissenting from the Court of Appeals' decision: "It would have been a simple matter in enacting the statute to insert, as descriptive words, airplanes, aircraft, or flying machines. *If they had been in the legislative mind, the language would not have been expressed in such uncertainty* as 'any other self-propelled vehicle not designed for running on rails'" (our emphasis).

5. *Is the Use of this Argument Arbitrary?*

On the basis of the analysis we have been presenting so far, is the use of this argument arbitrary? If we consider the standard approach to the study of legal argumentation, it is. The argument from legislative silence is vague and ambiguous, and simply masks some political choice or preference of the interpreter. But this does not give a perspicuous explanation of the actual uses of the argument. Can we put forward a better explanation of them, showing the constraints put on those who resort to this argumentative technique?

Our aim is to analyze the argument from legislative silence by means of a theoretical framework we have put forward in a number of previous papers[31]. Our approach might be outlined as follows:

1. the semantic content of a legal text depends on the exchange of reasons among the participants in a legal dispute (judges, lawyers, experts, etc.);
2. this content has an inferential structure (it consists of a set of inferences the text is involved in);
3. this structure can be analyzed from a pragmatic point of view, on the basis of the discursive *commitments* and *entitlements* that the participants undertake and acquire in a legal dispute.

Let us continue then our inferential analysis by considering versions (*a*) and (*c*) of the argument with reference to *Smith*.

Versions (*a*) and (*c*) can be considered as (sets of) speech acts performed by a legal interpreter during a trial. By performing them the interpreter is committed to the following claim: "Congress intended to be silent". Silence is here conceived as an intentional event; indeed only if this presupposition is accepted the interpreter is justified in claiming either that the case is not an exception to Section 924, or that it is not actually ruled by this Section.

Now the question is: Under what conditions is the interpreter entitled to this claim? An interpreter typically resorts to three kind of *reasons* in order to get entitled to (*a*) or (*c*) by the other participants in the trial:

(1) reasons from legislative history (the enactment process and all the documents produced in it);
(2) reasons from the assessment of the consequences of statutory construction (if these consequences are taken to be just, fair, right, etc., then the interpreter is entitled to the claim);
(3) reasons from systemic coherence (if the intentional silence of the legislature avoids conflicts between norms, then the interpreter is entitled to the claim).

Notice as an important point that each set of reasons presupposes a *different concept of legislature*. The use of these versions of the argument rests upon an idea of the nature and role of the legislature in general: in (1), it is the historical legislature which originally enacted the statute; in (2), it is the rational legislature (where the relevant concept of rationality is that of instrumental rationality); in (3), finally, it is the idea of a legislature which avoids antinomies among norms.

Thus, being entitled to such a counterfactual claim is not easy. In particular, determining the consequences of statutory construction is a controversial task, which calls for further argumentative resources and cognitive devices. Those who make use of this argument can be requested to give reasons as to the fact that a certain consequence is taken to be reasonable/unreasonable, just/unjust, fair/unfair, acceptable/absurd. This evaluation requires other kinds of arguments in order to be carried on and justified; typically, it requires an argument from purpose or an argument from principle. According to the former, the consequences of interpretation are valuable as means to achieve a purpose of the law (*ratio legis*). According the latter, they are valuable on the basis of their coherence with the relevant principles of the legal system. In this last case, it seems correct to

[31] Canale & Tuzet (2007), (2008), (2009), (2010).

argue that what counts as the intention of the legislature is a "question not about meaning […] but about constitutional principles"[32].
Versions (*b*) and (*d*) of the argument are more tricky than the previous. Indeed by performing these (sets of) speech acts the interpreter is committed to the following claim: "The legislature did not want to be silent: if it had considered the case, it would have ruled it". Silence is here considered as an unintentional event. Now, under what conditions is the interpreter entitled to this counterfactual claim? To answer this question, we have to develop some further considerations on the kind of intentions we are dealing with.

6. *Intentions and Counterfactual Statements*

The unexpressed legislative intentions we have been focusing on in this paper are sometimes called "hypothetical intentions". They consist in "what the legislator himself would have thought the statute to mean *if* he had more closely considered such cases as the one being decided"[33]; or, more broadly speaking, what the legislature would have intended on certain conditions different from the actual ones[34]. Sometimes they are called "counterfactual intentions" and are expressed by counterfactual conditional statements[35]. This is a proper naming when the issue is not what the legislature actually intended, but what it would have intended had things been different[36]. Indeed in versions (*b*) and (*d*) of the argument from legislative silence the intentions at stake are counterfactual.
Now, from a logical point of view, counterfactual statements are traditionally puzzling. Do they have truth-values, so that they might be considered true or false?
According to Quine, they do not. Take his famous example of the Bizet-Verdi case, with the following counterfactual statements:

(i) If Bizet and Verdi had been compatriots, Bizet would have been Italian;
(ii) If Bizet and Verdi had been compatriots, Verdi would have been French.

What are their truth-values? It is hard to say, at least for the reason that both (i) and (ii) 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). According to Lewis and Stalnaker, instead, these and similar conditionals can have determinate truth-values within the framework of possible worlds semantics[37]. In particular, a counterfactual conditional is true if and only if in the most similar world to the actual in which the antecedent is true, the consequent is also true.
Obviously the similarity between possible worlds is vague and depends on the context of discussion. Consider the following counterfactuals:

(iii) If Caesar were in command in Korea, he would use catapults;
(iv) If Caesar were in command in Korea, he would use the atom bomb.

