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# Falsifying Falsificationist Legal Theory

## A Refutation of Bernhard Schlink's "Interpretations as Hypotheses"

**ABSTRACT:** A number of attempts have been made to conceptualise legal reasoning along falsificationist lines. This paper criticises a recent one by Bernhard Schlink. After familiarising the reader with falsificationism, I argue that falsificationism is premised on an epistemological asymmetry between singular observation statements and universal hypotheses, and that absent such an asymmetry in the context of statutory interpretation, framing jurisprudence in falsificationist terms is unwarranted and misleading. To get off the ground, legal falsificationism would need to combine with some kind of broadly intuitionist moral cognitivism, but even then, it would still misrepresent what is going on in legal reasoning. The arguments in this paper apply *mutatis mutandis* to all falsificationist theories of legal and ethical reasoning. I point to some by Albert, Canaris and Larenz.

**Keywords:** falsification, critical rationalism, interpretation, theory, hypothesis, logic, epistemology, science, Schlink, Popper

**Schlagworte:** Falsifikation, kritischer Rationalismus, Auslegung, Theorie, Hypothese, Logik, Epistemologie, Wissenschaft, Schlink, Popper

### 1 Introduction

In his 2021 Dietrich Schindler lecture "Interpretations as Hypotheses",<sup>1</sup> Bernhard Schlink proposes an account of judicial reasoning in analogy to scientific reasoning. He looks beyond traditional legal methodology and to philosophy of science for inspiration and sketches an account of legal decision making along the lines of scientific theorising. A most commendable and fruitful strategy, in my view.<sup>2</sup> However, his analogy is faulty, and his picture of scientific method is outdated. Schlink draws his analogy to science as critical rationalism sees it. *Critical rationalism*, a.k.a. *falsificationism*, a.k.a. *hypothetico-deductivism*, was proposed in 1934 by Sir Karl Popper and was widely discussed in the mid-20<sup>th</sup> century but has since gone out of fashion – and for good reason.<sup>3</sup> But more importantly, falsificationism is motivated by an alleged epistemic asymmetry

1 Given at the University of Zurich on 19 October 2021, published in Schlink, Bernhard, *Interpretations as Hypotheses*, in: Peter Goodrich/Michel Rosenfeld (eds.), *Administering Interpretation: Derrida, Agamben, and the Political Theology of Law*, New York: Fordham University Press, 2019, 11–21.

2 Cf. my *Structures in Law*, currently under review.

3 For a defence by one of the last dedicated falsificationists: Miller, David, *Critical Rationalism: A Restatement and Defence*, La Salle: Open Court, 1994. For a critical review thereof Watkins, John, *Review of "Critical Rationalism"*, La Salle: Open Court, 1994.

between theory and observation, which critical rationalists say shows in the logical form of statements. Schlink adopts falsificationism about legal interpretation without any argument to the effect that an analogous asymmetry is to be found in legal reasoning. And in fact, there is no analogous asymmetry in his conception of legal reasoning. But then his adoption of falsificationism is unmotivated. Indeed, I shall argue, it adds nothing to traditional methodology, except confusion. To show this, I will first sketch the relevant aspects of falsificationism and then go through Schlink's argument, trying to find a basis for transferring the falsificationist methodology to the theory of statutory interpretation. A failure to find a basis for the analogy will not only count against Schlink's but against any attempt to conceptualise legal reasoning within a falsificationist framework. Thereafter, I will argue that, in addition, what Schlink identifies as "falsifications" do not deserve that name by falsificationist lights. Then, I will consider some inferences Schlink draws from his critical rationalist rendering of jurisprudence. In particular, he thinks that it supports the thesis that a question of legal interpretation need not have a unique correct answer but might have several equally correct ones. However, this conclusion rests on yet another false analogy and would be unwarranted even if Schlink's legal falsificationism were not. More generally, this paper illustrates some of the dangers of overly coarse analogies between jurisprudence and science. I focus on Schlink's proposal not only because it is recent but also because it has the merit of coming equipped with clear and telling examples, which allow me to show clearly and tellingly why the proposal is mistaken.

## 2 Schlink's analogy

Scientific hypotheses and norms both come as if-then sentences, says Schlink. Scientific hypotheses have descriptive antecedents and descriptive consequents; ethical and legal rules have descriptive antecedents and normative consequents. The former predict or explain what happens if some facts obtain; the latter command that something happen if some facts obtain. Moreover, scientific hypotheses and norms both are normally of general and abstract character, i. e. they purport to apply not to a finite set of instances and people but to an indefinite number of them.<sup>4</sup> So far, so good.

Because they refer to an infinite or indefinite number of instances, scientific hypotheses can never be verified. But a scientific hypothesis can be *falsified*, say the falsificationists, namely by showing that a prediction derived from it failed to obtain. In the case of a norm, on the other hand, if what it commands fails to happen, the norm as such remains valid. But according to Schlink, interpretations of norms can be falsified like scientific hypotheses. An interpretation is also a kind of norm, in that it is a general and abstract if-then statement with a generic description of a factual situation as its antecedent

*ical Rationalism: A Restatement and Defence*" by David Miller, *The British Journal for the Philosophy of Science*, Vol. 46, No. 4, 1995, 610–616.

<sup>4</sup> Schlink (fn. 1), 13

and legal consequences as its consequent. Such an interpretation is a hypothesis, says Schlink, which can be tested and falsified by “a new case or the rethinking of the legal consequences [...] or a new natural or social event”<sup>5</sup> This being so, we must distinguish, in legal reasoning just as in scientific enquiry, between the *context of discovery* and the *context of justification*. In the context of discovery, i. e. in the process of coming up with a scientific hypothesis or a legal interpretation, anything goes. We may dream it up or read an interpretation into a norm based on a whim or personal prejudice. Rationality is guaranteed only by the second step. The hypothesis gains currency from its justification, which is independent of its discovery. Scientists justify by testing and attempting to falsify their hypotheses, and judges do exactly the same to their interpretation hypotheses about legal norms. Amongst those interpretations which survive the testing unfalsified, the court finally chooses one, based on extra-legal considerations.<sup>6</sup>

But how can an *interpretation of a legal norm* be *falsified*? To see this, let's first understand falsificationism about *scientific* hypotheses.

### 3 Popper's falsificationism

Science is after the laws of nature. Laws of nature, plausibly, come as universal statements – something along the lines of  $\forall x(Fx \rightarrow Gx)$ . They say for an indefinite number of cases what is going to happen, or what must have happened, given that something else was the case.  $\forall x(Fx \rightarrow Gx)$  says, for any  $x$  within its range of application, observed or not, if it is  $F$ , then it is  $G$ . For example, for all things in the world, if it is a raven, then it is black. In the eyes of anyone of broadly empiricist spirit, our knowledge of nature is based on observation. But we observe *specific* instances. We see a *particular* raven  $a$ , and that it is black,  $Fa \ \& \ Ga$ , from which it follows that *there is* a black raven,  $\exists x(Fx \ \& \ Gx)$ . And then we see another, and another, and so we come to think that all ravens roaming the skies are black. But we cannot know from observation that *all* ravens, passed, present and future, are black. No finite number of observations can guarantee the truth of the universal statement which ranges over a potentially infinite number of individuals. And yet, this appears to be how we reason. Inferring from a finite set of observations of some kind to a universal statement about all things of that kind is called *inductive* reasoning. Can we say that inductive reasoning is justified, or warranted, because induction has always worked, and thus will continue to work? No, because this would be an inference from a finite set of past cases to future cases, i. e. this argument presupposes what it is supposed to show: that induction works. So, induction is baseless, but science cannot do without it. Such is the *problem of induction*.<sup>7</sup>

5 Schlink (fn. 1), 13–16, quote on p. 14.

6 Schlink (fn. 1), 14–19

7 Hume, David, *Enquiry Concerning Human Understanding*, in: id., *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, edited by L. A. Selby-Bigge/P. H. Nidditch, 1975, Oxford: OUP, section IV, part II; Popper, Karl, *The Logic of Scientific Discovery*, London: Routledge Classics,

Popper's falsificationism is a solution (or a dissolution, rather) of the problem of induction.<sup>8</sup> It capitalises on a *logico-epistemic asymmetry*. No finite conjunction of positive singular instances can verify a universal generalisation, but a single counterexample can falsify it. No finite number of observed black ravens can prove that *all* ravens are black, but one pink raven proves it false. You cannot infer  $\forall x(Fx \rightarrow Gx)$  from  $(Fa \ \& \ Ga) \ \& \ (Fb \ \& \ Gb) \ \& \ \dots \ \& \ (Fn \ \& \ Gn)$ , but you can infer  $\neg\forall x(Fx \rightarrow Gx)$  from  $(Fa \ \& \ \neg Ga)$ . There is nothing mysterious about this. There are two points, one logical, one epistemological. The logical point is that the quantifiers are interdefinable, i. e.  $\forall x(\alpha) \dashv\vdash \neg\exists x(\neg\alpha)$ . The epistemological point is that experience does not tend to give us anything of the sort  $\forall x(\alpha)$  or  $\neg\exists x(\neg\alpha)$ , but it can give us something like  $\exists x(\neg\alpha)$ , and this can clash with  $\neg\exists x(\neg\alpha)$ . My main complaint about Schlink's transposal of falsificationist methodology into jurisprudence will be that no equivalent asymmetry holds in the domain of jurisprudence, at least not under its usual construal.

Given this asymmetry, the method of science, according to Popper, roughly, is this. Propose a theory in universal form, e. g.  $T \stackrel{\text{def}}{=} \forall x(Fx \rightarrow Gx)$  – “All ravens are black”. Then, derive a prediction, in the form of a singular statement, from this theory together with some initial conditions. (On its own,  $T$  does not imply any singular statements. It does not entail that we observe anything at all, for  $T$  would be true if there were no ravens at all.) For instance: initial condition  $Fa$  – “This is a raven”. So,  $T$  predicts  $Ga$  – “It's black.” Then, test it – check out the raven  $a$ . Suppose it is not black, then your observation is  $\neg Ga$ , contradicting the prediction, so  $T$  is falsified. You should discard  $T$  and come up with a better theory. On the other hand, if the raven is black, then  $Ga$ , compatible with the prediction, so  $T$  has survived a test.  $T$  is not verified, nor is it confirmed – it is still as likely to be true as any other non-falsified hypothesis – but it is what Popper called “corroborated”, i. e. we may tentatively keep holding onto  $T$  since it has survived the test.<sup>9</sup>

#### 4 What are the potential falsifiers in legal reasoning?

As indicated above, the things which do the falsifying in science are *singular* statements about specific observable events. They can falsify hypotheses, which are *universal* statements, and this is the asymmetry falsificationism exploits. Popper calls these potential falsifiers “basic statements”. They are not immune to revision, for all knowledge is conjectural, but the basic statements are accepted as true for the time being and they are

2002, §§ 1, 15. Cf. Schurz, Gerhard, *Hume's Problem Solved: The Optimality of Meta-Induction*, Cambridge, MA: MIT Press, 2019, for the most sophisticated justification of induction so far.

8 Popper (fn. 7), §§ 1–3, 12–13, 15

9 Popper (fn. 7), §§ 3, 12, 18. Note that falsificationism goes far beyond fallibilism in that it holds not only that any hypothesis may turn out to be false but that no amount of testing ever makes a hypothesis more likely than any other non-falsified hypothesis. Cf. Miller (fn. 3), chapters 2.1–2.2, 10.1.

in any case more easily testable and more specific than the hypothesis which is tested against them.<sup>10</sup>

What is doing the job of observation in legal reasoning? What is playing the role of the basic statements in Schlink's account? Let us consider a number of things which could act as potential falsifiers: verdicts, standard interpretative arguments, and intuitions. I will argue that Schlink's "falsifiers" do *not* normally take the form of *singular* statements, and often not even of universal hypotheses which are any less general than the interpretative hypothesis which they are brought to bear on for testing.<sup>11</sup> Often, they are universal hypotheses of a generality intuitively higher than that of the interpretative hypothesis, and our epistemic access to them is no better than it is to the interpretative hypothesis itself, or to any other norms. If this is correct, then the motivation for adopting a falsificationist methodology evaporates. Absent the asymmetry on which falsificationism is premised, talk of falsification is idle, at best, and misleading at worst.