[32] Honoré (1987, p. 26). However, those sets of reasons are not mutually exclusive; in principle one can make appeal to all of them (once the differences among them are pointed out and their tensions are addressed).
[33] Ekelöf (1958, p. 91).
[34] Marmor (2005, p. 130).
[35] According to Marmor (2005, p. 23), for instance, "an interpretative statement is either a statement on the communicative intentions of the actual speaker, or else it must be a counterfactual statement, characterizing the communication intentions of a stipulated hypothetical speaker, whose identity and nature are either explicitly defined or, as is more often the case, presupposed by the particular interpretation offered".
[36] See Stoljar (2001a) and (2001b).
[37] See Stoljar (2001a, pp. 457-458).

Lewis claimed of them that one context might resolve the vagueness of the comparative similarity in a such a way that some worlds with a modernized Caesar in common come out closer to our world than any with an unmodernized Caesar, while another context might resolve the vagueness in the opposite direction.

Now, if Lewis was right, what are the relevant contexts to be considered in a legal dispute for resolving[38] or at least reducing the vagueness of the counterfactual claim of versions (*b*) and (*d*) of our argument, so that the interpreter gets entitled to it? First of all, the historical context, that is the time of the enactment of the statute and its social and political characteristics. Second, the socio-political context at present time, which might lead the interpreter to resolve the vagueness in a different way. Third, the context of the legal system, which requires coherence and consistency in statutory construction. As far as unintentional silence is concerned, each of these contexts presupposes a *general conception of legal interpretation and argumentation*. Thus being entitled to such counterfactual claim depends on sharing the same conception of interpretation and argumentation[39]. If this is not the case, the use of the argument from unintentional legislative silence is hardly justified.

REFERENCES

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

Barak, A. (2005). *Purposive Interpretation in Law*. Princeton: Princeton 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, pp. 449-476.

Boella, G. *et al.* (2010). "*Lex minus dixit quam voluit, lex magis dixit quam voluit*: A formal study on legal compliance and interpretation". In P. Casanovas *et al.* (eds.), *AI approaches to the complexity of legal systems*, in press. Berlin: Springer.

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

Brandom, R.B. (1994). *Making It Explicit.* Cambridge (Mass.) and London: Harvard University Press.

Bratman, M.E. (1987). *Intention, Plans, and Practical Reason*. Cambridge (Mass.) 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), pp. 291-319.

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

Canale, D. & Tuzet, G. (2010). "What Is the Reason for This Rule? An Inferential Account of the *Ratio Legis*". *Argumentation* 24, pp. 197-210.

Ekelöf, P.O. (1958). "Teleological Construction of Statutes". In: *Scandinavian Studies in Law*, Vol. 2, ed. by F. Schmidt, pp. 75-117. Stockholm: Almqvist & Wiksell.

Feteris, E. (2005). "The Rational Reconstruction of Argumentation Referring to Consequences and Purposes in the Application of Legal Rules: A Pragma-Dialectical Perspective". *Argumentation* 19, pp. 459-470.

Feteris, E. (2008). "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions". *Argumentation* 22, pp. 335-353.

Fuller, L.L. (1969). *The Morality of Law*. Revised ed. New Haven: Yale University Press.

Goldsworthy, J. (1997). "Originalism in Constitutional Interpretation". *Federal Law Review* 25, pp. 1-50.

Goldsworthy, J. (2005). "Legislative Intentions, Legislative Supremacy, and Legal Positivism". *San Diego Law Review* 42, pp. 493-518.

Greenawalt, K. (2000). "Are Mental States Relevant for Statutory and Constitutional Interpretation?". *Cornell Law Review* 85, pp. 1609-1672.

[38] Note that Stoljar (1998, p. 59) is skeptical about this: "the counterfactuals required to be used in intentionalist interpretation are sensitive to context, and hence are vague or indeterminate. If I am right, we cannot have recourse to intentionalism to solve interpretive problems when counterfactuals are required. We must look to some other theory of interpretation".

[39] However, again, those conceptions are not mutually exclusive; in principle one can make appeal to all of them (once the differences among them are pointed out and their tensions are addressed).

Honoré, T. (1987). "How Is Law Possible?". In Id., *Making Law Bind. Essays Legal and Philosophical*, pp. 1-31. Oxford: Oxford University Press.
Levi, E.H. (1948). "An Introduction to Legal Reasoning". *The University of Chicago Law Review* 15, pp. 501-574.
MacPherson, J.A.E. (2010). "Legislative Intentionalism and Proxy Agency". *Law and Philosophy* 29, pp. 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.
McCormick, D.N. & Summers, R.S. (eds.) (1991). *Interpreting Statutes. A Comparative Study*. Aldershot: Dartmouth.
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), pp. 241-254.
Pino, G. (2008). "Il linguaggio dei diritti". *Ragion pratica* 31, pp. 393-409.
Radin, M. (1930). "Statutory Interpretation". *Harvard Law Review* 43, pp. 863-885.
Raz, J. (1996). "Intention in Interpretation". In R.P. George (ed.), *The Autonomy of Law. Essays on Legal Positivism*, pp. 249-286. Oxford: Oxford University Press.
Stoljar, N. (1998). "Counterfactuals in Interpretation: The Case Against Intentionalism". *Adelaide Law Review* 20, pp. 29-59.
Stoljar, N. (2001a). "Vagueness, Counterfactual Intentions, and Legal Interpretation". *Legal Theory* 7, pp. 447-465.
Stoljar, N. (2001b). "Postulated Authors and Hypothetical Intentions". In Naffine *et al.* (2001), pp. 271-290.
Williams, J. (2001). "Constitutional Intention: The Limits of Originalism". In Naffine *et al.* (2001), pp. 321-341.