#### 4.1 Verdicts

Verdicts are individual and specific statements. They say of a specific person what she ought to do or be done to, much like an observation sentence in science says of a specific object what it is like. Hence, verdicts appear to be suitable candidates for the job of falsifying. Are they doing it? Schlink writes:

"Scientific hypotheses are falsified by consensus about how to understand reality. Legal interpretations are also falsified by consensus: about what the text of the norm says, about what the legislature intended, and about the consequences of a legal interpretation being compatible or incompatible with the rest of the legal system and its normative principles."<sup>12</sup>

First, sociological aspects should be kept apart from epistemic ones. Whether the "scientific community agrees"<sup>13</sup> on a theory *T* – whatever that may mean – is a question quite independent from whether *T* is the best available theory. The former is a descriptive, sociological question, the latter a normative, epistemological one. Conflating these two questions implies that it is conceptually impossible for the consensus to be mistaken. But scientists accept theories (and lawyers adopt interpretations) for all sorts of reasons – for reputation, affiliation, promotions, medals, and pensions, even. Whether, *to the best of our current knowledge*, a theory or an interpretation *should* be accepted is a

10 Popper (fn. 7), §§ 18, 22, 28

11 Therefore, what is to follow also counts against the falsificationism of Canaris, who identifies as falsifiers "statements about legal norms" which are "of lower generality": Canaris, Claus-Wilhelm, *Funktion, Struktur und Falsifikation juristischer Theorien*, *Juristen-Zeitung*, Vol. 48, Nr. 8, 1993, 377–391, 386.

12 Schlink (fn. 1), 17–18. In his fn. 8, Schlink falsely attributes the mistaken view that consensus matters to Popper, and curiously, this is the only place where he refers to Popper, although Schlink's entire theory is but an adaptation of Popper (fn. 7).

13 Schlink (fn. 1), 16

very different question, one governed by epistemic norms. The likes of Kuhn<sup>14</sup> will now protest, of course, and we cannot go into any depth here, but surely at least a rough distinction between sociology and epistemology is feasible, and this is all we need for now. I am interested in the epistemological question about which interpretation is *correct*, and the sociologically minded should be too. Because if we only look at the consensus of legal professionals and the utterances of judges, then our account has nothing to say to legal professionals and judges. From their perspective (from the “internal perspective”, if you will),<sup>15</sup> epistemic considerations matter. Indeed, for the ideal scientist and the ideal judge, nothing else matters.

Moreover, if we were to take the requirement of consensus seriously, this would threaten to render Schlink’s account inapplicable. Schlink appears to be suggesting that the “three consensuses”<sup>16</sup> mentioned in the passage quoted above are a precondition of the falsificationist interpretative procedure. But what interpretational problem would there be left to solve if there were already a consensus about what the text of the norm says and about the legislator’s intentions and the interpretation’s effects? Furthermore, it is not clear what consensus he is referring to. Schlink just insists that “the possibly falsifying instances [...] have to be agreed on.”<sup>17</sup> Agreed on how, by whom? Actual consensus will not obtain, not amongst the general public, not amongst legal scholars, and not amongst those involved in the dispute – that’s why cases go to court in the first place. But Schlink also says nothing about what idealisations should be read into the consensus requirement, nor can I think of any, at least not without shifting the entire burden of the argument onto the idealising assumptions.

Clearly, the brute fact that someone or some group of people thinks, or proclaims, that some interpretation is false is, in and of itself, irrelevant, even if it is the supreme court that does so. Although Schlink muddies the waters by bringing in consensus, he seems to agree with this last point.<sup>18</sup> Thus, verdicts are not falsifiers and consensus is irrelevant. Only reasons count.<sup>19</sup> Where do the reasons come from?

14 Kuhn, Thomas, *The Structure of Scientific Revolutions*, Chicago: University of Chicago Press, 1962

15 Cf. Hart, H. L. A., *The Concept of Law*, 2<sup>nd</sup> ed., Oxford: Clarendon Press, 1994, 56.

16 Schlink (fn. 1), 18

17 Schlink (fn. 1), 15

18 Schlink (fn. 1), 19: “If a decision uses a falsified interpretation, it is wrong, even if it is the decision of a court of last instance, unappealable, unchangeable.”

19 Vogel, Wolfgang *Steuerrechtliche Theorien auf dem Prüfstand des rechtswissenschaftlichen Experiments*, *Rechtstheorie*, Vol. 9, 1978, 317–347, disagrees, *ibid.* 339–347. He “tested” interpretations of Austrian tax law provisions “experimentally” by initiating judicial proceedings and taking their outcomes as experimental results capable of “falsifying” interpretations. To repeat, such results about the actual behaviour of the court may be of predictive value for those subject to this tax law, but what are *the judges* to make of a theory of legal interpretation which says that an interpretation is right if the court says so?

## 4.2 Falsifying by traditional methods

Having eliminated the “consensus” from Schlink’s quote, what remains is that statements “about what the text of the norm says, about what the legislature intended, and about the consequences of a legal interpretation being compatible or incompatible with the rest of the legal system and its normative principles” are capable of falsifying interpretation hypotheses. As Schlink readily admits, this is nothing but a reference to the “old, familiar questions” as conceptualised by traditional legal methodology: “What does the text really say? What did the legislature intend? What are the consequences of this or that interpretation?”<sup>20</sup> Let’s look in turn at arguments from meaning, legislative intent and systematic coherence.

### 4.2.1 Arguments from meaning

Arguments concerning the meaning or use of language do not normally seem to take the form of singular statements. They say something like “The word ‘ $\varphi$ ’ is used by most ordinary people/according to the dictionaries/in precedents/in other legislation so as to signify  $\psi$ .” Something like that is plausibly formalised somewhat like this:  $\forall x(Ax \rightarrow Bx)$ . For example: “For all ordinary people, when they say ‘publisher’, they mean someone professionally involved in the dissemination of some sort of information.” Therefore, on the face of it, arguments from meaning cannot be falsifiers. But let’s examine Schlink’s example in detail.

Schlink’s example is this. Pursuant to some provision of German tax law, “Verleger”, viz. “publishers”, are privileged in some way. The provision has been understood to apply to publishers of books, magazines, newspapers, and records, and the issue is whether it also applies to videotapes. Some say that yes, because “publishers are publishers”. Others say that no, because traders in beer are called “beer publishers” (“Bierverleger”) and they undoubtedly have never been subject to this tax privilege. Hence:

- interpretation hypothesis  $H$ : “Publishers are publishers.”
- alleged falsifier  $F$ : “Traders in beer and other beverages are traditionally called ‘beer publishers’ (‘Bierverleger’) but were never meant.”

Schlink says that  $F$  has falsified  $H$ .<sup>21</sup>

First, note that on the face of it,  $F$  and  $H$  appear to be universal statements of an intuitively equal standing. If so, then there is no asymmetry between them that would justify saying that one of them falsifies the other. But let’s take it slow and carefully follow through the argument to the point where the allegedly falsificatory contradiction occurs and see whether we can spot any asymmetry between a supposedly universal hypothesis and a supposedly existential falsifier of safer epistemic standing.

<sup>20</sup> Schlink (fn. 1), 18

<sup>21</sup> Schlink (fn. 1), 16



$H$  looks tautological, but it cannot be a tautology, for if it were, it could not be empirically falsified. It must be an assertion about the legal meaning of the word based on the ordinary meaning of the word. Presumably,  $H$  asserts that all those whom competent speakers of German sometimes call something involving the word “Verleger” (ordinary use of “Verleger”,  $V_O$ ) are privileged as “publishers” pursuant to provision so-and-so of German tax law (legal use of “Verleger”,  $V_L$ ). So,  $H$  is  $\forall x(V_Ox \rightarrow V_Lx)$ . And  $F$ ? Plausibly it asserts that all those whom competent German speakers sometimes call “Bierverleger” (ordinary use,  $V_B$ ) are not privileged as “publishers” pursuant to provision so-and-so, thus  $F$  is  $\forall x(V_Bx \rightarrow \neg V_Lx)$ . Now, given my formulation of  $H$ , “Bierverleger” are *Verleger* in the ordinary sense of the word because “Bierverleger” involves the word “Verleger”, i. e.  $\forall x(V_Bx \rightarrow V_Ox)$ . But also by  $H$ , all ordinary-language “Verleger” are tax-legally *Verleger*, and so by transitivity,  $\forall x(V_Bx \rightarrow V_Lx)$ . Then by universal instantiation of this and of  $F$ , for some Person  $x$ , she is both, legally a *Verleger* and not legally a *Verleger*:  $V_Lx \ \& \ \neg V_Lx$ . Contradiction.<sup>22</sup>

Where is the singular basic statement, the existentially quantified falsifier? Well, given interdefinability of quantifiers, we could have rendered any of the universally quantified statements above as existentially quantified. Schlink’s idea, we must suppose, is that we should say about the *Bierverleger* that we *found someone* who is an ordinary-language *Verleger* but not legally a *Verleger*,  $\exists x(V_Ox \ \& \ \neg V_Lx)$  contradicting the universal hypothesis  $H$  that *all Verleger* are *Verleger*,  $\forall x(V_Ox \rightarrow V_Lx)$ , and thereby falsifying it. But what’s the point of putting it like this? The falsificationists’ point is that we observe specific things or events, as opposed to general regularities, which we do not as such observe. Their point is that our knowledge comes from experience and that experience comes to us naturally in the form of “There is something such that ...”,  $\exists x(\dots)$ ,<sup>23</sup> but never in the form of “All things are such that ...”,  $\forall x(\dots)$ . But have we observed a *Bierverleger* not being legally a *Verleger* like we observe a raven not being black? Note that the alleged falsifier,  $\exists x(V_Ox \ \& \ \neg V_Lx)$  – “There is someone who is ordinarily called a *Verleger* but not legally so”, entirely depends on universal statements about language use and precedent. It has no independent warrant. This is very unlike “There is a pink raven!” upon spotting a pink raven. Is there any reason to think that statements about the use of the word “Bierverleger” are privileged over statements about the use of the word “Verleger” in some way akin to how experience of particular events is privileged over knowledge of general facts and regularities? Is our *Bierverleger*-related knowledge somehow more reliable than our *Verleger*-related knowledge? It is difficult to see how this could be so.  $H$  and  $F$  both are assertions about past ordinary and legal language use, or perhaps they are both normative statements, but in any case, they are susceptible to the exact

22 We could also conceptualise set-theoretically: my formulation of  $H$  ascertains that  $V_B \subseteq V_O$ , and  $H$  asserts  $V_O \subseteq V_L$ , thus  $V_B \subseteq V_L$ , but  $F$  implies  $V_B \cap V_L = \emptyset$ , yielding a contradiction if the sets are non-empty.

23 Those of phenomenalist leanings are tempted to say that observation sentences must talk about the observing subject, e.g. “I now see something appearing as  $\alpha$ ”. But unless I infer from this that *there is something* which is  $\alpha$ , I cannot confront it with my theory about  $\alpha$  if this theory is using realist language, i. e. talking of objects. So, phenomenalism (only) in observation sentences is a pointless detour, cf. Popper (fn. 7), § 27 and appendix X.

same methods of cognising and testing. But if there is no asymmetry in their epistemic standing, akin to that between observation and scientific hypothesis, then talk of falsification is uncalled for. There is nothing for Schlink to base his critical rationalist analogy on. His “falsifications” are simply contradictions. Unlike falsification, contradiction is a symmetric relationship, i. e. it leaves indeterminate which of the conflicting statements must give in.

This has been my core argument: Given that there are universal statements of equal epistemic merit on all sides, it is arbitrary to count some as falsifiers and others as falsifiable. To double check, let's see whether the conclusion holds water under a more common and perhaps less tendentious construal of what is going on in legal interpretation. The following view appears to be quite widely held, though often only implicitly: The interpretation of a norm can be conceptualised as a question about the range of application of some predicate. Suppose we want to think of legal rules as being of the form  $\forall x(Fx \rightarrow Gx)$ .<sup>24</sup> The court is faced with some specific case  $a$ . The legal question on which the court must decide is whether for the specific case  $a$  at hand, the law commands that it be treated as  $G$ , i. e. the legal question is whether  $Ga$ . Given the rule,  $a$  is  $G$  if it is  $F$ , i. e.  $Fa \rightarrow Ga$ , so the question becomes whether  $Fa$ . The court might know from precedents  $p$  and  $q$  that  $Fp$  but  $\neg Fq$ . Then the question is whether, for the regulative purposes at hand,  $a$  is more like  $p$  or more like  $q$ . That is, the question is one of similarity in legally relevant respects. In Schlink's example, the question is whether for the purposes of taxation, movies are more like the press and records, or more like brewed beverages. Under this construal, the interpretative question reduces to one of degrees of relevant similarity:  $\text{similarity}_{\text{tax}}(\text{video}, \text{press}) > \text{similarity}_{\text{tax}}(\text{video}, \text{beer})$  or  $\text{similarity}_{\text{tax}}(\text{video}, \text{press}) < \text{similarity}_{\text{tax}}(\text{video}, \text{beer})$ ? This way of conceptualising things also fails to bring any kind of systematic asymmetry to the fore. Thus, it confirms the impression that falsification talk is out of place.

#### 4.2.2 Legislative intent and systematic arguments

In sum, interpretation based on the meaning or use of words exhibits no characteristics that would afford falsification talk. Do any of the other elements of traditional methodology? Let's see how arguments from legislative intent and systematic coherence fare. That is, we are now concerned with statements “about what the legislature intended, and about the consequences of a legal interpretation being compatible or incompatible with the rest of the legal system and its normative principles”.<sup>25</sup>

First, in as far as falsification is supposed to consist in being “incompatible with the rest of the legal system and its normative principles”, not much argument seems to be required on my part. Surely, the legal system is made up of general and abstract rules

24 I doubt that this is adequate, but I cannot discuss this here. Cf. my (fn. 2) for a rendering of legal rules in terms of functions between set-theoretic structures.

25 Schlink (fn. 1), 17–18

throughout, and surely these “normative principles” Schlink mentions are of the same kind, and, if anything, rather more general and abstract than the interpretative hypothesis at issue. Any incompatibility here is an incompatibility amongst universal norms of law. Absent a categorical difference in their epistemic standing, there is no good reason for privileging one class over the other. Hence, it is hard to see why members of one class should count as refuting members of the other but not *vice versa*. (Indeed, it is already hard to see how the classes should be identified. Isn't, to the interpreter, “the rest of the legal system and its normative principles” essentially a bunch of interpretative hypotheses?)<sup>26</sup>

It remains to consider facts about “what the legislature intended, and about the consequences of a legal interpretation”. Schlink suggests the following case. Non-resident A illegally drives on a private street open only to residents. He drives carefully. Resident B drives on the same street, carelessly. After the collision, B demands compensation for his damage from A based on tort. The law says that one must compensate for damage one has caused illegally. That is, the elements definitive of tort are damage, causality, and the illegality of the causal action. The tort provision appears to command that A compensate B. Does A have to compensate B? The court says no, on grounds which seem to me two-fold but Schlink presents as one: “the court – followed by academic opinion – regarded this result as unjust, incompatible with normative principles inherent in the legal system.”<sup>27</sup>

First, incompatibility with normative principles inherent in the legal system. Say, we reconstruct the tort rule as  $\forall x((F_1x \ \& \ F_2x \ \& \ F_3x) \rightarrow Gx)$ , with the *F*'s for the several elements of tort. Now, the court found that in this case *a*,  $F_1a \ \& \ F_2a \ \& \ F_3a$ , and thus by the tort rule  $Ga$ , but by some “normative principles inherent in the legal system”,  $\neg Ga$ . Whatever these normative principles inherent in the legal system, it seems safe to assume that they are rules formally like the tort rule, and likely more basic, more general, more abstract than the tort rule. Plausibly, the tort rule would be *lex specialis* in relation to these principles! If so, some other priority rule must be at work here, causing the victory of these principles over the tort rule. But be this as it may. In any case, these are conflicts between rules or principles, i. e. between members of the same kind of things: universal norms. No radical epistemic asymmetry affording falsificationism is on the horizon.

In fact, *all* the arguments from traditional methodology derive from rules and principles. Schlink remarks that the reason why the arguments from meaning, legislative intent and coherence count lies in constitutional law.<sup>28</sup> I completely agree. It is in virtue of the institutional division of powers in a democratic state that the courts must adhere

26 The remarks in this paragraph apply equally to the falsificationist conception suggested by Larenz, Karl, *Methodenlehre der Rechtswissenschaft*, 6<sup>th</sup> ed., Berlin: Springer, 1991, in as far as he identifies as potential falsifiers valid legal norms, legal principles and the aims inherent in them. But Larenz acknowledges that treating them as falsifiers akin to experimental facts is inappropriate because they are also just norms in need of interpretation, *ibid.* 451–452.

27 Schlink (*fn.* 1), 17

28 Schlink (*fn.* 1), 18

to the words the elected legislative branch has chosen and take their intentions seriously – and all of them, past and present, under the supposition that the legislator spoke coherently. To this extent, traditional methodology is just constitutional law in action. But then all traditional arguments are based on legal rules and principles. Therefore, when they conflict with an “interpretative hypothesis”, these are all conflicts amongst norms, and thus, there cannot be any asymmetry of the kind a critical rationalist legal theory must presuppose.

Now, turning to the second variety present in Schlink’s case, the court applied the law and came to the result that *Ga*, but “regarded this result as unjust”.<sup>29</sup> If the court regarded this result as unjust exclusively on account of its incompatibility with “normative principles inherent in the legal system”, then we are back at where we were in the previous paragraphs. The result is unjust in virtue of a conflict amongst norms – because these normative principles have priority over the tort rule, in virtue of some priority rule. Still no asymmetry. But there is a more interesting rendering of this sub-case – the only one which could actually yield a reason to conceptualise legal reasoning in analogy to critical rationalist science. This could be justified if some kind of intuitive moral cognition played the role which observation plays in science.

#### 4.3 Intuitions

Falsificationism about statutory interpretation could get off the ground if it were combined with some sort of *intuitionism* or *value empiricism*. As we have seen, for something to be a potential falsifier, it must be more than just a derivation from legal or ethical principles, for if all we have is this kind of inferential knowledge of it, then it is no more certain than that which we test against it. So, we need some sort of non-inferential source of normative knowledge, akin to perception in science. If we had some kind of intuitive access to right and wrong upon confrontation with specific cases, this is where potential falsifiers could come from.

I am not unsympathetic to this line of argument. When we see or imagine something abhorrent, don’t we know immediately that it is wrong, without any need for inferences? When you see a baby being tortured, you spontaneously know for sure that *this* is wrong, and you are more certain about this than about any of the principles – *neminem laede*, human dignity, and what not – from which it would follow that torturing this baby is wrong. If so, then there are singular moral statements to which we have epistemically privileged access. In virtue of their superior epistemic warrant, they could have the power to falsify legal interpretation hypotheses.<sup>30</sup>

<sup>29</sup> Schlink (fn. 1), 17

<sup>30</sup> von Savigny, Eike, *Die Überprüfbarkeit der Strafrechtssätze*, München: Karl Alber, 1967, argues along these lines, rightly pointing out that value judgements are strikingly similar to observation sentences with respect to considerations of objectivity, e. g. *ibid.*, 52: “What is rational about my visual perceptions? Why is my impression ‘red’ of the curtains in front of me rational? [...] Such impressions are psychological causes of our assent to observation statements. They look in no way more rational than moral sentiments.”

But first, I doubt that many of falsificationist leanings are willing to go down this road. Although falsificationism is perfectly consistent with value empiricism, as I am suggesting here, traditionally, friends of falsificationism tend to be non-cognitivists.<sup>31</sup> Second, even if we suppose that there is such an intuitionist empirical basis for moral and legal judgment, it is a further question whether critical rationalism provides the best framework for thinking about it. The answer is negative, I suggest, for several reasons, one of them being that what Schlink calls a “falsification” is not deserving of this name in the eyes of a falsificationist. Schlink’s “falsifications” are what Popper would disdainfully call *ad hoc* manoeuvres.

### 5 Falsification vs. *ad hoc* manoeuvres

Popper saw clearly (and long before Quine popularised – and arguably over-generalised – the point)<sup>32</sup> that irrespective of what the conflicting evidence is, a theory can always be saved from falsification, “by introducing *ad hoc* some auxiliary hypotheses or by re-interpreting the theory *ad hoc* in such a way that it escapes refutation.”<sup>33</sup> One of his favourite examples for an unscientific theory was Marxist theory of history. Marxism had originally made testable predictions, for instance about the conditions under which revolutions occur. But when history refused to conform to Marxist predictions, Marxists “re-interpreted both the theory and the evidence in order to make them agree” instead of accepting that Marxism had been refuted.<sup>34</sup> Therefore, one cannot tell whether a theory is genuinely scientific or just pseudo-science simply by looking at the statements it consists of. One also has to look at the methodology the scientists follow, namely, whether they are ready to give up their theory upon falsification or whether they deploy *ad hoc* stratagems in order to save it.

(my translation). Thus, falsificationism is an option, e.g. *ibid.*, 97: “When the Federal Court of Justice enquires about the intentions of the just legislator, they are putting forward hypotheses about what is just.” The court tests these hypotheses against basic moral judgments: von Savigny, Eike/Neumann, Ulfried/Rahlf, Joachim, *Juristische Dogmatik und Wissenschaftstheorie*, München: Beck, 1976, especially 128–143. With regard to ethics, White, Morton, *What Is and What Ought to Be Done*, Oxford: Oxford University Press, 1981, particularly 44–54, for example, treats moral feelings as analogues to falsifiers in science, albeit the framework he opts for is a Quinean holistic theory of confirmation. Moreover, *Cornell realism* treats moral intuition analogously to observation in science, e.g. Boyd, Richard, *How to Be a Moral Realist*, in: G. Sayre-McCord (ed.), *Essays on Moral Realism*, Ithaca, NY: Cornell University Press, 1988, 181–228. Rawls, John, *A Theory of Justice*, Revised Edition, Cambridge, MA: Belknap Press, 1999, is well-known for his broadly coherentist metaethics with “considered judgments” as essential components, which emanate from our “sense of justice”, *ibid.* §§ 4, 9. Moreover, cf. my *Theory-Building in Science, Ethics and Jurisprudence*, forthcoming.

31 E.g. notoriously Ayer, Alfred J., *Language, Truth and Logic*, New York: Dover, 1952, chapter VI, who, to be precise, is a logical positivist, a.k.a. verificationist, not a falsificationist, but these two share just about everything in their general outlook.

32 Quine, Willard Van Orman, *Two Dogmas of Empiricism*, *The Philosophical Review*, Vol. 60, 1951, 20–43

33 Popper, Karl, *Conjectures and Refutations*, London: Routledge Classics, 2002, 48; also Popper (fn. 7), §§ 19–20.

34 Popper (fn. 33), 49

Now, consider the “falsification” that Schlink alleges took place in the tort case. Has *the tort rule* been *falsified*? No, the court just narrowed down its range of application. It did not give up tort law. It did not revise tort law in a substantial, fruitful way, such that new, unexpected consequences would follow. Upon finding the result, which the tort rule commanded, to be unjust in that specific case, the court just introduced an exception for this kind of cases by adding “the further condition that the illegality of the behaviour caused the damage”.<sup>35</sup> It excluded exactly those cases which conflicted with the “falsifier”.

Now, that is a prime example of the sort of *ad hoc* move Popper wanted to rule out. Suppose a scientist working on gravity takes an apple from his lunch box, drops it, and observes it fly skywards instead of to the ground (and suppose the apple continues exhibiting this strange behaviour on later occasions). Would the scientist do well to say “Lo, I have falsified Newton’s laws. The correct laws of gravity are: All things behave just like Newton said, except for the apples from my lunch box”?<sup>36</sup>

## 6 Against falsificationism

Thus, even if there were “falsifiers” in jurisprudence, falsificationism would not give the right picture of what is going on in moral and legal reasoning. Something like Rawls’ picture of *reflective equilibrium* seems much closer to the truth. We think we know of some specific things that they are right, and of some that they are wrong, and we think we know of some principles that they are right, and of some that they are wrong, and we theorise so as to bring them into harmony, working “from both ends”, with neither kind of input immune from revision, adapting here a principle and there a judgment, until it all fits together nicely.<sup>37</sup> This picture is surely more adequate, but alas – it is just that: a picture. What falsificationism has going for it is that it is a rigorously worked out theory. But that is of no avail when it does not fit the phenomenon.

Besides, falsificationism is also questionable as an account of science. Amongst other things,<sup>38</sup> falsificationism arguably fails on its home stage. For, falsificationism is constructed around avoiding inductive inferences. But suppose we have conducted an experiment *e* and its outcome has falsified a theory *T*, whereas another theory *T'* has so far survived all tests. Is there anything we can learn from this for the purposes of predicting the future? Arguably, not without presupposing induction. Assuming that *T'* is better at predicting the future than its rivals is reasoning inductively. Even assuming that the next experiment of type *e* will yield the same result as the last one, again clashing with *T*, is inferring inductively. So, either falsificationism uses induction after all, or it

35 Schlink (fn. 1), 17

36 Cf. also Canaris (fn. 11), 386–387 for an example of an *ad hoc* move in jurisprudence.

37 Rawls (fn. 30), §§ 4, 9

38 For the debate with Kuhn see Lakatos, Imre/Musgrave, Alan (eds.), *Criticism and the Growth of Knowledge*, Cambridge: Cambridge University Press, 1970.

must hold that science is entirely devoid of predictive import.<sup>39</sup> Falsificationism could avoid this dire dilemma if it could produce a viable theory of *verisimilitude*, i. e. a way to compare unfalsified theories with regard to how close they are to the truth. But in spite of countless ingenious attempts, no such theory is forthcoming, and there are good reasons to think that a coherent, general account of truth-likeness is impossible.<sup>40</sup> Yet another reason not to look to falsificationism as a model for legal reasoning.<sup>41</sup> Indeed, something like reflective equilibrium might well be a far better framework to model science in, as well.<sup>42</sup> Thus, there is really no temptation to force statutory interpretation into a falsificationist Procrustes' bed. It seems that those who do this feel obliged to do so in order to save the claim that jurisprudence is scientific, but if science does not work the falsificationist way, then this is unnecessary.<sup>43</sup>

## 7 What of it?

### 7.1 Just idle or misleading?

Thus, the motivation to apply falsificationist ideas to statutory interpretation fades away. Talk of falsification hangs idly in the air. When we reason about legal norms, some norms win over other norms, along the lines laid down by traditional legal methodolo-

39 Salmon, Wesley C., *Rational Prediction*, *The British Journal for the Philosophy of Science*, Vol. 32, No. 2, 1981, 115–125; cf. also the debate in Schilpp, Paul Arthur (ed.), *The Philosophy of Karl Popper*, La Salle: Open Court, 1974.

40 Miller (fn. 3), chapters 10–11. *Ibid.* p. 231: “there seems to be the strongest possible methodological demand for our being able to make sense in some way of the degree to which some hypothesis, in answer to some problem, approaches what might be thought to be the true answer to that problem. I am no less sorry than I was 20 years ago that I still seem unable to do much at all to satisfy that demand”. For Akaike’s theorem as a truth-likeness criterion with limited applicability see Forster, Malcolm/Sober, Elliott, *How to Tell When Simpler, More Unified, or Less Ad Hoc Theories Will Provide More Accurate Predictions*, *The British Journal for the Philosophy of Science*, Vol. 45, No. 1, 1994, 1–35, especially 26–29. For the latest debate on verisimilitude Niiniluoto, Ilkka, *Truthlikeness: old and new debates*, *Synthese*, Vol. 197, 2020, 1581–1599.

41 A sophisticated attempt at a falsificationist rendering of jurisprudence is Albert, Hans, *Kritische Vernunft und rationale Praxis*, Tübingen: Mohr Siebeck, 2011, 163–181. Albert characterises statutory interpretation as purely descriptive “social technology”, with no normative elements involved. Interpretations are hypotheses about what the rule must be like in order to achieve some given goal (*telos*) most effectively. While this account may be coherent, it neglects that the goals are not simply given. When legal practitioners interpret the law, they often cannot avoid getting involved in axiology. Their job is often to determine the *telos*, which in all the interesting cases unforeseen by the legislator, is not just “there”, but the question is precisely what the goals *should* be. Regarding ethics also Albert (*ibid.*), 103–162 and Albert, Hans, *Traktat über kritische Vernunft*, 5<sup>th</sup> revised edition, Tübingen: Mohr Siebeck UTB, 1991, 66–95. Larenz (fn. 26), 449–453, proposes an account of legal interpretation similar to Albert’s in that, after considering norms as falsifiers, he suggests that what is ultimately decisive is “factual adequacy” of an interpretation’s consequences in light of teleological considerations («Dabei spielen neben logischen vor allem teleologische Erwägungen eine Rolle; letzten Endes entscheidend ist die sachliche Angemessenheit der sich aus der Theorie ergebenden Folgesätze über normativ Geltendes.»).

42 E. g. Ebertz, Roger P., *Is Reflective Equilibrium a Coherentist Model?*, *Canadian Journal of Philosophy*, Vol. 23, No. 2, 1993, 193–214, 213–214: “Indeed the reflective process spelled out by Rawls can be taken as a model for responsible belief formation, at least at the level of reflective activity. [...] it seems to be a paradigm of epistemic responsibility.”

43 Cf. my (fn. 30).

gy. That is all Schlink has to say and talk of falsification adds nothing to it. Likewise, the distinction Schlink draws, closely following Popper, between “context of discovery” and “context of justification”<sup>44</sup> also idles. When an interpretation *H* comes to mind, it will have come to mind for some specific reason *X* (“context of discovery”), but it might not be the case that *H* ought to be held for that exact reason *X*, or that *H* ought to be held at all. It is not enough to just take *H* and *X* and run with it. You must also consider counterarguments, other reasons, and rival interpretations, before you assert *H* (“context of justification”). The critical rationalist terms can be eliminated without loss.

In fact, Schlink acknowledges that his falsificationist talk adds nothing on the methodological plane. “Since the old, familiar questions reappear in the falsification model of interpretation, what is its advantage?”, Schlink rightly asks.<sup>45</sup> In some circles, it is fashionable to throw around big words. Every lousy feedback loop is a “hermeneutic circle” and Heidegger and Gadamer must be quoted.<sup>46</sup> And now, if one argument beats another, that’s a “falsification”. Is all this purely ornamental?<sup>47</sup> Schlink does not think so, he does not think his conception without import. He thinks that “the standards for interpretation [...] were, and are even now, normally presented as standards for finding the right interpretation. That is precisely what they cannot be”,<sup>48</sup> and that “understanding legal interpretations as the hypotheses that they are confirms that there is no one right interpretation and that the quest for it goes astray. [...] The falsifying instances, consensus based as they are, are too weak to reduce the competing interpretations to one”, and therefore, “judges have to choose. [...] the judge cannot hide behind interpretation.” “But this decision”, he assures us, “is nothing mystical or mythical [...]. The step from considering to choosing, from calculating to deciding, is simply the point where theory becomes practice. And wherever theory becomes practice, be it a house that has been designed and is now being built, an operation that surgeons wondered how to perform and now go to perform, something ends and something begins. Theory ends and practice begins.”<sup>49</sup> His assurances notwithstanding, these remarks admittedly mystify me. In any case, Schlink takes his conception as evidence against the one-right-answer

44 Schlink (fn. 1), 14–16

45 Schlink (fn. 1), 18

46 Schlink (fn. 1), 16, fn. 7

47 Canaris (fn. 11) also sketches a kind of falsificationism for legal reasoning. He notes that there are no non-inferential statements, categorically different from interpretation hypotheses and akin to empirical observation statements, available for doing the falsifying in legal reasoning. But he thinks that it is enough for falsificationism to go through if “statements of lower generality” (ibid. 386) which “are derived from the law or by means of extrapolative legal interpretation” (“*gesetzesübersteigende Rechtsfortbildung*”, ibid. 387) are taken as falsifiers. But without an account as to what makes one statement more or less general than another, this “falsificationism” is equally empty; and unless one goes for intuitionism, such an account is hard to produce. For, relying on surface grammar will not do, and as both statements will stand in deductive relationships to many other statements of higher and lower generality, substantive criteria are difficult to find. The problem is acute, as Canaris implicitly admits when he reports on a conflict amongst two “contrary basic statements” (!), which he then resolves by appeal to *very general* legal principles, ibid. 387. Thus, when we locate a “falsification” as per Canaris’ account, then, just as in Schlink’s, it is simply a contradiction, leaving indeterminate which part must yield.

48 Schlink (fn. 1), 15

49 Schlink (fn. 1), 18–19



thesis. Let's see why this would be mistaken even if statutory interpretation worked the falsificationist way.

## 7.2 The one-right-answer thesis

Famously, Hart held that the law has what he termed an “open texture”. Because general terms occur in legal rules, referring to indefinitely many cases, and because the legislator has not foreseen all of them, the law does not settle all cases. When the judge applies the rule, she makes a “fresh choice between open alternatives”.<sup>50</sup> Dworkin rejected this view. He held that legal questions have one right answer, because the law not only settles questions by means of explicit rules. It also comprises implicit rules, which can be found through considerations of coherence, and which settle the cases Hart deemed unsettled.<sup>51</sup>

Schlink appears to be siding with Hart, on grounds of his falsificationism. If my argument so far has been correct, then this is mistaken because his falsificationism is mistaken. But in addition, it is also mistaken, because, once again, the analogy Schlink presupposes is based on deceptive appearances and does not hold water under closer inspection.

In science, according to falsificationism, we might be faced with a great many rival theories on some single subject. They might all make different predictions, i. e. they might be *empirically non-equivalent*. (In fact, if they are empirically equivalent, falsificationism will treat them essentially as just different formulations of one and the same theory, since they only differ in “metaphysical” respects.) In falsificationism, all the non-refuted theories basically enjoy an equal standing. But if they differ in their predictions, then an *experimentum crucis* is conceivable which could decide between them.<sup>52</sup> However, it might be impossible to actually perform the crucial experiment at the moment and in the foreseeable future, for technological or practical reasons. If so, then we cannot decide between the rival theories. Schlink assumes that this result carries over to falsificationist legal theory, confirming that “there is no one right interpretation” so that “judges have to choose [...] between possible interpretations”.<sup>53</sup>

But do we have just the same troubles in statutory interpretation? Not quite. For, if the rival interpretations all command the same results in all cases, then they do not differ “empirically”, so there is simply no need to adjudicate between them – it's potayto, potahto. If, on the other hand, they do differ “empirically”, then there is some conceivable case for which they command different results. Thus, a “crucial experiment” is conceivable. But if it is conceivable, then we can also “perform” it, for in legal reasoning,

50 Hart (fn. 15), 128

51 Dworkin, Ronald, *No Right Answer*, New York University Law Review, Vol. 53, No. 1, 1978, 1–32; Hart (fn. 15), postscript to the 2<sup>nd</sup> ed. § 6, 272–276

52 Popper (fn. 7), § 85

53 Schlink (fn. 1), 18–19

there are no technological shortcomings holding us back. In legal reasoning, all experiments are thought experiments, and there are no “real” experiments of which thought experiments could fall short. If we can conceive of a case, then we can consider it. We need not wait for that case to actually arise in reality and be brought to a court of law.<sup>54</sup> Therefore, according to falsificationist legal theory, as soon as we realise that two interpretations differ with regard to the outcome of some case, we can decide between them. There are no conceivably differing interpretations between which we cannot decide. Hence, if falsificationism were true of legal reasoning, it would not undermine the one-right-answer thesis, but to the contrary, support it. Hence, falsificationist legal theory would give us no reason to think that “the standards for interpretation” which “were, and are even now, normally presented as standards for finding the right interpretation”<sup>55</sup> were and are unduly so presented.

## 8 Conclusion

To conclude, Schlink’s critical rationalist rendering of statutory interpretation adds nothing to traditional methodology except falsehoods. Or such is my tentative hypothesis. Those who believe that knowledge grows only through criticism and refutations will welcome this result. The general lessons are, first, that the falsificationist programme in legal philosophy is misguided, and, second, that when we draw on philosophy of science to conceptualise legal reasoning, careful attention to detail is of paramount importance.<sup>56</sup> Loose analogies based on superficial similarities between the two fields will not help us understand the one based on the other but make us misunderstand both.

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54 Remember §4.1 above where we said that it is not verdicts that do the falsifying but reasons.

55 Schlink (fn. 1), 15

56 Another example of the latter problem is Canaris (fn. 11). Canaris elaborates in detail on the so-called *structuralist* or *non-statement view of theories* and drives at an analogy of legal interpretations to scientific theories as seen through this philosophical framework. However, he is cherry-picking in a way which renders his approach incoherent. The structuralists reconstruct scientific theories by defining sets of mathematical models by means of set-theoretic formalisms. Canaris finds this unnecessarily complicated, *ibid.* 382, so he insists on reconstructing legal theories not as sets of mathematical models, as the *non-statement view* would have it, but as pieces of language. But this means that his is a *statement view*, after all – and a messy one, indeed. For an unnecessarily complicated structuralist reconstruction of Swiss tort law see my (fn. 2).